

# **APPENDIX**

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**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 18-48-cr

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UNITED STATES OF AMERICA,  
APPELLEE,

v.

JOHN J. GOTTI, MICHAEL GUIDICI, MATTHEW  
RULLAN, AKA FAT MATT,  
DEFENDANTS

and

VINCENT ASARO,  
DEFENDANT-APPELLANT.

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Decided: April 23, 2019

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Before HALL, and LYNCH, Circuit Judges,  
GARDEPHE, District Judge.

**SUMMARY ORDER**

Vincent Asaro appeals from the district court's judgment sentencing him to 96 months' imprisonment and three years' supervised release following his conviction

for using a telephone to facilitate arson, in violation of the Travel Act, 18 U.S.C. § 1952 (a)(3)(B). We assume the parties' familiarity with the underlying facts and procedural history, which we describe only as necessary to explain our decision to affirm.

We review a district court's sentencing decision for reasonableness under an abuse-of-discretion standard. *United States v. Skys*, 637 F.3d 146, 152 (2d Cir. 2011). In so doing, we review factual findings for clear error and rulings of law *de novo*. *United States v. Pica*, 692 F.3d 79, 89 (2d Cir. 2012). The district court did not exceed the bounds of its discretion when it sentenced Asaro to 96 months' imprisonment followed by 3 years' supervised release.

The principle articulated in *United States v. Watts*, 519 U.S. 148, 157 (1997), that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence," guides our decision in this case. An acquittal does not necessarily mean a jury found the defendant innocent; rather it indicates there exists reasonable doubt as to his guilt. *Id.* at 155. After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), we reaffirmed that under *Watts* a district court may consider acquitted conduct at sentencing. *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) (holding that "district courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct." (internal citations omitted)).

The district court did not err when it considered acquitted conduct in sentencing Asaro. The court found Asaro's long history of violent behavior to be proven by "not

only just a preponderance of the evidence but by overwhelming evidence” based on Asaro’s 2015 RICO trial at which the government presented evidence of crimes alleged to have been committed by Asaro during a period of over forty years. App. 153. While acknowledging that *Watts* allows sentencing judges to consider acquitted conduct, Asaro argues that judges may only consider *related* acquitted conduct and that Asaro’s past alleged crimes are not related to the present crime because the arson was “the result of a personal vendetta fueled by road rage.” Appellant’s Br. 25.

We are not persuaded. Under *Watts*, the distinction between unrelated and related conduct is irrelevant. In *Watts*, the Supreme Court approved the consideration of acquitted conduct at sentencing as evidence of the defendant’s “character and conduct,” holding that such consideration would not “result in ‘punishment’ for any offense other than the one of which the defendant was convicted,” but rather would recognize that the “present offense was carried out in a manner that warrants increased punishment.” 519 U.S. at 155. Here, although the 1969 murder and the 1978 robbery did not “stem from a common nucleus of operative fact” as the 2012 arson offense, those earlier offenses nevertheless informed the court’s assessment of the danger Asaro posed to the community, in light of his “lifelong history of violent crime,” and spoke to the level of specific deterrence needed—each of which the court found relevant under § 3553(a) in exactly the way approved by *Watts*. That history also informed the district court’s understanding of the seriousness of the present crime. Asaro’s insistence that the instant offense “was not an organized crime-related [crime]” is belief by the fact that he used organized-crime associates whom he could command because of his status as a crime boss. The crime

was thus not merely an isolated instance, however reprehensible, of road rage, but an example of his continued ability to exert the power of the underworld to intimidate and harm law-abiding citizens.<sup>1</sup>

Asaro also asserts defense counsel was ineffective when counsel failed to advise him about the possibility that the judge may rely on acquitted conduct when imposing a sentence. Asaro asks that we hold this appeal in abeyance and remand to the district court for an evidentiary hearing on that claim.

When faced with an ineffective assistance of counsel claim on direct appeal, “we may do one of three things: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent § 2255 petition; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us.” *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993). This circuit has a “baseline aversion to resolving ineffectiveness claims on direct appeal.” *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). This aversion, however, is not a rigid rule and “in no way limits our discretion to hear an ineffective assistance of counsel claim on direct appeal, or, when appropriate, to remand such a claim” for further fact-finding. *Id.*

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<sup>1</sup> Even if we accept Asaro’s argument that a sentencing judge cannot consider unrelated acquitted conduct, his claim is without merit. This arson and his past conduct are related because all of his relevant actions involve organized crime. Asaro relied on crime family associates to carry out the arson of John Doe’s car—every single individual involved was affiliated with a local crime family. Asaro may have been personally offended when John Doe cut his car off, yet Asaro utilized his crime family connections to carry out the arson.

On the record before us, we do not have the facts necessary to assess appropriately Asaro's ineffective assistance of counsel claim.<sup>2</sup> We thus refrain from deciding it.

We have considered Asaro's remaining arguments and find them to be without merit.

The judgment is **AFFIRMED**.

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<sup>2</sup> Whether Asaro's trial counsel would have informed him of the possibility that the acquitted conduct could be considered at sentencing and whether knowing that he would have definitely gone to trial is beyond the record before us.

**APPENDIX B**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA, 17-CR-127 (AR)  
  
Plaintiff, United States  
Courthouse  
-against- Brooklyn, New  
York  
VINCENT ASARO,  
  
Defendant. Friday,  
December 28, 2017  
2:00 p.m.  
-----X

TRANSCRIPT OF CRIMINAL CAUSE  
FOR SENTENCING  
BEFORE THE HONORABLE ALLYNE ROSS  
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings recorded by Stenographic machine short-  
hand, transcript produced by Computer-Assisted Tran-  
scription.

[2] (In open court.)

THE COURTROOM DEPUTY: United States of America against Vincent Asaro, Docket Number CR-17-127.

Counsel, please state your name for the record.

MS. ARGENTIERI: Good afternoon, Judge. Nicole Argentieri, Lindsay Gerdes, and Keith Edelman for the United States. With us at counsel table are special agents, FBI Special Agents Robert Ypelaar, Y-P-E-L-A-A-R, and Adam Mininni. And also present is Probation Office Kristen McKeown, which is M-C-K-E-O-W-N -- yes?

MS. MCKEOWN: Yes.

MS. ARGENTIERI: Okay.

MS. MCKEOWN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. MACEDONIO: Good afternoon, Your Honor. Elizabeth Macedonio and Carla Sanderson.

THE COURT: Good morning.

MS. MACEDONIO: As the Court is aware, Ms. Sanderson is participating in the mentoring program here in the Eastern District. And with the Court's permission, she will be speaking in part today.

THE COURT: Yes, that would be lovely, Counsel.

MS. MACEDONIO: Thank you.

THE COURT: I have received the presentence report; two addenda to the presentence report; a submission [3] dated October 30th from you, Ms. Macedonio, which annexes a great number of exhibits; a December 13th letter from you; December 13th letter from the Government. There is the lengthy – I am sorry, I did not bring it up –

but the Government's addenda to its sentencing letter; another letter dated December 19th from you, Ms. Macedonio. I did not bring the volume up. There is a volume in the letter that was not brought up.

Is that the complete sentencing record?

MS. MACEDONIO: There is also a letter from me dated December 20th.

THE COURT: Is that what related to the bail issue?

MS. MACEDONIO: Yes.

THE COURT: The health issues?

MS. MACEDONIO: Yes.

THE COURT: I read that.

Is that a complete sentencing record?

MS. MACEDONIO: For Defense, yes.

MS. ARGENTIERI: And, Your Honor, just a note for the record, the date of our lengthy sentencing submission was November 20, 2017.

THE COURT: Yes.

MS. ARGENTIERI: Okay.

THE COURT: Okay. I have read that.

[4] Ms. Macedonio, I am sure you reviewed all of that with your client; is that correct?

MS. MACEDONIO: That's correct, Judge.

THE COURT: Okay.

Mr. Asaro, are you satisfied that you have had enough time to go over with Ms. Macedonio everything that I just mentioned and everything else that you believe is related to your sentence?

THE DEFENDANT: Yes.

THE COURT: Okay.

All right. Ms. Macedonio, why don't you go ahead or with assistance, go ahead.

MS. MACEDONIO: Judge, I'm going to begin and then I'm going to have Ms. Sanderson make some comments on the law.

THE COURT: Okay.

MS. MACEDONIO: I know that this case has been fully briefed and I know Your Honor has studied it carefully, so I am not going to repeat every ailment of Mr. Asaro. I certainly had a log in my submission. But what it comes down to, Judge, is Mr. Asaro is here today to be sentencing for an arson. He is sentenced for an arson that occurred five and a half years ago, a crime which occurred on a public street in which no one was hurt. This is a crime for which he quickly accepted responsibility for. [5] The parties now agree that his guideline range is 33 to 41 months, but as he approaches his 83rd birthday and his health is rapidly deteriorating, the Government is asking for a sentence in excess of 15 years. What they are really asking for, Judge, is a life sentence for an arson.

The Government is not asking you to consider acquitted conduct. They are not asking you to sentence -- they are not asking you to consider the acquitted conduct of 3553(a) factors. Really what they are asking you to do, Judge, is to sentence him for the acquitted conduct. They are not asking you to sentence him for the crime of conviction. They are asking you to sentence him purely to crimes that he was acquitted of which allegedly occurred 50 and 60 years ago.

The law calls for the sentence to be imposed upon Mr.

Asaro to be sufficient, but not greater than necessary for the crime of conviction. His sentence must be reasonable under all of the factors, but under no test, under no test can what the Government -- for what the Government is asking for can be deemed to be reasonable, and there is a reason for that. In essence what the Government is asking you to do, Judge, is to take the American Justice System and turn it on its head. They are asking that when a defendant is acquitted of conduct, the Government can then, years later, indict him for something else and then have him [6] sentenced for all of the crimes that he was acquitted of. What they are asking for is simply unprecedented, and they cite you no case which allows for such an outcome.

With the Court's permission, Ms. Sanderson is going to address the law.

MS. SANDERSON: Yes, Judge. In the *Watts* case and all the cases of precedence, those are cases having to do with calculation of relevant conduct under the guidelines, and under *Watts*, which is a specific case that permits that, the conduct is permitted to be included as relevant conduct, not for punishment for that acquitted conduct --

THE COURT: No, right. But as it relates to the individual and --

MS. SANDERSON: As it relates --

THE COURT: -- as it relates to the sentencing factor --

MS. SANDERSON: Correct.

Specifically in *Watts* with regard to manner of commission of the crime to relevant conduct that was acquitted with relevance in that case and a line of cases, such as

in *Vaughn*, increasing a drug resource, for example, which is -- it is really distinct from what the Government is asking the Court to do in this case, which is to consider acquitted conduct from a past trial, a past case that has nothing to do with the manner in which the arson crime was [7] committed.

THE COURT: But that was not exactly how I understood the Government's argument, honestly. But I will let them speak for themselves.

Anything further from the lawyers?

MS. SANDERSON: No, Your Honor.

MS. MACEDONIO: But I would just like to turn to the 3553(a) factors.

THE COURT: Yes.

MS. MACEDONIO: I mean, I think it is very clear that Mr. Asaro is an ill man. I have brought with me just the medical records that I have received from the MDC since his March incarceration. Just for the record, there is probably eight inches of medical documents here. I did not submit them as part of my sentencing submission. They are here if anybody wants to review them, but that is what they are.

He has been to the hospital five times since March. Since his incarceration in 2014, it is clear that the Bureau of Prisons, despite what they say, they are simply incapable of caring for him. He had kidney stones, and they botched it to such a degree that -- they shackled him to a bed for a week and removed his prostate instead of just the kidney stone. He then was sent to the hospital during a discharge of incarceration for what was called [8] cardiac testing. Again, an 82-year-old man shackled to a bed with no participation from his family for a week, and then he

had a stent put in. After that extremely dangerous surgery --

THE COURT: Did you ever confirm -- when you said presumably the stent was put in, did you ever confirm that?

MS. MACEDONIO: I was unable to confirm that because the medical records are just unclear. He underwent some --

THE COURT: I assumed there was a reason you did not give me the records.

MS. MACEDONIO: Yes.

And he then returned to the MDC and put in the SHU with no medical care at all. I mean, their idea of medical care is let's test his pressure. If it's dangerously low, we will either ignore it, or maybe we will send him to the hospital, or they will adjust his medication to make it dangerously low. He is not receiving medical care, Judge. There is just no other way to describe it. Again, yesterday his blood pressure was tested. It is dangerously high. It's at stroke level, and they just sent him back to the unit. They are not caring for him; I mean, certainly not in any medical standard that is appropriate in this country.

I think in looking forward what we need to consider is not only his medical condition, but his advanced [9] age and what was going on in his life between his acquittal in November of 2015 and his re-arrest in March of 2017, what was Vincent Asaro doing? Well, there was no big welcome home party. There was no indication that he was caught up in the ongoing investigation of the Bonanno crime family that clearly was going on since there were subsequent indictments. He was home cooking meals for his family, going to medical appointments. He had no unexplained wealth. He didn't even have a car. Whatever

his life was in the past, it was over. He was home taking care of what a man at 82-year-old -- at 82 years of age needs to take care of, his health.

Quite frankly, Judge, I think that the guideline sentence in this case is more than appropriate. I think that is what is called for in this case, and that is what he should be sentenced to.

Unless the Court wants to hear something else? I just don't want to keep repeating everything that I have --

THE COURT: No, I understand, because it was all within your papers.

MS. MACEDONIO: And we have briefed this fully. I think the guideline sentence is appropriate.

Thank you, Judge.

THE COURT: Mr. Asaro, is there anything you would like to say?

[10] THE DEFENDANT: I have a piece of paper.

THE COURT: You can read something, sure.

THE DEFENDANT: I would like to apologize for the car that was burned. It was a stupid thing I did. I'm terribly sorry. I was on my way home, it happened. It just got out of hand. I was two blocks from my house and was, you know, cut off, and I'm terribly sorry, all right?

What my life was in the past, I honestly have to say it's over. I'm going to be 83 in two months. And that's it. I would like to apologize to the Court, and thank you for this speaking opportunity.

THE COURT: Ms. Argentieri?

MS. ARGENTIERI: Judge, on the law, I'm not sure if you want to just hear from us on the law. But we cited



*Watts* for the proposition that basically the Court is not bound by the jury's verdict. It can be considered acquitted conduct.

THE COURT: I understand that. I think the law, however it is, is very clear.

MS. ARGENTIERI: Okay.

THE COURT: And it will remain quite clear.

MS. ARGENTIERI: Okay. So I'm not going to -- I'm not going to belabor that.

THE COURT: Okay.

MS. ARGENTIERI: So, Judge, you know, in speaking [11] about today, you know, what is the sentencing? What is the Court supposed to consider at sentencing? And I think that what you've just heard from the defendant and defense counsel is they want you to take a snapshot of Mr. Asaro today and say sentence him as he sits here in this chair. And that's not what a 3553(a) or Congress really directs us to do. What it says quite clearly is you're supposed to look at the history and characteristics of the defendant. That's in their statute. Who is this defendant? What choices has he made? How did he live his life? And you know, Judge, you know better than anyone, it wasn't as a working man or working legitimate jobs supporting his family. That's absurd.

You know, and it's true that today he is elderly and he is sick, but he is not beyond the care of the Bureau of Prisons. I spoke to them today. They gave me a quite a different picture of his blood pressure yesterday, and they said that, in fact, and this was attached to our filings, there are four levels of care that are required by defendants in custody, 4 being the worst. They had assessed him at a Level 2. So they are more than qualified to care for his

medical needs. And while he may be -- prefer at this point in his life -- it would be more comfortable for him to be treated by a private physician, that's just not the standard at sentencing.

[12] This defendant has dedicated his life to crime and a crime family. And, Judge, you've heard that on recording after recording in his own words. Those were crimes that paid for his life, his children's lives, his gambling habit. Crime, quite simply, has paid for this defendant. And you heard him on recording after recording. His age, he was -- it was not a handicap for him in organized crime. It wasn't when he committed this arson a couple years ago, and it hasn't been for the years before that. You heard him on recording after recording saying, I'm here for 30 years. I am only -- all I got left is my age. I'm only -- the only wise guy left in the neighborhood.

And, you know, while it's true that having the defendant be in jail is sad for his blood family, and that is a difficult thing, that's true for all families, and it's really a result of his own choices. You know, if you look at the choices he made, he inducted his own son into the crime family. He taught him the life. It's because of his choices that his son sits in jail serving a 90-month sentence that you give him, Judge, for moving the body of Paul Katz. That's who the defendant is. That's his history and characteristics. Not only did he induct his son into the crime family, he directed him to move the body, and his son is serving that time for what he asked him to do, for what he taught him. And that is not even getting into the [13] impact of what the defendant did to the Katz family. And I think that that is a murder that everyone knows that he committed. We proved it at trial through recordings, witnesses, and expert testimony, and his son stood in the courtroom and told you that he moved that body.

This defendant has never been held accountable for his history and characteristics. History and characteristics that empowered him, emboldened him at the age of almost 80 to commit the crime he committed in this case. That's why it's relevant. That's why at almost 80 years old, he could commit this arson, which wasn't something that happened in a flash of anger. It wasn't he was on his way home and all of a sudden, the car was burned. It happened over the next few days. What happened in this -- and that leads us to the nature the circumstances of the effect, the other thing that 3553(a) directs us to look at: How did he come to be 80 years old and able to order an organized crime associate to burn a car of a civilian? How did that happen? You know, this is something that happened within the last couple of years. It's not an ancient crime we're asking you to sentence him for. He used his position and reputation as a respected wise guy in the neighborhood, a reputation earned through years of committing crimes, the lure that is Vincent Asaro, the Lufthansa heist, loan sharking, bookmaking, all of it. And someone cuts him off [14] in traffic, and what does the defendant do? He chased him through the neighborhood. The man was in fear for his life. He called 911. His started trying to activate the red light cameras because he wanted the police to come, and he was terrified and he should have been.

What did the defendant do next? He called upon the means of his crime family, means that were available to him because of his position. He contacted a Gambino associate with ties to the NYPD. He had the license plate run of the person who cut him off in traffic. Think about that. He is corrupting our institutions that are there to protect people, and he can do that because of who he is, because of his life of crime.

And then -- you know, and that just shows how dangerous he is, even -- I know it's, like, laughable. He's 80, he's not dangerous. He accomplished this crime at a very severe age, and it's a very dangerous crime. It's a dangerous crime. And he reaches out to CW Number 1, who this defense counsel has referred to in another case as a one-man crime wave. He's -- and -- and he's a benign associate at the time. He's just started out in organized crime. He's building his representation. He's in robbery, bookmaking. He's a young Vincent Asaro in the making. And the defendant trades on his street cred and association with the crime family and the desire of CW 1 to be just like him, [15] to be a made guy. And he tells him, Go burn the car. And that's just what CW 1 does. And that is the circle of organized crime, Judge. It goes round and round and round, generation after generation.

And that brings us to deterrence. That's the other thing that 3553(a) directs us to do. This defendant was incarcerated from his arrest in January of 2014 to his acquittal in November of 2015. The defendant is going to receive credit for that 22 months that he was in jail and for the seven months or eight months he had been on the case. If you sentenced him to time served for four to five years, the guideline sentence, he is going to walk out that door. And, Judge, that is not justice in this case. It is just not. This is a notorious crime figure. He has engaged in a lifetime of crime, and he has served in his entire life less than nine years in jail.

At the time, LCNs, they're watching, all the people who are about to be the next generation who revered this defendant, it's time to send a message. It's time to break the circle. This defendant walked out of the courtroom in November of 2015. He walked out to cameras and press attention, and what did he say? He joked about a body

being in the trunk of the car. He was a hero to everyone in his neighborhood. And it's time for you today, Judge, to send a message. General deterrence in this case, the [16] importance of it, cannot be understated.

And then finally, Judge, you know, Congress mandated that for the crimes that the defendant committed -- for the crimes he pled guilty to, sometimes no time would be appropriate, and sometimes 20 years would be appropriate. And that causes you to question, in what cases did they think 20 years would be appropriate? And, Judge, this is that case. He's got associates in the region for the violent criminal organization, the only family he ever cared about. You know that from recording after recording. He is not worrying about his family. You know, he is complaining about his son constantly who is now serving a 90-month sentence for something he asked him to do. This is a crime in which he used the sophisticated means. He used a law enforcement database to victimize a civilian. If not in this case, a sentence above 15 years, then when?

And so, Judge, I think that what we are asking you today is just to hold him accountable for who he is now, for the choices that he has made that gave him the power he had to commit the crime he pled guilty to, which is the life he has lived and the lives that he has ruined.

Thank you.

MS. MACEDONIO: May I respond briefly?

THE COURT: Sure.

MS. MACEDONIO: I think the Government's [17] presentation really brings it home that it is not about the arson. It's merely about the acquittal, you know, what he said when he left the courtroom.

THE COURT: I do not think she is saying -- I am just telling you how I understand her. I understand her to be referring to the statutory factors, the history and characteristics of the defendant. That is how I understand it.

MS. MACEDONIO: When she makes the comment such as, He -- quote, He killed Paul Katz, and everybody knows it, clearly that is not the case. And so as the Government sits there, and he just -- take Mr. Edelman out and put Ms. Cooley there, it is the same group of people that have brought this case again. The arson that he is going to be sentenced for and the time that he receives for that should be reasonable under the standard set forth by the sentence served. We also cannot have a situation where we are creating a complete disparity in sentencing between the other two defendants that are going to be sentenced for this.

I ask that Your Honor sentence him to the guidelines in the sentence given all the 3553(a) factors, including his health.

THE COURT: Vincent Asaro is before me for sentencing after pleading guilty to a travel act violation [18] under 18 U.S.C. Section 1952(a)(3)(b). Specifically, he allocated to using a telephone in interstate commerce to direct that Bonanno Family associates set fire to a car. This case does not mark the first time that Mr. Asaro has been in my courtroom. I was the judge who presided over his trial in October to November of 2015 for numerous *Rico* violations that occurred over the course of 45 years, between 1968 and 2013. The testimony and other evidence at that trial, which I will discuss further later, was that the defendant was a long-time member of the Bonanno Family, who committed numerous violent acts, rose to the level of captain, and eventually acted as a member of the commission.

The guidelines range in this case is undisputed. Both parties, as well as the Department of Probation, now agree that the defendant has a criminal history category of 2 and an adjusted offense level of 19, with a base offense level of 20, a two-point increase for an aggravating role, and a three-point decrease for acceptance of responsibility.

This makes his guidelines range of imprisonment from 33 to 41 months. I agree with the calculations.

But this is not the end of the sentencing inquiry. Under *Booker and Gall*, I also must consider the various factors enumerated in Section 3553(a) in order to fix an appropriate sentence in this case.

First among these factors are the nature and [19] circumstances of the offense and the history and characteristics of the defendant. Both weigh heavily toward granting the upward variance requested by the Government. The facts of this case are simple and largely undisputed. While driving in Howard Beach on April 1st, 2012 Vincent Asaro got into a road rage incident with another motorist. Mr. Asaro followed the other man's car for a protracted period, got his license plate, had a Bonanno Family associate run the plate in a law enforcement database to determine the other motorist's home address, and then directed a Bonanno Family associate to set fire to the motorist's car. The defendant says in his sentencing memorandum that he requested that the car be burned as opposed to directing it, and he did not know that Matthew Rullan and John Gotti would be involved in the arson. But these are distinctions without a meaningful difference. The relevant conduct is that the defendant asked that a car be set on fire solely because its driver had cut him off in traffic, and someone else carried out his will. And the defendant was able to command others to do this deed for

him because he was a high-level member of the Bonanno Family who has been active in mob-related activities for over forty years.

I see no mitigating circumstances to this crime. The arson was a senseless act of violence that suggests that the defendant poses a significant and ongoing threat to the [20] general public. I find it troubling that Mr. Asaro nursed enough of a grudge from simply being cut off in traffic that he not only followed a member of the public for an extended period, terrorizing him, but also had an associate find out his home address and then ordered the man's car to be burned to a crisp days later. I also find concerning that, despite his relatively advanced age and supposed infirmities, the defendant continued to wield the power to direct or request other people to carry this act out. This act shows that as recently as 2012, Mr. Asaro not only had an explosive temper, but he also had the ability to carry out his threats and the desire to carry out revenge after the heat of the moment had passed. Defense counsel argues that Mr. Asaro has "outbursts" but quickly becomes calm again. This crime shows that his anger does not always soon subside.

None of this is surprising, however, when viewed in the context of the history and characteristics of the defendant. The testimony and other evidence introduced at his 2015 trial showed not only just by a preponderance of the evidence but by overwhelming evidence that Mr. Asaro has lived a life of violence. As trial judge, I had the opportunity to observe the demeanor of the witnesses and to make first-hand assessments of their credibility. And I have since reviewed my notes and the transcript from the trial. I was particularly impressed by the testimony of Mr. Asaro's [21] cousin, Gasper Valenti. Although Mr. Valenti was a cooperating witness for the Government, his



testimony was forthright, credible, and corroborated in numerous details. I also note that the testimony of the Government's witnesses in the 2015 trial were corroborated not only by other witnesses, but also by audio recordings of the defendant by Mr. Valenti, who wore a wire, among other things. In these recordings, the defendant boasted of being a "wise guy" for numerous years and of the dirty deeds he had done to earn his place in the mob.

I give particular weight to two crimes committed by the defendant, the murder of Paul Katz and the Lufthansa heist.

Mr. Valenti testified that the defendant said that he and Jimmy Burke had strangled Paul Katz to death because Katz was cooperating with law enforcement. Mr. Valenti described standing watch as the defendant buried Katz's body, and how he later poured lime and cement over the hole. He also testified that the defendant had told him and the defendant's son, Jerome Asaro, to move the body in the 1980s and that they did so. This testimony was corroborated by Jerome Asaro's guilty plea before me where he admitted to moving the body of a person he knew to have been murdered.

Valenti's testimony was also corroborated by significant physical evidence. A forensic anthropologist, [22] Bradley Adams, testified that he recovered human remains of an adult male from where Valenti said they buried the body. And a criminalist, Frances Rue, who testified that based on a comparison of the DNA of Katz's family members, the DNA profile that she developed from these remains appeared to be that of Paul Katz.

As for the Lufthansa heist, Mr. Valenti credibly testified that the defendant played a leading role. Again, this

testimony was amply corroborated. For example, cooperating witnesses Salvatore Vitale and Anthony Ruggiano testified that the defendant had jewelry from the Lufthansa heist. And most damningly, the defendant himself corroborated his involvement in his comments about the wake of Henry Hill, whose life was the basis for the film *Goodfellas*. In a recorded conversation with Valenti, the defendant implicitly admitted, in highly profane terms, his involvement in the Lufthansa heist. These are but the two most dramatic incidents in a long life of crime, but two are enough to make the point.

I also note that, while these two incidents took place many years ago, the testimony at the defendant's 2015 trial established that he remained involved in loansharking up until 2013. And his guilty plea in this case showed that he remained a powerful player within the Bonanno Family, capable of orchestrating violent acts as of 2012.

[23] Although the defense is correct that I am not required to consider this acquitted conduct in sentencing Mr. Asaro, I will exercise my discretion to do so. I am mindful of the weight that I must give to the jury's verdict of acquittal, but I nonetheless am firmly convinced that the Government proved Mr. Asaro's conduct by more than a preponderance of the evidence. And I can imagine few things that are more relevant to the factors that I must consider under Section 3553(a) than the defendant's lifelong history of violent crime. This conduct also shows that the guidelines significantly underestimate Mr. Asaro by assigning him to a criminal history category of 2.

Given Defendant's history, I do not credit the defense's assertion that Mr. Asaro has become a changed man since this crime took place in 2012. He is now 82, but he was already 77 years old at the time of this offense.

On the other side of the ledger, Mr. Asaro's poor health and advanced age are significant mitigating personal characteristics. I must give these factors considerable weight because they mean that each year of imprisonment will be harder on him than they would be on a younger and healthier man.

I will not summarize the defendant's entire medical history, but the list of medications he takes is long. Alongside the aches and pains and indignities of aging, he [24] also suffers from more serious health conditions, including hepatitis C, hypertension, and serious cardiac problems. He underwent a triple bypass in 2013, and then had another heart surgery in 2016. Heart problems run in his family. His father and only brother both died at a relatively young age of heart attacks. His mother died of an aneurysm in her heart, and his three sisters all have heart problems.

Although counsel has not provided any recent medical records, I credit her assertions that defendant's health has been deteriorating during his time at the Metropolitan Detention Center. But I do want to indicate that my staff has been in communication with officials at MDC. We were informed them that defendant's recent hospitalizations have been due to trouble with his blood pressure medications, that they have adjusted his medication regimen, and that his most recent blood pressure readings were normal. I don't know what happened today, but I am speaking about the time that I was notified, which was several days ago. I do have confidence that he will receive better medical care at a federal correctional institution.

As for the letters from friends and family submitted with the defense sentencing memorandum, I do give them some but marginal weight. Mr. Asaro may well be a loving

man to his family, but that has not stopped him from inflicting violence on others who have families of their own. [25] These letters depict him as a frail grandfather, but as long as the defendant can command the loyalty of lower-ranking members of La Cosa Nostra, he remains a danger to the public. It does not matter if he can no longer personally carry out violent acts.

Having laid out the relevant considerations, I must now weigh them against one another in considering the purposes of punishment including retribution, deterrence, incapacitation, and rehabilitation. The defense urges me to impose a sentence of time served based on Mr. Asaro's age and state of health, arguing that any lengthy period of incarceration will likely amount to a death sentence. The Government, on the other hand, asks me to impose a sentence of over 15 years of imprisonment based on Mr. Asaro's personal characteristics and criminal history focusing, in particular, on the acquitted conduct.

I have no illusions that Mr. Asaro will be rehabilitated by a prison stint. Nor do I believe that a prison sentence, however long, will deter him from future criminal acts, given his life-long career as a member of the mafia. If he had not aged out of violent crime by the age of 77, I see little hope that he will ever do so.

Further, the other sentencing factors that I must consider all militate in favor of a substantial prison sentence. Although I am sympathetic to Mr. Asaro's ill [26] health, I find that the seriousness of the offense, promoting respect for the law, general deterrence, and protecting the public from the defendant's crimes, all require me to impose a significant period of imprisonment.

It is necessary to send a message that members of organized crime cannot threaten members of the general public or destroy their property with impunity. It is necessary to deter others from a life of crime by showing that there will be real consequences to their crimes. I note here that, although I am relying on acquitted conduct in sentencing the defendant, had he been found guilty at the trial in 2015, he would have been facing far more than the statutory maximum of 20 years of imprisonment he faces here.

Finally, and most importantly, a substantial prison sentence is necessary to protect the public. I see no other way to do so. I also note that had the defendant pleaded guilty to the underlying substantive offense of conspiracy to commit arson, rather than to a violation of the travel act, he would likely have faced a mandatory minimum sentence of five years of imprisonment, with a maximum of 20 years.

Balancing all the pertinent sentencing factors, I conclude that a sentence of 96 months of incarceration in conjunction with the other aspects of his sentence is sufficient but not unduly severe to accomplish the sentencing goals set forth in Section 3553(a). In my view, eight years [27] of imprisonment is an undeniably serious punishment that reflects the gravity of the defendant's offense and criminal history and serves the functions of both general deterrence and incapacitation, while also taking into account the defendant's advanced age and his poor health.

Accordingly, I sentence the defendant to the custody of the Attorney General for a term of 96 months of imprisonment on the sole count of the superseding information.

I also issue an order of restitution in the amount of \$21,276 due immediately and payable at a rate of \$25 per

quarter while in custody and 10 percent of gross monthly income while on supervised release, and I will impose a period of three years to supervised release with special conditions that he not associate in person, through mail, through electronic mail, or telephone with any individual with any affiliation to any organized crime group, gangs, or any other criminal enterprise; nor shall the defendant frequent any establishment or other locale where these groups may meet pursuant, but not limited to, a prohibition list provided by the probation department. The defendant shall comply with the restitution order.

Upon request, the defendant shall provide the United States Probation Department with a full disclosure of his financial records, including commingled income, expenses, [28] assets, and liabilities, to include yearly income tax returns, with the exception of the financial accounts reported and noted within the presentence report. The defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts for either personal or business purposes without the knowledge and approval of the United States Probation Department. The defendant shall cooperate with the probation officer in the investigation, his financial dealings and to provide truthful monthly statements as income and expenses. He shall cooperate in the signing of any necessary authorizations, release information forms permitting the U.S. Probation Department access to his financial information or records.

I will not impose a fine, but I will impose the mandatory \$100 special assessment.

Mr. Asaro, as you know, you have a right to appeal the sentence. A notice of appeal -- I am sure Ms. Macedonio will continue to represent you. A notice of appeal must be filed within 14 days.

I also recommend that you be designated to an appropriate medical facility. I do not know if you have any requests?

THE DEFENDANT: I would like to go to Danbury or Fort Dix.

[29] THE COURT: I'm sorry. I did not hear you.

MS. MACEDONIO: He said he's requesting that the Court recommend either Danbury or Fort Dix so that he will be able to see his family.

THE DEFENDANT: Otherwise, I will never see my family again.

THE COURT: Neither Danbury nor Fort Dix has particular medical --

THE DEFENDANT: I don't care if I die there.

THE COURT: You do not need the medical facility?

MS. MACEDONIO: I don't think so.

THE DEFENDANT: I don't care what happens to me at this point, Your Honor. What you sentenced me for is a death sentence anyway, so it doesn't make any difference.

THE COURT: All right. I am going to recommend that he be designated to a facility as close as possible to the New York metropolitan area, but I also recommend that he be designated to a facility that has ample medical facilities for Mr. Asaro.

THE DEFENDANT: Your Honor, may I say something?

THE COURT: You should speak to Ms. Macedonio before you speak --

THE DEFENDANT: I don't understand --

THE COURT: Mr. Asaro --

THE DEFENDANT: Yes.

[30] THE COURT: Mr. Asaro, I think the sentence is concluded.

THE DEFENDANT: Okay. Can I say anything?

MS. ARGENTIERI: Judge, we --

THE COURT: Speak with Ms. Macedonio. You have an attorney and she will speak for you.

THE DEFENDANT: Okay.

MS. ARGENTIERI: We move to dismiss the underlying indictment, Judge.

THE COURT: The underlying indictment is dismissed.

MS. MACEDONIO: Your Honor, the Government has placed a number of separation orders that would necessarily move this defendant to a facility that's further away than necessary. I would ask the Government consider lifting those separation orders in light of the fact that the defendant has now been sentenced.

THE COURT: I have nothing --

MS. MACEDONIO: I understand.

THE COURT: -- to do with that, so... And I appreciate it. You can talk about it in with your client.

(Pause in proceedings.)

THE COURT: Obviously, Mr. Asaro is prohibited from the possession of any firearm or other destructive device.

[31] MS. MACEDONIO: Judge, may I get a copy of today's sentence, please.



THE COURT: Certainly.

MS. MACEDONIO: Thank you.

MS. ARGENTIERI: Thank you, Your Honor.

THE COURT: Thank you.

(Matter concluded.)

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