No. _____

IN THE

Supreme Court of the United States

MARCO ANTONIO PEREZ,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

John W. Beck
Appointed Counsel of Record
816 Manci Avenue
Daphne, Alabama 36526
(251) 767-9048
john@beckdefense.com

APPENDIX

Table of Contents

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10267

UNITED STATES OF AMERICA
Plaintiff

v.

MARCO ANTONIO PEREZ,
a.k.a. Red,
Defendant

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket Nos. 1:21-cr-00005-JB-N-1
1:18-cr-00340-KD-B-1

Before JORDAN, LAGOA, and ED CARNES, Circuit Judges.

JORDAN, Circuit Judge:

In relevant part, 18 U.S.C. § 3147 provides that, if a person commits a felony offense while on pretrial release, he "shall be sentenced, in addition to the sentence prescribed for the offense, to ... a term of imprisonment of not more than ten years," with the additional term to be "consecutive to any other sentence of imprisonment." We hold that a sentence imposed pursuant to § 3147 can exceed the maximum term prescribed for the underlying offense(s) of conviction. But in such a circumstance the issue of whether the person committed a felony offense while on pretrial release must be submitted to a jury and proven beyond a reasonable doubt pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 490, (2000), and its progeny.

I

In late 2018 a grand jury in Mobile, Alabama, charged Marco Antonio Perez with possessing a stolen firearm in violation of 18 U.S.C. § 922(j). The district court allowed him to be released on bond pending trial. A probation officer instructed him on the terms

of his pretrial supervision, and provided him with a form which included the following language:

> The commission of a federal offense while on pretrial release will result in an additional sentence of a term of imprisonment of not more than ten years, if the offense is a felony, or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence you receive.

D.E. 66-1 at 4. Mr. Perez signed the form, indicating that he understood its terms. See id.

Not long after he was released, Mr. Perez faked his own kidnapping. The Mobile Police Department then began looking for Mr. Perez pursuant to an arrest warrant. While off duty on a Sunday, Officer Sean Tuder was informed that Mr. Perez was staying at the Peach Place Inn Apartments in Mobile. Officer Tuder called the patrol sergeant to request assistance in arresting Mr. Perez, and then he drove over to the Peach Place Inn in his personal car and dressed in civilian clothes.

Upon seeing Mr. Perez, Officer Tuder jumped out of his car and aimed his gun at him. Mr. Perez froze and slowly backed away. Officer Tuder ran toward Mr. Perez and attempted to wrestle him into control. A struggle ensued. Mr. Perez pulled a previously stolen firearm out of his waistband and shot Officer Tuder three times. Those shots proved fatal.

Mr. Perez tried to run into a nearby wooded area, but other officers arrived and captured him. A

superseding indictment charged him with receiving a firearm while under indictment in violation of 18 U.S.C. § 922(n), possessing a stolen firearm in violation of 18 U.S.C. § 922(j), obstruction of justice by killing a witness in violation of 18 U.S.C. § 1512(a)(1)(C), and carrying, using, and discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The case proceeded to trial, and the jury convicted him of the two § 922 firearm charges and acquitted him of the § 1512 and § 924 charges.

After trial, but before sentencing, the government filed a notice informing Mr. Perez that it was going to seek a ten-year consecutive sentence pursuant to § 3147. The probation office calculated the total offense level as 52 and the criminal history category as VI, with a corresponding advisory range of life in prison under the Sentencing Guidelines. The total offense level of 52 included a three-level enhancement because of § 3147. See U.S.S.G. § 3C1.3 ("If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels."). [1]

The § 922(n) conviction carried a statutory maximum sentence of five years in prison, while the § 922(j) conviction carried a statutory maximum sentence of ten years in prison. Running these sentences consecutively, as set out in U.S.S.G. § 5G1.2(d), resulted in a total maximum sentence of

---

[1] Since 2006, U.S.S.G. § 3C1.3 has been the guideline provision addressing § 3147. Before then, the applicable guideline provision was U.S.S.G. § 2J1.7 (now deleted). *See United States v. Chuong Van Duong*, 665 F.3d 364, 368 (1st Cir. 2012).

fifteen years. That sentence was still below the advisory guideline range of life in prison, even after a ten-year consecutive sentence was tacked on pursuant to § 3147 because Mr. Perez committed the § 922(n) offense while on pretrial release.

The probation office determined that the advisory guideline range was 300 months (or twenty-five years) in prison and the district court agreed. Mr. Perez objected to the § 3147 ten-year consecutive sentence, asserting that there was an Apprendi error because (a) the ten-year sentence exceeded the maximum sentences permitted for his underlying offenses of conviction, and (b) the jury never found beyond a reasonable doubt that he committed a felony offense while on pretrial release (the necessary fact for the § 3147 consecutive sentence). The district court ruled that there was no Apprendi problem because the jury found Mr. Perez guilty of receiving a firearm while under indictment in violation of § 922(n), and sentenced him to a prison term of 300 months.

II

We review the legality of Mr. Perez's sentence de novo. *See United States v. Cobbs*, 967 F.2d 1555 (11th Cir. 1992). This plenary standard applies to the interpretation of § 3147 and to the *Apprendi* issue. See *Dept. of Caldas v. Diageo PLC*, 925 F.3d 1218, 1221 (11th Cir. 2019) (statutory interpretation presents a question of law); *United States v. Candelario*, 240

F.3d 1300, 1306 (11th Cir. 2001) (whether a sentence violates *Apprendi* is subject to de novo review).[2]

III

Mr. Perez argues that § 3147 did not authorize the district court to exceed the statutory maximum sentences for his underlying offenses of conviction (which totaled fifteen years). In his view, § 3147 only allows a court to increase (i.e., enhance) a sentence within the statutory maximum for the underlying offense(s) of conviction.

A

Our starting point is the language of § 3147. *See United States v. Braddy*, 11 F.4th 1298, 1309 (11th Cir. 2021). Here is the full text of the statute:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to
>
> (1) a term of imprisonment of not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.

---

[2] The government argues that plain error review applies to Mr. Perez's argument that § 3147 does not authorize the district court to impose a sentence that exceeds the maximum permitted for the underlying offense(s) of conviction. In the government's view, Mr. Perez did not sufficiently preserve that argument in the district court. We do not address the government's contention because Mr. Perez's § 3147 argument fails under plenary review.

A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. § 3147. We have described § 3147 as a "sentence enhancement statute." *United States v. Tyndale*, 209 F.3d 1292, 1295 (11th Cir. 2000).

We "normally interpret[ ] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 590 U.S. – ––, 140 S.Ct. 1731, 1738, (2020). Like the Third Circuit in *United States v. Lewis*, 660 F.3d 189, 192 (3d Cir. 2011), we read the language of § 3147 to require a consecutive sentence–of up to ten years–in addition to the sentence for the offenses of conviction, even where the enhancement takes the total sentence beyond the statutory maximum for the underlying offense(s) of conviction.

The first paragraph of § 3147 requires a court (emphasis ours) to impose a sentence of up to ten years "in addition to the sentence prescribed for the offense." And the last paragraph of § 3147 specifies (emphasis again ours) that the "term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment." Congress would not have used the phrases "in addition to the sentence prescribed" and "shall be consecutive" if it meant for the § 3147 enhancement to be included only as part of the sentence for the underlying offenses of conviction. See Lewis, 660 F.3d at 192 (reviewing for plain error but conducting plenary statutory analysis). Moreover, § 3147 "contains no qualification or exception where adding up to ten years of the 'sentence prescribed'

would exceed the statutory maximum for the underlying offense. It is difficult for us to read this language in any other manner; by its own terms, the provision states that a sentence of up to ten years shall be imposed 'in addition to the sentence prescribed' for the underlying felony." *Id.* *Accord United States v. Confredo*, 528 F.3d 143, 155 (2d Cir. 2008) (stating, in dicta, that § 3147 "exposes [the defendant] to a higher maximum, i.e., ten more years, than the highest maximum he could have received on the offense-on-release counts").

The D.C. and Fifth Circuits have said in dicta that § 3147 only increases a sentence within the guideline range (and within the statutory maximum) for the underlying offense(s) of conviction. See *United States v. Samuel*, 296 F.3d 1169, 1175 (D.C. Cir. 2002) ("Where a defendant has not been separately convicted of an offense under § 3147, but instead has merely had his offense level increased under [U.S.S.G.] § 2J1.7 [now U.S.S.G. § 3C1.3], the Sentencing Guidelines decree that the maximum term to which he may be sentenced is the maximum authorized for the underlying offense.") (citing U.S.S.G. § 5G1.1); *United States v. Dison*, 573 F.3d 204, 209 (5th Cir. 2009) ("[R]egardless of the fact that § 3147 calls for punishment 'in addition to the sentence prescribed' for the underlying offense, the § 3147 enhancement can never result in a sentence in excess of the statutory maximum prescribed for the offense committed while on release[.]") (citing U.S.S.G. § 5G1.1(a) and *Samuel*). We do not find their statements persuasive. First, the D.C. and Fifth Circuit decisions do not properly account for the "in

addition to the sentence prescribed for the offense" and "shall be consecutive" language in § 3147. *See Lewis*, 660 F.3d at 194. Second, though the Sentencing Guidelines can and do provide a mechanism for implementing a § 3147 enhancement in cases where the total sentence does not exceed the statutory maximum for the underlying offense(s) of conviction, see U.S.S.G. § 3C1.3, the Sentencing Commission "has no authority to override" a sentencing statute like § 3147. *See Neal v. United States*, 516 U.S. 284, 294 (1996). Cf. U.S.S.G. § 5G1.2(a) ("Except as provided in subsection (e), the sentence to be imposed on a count for the which the statute ... requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.").

Where, as here, the language Congress used is clear, "that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). We therefore conclude that the district court did not err in imposing a ten-year consecutive sentence pursuant to § 3147 that took Mr. Perez's total sentence to twenty-five years.

B

Mr. Perez argues that some Eleventh Circuit cases compel us to hold that a § 3147 enhancement only affects the guideline sentence and cannot be applied to exceed the statutory maximum for the underlying offense(s) of conviction. These cases are *United States v. Martell*, 906 F.2d 555, 559 (11th Cir. 1990), *United States v. Bozza*, 132 F.3d 659, 661–662 (11th Cir. 1998), and *Tyndale*, 209 F.3d at 1295–96.

In *Martell*, which was decided when the Sentencing Guidelines were mandatory, we reversed a ten-year enhancement under § 3147 that did not result in a total sentence that exceeded the statutory maximum for the underlying offenses of conviction. We did so because the Sentencing Guidelines called for a 15 to 21 month enhancement under § 3147 and the district court did not explain why it departed upwards to a ten-year enhancement. See *Martell*, 906 F.2d at 559.

For two reasons, *Martell* does not help Mr. Perez. First, *Martell* does not address whether a district court can impose a § 3147 enhancement that exceeds the statutory maximum for the underlying offense(s) of conviction. Second, unlike what happened in *Martell*, here the twenty five-year sentence was the advisory range provided by the Sentencing Guidelines.

In *Bozza* the defendant argued that he was entitled to notice, before pleading guilty, of the § 3147 enhancement. We rejected this argument, and concluded that he had sufficient notice before the sentencing hearing: "It is clear that [the defendant] had notice of the possible enhancement from the

release bond for his prior conviction, the government's notice seeking a sentencing enhancement, and the revised PSR." *Bozza*, 132 F.3d at 661.

Like *Martell*, *Bozza* does not assist Mr. Perez. First, *Bozza* does not address the issue we confront in this appeal. Second, Mr. Perez did not plead guilty, so he is not in the same position as the defendant in *Bozza* with respect to notice. Third, Mr. Perez had the same notice as the defendant in *Bozza*. His pretrial release form contained the language from § 3147, the government filed a notice before sentencing about its intent to seek the § 3147 enhancement, and the presentence investigation report proposed the § 3147 enhancement.

Tyndale also involved a defendant's request to set aside his guilty plea based on his lack of notice that his sentence would be enhanced pursuant to § 3147. *See Tyndale*, 209 F.3d at 1294–1295. Conducting plain error review, we noted that a "single additional day of imprisonment or less would apparently suffice to comply with the statute," which meant that any enhancement could be de minimus. As a result, the district court's failure to advise the defendant of the § 3147 enhancement did not violate his substantial rights. *See id*. at 1295–96.

We don't think *Tyndale* is relevant to Mr. Perez's argument about the reach and scope of § 3147. *Tyndale*, a plain error case about what notice might be required about § 3147 in the context of a guilty plea, does not address the issue we resolve today—whether a § 3147 enhancement can exceed the statutory maximum for the underlying offense(s) of

conviction. Moreover, as explained above, Mr. Perez had sufficient notice about § 3147. See *Bozza*, 132 F.3d at 661.

IV

We turn next to Mr. Perez's argument that the ten-year enhancement under § 3147 violated *Apprendi* and its progeny. *Apprendi* holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. For example, "a drug quantity determination that takes a sentence beyond the statutory maximum must be found by a jury beyond a reasonable doubt." *United States v. Anderson*, 289 F.3d 1321, 1326 (11th Cir. 2002).

A

We join the Third and Second Circuits in concluding that *Apprendi* applies when a § 3147 enhancement takes the total sentence beyond the statutory maximum for the underlying offense(s) of conviction. *See Lewis*, 660 F.3d at 195; *Confredo*, 528 F.3d at 156. And, as explained below, we conclude that there was an *Apprendi* error.

Mr. Perez faced a combined statutory maximum sentence of fifteen years (i.e., 180 months) in prison for his two § 922 convictions (the underlying offenses). His twenty five-year sentence exceeded the statutory

maximum for the § 922 offenses by ten years (i.e., 120 months) due to the application of § 3147. The § 3147 enhancement was predicated on the fact that he committed the § 922(n) offense while he was on pretrial release, but that issue was not submitted to the jury, and as a result the jury did not find that fact beyond a reasonable doubt. This failure violated *Apprendi* because "the relevant 'statutory maximum' is not the maximum sentence a [court] may impose after finding additional facts, but the maximum [it] may impose without any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303–04, (2004) (emphasis in original).

The government argues that the failure to submit this issue to the jury did not violate *Apprendi* for two reasons. First, it asserts that *Apprendi* does not apply because committing an offense while on pretrial release should be treated like the fact of a prior conviction, which need not be submitted to the jury. See *United States v. Randall*, 287 F.3d 27, 30 (1st Cir. 2002) ("[T]his factfinding [for § 3147] may fairly be characterized as literally within the express exception recognized in *Apprendi* for 'the fact of a prior conviction.' "). Second, the government maintains that the jury convicted Mr. Perez of receiving a firearm while under indictment in violation of § 922(n), and this satisfies any *Apprendi* concerns.

We disagree with both of these arguments. As a general matter, a person's status on pretrial release is simply not constitutionally identical to the fact of a prior conviction. The former goes to the circumstances surrounding the offense, while the latter establishes that a person was previously found guilty of a certain

offense. A conviction for an offense committed while under indictment, moreover, does not necessarily indicate whether the person was on pretrial release when the offense was committed. That is because a person under indictment can commit certain offenses while on pretrial release or while in custody. *See, e.g., United States v. Daoud*, 980 F.3d 581, 593 (7th Cir. 2020) (defendant solicited the murder of an FBI agent and tried to stab another inmate to death while in pretrial detention).

B

An *Apprendi* violation does not automatically lead to reversal. "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, 548 U.S. 212, 222, (2006). In cases of constitutional error where the issue has been properly preserved, the government has the burden of proving that the error was harmless beyond a reasonable doubt. See *United States v. Pon*, 963 F.3d 1207, 1227–28 (11th Cir. 2020) (citing cases).

Under our precedent, an *Apprendi* error is harmless "when there is 'uncontroverted evidence' supporting a statutory fact that alters the range of possible sentences a defendant may receive." *United States v. Payne*, 763 F.3d 1301, 1304 (11th Cir. 2014). In other words, an error is harmless under *Apprendi* if the fact at issue is uncontested. See *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (failure to submit the amount of drugs to the jury was harmless error because the amount was uncontested at trial).

We will affirm "if the record does not contain evidence that could rationally lead to a contrary finding with respect to" the fact at issue. *See Anderson*, 289 F.3d at 1327. See also *Nealy*, 232 F.3d at 830 (affirming because "no reasonable jury could have rationally concluded that [the d]efendant was guilty of the substantive offense—possession, with intent to distribute of the cocaine base in his backpack—but that the amount of cocaine possessed was less than 5 grams").

The *Apprendi* error here was harmless beyond a reasonable doubt. Mr. Perez did not dispute at any point that he was on pretrial release at the time of the § 922(n) offense, and his counsel recognized that this fact was undisputed at oral argument. See also Initial Br. at 10–11 (explaining that Mr. Perez was released after signing a form concerning the requirements of pretrial supervision). More importantly, Mr. Perez stipulated at trial that he was under indictment for a felony offense and that he remained under indictment through the date of Officer Tuder's shooting. See D.E. 80 at 130. Mr. Perez's probation officer testified that Mr. Perez was required to comply with certain conditions while on pretrial release and that he would be penalized if he violated the conditions. See id. at 134–136. The government also introduced at trial a copy of the form containing release conditions, which Mr. Perez had signed. See id. Finally, Mr. Perez told a friend "that he was running from the feds," and other friends knew that he "was on the run." D.E. 81 at 56, 74, 196. In short, no reasonable jury could have convicted Mr. Perez of the § 922(n) offense without also finding that he committed this crime while on

pretrial release. On this record, the failure to submit the issue to the jury was harmless.

V

We affirm Mr. Perez's sentence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA	§	
	§	
v.	§	CRIM NO 21-05
	§	USAM NO
	§	17474-003
MARCO ANTONIO PEREZ	§	**John W. Beck**
aka RED	§	Defendant's Att
	§	

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.

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

☒ was found guilty on Counts One and Two after a plea of not guilty on 10/6/2021.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section /	**Nature of Offense**	**Offense Ended**

Count		
	18:922JF Possession of a Stolen Firearm 7/26/2018	One
18:922N.F Possession Of A Stolen Firearm While Under Indictment		Two
	7/26/2018	

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall 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.

January 10, 2022
Date of Imposition of Judgment

s/JEFFREY U. BEAVERSTOCK
Signature of Judge

JEFFREY U. BEAVERSTOCK
CHIEF UNITED STATES DISTRICT JUDGE
Name and Title of Judge

January 24, 2022
Date

DEFENDANT: MARCO ANTONIO PEREZ
CASE NUMBER: 1:21-CR-00005-JB-N(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

300 MONTHS; said term consists of 60 months as to Count One, 120 months as to Count Two; said terms to run consecutively; and 120 months as to the statutory enhancement at 18 U.S.C Section 3147, to be served consecutively to the custody sentences imposed in Counts One and Two; and consecutively to the yet to be imposed state custody sentence referenced in Paragraph #41 of the Presentence Report.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant be allowed to participate in mental health treatment while incarcerated.

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at , _____with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION**

UNITED STATES OF AMERICA	*	
	*	CRIM NO 21-05
v.	*	USAO NO
	*	19R00297
	*	
MARCO ANTONIO PEREZ	*	
aka RED	*	
	*	

VIOLATIONS:

18 USC § 922(n)
18 USC § 922(j)
18 USC § 1512(a)(l)(C)
18 USC§ 924(c)(l)(A)(iii)

INDICTMENT

THE GRAND JURY CHARGES:

Count One

Receiving a Firearm While Under Indictment Title 18, United States Code, Section 922(n)

On or about January 15, 2019, in the Southern District of Alabama, Southern Division, the defendant,

MARCO ANTONIO PEREZ
aka RED,

being under indictment for a crime punishable by imprisonment for a term exceeding one year, to-wit: Possession of a Stolen Firearm in the United States District Court for the Southern District of Alabama, case number 18-00340-KD-MU, did receive a firearm that had been shipped and transported in interstate and foreign commerce, to-wit: a loaded Smith & Wesson, M&P 40, .40 caliber pistol, serial number MRF0621.

In violation of Title 18, United States Code, Section 922(n).

Count Two
Possession of a Stolen Firearm
Title 18, United States Code, Section 922(i)

On or about January 20, 2019, in the Southern District of Alabama, Southern Division, the defendant,

MARCO ANTONIO PEREZ
aka RED,

knowingly did receive, possess, conceal, store, barter, sell and dispose of a stolen firearm, namely a loaded Smith & Wesson, M&P 40, .40 caliber pistol, serial number MRF0621, which **MARCO ANTONIO PEREZ** knew and had reasonable cause to believe had been stolen and which had been previously shipped and transported in interstate commerce.

In violation of Title 18, United States Code, Section 922(j).

Count Three

Obstruction of Justice by Killing and Attempting to Kill a Witness Title 18, United States Code, Section 1512(a)(l)(C)

On or about January 20, 2019, in the Southern District of Alabama, Southern Division, the defendant,

MARCO ANTONIO PEREZ
aka RED,

killed and attempted to kill another person, that is, Mobile Police Department Officer Sean Paul Tuder, with the intent to prevent his communication of information relating to **PEREZ's** violation of the Court's Order Setting Conditions of Release in the District Court for the Southern District of Alabama, Crim No. 18-340 and the execution of an arrest warrant related thereto, and commission of federal offenses, as set forth more fully in Counts

One and Two of this Indictment, to law enforcement officers and judges of the United States.

In violation of Title 18, United States Code, Section 1512(a)(l)(C).

Count Four
Carrying, Using and Discharging a Firearm During and in Relation to a Crime of Violence
Title 18, United States Code, Section 924(c)(l)(A)(iii)

On or about January 20, 2019, in the Southern District of Alabama, Southern Division, the defendant,

MARCO ANTONIO PEREZ
aka RED,

did knowingly carry, use, and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Obstruction of Justice by Killing a Witness, as set forth more fully in Count Three of this Indictment.

In violation of Title 18, United States Code, Section 924(c)(l)(A)(iii).

A TRUE BILL

(REDACTED)
FOREMAN UNITED STATES
GRAND JURY SOUTHERN
DISTRICT OF ALABAMA

RICHARD W. MOORE
UNITED STATES ATTORNEY
By:

<s> Michele O'Brien
MICHELE C. O'BRIEN
Assistant United States Attorney

<s> Vicki Davis
VICKI M. DAVIS
Assistant United States Attorney

<s> Sean Costello
SEAN P. COSTELLO
Assistant United States Attorney
Chief, Criminal Division

JANUARY 2021

APPENDIX D

PENALTY PAGE

CASE STYLE: **UNITED STATES v. MARCO ANTONIO PEREZ aka RED**

DEFENDANT: **MARCO ANTONIO PEREZ (ALL COUNTS)**

USAO NO.: **19R00297**

AUSAS: **Vicki M. Davis**
Michele C. O'Brien

CODE VIOLATIONS:

COUNT 1: **18 USC§ 922(n), Receiving a Firearm While Under Indictment**

COUNT 2: **18 USC§ 922(j), Possession of a Stolen Firearm**

COUNT 3: **18 USC§ 1512(a)(l)(C), Obstruction of Justice by Killing a Witness**

COUNT 4: **18 USC§ 924(c)(l)(A)(iii), Carrying, Using and Discharging a Firearm During and in**

Relation to a Crime of Violence

PENALTIES:

COUNT 1:	**5 yrs/$250,000/3 yrs SRT/$100SA**
COUNT 2:	**10 yrs/$250,000/3 yrs SRT/$100SA**
COUNT 3:	**20 yrs/$2S0,000/S yrs SRT/$100SA**
COUNT 4:	**10 yrs (to life) consecutive/$2S0,000/3 yrs SRT/$100SA**

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**CRIMINAL**
	)	**ACTION**
MARCO ANTONIO PEREZ,	)	**NO. 21-**
	)	**0005-JB**
Defendant.	)	

VERDICT FORM

1. As to Count One of the Indictment, Receiving a Firearm While Under Indictment, we the jury find the Defendant (circle one)

   (GUILTY) NOT GUILTY

2. As to Count Two of the Indictment, Possession of a Stolen Firearm, we the jury find the Defendant (circle one)

   (GUILTY) NOT GUILTY

3. As to Count Three of the Indictment, Obstruction of Justice by Killing or Attempting to Kill a Witness, we the jury find the Defendant (circle one)

GUILTY NOT GUILTY

4. As to Count Four of the Indictment, Carrying, Using, and Discharging a Firearm During and in Relation to a Crime of Violence, we the jury find the Defendant (circle one)

GUILTY NOT GUILTY

If you find the Defendant guilty of Count Four continue to Item 5. If you find the Defendant not guilty of Count Four stop after you have completed Item 4.

5. As to Count Four of the Indictment, we the jury find that: (circle one)

The firearm WAS discharged.

The firearm WAS NOT discharged.

<s> 3 16-6-21

Foreperson Date

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	21-cr-05
	*	Jan. 10, 2022
vs.	*	Mobile, Ala.
	*	10:14 AM
MARCO ANTONIO PEREZ,	*	
Defendant.	*	

****

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JEFFERY U. BEAVERSTOCK
CHIEF UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES:

MS. MICHELE C. O'BRIEN, ESQ.
U.S. Attorney's Office
63 S. Royal Street Room 600
Mobile, AL 36602
251-441-5845

MS. VICKI DAVIS, ESQ.
U.S. Attorney's Office
63 S. Royal Street Room 600

Mobile, AL 36602
251-441-5845

MS. ELIZABETH P. STEPAN, ESQ.
U.S. Attorney's Office
63 S. Royal Street Suite 600
Mobile, AL 36602
251-441-5845

FOR THE DEFENDANT:

MR. JOHN W. BECK, ESQ.
PO Box 931
Fairhope, AL 36533
251-990-5454

COURTROOM DEPUTY: MS. CATHI JENNINGS
PROBATION OFFICER: MR. ALAN WATKINS
COURT REPORTER: CHERYL K. POWELL, CCR, RPR, FCRR

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PROCEEDINGS

(In open court. Defendant present.)

COURTROOM DEPUTY: This matter is set for sentencing hearing in Criminal Case 21-5, United States of America versus Marco Antonio Perez. What says the United States?

MS. O'BRIEN: United States is ready.

COURTROOM DEPUTY: What says the defendant?

MR. BECK: Defendant is ready, Your Honor.

THE COURT: All right. Good morning, Mr. Perez.

THE DEFENDANT: Good morning.

THE COURT: We're here today for a sentencing hearing following the entry of a guilty verdict on October 6, 2021 to Counts One and Two of an indictment charging you with receiving a firearm while under indictment and possession of a stolen firearm. The presentence report has been published. Mr. Beck, I presume you've had the opportunity to review that report with Mr. Perez.

MR. BECK: I have, Your Honor.

THE COURT: Mr. Perez, do you understand what's contained in that presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. Now, I note that there are written objections to the presentence report. Mr. Beck?

MR. BECK: Yes, Your Honor. At this time, after discussing with my client, we would like to withdraw Numbers 2, 3, and 4, as listed in the position of defendant with respect to sentencing factors. I am reasonably satisfied, based on my research, that the Court is certainly permitted to utilize the preponderance standard with respect to what it may have considered to be relevant conduct which would implicate Number 2 and would also implicate Number 3. And Number 4, the defense is also reasonably satisfied that the Criminal History Category of VI is correct.

I anticipate that should the Court sentence, with respect to Section 3147, any consecutive sentence that would go beyond the maximum what I believe is the maximum sentence allowable on Count One and Count Two that we would lodge an objection with respect to that. And also with respect to should the Court sentence Mr. Perez to any consecutive time for a future state sentence, that is part of the relevant conduct.

THE COURT: Okay. Well, let's talk about the consecutive application in terms of the counts that are in this case, to that. Why don't you tell me why you have an objection.

MR. BECK: Your Honor, the Apprendi case which I know the Court is very familiar with -- it's pretty concise in what it states. Any fact that may increase the sentence beyond what is the statutory maximum sentence must be submitted and considered by a jury specifically. And that -- in this

particular case, that was not -- that was not necessarily done. In fact, with respect to --

THE COURT: Hold on one second, John. Can we mute the phones?

COURTROOM DEPUTY: If we mute them, we won't be able to hear in here.

THE COURT: Oh. Let's try it. For the folks that are on the phone line, would you please mute your phones? And --

COURTROOM DEPUTY: Can the callers please mute your phone? Please mute your phone.

THE COURT: Well, let's just keep trying.

Mr. Beck, I'm sorry.

MR. BECK: Oh, no, sir.

And, in fact, the defendant with respect to Count One had already specifically been charged with receiving a firearm while under indictment. So he was convicted of that charge. And that charge can carry up to a five-year sentence. And I think that's the end of the story with respect to that count.

With respect to Count Two, you know, again, this is a fact that is the basis of Count One completely and it was not specifically submitted to a jury. It was not charged separately. It was not -- there may be an argument that he was given some level of notice with respect to maybe an exhibit that was submitted during the trial. But that does not constitute a sufficient notice with respect to Apprendi and the application of that particular subsection or any attempted application of that

particular subsection. So we would object if I may formally object to the imposition or inclusion of enhancements pursuant to 8147 on the basis of Apprendi and the Fifth and Sixth Amendments of the Constitution.

THE COURT: What's the United States' position?

MS. O'BRIEN: Well, Your Honor, I may have misunderstood, but I thought the question you were asking Mr. Beck is about the imposition of the consecutive sentences as to Counts One and Two, the ten and the five years. And our position is, given the application of the guidelines, 5Gl.2, Section (d), that, in this instance, since the guideline range is so much higher, that those sentences are to be imposed consecutively.

Our position as to the 3147 sentencing enhancement, which is not a separate charge that the -- based on Booker and based on the circumstances in this case -- Probation Officer Marsal testified the document that the defendant signed, which contained the notice of the application of another penalty if he committed another offense while he was on conditions of release, was explained to this defendant. Officer Marsal testified to that. The defendant signed that document and it was admitted into evidence by agreement.

So our position would be that that standard has been met for the application of 3147 and that the sentence should be imposed consecutively as required by the statute.

And I'm not sure whether Mr. Beck jumped to the state court situation as well, but our position would be that any sentence imposed in this case be imposed to run consecutively to the defendant's prior federal sentence in this court as well as any yet-to-be-imposed sentences in state court. For the reasons we stated in our sentencing memorandum, the 3553(a) factors in this case, based on the Court's analysis and what the Court may find, that that is appropriate in this case, even given the fact that the guidelines advise for a concurrent sentence.

The defendant has a number of cases pending -- arguably relevant conduct -- and also has a completely separate matter related to an assault allegedly committed while the defendant was in Mobile Metro Jail.

So our position would be that the conduct in this case related to Counts One and Two, along with any applicable sentencing enhancements and the yet-to-be-imposed state sentences, should all be imposed to run consecutively.

THE COURT: Okay. And I just want to make sure the record is clear. It's specifically relevant conduct because of the cross-reference which is how we get to the --

MS. O'BRIEN: Offense level.

THE COURT: And how we get to our start point. So it's specifically relevant conduct. presentence report indicates. At least that's what the

MS. O'BRIEN: Yes, Your Honor.

THE COURT: Okay. And we've talked about all of the different consecutive applications in the process of initially starting to talk about just the first two.

Mr. Beck, it's your objection. Anything else you want to…

MR. BECK: And I think I misapprehended what the Court was requesting initially. So let me go ahead and address the consecutive -- potential consecutive sentences with respect to Counts One and Two.

I put on the record an objection that sentencing Mr. Perez to both of those in any consecutive fashion would -- these are multiplicatus counts that -- this was the same firearm and that there was not -- it was uninterrupted possession, presumably, by Mr. Perez. Even though two different dates are listed on the indictment for Count One and Count Two, that this was a continuing course of conduct and that it would -- while I believe that, upon my research, that it probably does satisfy Blockburger, but that sentencing with respect to both of those counts consecutively would be in error.

THE COURT: Okay. Well, it's my -- it's my position that I agree with the United States that the guidelines actually direct that Count One and Count Two be consecutive under the circumstances of this case. And so I'm going to overrule your objection. It's noted. You've made your record.

We might as well also address the Apprendi objection. The United States has stated their

position on it. I also agree with the United States. That issue was before the jury. Count One specifically deals with receipt -- I'm sorry. While under indictment. Not receipt. Possession of a firearm Probation officer did testify and the record was made regarding Mr. Perez's advisement of the enhancement and his signature on the document. So I also overrule that objection.

Mr. Beck, are there any further objections that you have?

MR. BECK: The last one that I would like to make clear is if the Court should impose a consecutive sentence to any future state sentence, I would like my objection to be noted and on the record that, pursuant to Guidelines Manual 5Gl.3(c) that -- which says if Subsection (a) does not apply and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under provisions of Subsection (a)(1), (a)(2), or (a)(3) of the relevant conduct statute, the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

And if I may have my objection on the record with respect to the imposition of any consecutive sentence to a future state sentence.

THE COURT: Okay.

MR. BECK: As that is relevant conduct.

THE COURT: So, typically, I would entertain that at the end when I state the sentence that I intend to impose.

So why don't we wait until we get to that point and then we can adopt your objection at that time.

All right. Any objections that the United States wants to make?

MS. O'BRIEN: No, Your Honor.

THE COURT: Okay. Mr. Beck, any other issues regarding the content of the presentence report that needs to be taken up?

MR. BECK: None, Your Honor.

THE COURT: All right. Well, then based on my rulings, the Court will adopt the presentence report as published. I note that the sentencing guidelines have been accurately calculated. We're going to walk through them right now.

Because of the cross-reference that we discussed a moment ago, we begin with a base offense level of 43.

Mr. Perez receives a six-level enhancement because, in a manner creating a substantial risk of serious bodily injury, the defendant knowingly or having reasonable cause to believe that a person was a law enforcement officer assaulted such officer during the course of the offense or immediate flight therefrom.

Mr. Perez also receives a three-point enhancement or three-level enhancement because

the statutory sentencing enhancement under 18 U.S.C. 3147 is being applied.

This produces a total offense level of 52.

Mr. Perez has 12 criminal history points; however, he committed the instant offense while on probation in Mobile County Circuit Cases CC-18-4536 through 4549. Therefore, two points are added, producing a total criminal history score of 14. This places him in Criminal History Category VI.

This yields the following advisory guideline ranges: For custody, the guideline range is 300 months. The guideline range for supervised release is one to three years. The guideline fine range is 50,000 to $500,000.

Mr. Perez is due to pay a special assessment in the amount of $100 on each count of conviction for a total of amount of $200.

For the record, are there any objections to this calculation? Mr. Beck?

MR. BECK: We object to the -- as previously stated, to the upper boundary of being 300 months. It's our opinion that the most that Mr. Perez could be subjected to is ten years -- five years with respect to Count One, 60 months, and 120 months or ten years with respect to Count Two.

And we object to the guidelines being calculated above 120 months for the previous argument that I made and also specifically above a total of 180 months which would be a total of 15 years.

THE COURT: Okay. And as stated previously, those objections are overruled.

Any objections from the United States?

MS. O'BRIEN: No objections from the United States, Your Honor.

We do have several people that would like to address the Court before sentence is pronounced.

THE COURT: Okay. We're going to get to that in a moment.

First I'm going to hear sentencing argument from Mr. Beck. Then, Mr. Perez, I will give you an opportunity to say anything you would like. The I will hear from the United States.

Mr. Beck?

MR. BECK: Your Honor, we are limiting any objections -- any arguments to the objections that we previously made. We have no objection to the content that's concerning Mr. Perez's background and his family situation. I think that all that information is before the Court satisfactorily.

THE COURT: Mr. Perez, do you have anything you would like to say, sir?

THE DEFENDANT: No, sir.

THE COURT: All right. Ms. O'Brien?

MS. O'BRIEN: Your Honor, our position, for all the reasons that we stated in our sentencing memorandum, is that the guidelines are accurately calculated. They provide for a reasonable sentence in this case, taking into account the applicable

guideline provisions as well as the application of 18 U.S.C.3147. And our position is that the sentence as set out by Your Honor just a moment ago provides for a reasonable sentence in this case and is appropriate given the consideration of the 3553(a) factors which I know the Court will address; that it is a reasonable sentence in this case.

THE COURT: Okay. And you indicated you had some people who would like to speak?

MS. O'BRIEN: Yes, Your Honor.

A number of Officer Tuder's colleagues are here as well as some of his family members. And I think his mother, Noreen Tuder; his cousin, Anne [sic] Marron; and one of his fellow officers, Sergeant Patrick McKean, would like to address the Court briefly.

THE COURT: Certainly. And they can do that from the podium.

MS. O'BRIEN: Your Honor, this is Officer Tuder's mother, Noreen Tuder. THE COURT: Ma'am, before you begin, please just state your name and spell it for the record.

THE WITNESS: My name is Noreen Tuder. That's N-O-R-E-E-N T-U-D-E-R.

THE COURT: Thank you, ma'am.

THE WITNESS: Thank you for taking this time to let me read this letter.

My name is Noreen Tuder. I am Sean Tuder's mother. Sean was born on December 2nd, 1987. He was the light of our world, our son, and our dream.

Sean was so loved and is missed by so many, especially myself and his father and his brother.

He was our miracle child. I was never supposed to be able to have children. I was diagnosed by several doctors that I could never have children. Imagine our delight in April, 1987 when I was told by one of those very doctors that I was pregnant. You can only imagine the joy and the happiness. I was over the moon as my husband and family were also.

Sean loved his family. We moved from Baltimore, Maryland to Jacksonville, Florida in late 1995. We left behind two large extended families, grandparents, and so many cousins that he was so very close with.

Every summer, beginning in 1996, I would drive home with Sean and his little brother, Chris, and we would stay for a few months. I would take care of my parents as my family would take care of my boys to be with their family.

They both had very strong relationships and wonderful lifelong memories together.

Sean was a normal teenager. He loved music, his friends, sports, and playing in bands. Sean grew to become a very special man. He was a mama's boy. Our family spent a lot of time together watching sports, working, and riding motorcycles, beach days and being together.

Sean and I spent a lot of time together. I worked in his and his brother's elementary school. They knew that I was always close by. When Sean

moved to middle school, he was accepted into a magnet school, Kirby-Smith Science School. I would drive him to school approximately 30, 60 minutes away, depending on the traffic. He would then ride the bus home to my school when we would drive home together. Our rides together were always memorable. He would tell me about his day as I would listen and we would listen to music and just have good memories. He was always my buddy.

Sean dreamed of being a police officer and joining the military. He wanted to serve his community along with his country. He grew up and was able to fill both of these goals.

Sean was very giving towards others. He loved his work and, even though at times it was very difficult to forget the harrowing events of the day, he would put people first. He put them up in hotels with his own money. He would buy bus tickets and train tickets to get people home. He would purchase meals for them. He would even ask his wife, Krissy, for money that she would spend on him for Christmas gifts so that he could help others pay their bills or just help them through the holidays. He loved to help however he could.

Sean loved his work. But he also looked forward to serving his country in the United States Army. He loved the military and was scheduled to deploy in 2020. He also hoped to become a federal agent some day. He was working on his schoolwork. He also dreamed of being a parent.

On January 20, 19th [sic] he received a call and then, later, we received a call which changed our

lives forever. The day was chilly and rainy in Florida. We'd worked around the house and then we went to be with some friends that were having a very rough time. We went over to our local fish camp to eat and to watch football. New Orleans was playing in the playoffs and I had called Sean several times that weekend, wanting to ask him who he was going to pick for the game, as I usually did. We both were big football fans and, during the games, combines, drafts, we would watch together or call each other.

Fate had it that day that I left my phone home because my husband, John, had his with us. As we were eating and watching the game, my husband's phone began to ring. It was Krissy. My husband looked at the phone and said to me, it must be for you because she doesn't call my phone that much, and handed me the phone.

As I wrote earlier, Sean dreamed of being a parent. Sean and Krissy had been trying to have a baby. My heart was so excited. I thought maybe they knew something that I didn't and everyone looked at me and they all thought the same for that call.

I answered the phone, hearing Krissy's voice. She asked where I was, who I was with. I told her. And then she said what I thought was: We have our boy. I screamed in excitement, thinking I was going to be -- I was going to have another grandchild. Then she said, no. You don't understand. They got our boy. I then asked -- I then asked what she was talking about. She then

responded to me that Sean had been shot and killed at work. I fell to my knees, screaming, and I remember crying out: They've murdered him; they've murdered him, over and over again. Our miracle, our life, our hero was taken down. I could not and did not want to believe it. He was killed for doing his job.

I have some memory of the rest of that day as my family got me out of there to my friend's home. Police officers showed up. Some of his friends who he had gone to with the academy. They confirmed the horrible news. Life shattering. Our worst nightmare had come true. Our son is gone due to the senseless act of violence while he was doing his job. He was taken from us forever.

But I just kept thinking: No; it's not true; it's a mistake, as I crazily called my family members, asking for help and telling them the news. Then I thought: Oh, God. What do I do? I have to tell Chris which is Sean's youngest brother. How do I tell him? How do I destroy his world and that of my grandchildren who loved their Uncle Sean? Friends had taken care of telling Chris and brought him to us.

The day will live into our lives forever. Our son was killed senselessly.

Your Honor, I ask, if you would, please give the maximum sentences allowed. I am a Christian woman and I know that someday I will -- someday, I will find a way to forgive, but I can never forget what happened to my son. Your sentence will also show fellow officers and the community that this

type of action will not be tolerated and that justice must always prevail.

Thank you, sir.

THE COURT: Thank you, ma'am.

MS. O'BRIEN: And, Your Honor, this is Officer Tuder's cousin, Anne [sic] Marron.

THE COURT: Ma'am, same thing. If you would, please state your name and spell it for the record.

THE WITNESS: Sure. My name is Anna Marron. It's spelled A-N-N-A M-A-R-R-O-N.

THE COURT: Thank you.

THE WITNESS: I'm Sean Tuder's cousin. Sean was not only my cousin. But he was what I like to say my best friend by birthright. We came from, as has been described, a very large, very tight-knit, very Irish family. And there are 13 blood cousins. I affectionately call us the wolf pack, and Sean has been my right-hand man since he could keep up.

Our parents did an amazing job keeping our family close, supporting one another's individual family and creating an environment that fostered extremely close relationships between the cousins.

Throughout this legal process, there's been a significant focus on Sean's professional life which is understood, but I am thankful to have the opportunity to address the Court and just give a little description of who he was in his personal life.

Sean was, first and foremost, a really kind and generous person. In my life, his role was one of humor. He had an incredible sense of humor. It was intelligent. It was witty. And it was really subtly silly. He took great pride in constantly -- and myself -- laughing about whatever family mayhem was occurring around us, especially at large events. We looked forward to large events. We counted down to the next time we would all be together at weddings and things of that nature. We even were excited to see each other at family funerals. His smile was infectious and it was actually constant.

In the days after his death, I used my very unhealthy but very productive coping mechanism of planning and management to keep it together. I generally spent all of my time managing the events of that day and corralling my giant family minute by minute to not acknowledge my crushing pain and loss.

As I drove to the airport to pick up yet another member of the cousin wolf pack, it kind of all came crashing down because I realized that he wasn't in the car with me. And he should have been there with me. He always was. He should have been laughing about our parents, aunts, and uncles. We should have been doing silly accents at the drive-thru at McDonald's. And he would have been so excited to see all his cousins together. I no longer had my right-hand man, and my family will never be the same.

The last time Sean and I spoke in the weeks prior to his death, it was the new year and we had talked

about how excited we were about starting our own families. It was 2019 and it was going to be the year that we both gave it a go to have our own little families.

We discussed how lucky we were to be raised in such a large, loving family where the cousins were all together. We made a pact on that phone call to try and do the same for our own future children no matter how far apart we were living.

We discussed future family vacations and shipping our kids back and forth for cousin summer camp. We wanted to make sure that our children grew up truly knowing one another just like we had. It was an exciting future.

I want to make it extremely clear that the actions of the defendant and the crimes that were committed and he's been found guilty of took this future from me and they took this future from my family.

There's really no way for me to describe how deeply I miss my cousin or the hole that has been left when he was taken from us. The ripples of grief and longing ricochet through every family gathering we have and we will never be the same.

The defendant was found guilty and, with this guilty verdict, I ask that the Court apply the maximum sentence possible for his crimes. Without the illegal actions of my -- of the defendant, my cousin, my friend, and my Sean would still be here with me today. I want my family to have time

to heal. I want to feel the security that the defendant can't harm anyone else.

On behalf of my family and all of those who Sean touched, I want to thank you for the opportunity to express my feelings and to give you a little insight as to who Sean Tuder was.

So thank you.

THE COURT: Thank you, ma'am.

THE WITNESS: Good morning, Judge.

THE COURT: Good morning.

THE WITNESS: My name is Patrick McKean. It's P-A-T-R-I-C-K M-C-K-E-A-N.

THE COURT: Thank you, sir.

THE WITNESS: Judge, I didn't prepare a statement or anything this morning. I just found out this morning I was going to get the opportunity to speak, and I appreciate it.

I guess I could start off by saying, last week, my wife -- she asked me to prepare a statement to be presented to the Court and I sat down to write it.

Let me back up. I been a police officer going on 26 years now. I've written many reports, many narratives, many things through my career. And when I sat down to write this statement, I sat there and stared at my computer screen probably for ten minutes before I could even begin to write.

You know, Sean was a lot younger than I am. knew him from work. He was a very dedicated officer. He was in the military. I mean, he wanted

to serve the people of his country, of this state, and this city. And the impact statement that I was asked to write -- I was thinking as I was trying to write it: Where would this begin and how could this end? Because you've heard from the family. And I've become close with the family since his death. And the only thing I could think is the impacts will never end for them.

And that's and it hurts me -- it hurts all the -- every officer of the police department. And it's -- you know, with your decision and your -- whatever judgment you pass down today I think will really help the -- you know, maybe future actions of other people, you know, to stop these -- you know, so we don't have to have these impacts like this anymore.

Like I said, I didn't get a chance to really sit down and decide how I wanted to express myself this morning. But the -- you know, when I go back to when I sat down to write the statement, it's -- the impact is never ending. It's that way for the family and everyone who knew Sean.

So thank you for your time.

THE COURT: Yes, sir. Thank you.

MS. O'BRIEN: That's all, Your Honor.

THE COURT: All right. All right. Mr. Perez, I have considered all the information that's available to me. That's what's contained in the presentence report we talked about at the beginning of this hearing; the positions on the sentencing factors that was filed by the lawyers; the sentencing memorandum the United States filed;

the letters that the United States submitted; what I've heard here in court today; and, of course, what I heard at the trial that I presided over.

I've considered the sentencing factors and the sentencing objectives of Section 3553(a) of Title 18 of the United States Code. They include things like the nature and circumstances of this offense; your criminal history; the need for the sentence to reflect the seriousness of the offense; promoting respect for the law; providing just punishment for the offense; and protecting the public from further harm. I have to also consider the kinds of sentences that are available and, in the end, reconcile all that with the facts of your case and determine what is a sufficient but not greater-than-necessary sentence to impose.

I'm hopeful that you will find a way to move forward or at least stop making things worse for yourself. You know, I know you've had issues since you've been in custody. You're going to be in custody for sometime. At some point, the light needs to come on for you that you need to make a change. I'm hopeful that day can be today. I wish that day had happened years ago.

You know, it occurred to me while I remained impartial observing the testimony and evidence that was presented at your trial that there were a lot of exits that you could have taken along the way. You didn't take them. There was a lot of evidence of an absence of respect for the law. And that was long before the fight that ultimately ended with you shooting Officer Tuder.

I challenge you to decide to make a change for your soul, for yourself. I encourage you to take advantage of all the resources that will be made available to you while you're at least in federal custody. I can't speak to what's available at the -- by the State of Alabama. But certainly when you're in custody of the Bureau of Prisons, there will be a lot of resources that are made available to you.

I'm going to recommend that you be imprisoned at an institution where a mental health treatment program is available. I want to encourage you to take advantage of that. I challenge you to take advantage of any resource that can be made available to you, though, to just improve yourself.

I have a real problem in your case because you were on pretrial release when this occurred from essentially the very same crime that you were ultimately convicted for here, possession of a stolen firearm. And while you were on that pretrial release, you stole the firearm. This is a much more serious problem in this situation because, ultimately, someone was shot and killed. But it's a situation that built up over time and the outcome could have been averted in any of many, many, many ways.

So at the end of the day, I do find that a custodial sentence at the maximum statutory sentence that I'm allowed to impose is an appropriate sentence in your case; that it would be sufficient but not greater than necessary. And so that's the sentence that I intend to impose. And if you please stand, Mr. Perez, I will read your sentence.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Marco Antonio Perez, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 300 months.

This term consists of 60 months as to Count One; 120 months as to Count Two; 120 months as to the statutory enhancement at 18 U.S.C. 3147.

Each of Counts One, Two, and the statutory enhancement at 18 U.S.C. 3147 are to be served consecutively.

The Court recommends the defendant be imprisoned at an institution where a mental health treatment program is available.

Upon release from imprisonment, defendant shall be placed on supervised release for a term of three years on each of Counts One and Two, all such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which he is released.

While on supervised release, the defendant shall not commit any federal, state, or local crimes; the defendant shall be prohibited from possessing a firearm or other dangerous device and shall not possess a controlled substance.

In addition, the defendant shall comply with the standard conditions of supervised release as recommended by the United States Sentencing Commission and on record with this court.

The Court orders defendant also comply with the following special conditions of supervised release which are referenced in Part F of the presentence report: Urine surveillance; mental health evaluation and any recommended treatment; and the model search condition.

The Court finds the defendant does not have the ability to pay a fine; therefore, a fine is not imposed.

The Court finds the advisory guideline range is appropriate to the facts and circumstances of this case and provides a reasonable sentence; however, I have considered the provisions of Section 5Gl.3 and find it not to be appropriate in this case; that is to say, I intend this sentence to run consecutive to the sentence as yet to be imposed on the related state case that is referenced in Paragraph 41 of the presentence report.

The sentence imposed addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation.

It is ordered the defendant pay a special assessment in the amount of $100 on Count One and Count Two for a total of $200 which shall be due immediately.

Mr. Perez, you do have 14 days to appeal my sentence. If it is your wish to file an appeal, Mr. Beck can assist you in filing that notice of appeal.

Mr. Beck, now I will ask you if you have any objections. So this would be the time to make that objection.

MR. BECK: Yes, sir. Thank you, Your Honor.

With respect to the imposition of the consecutive sentence of ten years pursuant to 31 -- Section 3147, the defendant would object to that as violative of the United States Supreme Court case of Apprendi, Fifth and Sixth Amendments of the Constitution. And we would object to the imposition of this sentence being consecutive to any future speculative state sentence. And I believe I previously related the subsection of 5Gl.3(c). And also the -- we object to the imposition of consecutive sentences with respect to Counts One and Two for the reasons that I previously stated and incorporate those arguments by reference, if the Court please.

THE COURT: Okay. Well, the arguments that you had previously made that I had overruled are overruled again.

I overrule your objection specifically regarding the as-yet-to-be-sentenced case in state court as referenced in Paragraph 41 of the presentence report because, again, I have considered the provision of 5Gl.3 and, although it says those -- this sentence shall be concurrent, I find that that's not appropriate under the circumstances of this case -- the facts and circumstances of this case; the nature and circumstances of this offense; and Mr. Perez's criminal history. And for that reason, I am not going to follow it. And the sentencing guidelines are advisory. And I don't agree. So I overrule your objection.

Does the United States -- I'm sorry.

MR. BECK: And apologies, Your Honor.

With respect to the base offense level, has the Court, indeed, made a finding of proof beyond a preponderance of the evidence with respect to those factors that are the relevant conduct?

THE COURT: I have.

MR. BECK: Yes, sir. Thank you.

THE COURT: And that's the reason that we have the cross-reference.

MR. BECK: Yes, sir. Thank you. THE COURT: Okay. Any objections from the United States?

MS. O'BRIEN: Your Honor, just for purposes of clarity that as I understood it, Your Honor pronounced the sentences to be consecutive, but if the record could reflect that there is a 3147 sentence consecutive to each of those individual counts and also if Your Honor could make a Keene statement on the record as to your rulings on the adjustments to the guidelines.

THE COURT: The guidelines? Right. Okay.

Well, so I think I did state that I intended all three components of this sentence, Count One and Count Two, to be consecutive, and then the statutory enhancement is consecutive to both counts. So that is certainly the intention that I have in sentencing Mr. Perez.

Additionally, if there are any errors that have been made in calculating the guideline in this case, I do find the sentence of 300 months to be the appropriate sentence under the facts and

circumstances of this case, and that's the sentence that I would give, regardless.

MS. O'BRIEN: Thank you, Your Honor.

MR. BECK: Thank you.

THE COURT: Thank you.

Mr. Perez, good luck to you, sir.

(The Proceedings were concluded at approximately 10:55 a.m. on January 10, 2022.)

CERTIFICATE

I, the undersigned, hereby certify that the foregoing pages contain a true and correct transcript of the aforementioned proceedings as is hereinabove set out, as the same was taken down by me in stenotype and later transcribed utilizing computer-aided transcription.

This is the 12th day of April of 2022.

<s> Cheryl K. Powell

Cheryl K. Powell, CCR, RPR, FCRR

Federal Certified Realtime Reporter