

APPENDIX

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APPENDIX A

REVISED August 24, 2023

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 26, 2023

Lyle W. Cayce
Clerk

No. 22-30169

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CHRISTOPHER KINZY,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CR-102-1

Before BARKSDALE, SOUTHWICK, AND HIGGINSON,
*Circuit Judges.**

STEPHEN A. HIGGINSON, *Circuit Judge*:†**

Christopher Kinzy pleaded guilty to one count of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1), and was

* Judge Barksdale concurs in the judgment only.

** This opinion is not designated for publication. See 5TH CIR. R. 47.5

sentenced to a term of 87 months' imprisonment. He appeals his sentence, arguing that his state conviction for resisting an officer does not qualify as a "crime of violence" under the Sentencing Guidelines, and that the district court lacked a reliable factual foundation for imposing a four-level enhancement for having committed the offense in connection with another felony.

Although we conclude that the district court erred in determining that Kinzy's prior conviction was a crime of violence, we nonetheless AFFIRM.

I.

Kinzy's conviction in this case arises out of a traffic stop on January 25, 2021, in Kenner, Louisiana. According to the presentence report ("PSR"), a police officer pulled Kinzy over because the officer was unable to read Kinzy's vehicle's tinted license plate. The windows of the car were also heavily tinted. When the officer approached the vehicle, he saw a firearm near Kinzy's lap. The officer instructed Kinzy to put his hands out the window, and when the officer grabbed Kinzy's hands, Kinzy began pulling his hands inward, toward the firearm. According to the PSR, while reaching for the gun, Kinzy said, "I'm not going back to jail. I'm going to shoot you. I'll kill you." Then, "[a] struggle ensued and [officers] were able to disarm [Kinzy] and remove him from the vehicle." Then, while Kinzy was being handcuffed, he elbowed an assisting officer in the chest, causing the officer to lose his grip on Kinzy. Kinzy then pushed the officer to the ground. According to the PSR, the officer sustained "an internal injury to his upper body" requiring "immediate hospitalization and surgery for

pectoralis and major muscle repair to his right shoulder.”

On August 12, 2021, a grand jury indicted Kinzy on one count of possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). On December 14, 2021, Kinzy pleaded guilty without a written plea agreement.

Kinzy’s PSR calculated a base offense level of 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(A), because he committed the firearm offense after sustaining a felony conviction for a “crime of violence.”¹ The PSR cited Kinzy’s March 18, 2019, conviction for resisting police with force or violence, in violation of Louisiana Rev. Stat. § 14:108.2. The PSR also included a four-point increase in his offense level under § 2K2.1(b)(6)(B) for using or possessing a firearm in connection with another felony offense, noting that Kinzy “threatened to shoot and/or kill” the officer during the traffic stop. Kinzy received a three-point reduction for his acceptance of responsibility. Based on his total offense level of 21 and his criminal history category of VI, Kinzy’s guideline range was 77 to 96 months’ imprisonment.

Kinzy filed written objections to the PSR’s base offense level, asserting that his prior conviction for

¹ The enhancement at issue also covers prior felony convictions for a “controlled substance offense.” U.S.S.G. § 2K2.1(a)(4)(A). The U.S. Probation Office originally maintained that Kinzy’s base offense level was 20 because of his having a prior “controlled substance offense.” But the Government agreed with Kinzy’s objection that his drug conviction was not a “controlled substance offense,” and the PSR was revised in a supplemental addendum to reflect the “crime of violence” predicate, rather than the “controlled substance offense” predicate. The base offense level remained 20.

resisting police by force or violence is not a “crime of violence.” Kinzy also objected to the four-level enhancement, denying that he threatened to shoot or kill an officer and denying that he reached for the firearm. Kinzy contended that, during the traffic stop, he was “tackled by multiple officers; one of his teeth [was] knocked out and another was broken by the officers.”

The Government opposed Kinzy’s objections, attaching the probable-cause affidavit and a crime report in support of the four-level enhancement. The Government also asserted that Kinzy’s state conviction for resisting police with force or violence constituted a crime of violence. The Government argued that the underlying state statute is divisible and that the offense described in the subsection at issue is a crime of violence under the Sentencing Guidelines. The Government submitted the charging document from the state conviction, and the U.S. Probation Office supplemented that documentation with the transcript from Kinzy’s plea hearing in state court.

At Kinzy’s sentencing hearing, the district court concluded that the Louisiana statute forming the basis of Kinzy’s predicate conviction was divisible and that the charging document showed that Kinzy’s conviction qualified as a crime of violence. The district court also overruled Kinzy’s objection to the four-level enhancement, finding that the PSR was accurate and reliable.

The district court sentenced Kinzy to 87 months of imprisonment and three years of supervised release. At the end of the hearing, the Government asked the court if it had considered the alternative

guideline range suggested by Kinzy. The court responded: “The sentence that I crafted is what I believe is appropriate for the defendant in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question.”

Kinzy timely appealed. He argues that the district court erred by assigning him a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4) on the basis that he had a prior felony conviction for a “crime of violence,” and by imposing a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for committing the offense in connection with another felony, *i.e.*, threatening to shoot or kill the arresting officer.

II.

We begin with the simpler of Kinzy’s two challenges on appeal. Kinzy contests the district court’s imposition of a four-point enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for possessing a firearm in connection with another felony. Under § 2K2.1(b)(6)(B), a defendant’s offense level is increased by four points if he “used or possessed any firearm or ammunition in connection with another felony offense.” U.S.S.G. § 2K2.1(b)(6)(B). Kinzy’s PSR recommended application of the enhancement because Kinzy “threatened to shoot and/or kill” the police officer during his arrest. Kinzy objected to the enhancement, denying that he made such a threat, and the district court overruled the objection and imposed the enhancement, finding the PSR sufficiently reliable and “supported by a proper investigation.”

“In determining whether a Guidelines enhancement applies, the district court is allowed to draw reasonable inferences from the facts, and these inferences are fact findings reviewed for clear error.” *United States v. Coleman*, 609 F.3d 699, 708 (5th Cir. 2010) (citing *United States v. Caldwell*, 448 F.3d 287, 290 (5th Cir. 2006)). A factual finding is not clearly erroneous “if it is plausible in light of the record as a whole.” *United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013) (per curiam) (citing *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011)). A factual finding is clearly erroneous if the evidence as a whole leaves the reviewing court “with the definite and firm conviction that a mistake has been committed.” *Coleman*, 609 F.3d at 708 (quoting *United States v. Cooper*, 274 F.3d 230, 238 (5th Cir. 2001)).

Kinzy disputes the facts of his offense and thus challenges the factual foundation for imposition of the enhancement.² “The proponent of an adjustment to the defendant’s base offense level bears the burden of establishing the factual predicate ‘by a preponderance of the relevant and sufficiently reliable evidence.’” *United States v. Aguilar-Alonzo*, 944 F.3d 544, 549 (5th Cir. 2019) (quoting *United States v. Richardson*, 781 F.3d 237, 249 (5th Cir. 2015)). Generally, a PSR’s factual recitation “bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.” *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (per curiam)

² Importantly, Kinzy does not dispute that the facts, if true, support the enhancement as a matter of law. We therefore assume without deciding that the asserted conduct satisfies the language of the enhancement.

(citation omitted). A district court may therefore “adopt the facts contained in a PSR without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable.” *Id.* (cleaned up) (quoting *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)). To rebut facts in a PSR that are supported by adequate evidence, a defendant must submit “evidence demonstrating that those facts are ‘materially untrue, inaccurate or unreliable.’” *Id.* (quoting *United States v. Huerta*, 182 F.3d 361, 364-65 (5th Cir. 1999)). “Mere objections are generally insufficient,” but an objection “may sufficiently alert the district court to questions regarding the reliability of the evidentiary basis for the facts contained in the PSR.” *United States v. Fields*, 932 F.3d 316, 320 (5th Cir. 2019) (cleaned up) (quoting *Harris*, 702 F.3d at 230 & n.3).

Here, the PSR recommended the enhancement based on Kinzy’s threat to shoot or kill the arresting officer, and Kinzy filed an objection, writing through counsel that he “denies ever threatening to shoot or kill any officer.” Counsel continued:

[Kinzy] also denies reaching for the firearm at any time. To the contrary, he fully complied by stopping his vehicle, rolling his window or leaving his window rolled down, and reaching his hands out of his car window when instructed to do so. He pulled one arm back from the officer’s tight grip but that was because he was attempting to get away from the firearm by opening his car door. He

repeatedly asked the officers to let him open the door to get out of his vehicle. He was eventually tackled by multiple officers; one of his teeth were knocked out and another was broken by the officers. He did not intentionally injure, threaten, or attempt to injure any officer.

The U.S. Probation Office reviewed Kinzy's objection and maintained the enhancement in the final PSR, writing that "[b]ased upon the probation officer's independent investigation of the investigative material in this case, the information contained in this section of the PSR is accurate, has an indicia of reliability, and can be supported by the investigative material." The Probation Office attached the arrest report and probable-cause affidavit from the Kenner Police Department to support its finding. The affidavit states that, when the arresting officer grabbed Kinzy's hands, Kinzy "immediately began pulling his hands away from the arresting officer and pulling his hands towards the firearm in his lap in an attempt to grab it while saying 'I'm not going back to jail. I'm going to shoot you. I'll kill you.'" The affidavit is sworn to and subscribed on January 26, 2021, the day after the arrest.

After the Probation Office's rejection of defendant's challenge, the Government also responded to Kinzy's objection, arguing, along similar lines, that the facts in the PSR were supported by evidence from the Kenner Police Department, including the probable-cause affidavit describing the event in detail. In addition to the affidavit, the Government also attached a "crime report" naming three police officers as victims of an assault on a law

enforcement officer and noting that one of the officers had a “possibly torn pectoral muscle” as a result of the incident. The report identifies Christopher Kinzy as the suspect, lists three additional witnesses, and states that Kinzy “threatened to kill officer during traffic stop, with firearm.” The report also contains a five-page single-spaced “narrative” attachment authored by a responding officer and time-stamped on January 30, 2021, five days after the incident. The narrative proceeds moment by moment and recounts the interaction in significant detail. The narrative says, in relevant part:

Kinzy then placed his hands outside the window. However, immediately upon doing so, Christopher Kinzy reached his right arm down towards the handgun in his lap. Officer Lawler, fearing Christopher Kinzy was attempting to grab the handgun and discharge it at Officers, quickly grabbed Christopher Kinzy’s right wrist with his left hand. Officer Lawler, with his handgun still in his right hand, then pulled Christopher Kinzy’s right wrist towards the window. It was at this time, Officer Gagliano arrived to assist. Officer Gagliano positioned himself at the front driver’s side window of the white Charger and observed Christopher Kinzy pull away from Officer Lawler and towards the firearm in his lap. Officer Gagliano was able to quickly gain control of Christopher Kinzy’s left wrist by grabbing it with both hands.

... Officer Lawler felt Christopher Kinzy stiffen his right arm. Officer Gagliano[] simultaneously began pulling Christopher

Kinzy's left arm outside the window, away from the firearm. Christopher Kinzy then began aggressively pulling his arms away from Officers Lawler and Gagliano, pulling Officer Lawler and Gagliano aggressively into the side of the white Charger so strongly that the entire vehicle was swaying side to side. Officer Lawler tightened his grip on Christopher Kinzy's wrist, and pushed off of the white Charger in order to combat Christopher Kinzy's attempts to break free and arm himself with the handgun. When Christopher Kinzy initially reached for the handgun, and while Officers Lawler and Gagliano were attempting to restrict his wrists, Christopher Kinzy was continuously and loudly yelling "I'm not going back to jail. I'm going to shoot you. I'll kill you."

... During the entirety of the above described struggle, the firearm in the lap of Christopher Kinzy was in his immediate control and arm span. Officer Lawler was also commanding Christopher Kinzy to stop resisting and to not reach for the handgun during the struggle.

Following issuance of the final PSR and submission of these evidentiary materials, Kinzy filed a sentencing memorandum, in which he again contested the facts of the arrest through counsel and "maintain[ed] that he did not threaten to shoot or kill any officer." He pointed out that, "although the arresting officers originally charged him with aggravated assault with a firearm and battery on an officer, those charges were rejected by the state prosecutors well before the case went federal." Kinzy

also contended that the arresting officers had been sued for conduct arising out of circumstances similar to those of Kinzy's arrest. Kinzy did not attach any evidence in support of his account of the arrest.

In light of this record evidence, Kinzy's challenge to the district court's factual finding supporting the enhancement fails. The Government offers extensive evidence in support of the fact that Kinzy threatened to shoot or kill the officers, in the form of a sworn arrest affidavit and a detailed narrative attached to a crime report. Kinzy, on the other hand, offers no evidence and instead rests on his unsworn assertions made through counsel. This is not sufficient to rebut the PSR's facts. *See United States v. Rodriguez*, 602 F.3d 346, 363 (5th Cir. 2010) (finding that the PSR was not rebutted by a defendant's objections to the PSR because objections are "not evidence" and are "merely 'unsworn assertions'" (emphasis in original) (citations omitted)).

Kinzy argues that he "could not provide any direct evidence to corroborate his account," "because he had none." But this is wrong. Kinzy could have at least submitted his own sworn affidavit contradicting the officers' version of the arrest. He did not do so, nor does he attempt to explain why not. *See United States v. Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990) (finding no error where the defendant "did not request an evidentiary hearing on the issue, nor did he submit affidavits or other sworn testimony to rebut the evidence contained in the officer's affidavit and the presentence report"). And while Kinzy's reliance on the dropped assault charge and a lawsuit against the arresting officers may have "alert[ed] the district court to questions regarding the reliability of the

evidentiary basis for the facts contained in the PSR,” *Fields*, 932 F.3d at 320 (citation omitted), Kinzy does not explain why any such questions could not ultimately be resolved in favor of the facts as stated in the PSR, particularly in light of the detailed evidence submitted by the Government and the dearth of evidence offered by Kinzy. *See Alfaro*, 919 F.2d at 966 (“An affidavit prepared and submitted in support of a search warrant ... bears sufficient indicia of reliability to be considered by the trial judge in making sentencing decisions.”).

Accordingly, the record evidence supporting the facts beneath Kinzy’s § 2K2.1(b)(6)(B) enhancement does not give rise to a “definite and firm conviction that a mistake has been committed.” *Coleman*, 609 F.3d at 708 (citation omitted). There was therefore no clear error. We affirm the district court’s imposition of the enhancement.

III.

Kinzy also argues that his state conviction under Louisiana Rev. Stat. § 14:108.2 for resisting an officer is not a “crime of violence,” and that he thus should not have received a base offense level of 20 under § 2K2.1(a)(4). This court reviews preserved challenges to the district court’s interpretation and application of the Sentencing Guidelines de novo and its findings of fact for clear error. *United States v. Torres-Perez*, 777 F.3d 764, 768 (5th Cir. 2015) (citation omitted). The sentencing court’s characterization of a prior offense as a “crime of violence” is a question of law subject to de novo review. *United States v. Herrera*, 647 F.3d 172, 175 (5th Cir. 2011).

A.

Under § 2K2.1, which covers certain firearm offenses, a defendant’s offense level is 20 if he “committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.” U.S.S.G. § 2K2.1(a)(4)(A). The Guidelines define a “crime of violence,” in relevant part, as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that ... has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a)(1).

To determine whether a predicate conviction qualifies as a “crime of violence,” courts use the “categorical approach,” which looks not to the conduct beneath the prior offense but instead to the statutory definitions, *i.e.*, the elements, of the statute of conviction. *Descamps v. United States*, 570 U.S. 254, 261 (2013); *United States v. Garner*, 28 F.4th 678, 681 (5th Cir. 2022) (per curiam).³ If a statute contains “multiple, alternative versions of the crime,” rather than one set of elements, it is deemed “divisible,” and

³ Much of the case law governing whether prior offenses qualify as federal predicates arises in the context of the Armed Career Criminal Act (“ACCA”). *E.g.*, *Descamps*, 570 U.S. at 258; *Taylor v. United States*, 495 U.S. 575, 577-78 (1990). The parties agree that ACCA case law guides our analysis, despite that Kinzy’s challenge arises under the Sentencing Guidelines. *Cf. United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011) (noting that, because of “similarities” between certain Guideline provisions and ACCA, “we treat cases dealing with these provisions interchangeably” (citations omitted)); *Garner*, 28 F.4th at 682 (explaining that ACCA case law applies to a § 4B1.2(a)(1) “crime of violence” analysis because of similar statutory language).

courts assessing such statutes instead apply a “modified categorical approach.” *Descamps*, 570 U.S. at 261-62 (citation omitted). Under the modified categorical approach, courts “determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.” *Johnson v. United States*, 559 U.S. 133, 144 (2010). These documents are often called “*Shepard* documents,” named after the Supreme Court’s decision in *Shepard v. United States*, 544 U.S. 13 (2005).

The district court imposed the crime-of-violence enhancement based on Kinzy’s 2019 state conviction for resisting arrest by force or violence, in violation of Louisiana Rev. Stat. § 14:108.2. The statute provides as follows:

- A. Resisting a police officer with force or violence is any of the following when the offender has reasonable grounds to believe the victim is a police officer who is arresting, detaining, seizing property, serving process, or is otherwise acting in the performance of his official duty:
 - (1) Using threatening force or violence by one sought to be arrested or detained before the arresting officer can restrain him and after notice is given that he is under arrest or detention.
 - (2) Using threatening force or violence toward or any resistance or opposition using force or violence to the arresting

officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.

- (3) Injuring or attempting to injure a police officer engaged in the performance of his duties as a police officer.
- (4) Using or threatening force or violence toward a police officer performing any official duty/

La. R.S. § 14:108.2(A).

Kinzy does not dispute that the statute is divisible, nor that the modified categorical approach is appropriate here. He instead contends that the Government has not shown that he was convicted under any particular subsection of the statute, thus ending the inquiry. He argues alternatively that no subsection of the statute qualifies as a crime of violence.

“The Government bears the burden of showing that, based on [the *Shepard*] documents, the offense of conviction necessarily constituted a qualifying offense under the Sentencing Guidelines.” *United States v. Rodriguez-Negrete*, 772 F.3d 221, 225 (5th Cir. 2014) (citing *United States v. Castaneda*, 740 F.3d 169, 174 (5th Cir. 2013)). Where the documents do not identify the offense of conviction, the court “must consider whether the ‘least culpable’ means of violating the statute of conviction qualifies as an offense under the Sentencing Guidelines.” *United States v. Sanchez-Rodriguez*, 830 F.3d 168, 173 (5th Cir. 2016) (per curiam) (quoting *Rodriguez-Negrete*, 772 F.3d at 225).

Here, the Government relies only on Kinzy's state-court indictment to show which subsection formed the basis of his conviction. But the indictment does not specify a subsection of the statute. It alleges, in relevant part, that Kinzy "violated La.R.S. 14:108.2 in that he did resist a police officer ... with the use of violence or threats of violence, knowing that said officer was acting in his official capacity." The Government argues that this language tracks only the language of subsection (4), while Kinzy argues that the language merely tracks the generic offense as described in the preamble of the statute and does not identify any particular subsection of § 14:108.2.

We agree with Kinzy. The statute's description of the generic offense provides that "[r]esisting a police officer with force or violence is any of the following when the offender has reasonable grounds to believe the victim is a police officer ... acting in the performance of his official duty." La. R.S. § 14:108.2(A). The indictment, in turn, says that Kinzy violated § 14:108.2 by "resist[ing] a police officer ... with the use of violence or threats of violence, knowing that said officer was acting in his official capacity." The resemblance is close. The only word that substantively distinguishes the indictment's language from the generic offense in the statute is the indictment's use of the word "threats," which does not appear in the generic-offense definition. But the word "threats" does not clarify which subsection formed the basis of Kinzy's conviction, because three of the four subsections use the word "threatening." *See id.* § 14:108.2(A)(1), (2), (4) (referring to "threatening force or violence"). We are thus unpersuaded by the Government's contention that the word "threats" in the indictment is meant to refer exclusively to

subsection (4), as opposed to any of the three subsections using that word.

Moreover, it is true that subsection (4), unlike (1) and (2), refers to “a police officer performing any official duty,” which sounds like the indictment’s language. But this language also shows up in the generic-offense description. *See id.* § 14:108.2(A). Indeed, the indictment’s language resembles the generic offense *more* than subsection (4) in this regard: the indictment refers to Kinzy’s “*knowing* that said officer was acting in his official capacity,” thus satisfying the generic offense’s requirement that the offender have “*reasonable grounds* to believe the victim is a police officer ... acting in the performance of his official duty.” *Id.* (emphasis added). Subsection (4), on the other hand, refers to “force or violence *toward* a police officer performing any official duty.” *Id.* § 14:108.2(A)(4) (emphasis added). The indictment contains no such language.

Because the indictment fails to specify a subsection of conviction, and because its sparse language closely resembles the statute’s description of the generic offense, we cannot say with any degree of certainty that Kinzy was convicted under subsection (4) of § 14:108.2(A).

In support of its argument that Kinzy’s indictment corresponds only to subsection (4), the Government cites this court’s decisions in *United States v. Sanchez-Espinal*, 762 F.3d 425, 430 (5th Cir. 2014), and *United States v. Torres-Jaime*, 821 F.3d 577, 580-51 (5th Cir. 2016). But, far from supporting the Government’s position here, those cases further illustrate why Kinzy’s indictment fails to identify a subsection of conviction. In those cases, the charging

documents' language tracked the statutory language much more clearly and unambiguously than the unsatisfying comparison urged here. For example, in *Sanchez-Espinal*, the charging document included the lengthy phrase, "in violation of a duly served order of protection, or such order of which the defendant had actual knowledge because the defendant was present in court when such order was issued." 762 F.3d at 430. The New York statute at issue had three subsections, one of which contained this language essentially verbatim, while the other two subsections contained no language of the sort. *See* N.Y. Penal Law § 215.52. Similarly, in *Torres-Jaime*, the court considered a state-court aggravated-assault charge in which the indictment alleged that the defendant "did unlawfully make an assault upon [the victims], with his 2000 Chevrolet Express Van, an instrument which when used offensively against a person is likely to result in serious bodily injury." 821 F.3d at 580-81. Georgia's aggravated-assault statute contains three subsections, one of which covers assaults "[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." Ga. Code Ann. § 16-5-21(a)(2). The other subsections contained no comparable language, and the court found that the defendant's indictment "unquestionably track[ed]" subsection (2). *Torres-Jaime*, 821 F.3d at 581. What's more, the statutes at issue in *Sanchez-Espinal* and *Torres-Jaime* did not contain subsections that at all resembled the generic offense or any preamble language.

The Government has therefore not carried its burden to show which subsection formed the basis of Kinzy's predicate state conviction. Accordingly, we

must ask if the “least culpable’ means of violating the statute of conviction qualifies as an offense under the Sentencing Guidelines.” *Sanchez-Rodriguez*, 830 F.3d at 173 (citation omitted). As the Government concedes, the statute fails this test. For instance, subsection (1) accommodates a conviction for “[u]sing threatening force or violence by one sought to be arrested or detained before the arresting officer can restrain him and after notice is given that he is under arrest or detention.” La. R.S. § 14:108.2(A)(1). This does not “ha[ve] as an element the use, attempted use, or threatened use of physical force *against the person of another*.” U.S.S.G. § 4B1.2(a)(1) (emphasis added). Furthermore, subsection (3) accommodates a conviction merely for injuring an officer, La. R.S. § 14:108.2(A)(3). This does not satisfy § 4B1.2(a)(1). *See Leocal v. Ashcroft*, 543 U.S. 1, 7-10 (2004) (holding that a Florida felony that requires “causing serious bodily injury” does not satisfy a substantially similar “crime of violence” definition because it includes “negligent or merely accidental conduct”).

Because the indictment fails to identify a particular subsection as the basis of Kinzy’s conviction, and because the least culpable means of violating the statute does not qualify as a “crime of violence” as defined in U.S.S.G. § 4B1.2(a)(1), the district court’s imposition of the crime-of-violence enhancement was an error.

B.

But our inquiry does not end here. The Government contends that any error in the guideline calculation was harmless. Kinzy disagrees. Under our harmless-error doctrine, the Government is right.

Challenges to guideline calculations are subject to harmless-error review. *United States v. Greer*, 20 F.4th 1071, 1073 (5th Cir. 2021). In the Fifth Circuit, “there are two ways to show harmless error if the wrong guidelines range is employed.” *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017) (citing *United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012)). The first is “to show that the district court considered both ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way.” *Id.* The second “applies even if the correct guidelines range was not considered.” *Id.* Under this method, the government must “convincingly demonstrate both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.” *Id.* (cleaned up) (quoting *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010)).

Kinzy asks us to apply the latter standard from *Ibarra-Luna*, which demands a higher showing from the Government. As a threshold matter, Kinzy contends that the “two paths” to showing harmless error “are not independent tests,” and are instead “two alternative means for the government to meet its ‘heavy burden’ of ‘proving that the sentence the district court imposed was not influenced *in any way* by the erroneous Guidelines calculation.” To this end, Kinzy cites *Ibarra-Luna*’s statement that the harmless-error doctrine applies “only” if the Government meets this heavy burden.⁴ 628 F.3d at

⁴ Even where Kinzy refrains from urging the *Ibarra-Luna* test directly, he bases his harmless-error arguments on cases

714. But this court has already rejected this argument based on our rule of orderliness. In *Guzman-Rendon*, we explained that, notwithstanding *Ibarra-Luna*'s use of the word "only," the *Ibarra-Luna* method is not the only way to show harmless error in a guideline-range calculation. The court explained as follows:

Ibarra-Luna contains some language suggesting that it represents the exclusive manner for examining harmless error in this circuit. Specifically, it suggests that the "harmless error doctrine applies *only*" if the procedure described above is followed. *Richardson*⁵ postdates *Ibarra-Luna*, so if *Ibarra-Luna*'s claims of exclusivity were correct, *Richardson* might not be valid precedent under this circuit's rule of orderliness, which prohibits one panel from overruling another panel absent intervening *en banc* or Supreme Court decisions. However, *Ibarra-Luna* in turn postdates two cases, *United States v. Duhon*, 541 F.3d 391 (5th Cir. 2008) and *United States v. Bonilla*, 524 F.3d

that apply the *Ibarra-Luna* standard. *E.g.*, *United States v. Alfaro*, 30 F.4th 514, 521 (5th Cir. 2022) (applying the *Ibarra-Luna* standard); *United States v. Martinez-Romero*, 817 F.3d 917, 924-25 (5th Cir. 2016) (same); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir.), *supplemented*, 854 F.3d 284 (5th Cir. 2017); *see Tanksley*, 854 F.3d at 286 n.1 (noting that the panel opinion's "harmless error analysis relied exclusively on the test set forth in [*Ibarra-Luna*], because the district court did not consider the correct guidelines range").

⁵ *Richardson* articulates both methods of showing harmless error, 676 F.3d at 511, and in this way contradicts the proposition that the *Ibarra-Luna* method is the "only" means of showing harmless error.

647 (5th Cir. 2008),^[6] which draw the same distinction *Richardson* does, and thus, to the extent *Ibarra-Luna* claimed exclusivity, that claim would be foreclosed by the rule of orderliness.

Guzman-Rendon, 864 F.3d at 411 n.1 (cleaned up) (emphasis in original) (internal citations omitted).

We therefore reject Kinzy’s argument that the harmless-error inquiry consists exclusively of the test articulated in *Ibarra-Luna*. There are, as explained in *Guzman-Rendon*, “two ways to show harmless error if the wrong guidelines range is employed.” *Id.* at 411; see also *Richardson*, 676 F.3d at 511.

Having so concluded, we must decide whether the district court’s error here was harmless under either of these tests. The Government contends that the requirements of *Bonilla* and *Duhon* are satisfied, because the district court (1) considered the correct range and (2) stated that it would impose the same sentence either way.⁷ Kinzy argues that the Government fails to satisfy *Bonilla* and *Duhon* because the record here shows that the district court did not actually consider the alternative guideline range.⁸ The result, if Kinzy were right, would be to

⁶ *Bonilla* was overruled on other grounds—not implicating its harmless-error analysis—by our en banc decision in *United States v. Reyes-Contreras*, 910 F.3d 169, 177-78, 187 (5th Cir. 2018).

⁷ The Government states that it “does not pursue” the *Ibarra-Luna* method.

⁸ Kinzy did not make this argument in his briefs; counsel raised it for the first time at oral argument. We generally do not consider arguments raised for the first time at oral argument. *United States v. Robinson*, 67 F.4th 742, 752 n.3 (5th Cir. 2023)

apply the demanding *Ibarra-Luna* standard. See *United States v. Juarez*, 866 F.3d 622, 633 (5th Cir. 2017) (explaining that the *Ibarra-Luna* test governs situations “when a court does not consider the proper sentencing range” (quoting *United States v. Martinez-Romero*, 817 F.3d 917, 924 (5th Cir. 2016))).

But Kinzy’s argument fails under our case law, which, for the purposes of the *Bonilla-Duhon* harmlessness test, requires only that the district court “entertain[] arguments as to the proper guidelines range.” *United States v. Nanda*, 867 F.3d 522, 531 (5th Cir. 2017) (citations omitted). For example, in *Duhon*, we explained that “the district court was aware of the correct Guideline range because it was in the PSR, and the Government had vehemently argued for the [contested] enhancements during the sentencing proceeding.” 541 F.3d at 396. Similarly, in *Bonilla*, we explained that, “[a]lthough the district court did not comment on the guideline ranges that would apply with and without the enhancement, the record reflect[ed] no disagreement between the parties or confusion by the district court about the guidelines range before and after the enhancement.” 524 F.3d at 656. There, the defendant had argued in his objections to the PSR that “he should be scored at Level 6, at a Category I, with a sentencing range of 0-6 months,” and, at sentencing, the district court “specifically referenced his consideration of the parties’ arguments made at sentencing and in the reports before” imposing the defendant’s sentence. *Id.* at 656-57; see also *United States v. Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir. 2021) (finding the *Bonilla-Duhon*

(citation omitted). We address the argument here only to explain why it is unavailing in any event.

requirements satisfied where “the district court was aware of the guidelines range absent the enhancements because *Medel-Guadalupe* advised the court of this range in his written PSR objections”).

Guided by these principles, we conclude that the district court here did “consider” the proper range, *i.e.*, the range that would apply absent the erroneous crime-of-violence finding, because that range featured prominently in the parties’ written sentencing materials and at the sentencing hearing. Specifically, Kinzy filed written objections to the PSR’s use of a base offense level of 20, arguing that his state conviction was not a crime of violence under § 2K2.1(a). He accordingly contended that his proper base offense level was 14. (This reflects a six-point decrease from the PSR’s offense level, and, after Kinzy’s other adjustments, would have resulted in a sentencing range of 41 to 51 months. *See* U.S.S.G. ch. 5, pt. A (sentencing table)). Kinzy also filed a sentencing memorandum, arguing that the crime-of-violence enhancement increased his guideline range “from 41- 51 months to 77-96 months.” He requested a sentence of 51 months, which he acknowledged was at the top of the lower guideline range for which he advocated. The Government argued in its sentencing memorandum for the 77-to-96-month range, and further requested, “should the Court sustain defendant’s objection regarding his prior conviction for a crime of violence,” that it impose “an upward variance to the same range, 77 to 96 months.”

At Kinzy’s sentencing hearing, the district court explicitly stated that it had “read the defendant’s [sentencing] memorandum and the responses of the United States Probation Office and also of the

Government.” It then proceeded through Kinzy’s objections, including his objection to the crime-of-violence enhancement. The court stated, “as for the objection to [the crime-of-violence enhancement,] ... [a]fter reviewing the defendant’s objection and the government’s response, I find that the final PSR does properly evaluate the United States Sentencing Guidelines Section 2K2.1(a)(4).” The court then overruled the objection and used a base offense level of 20 because it found that the crime-of-violence enhancement under § 2K2.1(a)(4) was appropriate.

Then, after announcing that the guideline range of imprisonment was therefore 77 to 96 months, the court again mentioned Kinzy’s sentencing memorandum and invited Kinzy and the attorneys to speak before the imposition of sentence. Kinzy’s counsel reminded the court: “[I]n our sealed memorandum, we asked the Court to consider a sentence of 51 months, which would have been the top of the guidelines had the Court sustained the objection to the crime of violence.” Counsel then asked the court “when fashioning [Kinzy’s] sentence ... not to sentence him ... within the 77 to 96 range, because under the equitable circumstances of the prior [offense], it’s not ... the type of crime of violence which commands a severe punishment.” After arguing a series of mitigating factors, Kinzy’s counsel again “ask[ed] the Court to sentence him to a sentence of 51 months in prison.” The Government responded by reminding the court of its sentencing memorandum and again “requesting a within guideline sentence between 77 and 91 ... months.”⁹ The court then

⁹ The top of the range is 96, not 91. The Government appears to have misspoken.

imposed an 87-month sentence. Under our precedents, this is more than enough to demonstrate that the district court considered the proper guideline range.

At oral argument, Kinzy argued against this conclusion by pointing to our decision in *United States v. Sanchez-Arvizu*, 893 F.3d 312 (5th Cir. 2018) (per curiam).¹⁰ There, the court held that it could not “conclude that the district court considered and rejected the correct Guidelines range,” even though the range deemed correct on appeal—15 to 21 months—was mentioned at the sentencing hearing. *Id.* at 316-17. But Kinzy’s reliance on *Sanchez-Arvizu* is misplaced for at least two reasons.

First, *Sanchez-Arvizu* did not involve a district court’s statement that it would impose the same sentence in the event of a guideline-calculation error. Accordingly, the court in *Sanchez-Arvizu* did not have occasion to consider the issue presented by Kinzy’s appeal—namely, whether, under the *Bonilla-Duhon* harmlessness standard, the district court “considered” the proper guideline range, such that its articulation of an alternative basis for the same sentence was sufficient to render any error harmless. That distinction alone is enough to reject Kinzy’s comparison to the case.

But even assuming that the case is instructive for the *Bonilla-Duhon* issue presented here, the case is materially distinct on its facts. In *Sanchez-Arvizu*,

¹⁰ Kinzy cited *Sanchez-Arvizu* for the first time in his reply brief, and even then, he did not cite it for the proposition later urged at oral argument. Again, we generally do not consider arguments raised for the first time at oral argument and address the issue here solely for the sake of thoroughness.

there was considerably less evidence that the district court considered the correct sentencing range. Specifically, defense counsel in *Sanchez-Arvizu* did not object to the probation officer's calculation of the higher range, so the lower, correct range was not included in the defendant's written sentencing materials. *Id.* at 314. And the lower range was mentioned only once at the sentencing hearing, when defense counsel stated (incorrectly) that under a proposed amendment to the Guidelines, the defendant's range would be 15 to 21 months. *Id.* at 316. The probation officer calculated an even lower range—one to seven months—and the exchange with the court “centered on” that estimation. *Id.* Notably, the district court stated that any amended range would not be retroactive and that it was “not inclined to follow it.” *Id.* (internal quotation marks omitted). This passing reference to a hypothetical lower range under a proposed amendment is a far cry from Kinzy's repeated pressing of the relevant range in both written and oral submissions to the sentencing court.

For these reasons, *Sanchez-Arvizu* does not undermine our conclusion that, based on this record, under the relevant case law, the district court here “considered” the proper guideline range. *Guzman-Rendon*, 864 F.3d at 411 (citation omitted).

The only remaining question, then, is whether the district court “explained that it would give the same sentence either way.” *Id.*; *see also Nanda*, 867 F.3d at 531 (“[W]hen a district court entertains arguments as to the proper guidelines range and explicitly states that it would have given the same sentence it did regardless, any error in the range calculation is harmless.” (citations omitted)).

Here, the court made the requisite statement. At the end of the hearing, the Government asked the court if it had “considered the alternative guideline suggested by the defendant.” The court responded: “The sentence that I crafted is what I believe is appropriate for the defendant in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question.”

This case thus falls in the camp of situations in which “the district court considered both ranges” and “explained that it would give the same sentence either way.” *Guzman-Rendon*, 864 F.3d at 411. Accordingly, the district court’s error in applying the § 2K2.1(a)(4) crime-of-violence enhancement was harmless. See *Nanda*, 867 F.3d at 531; *Richardson*, 676 F.3d at 512; *Duhon*, 541 F.3d at 396; *Bonilla*, 524 F.3d at 656-57.

On this basis, we affirm Kinzy’s sentence despite the error.

C.

This case pushes the outer bounds of our harmless-error doctrine. Christopher Kinzy was sentenced to a term of imprisonment that exceeds the top of his correct sentencing range by three years. The sentence imposed is nearly double the length of the midpoint of his correct range. And the sentence imposed sits at the very center of a range whose calculation rests on a legal error. But, bound by our case law, we are compelled to conclude that the sentence must stand.

To be sure, the *Bonilla-Duhon* rule has a degree of merit. In some cases, the rule simply gives effect to the commonsense proposition that “[n]ot all errors in

determining a defendant's guideline sentence require reversal." *Bonilla*, 524 F.3d at 656. The rule reflects the post-*Booker* reality that the Sentencing Guidelines are just the starting point for a district court and that, ultimately, sentences are to be individualized based on the circumstances of a particular defendant in a particular case. *See Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016) (explaining that, while "[t]he Guidelines inform and instruct the district court's determination of an appropriate sentence," the "sentencing process is particular to each defendant," and, "[t]he record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range").

Moreover, the *Bonilla-Duhon* rule does not exclusively favor the Government's defense of higher sentences imposed after the erroneous application of sentencing enhancements. The rule applies equally to *lenient* sentences that follow the erroneous *non-imposition* of enhancements. *Duhon* itself was such a case. There, the Government appealed the district court's downward variance to a sentence of sixty months' probation in part on the basis that the district court failed to impose certain sentencing enhancements supported by facts in the PSR. 541 F.3d at 395-96. We concluded that, although the court "ultimately erred by failing to apply the enhancements," the error was not reversible because the court was aware of the correct guideline range and "declared that it would have sentenced Duhon to sixty months of probation even if it miscalculated the ... range." *Id.* at 396.

Understood as a doctrine that is compelled by the discretionary nature of sentencing and is balanced in its applicability, the *Bonilla-Duhon* rule may be both reasonable and fair. But in this case, we confess that its application unsettles us. A more probing review of the record reveals why.

It was under odd circumstances that the district court made its final statement that it would impose the same sentence “under either scenario.” The court had already ruled on Kinzy’s objections, announced its guideline-range calculations, heard Kinzy’s allocution and other arguments from the parties, imposed sentence, advised Kinzy of his appellate rights, and ordered that Kinzy be remanded to the custody of the U.S. Marshals. Then, the court attempted to adjourn the hearing. When the court said, “If there’s nothing further,” the Government interjected. Counsel said, in relevant part:

I would ask your Honor, in light of the fact there’s no waiver of appeal in this case, I would ask whether your Honor has considered the alternative guidelines range suggested by the defendant and whether you would have imposed the same sentence had that alternative guideline range been in effect. If your Honor has considered that.

The court did not engage the Government’s request. It said, “Will you submit this in writing, please, submit this in [a] post sentencing brief.” Defense counsel spoke up, and the exchange continued as follows:

[DEFENSE]: Your Honor, it sounds that the Court hasn’t made the decision to impose the sentence regardless, and we just ask that the

sentence remain as is, that it not be extended further, he's ready to begin his term, you know. We're ready to conclude this matter. I don't think there needs to be a further—

THE COURT: What are you requesting, Mr. [prosecutor]?

[GOVERNMENT]: So, your Honor, I guess if your Honor has considered the alternative guideline suggested by the defendant and then would have imposed the same sentence anyway, then should this case be appealed and the Fifth Circuit find that the Court committed error with respect to the guidelines calculations, that error would arguably be harmless error since you would have imposed the same sentence.

THE COURT: The sentence that I crafted is what I believe is appropriate for the defendant in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question.

[GOVERNMENT]: Thank you, your Honor.

THE COURT: Court's adjourned.

[DEFENSE]: Please note our objection for the record. Thank you.

We emphasize three salient features of this sentencing record that give us pause in applying our *Bonilla-Duhon* harmless rule. First, the district court's statement was made as an afterthought, at the very end of the sentencing hearing, after imposition of the sentence. The court did not issue the statement

when one might expect it—namely, in imposing the term of imprisonment and articulating its reasons for doing so.

Second, the statement was made only at the Government's repeated request.¹¹ Not only was the court evidently not inclined to make the statement on its own volition, but it indeed appeared confused when the Government raised it. The court first rebuffed the Government by telling it to file a written motion. It then had to ask counsel, "What are you requesting ... ?" Most concerning, the Government's request was an acknowledged attempt to insulate the sentence on appeal. The Government said as much, telling the court that its request was "in light of the fact [that] there's no waiver of appeal in this case," and explaining that, "should this case be appealed and the Fifth Circuit find that the Court committed error with respect to the guidelines calculations, that error would arguably be harmless error since you would have imposed the same sentence."¹²

¹¹ We observe that this practice is apparently not new. In at least one other *Bonilla-Duhon* case, from over a decade ago, the court made its statement at the invitation of the Government. See *Richardson*, 676 F.3d at 510 ("After the district court finished announcing its sentence, the Government asked the court whether it would state on the record that it would have imposed the same sentence, notwithstanding the enhancements that had been applied to Richardson's offense level.").

¹² The Government made the same argument in its written submission before sentencing. In its response to Kinzy's PSR objections, the Government wrote in a footnote:

The government also notes that any error in calculating the guidelines related to the crime-of-violence enhancement would be subjected to harmless error review on appeal, so long as the Court contemplated the guidelines range suggested by defendant and "stated that it

Third and finally, the court’s statement of reasons for the alternative sentence was perfunctory. The court said that the same sentence would have resulted “under either scenario,” without explaining why, if Kinzy’s conviction were *not* a crime of violence, the court would have decided to vary upward by three years, nearly doubling the guideline range, and why it would have landed at the center of the heightened (and wrong) range.

These troubling aspects of the record, however, cannot alter our resolution. Our *Bonilla-Duhon* jurisprudence, as it stands, does not interrogate record-based oddities like these, much less instruct that the harmlessness of a sentencing error turns on factors like when the district court’s statement was made or whether it came at the Government’s urging. Nor has our case law required that district courts offer a more detailed explanation of the alternative sentence.¹³ To turn these disconcerting features of the

would have imposed the same sentence even if that range applied.”

¹³ At least two sister circuits require more than a simple statement that the court would have imposed the same sentence in the event of a guideline-calculation error. For example, while the Third Circuit, like us, acknowledges that an error in a guideline-range calculation can be harmless if the district court “explicitly states that it would have imposed the same sentence even under the correct Guidelines range,” *United States v. Raia*, 993 F.3d 185, 195 (3d Cir. 2021), the court scrutinizes those statements and requires that alternative sentences be fully explained. *See id.* at 196 (“[E]ven an explicit statement that the same sentence would be imposed under a different Guidelines range is insufficient if that alternative sentence is not also a product of the entire three-step sentencing process.”); *see also United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) (remanding for resentencing where the district court said it would

record into case-dispositive facts would be to create new carveouts from our *Bonilla-Duhon* doctrine. In an appropriate case, it may be prudent to do so, but Kinzy has not, at least to this panel, asked that we take such a step.¹⁴

have imposed the same sentence even without an enhancement, but “without explaining what the Guidelines range would have been without the enhancement, and without explaining why an upward departure or variance would be merited from that range”).

The Tenth Circuit also demands more than we do. In *United States v. Pena-Hermosillo*, the Tenth Circuit remanded for resentencing despite that the “district court found that the same sentence would be appropriate ... even if the correct offense level were five points higher and the recommended guidelines range 136 months higher,” explaining that “[s]urely that requires some explanation beyond a vague statement that the sentence is appropriate under § 3553(a).” 522 F.3d 1108, 1117 (10th Cir. 2008) (McConnell, J.). The court noted that it is “hard” to “imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation.” *Id.*

¹⁴ Instead, Kinzy has based his opposition to the Government’s harmless position on the assertion that we should apply the *Ibarra-Luna* standard because (i) *Bonilla-Duhon* is not an “independent test,” and, alternatively, (ii) the district court did not sufficiently “consider” the correct range. For the reasons given *supra* Section III.B, these arguments are foreclosed by our case law.

As to that law, we note that the *Bonilla-Duhon* rule appears best suited for scenarios where the district court imposes a *non-guidelines* sentence. Indeed, this was the situation in both *Bonilla* and *Duhon*. See 524 F.3d at 656; 541 F.3d at 394-96. But the rule has since been expanded to cover situations like Kinzy’s, where the imposed sentence is within a different—and purportedly incorrect—guideline range. See, e.g., *Guzman-Rendon*, 864 F.3d at 410-12.

For now, we simply warn that the workability and fairness of our harmless-error doctrine depend fundamentally on the good faith of the Government, defense counsel, and the district courts. The doctrine is meant to reflect the reality that the Sentencing Guidelines are advisory and that not all errors arising from the complex process of calculating guideline ranges require reversal and resentencing. The doctrine is not to be deployed as a talisman to insulate sentences that otherwise ought to be revisited by all participants: opposing counsel, the parties, and sentencing judges.

IV.

Kinzy's prior state conviction does not categorically qualify as a crime of violence, and the district court's conclusion to the contrary was erroneous. But our harmless-error doctrine compels us to hold that the sentence must stand. We accordingly AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF
AMERICA

**JUDGMENT IN A
CRIMINAL CASE**

V.

CHRISTOPHER KINZY

Case Number: 21-102

USM Number: 60152-509

Annalisa Miron

Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count 1 of the Indictment on December 14, 2021.
- pleaded nolo contendere to count(s) which was accepted by the court.
- Was found guilty on as to count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1), 924(e)	Felon in Possession of Firearm		1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Count(s) dismissed on the motion of the United States:

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

COURT REPORTER:

Karen Ibos

ASST. U. S.

**ATTORNEY: Jonathan
Leighton Shish**

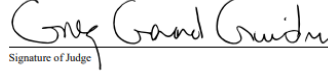
PROBATION

OFFICER:

Tiffany S. Roberson

April 5, 2022

Date of Imposition of Judgment



Signature of Judge

Greg Gerard Guidry, United States District Judge

Name and Title of Judge

4/5/22

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 87 months.,

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

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

The defendant shall surrender to the United States Marshal for this district:
at a.m. p.m. on
as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: before 2:00 p.m. on as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

39a

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES
MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*Check if applicable.*)

4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
5. You must cooperate in the collection of DNA as directed by the probation officer. (*Check if applicable.*)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or was convicted of a qualifying offense. (*Check if applicable.*)

41a

7. . You must participate in an approved program for domestic violence. (*Check if applicable.*)

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

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change.

If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or

dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date:

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment, which may include urinalysis testing. Participation may include inpatient/outpatient treatment. The defendant shall contribute to the cost of this program to the extent that the defendant is deemed capable by the United States Probation Officer. While under supervision, the defendant shall submit to random urinalysis testing, as directed by the United States Probation Officer.

As directed by the probation officer the defendant shall participate in an approved cognitive behavioral therapeutic treatment program and abide by all supplemental conditions of treatment. The defendant shall contribute to the cost of this program to the extent that the defendant is deemed capable by the United States Probation Officer.

The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time in a reasonable manner, based upon reasonable suspicion that contraband or evidence of a violation of a condition of supervision may exist; failure to submit to a search may be grounds for revocation; the defendant shall warn any other resident(s) that the premises may be subject to searches pursuant to this condition.

The U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

CRIMINAL MONETARY PENALTIES

The defendant may pay any imposed fine or restitution under the schedule of payments on Sheet 6.

	<u>Assess</u> <u>ment</u>	<u>Restit</u> <u>ution</u>	<u>Fi</u> <u>ne</u>	<u>AVAA</u> <u>Assess</u> <u>ment*</u>	<u>JVTA</u> <u>Assess</u> <u>ment**</u>
TOT	\$100.0	\$	\$	\$	\$
ALS	0				

- The special assessment is due immediately.
- The determination of restitution is deferred until .
An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

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

TOTALS \$_____ \$_____

Restitution amount ordered pursuant to plea _____

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

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

the interest requirement is waived for the fine restitution

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

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

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

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

SCHEDULE OF PAYMENTS

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

- A** Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below); or
- B** Payment to begin immediately (may be combined with C, D, E, or F below); or
- C** Payment in equal monthly installments of \$ _____, to commence _____; or
- D** Payment in equal _____ (e.g., weekly, monthly quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** Special instructions regarding the payment of criminal monetary penalties:

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

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

Joint and Several

Case Numer, Defendant and Co- Defendant Names <i>(including defendant number)</i>	Total Amount	Joint and Several Amount	Corresponding Payee if appropriate
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The defendant shall pay the cost of prosecution.

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

The defendant shall forfeit the defendant's interest in the following property to the United States: as referenced in the Order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6)

50a

fine interest, (7) community restitution, (8) JVTAs assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

Docket No. 21-CR_102
Section "T"

v.

New Orleans, Louisiana
Tuesday April 5, 2022

CHRISTOPHER KINZY

TRANSCRIPT OF SENTENCING PROCEEDINGS
HEARD BEFORE THE HONORABLE GREG G.
GUIDRY

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE
GOVERNMENT:

UNITED STATES
ATTORNEY'S OFFICE

BY: JONATHAN L.
SHIH, ESQ.

650 Poydras St., Suite
1600

New Orleans, LA 70130

FOR THE
DEFENDANT:

FEDERAL PUBLIC
DEFENDER

BY: ANNALISA
MIRON, ESQ.

500 Poydras St., HB-318
New Orleans, LA 70130

52a

Official Court Reporter: Karen A. Ibos, CCR,
RPR, CRR, RMR
500 Poydras Street, B-
275
New Orleans, Louisiana
70130
(504) 589-7776

Proceedings recorded by mechanical stenogra-
phy, transcript produced by computer.

P R O C E E D I N G S
(TUESDAY, APRIL 5, 2022)
(SENTENCING PROCEEDINGS)

(OPEN COURT.)

THE COURT: Call the next case, please.

THE DEPUTY CLERK: The next case on the docket is the sentencing in the criminal matter 21-CR-102, *United States of America v. Christopher Kinzy*. Counsel, please make your appearance for the record.

MR. SHIH: Good morning, your Honor. Jonathan Shih for the United States.

MS. MIRON: Good morning. Annalisa Miron on behalf of Mr. Kinzy.

THE DEPUTY CLERK: Mr. Kinzy, please state your full name for the record.

THE DEFENDANT: First, middle, and last? Christopher Warren Kinzy.

THE COURT: This matter is before the Court this morning for sentencing. Is there any reason why sentence should not be imposed at this time?

MS. MIRON: No, your Honor.

MR. SHIH: Not from the government, your Honor.

THE COURT: Mr. Kinzy, have you received a copy of the presentence investigation report and any addendum that was prepared in your case?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had a chance to read it?

THE DEFENDANT: Yes, sir.

THE COURT: The record reflects that the defendant has made objections to the presentence investigation report, in particular to paragraphs 6, 7, 9, 12, 13, 17, 20, 29, 30, 32, 40, 58, 73, 82, 83, and 88.

Now, I have read the defendant's memorandum and the responses of the United States Probation Office and also of the Government. Does either party wish to make further objections, corrections, or alterations to the report at this time, or make any argument with reference to those objections?

MS. MIRON: Briefly, your Honor. I think most of the objections that do not affect the guidelines were resolved, so I won't need to address those.

As for the objection relating to the offense conduct in paragraph 6. The government is correct that the Court can rely on the police reports in finding an enhancement under that guideline; in other words, that he possessed a weapon in connection with another felony. But -- and that's under current precedent. We just maintain out of fairness that the Court not do that because it hasn't been established through evidence that is subject to an adversarial process.

The police reports were written, the state prosecutors did not pursue the charges of battery against a police officer or aggravated battery. They simply pursued the charge of felon in possession and resisting by force or violence, which, as your Honor is aware, is the subject of another objection.

But it's essentially he said/she said where Mr. Kinzy explains that he did not and had no reason to threaten the officers. He did comply with their orders to put his hands out the window. That was a very painful situation, and he attempted to open the door to distance himself from the weapon. He did not want

them to be in fear of their lives being in jeopardy, and he personally didn't want to get shot. So he had no interest in reaching for the weapon.

It was a very contentious arrest, it seems, where Mr. Kinzy's two teeth were knocked out. You can see on the side that two teeth are now missing. And certainly in retrospect, things should have gone a lot smoother. But in terms of finding whether the government has established their burden, we preserve our objections under the Constitution and under the sentencing guidelines that they haven't. They haven't called witnesses that are subject to cross-examination, there's no independent corroboration for the police version of events, and for those reasons we ask the Court not to find a four-level enhancement in connection with the offense conduct.

THE COURT: Would you like to respond?

MR. SHIH: Your Honor, so we discussed this in our memorandum and in the response to the objections, but there's no requirement that the government establish that once the probation department has conducted their own investigation and determined that there's a credible basis for the factual allegations described in the PSR. And some of the cases cited, including Alfaro, in our response to the objections indicate that once the probation department has made those factual conclusions, the Court can rely on those, as the defense indicated, because they're entitled to the presumption of reliability.

In this case, besides the defendant's self-serving denials of those facts, there's no rebuttal evidence presented by the defendant; and in the absence of that, your Honor can rely on the PSR and properly apply that enhancement.

THE COURT: First, I find that the objections to paragraphs 30, 40, 58, 82, and 83 have been resolved by the United States Probation Office in favor of the defendant, and those objections are sustained.

Second, considering the defendant's objection to restitution and the United States Probation Office's agreement, the objection to restitution under paragraph 9 is sustained.

Third, regarding the objections to paragraphs 6, 7, 29, and 88, I find that the probation officer's report is accurate and based on reliable information that is supported by a proper investigation, and I overrule those objections.

Fourth, as for the objection to paragraph 12. After reviewing the defendant's objection and the government's response, I find that the final PSR does properly evaluate the United States Sentencing Guidelines Section 2K2.1(a)(4). For a base offense level 20, Section 2K2.1(a)(4) requires that the defendant have been previously convicted of a crime of violence under Section 4B1.2, a crime of violence is defined as the violation of a state or federal law punishable by more than one year, and as an element of the crime, involves the use, attempted use, or threatened use of physical force against another.

On March 18, 2019, Mr. Kinzy pled guilty to Count 2 of the indictment in the 24th Judicial District Court in Jefferson Parish. Specifically, he pled guilty to a violation of Louisiana Revised Statute 14:108.2, with reference to resisting arrest by force or violence. I agree with the Government's position that 14:108.2 is broader than the definition of a crime of violence in Section 4B1.2 and the statute is divisible. As a result, I examined Mr. Kinzy's charging documents and

found that, by pleading guilty, he admitted that he resisted a police officer with the use of violence or threats of violence, and therefore, by his own admission, his actions qualify as a crime of violence. Accordingly, I find that Mr. Kinzy was previously convicted of a crime of violence and overrule that objection.

Fifth, considering this previous ruling, the related objections to paragraphs 13, 17, 20, and 73 are overruled.

With these rulings on the parties' objections, I adopt the factual statements in the final presentence investigation report and its addendum as my findings of fact. The Court, therefore, orders the presentence report and the addendum, except for the probation officer's sentencing recommendation, to be made a part of the record and filed under seal.

Based on the guidelines and Mr. Kinzy's total offense level of 21 and criminal history category of VI, I find that the following guideline ranges are applicable:

On December 14th, 2021, the defendant entered a plea of guilty to a one-count indictment charging him with being a felon in possession of a firearm, which carries a maximum sentence of ten years.

Under the guidelines, the imprisonment range is 77 to 96 months; the guideline supervised release range is one to three years; the guideline fine range is from 15 to \$150,000; and the guideline special assessment is \$100.

As I mentioned earlier, Mr. Kinzy has filed a sentencing memorandum. Do you have anything to say or

offer in mitigation of punishment before I impose sentence, Mr. Kinzy?

THE DEFENDANT: I do, your Honor. With all due respect, I am not going to waste your time trying to come up with excuses or find somebody to blame. Like, I'm here today prepared to take full responsibility for what happened. You know, it's a lot of stuff that happened that I can't go into, it's not the time. But I am prepared to take full responsibility.

I know what I did. And if I can, am I going to be able to say something to my mother and my daughter before I get sentenced?

THE COURT: You mean privately?

THE DEFENDANT: No, I can do it –

THE COURT: You can do it now, sure. You would like to do it now, sure.

THE DEFENDANT: Skye, I'm sorry. I'm sorry that you got to see this. I'm sorry for a lot of decisions that I made that wasn't the healthiest.

Just --

THE COURT: Take your time.

THE DEFENDANT: Ma, I'm sorry to you, too, for pretty much the same thing. Because this is like a disappointing thing, and I never thought that I'd be going through this again. I'm sorry for -- by taking you for granted, all of the sacrifices that you made, I'm sorry. I'm sorry. And I don't really know what else to say.

MOTHER: It's all right, son. That's okay.

THE COURT: Do the attorneys have anything to say?

MS. MIRON: Yes, briefly. And, your Honor, I apologize, I didn't make one very minor correction to the

presentence report. It seems that the probation department has agreed with us that he was not convicted of possession of intent to distribute heroin in paragraph 29, and so I would just ask that that be corrected to possession of heroin.

THE COURT: Any objection to that?

MR. SHIH: No, your Honor. We would agree with that based on the review of the underlying conviction documents.

THE COURT: So noted.

MS. MIRON: Additionally, your Honor, in our sealed memorandum, we asked the Court to consider a sentence of 51 months, which would have been the top of the guidelines had the Court sustained the objection to the crime of violence. And the reason for that request is when looking at the circumstances of that offense -- which, by the way, under Louisiana law is not a crime of violence under the statute defining crimes of violence. The conduct was essentially Mr. Kinzy resisting, running and being tased, and then the officers handcuffing him. So there was no allegation there that he threatened, kicked, you know, used any force, although I guess the Court is finding that he did, but beyond the resisting that occurred when he was arrested.

So under those circumstances, this is not like a manslaughter prior conviction, it's not like an aggravated assault with a weapon, it's something less than that in our view. And I would ask the Court to consider when fashioning a sentence -- which obviously is not mandated by the guidelines but is mandated under 3553(a) to be sufficient but not greater than necessary -- when fashioning that sentence that the Court not sentence him to the 77 -- within the 77 to 96

range, because under the equitable circumstances of the prior, it's not -- it's not the type of crime of violence which commands a severe punishment.

Mr. Kinzy's personal circumstances are very different from his criminal record. There are letters of support from his father, who was not in his life and lived a very different life-style in California, and acknowledges that his absence might have created a hole in Mr. Kinzy's upbringing.

As Mr. Kinzy himself says, he does not wish to blame his mother, neither will I. She was a single mother and continues to work hard to support her family, including now her granddaughter who is sitting in the audience, who is in 8th grade.

Mr. Kinzy has struggled with drug addiction, and I believe that many of his convictions stem from that, some not clear thinking, possession of drugs. He needs drug treatment to treat the long-standing addictions that he has. He is not a violent criminal as his mother says. She writes that he is not a violent criminal and that the government's attempt to portray him as such should be balanced by the personal letters that we submitted.

The authors give examples of where he saved a child's life at a family reunion, he jumped straight into the water to save that child. He attempts to repair family disputes between his siblings, and his absence, now his custodial sentence is going to be felt by everybody.

He has community support so when he is out he will be able to get back on his feet, he has trade skills, he's earned a lot of certificates as noted in the presentence report. And for all of those reasons, your Honor,

I would ask the Court to sentence him to a sentence of 51 months in prison.

MR. SHIH: Your Honor, we did submit a sentencing memo so I won't belabor the point, but we are requesting a within guideline sentence between 77 and 91 (VERBATIM) months. I think that type of sentence is necessary to reflect the seriousness of the offense charged here.

I'll note that in addition to the threats that the defendant made to kill the police officers arresting him and the violent nature of the defendant's resisting arrest resulted in the injury, serious injury to one of the police officers that was involved in that incident requiring, ultimately, surgery.

In addition, the defendant does have a very serious criminal history. You know, I understand that there's a dispute about sort of the underlying facts of the prior resisting by force or violence conviction. Although I'll note that the underlying facts are not really relevant to the Court's determination of whether that is a violent offense or not because the Court cannot review underlying facts, only the Shepard documents for what particular provision he was convicted of, and our position is that that provision is a violent crime under the federal test regardless of what it is in state law.

But I'll note that there is also a prior conviction for armed robbery that the defendant was convicted of, which did not score either in his criminal history, nor did it qualify as predicate for a crime of violence because it's too old. But it's only too old by a couple of months, and had the defendant committed this offense a few months earlier that would have scored.

So I would argue that his criminal history is serious, and that a within guideline sentence is necessary to reflect his background, as well as the nature of this offense, your Honor.

MS. MIRON: Your Honor, may I briefly reply to the mention of the armed robbery?

THE COURT: Yes.

MS. MIRON: And I've had some discussions with Mr. Kinzy who brought to my attention, since it didn't affect the guidelines range we did not focus on that conviction. But he was actually convicted of simple robbery. He was the youngest of a group of teenagers, another person had a weapon. I confirmed with his mother, and if the Court would also like to inquire of her, that he personally did not engage in armed robbery. It was simple robbery taking from a store where other people were present. And under those circumstances, it shouldn't be a factor in the Court's consideration for a sentence in this case.

THE COURT: It's not. And I note your request for a downward variance or departure and I'll deny that. The sentence will be within the guideline range. But your objections are noted.

Pursuant to the Sentencing Reform Act of 1984 and considering the provisions found in Title 18, United States Code, Section 3553, it is the judgment of the Court that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a period of 87 months.

It is the finding of this Court that the defendant is not able to pay a fine. Accordingly, no fine shall be imposed.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. Within 72 hours of release from custody of the United States 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 crimes, and shall be prohibited from possessing any firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall not possess a controlled substance, he shall cooperate in the collection of DNA, and he shall comply with all other standard conditions of probation, including the following special conditions:

Based on the defendant's history of substance abuse, the drug abuse outpatient treatment and/or testing condition is imposed.

Based on the defendant's criminal associations and participation in the instant offense, and to assist him with developing better decision-making skills, the defendant shall participate in an approved cognitive behavioral therapeutic treatment program and abide by all supplemental conditions of treatment. The defendant shall contribute to the cost of this program to the extent that he is deemed capable by the United States Probation Office.

Based on the defendant's criminal history and the nature of the instant offense, the defendant shall submit his person, residence, office or vehicle to a search to be conducted by a United States probation officer at a reasonable time in a reasonable manner, based upon a reasonable suspicion that contraband or evidence of a violation of a condition of supervision may exist; failure to submit to a search may be grounds for

revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

It is further ordered that the defendant immediately pay to the United States a special assessment of \$100.

This brings the total sentence to 87 months in prison, three years of supervised release, and \$100 special assessment.

Forfeiture of the defendant's right, title, and interest in certain property may be ordered consistent with the indictment, and the government has not filed a motion for a preliminary order of forfeiture. Do you intend to do so?

MR. SHIH: Your Honor, I think we actually did. I want to say it's Record Document 35. But in any event, I believe that there are -- if your Honor would order forfeiture of the firearm and ammunition that's listed in the indictment or the bill of particulars, we would ask that be made a part of the judgment.

THE COURT: So ordered.

Mr. Kinzy, you have the right to appeal the judgment and the sentence under certain circumstances. With few exceptions, any notice of appeal must be filed within 14 days of the judgment being entered in your case. Failure to appeal within the 14-day period shall be a waiver of your right to appeal. The government may file an appeal from the sentence. You're entitled to the assistance of counsel in taking an appeal. If you're not able to afford an attorney, one will be provided for you. If you're not able to afford the filing fee, the Clerk of Court will be directed to accept a notice of appeal without the fee. If you could not afford a

transcript of the record in this case, it will be prepared for appeal at the government's expense.

Do you understand these appeal rights?

THE DEFENDANT: Yes, sir.

THE COURT: It is ordered that the defendant be remanded to the custody of the United States Marshal Service to begin serving the sentence. If there's nothing further --

MR. SHIH: Your Honor, two issues, I guess. Your Honor, we either have filed or will file a motion for the third point for acceptance of responsibility, so that may have already hit ECF.

And also I would ask your Honor, in light of the fact there's no waiver of appeal in this case, I would ask whether your Honor has considered the alternative guidelines range suggested by the defendant and whether you would have imposed the same sentence had that alternative guideline range been in effect. If your Honor has considered that.

THE COURT: Will you submit this in writing, please, submit this in post sentencing brief.

MS. MIRON: Your Honor, it sounds that the Court hasn't made the decision to impose the sentence regardless, and we just ask that the sentence remain as is, that it not be extended further, he's ready to begin his term, you know. We're ready to conclude this matter. I don't think there needs to be a further --

THE COURT: What are you requesting, Mr. Shih?

MR. SHIH: So, your Honor, I guess if your Honor has considered the alternative guideline suggested by the defendant and then would have imposed the same sentence anyway, then should this case be appealed and the Fifth Circuit find that the Court committed

error with respect to the guidelines calculations, that error would arguably be harmless error since you would have imposed the same sentence.

THE COURT: The sentence that I crafted is what I believe is appropriate for the defendant in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question.

MR. SHIH: Thank you, your Honor.

THE COURT: Court's adjourned.

MS. MIRON: Please note our objection for the record.

Thank you.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

* * * * *

REPORTER'S CERTIFICATE

I, Karen A. Ibos, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/ Karen A. Ibos

Karen A. Ibos, CCR, RPR, CRR, RMR
Official Court Reporter

APPENDIX D**18 U.S.C. § 3553(a), (c) Imposition of a sentence**

(a) **FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentences available;

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

...

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.— The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements

¹ So in original. The period probably should be a semicolon

were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,³ and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

...

³ So in original.