No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MALIK MOSS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Volume 2 (A137-280)

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May 19, 2025

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Volume 2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
) No. 22-24-1-CFC
v.)
)
MALIK MOSS,)
)
Defendant.)

Thursday, November 2, 2023
10:05 a.m.
Sentencing

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE COLM F. CONNOLLY
United States District Court Judge

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE
BY: ALEXANDER IBRAHIM, ESQ.
Counsel for the Government

BY: DANIEL BRESLIN, ESQ.
Counsel for the Defendant, Malik Moss

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P R O C E E D I N G S

(Proceedings commenced in the courtroom beginning at 10:05 a.m.)

THE COURT: Good morning. Please be seated.

MR. IBRAHIM: Good morning, Your Honor. Alexander Ibrahim on behalf of the United States. Now is the time that the Court has set aside for the sentencing in the matter of United States versus Malik Moss. That's Case Number 22-24-1.

The defendant is present, along with his counsel, Mr. Daniel Breslin. And we are ready to proceed, Your Honor.

THE COURT: All right. Thank you.

Mr. Breslin, good morning.

MR. BRESLIN: Good morning, Your Honor.

THE COURT: Mr. Moss, good morning.

THE DEFENDANT: Good morning.

THE COURT: All right. So I've reviewed, in preparation for today's hearing, there was a memorandum submitted by the Government, a memorandum submitted by Mr. Breslin. They all had attachments. I reviewed all those. I went back and I reread the May letter submitted by the Government. And I've read the Presentence Report. And I've actually gone back and also looked at the transcript from the hearing from December, and my

memorandum opinion where I ruled about the drug amount.

Is there anything else I should have read in preparation for today? And, obviously, the Presentence Report, and I'll talk about that in a second.

Mr. Ibrahim.

MR. IBRAHIM: And then there was a letter -- I don't know if the Court mentioned it, but a letter filed yesterday by Mr. Breslin.

THE COURT: Yes, I did read that letter. In fact, that -- and I'll use that as a template of how to proceed, frankly. So thank you for that reminder.

Mr. Breslin, was there anything else I should have reviewed?

MR. BRESLIN: No. In addition to what AUSA Ibrahim just indicated about the letter, I don't believe there's anything else.

THE COURT: And the letter had attachments, so.

MR. BRESLIN: That's right.

THE COURT: All right. Mr. Moss, have you had a chance to review all the materials, and especially the Presentence Report?

THE DEFENDANT: Yes. Not a lot of things, but some of the things, yes.

THE COURT: All right. Well, Mr. Breslin, were the pleadings made available to Mr. Moss?

MR. BRESLIN: Correct, Your Honor. I think the only thing that Mr. Moss has not had an opportunity to review, and that was just because of the late filing as of yesterday, is that letter that I submitted.

THE COURT: All right. So then that's not a problem, though. So, basically, Mr. Breslin submitted a letter yesterday that's just outlined. And I'm going to go over it, so that's not a problem.

All right. Mr. Moss, has Mr. Breslin answered all the questions you had about the Presentence Report?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And are you satisfied with the advice he's given you?

THE DEFENDANT: Yes.

THE COURT: All right. So now, in the letter Mr. Breslin writes that there's one objection the defense plans to withdraw, we'll get to that when we get to the Presentence Report; and then outlines that you intend to rely on the written submissions with regards to some other objections, and we'll explore those; and then that there's going to be competing evidence and argument presented today with regard to the obstruction of justice enhancement.

All right. It's a fair summary of the letter?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: It makes sense to you, Mr. Moss?

THE DEFENDANT: Yes.

THE COURT: All right. So then, let's talk about the Presentence Report. Start with that.

All right. And, Mr. Moss, you said you have had a chance to read through the Presentence Report; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you have any questions about it?

THE DEFENDANT: No.

THE COURT: All right. Now, are there any objections from the Government to the Presentence Report?

MR. IBRAHIM: No, Your Honor.

THE COURT: All right. And there are objections, Mr. Breslin, by you, so let's walk through those. All right?

Your first objection -- I'm going to take them in the order they're presented in the Presentence Report. And I'm looking, just so the record is clear, at the second revised Presentence Report, which is dated October 26, 2023.

The first objection concerns Paragraphs 50 to 53 of the Presentence Report, and essentially, as I understand the defense objection, it takes issue with

paragraphs that include Mr. Pankins' statement to detective -- is it Riccobon? I want to make sure I pronounce it correctly.

MR. IBRAHIM: Riccobon, Your Honor.

THE COURT: Riccobon? Okay.

-- Detective Riccobon with respect to the methamphetamine and marijuana. Right? And you basically want -- essentially, you want to supplement those paragraphs by making sure there's substance from the transcript that Mr. Pankins' post-arrest statement included.

MR. BRESLIN: That's correct, Your Honor.

THE COURT: So I'm aware of that post-arrest statement. And I agree with the Government that the issues that are objected to in Paragraphs 50 to 53 are, essentially, just a factual description of what occurred at the home. And so I'm going to overrule the objection. I don't think the information prejudices the defendant. It's not going to inform any decision I make --

MR. BRESLIN: Understood.

THE COURT: -- in a negative way against the defendant.

All right. The next objection is the obstruction of justice enhancement, right? That's with regards to Paragraphs 71 through 77, and 88 through 89.

I'm going to table that. We're going to come back to that because that's what we're going to hear argument on.

The next objection is to Paragraph 84. Now, here, as I understand the objection, Mr. Breslin, you think that only 300 of the 600 bundles of fentanyl should be attributed to Mr. Moss, right?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: Anything else you want to say about the objection?

MR. BRESLIN: No. As indicated in my letter, we're okay with ruling on what I submitted.

THE COURT: All right. I'm going to overrule -- I mean, this is not going to make a difference in the assessment of the drug weight, correct?

MR. IBRAHIM: Correct, Your Honor.

THE COURT: Yeah. Correct? And for that reason alone, I'd overrule it. But I happen to agree with the Government's position, that Mr. Moss jointly traveled with Mr. Rodriguez that led to the chain of events to the possession of the 600 bundles, and it would be fair to attribute the entirety of the 600 to him for that reason alone.

But it's not going to make a difference with the weight. And I've actually ruled -- I applied the rule of lenity in coming up with the weight, as I explained in

my opinion earlier this year. So I'm going to overrule the objection. I think there's an evidentiary basis to say that the entirety of the drug weight challenged in those paragraphs is attributable to the defendant. All right.

Next objection, as I understand it, is to Paragraph 85, and this is for the two-point offense level enhancement for possession of a deadly weapon.

Is that right, Mr. Breslin?

MR. BRESLIN: That is correct, Your Honor.

THE COURT: All right. Now, as I understand the Government's position, this -- first of all, it's unchallenged or undisputed, the weapons in question were located in Mr. Pankins' house; is that right?

MR. IBRAHIM: There were three firearms located in Pankins' house, Your Honor. The enhancement relates to a 9 millimeter found at Christina Chamberlain's house.

THE COURT: Okay. So that's, first question of clarification. So you're saying it's solely the 9 mm found at Chamberlain? You're not attributing any weapons to Pankins, to him; is that right?

MR. IBRAHIM: Yeah. Your Honor, I think that the weapon found in Ms. Chamberlain's house is just so obviously attributable to him, that it gets the two points that -- the Government hasn't even addressed the three

firearms at Mr. Pankins' house.

THE COURT: So why don't you come forward and tell me what you think the evidence is to support that.

MR. IBRAHIM: Sure, Your Honor.

THE COURT: Right. And so I've read the three -- in the response of the Government, you cite to three exhibits to the May filing by the Government. I think it's D.I. 119, but I might not be right on the number. D.I. 80 -- it's the May 5th letter, right?

MR. IBRAHIM: I don't want to confuse the Court. The citations to that -- the citations that I made were citations to the evidentiary hearing exhibits wherein post-arrest statements were made by Mr. Lapointe, Ms. Chamberlain, and Mr. Meadow.

THE COURT: All right. Were those three exhibits, though, not attached to and labeled the same with the May --

MR. IBRAHIM: Correct. The May letter that I think the Court refers to, refers to the obstruction of justice under Mr. Moss' prison calls and e-mails.

THE COURT: All right. Then let me step back. Hold on. I read this morning the three statements, and I just want to make sure I'm identifying them right.

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Is that right?

MR. IBRAHIM: And I realize where the confusion came up, Your Honor, because the probation office redacted the names from the PSR --

THE COURT: Right.

MR. IBRAHIM: -- so I can address that.

THE COURT: Well, let me put it this way: I went back and read the three statements.

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Okay.

I think they are very, very thin; a very thin reed to establish that Mr. Moss possessed the weapon in question. There is a description. There's no question -- I mean, it's somewhat ambiguous. There's some vagueness in the statements. There's no question that the three witnesses say at some point, they observed Mr. Moss in possession of a firearm. But whether it's the firearm that is located in Ms. Chamberlain's residence, I don't know.

So you should make your best argument because I'm inclined to not rule. I'm inclined to sustain this objection. So if you want to maybe hand up, and if you want to point to specific language in the transcripts, but I looked at them, and I did not come away feeling comfortable applying a two-level enhancement for the possession of the particular weapon in

Ms. Chamberlain's -- that was ultimately found in Ms. Chamberlain's residence.

MR. IBRAHIM: Sure, Your Honor. So first, of course, we have a DNA analysis on that firearm.

THE COURT: So I didn't find that persuasive. Well, at least I don't know how to interpret it. The expert says that it's ten times more likely that if you had four people and Mr. Moss, that he -- one of them possessed it than if you had five people randomly; is that right?

MR. IBRAHIM: That's right. Instead of five random people, it's ten times more likely that it's actually four random people and Mr. Moss.

THE COURT: I mean, A, that's my limited experience with DNA, which is in murder cases and is -- the odds, the percentage, and the probabilities were presented much differently than as this expert report does. So you, maybe, want to try to educate me, but it didn't seem to me to be that compelling.

MR. IBRAHIM: Sure, Your Honor. And, of course, you know, there's sometimes hits in the millions and in the hundred-thousands. For example, there's one in hundred-thousand chance relating to his codefendant, Mr. Santiago, and for Mr. Moss it's only ten.

THE COURT: When you say "it's only ten," what

do you mean? It's one in ten that they're his?

MR. IBRAHIM: Sorry. I mean, it's ten times more likely. That's, you know, the phraseology from the expert is it's ten times more likely that it's Mr. Moss and four random people, than it's five random people whose DNA is on that firearm.

THE COURT: But why is it phrased in the sense that it's him and four other people as opposed to just him versus the public at large?

MR. IBRAHIM: Because there's -- there are four other -- there are other DNA samples on the firearm that were recovered, but they're not in the database. They don't have that -- those DNA profiles to compare to in the database. So they can't say exactly who those people are, but they know that their DNA is on the firearm. And they know that it's ten times more likely that it's Mr. Moss' DNA than a fifth random person.

THE COURT: Why can't they just -- because, again, based on my limited experience, so why can't they just have somebody assessed what the odds are that it's his DNA relative to the population at large?

MR. IBRAHIM: Your Honor, I think that that's how they express those odds. That's, you know, how I've seen them expressed in DNA reports as the likelihood, this is X times more likely that it's this person and another

person, than if it was two random people.

And, you know, I agree with the Court, you know, as the glossary -- as the index says, it provides limited support. It doesn't provide strong support, but it provides limited support. But limited support is support, Your Honor.

THE COURT: All right. But why don't you deal with the three statements.

MR. IBRAHIM: Sure.

THE COURT: I mean, how do you know we're talking the same gun that's found in Chamberlain's residence?

MR. IBRAHIM: So, Your Honor, we have three people, all of whom describe a firearm that resembles the firearm that we're talking about. And there's no dispute that it's a black and silver Taurus 9 mm with an extended magazine.

THE COURT: When you say "black and silver," one of the witnesses, didn't they use the word "tan"?

MR. IBRAHIM: Yes. At one point --

THE COURT: So they didn't even use the word "silver."

MR. IBRAHIM: And Mr. Lapointe called it "black and tan" at one point, and then later in his statement he said "silver." He also called it 9 mm. He said it's a

9 mm with an extended magazine. That's fairly descriptive, Your Honor, for someone to say that they saw Mr. Moss with a gun -- with a handgun.

THE COURT: Right. But you have to prove it's this handgun. When you say "the" let's be honest -- right? -- I mean, you are not saying -- the evidence is not -- or rather, the point you're trying to prove is not that at some point, he possessed a firearm; the point you're trying to establish is that he possessed the firearm in Chamberlain's residence, correct?

MR. IBRAHIM: The firearm that was recovered --

THE COURT: Yeah.

MR. IBRAHIM: -- that at some point in time, he possessed that firearm.

THE COURT: Right.

MR. IBRAHIM: It's also worth noting for record, Your Honor -- and I know you know this -- but the Third Circuit law only requires the Government to prove its initial burden to show that he possessed it at some point; where a defendant drug dealer is found to possess a firearm, then the burden shifts to him to prove that it was clearly improbable that it was not in connection with the offense.

So from the Government's perspective, if we prove he possessed that firearm -- and we've obviously

proven that he's a drug dealer given that he pled guilty -- then the burden shifts to him to show that it wasn't in connection with the offense.

THE COURT: Wait. You've got to prove by a preponderance.

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Right. Again, what I'm trying to understand is, I think, as it's put before me, the issue is whether you've established by a preponderance of the evidence that he possessed the gun, the particular gun in Chamberlain's residence.

MR. IBRAHIM: Right.

THE COURT: It is not that he possessed a gun generally; is that right?

MR. IBRAHIM: Understood, Your Honor.

THE COURT: Okay. So then --

MR. IBRAHIM: Of course, yes. We are on the same page.

So we have Ms. Chamberlain's statement, right. She is talking about that gun that was found in her house. And she said it wasn't hers, it was either Moss' or Santiago's, and that she saw both of them with it at one point.

That alone, Your Honor, it's -- we -- that's in a grand jury statement. To a grand jury, she says she

saw --

THE COURT: Right. But what bothered me about her -- and this is a good example of it being ambiguous or vague. Her testimony was, it was either one or the other.

MR. IBRAHIM: Right.

THE COURT: Now, she did say in her testimony at some point, both of them handled the gun.

MR. IBRAHIM: Right.

Your Honor, I think that independently meets the Government's burden. We have to show that Mr. Moss possessed that gun at some point.

THE COURT: All right. Is that the best you've got?

MR. IBRAHIM: No, Your Honor. We have two other statements that I think are telling.

One of them, the next one from Mr. Meadow, he describes it exactly as a gray and black handgun with an extended magazine kept at Tina's. He says that in the post-arrest statement, "kept at Tina's." Tina's is The Elms apartment where this handgun was found. And he says, "black and gray with an extended magazine."

Your Honor, I think for somebody --

THE COURT: Can I see that transcript?

MR. IBRAHIM: Sure, Your Honor.

I think the easiest thing to do, if the Court

would allow me, is to put it up on the screen, Your Honor. I have it electronically.

THE COURT: That's fine, yeah. Let's do that.

MR. IBRAHIM: If I could have the Court's indulgence to just set that up.

Can I share with the Court without having to do that?

THE COURT: You can do whatever you want. Here's the screen.

MR. IBRAHIM: Okay, Your Honor. So this is the post-arrest statement of Mr. Meadow. As the Court may remember from the evidentiary hearing, Mr. Meadow was one of the people who Mr. Moss asked, on November 11, to bring him some -- to bring him a bag because Mr. Moss was worried about a police presence around the Elms. So he was asked about that. The majority of his statement is about that.

However, he's asked here: "Did you ever see him with any weapons?"

He says, "Yeah, there was two. I know there was. I know they were keeping one over at Tina's."

He's asked: "You saw that one?"

"No."

And then, "Did Tina tell you?"

Then he realizes, "Oh, yes. I've seen it."

He's confused for a second. "I've seen it," he says.

"Describe it for me."

"It was a handgun with an extended clip on it."

"What color was it?"

And at first he says gray and blue, and then he says gray and black. So he's describing a gray and black handgun with an extended magazine.

And the Government acknowledges at first he says gray and blue. And then he says later, "It looked like, I guess -- it would be like a nine, like a regular pistol."

I understand there's a little bit of wiggle room here, Your Honor. But for somebody to say that they've seen Mr. Moss with a handgun with an extended magazine, gray and black 9-millimeter, there's some indicia there, Your Honor, that Mr. Meadow knows what he's talking about. And that's exactly the gun that was recovered.

THE COURT: Right. He also says, "I know they were keeping it." Where does he say specifically -- you know, again, why -- there's another person involved here. Rodriguez is storing his drugs there, right?

MR. IBRAHIM: Absolutely, Your Honor. And I think --

THE COURT: Okay. So how do you get it on this

defendant, Mr. Moss?

MR. IBRAHIM: Well, you know, obviously, the -- in the Government's opinion, the other statements. For example, Ms. Chamberlain saying she saw Moss with it, Mr. Lapointe saying he saw Moss with it, you know, adds to that puzzle. And then, of course, the DNA report.

And the other thing, Your Honor, is, you know, the Government -- from the Government's perspective, Pinkerton liability applies to sentencing enhancements. So if a codefendant possesses a firearm in furtherance of a drug crime and if it's reasonably foreseeable to the defendant, then that sentencing enhancement applies to him as well.

The Government's --

THE COURT: I hadn't focused on that, so hold on a second.

Because when I said "the ambiguity," part of the ambiguity to me stemmed from, was it Rodriguez, versus was it Mr. Moss, but they're both part of the same conspiracy. So your point would be that he gets the enhancement no matter -- even if it's Rodriguez.

MR. IBRAHIM: Yes, Your Honor. I think we've gone above and beyond that, though. I think we've put the gun in Mr. Moss' hand. But, you know, as an alternative argument, Your Honor, I don't think that we need to.

THE COURT: Okay. I think I'm going to go ahead, then, and actually overrule the objection on that basis. And what I mean by that is this: I read the three transcripts. And just for the record, it's D.I. ...

MR. IBRAHIM: I have D.I. 82, Your Honor.

THE COURT: That's what I have. I was about to say. So it's listed as D.I. 82. And there were three transcripts, and I read all three.

I think considered in their totality, and with the DNA lab report, they easily establish by a preponderance of the evidence that Rodriguez or Moss possessed the weapon, the 9-millimeter pistol found in Chamberlain's residence.

I think it's a really close question -- well, it's a much closer question, I'll say, a much closer question whether it was Moss or Rodriguez, but I am satisfied that there's, by a preponderance of the evidence, that it's one or the other. And on that basis, I'm going to sustain -- I'm going to overrule the objection, rather.

MR. BRESLIN: Your Honor, just for clarity of the record, I believe when you're saying "Rodriguez" you're meaning "Santiago"?

THE COURT: Oh, I'm sorry. Did I -- yes, I meant Santiago. Thank you very much. I did.

MR. BRESLIN: Right.

THE COURT: All right. So I'm going to actually -- I am convinced that one or the two of those gentlemen possessed this weapon, and I am convinced by a preponderance of the evidence that the weapon fell within the purview of the conspiracy because of the use of Ms. Chamberlain's apartment by both of those individuals. All right?

All right. So I'm going to, then, overrule the firearm objection on that basis.

All right. Next.

All right. The next objection is for role in the offense; is that right?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Or, wait. Yes, for role in the offense, I think, correct?

MR. BRESLIN: Correct, Your Honor.

THE COURT: Okay. And this is whether the four-point enhancement applies under U.S. Guideline 3B1.1. I think it's undisputed that the legal elements for this would be that the defendant has to be an organizer or leader, right? That's the first.

You agree, Mr. Ibrahim?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: You agree, Mr. Breslin?

MR. BRESLIN: Correct, Your Honor.

THE COURT: All right. And then there has to be at least five or more participants in the offense, right, or there has to be otherwise extensive -- an otherwise extensive criminal enterprise, fair?

MR. IBRAHIM: Yes, Your Honor.

MR. BRESLIN: Yes, Your Honor.

THE COURT: Okay. Is there any dispute that the defendant is an organizer or leader?

I mean, isn't the dispute really just about how many people over whom he is an organizer or leader? That's the way I understand it.

MR. IBRAHIM: That was the Government's understanding as well, Your Honor.

MR. BRESLIN: The defense's understanding is in order to qualify as a leader, essentially, Mr. Moss would only have to oversee one individual.

THE COURT: Yeah. I think that's right. And that's my point, is that -- and I think -- I just think the facts are really undisputed, he's an organizer and a leader of Ms. Chamberlain, correct?

And I, frankly, think it's also clear he was an organizer and a leader of Pankins, an unindicted coconspirator.

I think there's closer questions as to Santiago

or, you know, other individuals. So I think he qualifies as an organizer and leader.

I also think it's clear there are more than five people. And those -- in fact, I think it's fair to say that by a preponderance of the evidence, there are at least eight participants that the Government has established participated in the criminal activity, including Moss, Santiago, Rodriguez, Chamberlain; two unindicted coconspirators, Pankins and Alfaro. Six of those people have pled guilty in federal court.

So I'm going to overrule the objection, all right, on that basis.

All right. I think the only thing left is the obstruction; is that right?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: And I say that because -- actually, let's make a record of it. There was originally an objection to Paragraph 132, and that's been withdrawn, right?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: Okay. So then the only thing left is the obstruction. So then let me hear from the parties.

MR. IBRAHIM: Yes, Your Honor. The only thing, just for the record, again, is that there is a purity of the methamphetamine argument that could be interpreted as

an objection to the guidelines because the guidelines, of course, rely on the purity guidelines and not the mixture and substance guidelines.

I've discussed with Mr. Breslin, I believe Mr. Breslin is going to make that argument as part of a furtherance of a variance and not separately as an objection to the PSR. But I think this is a good opportunity to put that on the record.

THE COURT: All right. Thank you for that clarification.

Mr. Breslin, you want to speak to that?

MR. BRESLIN: That is correct, Your Honor. And that's why I raised that argument in the sentencing memorandum, whether it's part of the -- of my objection.

The only other thing, just for clarity of the record, and I've indicated this in the letter yesterday, is that the acceptance of responsibility objection is tied specifically to the obstruction.

THE COURT: Correct. So I'm not going to rule on that until I first rule on the objection. And on the purity issue, as I understand your argument is, you basically are asking me to say I don't agree with the policy of -- behind the purity levels in the sentencing guideline because they're not empirically based, and that you, therefore, think I can exercise my discretion to

reject it as a policy matter.

MR. BRESLIN: That is correct, Your Honor, based on the case law that I presented to the Court in my memorandum of the various district courts around the country that have taken that position.

THE COURT: Right. So I'm not -- I'll already tell you, I'm not going to reject the policy. And I afforded the defendant lenity in my calculation of the drug amounts for the reasons I explained in the memorandum. I can't remember when I issued it, but it was some months ago.

And, you know, if you'll recall one of the arguments that is actually made in your -- in support of the position you're taking, Mr. Breslin, is that 90 percent or greater purity is routinely found on the streets, correct?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: Right. And in this case, in fact, most of the seized amounts did have a purity level that was close to 90 percent, or above 90 percent. But there was one sample that was at 62 percent, as I recall it. And I said in fairness and just applying the rule of lenity, I'm going to use that purity.

So I think I've already, in a way -- I factored into my consideration of the drug amounts, the exact

argument you're making, in a way. All right. But we'll deal -- you can still be heard as far as a variance about that issue. All right.

All right. So then let's -- I think, then, let's go to the obstruction, and then that will also segue into ultimately a finding about the acceptance of responsibility, the third point.

MR. IBRAHIM: Sure, Your Honor.

So the Government has two bases for the obstruction of justice enhancement. One is threats that were sent to a cooperator while he was at FDC. Cooperator is present and prepared to testify. The other basis, which is the subject of the May letter that the Court has referenced and filed on the docket as docket entry 119, is transcripts of phone calls and also e-mails sent by Mr. Moss that show that he actually hatched a plan to record the cooperator when he was originally scheduled to testify at the evidentiary hearing.

So the Government is prepared to do both things today. The Government thinks the first thing that would make sense is to just call the cooperator and get him to testify.

THE COURT: That would be good. Are you planning on eliciting from this witness some description of what the, quote, "plumbing," unquote, is?

MR. IBRAHIM: Certainly, Your Honor.

THE COURT: Or does somebody want to explain it to me? I mean, I'm trying to figure out, you know, is it shorthand for some formal mail delivery system? Or are we literally talking this is the septic system in the FDC, and people are actually exchanging mail through the septic system of the FDC?

MR. IBRAHIM: Unfortunately, Your Honor, it is exactly what you just said. It is letters sent in gloves or somehow waterproofed through the toilets in the prison.

THE COURT: But how do they do it? I don't understand how you're in -- some cell in a toilet, and you put something in a rubber glove, tie it up, and it ends up -- you can direct it to somebody else's cell. Can you explain that to me?

MR. IBRAHIM: Sure, Your Honor. And I think some of that will be spoken -- you know, said by the cooperator.

THE COURT: Oh, well, then -- then you can do it that way. That's why I just asked.

MR. IBRAHIM: Sure.

THE COURT: You need to explain -- you need to educate me what this plumbing is all about.

MR. IBRAHIM: And whatever he doesn't address, we can certainly address -- both Mr. Breslin and I have

looked into it since the events at issue, so we have some familiarity with it.

THE COURT: Okay. All right. Thank you very much.

The other thing is, don't -- I've looked at the transcripts that you submitted, but I'm -- you're going to have to walk through them with me.

MR. IBRAHIM: Of course.

THE COURT: It's not readily apparent to me what certain words mean and that kind of thing.

MR. IBRAHIM: Of course, Your Honor.

THE COURT: All right. Thank you.

MR. IBRAHIM: Okay. So then, the first thing the Government will do, will call Jesus Alfaro, Your Honor.

THE COURT: All right.

MR. IBRAHIM: Yes, Your Honor, while we're waiting for the cooperator, we do have a -- two joint exhibits. They are a letter that the cooperator submitted to the Court that was actually read in open court by his attorney, and then we have his cooperation agreement.

If I may approach.

And, again, those are stipulated, Your Honor. So for purposes of the hearing, I would just ask those to be admitted.

THE COURT: All right. They're admitted.

DIRECT EXAMINATION

BY MR. IBRAHIM:

Q. Good morning, Mr. Alfaro.

A. Good morning.

Q. Could you state and spell your last name, please, for the record.

A. My name is Jesus Alfaro. First name J-E-S-U-S, last name Alfaro, A-L-F-A-R-O.

MR. IBRAHIM: And I apologize. You weren't sworn in yet, so we're just going to strike that.

THE COURT: No. Well, I mean, we've got your name. All right. Go ahead, please administer the oath.

THE CLERK: Please raise your right hand.

JESUS ALFARO, having been called as a witness, being first duly sworn under oath or affirmed, testified as follows:

THE CLERK: Thank you. Please be seated.

MR. IBRAHIM: Thank you.

DIRECT EXAMINATION

BY MR. IBRAHIM:

Q. All right. So you said your name is Jesus Alfaro?

A. Correct.

Q. Do you know someone by the name of Malik Moss?

A. Yes, I do.

Q. Do you know him by any nicknames?

A. Malik -- Bleek.

Q. Bleek?

A. Yeah.

Q. Do you see him here today?

A. Yes, I do.

Q. Where is he?

A. Over there in the green jumper.

Q. All right. How do you know him?

A. I've done a couple drug deals together.

Q. Okay. Was that the nature of your relationship with him?

A. Yes.

Q. What drug are you referring to?

A. Methamphetamines.

Q. Okay. And how long have you known him?

A. About seven to nine years.

Q. How long were you dealing in methamphetamine with him?

A. About a strong year.

Q. Were you buying from him or were you selling to him?

A. I was buying from him.

Q. And generally, what type of quantities are we talking

about?

A. Quarter pound each time.

Q. Okay. And, by the way, in your relationship with him, did he know you by a nickname?

A. Yes.

Q. What nickname is that?

A. Chewy.

Q. Okay. Did the Y ever get dropped and just Chew? Did people refer to you as Chew?

A. Yeah.

Q. At some point in this case, were you arrested?

A. Yes, I was.

Q. Okay. Why were you arrested?

A. For conspiracy and distribution of methamphetamines.

Q. And at some point, were you offered the opportunity to cooperate?

A. Yes, I was.

Q. Did you agree to cooperate at that time?

A. Yes, I did.

Q. As part of that cooperation, were you scheduled to testify at a hearing last December?

A. Yes.

Q. Okay. Did you end up testifying at that hearing?

A. No.

Q. What did you say?

A. No.

Q. Why not?

A. Because I got a couple threatening letters about my family's safety.

Q. Could you tell the Court a little bit about those letters, please?

A. I got three letters. First two regarding about our relationship, stating, basically, "Damn. Why are you doing this to me?"

Q. And when you say that you got these letters, where were you when you received the letters?

A. I was on Six North at FDC.

Q. Okay. So you were an inmate at the FDC?

A. Correct.

Q. And when you say you got these letters, how does an inmate at the FDC receive letters like this?

A. Usually through the toilet or the food cart.

Q. Okay. Are these approved methods of sending communication between inmates?

A. Yes.

Q. When I say "approved," I mean --

A. Oh, approved. No, they're not.

Q. Okay. This is something that inmates do on the side?

A. Yes.

Q. Okay. All right. So you were referring to a couple

of these letters. If you could -- you said there was a few letters. How many letters were there?

THE COURT: Well, wait, before you do, how do you get a letter in your toilet?

THE WITNESS: Usually it's called you fish it through a, I guess, sheet or blankets. You fish it through the toilet.

THE COURT: So I don't -- but you've got to explain that to me.

THE WITNESS: Well, the toilets are running through the same pipeline, right, and they connect at each floor. So if you're on that same floor, that side, you can connect through the other floors, through the toilet. You have to use a bag so nothing will get wet.

THE COURT: All right. So I'm on the seventh floor and I want to get a message to somebody on the sixth floor below me.

THE WITNESS: Correct.

THE COURT: All right. So what do I do?

THE WITNESS: You have to empty out our toilet, open up the toilet, the pipeline, and then shoot the string down so the other person can grab it.

THE COURT: All right. So the person has to be willing to grab it below?

THE WITNESS: Yes.

THE COURT: So do they have to be directly below me? I mean, where --

THE WITNESS: Yes. That same pipeline. Usually other cellmates or cellies or inmates will allow another person to use that cell so they can fish through the line.

THE COURT: Do you have to warn them ahead of time it's coming?

THE WITNESS: Sometimes, yeah. Sometimes there's phone calls, conversations somehow that people know, or they yell through the toilet. Sometimes they can hear them, and repeat to them to open the bowl.

THE COURT: All right. So if I'm on the seventh floor, I put some letter -- what, I put it in a plastic bag or something?

THE WITNESS: Yes.

THE COURT: Okay. I empty out my toilet?

THE WITNESS: Correct.

THE COURT: And then I shove down the bottom of the toilet --

THE WITNESS: In the pipeline.

THE COURT: -- in the pipeline, but it's through the toilet?

THE WITNESS: Yes.

THE COURT: Okay. And do I got to push it with

my blanket or something?

THE WITNESS: I really don't know about that. I think you have to flush, and it helps it go down with it.

THE COURT: Okay. But then how do I know where it's going once I flush?

THE WITNESS: Because it will go straight down. Every cell has the same pipeline.

THE COURT: Okay.

THE WITNESS: So he will have to catch it as the middle of flushing it.

THE COURT: How does he catch it?

THE WITNESS: With his hands.

THE COURT: So he's told ahead of time it's going to be flushed?

THE WITNESS: Yes.

THE COURT: How do you time that? How do you know? If I'm going to flush something at noon, how do I make sure the guy below me, at noon, is going to --

THE WITNESS: Well, usually you would yell through the toilet and you can hear, communicate, hey, grab such and such; or, hey, look, I'm going fish at this time, be aware.

THE COURT: Okay. So you flush it down, and then the guy catches it right below me?

THE WITNESS: Yes.

THE COURT: All right. So that's -- and you've got some message in your toilet?

THE WITNESS: No. It was a guy on the tier that usually does that. And it had a letter with my name on it, "Chewy."

THE COURT: Okay. So there's somebody on the tier who agrees to take the mail and then --

THE WITNESS: Yes.

THE COURT: -- essentially, deliver it?

THE WITNESS: Yes. It's a nasty job.

THE COURT: All right. So you're saying -- when you say you got three letters --

THE WITNESS: Correct.

THE COURT: -- did somebody give you those three letters?

THE WITNESS: Yes.

THE COURT: Was it the same person?

THE WITNESS: Yes.

THE COURT: And is that -- this the guy who, on your floor, I guess, gets the mail through the toilet?

THE WITNESS: Yes. Usually does the mail.

THE COURT: All right. Go ahead.

MR. IBRAHIM: Thank you, Your Honor.

BY MR. IBRAHIM:

Q. So those three letters, since we're talking about them, what did they say?

A. Well, the first two stated, basically, "Damn, Chew. I can't believe you're doing this to me."

And then the third letter, basically, regards "You know where I know -- you know where your" -- sorry, "I know where your mother and your son lives. Don't have me do this. Don't testify."

Q. What did you do with those letters?

A. I hurried up and flushed them in panic mode.

Q. Why?

A. I was scared.

Q. So you mentioned that the letters remarked about you testifying or --

A. Correct.

Q. Who at the FDC knew you were scheduled to testify?

A. Nobody.

Q. Okay. You didn't tell anybody you were planning on testifying?

A. Only my girlfriend and my mother.

Q. So nobody at the FDC?

A. Nobody at FDC.

Q. Okay. And you mentioned that the letter, at least one letter referenced your mom and son?

A. Correct.

Q. Who, if anyone at the FDC, knew about your relationship with your mom and son?

A. Nobody beside Bleek.

Q. Okay. You were aware that he knew about them?

A. Yes.

Q. Okay. Who, if anyone at the FDC, knew where they lived?

A. Nobody.

Q. Okay. All right. So you mentioned that you were scared.

A. Yes.

Q. So at some point, did you decide that you didn't want to cooperate anymore?

A. Yes, I did.

Q. Okay. And at some point -- at any point after you decided you didn't want to cooperate anymore, did you have any contact with anybody --

A. Yes.

Q. -- about your cooperation?

A. Yes.

Q. Who?

A. A close friend of ours, Hove.

Q. When you say "close friend of ours," what does that --

A. Me and Bleek's friend.

Q. Okay. It was a mutual friend?

A. Yes.

Q. And you said his name was Hove?

A. Correct.

Q. Okay. Now, I want to take you back to November-December time period of last year. You just told the Court you decided not to testify because you were scared because of these letters.

Do you remember saying that?

A. Yes.

Q. Okay. At the time, though, what was the reason that you gave for not wanting to testify?

A. Honestly, I was hoping that it would go away. And, just, I was scared for my family's safety. I didn't want nothing to happen to them. But knowing the person who Bleek is, if something were to happen to them, I would have never forgave myself, and I had to speak out.

Q. So do you recall signing a letter that was --

A. Yes.

Q. -- from your attorney that said that you weren't threatened?

A. Yes.

Q. Was that letter true, that you weren't threatened?

A. No.

Q. Are you being honest with the Court now about you receiving these letters?

A. Yes.

Q. Are you aware what will happen to your cooperation with the Government if you are truthful here today?

A. Yes, I am.

Q. What will happen?

A. 51K will be dismissed, and anything that's brought up now could be charged against me.

Q. Okay. And why didn't you tell your lawyer the story that you've just said now in open court about you being threatened?

A. I was scared.

MR. IBRAHIM: That's all I have, Your Honor.

THE COURT: All right. Cross-examination.

CROSS EXAMINATION

BY MR. BRESLIN:

Q. Good morning, Mr. Alfaro. How are you?

A. Good. How are you?

Q. Good. So I just want to touch on a few questions. I'll probably ask some things you've already answered, but just to get some clarity in the record.

During direct examination, you indicated that your nickname is "Chewy" or "Chew"?

A. Correct.

Q. Are there individuals in the facility that address you as "Chew" or "Chewy"?
A. Yes. When they hear my nickname, sometimes they say, "Chew" or "Chewy."
Q. All right. And you said when -- in the threatening letters, they were addressed to you as "Chew" or "Chewy"?
A. Chewy.
Q. Okay. All right. I want to go back a little bit to the summer of 2022.
About -- in July of 2022, you entered a guilty plea in -- in relation to the charges that you're facing, correct?
A. Yes.
Q. And in anticipation of the guilty plea hearing, you reviewed the Plea Agreement?
A. Yes.
Q. In its entirety?
A. Yes.
Q. And you signed that Plea Agreement?
A. Correct.
Q. Okay. As part of that Plea Agreement, you entered into certain agreements with the Government; is that correct?
A. Yes.
Q. And one of those agreements was that the Government

was going to agree that your base offense level for the guidelines was an offense level of 30; is that correct?
A. Correct.
Q. And additionally, the Government was going to agree to not recommend a sentence greater than the bottom of the guideline range, correct?
A. Correct.
Q. And that would be a hundred months at the time?
A. Yes.
Q. And as part of the Plea Agreement, there was also what was Attachment A.
Do you recall that?
A. Yes.
Q. And that was the cooperation agreement, correct?
A. Yes.
Q. All right. And you reviewed that cooperation agreement?
A. Yes.
Q. And you signed that cooperation agreement?
A. Yes.
Q. In that cooperation agreement, there were some terms you agreed between you and the Government?
A. Yes.
Q. And one of those terms was that you were to, quote, "provide truthful, complete, and accurate information and

testimony"; is that correct?
A. Yes.
Q. Additionally, one of the terms was, you were to make yourself available at the Government's request, correct?
A. Yes.
Q. All right. But the cooperation agreement also outlined certain risks, that if you violated that agreement, what would happen, correct?
A. Yes.
Q. All right. And those risks include being prosecuted for perjury, being prosecuted for obstruction of justice, correct?
A. Yes.
Q. Reinstatement of dismissed charges, correct?
A. (Indicating.)
Q. I need a verbal.
A. Correct.
Q. Sorry.
And the Government declining to file a substantial assistance or a 5K motion for you, correct?
A. Correct.
Q. All right. And despite these risks, you still voluntarily agreed to cooperate; is that correct?
A. Correct.
Q. And in doing so, you had a hope that the Government

would file a 5K motion for you?
A. Yes.
Q. Or provide some other kind of benefit for you for sentencing purposes, correct?
A. Yes.
Q. Now, as part of the cooperation agreement, you were asked to testify in December of 2022 at an evidentiary hearing in this case, correct?
A. Correct.
Q. All right. And you initially agreed to testify to that?
A. Correct.
Q. However, as you indicated on direct examination, you changed your mind, correct?
A. Yes.
Q. All right. And you asked your attorney to inform the Government that you no longer desired to testify, correct?
A. Yes.
Q. And your attorney had you sign a letter?
A. Yes.
Q. And you reviewed that letter?
A. Yes.
Q. Okay. And before signing that, you were made aware of what would happen if you no longer cooperated?
A. Yes.

Q. All right. And specifically, that you would probably lose out on a 5K motion, correct?
A. Yes.
Q. You just indicated that you reviewed the letter, and in that letter, you indicated that you were changing your mind of your own freewill, correct?
A. Yes.
Q. And you indicated that you were not threatened, coerced or intimidated when making that decision, correct?
A. Correct.
Q. Okay. And you were aware that this letter would have -- be presented to the Court, correct?
A. Yes.
Q. As a result of you not agreeing to testify, you breached certain terms of your plea agreement and cooperation agreement, correct?
A. Yes.
Q. And you were made aware of this fact, correct?
A. Yes.
Q. And this meant that the no -- the Government no longer needed to agree that your base offense level was a 30, correct?
A. Correct.
Q. And no longer needed to recommend a sentence of hundred months, correct?

A. Correct.
Q. And you possibly lost the 5K motion, correct?
A. Yes.
Q. Now, at some point in early 2022 -- 2023, you reached out to the Government, correct?
A. Yes.
Q. And that was because you wanted to tell them about these threatening letters?
A. Yes.
Q. All right. And you received the first threatening letter in November of 2022?
A. Yes.
Q. All right. Did you alert any correctional staff about this?
A. No, I did not.
Q. Okay. Did you ever provide that letter to the Government?
A. No.
Q. Did you provide it to any correctional staff?
A. No.
Q. And I believe on direct examination you indicated you destroyed this letter by flushing it?
A. Yes.
Q. Okay. And Mr. Moss did not personally give you this letter, correct?

A. No.
Q. Okay. And the contents of the letter was why -- essentially, why are you doing this to me?
A. Yes.
Q. Okay. Was it signed?
A. No.
Q. And then you received the second letter a few days after that?
A. Yes.
Q. Same method, though?
A. Correct.
Q. Again, did you alert any correctional staff to this?
A. No.
Q. Did you provide the letter to any correctional staff?
A. No.
Q. Did you provide the letter to the Government?
A. No.
Q. Okay. And that's because you destroyed the letter again?
A. Yes.
Q. And you did this by flushing it?
A. Correct.
Q. All right. For the second letter, did Mr. Moss give that to you personally?
A. No.

Q. Okay. And there was no signature on that?
A. No.
Q. And then at some point in time, you received a third letter?
A. Correct.
Q. All right. Did you alert any correctional staff about this?
A. No.
Q. Did you give the letter to any correctional staff?
A. No.
Q. Did you give the letter to the Government?
A. No.
Q. Okay. And, again, this is because you destroyed it?
A. Correct.
Q. All right. And in relation to the third letter, Mr. Moss did not give that to you?
A. No.
Q. And the third letter was not signed?
A. No.
Q. Okay. Mr. Alfaro, are you currently awaiting sentencing?
A. Yes.
Q. And do you still hope that you're going to receive some kind of sentencing benefit from the Government?
A. Yes, that's part of the plan, but also my family's

safety is more important.

Q. And so part of the reason you're testifying today is hope to reinstate that possibility of a 5K; is that correct?

A. Yes.

MR. BRESLIN: I have no further questions, Your Honor.

THE COURT: All right. Any redirect?

MR. IBRAHIM: No, Your Honor.

THE COURT: Your declaration is dated December 10. That's 11 days before the hearing.

THE WITNESS: Yes.

THE COURT: How many days prior to December 10 was it when you first decided you were not going to cooperate anymore?

THE WITNESS: It was, I think, two weeks before that, a week and a half before that.

THE COURT: There were three letters?

THE WITNESS: Yes.

THE COURT: What's your best estimate of when you got the three letters? How many days apart? How many before the first -- between the first and the third?

THE WITNESS: Between the 23rd of November to the 29th of November.

THE COURT: And why does the 23rd stick in your

mind that that's the first one?

THE WITNESS: Because my birthday is the 25th.

THE COURT: Now, when did you first alert your attorney about these letters?

THE WITNESS: I didn't alert her until about January of 2023, close to February, if I recall.

THE COURT: Now, you didn't cooperate in December because you were afraid Mr. Moss or somebody would hurt your family, right?

THE WITNESS: Correct.

THE COURT: So why aren't you still afraid of that right now?

THE WITNESS: I still am.

THE COURT: So why are you willing to testify now, but you weren't willing to testify back in December?

THE WITNESS: Because if something were to happen to my family --

THE REPORTER: Could you speak up.

THE WITNESS: I'm sorry.

If something were to happen to my family and me not saying anything, I could never forgive myself.

THE COURT: All right. Anything else from counsel?

MR. IBRAHIM: No, Your Honor.

THE COURT: All right. Thank you.

MR. IBRAHIM: Your Honor, I just want to put one note on the record. When you asked Mr. Alfaro about the letter, and it was dated December 10th and it was 11 days before the hearing, I just want to put on the record, if the Court remembers, the originally scheduled hearing was actually December 12th, but a chickenpox outbreak at the FDC happened, and Mr. Santiago couldn't be here, so the Court rescheduled the hearing to December 21st.

THE COURT: All right. Thank you for that clarification.

MR. IBRAHIM: So that's all the Government has for that piece of it, which is the threatening letters to the cooperator.

I'm happy to go into the second piece, which as the Court knows, is the plan to record his testimony originally at the December 12th hearing, which of course, as we just discussed, was postponed and then reset to December 21st.

THE COURT: Is there any other evidence you have -- well, let's step back.

You separate the two; is that fair? Like, you view it as almost two separate obstructions. Is that a fair summary?

MR. IBRAHIM: That's a great question,

Your Honor, because I actually was just about to address that. I think, independent -- the Government's position independently, either one, if the Court wanted to take them separately, either one would support obstruction.

With that being said, the Government does think that the statements by Mr. Moss that were contemporaneous to all of these things happening, corroborate the fact -- make it more likely that what Mr. Alfaro is saying is true because Mr. Moss is showing a significant interest in the fact that Mr. Alfaro is about to testify against him, and putting people up to record him.

So they can be looked at separately, they can also be looked at together, Your Honor.

THE COURT: All right. Well, then why don't you go ahead and keep the presentation going, and then we will have arguments.

MR. IBRAHIM: Yes, Your Honor.

So the Government filed a letter -- would the Court like me to approach the lectern?

THE COURT: Please.

MR. IBRAHIM: So as Court well knows, on December 21st, a person in the gallery was suspected of recording the hearing. The Court alerted staff to that happening. It was based on that, that the Government went back and looked at some prison calls and some prison

e-mails of Mr. Moss' around that time.

And the Government filed its findings on the record at D.I. 119. And there's two sets of exhibits to D.I. 119; some transcripts of some phone calls, which are Exhibit A; and then some prison e-mails, which are Exhibit B.

I have courtesy copies for the Court.

THE COURT: I've got copies. I'm reading it. They're in front of me right now. So go ahead.

MR. IBRAHIM: Okay. All right. So the first document that the Government has is a transcript of a phone call. This is Page 1 of Exhibit A. It's a transcript of a phone call from December 11, 2022, at 5:48 p.m. This is the night before the hearing. The night before Mr. Alfaro is scheduled to testify.

And Mr. Moss is talking to -- talking to someone, and the person says to him, "Phone's gonna -- phone's gonna be in there and everything." It's about a third of the way down on the page.

Then later on down the page, Moss says, "I'm trying to figure it out. Nothing. It's something I don't want" --

THE COURT: Step back, though, because --

MR. IBRAHIM: Sure.

THE COURT: Is there any reason we can't

identify who these two speakers are?

MR. IBRAHIM: We can, Your Honor. Certainly, the Government thinks that we can. I was just avoiding it. If not --

THE COURT: Well, why were you avoiding it?

MR. IBRAHIM: Just for their -- you know, their personal safety.

THE COURT: Their personal safety -- these are people who are cooperating with -- under your theory, are actually engaged in obstruction of justice.

MR. IBRAHIM: Agreed, Your Honor.

THE COURT: All right. So then I don't think we need to worry about their safety from --

MR. IBRAHIM: Okay. Sure. So --

THE COURT: There's a person who's called Sharee who says to the defendant, "Phone's gonna -- phone's gonna be in there and everything."

MR. IBRAHIM: That's right, Your Honor.

THE COURT: Okay. All right.

MR. IBRAHIM: Yep. And then there's an exchange between --

THE COURT: And before that, she said, "I'll be there. Imma be there tomorrow," meaning I'm going to be in court tomorrow, and there's going to be a phone in the courtroom?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Okay. I'm with you so far.

MR. IBRAHIM: Yep.

THE COURT: All right. So then -- but then it says "Ruth." So there's three people on the call; is that right?

MR. IBRAHIM: That's correct, Your Honor.

THE COURT: Okay. All right.

MR. IBRAHIM: Yep. And that's Shannon Ruth, the defendant's girlfriend, and Sharee Christian --

THE COURT: Right.

MR. IBRAHIM: -- who was the person who was actually recording on December 21st, who was stopped.

THE COURT: Who was the -- Sharee is the one who stopped?

MR. IBRAHIM: Yeah, she stopped --

THE COURT: Ruth is the girlfriend?

MR. IBRAHIM: That's correct.

THE COURT: And she's in the courtroom today?

MR. IBRAHIM: That's correct.

THE COURT: In fact, she's sitting there? Should she be present? Is she going to be testifying? Is there any reason we should not be having this discussion with her listening to it?

MR. IBRAHIM: I think that it's appropriate,

Your Honor. She does have counsel, and we've had conversations about what's appropriate and what's not. From the Government's perspective, if she wants to be here to provide --

THE COURT: You're not calling her as a witness?

MR. IBRAHIM: No, Your Honor.

THE COURT: Are you calling her as a witness?

MR. BRESLIN: No intent to call her as a witness.

THE COURT: Okay. All right. So go ahead.

MR. IBRAHIM: Okay. So a conversation between Sharee Christian and Mr. Moss. As you said, Your Honor, Sharee says to the defendant, "Phone's gonna -- phone's gonna be in there and everything."

There's then a conversation back and forth about whether it's legal to bring a phone into the courthouse. And then Mr. Moss says, "Oh, shit, shit," and Sharee --

THE COURT: Well, hold on. Let's walk through, if you don't mind.

MR. IBRAHIM: Sure, sure.

THE COURT: So she says -- Sharee says, "Phone's gonna -- phone's gonna be in there and everything."

And then the defendant says, "Oh, yeah. Y'all allowed to bring y'all phones in that jawn."

What's "jawn"?

MR. IBRAHIM: "Jawn" is a catch-all for "that thing."

THE COURT: "That thing"?

MR. IBRAHIM: So here I think it's fair to say he means "the courthouse."

THE COURT: Okay. All right. And then Ruth says, "I know. I told Sharee that."

MR. IBRAHIM: Right.

THE COURT: So his girlfriend says, "I know. You're allowed to bring phones in" --

MR. IBRAHIM: Right.

THE COURT: -- "and I told Sharee she can bring the phone in."

MR. IBRAHIM: Right.

THE COURT: Okay. Then Sharee says, "I mean, they passed a law now. That's all the courthouses. Court 11, all that, they all allow phones."

MR. IBRAHIM: Right.

THE COURT: All right. So Sharee's agreeing -- and Court 11 is probably a reference to a state court, is my guess. What do you think?

MR. IBRAHIM: I think so, Your Honor.

THE COURT: All right. And the State, in fact, changed its policy last year to allow phones to be brought into the courtroom. That was a change in policy. The feds had already allowed it, correct?

MR. IBRAHIM: Right.

THE COURT: All right. You don't dispute that, Mr. Breslin, right?

I'm going to take judicial notice unless you dispute that the State changed its policy to allow phones in.

MR. BRESLIN: That is my understanding, Your Honor.

THE COURT: All right. Okay.

MR. IBRAHIM: And so far, Your Honor --

THE COURT: And, actually, I just want to also take judicial notice of the fact that in December of last year, there were no prohibitions at all in this courthouse about people bringing in phones.

That has since changed, but as of the date of the hearing, and as of the date of this phone call, you could bring a phone in without restriction in this federal building?

MR. IBRAHIM: Absolutely, Your Honor.

THE COURT: All right.

MR. IBRAHIM: As of right now, there's nothing

untoward, so to speak, other than the fact that Ms. Christian is telling Malik, confirmation, "phone's gonna be there tomorrow."

THE COURT: Right. There were signs in our courthouse, though, as of December 2022, that warned people they could not record court proceedings. I'll take judicial notice of that.

MR. IBRAHIM: Right.

THE COURT: All right. Go ahead.

MR. IBRAHIM: Yes, Your Honor.

So I think what starts maybe a shift in the conversation is Moss says, "Oh shit, shit."

Sharee says, "Yep."

Moss says, "Yeah, yo."

And Sharee says, "What?"

And then Moss responds to Sharee when she says "What," he says, "I'm trying to figure out -- nothing. It's something I don't want to talk to you about over this motherfucker."

What the Government takes to mean is, there's something else I want to say to you, but I know this call is recorded and so I'm not going to say it.

THE COURT: All right.

MR. IBRAHIM: And Sharee, in fact, responds, "Yeah, because you know you get to talking too much over

the phone."

THE COURT: Right.

MR. IBRAHIM: So there's something -- the Government submits, something understood between the two of them that's not discussed on the phone the night before the hearing.

THE COURT: All right. And I think that's a fair inference to be drawn from the phone call.

All right. Go ahead.

MR. IBRAHIM: So then -- and, of course, we have contemporaneous e-mails as well, Your Honor, but we're going through the phone calls right now.

Then this is the next phone call on Page 2, is December 12, 6:34 p.m. This is the night after the hearing, the originally scheduled hearing.

THE COURT: All right. So that's what I need to -- we did meet on December 12?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Okay. And what I don't recall, were there people in the courtroom?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: All right. That's what I did not recall.

MR. IBRAHIM: Yes.

THE COURT: All right. Is there any debate

over that, Mr. Breslin?

MR. BRESLIN: I don't think there's any debate. I don't have any recollection of -- I believe there were people in the courtroom. I know, at least Mr. Alfaro. On the day that the hearing was rescheduled, I know. At a minimum --

THE COURT: When you say the date it was rescheduled, that's ambiguous. It could be --

MR. BRESLIN: I'm sorry.

THE COURT: No, no, that's -- just so we're clear, we had the -- we actually started the hearing, right? The defendant didn't come because of the chickenpox outbreak.

MR. BRESLIN: Defendant Santiago did not come.

THE COURT: Correct. All right.

MR. IBRAHIM: Yes.

Now, Your Honor, when I say "there were people here," I mean the courtroom was open to the public. Of course, as we will see from the calls, they were late. So they actually didn't get here -- Mr. Moss expressed frustration. They didn't get here when a key thing happened. The letter that Mr. Breslin just talked about was read into the record by his attorney.

THE COURT: All right. Go ahead. Just pick up, then.

MR. IBRAHIM: Sure.

THE COURT: So we have the hearing on December 12 --

MR. IBRAHIM: Yes, Your Honor.

THE COURT: -- correct?

MR. IBRAHIM: Correct.

THE COURT: All right. Go from there.

MR. IBRAHIM: Then later that night, Moss is on the phone with his girlfriend, "Was she all videoing?"

Response, "Yes, she was. Yeah, she was."

And then there's some back and forth. Mr. Moss mentions that they said that Jake got chickenpox, reference to Mr. Santiago, his tier having chickenpox at the FDC.

And then if I could draw your attention further down to Mr. Moss, about halfway through, where he says, "Oh, so listen. Before y'all got there, if you y'all would have gotten there, then y'all would have gotten the real good shit. The 'N word,' that's fucking telling, the fuck, right before y'all walked in, they just got done talking about the 'N word' telling, literally."

She responds, "Who? Chewy?"

He responds, "Yeah, Alfaro. And all this, that, and the third."

And then Mr. Moss proceeds to say his real

name.

THE COURT: And that's a reference to the disclosure that he's no longer cooperating.

MR. IBRAHIM: That's right. It's exactly right.

THE COURT: All right.

MR. IBRAHIM: And then just on that next page, it's still the same phone call, Mr. Moss says, "They was talking about all that shit. They was talking about how the boy's snitching. I'm like, yo, why the fuck they miss the most important part if they was gonna be in here recording? I'm like, I was pissed at y'all. I'm like, what the fuck was they doing?"

So the subject of that, he's mentioning, that they were talking about the boy snitching. A reference to Alfaro and his cooperation. And Mr. Moss is upset because they missed recording that.

THE COURT: Okay. Your take on that last paragraph there.

MR. IBRAHIM: You mean further down where --

THE COURT: Where he says -- what you just read.

MR. IBRAHIM: Okay.

THE COURT: He was talking about how the boy snitching --

MR. IBRAHIM: Right.

THE COURT: -- that paragraph.

MR. IBRAHIM: Yeah. So Mr. Moss --

THE COURT: Your interpretation of that paragraph.

MR. IBRAHIM: My interpretation of that, Your Honor, is that, you know, during that conversation, the Court -- excuse me, the Government alerted the Court that Mr. Alfaro was not going to be testifying anymore. He --

THE COURT: Correct.

MR. IBRAHIM: He was no longer going to agree to cooperate. His attorney, Caroline Cinquanto, read the letter -- that's Exhibit 1 -- today into the record, saying, "I'm no longer going to testify. I'm doing it of my own freewill."

Ms. Christian was not in the courtroom at that period because they were late. They got stuck outside. So Mr. Moss was upset because they missed recording that, a public statement about the fact Mr. Alfaro indeed had been a cooperator.

THE COURT: Okay.

MR. IBRAHIM: And then later on down in the conversation, further down, halfway through Mr. Moss says, "Oh, shit. I seen her had it. I seen her have it in her

hand, and I'm like, she recorded shit."

Do you see that, Your Honor?

THE COURT: Yes.

MR. IBRAHIM: And Ruth said, "She's gonna try to come with me on the 21st, she said."

Moss said something unintelligible here, "Who told now? Y'all done missed the shit." Meaning, you missed the part about Alfaro.

Ms. Ruth says, "Well, I'm pretty sure they're going to talk about what she said." And Mr. Moss -- excuse me -- "well, I'm pretty sure they're going to talk about what he said."

Mr. Moss responds, "I mean, they probably is."

So from the Government's perspective, the Government submits, Your Honor, it's pretty clear they're talking about recording in the courtroom related to Jesus Alfaro. And I think the other statements that the Government is prepared to discuss corroborate that.

THE COURT: Give me a second.

Okay.

MR. IBRAHIM: Okay. So then, on the next page, Page 4, is a transcript from the next day. This is December 13, 2022. And Mr. Moss is having a call with Christy Eckenrode. And about --

THE COURT: And she is?

MR. IBRAHIM: She is a friend of Mr. Moss'. She is a close friend, in fact. And Eckenrode -- about halfway down, there's a paragraph there, Your Honor, where it starts with, "So after I cleaned my first two rooms, I go outside to smoke a cigarette."

At the end of that paragraph, she says, after she smoked that cigarette, she says, quote, "And then I had four text messages of all these videos and pictures of it."

Moss responds, "I wish they would have come into the courtroom before because they talking about Chewy wrote the judge a letter, talking about how he don't want to testify now. All that shit. That shit was crazy."

Then the topic changes. And later on in the conversation, it comes back. And Moss says to Ms. Eckenrode, "And he had his proffer hearing already. But watch, watch, I'm gonna get my peoples to fucking video it."

And then there's a conversation back and forth between Ms. Eckenrode and Mr. Moss about what a proffer is, and he spells it out for her, spells out "proffer."

And then Moss says, "Proffer, but fucking, that's what he already did it. See, they was late coming in the courtroom so they didn't see where the dude already said it. You feel me? Chewy's lawyer was in the

courtroom too. She got up and read Chewy's letter. You feel me?"

And then there's back and forth about the video that was recorded. And then Mr. Moss says, at the bottom of Page 5, "Yeah, tell Hove I'm going to knock him straight the fuck out too, on everything I love, Bro. He's a police too."

And we just heard from Mr. Alfaro who Hove was. Hove was someone who contacted Mr. Alfaro while he was in prison, and he's a mutual friend of Mr. Moss' and Mr. Alfaro. So that's what that reference is to.

THE COURT: So can you spell that out when you say "that's what that's in reference to"? I'm trying to make sure I understand the import from the Government's perspective --

MR. IBRAHIM: Sure, sure.

THE COURT: -- about the statement, "tell Hove I'm gonna knock him straight the F out too, on everything I love, Bro. He's a police too."

MR. IBRAHIM: Right. So --

THE COURT: So tell me what's your interpretation of that.

MR. IBRAHIM: Sure. So let's take the easiest part first. "He's a police too," meaning he's a cooperator too. He's a snitch too.

THE COURT: So he's -- "he" is a reference to Alfaro?

MR. IBRAHIM: It's unclear. Probably here, actually, Your Honor --

THE COURT: I just want your interpretation.

MR. IBRAHIM: He's referring to Hove. He's saying Hove is a police too. But it is unclear because it's not clear whether Mr. Moss is saying to Ms. Eckenrode, "tell Hove I'm gonna knock Hove out," or "tell Hove I'm gonna knock Chewy out."

THE COURT: That's what I'm trying to figure out. What's your interpretation of it?

MR. IBRAHIM: I think it's 50/50, Your Honor. I'm not sure it necessarily matters. And the reason that it doesn't matter is because if Mr. Moss is talking to Hove, saying that he's going to knock out Hove, what he is saying, I submit, Your Honor, is that I'm going to hold Hove accountable for Chewy testifying against me, because Chewy is incarcerated. Hove's on the outside. I'm holding him accountable. He's our mutual friend.

THE COURT: All right.

MR. IBRAHIM: Okay. So those are the calls, Your Honor. Again, those are Exhibit A, docket 119. Exhibit B is some transcripts of prison e-mails.

THE COURT: All right.

MR. IBRAHIM: So on Page 1 -- and this shows up like an e-mail, Your Honor, being that the older e-mail header is lower. So I'd actually like to start at the bottom, Your Honor, where it says "CJ Black on 12/9/2022 at 9:06 wrote."

And then there's a sentence that starts, "No one else" -- the sentence says -- starts, "No one else has my attention, trust me. And now" -- and this is the part that I wanted to draw the Court's attention to, "Chewy is back in Gander. SMH." And that means "shaking my head."

"Wow. Did you see messages I sent from Hove?"

So it's a reference to Chewy. And "back in Gander," I submit, Your Honor, Chewy had been moved from the FDC, and they didn't know where he was. So there's a guess that he's at Gander Hill State Correctional Facility.

THE COURT: Just so I know, who's writing the letter to whom?

MR. IBRAHIM: So this is an e-mail from somebody who goes by the name KJ Black to Mr. Moss.

THE COURT: Have you identified who that person is?

MR. IBRAHIM: No, Your Honor. What we think happened is that Mr. Moss used an intermediary to send -- so all the e-mails back and forth would go to this double

parm at Gmail.com, this KJ Black. But then they would get -- he would be having conversations with Ms. Eckenrode or Ms. Ruth or other people, but through this e-mail address. So I don't actually think that it's meant for one specific -- it's not identified with one specific person.

THE COURT: So KJ Black is on the outside at FDC? Where?

MR. IBRAHIM: On the outside, Your Honor.

And so KJ Black is saying, "Chewy's back in Gander. Shaking my head. Wow. Did you see messages I sent from Hove?"

Okay. Mr. Moss responds on December 11, the night before the hearing again, at 6:09 p.m. "Hey, hopefully I'll come off tomorrow, baby. FR, FR." For real, for real. "My peoples' baby mom is going to record it, so everyone will see the whole court hearing. But anyway, was hoping to her from your ass maybe a good luck or something. But like I said before, someone has your attention. I see. But just be safe. Love you ND hope to see you soon." And then another --

THE COURT: What does "ND" mean?

MR. IBRAHIM: I think it's short for "and," it cuts off the "A."

And "hope to see ya ass soon." And then this

is the key part here, "I'm trying to get that video showed on at the hearing were" -- and I think that's supposed to be "where," but it's an abbreviation for it -- "Chew wore a wire ND video" -- meaning "and video" -- "but it's just funny ASF" -- which I think means "as fuck" -- "seriously how people change up."

So what Mr. -- and I apologize for my swearing, Your Honor.

THE COURT: You don't have to apologize. It's the sad reality of the way people speak a lot these days.

MR. IBRAHIM: Unfortunately.

And so I think what that is saying there is, he's trying to get a video on at the hearing where Chew wore a wire. He's accusing Chewy there of being a cooperator. And he's saying, "It's just funny how people change up." Basically, "I thought I knew who Chewy was, but now he is cooperating against me."

And, again, that's the night before the hearing.

THE COURT: All right.

MR. IBRAHIM: Okay. And then another e-mail from Malik Moss. This is from December 6. This is Page 2. December 6, just the week before, in all capitals he writes, "Yeah, hey, you be seeing anyone who chills with the boy Hove, tell him his PPL" -- meaning his

people -- "Chewy getting on that stand on me the 12, shit is cray."

THE COURT: What's "cray"? Crazy?

MR. IBRAHIM: Crazy.

"But I love you, Shannon. But, yeah, I got it. Love you, K."

So here he is telling Shannon to get "with the boy Hove and tell him his people Chewy," meaning, you tell Hove Chewy is a cooperator. And "his people," meaning he's his friend. He's vouching. Hove vouches for Chewy. He's his people. He's my people. Meaning, that's your friend that you vouched for who is about to cooperate against me.

THE COURT: All right.

MR. IBRAHIM: All right. And then Page 3, this is a long e-mail with bad punctation, Your Honor, and there's a lot going on in it, a lot going on. But halfway through, there's a sentence -- there's no punctation on it. I apologize. But a new sentence really starts with, "Ask Sharee. She was there videoing." I just want to make sure the court sees that, about halfway down.

THE COURT: Yes.

MR. IBRAHIM: Okay. He says, "Ask Sharee. She was there videoing the hearing. The feds tried to book her for videoing it, but she heard all about them rats.

Those rat 'N words.' FOH."

I actually don't know what "FOH" means, Your Honor.

But he's calling them -- we think it's clear that he's calling them rats. He's saying "Sharee was there videoing, and she heard all about them rats."

THE COURT: All right.

MR. IBRAHIM: All right. And then the final exhibit was attached to the Government's sentencing memo. It's Exhibit B.

THE COURT: Hold up.

MR. IBRAHIM: And I also have a courtesy copy, if the Court would like.

THE COURT: Just, the 12/14 email?

MR. IBRAHIM: I apologize, Your Honor. If I could have a moment myself.

Yes, the 12/14 email 3:12 p.m.

THE COURT: Yep.

MR. IBRAHIM: Okay. This is an e-mail, again, from Malik Moss on 12/14. So the first hearing happened, it's been postponed, and we're awaiting the second hearing.

So he starts by referencing, "The Mexican Hove talking real heavy, talking about I ain't going to be out in a long time. ND" -- and -- "his folks Chewy not

telling. LMAO." Meaning, I'm laughing -- "laughing my ass off," is that reference. But basically, I'm laughing.

"This is funny."

And then Mr. Moss says, most importantly, "If you ever see that 'N word,' let him know I'll see him when I touch down for running his mouth BC" -- because -- "his folks videoed me serving him ND" -- and -- "everything."

So what that is a reference to, Your Honor, is that there was a controlled purchase that the Court knows about. That's the half-pound of methamphetamine directly from Mr. Moss, and it was videotaped. It was video recorded.

Mr. Moss is saying that he believed that Chewy -- that Chewy was the cooperator who videotaped him selling him a half pound of methamphetamine that day. That's what that reference is to, "videoed me serving him and everything, videoed me selling him meth."

Again, that relates to the substance of Mr. Alfaro was going to testify.

THE COURT: That video had been turned over to the defense?

MR. IBRAHIM: Yes.

THE COURT: And it was a transaction between the defendant and Alfaro?

MR. IBRAHIM: Mr. Moss believed it was a

transaction between himself and Mr. Alfaro. The identity of that cooperator has never been disclosed, but Mr. Moss believes that it was Mr. Alfaro. The Government is not confirming or denying who it was, but that's what Mr. Moss thinks.

And so Mr. Alfaro, Chewy, is the subject of this e-mail. And he says very clearly, "If you ever see that 'N word,' let him know I'll see him when I touch down for running his mouth."

I think the reference there is pretty clear, Your Honor.

THE COURT: Okay. When did the Government disclose to the defense that Alfaro was cooperating?

MR. IBRAHIM: I can certainly pull the exact date, Your Honor, but it is -- I think Mr. Breslin would agree it's in the November 2022 time period, immediately before --

THE COURT: Well, actually, you say that. So that's -- like in the papers, it doesn't say.

MR. IBRAHIM: Right.

THE COURT: And really, I would like to know when. And so if you -- and essentially, you know, it's ambiguous. I don't know whether it was December, whether it was November. Can you please --

MR. IBRAHIM: I think we can agree that it was

in advance of the hearing, but I can get the exact date that the discovery was actually sent.

THE COURT: Well, here's what you've stipulated to. It says, quote, "In advance of the cooperator's anticipated testimony at the December 2022 evidentiary hearing, the Government provided discovery to the defense that identified the cooperator." So that's clear.

MR. IBRAHIM: Yes, Your Honor.

THE COURT: But what I don't have from you-all is --

MR. IBRAHIM: -- is the date.

THE COURT: -- what is in advance.

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Can you find that out?

MR. IBRAHIM: Yeah. I will get the exact day.

THE COURT: Thank you.

MR. IBRAHIM: It'll just require me to send an e-mail to my office, if it's all right.

THE COURT: All right. Would you please do that.

MR. IBRAHIM: Thank you.

THE COURT: All right. Anything else from the Government?

MR. IBRAHIM: On that topic, no, Your Honor.

THE COURT: Mr. Breslin, do you want to be

heard?

MR. BRESLIN: Yes, Your Honor. I'm just trying to find that -- actually, the e-mail.

THE COURT: You can do that. That's fine.

And, also, if you could tell me the date of Alfaro's Plea Agreement. I think it was in July.

MR. IBRAHIM: So the discovery materials were officially sent to Mr. Breslin on November 23, 2022, Your Honor. I think that I probably have a record of letting him know the identity -- you know, in advance of the materials being sent, which would have been the Plea Agreement for Mr. Alfaro, and the Cooperation Agreement and all that. Probably have a record of disclosing to him the identity of the cooperator and that he was going to be testifying in advance of that, but I have to get that, Your Honor.

THE COURT: Okay.

MR. IBRAHIM: The latest date is November 23rd.

THE COURT: What time in the day? So you're looking at an email?

MR. BRESLIN: 9:37 a.m., Your Honor, is the date, according to my inbox.

THE COURT: All right.

MR. BRESLIN: Your Honor, am I correct that you wanted to know the date of Mr. Alfaro's plea?

THE COURT: It's in July, isn't it? I'm pretty sure it's July.

MR. BRESLIN: So I'm looking at the timestamp --

THE COURT: I already found out. My clerk told me. It's July 13.

MR. BRESLIN: Yep.

THE COURT: All right. And, Mr. Ibrahim, I want you to think about would there have been any other reasons that the defendant would have -- the defendant in this case would have gathered that Mr. Alfaro was cooperating prior to November 23rd.

I think the issue you have to contend with is that the witness was pretty explicit. November 23rd was -- and it might have been -- I'll have to go back and look -- November 22 was the first communication.

MR. IBRAHIM: Right. And, Your Honor, that was the formal conveyance of the discovery. In advance of that, the Government -- you know, I don't want to just throw facts onto the record, Your Honor, but --

THE COURT: Well, then don't throw them on it. Think about it.

MR. IBRAHIM: Yeah.

THE COURT: But that's -- that's an issue. There's very few things to corroborate this witness'

testimony. So that's one of them is, if he's got a firm recollection of the date in which he receives the first communication, I think, you know, it's important to establish whether the defendant either knew or had reason to believe he was going to cooperate.

All right. Let me hear from Mr. Breslin.

MR. BRESLIN: Just one moment, Your Honor, while I gather some documents.

Thank you, Your Honor.

So I think probably the wisest course is to start with Mr. Alfaro and the events surrounding him, and then move into the e-mails and phone calls that the Government just went over with Your Honor.

So in relation to Mr. Alfaro, what did we learn from today's testimony? We know Mr. Alfaro agreed to cooperate, and that he agreed to testify against Mr. Moss and Mr. Santiago. However, when it was time to come up to the plate, he backed out. After backing out, he's being told by the Government, no longer agreeing to the base offense level, no longer agreeing to the recommended sentence, no longer the possibility of a 5K.

So what does he do? He now comes to the Government and tells them, oh, wait, wait, wait, wait. Now all of the sudden I'm getting these threats -- I've got these threatening letters and that's the reason why I

decided not to cooperate.

You know, without his cooperation -- from my understanding of Mr. Alfaro's Plea Agreement, he's looking at a significant term of incarceration, just like Mr. Moss is. So it's just convenient that he backs out of the testimony, and then he's being told he's losing all these benefits, and now all of a sudden he's afraid of testifying.

Mr. Alfaro specifically testified he didn't personally receive these letters.

THE COURT: So why would you back out, but then agree to testify?

MR. BRESLIN: To regain the benefit that he, essentially, lost by backing out, back to the agreement of the base offense level of 30, back to the recommendation of 100 months.

THE COURT: Right. But he had it, he backed out. So why try to go forward again?

MR. BRESLIN: I'm sorry, go forward with today's testimony?

THE COURT: Yeah.

MR. BRESLIN: To essentially try and garner back those benefits. He lost --

THE COURT: Why did he back out?

MR. BRESLIN: I don't have an explanation. I

mean, the only explanation I have is what he -- maybe he decided, you know, I no longer wanted to testify. I mean, the only evidence I have, other than his statements that he was scared, was the letter that him and his lawyer presented this Court, saying, you know, I changed my mind, I don't want to testify, you know, I'm doing this voluntarily, I'm not being threatened or coerced to do so.

In essence, Your Honor, what I'm getting at is, the only proof of these letters is Mr. Alfaro's own statements. And why is that? Because he destroyed them. He didn't alert any correctional staff to this. He didn't provide them. He can't provide them to the Government. At best, we have Mr. Alfaro's word.

But we know his word can't be relied upon because he said he was going to cooperate and then he changed his mind. And when he's finding out that, you know, now he's probably going to have to serve an even more significant term of incarceration, you know, he's -- he's got these threatening letters, and so therefore, the Government should reinstate the benefits that he was going to get.

As far as the events surrounding the recording of the proceedings, as I outlined in my PSR objections, I think what the Government is doing, is taking a lot of events out of context.

One of the things I think is clear, when you look at the totality of what the Government submitted as exhibits, as well as what I submitted exhibits as part of the PSR objections, is that Mr. Moss was attempting to, essentially, clear his name of --

THE COURT: You want to point me to where he's trying to clear his name, and specifically --

MR. BRESLIN: Sure. I can actually -- I'm looking at -- this is the Government's Exhibit B to their May 5th letter.

THE COURT: Okay.

MR. BRESLIN: Specifically the e-mail that's dated 1/05 -- January 5th, 2023, at 1:04.

THE COURT: Okay.

MR. BRESLIN: And this is a message from Mr. Moss to the e-mail account KY Black. The very first sentence, "Yo, what's up with Chunk telling people I'm police."

And I interpret that as people are accusing Mr. Moss of being the cooperator, being the snitch. And the important thing -- and I think Your Honor realizes -- this Court does a lot, and the FDC does a lot to hide the fact that someone's cooperating because there's so many risks associated with doing so.

So while what Mr. Moss is doing by asking

people to record the proceedings maybe is not the -- is clearly not the wisest way to clear his own name.

THE COURT: How does it clear it? When you say "his own name," whose name?

MR. BRESLIN: Mr. Moss' name.

THE COURT: How does videoing Chewy, or Alfaro, clear Mr. Moss' name?

MR. BRESLIN: It would be showing that he was not the cooperator; someone else was the cooperator. And specifically in this case, Mr. Alfaro, not Mr. Moss.

THE COURT: Has there been any suggestion Alfaro was going to cooperate against anyone other than Moss?

MR. BRESLIN: Not to my knowledge.

THE COURT: So how does that -- how does, then, videoing Alfaro indicate in any way that Moss is not cooperating against somebody else? That it's Alfaro?

In other words, your theory might work if Alfaro was going to testify, I don't know, against the Reading supplier, but he wasn't going to.

So how does it clear Moss as a cooperator by videoing Alfaro?

MR. BRESLIN: Well, that's where I think it ties into the mutual friend, Hove. In the documents that I provided, there seems to be this ongoing dispute between

Mr. Moss and Hove as to whether Mr. Moss is cooperating or whether Chewy, or Mr. Alfaro is cooperating.

THE COURT: Do you want to show me that?

MR. BRESLIN: Sure.

THE COURT: I mean, just so you'll know, it's just to -- not leave yet, the January 5th e-mail, the opening line says, "Yo, what's up with Chunk telling people I'm police?" I think in the light most favorable to your client, he's saying "What's up with Chunk," some person -- who is Chunk?

MR. BRESLIN: Your Honor, if I could have just one minute with my client?

THE COURT: Sure.

MR. BRESLIN: Based on representations, it's -- it was supposed to mean Mr. Alfaro, Chewy.

THE COURT: Okay. So then in the light most favorable to your client, he's saying "What's up with Chewy telling people I'm police," meaning, maybe Chewy is telling people that Moss is cooperating. That would be in the light most favorable to you?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: Okay. So how would videoing Alfaro testifying against Moss somehow make it clear that Moss wasn't cooperating against someone else?

MR. BRESLIN: Well, my interpretation of this

specific e-mail, as Your Honor was just going into, is that Alfaro is telling his people -- I would interpret that as Hove because of different communications -- that Mr. Moss is the one cooperating. And by videotaping Mr. Alfaro on the stand, or at the very least the letter read into the record, it would refute that --

THE COURT: Okay.

MR. BRESLIN: -- that, essentially, argument.

THE COURT: All right.

MR. BRESLIN: So I want to direct Your Honor's attention to -- it would be Exhibit B, that I filed yesterday with my letter, that was originally submitted with my PSR objections.

THE COURT: Okay. I've got it.

MR. BRESLIN: And I'm looking at the e-mail dated December 14, 2022 at 3:12 p.m. And the very first line, "Love you too. Yo, why the 'N word' Mexican Hove talking real heavy, talking about I ain't going to be out in a long time and his folks Chewy not telling."

So there seems to be this ongoing beef between Mr. Moss and Mr. Hove, and whether it's Mr. Moss cooperating or whether it's Mr. Alfaro cooperating.

THE COURT: Well, you'd agree that what's being said here is that -- that Hove is saying that "Chewy not telling," meaning Hove is telling people that Chewy is not

cooperating; is that right?

MR. BRESLIN: I don't think it's necessarily 100 percent clear, because when you look at the e-mail we just talked about --

THE COURT: But what do you think it is? What's your position?

MR. BRESLIN: I think it's essentially both, Mr. Alfaro and Hove accusing Mr. Moss of being the cooperator.

THE COURT: Well, it says literally, "Hove talking real heavy, talking about I" -- the "I" there is Mr. Moss, right?

MR. BRESLIN: Correct.

THE COURT: All right.

-- "talking real heavy about Mr. Moss ain't gonna be out in a long time." That doesn't seem to be consistent with saying Mr. Moss is cooperating. It seems the opposite. He's going to be spending a long time in jail -- if you're spending a long time in jail, it's -- and somebody's real heavy talking about that, that doesn't seem to be consistent with saying that that same person is talking about Mr. Moss cooperating.

MR. BRESLIN: Well, the only thing I would add on, Your Honor, is after "long time and his folks Chewy not telling." So you've got to take that together.

THE COURT: Right.

MR. BRESLIN: And I interpret that as, that Hove, in addition to Mr. Alfaro, based on the January 5th, 2023, e-mail, that it's both of them accusing Mr. Moss of being the cooperator.

THE COURT: Yeah. I just, I don't see that. I mean, I'll make a fact finding. I don't see that.

I read this to say that Hove, who's a mutual acquaintance, is talking heavy about the fact that Moss is going to be in jail for a long time, and that Alfaro is not cooperating.

Now, then it follows, "LMAO. This 'SH word' is funny." So it could be that Mr. Moss is saying, can you believe that, or, you know, that's funny because it's wrong.

But I think the more disturbing thing that you have to answer for this e-mail is what follows, when then -- when the defendant says, "If you ever see that 'N word,' let him know I'll see him when I touch down for running his mouth."

That sounds pretty intimidating. That sounds like somebody who's ready to go after somebody for cooperating.

MR. BRESLIN: Your Honor, I understand your interpretation of it; however, the way I read that is it

is more to the extent of Hove being accountable for, you know, talking real heavy and accusing Mr. Moss of being the cooperator.

THE COURT: Yeah. Well, I just don't know how you read it that way, because, if anything, he's saying -- I could see it, the defendant thinks Hove is cooperating because he knows that the defendant, quote, "ain't gonna be out in a long time." It could be he's worried about Hove cooperating, that's possible.

It's not clear. I would agree it's not clear whether it's Hove or Chewy, but whoever it is, the defendant is saying, "Let that 'N word' know I'll see him when I touch down for running his mouth because his folks videoed me serving him," which I interpret to mean, as the Government said, because the folks of that person, be it Hove or be it Chewy, videoed the defendant serving him.

But he finds the situation funny because they had to reschedule the hearing.

Anything else?

MR. BRESLIN: Yes, Your Honor.

So turning to the very next page of Exhibit B, December 15, 2022, e-mail, "Not his peoples, it's just the one who had the wire and camera on, but the 'N word' Hove talking -- shit talking about I'm paranoid and that his folks solid over there."

I think that further, you know, provides evidence that it's this beef between Mr. Moss and Hove and Mr. Alfaro, that it's Mr. Moss that's cooperating, and not Mr. Alfaro.

THE COURT: All right.

MR. BRESLIN: One last thing I would just highlight for Your Honor is Exhibit C to the November 1st letter, which was originally submitted with the PSR objections, turning to, it would be, Page 2 of the exhibit.

It's a dialogue between Mr. Moss and Ms. Eckenrode. It is the third time Ms. Eckenrode speaks. "Yeah, that's what I said. He said I talked to Chewy and he's not in Gander. He's in -- he's still in (unintelligible). Well, then I said, then he must be protective custody or something because" -- and then Mr. Moss indicates, "Yo, I seen something, man. Trust me. I ain't, man, telling -- tell him, tell him do he know what I proffer hearing is? This is how he can tell. All he got to do is go to pacer.com, right?"

I think that's just highlighting, you know, again, the defense's argument that Mr. Moss is engaging in this unwise activity in an effort to clear his name, that Hove is the one -- Hove and Mr. Alfaro are the ones that are accusing him of being a cooperator.

THE COURT: All right. Anything else?

MR. BRESLIN: The only other thing, Your Honor, is -- and the Government began their argument by saying that, you know, Your Honor could find the obstruction of justice both on the events separate. I don't think that's necessarily accurate. I would say the recording is tied specifically to the threatening letters.

So if Your Honor finds that there's not enough evidence to support the belief that Mr. Alfaro received these threatening letters, then there's no essential attempt by Mr. Moss to, you know, impede his sentencing or obstruct justice.

THE COURT: All right. It's undisputed, as far as I can tell, that no later than November 23rd the defense was informed that Alfaro was cooperating, correct?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: Correct?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: You think it's before?

MR. IBRAHIM: Yes.

THE COURT: When do you think it is?

MR. IBRAHIM: There -- our calendar has a record of a conversation between the Government and Mr. Breslin on November 10th. And then the parties filed --

THE COURT: So do you think you told Mr. Breslin on the 10th --

MR. IBRAHIM: Yes, Your Honor.

THE COURT: -- that he was cooperating?

MR. IBRAHIM: Yes, Your Honor. And the parties actually --

THE COURT: Mr. Breslin, do you --

MR. BRESLIN: It's very well possible, Your Honor. I just don't have any recollection of it.

THE COURT: All right. Go ahead.

MR. IBRAHIM: The only thing I was going to add is that the parties actually, thereafter, filed on November 17th a joint status report based on the conversation between the parties about how the evidentiary hearing was going to go, and we put that on the record.

We asked the Court to issue a briefing schedule for all the parties to brief the summary of their argument. Now, the summary of the argument was filed in December after the threatening letters.

But the point is, Your Honor, that the parties discussed, actually in the middle of November, how the evidentiary hearing was going to go and filed a joint status letter on the docket about the evidentiary hearing.

THE COURT: Did you say on the docket that a cooperator would be testifying?

MR. IBRAHIM: No. Just that the parties had met and conferred --

THE COURT: Oh, I see.

MR. IBRAHIM: -- and discussed how the hearing was going to go.

THE COURT: All right. And you're representing to the Court that you informed the defense as of November 17th that --

MR. IBRAHIM: As of November 10, when the teleconference actually occurred, Your Honor.

THE COURT: Is when you informed the defense that the Government would be calling Alfaro as a witness?

MR. IBRAHIM: That's right, Your Honor.

THE COURT: All right. Well, it's undisputed, for sure, that it's November 23rd. It makes sense that it would have been before, and the Government's representing, without dispute, that it was before.

So the defendant certainly knows by the time he writes these e-mails, before -- on or before and on or about December 12th that Alfaro is cooperating. That's undisputed?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: And it seems -- I don't know whether you want to dispute it, but it seems to me overwhelming evidence that the defendant had made

arrangements for his girlfriend's friend, Sharee, to video record the proceedings in this courtroom on December 10th.

Is that disputed?

MR. BRESLIN: Your Honor, based on the transcripts, you know --

THE COURT: I don't know how you could dispute it.

MR. BRESLIN: Exactly, Your Honor.

THE COURT: It's overwhelming evidence. So if you do dispute it, it doesn't matter. I find it.

I think that alone would be sufficient to justify an obstruction of justice enhancement. That's blatant intimidation. That's planning to expose publicly somebody from coming in, doing what more people should do in this country, which is tell the truth, cooperate, put an end to the unlawfulness that's rampant. People ought to pay a price, and a severe price, when they enlist others to engage in that kind of activity.

That alone would be sufficient, in my mind, to justify the obstruction of justice, but there's more.

I think read in their totality, the e-mails are very clear that the defendant believes some combination of Hove or, rather, either Hove in combination with Alfaro, or Alfaro alone, were going to cooperate. And he wanted to do his best to put a stop to that.

And I think the e-mails provide evidence that the defendant was prepared to do harm and certainly wanted to express to others that he would do harm to somebody cooperating against him. In the words of the defendant, that when he touched down, he'd get the person for running his mouth. That's from the 12/14/2022 e-mail.

And from the 12/15/2022 e-mail, "He got his bitch-ass. For real, for real."

So I think there's compelling evidence beyond a preponderance of the evidence sufficient to justify the enhancement. I'm not going to go over it in detail. I made specific findings throughout, especially with my questioning of Mr. Ibrahim to indicate I agreed with the Government, except when I indicated otherwise, I agree with its interpretation of the e-mails of the telephone call transcripts, and so I think the enhancement should apply.

MR. BRESLIN: Understood, Your Honor. Thank you.

THE COURT: All right. Are there any other objections to the Presentence Report?

MR. BRESLIN: Your Honor, in light of your ruling, the only outstanding objection would just be the impact of acceptance of responsibility.

THE COURT: Which he clearly loses the third

point. That's not disputed. It's a legal matter, correct?

MR. BRESLIN: Based on the representations, I don't have a -- my objection to accept the reduction of the one point is specifically tied to obstruction of justice.

THE COURT: Right.

MR. BRESLIN: So in light of Your Honor's ruling, I have no objection to the loss of the one point.

THE COURT: For starters, you need the Government's say so to get the third point, right?

MR. IBRAHIM: Yes, Your Honor.

THE COURT: All right. So I think the Government has the justification for withholding the third point.

All right. Let's go over the calculations, then.

Oh, and let me just also say, I do think the testimony -- it's a close call. It always is a close call that there was no corroborative evidence, but at the end of the day, I found that it was more probable than not Mr. Alfaro was telling the truth.

I say that because it makes sense. I mean, he has still -- given what I have seen in the e-mails, Mr. Moss thinks that he can intimidate people into not

cooperating, and this defendant would have just reason knowing him and knowing about the conversations and the stuff being relayed to Hove that he's taking a risk by cooperating. And so it makes sense that he would be reluctant to cooperate in the first place. It would make sense that he would decide it wasn't worth it and not cooperate, and now he's cooperating again.

He certainly is hoping for a break, there's no question. But he's put himself in harm's way. If you read the e-mails and the conversations, the transcript, anybody who read it would think, I'm putting myself in harm's way by testifying. And that lends credibility to his testimony today. And it's corroborated indirectly by the defendant's statements in the transcripts -- in the e-mails in particular, about running people down.

And so I would find -- even the testimony would constitute evidence by a preponderance of obstruction, but where I just think it's overwhelming evidence is to look at the transcripts and the e-mails. All right?

All right. Now, so actually, there are no, then, changes to the calculation, I believe, correct?

MR. IBRAHIM: That's correct, Your Honor.

THE COURT: Correct, Mr. Breslin?

MR. BRESLIN: Correct, Your Honor.

THE COURT: All right. So that means that the

total offense level is a 42, and the criminal history category, because there was, I guess, initially some questioning of that, but that's not challenged, correct, with the criminal history category?

MR. BRESLIN: That's correct, Your Honor.

THE COURT: All right.

Just give me one second.

Give me a second.

All right. And it's undisputed the defendant's criminal history category is a 5, correct?

MR. IBRAHIM: Correct, Your Honor.

THE COURT: Right.

MR. BRESLIN: Correct, Your Honor.

THE COURT: All right. But I do want to note for the record that based on the amendment which became effective yesterday and will apply retroactively as of February next year, the defendant at least arguably could be entitled a further reduction of one point in his criminal history, but he would remain as a 5. All right.

Any reason to doubt that?

MR. IBRAHIM: The Government agrees with that analysis, Your Honor.

MR. BRESLIN: Same from the defense, Your Honor.

THE COURT: All right. So that means that the

defendant is at a total offense level of 42, and a criminal history category of 5, that puts him in a range of 360 months to life, supervised release term of five years. He's ineligible for probation. Fine, I'm going to find that the fine is waived. Restitution is not applicable. And there's a $100 special assessment.

All right. Are there any motions for a departure from the Government?

MR. IBRAHIM: No, Your Honor.

THE COURT: From the defense?

MR. BRESLIN: None from the defense, Your Honor.

THE COURT: All right. So that leaves us with arguments for a variance or for a totality -- or, rather, what a sentence should be. I'll hear the defense.

Mr. Breslin.

MR. BRESLIN: Thank you, Your Honor.

In light of Your Honor's rulings in -- previously in relation to the drug weight and the purity attributable to Mr. Moss' codefendant, as well as the way the PSR objections played out today, there's little if much could have been done about the sentencing guidelines, the applicable guideline range. They're high. They were high before Your Honor even considered any enhancements.

My calculation is that he was looking at 292 to

365. And Mr. Moss fully recognizes that today he's going to receive a significant term of incarceration. Additionally, he understands that Your Honor has the discretion to issue a sentence that ensures Mr. Moss does not leave the custody of the BOP.

But Mr. Moss is 38 years old. He's going on 39. And a sentence within the applicable guideline range could mean that Mr. Moss would not leave the BOP's custody until he's in his 60s, possibly never.

As described in the sentencing memorandum, Mr. Moss' upbringing is pretty tragic. You know, he was raised in an environment in which the way you survive is through drug dealing. He grew up in the crime infested city of Camden, New Jersey.

His father was, essentially, nonexistence beyond the age of seven. His mother, a big time drug dealer on the streets of Camden. And as a result of his mother's substance abuse, Mr. Moss and his siblings were transient for a significant time period. You know, moving from place to place, staying in abandoned houses.

You know, at a very young age, Mr. Moss was forced to be, essentially, a squatter. And he was -- relied upon to fend off other squatters who -- when, at the time, thought were coming to take his home.

As a result of his mother's drug abuse, as well

as in and out of stints in custody, you know, he resided with his paternal grandmother for a time period.

THE COURT: Hold up. I'm sorry, go ahead. Yes, yes. Go ahead. Yes, paternal grandmother.

MR. BRESLIN: Thank you, Your Honor.

THE COURT: Who was also a drug dealer?

MR. BRESLIN: Correct. And that's the point I was just about to get to, Your Honor.

You know, he's living with his mother in these transient -- in a transient nature. And then he's going to live with his grandmother, and the hope would be that, you know, he'd get away from this way of living. But that's not the case with his grandmother. His grandmother's dealing drugs out of the house. And his grandmother was the one who taught his mother how to sell drugs.

He spent time in foster care. It's unclear whether, you know, it was, you know, state-issued foster care. But, essentially, Mr. Moss was living with a foster family for a short -- for a brief -- for about a year to a year and a half. And during this time period, you know, Mr. Moss reported, you know, mental, physical, and emotional abuse. He recalls sitting on the porch with his brother, crying about how bad it was living in that foster home.

The only reason he, essentially, escaped the foster home was, essentially, him and his brother begged their grandmother to take them back; and, essentially, take them back into a home that was already overcrowded as a result of the grandmother taking care of not only Mr. Moss and his siblings, but as well as the -- the children that belonged to his aunt who passed away.

There was a glimmer of hope when Mr. Moss' family moved to Delaware. And this was the result of, at the time Mr. Moss' mother's significant other, you know, made efforts to try and get his mother clean. Unfortunately, that didn't occur. And any hope quickly evaporated when his mother began using heroin in place of cocaine.

Mr. Moss is the oldest child, was responsible for caring for his siblings. And as a result, you know, he began committing petty crimes to be able to feed his family. It was also at this time that Mr. Moss got his, I'd say, first taste of the drug dealing game. His mother handed him drugs and taught him how to sell drugs. And this is how, I would say, Mr. Moss' addiction to drug dealing began.

Drug dealing is all Mr. Moss knew. It was how he was taught to survive. Quoting Mr. Moss, "Growing up around this, I thought it was normal. And no one ever

showed me anything different. Selling drugs is as addictive as doing them, especially when you're brought up thinking about -- thinking that is how you're going to survive."

And it was this addiction to selling drugs that resulted in Mr. Moss being before Your Honor.

As I described in the sentencing memorandum, Mr. Moss grew incredibly close with his mother in her waning years. This was because she finally, after such a long battle with drug addiction, was clean. They spoke on the phone regularly, but unfortunately that was short lived as his mother unexpectedly passed away, which devastated Mr. Moss, especially since because he was incarcerated at the time, he was not able to, you know, be with his mother in her dying moments or even attend her funeral.

After being released from incarceration, he traveled to his mother's gravesite only to discover that there was no headstone.

THE COURT: I read your memo, I know that.

MR. BRESLIN: Yep. And the reason there was no headstone is because no one could afford one. He felt an enormous obligation to take on the undertaking of making sure his mother had a headstone. But he was working minimum wage at the time washing dishes. And there was

just not a realistic possibility of being able to purchase a headstone for his mother on the current wages that he was earning.

So having been raised in an environment where you survive by selling drugs, Mr. Moss took his next paycheck, went and bought drugs, and turned around and sold those drugs and used it to purchase the headstone.

Mr. Moss recognizes that he should have stopped, but he was back up, quote, "to the fast addictive life of selling drugs."

Mr. Moss fully recognizes he has an addiction, and it's a little bit different. It's not the same addiction that Your Honor witnesses in this -- in the halls of this courtroom or in the halls of this courthouse. It's rather -- it's an addiction to the fast-paced lifestyle that comes along with selling drugs.

During his upcoming term of incarceration, Mr. Moss wants to learn more about how he can combat his addiction. He's already completed the nonresidential drug abuse problem at the FDC Philadelphia; however, he's requesting that Your Honor issue a recommendation that he be admitted to the BOP's residential drug abuse program.

Being involved in one of the most intensive addiction treatment programs that the BOP has, Mr. Moss hopes he obtains the necessary skills to avoid falling

back into his old lifestyle. He also has expressed an interest to counsel -- to myself that in -- to participate in the BOP's vocational training programs. He's previously received vocational training from Delaware Tech, so he's hoping to follow up on that.

It's Mr. Moss' sincerest hope that if he receives a sentence that would allow him to make it back home, he'd able to put the treatment and training --

THE COURT: Treatment for what? Just so we're clear, right, the only drug use -- I see it all the time. I see it in every single case. It's daily marijuana use, right?

MR. BRESLIN: Correct, Your Honor.

THE COURT: That's it, though? There's -- I just want to make sure, right, that's what we're talking about?

MR. BRESLIN: Correct.

THE COURT: Yep. Okay.

MR. BRESLIN: Allow him to put the training to good use. Again, Mr. Moss fully understands Your Honor's going to issue a significant sentence. And as part of the sentencing memorandum, he's requesting a substantial variance from the applicable guideline range.

He is at the mercy of this Court. And he's requesting that the Court issue a sentence that will allow

him to make good on any treatment, counseling, and vocational training that he would receive as part of the BOP.

In light of what I've just presented to Your Honor, as well as what I've outlined in the sentencing memorandums, he's requesting a variance to 180 months.

THE COURT: All right.

MR. BRESLIN: Thank you, Your Honor. Would Your Honor prefer Mr. Moss to speak now or after?

THE COURT: Do you want to say anything, Mr. Moss.

THE DEFENDANT: Yes, sir.

THE COURT: All right. Come on up.

Let me -- was he offered the chance to cooperate?

MR. BRESLIN: There was opportunity presented that was not taken up.

THE DEFENDANT: How are you doing?

THE COURT: All right. How are you?

THE DEFENDANT: I know I did bad stuff and all that, I know that, but I don't think I deserve life in jail. Like --

THE COURT: I'm not going to give you life.

THE DEFENDANT: And I understand, like -- all

right, like what Mr. Alfaro, right, the things that I was saying to him, this was my friend for a long time. Like, I accept the responsibility. I pled guilty. You know what I'm saying?

And it's like, he did exactly what I did. He sold drugs just as well as I've done, but I didn't put, you know, anybody else -- I accepted what I did, and I pled guilty.

So, of course, it was a natural reaction for me to be angry at him because this is my friend, and I felt like he wasn't accepting responsibility of his part and what we all did together.

THE COURT: Well, you can accept responsibility and still help fight the drug problem by cooperating. You could have cooperated against people in Reading people, right?

THE DEFENDANT: I didn't know them. It wasn't -- I didn't have no phone calls to them people at all. I went through somebody else to get there. So I didn't -- there was no way for me to --

THE COURT: Look, the only reason I'm saying, you're not required under our law to incriminate yourself, you're not required, then, to cooperate. But people deserve credit for cooperating. We need people to be cooperating.

A terrible thing has happened in the last 25 years that people are putting on the web cooperators' names. They're trying to intimidate folks. They're trying to shut down the criminal justice system from working the way it should. We actually need to -- and I do reward people for cooperating.

THE DEFENDANT: Sure. I understand that.

THE COURT: But you're right, you don't have a requirement to do it. But I give people a lot of credit when they do it.

THE DEFENDANT: Right.

THE COURT: All right. But anyway, you did accept responsibility. That's actually, that's right. And you --

THE DEFENDANT: Before anybody cooperated on me, I accepted responsibility. It wasn't -- it didn't take for anybody to cooperate or to tell what I did. I accepted it first. You know what I mean?

And, like -- it's, like, I don't know, like it was hard for me when I was out there. I tried. Like, I did it.

I went to work. I came home to my girl every day. She would go to school, and I'd be home. I'd be in there washing dishes until 3:00 in the morning, and I did it. I tried it.

But it was like when I see my mom gravesite, I just -- I don't know. It just hurt me, and I just wanted to fix it, basically. I got stuck into what I was so used to. That's just what happened. That's it.

THE COURT: All right. Okay. Thank you.

MR. BRESLIN: Thank you, Your Honor.

THE COURT: Mr. Ibrahim.

MR. IBRAHIM: Your Honor, in looking at the offense itself -- and we'll talk about the offender momentarily -- but about the offense itself, we're talking, of course, about an enormous amount of methamphetamine that was purchased out of state, brought into the District of Delaware to be resold onto the streets of Delaware.

All the parties agree that drives the guidelines here. That, as the Court found, was a base offense level 36.

THE COURT: So, you know, Mr. Breslin brought up a point that, you know, I went and I read the case. Hold on a second.

He cited *Kimbrough*, the Supreme Court case where the Court said that "district courts are free to deviate from the guidelines based on disagreements with the correct powder ratio."

In other words, you could have a policy

disagreement, especially if it's not founded on empirical evidence with the guidelines.

You disagree with that?

MR. IBRAHIM: No, Your Honor.

THE COURT: So let me ask you this: Mr. Moss, how many violent crimes does he have that he's been convicted of?

MR. IBRAHIM: Well, he's got a shots fired that resulted in a possession of a firearm by a prohibited person.

THE COURT: How old was he when that was committed?

MR. IBRAHIM: I believe he was 18. I can get it.

THE COURT: Right. That's my recollection too.

MR. IBRAHIM: Yep.

THE COURT: Did he even get any criminal history points for it?

MR. IBRAHIM: No. And, you know, Your Honor, I think that's one of the troubling things here, is there's a lot of offenses he didn't get criminal history points for.

THE COURT: Well, but I think that's the only violent crime; is that right?

MR. IBRAHIM: And then there was an armed

robbery that was --

THE COURT: That was a juvenile.

MR. IBRAHIM: That was -- he was age 19. It was --

THE COURT: Okay. Hold up. What page is that on?

MR. IBRAHIM: I have it at Paragraph 121.

THE COURT: Okay.

MR. IBRAHIM: But I must confess, I've been using the amended, not the second amendment Presentence Report, just because I had my notes in it. So I just want to confirm for the Court that it's still the same number.

THE COURT: Oh, this is where he's accused of pointing the gun at the homeless person who's urinating.

MR. IBRAHIM: Right. Exactly. Yep.

And the Government doesn't dispute, Your Honor, in fact, conceded in its papers that after -- that when he was younger, his crimes appeared to be more violent in nature.

We have that shots fired as an adult. We have that armed robbery of a homeless person as an adult. And then, you know, prior to that as a juvenile, there was burglaries and robberies, but after that it was drug dealing.

It was almost on a decade straight of just drug

dealing to the extent someone can use the word "just" before "drug dealing."

THE COURT: Right. But, and what I want to do, I always want to be fair --

MR. IBRAHIM: Of course.

THE COURT: -- and my reading of his history is that you have to go back almost 20 years for any kind of gun or violent crime. I think that's -- is that right?

MR. IBRAHIM: Yeah. I think it's fair to say --

THE COURT: He's a drug dealer. And he's a big-time drug dealer. I think he admits that. He accepted responsibility for that.

The reason why I say it is, and the reason I bring up the policy is because, you know, just recently in this court, I've had cases brought by your office, very good cases. This is a good case. And it's for people putting guns on the street.

And I see the terrible affects of drugs. And that's -- you said it, it drives the guidelines.

But it doesn't seem to me that the guidelines are driven by guns as much as they should be relative to drugs, because it's the guns that actually kill the people. And I'm having cases you bring where people are trafficking guns, and they're just not looking at 360 to

life.

MR. IBRAHIM: Absolutely.

THE COURT: And so --

MR. IBRAHIM: I think -- but, of course, Your Honor, I think the worse of both of them is a mixture of guns and drugs.

THE COURT: Right.

MR. IBRAHIM: And that, unfortunately, from the Government's perspective is what we have here.

I mean, he didn't need to run around with a gun on his person because he wasn't running around with drugs on his person.

He did a great job of using other people to be his stash houses. And in his main stash house, he's got a loaded handgun with an extended magazine, Your Honor, ready to go.

And Tyrell Pankins' house --

THE COURT: Was he living at the house at all?

MR. IBRAHIM: At that house? No, Your Honor. It was an apartment that was just coming and going all day with guys --

THE COURT: Where was the gun located in the house?

MR. IBRAHIM: It was in a fake microwave.

THE COURT: When you say "ready to go," like --

MR. IBRAHIM: It was -- it was loaded, Your Honor. It was -- you know, you just go in and you cock it, and it's ready to fire.

THE COURT: Right.

MR. IBRAHIM: Some people keep their guns in their home that way, but most people know that --

THE COURT: I mean, I, in the last few years, had to sentence a man who put a gun in somebody's mouth and pulled the trigger. He was just lucky it didn't go off. He wasn't looking at 360 to life.

MR. IBRAHIM: Absolutely agree, Your Honor, that the firearm guidelines are probably too low, especially for how serious that conduct is.

But, Your Honor, from my perspective, this is a combination of both. I mean, this is -- there are firearms in this case. Four firearms were seized.

The defendant kept his drugs in places with firearms. And absolutely, from the Government's perspective, that was intentional. He wanted to guard his drugs stash with firearms.

That firearm wasn't for Christina Chamberlain, a fentanyl addict who --

THE COURT: He got two points enhanced, right, for that firearm?

MR. IBRAHIM: Sure.

THE COURT: But as I said, I think the proof, you know, it's definitely it's him or Santiago. That's very, very clear. It's one or the other.

MR. IBRAHIM: You know, I think -- I think what the Government is saying is a lot like what the Court is saying, it's the conspiracy's firearm. It's there to protect the drugs of the conspiracy. And this is the leader of the conspiracy, Your Honor.

And I'm not -- just because he hasn't had violent crimes --

THE COURT: How do you know it's him or Santiago?

MR. IBRAHIM: Well, a couple of the indicia, Your Honor, are the fact that Mr. Moss was the only person involved in all aspects of the conspiracy. He -- the fentanyl side of this, the xylazine side of this, there really isn't any, you know, he didn't -- Mr. Santiago didn't go to those drug deals. That was Mr. Moss and Mr. Rodriguez, and that was them working together to get that supply of fentanyl from Philadelphia. And then it was Mr. Moss --

THE COURT: How do you relative -- how to you assess him relative to Rodriguez? Who is the leader?

MR. IBRAHIM: I think, you know, a couple of things on that. First is that the connection to the stash

house was Mr. Moss to Christina Chamberlain.

Rodriguez was actually -- and the Court probably remembers this -- was jumping from hotel to hotel. He was living in hotels at the time with his kids. He had nowhere to keep his drugs, so Mr. Moss let him use his stash house. But then there was a debate about whether or not some fentanyl was stolen from Mr. Rodriguez, and, you know, a fight ensued between them.

But Mr. Rodriguez was basically a transient at that time, selling drugs while keeping himself afloat in a hotel with his kids.

Mr. Moss, on the other hand, that was just one piece of the puzzle. He had two other stash houses. He had methamphetamine coming in from Reading.

At one of the stash houses, where there's no indication that -- had anything to do with Mr. Rodriguez, that's where we found the xylazine bottle.

So looking at all of these pieces of the puzzle, they really only come back to one person, Your Honor, and that's the defendant. The defendant had his piece -- his hand in every single piece of this conspiracy. He's the one who chose to engage in the fentanyl trafficking. He went out of his way to go with Mr. Rodriguez to Philadelphia.

Same thing with Mr. Santiago and the meth. He

got to make the decision about what drugs he wanted to sell, and he decided he wanted to sell crystal methamphetamine and fentanyl. And he decided he wanted to cut of the xylazine.

And as I was about to say, Your Honor, as you well know, the guidelines don't even -- says if the fentanyl and xylazine, gets them for free because the guidelines are driven by the meth quantity.

But in terms of seriousness, in terms of cutting your fentanyl with xylazine, putting horse tranquilizer in the things that you are feeding to people who actually are addicted, physically addicted --

THE COURT: Right. So I have to say that's a very good point. I mean, that's a very, very bad fact for him.

MR. IBRAHIM: You know, Your Honor -- and I take him at his word that he's -- I think Mr. Breslin said it well, you know. He's addicted to the fast and loose lifestyle. It feels good. One, doing things that make people feel good make them want to do it again. Government understands that.

But we're talking about preying on people who have a physical addiction to these drugs, who are physically sick when they're in withdrawal. And Mr. Moss, of all people, should know better because as he says, his

family members were addicted to it. He is so lucky that he doesn't have an opioid addiction. He's just doing it for the fun of it, Your Honor, and he really should know better.

And that's not to say he didn't have a sad life and a hard life, he has. And that's fair. But at the same time, the Court has to ask itself, well, what are the chances he's going to stop? And the Government submits that the chances are very low because he has --

THE COURT: Right. But if I gave him the minimum, even with good time, he's going to be in his 60s when he gets out, right?

MR. IBRAHIM: Yes, Your Honor.

And I think that's where he needs to be for this Court to feel some confidence that he's not going to do it anymore. Because he's 38 now, he was 36 when he was arrested. He had just gotten out of prison for five years, and he went right back to doing it, and doing it much bigger than he was before, Your Honor.

Before it was heroin and marijuana, as the Court saw from the PSR. And now it's huge quantities of meth and it's fentanyl and it's xylazine.

THE COURT: Right. But, you know, you could argue meth is the drug of the day. Congress and the Sentencing Commission are doing what they did with crack

before. And, you know, 20 years ago, it was heroin, and now it's meth.

MR. IBRAHIM: I mean, I think that the Court has a great point. I think the thing is, though, is that, you know, the findings from Congress show that meth really is a destructive drug.

It's -- you know, the marijuana and cocaine and all these other drugs, they don't hold a candle to the destructive affects of methamphetamine and of fentanyl. They really are harmful for people, and they deserve harsh penalties. And I know the Court knows that. And they especially --

THE COURT: Well, actually, what the Court knows is that 99 percent of the time, I've got a defendant in front of me from daily marijuana use --

MR. IBRAHIM: Uh-huh.

THE COURT: -- which is -- so, no, I think there's an argument to be made that it inflicts more harm than all these other drugs.

But that's clearly not a popular opinion, but that's certainly my observation.

MR. IBRAHIM: Certainly, Your Honor.

And so what to do about a situation like Mr. Moss'. He has four -- four prior -- excuse me, five prior drug-related felonies. And that's just, you know,

those are his adult convictions, and those are actually the most recent because it was the firearms ones before that.

How many drug-related felonies in a row does he need to have?

How many times does he need to get violate -- his probation violated? The answer was 16, by the way, Your Honor. But how many times does his probation need to be violated?

How many times does he need to getting referred to drug treatment?

THE COURT: He's had 14 violations of probation -- no, no, 16 convictions, 14 violations of probation.

MR. IBRAHIM: Thank you, Your Honor.

How many times -- and I'm sure the Court saw, all throughout his PSR, the judgments show that he's referred for substance abuse training.

Mr. Breslin mentioned one of the bright spots from the Government's perspective, which is that he completed the nonresidential drug abuse at the FDC.

And, Your Honor, we would love to give him a lot of credit for that, but he completed that November 26, 2022. At the same time he's completing the drug treatment at the FDC, he's launching this campaign against

Mr. Alfaro.

It's like it doesn't -- it's like it doesn't click, Your Honor. It doesn't -- everything he learned from that training doesn't matter. He's still going to wage his campaign against Mr. Alfaro. He's still going to get people to come in and record him testifying.

It's hard for the Court to conclude that any of these things actually catch a foothold with Mr. Moss, and he actually realizes he needs to stop. It's very hard, from his record, for anyone to conclude that he's going to stop. And, frankly, Your Honor, that he wants to stop.

THE COURT: All right. Anything else?

MR. IBRAHIM: No, Your Honor.

You know, I talked about the threats. But, you know, obviously, the fact that after he pled guilty and he was -- he knew he was going to be in front of this Court for this day, and that he pled to his conviction that had a life statutory maximum, he knew that was going to happen and --

THE COURT: Sorry, he knew?

MR. IBRAHIM: He knew that he pled guilty to a violation of 21 U.S.C. 841(b)(1)(A), 10-year statutory minimum and a life stat max.

THE COURT: Who knew that?

MR. IBRAHIM: Mr. Moss.

THE COURT: Oh, I'm sorry. Okay. I didn't know if you were saying Alfaro.

MR. IBRAHIM: Sorry. I apologize.

THE COURT: That's all right.

MR. IBRAHIM: Mr. Moss, you know, when he came in front of this Court for his change of plea hearing, of course he's told about the mandatories -- the mandatory minimums and the statutory maximums. It was read to him. He knew, I could get up to life in front of this judge when I come before him on sentencing.

And what did he do? He's behind -- there's no doubt he's behind the scheme to send letters, as Mr. Alfaro said. No one else knew.

And not only that, he gets his friends to come in and record him. I mean, nothing shouts that he doesn't get it more than that, Your Honor.

THE COURT: Actually, can you state for the record, is Mr. Alfaro cooperating against anybody else?

MR. IBRAHIM: No, Your Honor.

He was -- and I think that actually came out from the evidentiary hearing, because as the Court probably remembers, Special Agent Bethal testified as to Mr. Alfaro's proffer statements because Mr. Alfaro had declined to testify. And those proffer statements were in relation to drug purchases directly from Mr. Moss and

nobody else.

THE COURT: So you could represent that the U.S. Attorney has not informed any other defendant that Mr. Alfaro is cooperating against any other defendant at FDC?

MR. IBRAHIM: Correct, Your Honor.

THE COURT: Okay. All right.

MR. IBRAHIM: Correct.

And so that's really troubling. And what's most troubling about it is that his guidelines range would be where it is, Your Honor, even without the obstruction of justice. He's so far up the guidelines, he's in the bottom corner, Your Honor. I mean, he has a base offense level 42, category 5. He's well in the 360 to life, is my point, Your Honor.

And so what do you do in that scenario? And what do you do for someone who has shown repeated drug dealing, but has no --

THE COURT: How did you pick 480? Because I take your point --

MR. IBRAHIM: Uh-huh.

THE COURT: -- to send a message, you've got to get more than the minimum --

MR. IBRAHIM: Right.

THE COURT: -- because of the obstruction. And

it's just so over the top.

MR. IBRAHIM: Right.

THE COURT: But I can understand that position.

MR. IBRAHIM: Right.

THE COURT: The --

MR. IBRAHIM: But the Government, of course -- sure. Sorry. I didn't mean to cut the Court off.

The Government, of course, is trying to comply with the dictate that it needs to be a sentence no greater than necessary.

So from the Government's perspective, the guidelines without the obstruction, without the loss of a point, were 33 years.

So the Government's perspective was that it needed to be materially above 33 years, because that really truly takes into account the obstructive conduct. And so from the Government's perspective, 35 years wasn't materially above 33 years. So it felt the need to go to 40.

And I think that, you know, the need for deterrence and the respect for the law dictate that, Your Honor.

It's not something the Government lightly does, but the nature of what happened here, the fact that the fentanyl doesn't even really affect the guidelines range,

and the xylazine doesn't affect the guidelines range, and the fact that the -- frankly, that the obstruction doesn't affect the guidelines range meant that the Government felt that it really had to go into the guidelines for this. And so that's why the Government came to where it came.

THE COURT: All right. Anything else?

MR. IBRAHIM: No, Your Honor.

THE COURT: All right. Thank you.

MR. IBRAHIM: Thank you.

THE COURT: All right. Mr. Moss, I've spent a lot of time thinking about your sentencing, and reading and preparing for it. I listened very carefully today, and we've been going at it for more than two hours.

I listened to what you had to say, your lawyer, I read the papers. You had one nice letter that was included. I read that character letter.

When a judge sentences somebody in federal law, they're supposed to impose the sentence that is sufficient. You know what that means, right, sufficient, but not greater than necessary, right, to accomplish the purposes of sentencing.

It's hardest thing a judge does. And when you look at the purposes of sentencing, you start with the nature of the offense, the seriousness of the offense, and this is a very, very serious offense. That's why the

guidelines are so high. And methamphetamine, particularly right now, is doing a lot of destruction on our streets. And that's why the guidelines for it are so high; although, I gave you the break when it came to the purity and applied the 62 percent.

What's very, very scary here, and what's actually -- really, as the prosecutor said, it's not even reflected in the guidelines, as you've had the xylazine, you know, the laced fentanyl, which is -- I mean, is so deadly. And that's not even reflected in the guideline, the drug. Right?

So the sentence has to be substantial, and that's why the guidelines are so high, just to reflect the seriousness of the offense.

A second purpose is to deter people, to stop people from committing crimes, to stop you, personally, from committing further crimes and from stopping others.

I mean, the sentence range alone is so high that, as I mentioned, even at the low end you'd be out as a 60-year-old. I guess it's possible, it could be late 50s. But it'd be -- and you'd like to think that at that age, people don't commit further crimes, but they do on occasion, but much less than they do when they're young. That's true.

So, but then there's what we call general

deterrence, and that's send a message to the world at large. And here, again, that would call for a very substantial sentence. You were putting a lot of drugs on the street. This is not a small-time drug conspiracy, and it's a lot different types of drugs. And as we just mentioned with the fentanyl in one case, I mean, it's as deadly a drug as you can find. So all of that calls for a substantial sentence.

Then we are supposed to consider the nature of the defendant, the characteristics of the defendant. And here, you're a mixed bag, right? I mean, on one hand, you had a terrible upbringing. Right. You had a mother who dealt drugs, who taught you to deal drugs. You had a grandmother who took you into her home, but taught you to deal drugs.

You were in foster home for two years, I think it was, right, and it sounded like it was a very, very bad situation to be in. And I'm sure you didn't have a lot of hope for yourself and didn't see a path to a very law-abiding contributory or productive citizenship, right? So I get that. And I'm going to factor that into where the sentence should be.

I'm also factoring in that you did have some violent crimes when you were very, very young, but not recently, and, in fact, almost 20 years. And you don't

see that pattern. Usually you see an escalation of violence over time. So with you, it's the opposite. So that counts in your favor.

It doesn't count against you or, rather, what doesn't count in your favor is the number of convictions. By my count, you have 16 convictions. You've got 14 violations of probation, which suggests, you know, you don't take seriously the fact that you have been sentenced before. So you do have a big history that's hard to understand.

And then you have the obstruction conduct. And I just think courts really have to take a stand on this. I think we have to send a message. If you're going to mess with some witness, if you're going to intimidate some witness, you have got to pay a heavy price for that.

And I don't mean just you personally, I mean a message has to be sent out there because we have people who live in Wilmington right now, innocent people, who aren't at all involved in the criminal conduct around them, older women, who can't go outside of their house, and they are afraid to tell the police what they see around them. Their children are afraid. And it just makes the crime worse. So that's a big part of my thinking today.

I can't give you the minimum guideline range

because that would say, hey it's okay. Because the obstruction doesn't even factor in, right? I mean, and so I have to give you more than the minimum range just on that point alone, it seems to me.

Now, it does seem to me that the guidelines do not fairly treat guns versus drugs. And so I see gun traffickers come in here, and they are treated way more leniently than drug traffickers. And when I look at all the cases I had, even though there were guns involved in this case, you have not been tied to the AK-47. You've been tied to the one, the 9 millimeter.

And I mentioned in my ruling that it's not 100 percent clear whether it's really you or Santiago's gun. You got two points for that. So I think probably, in fairness, maybe a way I've decided -- not maybe -- I've decided to look at it as, well, what if you really got one point for that, like you split the point with Santiago? And if you did that, you'd be at a 41. And if you are at a 41 level, you would still be looking at 360 to life.

But if you were -- if you were a criminal history category 1, there'd be a change in the guidelines. You'd be looking at 324 to 405. You're not a criminal history category 1. But the only reason I bring it up is because there's some, some difference in the way the guidelines look at that in terms of the sentence.

And I'm just trying to figure out what's the right number to give you above the 360 that sends a message to you, you cannot punish people for cooperating. You just cannot come in and video people who are doing their obligation as a good citizen to testify and, basically, intimidate them and threaten them, and threaten to ruin their lives by posting on the Internet video of them.

We can't tolerate that situation. So I've got to give you something above it, and I'm just figuring -- trying to figure out what that is.

I don't think -- when I balance you and your totality, your upbringing, what you were deprived of as a child, which is a lot, I don't think it needs to be 480 months, but it's got to be something.

And I think the right answer is -- I think the right answer is 384 months. It's a lot of time, but that means that you've got the equivalent of two years for engaging in the obstructive conduct.

It's not a happy day as to impose a sentence that serious against somebody. You are able to gain good time credits. And by the Government's estimation, if I had given you the time they asked for, it would have been more than six years of good time. I would imagine even a 384-month sentence would be over five years, at least, of

good time. You can reduce that sentence by doing good. I hope you do that.

But when I look at, as I say, the totality of the circumstances, the criminal history, your family situation which counters it, I think in the end, that 384 months is what's sufficient to accomplish the purposes of sentencing here, but not greater than necessary.

So this is the sentence I intend to impose: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Malik Moss, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 384 months.

The Court has considered all the factors set forth under 18 U.S.C. Section 3553(a), and finds this sentence to be reasonable and appropriate.

Upon release from imprisonment, you shall be placed on supervised release for a term of five years. Within 72 hours of your release from the custody of the Bureau of Prisons, you shall report in person to the probation office in the district to which you are released.

While on supervised release, you shall not commit another federal, state or local crime. You should comply with the mandatory and standard conditions that have been adopted by this Court, and you shall comply with

the special conditions as listed in Paragraph 268 of the Presentence Report.

It is further ordered that you shall pay to the United States a special assessment of $100, which should be due immediately. The Court finds that you do not have the ability to pay a fine, and the Court will waive the fine in this case.

Are there any objections to the sentence as stated, other than have been previously argued?

MR. IBRAHIM: No, Your Honor.

THE COURT: I'll recommend, incidentally, I'll include in that a recommendation for the defendant to participate in RDAP.

Go ahead, Mr. Breslin.

MR. BRESLIN: Thank you, Your Honor. That was the only thing I was going to ask the Court about, the recommendation.

THE COURT: I will do that.

Therefore, it is the order of the Court that the sentence be imposed as stated. The Clerk's Office shall prepare the judgment. My deputy clerk shall enter the judgment of conviction.

It is ordered that a complete corrected copy of the Presentence Report be prepared for the Bureau of Prisons and the United States Sentencing Commission. Any

other copies of the Presentence Report shall remain confidential.

You have the right -- is there any qualification of a right to appeal?

MR. IBRAHIM: No, Your Honor.

THE COURT: And, Mr. Moss, you have the right to appeal within 14 days after entry of the judgment of conviction. You need to discuss your right to appeal with counsel.

If you cannot afford the cost of an appeal, you may file a request for permission to file the appeal without paying those costs.

If there is an appeal, counsel on appeal are permitted access to the Presentence Report, except that any recommendation from the Probation Office are not to be disclosed to counsel.

Any other matters, Mr. Breslin?

MR. BRESLIN: None from defense, Your Honor.

THE COURT: Mr. Ibrahim?

MR. IBRAHIM: None, Your Honor.

THE COURT: All right.

Good luck, Mr. Moss.

(The proceedings concluded at 12:47 p.m.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3059

UNITED STATES OF AMERICA,
APPELLEE,

v.

MALIK MOSS,
APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE (D. Del. No. 1:22-cr-00024-CFC-1)

BRIEF OF APPELLANT AND APPENDIX VOLUME I
(Pages 1-14)

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Dated: May 28, 2024

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

On May 24, 2022, Mr. Moss entered a guilty plea to one count of Conspiracy to Distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) as well as 21 U.S.C. § 846. (Appendix at 15[1]; A19). The United States District Court for the District of Delaware, pursuant to the Sentencing Reform Act of 1984, imposed on Mr. Moss a term of imprisonment of 384 months, followed by 60 months of supervised release, and a $100 special assessment. (A2-4; A22). Mr. Moss timely filed a notice of appeal on November 16, 2023. (A1; A22). The District Court had jurisdiction over the criminal charge pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review a final judgment of the district court pursuant to 28 U.S.C. § 1291 and jurisdiction to review a sentence imposed under the Sentencing Reform Act of 1984 pursuant to 18 U.S.C. § 3742.

[1] Hereinafter referenced as "A_."

STATEMENT OF THE ISSUES FOR REVIEW

Whether the District Court erred in finding that the Government had sustained its burden of proof during the evidentiary phase of Mr. Moss' sentencing hearing when it found that Mr. Moss purchased 15 pounds of methamphetamine from a source in Reading, Pennsylvania with a purity level of 62% despite the evidentiary record not supporting those findings. Mr. Moss preserved this issue in the Delaware District Court through the arguments raised during the December 21, 2022 evidentiary hearing as well as his post-hearing briefing. (A96-100; A108-13; A141-52). As such, the District Court's findings of fact are reviewed for clear error,[2] mixed questions of law and fact are reviewed de novo,[3] and the District Court's interpretation of the Guidelines are subject to plenary review.[4]

Whether the District Court erred when it overruled Mr. Moss' objection to a 2 point offense level enhancement for obstruction of justice when the record did not support the conclusion that Mr. Moss took steps to intimidate a cooperator. Mr. Moss preserved this issue in the Delaware District Court as he objected to the 2 point

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[2] *United States v. Miele*, 989 F.2d 659, 663 (3d Cir. 1993).

[3] *United States v. Bogusz*, 43 F.3d 82, 85 (3d Cir. 1994) (quoting *United States v. Belleteire*, 971 F.2d 961, 964 (3d Cir. 1991)).

[4] *Id.* (citing *United States v. Rosen*, 896 F.2d 789, 790-91 (3d Cir. 1990)).

offense level enhancement as part of his objections to the presentence report,[5] contested the Government's argument during the sentencing hearing,[6] and presented evidence and argument during the sentencing hearing as to why the enhancement was not warranted. (A276-87). As such, the District Court's findings of fact are reviewed for clear error,[7] mixed questions of law and fact are reviewed de novo,[8] and the District Court's interpretation of the Guidelines are subject to plenary review.[9]

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[5] *See* October 26, 2023 Second Revised Presentence Report at 47-49, hereinafter referenced as "PSR at __".

[6] A237-46.

[7] *Miele*, 989 F.2d at 663.

[8] *Bogusz*, 43 F.3d at 85 (quoting *Belleteire*, 971 F.2d at 964).

[9] *Id.* (citing *Rosen*, 896 F.2d at 790-91).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. This case is not related to any pending matters before this Court.

STATEMENT OF THE CASE

On December 14, 2021, Mr. Moss was arrested after the issuance of a criminal complaint. (A16). On that same day, Daniel C. Breslin, pursuant to the Criminal Justice Act, was appointed to represent Mr. Moss. (A17).

On December 22, 2021, Mr. Moss appeared before the United States District Court for the District of Delaware for a preliminary hearing and a detention hearing. (A17). Following the hearing, the Honorable Christopher J. Burke found that there was probable cause to believe that a crime had been committed and granted the Government's motion for detention. (A17).

On March 10, 2022, the Grand Jury for the United States District Court for the District of Delaware returned a single-count indictment and notice of forfeiture against Mr. Moss and his co-defendants for conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841 and 846. (A15; A18).

On May 24, 2022, Mr. Moss entered a guilty plea in the District Court, pursuant to Fed. R. Crim. P. 11(a)(2) to the lone count of Conspiracy to Distribute Controlled Substances, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. (A15; A19). Thereafter, the District Court scheduled an evidentiary hearing to determine the applicable base offense level under the United States Sentencing Guidelines. (A19).

The evidentiary hearing was originally scheduled for December 12, 2022, however, the hearing was continued to December 21, 2022 due to the fact that Mr. Moss' co-defendant was not able to attend the hearing. (A20).

Following post-hearing briefing, Chief United States District Court Judge Colm F. Connolly issued a memorandum regarding the applicable base offense level. (A20-21).

Mr. Moss' sentencing hearing was held on November 2, 2023. Mr. Moss was sentenced to a term of incarceration of 384 months, together with 60 months of supervised release, and a $100.00 special assessment. (A22).

Mr. Moss timely filed his notice of appeal on November 16, 2023. (A22).

STATEMENT OF FACTS

On May 24, 2022, Mr. Moss entered a guilty plea in the District Court to a lone count of Conspiracy to Distribute Controlled Substances, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. (A15; A19). As Mr. Moss' plea agreement did not contain an offense level stipulation, the District Court scheduled an evidentiary hearing to hear evidence regarding the applicable drug weight and purity level under the United States Sentencing Guidelines. (A19).

The evidentiary hearing was originally scheduled for December 12, 2022. (A20). However, as Mr. Moss' co-defendant Jacob Santiago was unable to attend the proceedings, the hearing was continued to December 21, 2022. (A20; A26).

Before the hearing was concluded, the Government made the District Court aware of a housekeeping matter. The Government advised:

> The government had mentioned that there was a corrborator in this case, Jesus Alfaro was his name. Ms. Carrie Cinquanto is representing Mr. Alfaro. Ms. Cinquanto is here. She gave the government a letter dated this weekend that Mr. Alfaro no longer wants to cooperate with the government. He has a signed cooperation agreement as the Court knows. One of those provisions of the cooperation agreement is that any proffer statements he made are on the record as of the date of his cooperation agreement.
>
> The Government plans to enforce that provision and insert his proffer statements through the testifying – through evidence of a testifying case agent, a DEA case agent who is present.
>
> So the government has discussed that with defense counsel, talked about it, I don't believe that there's an objection from defense counsel.

> But I wanted to let you know since Ms. Cinquanto is here, that that was the government's plan in case the Court wants to inquire of Ms. Cinquanto or anything since she is present.

(A26-27). In response, the District Court heard from Mr. Alfaro's attorney:

> MS. CINQUANTO: Yes, Sir. Good morning Caroline Goldner Cinquanto on behalf of Jesus Alfaro.
>
> Your Honor, I have spoken with Mr. Alfaro at length about this issue, and he has just maintained that he does not wish to go forward with his cooperation. I have prepared a statement that I had Mr. Alfaro sign stating that he understood the ramifications of this decision, that he was doing it voluntarily, and that he was not under threat or pressure not to testify.
>
> THE COURT: All right. Okay.
>
> Anything else that I should ask in follow-up?
>
> MR. IBRAHIM: I don't think so, Your Honor. You could – you know, we'll obviously have a plan to deal with Mr. Alfaro later, but in terms of, you know, how that affects these proceedings, I think I've outlined the government's plan to the Court. I've outlined it to the defense. I think we are all on the same page.
>
> Granted, however, that we can't proceed with the hearing today, I am not sure it is of very much moment how we decide to handle the issue.
>
> THE COURT: All right. Okay. All right. Well, thank you very much.
>
> MS. CINQUANTO: Your Honor, just so Your Honor is aware, I did advise him that he would not be receiving any of the benefits listed in Attachment A to the Memorandum of the Plea Agreement, including that the government – for the government moving for departure from the Sentencing Guidelines pursuant to 5K1.1 and 3553(e).
>
> He also understands that, as a result of his decision not to testify, the government may invoke the penalties set forth in Paragraph 2 of Attachment A of the Memorandum of Plea Agreement.
>
> And in summary, I advised Mr. Alfaro that those penalties include prosecution for any federal crime the government learned of during the course of his cooperation. The government's decision to decline to the file 5K1 and 3553 motion for departure, as well as the fact that the

> government could be relieved of any obligations under the Plea Agreement regarding recommendations as to sentence or stipulations including drug weight.

(A29-31).

On December 21, 2022, the District Court heard evidence from the Parties as to the applicable drug weight and purity for purposes of determining the base offense level under the United States Sentencing Guidelines. (A20). The Government began the hearing by noting that its evidentiary presentation and argument was that the Court could calculate a base offense level of 36 in one of two ways: (1) the District Court could find that Mr. Moss and Mr. Santiago purchased "10 pounds of at least 60 percent pure methamphetamine from Reading", Pennsylvania; and (2) "find that the 3.4 pounds of methamphetamine that's 86 percent pure, seized from Tyrell Pankins, was part of this drug conspiracy." (A38).

Thereafter, the Government called Officer Trevor Riccoban to the stand. (A39). In relation to the methamphetamine purchased from Reading, Pennsylvania, Officer Riccoban testified in relation to various communications between Mr. Moss and Mr. Santiago during which they discussed purchasing multiple pounds of methamphetamine. (A53-55). Officer Riccoban also testified that through surveillance techniques and by tracking Mr. Moss' and Mr. Santiago's cell phone location data, law enforcement was able to determine that Mr. Moss and Mr. Santiago

traveled to Reading, Pennsylvania on October 27, 2021 and October 28, 2021. (A55-56).

As there was no surveillance of Mr. Moss and Mr. Santiago in Reading, Pennsylvania on those dates, the Government, in an attempt to prove that Mr. Moss and Mr. Santiago purchased 10 pounds of methamphetamine, had Officer Riccoban testify in relation to cellular communications sent by Mr. Moss that he had methamphetamine for sale. (A56). Officer Riccoban also testified about a recorded phone conversation between Mr. Moss and co-conspirator, Gerardo Rodriguez during which Mr. Moss told Mr. Rodriguez that he had bought 10 pounds of "ice" from Reading, Pennsylvania. (A57).

Officer Riccoban also testified in relation to an alleged 5 pound methamphetamine purchase from Reading, Pennsylvania on November 11, 2021. Again, through surveillance techniques and tracking the location data of Mr. Moss and Mr. Santiago, Officer Riccoban testified that Mr. Moss and Mr. Santiago traveled to Reading, Pennsylvania on November 11, 2021. (A58-59). And to prove that Mr. Moss and Mr. Santiago purchased methamphetamine on this date, Officer Riccoban testified in relation to a phone call between Mr. Moss and Mr. Santiago the following day during which Mr. Santiago described that they had 5 1-pound drug sales lined up. (A59).

In relation to the methamphetamine recovered from Mr. Pankins' residence, the Government sought to prove that this methamphetamine was attributable to Mr. Moss by showing that Mr. Moss and Mr. Pankins were collaborating. Officer Riccoban testified that Mr. Pankins traveled to Reading, Pennsylvania with Mr. Moss and Mr. Santiago on November 11, 2021 and then the group traveled to Mr. Pankins' residence. (A58-59). Additionally, Officer Riccoban testified that prior to a sale of methamphetamine to a confidential source, Mr. Moss and Mr. Pankins met up and drove from the area of Mr. Pankins' apartment to the location where the sale was to take place. Officer Riccoban stated that Mr. Pankins was in the car while Mr. Moss was conducting the controlled purchase. (A60-61). Furthermore, Officer Riccoban testified regarding Mr. Moss allegedly moving methamphetamine stored at Christina Chamberlain's apartment to Mr. Pankins' residence. (A61-63).

During cross examination, Officer Riccoban was questioned about what law enforcement did to confirm their suspicion that Mr. Moss and Mr. Santiago were traveling to Reading, Pennsylvania to purchase multiple pounds of methamphetamine. During this line of questions, Officer Riccoban conceded that Mr. Moss and Mr. Santiago were never physically observed in Reading, Pennsylvania, they were never stopped upon returning to Delaware, and therefore, no controlled substances purchased on October 27-28 or November 11th were ever seized, weighed, or

chemically analyzed. (A64-66).

Also during cross examination, Officer Riccoban conceded that: (1) Mr. Pankins admitted that the methamphetamine recovered from his residence belonged to someone other than Mr. Moss; (2) that Mr. Moss traveled to the vicinity of another stash house before and after responding to the area of Mr. Pankins' residence on November 11, 2021; and (3) that Mr. Moss met with another individual in the vicinity of a stash house prior to allegedly moving methamphetamine to Mr. Pankins' residence . (A66, A67, A68-69). Furthermore, Officer Riccoban testified in relation to a recorded phone conversation between Mr. Moss and Mr. Santiago on the morning of October 27, 2021 during which they discussed only purchasing 5 pounds of methamphetamine. (A68).

After hearing arguments from the Parties, the District Court ordered simultaneous post-hearing briefing. (A104-05). In his post-hearing briefing, Mr. Moss asserted that the Government failed to meet its burden of proof that the applicable base offense level was 36. (A108-17; A141-52). The Government asserted that the evidence supported a base offense level of at least 36, but could be as high as 38. (A118-37).

Following post-hearing briefing, the District Court issued a memorandum regarding the applicable drug weight and purity level. (A20-21). The District Court

held that Mr. Moss and Mr. Santiago purchased a total of 15 pounds of methamphetamine from a source in Reading Pennsylvania, on October 27-28, 2021 and November 11, 2021, and that the applicable purity level for the methamphetamine was 62%. (A12-14). The District Court did not address the Government's argument regarding the methamphetamine recovered from Mr. Pankins' residence. (A12).

On August 29, 2023, the United States Probation Office issued its draft of Mr. Moss' presentence report. (A21). In response, Mr. Moss raised a series of objections which included objections to enhancements for obstruction of justice,[10] possession of a deadly weapon,[11] and role in the offense.[12] Thereafter, the Government and US Probation filed their responses to the objections.[13]

Mr. Moss' sentencing hearing was held on November 2, 2023. The District Court began the hearing by ruling on Mr. Moss' objections to the presentence report. The District Court overruled Mr. Moss' objections. (A205-18; A218-20; A291-92).

The District Court also heard testimony and argument regarding the Government's request for a 2 point offense level enhancement for obstruction of justice relating to Mr. Moss' attempt to have an individual record the evidentiary

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[10] PSR at 47-49.
[11] PSR at 54-55.
[12] PSR at 56-58.
[13] PSR at 49-50, 55-56, 58-60.

hearing. (A223). In support of the enhancement, the Government called Jesus Alfaro to testify in relation to letters he allegedly received through the prison facility's toilet system. (A226-37). Although there was no proof that Mr. Alfaro actually received the letters that he claimed he received because he destroyed them and there was no way for Mr. Moss to send these letters to Mr. Alfaro due to being housed on a different side of the prison facility, the Government argued that it was Mr. Moss who sent these letters to Mr. Alfaro in an attempt to persuade him to not testify against Mr. Moss. (A197; A234-37; A243-45; A248-49). The Government also presented a series of communications between Mr. Moss and other individuals which detailed Mr. Moss' attempt to recruit someone to record the evidentiary hearing. (A250-72).

To rebut the Government's argument, Mr. Moss presented a series of communications which Mr. Moss asserted showed that his intent was not to intimidate, but to prove that he was not a cooperator. (A276-87). Ultimately, the District Court rejected Mr. Moss' argument and overruled his objection to the obstruction of justice enhancement. (A289-91).

After hearing arguments from the Parties regarding the appropriate sentence and considering the 3553(a) factors, the District Court sentenced Mr. Moss to 384 months of incarceration, followed by 60 months of supervised release, and a $100.00 special assessment. (A295-328).

SUMMARY OF THE ARGUMENT

The District Court erred when it found that Mr. Moss purchased 10 pounds of methamphetamine on October 27-28, 2021 and 5 pounds of methamphetamine on November 11, 2021. In doing so, the District Court erroneously discounted critical evidence that directly refuted the conclusion that Mr. Moss purchased 10 pounds of methamphetamine on October 27-28, 2021 and that Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021. Additionally, the District Court erred when it relieved the Government of its burden of proof by artificially assigning a purity of level of 62% despite the Government's failure to present evidence regarding the purity level of the methamphetamine purchased from Reading, Pennsylvania.

The District Court erred when it overruled Mr. Moss' objection to the Government's request for a 2 point offense level enhancement for obstruction of justice. In doing so, the District Court did not give proper weight to evidence presented by Mr. Moss that demonstrated an intent to prove that Mr. Moss was not a cooperator as alleged by the co-conspirator and another individual, rather than an intent to intimidate.

ARGUMENT

I. The record does not support the District Court's finding that Mr. Moss purchased 15 pounds of methamphetamine and the assignment of an artificial 62% purity level to untested methamphetamine runs afoul of Mr. Moss' due process rights.

A. Standard of Review.

This Court reviews a sentencing court's findings of fact to determine whether the findings were clearly erroneous.[14] Findings that involve mixed questions of law and fact are subject "to a more demanding scrutiny 'approaching de novo review as the issue moves from one of strictly fact to one of strictly law.'"[15] "When the essential facts are not in dispute, [this Court's] review of the district court's interpretation of the Guidelines . . . is plenary."[16]

B. Argument.

As Mr. Moss did not stipulate to the base offense level as part of his plea agreement, the Government was required to prove by a preponderance of the evidence the weight and purity level of the methamphetamine that Mr. Moss conspired to distribute.[17] Although the Government presented a lot of evidence during the evidentiary hearing, the evidence presented did not support a conclusion that Mr.

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[14] *Miele*, 989 F.2d at 663.

[15] *Bogusz*, 43 F.3d at 85 (quoting *Belleteire*, 971 F.2d at 964).

[16] *Id*. (citing *Rosen*, 896 F.2d at 790-91).

[17] *United States v. Titus*, 78 F.4th 595, 600 (3d Cir. 2023) (citing *United States v. Douglas*, 885 F.3d 145, 150 (3d Cir. 2018)).

Moss purchased 15 pounds of methamphetamine with a purity of 62%. Thus, the District Court erred when it found that the Government had met its burden of proof and that Mr. Moss purchased 15 pounds of methamphetamine and that said methamphetamine had a purity level of 62%. (A12-14).

1. Applicable Law

"Appellate review [of a defendant's sentence] is limited to determining whether the sentence is reasonable."[18] When reviewing a sentence for reasonableness, this Court must "ensure that the district court committed no 'significant procedural error,' such as failing to calculate (or improperly calculating) the Guidelines ra[n]ge, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence."[19] A sentence is procedurally reasonable if the District Court gave "meaningful consideration of the relevant statutory factors and exercise[d] . . . independent judgment."[20]

"[I]f the district court's procedures are sound, we proceed to examine the

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[18] *United States v. Friedman*, 658 F.3d 342, 360 (3d Cir. 2011) (citing *United States v. Merced*, 603 F.3d 203, 213 (3d Cir. 2010)).

[19] *Id.* (citing *Merced*, 603 F.3d at 214).

[20] *Id.* (quoting *United States v. Grier*, 475 F.3d 556, 571-72 (3d Cir. 2007)) (internal quotations omitted).

substantive reasonableness of the sentence."[21] And this Court "will affirm a procedurally sound sentence as substantively reasonable 'unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.'"[22]

Although "[d]ecisions made in sentencing do not as deeply implicate a defendant's rights as do decisions made regarding guilt or innocence",[23] "[d]ue process does guarantee a convicted criminal defendant the right not to have his sentence based upon 'materially false' information."[24] As such, the Federal Rules of Criminal Procedure require sentencing courts "to hold a hearing to determine disputed issues of fact included in the presentence report if it wishes to rely upon these facts in sentencing."[25] It has been long recognized that the preponderance of the evidence burden of proof standard for disputed facts presented during a sentencing hearing satisf[ies] due process.[26] "Thus, when the Government attempts to upwardly adjust the sentence" or in this case, attempts to establish the applicable

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[21] *Id*.

[22] *Id*. (quoting *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009)).

[23] *United States v. McDowell*, 888 F.2d 285, 290 (3d Cir. 1989).

[24] *Id*. (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Cifuentes*, 863 F.2d 1149, 1153 (3d Cir. 1988)).

[25] *Id*. (citing Fed. R. Crim. P. 32(c)(3)(D)).

[26] *McDowell*, 888 F.2d at 291.

base offense level, "it must bear the burden of persuasion."[27]

2. The record does not support the conclusion that Mr. Moss purchased 10 pounds of methamphetamine on October 27th, 2021 and/or October 28th, 2021.

Consistent with the Government's sentencing position,[28] the District Court found that Mr. Moss and his co-conspirator purchased 10 pounds of methamphetamine during trips to Reading, Pennsylvania on October 27 and October 28, 2021. (A12-13). In support of this conclusion, the District Court referenced six events/factors:

> (1) Moss and Santiago's October 21, 2021 recorded call in which they discussed the possibility of buying 20 pounds of methamphetamine . . . (2) Moss and Santiago's October 27, 2021 recorded call in which they discussed buying five or 10 pounds of methamphetamine . . . (3) Moss and Santiago's trips to Reading on October 27 and 28 . . . (4) Moss's series of text messages sent on the way back from Reading, broadcasting that he had "ice" . . . for sale . . . Moss and Rodriguez's November 3, 2021 recorded conversation in which Moss stated that "Reading Pa" is "where the ice is"and that he "just went up there" and "bought 10 pounds of ice" . . . and (6) the totality of the evidence . . . which shows generally that Moss and Santiago were drug dealers who conspired to distribute various drugs, including methamphetamine.

(A13). However, as described below, none of the above noted events/factors prove by a preponderance of the evidence that Mr. Moss purchased 10 pounds of methamphetamine on October 27th or October 28th of 2021.

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[27] *Id*.

[28] A123-25; A128-33.

As Mr. Moss was not physically observed in Reading, Pennsylvania nor stopped by law enforcement at any point on October 27th, 2021 or October 28th, 2021 after traveling to Reading, Pennsylvania, law enforcement did not seize, field test, preliminarily weigh, or have chemically analyzed any controlled substances allegedly purchased on October 27th or October 28th. (A65). As such, the only evidence of what was purchased on those dates was found in Mr. Moss' cellular communications. The best evidence of what was purchased on these dates comes from a recorded phone call between Mr. Moss and Mr. Santiago on the morning of October 27th. (A68). Specifically, during this phone call, Mr. Santiago informed Mr. Moss that "we only gonna get 5 because I ain't trynna get the whole 10, for real." (A68). Upon being questioned about this phone call, Officer Riccoban interpreted this call as meaning that Mr. Moss and Mr. Santiago were only going to purchase five pounds of methamphetamine,[29] as opposed to the 10 pounds that the Government argued for and which the District agreed. (A13; A124-25; A128). As this communication clearly demonstrates that Mr. Moss and Mr. Santiago only planned to purchase 5 pounds only a few hours before they departed for Reading, Pennsylvania, the fact that the two individuals discussed purchasing 20 pounds six days before is meaningless.

Similar reasoning also applies to Mr. Moss' phone call with Mr. Rodriguez.

[29] A68.

A review of the phone call between Mr. Moss and Mr. Rodriguez shows that during this call Mr. Moss was acting as a salesman trying to convince Mr. Rodriguez to engage in the sale of methamphetamine.[30] During this call, Mr. Moss specifically informed Mr. Rodriguez that there was no way he could lose, that selling methamphetamine was "where the bread [was] at", and that selling methamphetamine was how Mr. Moss was "staying a float."[31] As such, it is logical to conclude that what Mr. Moss reported to Mr. Rodriguez was embellished. Additionally, the phone call with Mr. Rodriguez must be considered together with Mr. Moss' phone call with Mr. Santiago the morning of October 27th during which they discussed how they were only going to purchase 5 pounds of methamphetamine, not 10 pounds.[32] In light of these facts, the District Court should have given more weight to the phone call between Mr. Moss and Mr. Santiago rather than the phone call with Mr. Rodriguez.

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[30] *See* the Government's December 21, 2022, Evidentiary Hearing Exhibit 6F at 11 ("my boys all down there hustling right now.") (hereinafter referenced as "Government's Exhibit _ at _"); *Id*. ("But, one of them is like a millionaire, though, bro."); *Id*. ("I swear to you [U/I] it's like, a dope flip bro, you ain't gonna lose, I swear you not, ain't no . . . way you can lose bro. . . ."); *Id*. at 12 (" I promise you bro, that's where the bread is at."); *Id*. ("That's how I be staying a float. . . ."); *Id*. ("Times like this, the ice money be coming through bro, I am telling you, that shit save me every time.").

[31] *Id*. at 11, 12.

[32] A68; *see also* Government's Exhibit 6F at 3.

Turning to the remaining events/factors which the District Court referenced in support of its finding. Although it is correct that Mr. Moss "broadcast[ed] that he had 'ice' . . . for sale" on the way back from Reading, this fact does not prove that Mr. Moss purchased 10 pounds of methamphetamine as his advertisement was only for the sale of ounces, not pounds.[33]

As Mr. Moss and Mr. Santiago clearly set out a plan to only purchase 5 pounds of methamphetamine on the morning of October 27th, it is apparent that only 5 pounds of methamphetamine were purchased on October 27th and October 28th. Thus, the District Court erred when it held that the Government had proven by a preponderance of the evidence that Mr. Moss purchased 10 pounds of methamphetamine, rather than 5 pounds, on October 27-28, 2021.

3. The record does not support the conclusion that Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021.

Also consistent with the Government's sentencing position,[34] the District Court found that Mr. Moss and his co-conspirator purchased 5 pounds of methamphetamine during a trip to Reading, Pennsylvania on November 11, 2021. (A13-14). In support of this conclusion, the District Court referenced three events/factors:

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[33] Government's Exhibit 6F at 7-9.
[34] A125; A129-33.

> (1) the evidence that Moss, Santiago, and Pankins traveled to Reading on that day . . . (2) Moss and Santiago's November 12, 2021 recorded call during which Santiago confirmed that he and Moss had a total of five "pound traps" lined up to sell . . . and (3) the totality of the evidence . . . which shows generally that Moss and Santiago were drug dealers who conspired to distribute various drugs, including methamphetamine.

(A13-14). However, as described below, none of the above noted events/factors prove by a preponderance of the evidence that Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021.

Similar to the trips to Reading, Pennsylvania on October 27-28, 2021, Mr. Moss was not physically observed in Reading Pennsylvania on November 11, 2021 and was not stopped by law enforcement on his way back. (A65-66). As such, the Government did not present any forensic evidence which would have definitively proven the amount of methamphetamine that was purchased in Reading, Pennsylvania on November 11, 2021.

As there was no forensic evidence establishing the weight of methamphetamine purchased on November 11, 2021, the District Court again had to rely on Mr. Moss' cellular communications to establish a 5 pound purchase. (A13-14). However, a review of the noted November 12, 2021 phone call as well as another phone call that day between Mr. Moss and Mr. Santiago demonstrates that Mr. Moss did not purchase 5 pounds on methamphetamine on November 11, 2021.

As argued in his post-hearing responsive filing,[35] the fact that Mr. Moss and Mr. Santiago discussed "five one-pound drug sales" on November 12, 2021 does not prove that they had just purchased 5 pounds of methamphetamine on November 11, 2021. This becomes evident after considering other relevant portions of the phone call during which Mr. Santiago states that he is trying to "go up there" while also voicing concerns over the price that would need to be paid.[36] Mr. Moss asserts that this is not indicative of someone who recently made a large purchase of methamphetamine as it appears that Mr. Santiago is concerned about his ability to meet his customers demands. This is consistent with later parts of the phone call where Mr. Santiago describes that there are only a few ounces remaining at Ms. Chamberlain's residence.[37] This was also consistent with another phone call between Mr. Moss and Mr. Santiago also on November 12, 2021, during which they discuss how they only have 70 grams left.[38] In light of the above noted phone calls which detail how Mr. Moss and Mr. Santiago's methamphetamine supply was low, it is evident that Mr. Moss and Mr. Santiago did not purchase 5 pounds of methamphetamine on November 11, 2021 and therefore, the District Court erred

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[35] A111-12; A148-49.
[36] Government's Exhibit 6B at 16-18.
[37] *Id*. at 18.
[38] A100.

when it found that Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021.

4. The District Court unreasonably relieved the Government of its burden of proof when the District Court assigned the methamphetamine purchased from Reading, Pennsylvania an artificial purity level of 62%.

Although the District Court recognized that "[t]here is no direct or circumstantial evidence to establish by a preponderance that any of the methamphetamine seized by the government during its investigation came from the October 27-28 and November 11 purchases Moss and Santiago made in Reading," the District Court assigned an artificial purity level of 62% to the methamphetamine purchased on those dates because "[t]he purity level of methamphetamine purchased directly from Moss on" one occasion was 62%. (A14). The assignment of an artificial purity level to the un-seized methamphetamine purchased by Mr. Moss and Mr. Santiago on October 27-28 and November 11th runs afoul of Mr. Moss' due process rights.

Although "[d]ecisions made in sentencing do not as deeply implicate a defendant's rights as do decisions made regarding guilt or innocence",[39] "[d]ue process does guarantee a convicted criminal defendant the right not to have his

[39] *McDowell*, 888 F.2d at 290.

sentenced based upon 'materially false' information."[40] As such, "a sentencing court considering an adjustment of the offense level . . . need only base its determination on the preponderance of the evidence with which it is presented."[41] Thus, due process mandates that the Government prove by a preponderance of the evidence both the weight and the purity level attributable to Mr. Moss.[42]

However, the District Court essentially relieved the Government of its burden of proof by simply assigning a blanket purity level for the untested un-seized methamphetamine. (A14). This is despite the Government, through law enforcement, had the means to stop Mr. Moss upon his return to Delaware from Reading, Pennsylvania on October 27, 2021, October 28, 2021, and November 11, 2021 in order confirm their suspicions that Mr. Moss purchased methamphetamine on those dates. However, they did not. (A65). In light of the sheer lack of any evidence establishing the purity level of the methamphetamine purchased on October 27-28, 2021 and November 11, 2021, the District Court erred when it gave the benefit of the doubt to the Government and assigned an artificial purity level to the un-seized untested methamphetamine. Such a finding violates Mr. Moss' due process rights.[43]

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[40] *Id*. (citing *Townsend*, 334 U.S. at 741; *Cifuentes*, 863 F.2d at 1153).

[41] *Id*. at 291 (citing *United States v. Lee*, 818 F.2d 1052, 1056 (2d Cir. 1987)); *United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir. 1989); *United States v. Restrepo*, 832 F.2d 146, 150 (11th Cir. 1987)).

[42] *Id*.

[43] *Id*.

II. The District Court erred by overruling Mr. Moss' objection to the obstruction of justice enhancement as the record does not support the District Court's finding that Mr. Moss attempted to intimidate a witness.

A. Standard of Review.

This Court reviews a sentencing court's findings of fact to determine whether the findings were clearly erroneous.[44] Findings that involve mixed questions of law and fact are subject "to a more demanding scrutiny 'approaching de novo review as the issue moves from one of strictly fact to one of strictly law.'"[45] "When the essential facts are not in dispute, [this Court's] review of the district court's interpretation of the Guidelines . . . is plenary."[46]

B. Argument.

The District Court overruled Mr. Moss' objection to the Government's request for a 2 point offense level enhancement for obstruction of justice as the District Court found that Mr. Moss attempted to intimidate cooperator. (A289-91). In support of its holding, the District Court found that Mr. Moss "ma[king] arrangements for his girlfriend's friend, Sharee, to video record the proceedings" was "blatant intimidation" and that Mr. Moss' emails "provide[d] evidence that the defendant was prepared to do harm and certainly wanted to express to others that he would do harm

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[44] *Miele*, 989 F.2d at 663.
[45] *Bogusz*, 43 F.3d at 85 (quoting *Belleteire*, 971 F.2d at 964).
[46] *Id*. (citing *Rosen*, 896 F.2d at 790-91).

to somebody cooperating against him." (A289-91). The record does not support such a conclusion.

1. Applicable Law

As described above, this Court's review of Mr. Moss' sentence "is limited to determining whether the sentence is reasonable.[47] When doing so, this Court must "ensure that the district court committed no 'significant procedural error'"[48] and that the sentence given was substantively reasonable.[49]

Although "[d]ecisions made in sentencing do not as deeply implicate a defendant's rights as do decisions made regarding guilt or innocence",[50] "[d]ue process does guarantee a convicted criminal defendant the right not to have his sentence based upon 'materially false' information."[51] As such, the Federal Rules of Criminal Procedure require sentencing courts "to hold a hearing to determine disputed issues of fact included in the presentence report if it wishes to rely upon these facts in sentencing"[52] and disputed facts must proven by a preponderance of the evidence to satisfy due process.[53] "Thus, when the Government attempts to upwardly

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[47] *Friedman*, 658 F.3d at 360 (citing *Merced*, 603 F.3d at 213).
[48] *Id*. (citing *Merced*, 603 F.3d at 214).
[49] *Id*. (quoting *Tomko*, 562 F.3d at 568).
[50] *McDowell*, 888 F.2d at 290.
[51] *Id*. (citing *Townsend*, 334 U.S. at 741; *Cifuentes*, 863 F.2d at 1153).
[52] *Id*. (citing Fed. R. Crim. P. 32(c)(3)(D)).
[53] *McDowell*, 888 F.2d at 291.

adjust the sentence" or in this case, attempts to establish the applicable base offense level, "it must bear the burden of persuasion."[54]

2. The record does not support the conclusion that Mr. Moss obstructed justice when he attempted to recruit someone to record his sentencing proceedings.

Contrary to the District Court's findings, Mr. Moss' attempt to recruit others to record the proceedings was not meant to intimidate a cooperator, but rather an unwise attempt to clear his name of being labeled by his peers as a cooperator or a snitch. As argued during the sentencing hearing,[55] Mr. Moss' emails demonstrate this intent. During the sentencing hearing, Mr. Moss highlighted for the District Court, emails written on December 14, 2022, December 15, 2022, and January 5, 2023 which illustrated that Mr. Moss was being accused of being a cooperator by an individual named "Hove" and Mr. Moss was attempting to prove otherwise. (A279-86). In relation to the January 5, 2023 email, Mr. Moss noted that the very first sentence of the email read "Yo, what's up with Chunk telling people I'm police" which meant that Mr. Alfaro was accusing Mr. Moss of being "the police" or a cooperator. (A279-81).

Mr. Moss also referenced his December 14, 2022 email:

MR. BRESLIN: And I'm looking at the e-mail dated December 14, 2022

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[54] *Id*.
[55] A278-87.

> at 3:12 p.m. And the very first line, "Love you too. Yo, why the 'N word' Mexican Hove talking real heavy, talking about I ain't going to be out in a long time and his folks Chewy not telling."
>
> So there seems to be this ongoing beef between Mr. Moss and Mr. Hove, and whether it's Mr. Moss cooperating or whether it's Mr. Alfaro cooperating.
>
> THE COURT: Well, you'd agree that what's being said here is that – that Hove is saying that "Chewy not telling," meaning Hove is telling people that Chewy is not cooperating; is that right?
>
> MR. BRESLIN: I don't think it's necessarily 100 percent clear, because when you look at the e-mail we just talked about –
>
> THE COURT: But what do you think it is? What's your position?
>
> MR. BRESLIN: I think it's essentially both, Mr. Alfaro and Hove accusing Mr. Moss of being the cooperator.
>
> THE COURT: Well, it says literally, "Hove talking real heavy, talking about I" – the "I" there is Mr. Moss right?
>
> MR. BRESLIN: Correct.
>
> THE COURT: All right.
>
> – "talking real heavy about Mr. Moss ain't gonna be out in a long time." That doesn't seem to be consistent with saying Mr. Moss is cooperating. It seems the opposite. He's going to be spending a long time in jail – if you're spending a long time in jail, it's – and somebody's real heavy talking about that, that doesn't seem to be consistent with saying that that same person is talking about Mr. Moss cooperating.
>
> MR. BRESLIN: Well, the only thing I would add on, Your Honor, is after "long time and his folks Chewy not telling." So you've got to take that together.
>
> THE COURT: Right.
>
> MR. BRESLIN: And I interpret that as, that Hove, in addition to Mr. Alfaro, based on the January 5th, 2023 e-mail, that it's both of them accusing Mr. Moss of being the cooperator.

(A282-84).

Thereafter, Mr. Moss noted his December 15, 2022 email which read "[n]ot his peoples, it's just the one who had the wire and camera on, but the 'N word' Hove

talking – shit talking about I'm paranoid and that his folks solid over there" as evidence of "this beef between Mr. Moss and Hove and Mr. Alfaro, that it's Mr. Moss that's cooperating, and not Mr. Alfaro." (A285-86).

As argued during the sentencing hearing,[56] Mr. Moss submits that these above noted emails show that "Hove" and/or Mr. Alfaro were accusing Mr. Moss of being a cooperator and that Mr. Moss' attempt to recruit someone to film his sentencing proceedings was an effort to prove that he was not cooperating. This is consistent with a recorded phone call between Mr. Moss and another young woman during which Mr. Moss told this woman that he was not cooperating and that anyone could learn who a cooperator is by going to Pacer.com. (A286).

In light of the above, the record did not support the conclusion that Mr. Moss engaged in "blatant intimidation" as the emails clearly demonstrated Mr. Moss' unwise efforts to refute the accusation that he was a cooperator. (A278-87). As such, the District Court erred by overruling Mr. Moss' objection to the 2 point offense level enhancement for obstructing justice.

[56] A278-87.

CONCLUSION

WHEREFORE, Malik Moss respectfully requests that this Honorable Court overturn the District Court's judgment and remand this case to the District Court with instructions that the District Court grant Mr. Moss a new sentencing hearing.

Respectfully Submitted,
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Dated: May 28, 2024

No. 23-3059

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

MALIK MOSS,
Appellant.

On Appeal from the United States District Court
for the District of Delaware
Criminal Action No. 22-24 (Connolly, J.)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231.

STATEMENT OF THE ISSUES

1. Whether the District Court committed clear error at sentencing in finding that Moss was responsible for at least 15 pounds of methamphetamine that was at least 62% pure.

2. Whether the District Court committed clear error at sentencing in finding facts that triggered an obstruction-of-justice enhancement—namely, (i) that Moss sent a series of notes to a cooperating witness attempting to dissuade him from testifying, including a note that threatened the witness's family; and (ii) that Moss arranged to have two evidentiary hearings recorded for the purpose of exposing the witness as a cooperator.

STATEMENT OF THE CASE

I. Factual Background

A. The Investigation into Moss and His Co-Conspirators

Malik Moss was part of a conspiracy to sell methamphetamine and fentanyl in Delaware. R. 25 (hereinafter, PSR) ¶¶ 22–25.[1] Moss and his co-conspirators acquired their drugs in bulk quantities in Pennsylvania—the methamphetamine in Reading, and the fentanyl in Philadelphia. *Id.* ¶¶ 26–35.

The investigation into Moss began in the summer of 2021, when the Drug Enforcement Administration (DEA) used confidential sources to make three controlled purchases of methamphetamine from Moss. *Id.* ¶ 20. The first two purchases were for an ounce, each of which tested 95% pure. A41; SA52–53.[2] The third purchase was for two ounces, which tested 94% pure. A41; SA55.

Based in part on those controlled purchases, the DEA secured judicial approval to wiretap Moss's cell phone. PSR ¶ 19. The wiretap

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[1] Citations to "R." refer to entries on this Court's docket.

[2] Citations to "A" refer to the appendix filed along with Moss's brief. Citations to "SA" refer to the supplemental appendix filed along with the government's brief.

revealed that Moss had numerous co-conspirators. PSR ¶ 22. Jacob Santiago (a/k/a "Jake") partnered with Moss to sell both methamphetamine and fentanyl. *Id.* Gerardo Rodriguez (a/k/a "Snapper") partnered with Moss to sell fentanyl. *Id.* Christina Chamberlain (a/k/a "Bean"), Tyrell Pankins (a/k/a "Rell"), and an uncharged co-conspirator, RL, allowed Moss and Santiago to store drugs in their respective homes. *Id.* ¶ 23. And Jesus Alfaro (a/k/a "Chewy") bought substantial quantities of methamphetamine from Moss, which he resold on the street. *Id.* ¶ 22.

As explained in greater detail below, the wiretap also revealed that Moss and Santiago were acquiring their methamphetamine in Reading. *Id.* ¶¶ 26–27. Moss and Santiago discussed making bulk purchases from suppliers they described as the "n***s up top." A53–54; SA26. And phone-location data showed that, after those discussions, one or both men's phones would travel to Reading. A55–56, 58–59; SA66–75. Indeed, on one wiretapped call, Moss stated directly: "Reading . . . [is] where the ice is" ("ice" being a street name for methamphetamine). A48, 57; SA34.

While the wiretap was ongoing, the DEA also organized a fourth controlled purchase from Moss. A60. This purchase was for a half pound of methamphetamine, which tested 62% pure. A61; SA56.

Ultimately, the DEA took down the conspiracy in December 2021. The DEA searched the homes of Moss, Santiago, Chamberlain, Pankins, and RL. PSR ¶¶ 50–53, 56, 62–64. As relevant here, they found 1.6 grams of methamphetamine that tested 94% pure in Santiago's home. *Id.* ¶ 63; SA58. They found 296 grams of methamphetamine that tested 98% pure in RL's home. PSR ¶ 62; SA61. And they found 1,549.7 grams of methamphetamine that tested 86% pure in Pankins's home. PSR ¶ 52; SA57.

B. The Dispute Over Drug Quantity and Purity

Moss, Santiago, Rodriguez, and Alfaro were indicted for conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846. Dkt. 25.[3] All four defendants pleaded guilty. Dkt. 52, 58, 65, 74.[4]

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[3] Citations to "Dkt." refer to entries on the District Court's docket.

[4] Chamberlain and Pankins were charged separately. *See infra* p. 12. They also pleaded guilty. *See infra* p. 13.

The District Court held a post-plea evidentiary hearing to determine the quantity and purity of the methamphetamine that was attributable to Moss and Santiago for sentencing purposes. The hearing was originally scheduled for December 12, 2022. A24. But it was rescheduled for December 21, 2022, due to a chickenpox outbreak on Santiago's prison unit. A38.

At the hearing, two witnesses testified for the government—DEA Task Force Officer (TFO) Trevor Riccobon and DEA Special Agent (SA) Jerwon Bethel. A39, 82. Through those witnesses, the government introduced the following evidence (all of which is discussed in greater detail below):

- Numerous calls and text messages on which Moss and his co-conspirators discussed methamphetamine deals;
- Location data for Moss's and Santiago's cell phones showing multiple trips to Reading; and
- Lab reports showing the purity levels of the seven samples of methamphetamine seized in connection with the conspiracy (four from controlled purchases, and three from residential searches).

In post-hearing briefing, the government argued that the evidence established that Moss and Santiago were responsible for at least 15 pounds of methamphetamine—ten pounds they purchased from suppliers in Reading in late October 2021, and at least five pounds they purchased from the same suppliers in mid-November 2021. A123–25, 128–133. It was unclear whether any of the methamphetamine seized in connection with the conspiracy had come from the 15 pounds purchased in Reading. But the government argued that the lowest purity level associated with any of the seized methamphetamine—62%—should be used to estimate the purity of that 15 pounds. A126; 133–35.

The District Court issued a written order making factual findings on drug quantity and purity. A10. As to quantity, the Court found that "Moss and Santiago purchased in Reading 10 pounds of methamphetamine on or about October 27–28, 2021 and five pounds of methamphetamine on November 11, 2021," which made them responsible for 15 pounds total. A12–13. And as to purity, the Court found that the 15 pounds should be assigned a purity level of 62%, which was "the lowest known purity level of the methamphetamine associated with the entire conspiracy." A14. The Court characterized its use of that

conservative estimate as an exercise of "lenity." *Id.* At Moss's sentencing, the Court applied those findings on drug quantity and purity in setting the base offense level. A293–95; PSR ¶ 262.

C. The Dispute Over the Obstruction-of-Justice Enhancement

As noted, the evidentiary hearing on drug quantity and purity was originally scheduled for December 12, 2022. A24. The government and Moss came to court that day, but the hearing was rescheduled due to Santiago's absence. A26.

Before the December 12 hearing recessed, however, the government informed the District Court that co-defendant Alfaro had been slated to testify against Moss but was now reneging on his cooperation agreement with the government. A26–27. Alfaro's lawyer submitted a letter from her client, which claimed that he was breaching his cooperation agreement of his own free will, not because he had been threatened or pressured. A29–31.

After that discussion about Alfaro, Moss's girlfriend, Shannon Ruth, and her friend, Sharee Christian, arrived at the hearing. SA89–90. Unbeknownst to the government and the Court, Christian used her phone to record a portion of the hearing. *Id.* Christian also attended the

rescheduled hearing on December 21. PSR ¶ 75. She again tried to record the hearing, but this time, the U.S. Marshals spotted her, confiscated her phone, and informed the Court. *Id.*; A99.

Shortly thereafter, the government informed the Court by letter that it would be seeking an obstruction-of-justice enhancement against Moss. SA82–85. The letter stated that, in response to Christian's efforts to film the evidentiary hearing, the government had reviewed Moss's prison communications. SA84–86. That review revealed several calls and emails (discussed in greater detail below) that, in the government's view, showed (i) that Moss had arranged to have Christian record both the original and rescheduled evidentiary hearings, and (ii) that Moss did so for the purpose of exposing Alfaro as a cooperator. *Id.*

The government's letter to the Court also addressed a second ground for an obstruction enhancement. SA83–84. The government had learned that, while Alfaro and Moss were both detained at FDC Philadelphia, Alfaro had received a series of handwritten notes passed through the prison's plumbing system (which inmates regularly use to pass unsanctioned messages). *Id.* The first two notes said something to the effect of "I can't believe you're doing this to me." A234. The third and

final note said, in essence, "I know where your mother and son live. Don't have me do this. Don't testify." *Id.* (cleaned up). Although the notes were unsigned, Alfaro believed they came from Moss because Moss was the only person Alfaro was cooperating against, and also the only person at FDC Philadelphia who knew about Alfaro's close relationships with his mother and son. A235, 280, 319. Fearing for his family's safety, Alfaro pulled out of his cooperation agreement and lied about not being threatened. A236. The government's letter argued that for both reasons—Moss's efforts to record the evidentiary hearings, and his notes to Alfaro—he should receive an obstruction enhancement. SA83–86.

At sentencing, the District Court marched methodically though the prison communications that, in the government's view, revealed Moss's plan to have the evidentiary hearings recorded. A249–291. The Court also heard testimony from Alfaro about the notes he had received. A226–247. In the end, the Court concluded that either ground was independently sufficient for an obstruction enhancement. A290–93. The Court found "overwhelming evidence" that Moss "made arrangements for his girlfriend's friend, Sharee, to video record the proceedings" for the purpose of "exposing publicly" Alfaro as a cooperator. A289–90 (cleaned

up). The Court also found that, standing alone, Alfaro's testimony about the notes he received was credible and "would constitute evidence by a preponderance of obstruction." A292–93. The Court therefore added two points to Moss's base offense level. A293; PSR ¶ 88–89.

II. Procedural History

The single-count indictment against Moss, Santiago, Rodriguez, and Alfaro was returned on March 10, 2022. Dkt. 25. Moss pleaded guilty on May 24, 2022. Dkt. 52. Moss was sentenced on November 2, 2023. Dkt. 161. The District Court imposed a within-Guidelines sentence of 384 months' imprisonment. *Id.*; A327. This appeal followed.

STATEMENT OF RELATED CASES

Moss was indicted alongside co-defendants Jacob Santiago, Gerardo Rodriguez, and Jesus Alfaro. Dkt. 25. The indictment charged each defendant with one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846. *Id.* Co-conspirators Christina Chamberlain and Tyrell Pankins were charged by separate criminal informations. Chamberlain was charged with one count of using a communication facility in furtherance of a drug-trafficking offense, in violation of 21 U.S.C. § 843(b). *See United States v. Christina Chamberlain*, 22-cr-89 (D. Del.), Dkt. 34. Pankins was charged with one count of possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and one count of possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). *United States v. Tyrell Pankins*, No. 22-cr-42 (D. Del.), Dkt. 22.

Santiago, Rodriguez, and Alfaro all pleaded guilty to the conspiracy charge. Dkt. 58, 74, 65. Santiago was sentenced to 188 months' imprisonment. Dkt. 178. Rodriguez was sentenced to 63 months' imprisonment. Dkt. 135. And Alfaro was sentenced to 44 months'

imprisonment. Dkt. 65. Chamberlain pleaded guilty to the single charge in her information. 22-cr-89, Dkt. 37. She was sentenced to time served. 22-cr-89, Dkt. 64. Pankins pleaded guilty to both charges in his information. 22-cr-42, Dkt. 29. He was sentenced to 110 months' imprisonment. Dkt. 61.

None of the other defendants have filed an appeal or post-conviction motion. The government is not aware of any other related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, state or federal.

SUMMARY OF ARGUMENT

1. The District Court did not clearly err in finding that Moss was responsible for at least 15 pounds of methamphetamine that was at least 62% pure. After trips to Reading in late October, Moss stated directly to a co-conspirator: "we bought 10 pounds of ice." And after another trip to Reading in mid-November, Moss and Santiago discussed five one-pound methamphetamine deals they had lined up. Those statements were sufficient proof that Moss and Santiago conspired to distribute at least 15 pounds of methamphetamine. And the District Court properly estimated the purity of the 15 pounds by using the lowest purity level of any of the seven samples of methamphetamine seized in connection with the conspiracy. That approach for estimating drug purity has been blessed by several other courts of appeal—and disapproved by none.

2. The District Court did not clearly err in finding facts that triggered an obstruction-of-justice enhancement. A cooperating witness testified that Moss sent him notes trying to dissuade him from testifying, including a note that threatened the witness's family. And calls and emails Moss sent from prison show that he arranged to have evidentiary hearings recorded for the purpose of exposing the witness as a cooperator.

Either of those actions independently warranted an obstruction-of-justice enhancement.

ARGUMENT

I. The factual findings underlying Moss's base offense level are not clearly erroneous.

Standard of Review

This Court "exercises plenary review over a district court's interpretation" of the Sentencing Guidelines, but it reviews "factual findings relevant to the Guidelines for clear error." *United States v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007) (en banc) (cleaned up).

Argument

The District Court determined Moss's base offense level by applying U.S.S.G. § 2D1.1(a). Moss does not take issue with the District Court's legal interpretation of that guideline. Nor does he take issue with the District Court's factual findings (i) that, on two occasions in late October and mid-November 2021, he and Santiago purchased methamphetamine from suppliers in Reading, and (ii) that the full amount of methamphetamine purchased on those occasions is attributable to Moss for sentencing purposes, *see* U.S.S.G. § 1B1.3(a)(1)(B).

Instead, Moss objects only to two narrower factual findings: (i) that he and Santiago bought at least 15 pounds of methamphetamine across the purchases in Reading; and (ii) that those 15 pounds were at least 62%

pure. Both drug quantity and drug purity must be proven by a preponderance at sentencing. *Grier*, 475 F.3d at 568. And both findings are reviewed for clear error. *United States v. Freeman*, 763 F.3d 322, 337 (3d Cir. 2014) (drug quantity); *United States v. Rodriguez*, 666 F.3d 944, 947 (5th Cir. 2012) (drug purity).

A. The drug-quantity finding is not clearly erroneous.

The finding that Moss is responsible for at least 15 pounds of methamphetamine is not clearly erroneous. The government proved by a preponderance (i) that Moss and Santiago bought ten pounds of methamphetamine from suppliers in Reading in late October 2021, and (ii) that they bought at least another five pounds from the same suppliers in mid-November 2021.

1. Moss and Santiago bought ten pounds of methamphetamine in late October.

Start with the ten-pound purchase. On October 27, law enforcement saw Santiago pick up Moss from his home in Newark, Delaware. A55. The two then headed north—past Wilmington, heading toward Pennsylvania—before law enforcement lost sight of them. *Id.* Phone-location data reveals that Moss's phone continued north to

Reading. *Id.*; SA67. And the next day, October 28, both men's phones were in Reading. A55–56; SA69, 73.

Moss's own statements establish what he and Santiago did during those trips to Reading. Just days later, Moss spoke to another of his co-conspirators, Rodriguez, on the wiretapped line. A56–57; SA34–35. Moss said that Reading is "where the ice is." A57; SA34. He said that he "just went up there" to a house equipped with a "steel door" and a "camera." A57; SA34. And he stated directly: "we bought 10 pounds of ice." A57; SA35. TFO Riccobon, an experienced drug investigator, testified that "ice" is street slang for crystal methamphetamine, A48, and that the house Moss described has "every indication of . . . [being] a stash location," given the "steel door" and the "obvious[] countersurveillance with cameras," A57. In short, by Moss's own telling, he traveled to a stash house in Reading in late October and bought ten pounds of methamphetamine there.

That evidence of a ten-pound purchase becomes even stronger when one views it in the context of other statements made by Moss and Santiago. On October 21, just a week before the trips to Reading, the two men discussed making a bulk purchase of methamphetamine. A53;

SA11. Santiago told Moss they could buy 20 "plates" (or pounds) for $2,200 per pound (or $44,000 total). A53; SA11. Moss balked at the total price, and urged Santiago to ask whether they could get ten pounds for the same price of $2,200 per pound (or $22,000 total). A53; SA11. Santiago said he would ask the suppliers whether such a deal was available. A53; SA11.

On the morning of October 27, when Moss and Santiago made a trip to Reading, Santiago told Moss that the "n***s up top" would "be ready in a little bit." A53–54; SA26. Moss asked how much money he should bring, and Santiago responded that the suppliers had offered ten pounds for $2,400 per pound—although Santiago said he wanted to buy only five pounds. A54; SA27.

On another call minutes later, Santiago relayed the conversation he had just had with a middleman connected to the suppliers. A54–55; SA78–79. According to Santiago, he had told the middleman that, this time, he could buy only five pounds at $2,400 per pound, but that, next time, he would buy "the 10 by myself." A54–55; SA79. TFO Riccobon understood that to mean that, for this purchase, Santiago and Moss would buy five pounds each (for a total of ten), whereas, next time,

Santiago would buy ten pounds individually, regardless of how much Moss bought. A54–55. Santiago told Moss that the middleman was contacting the suppliers and would be back in touch soon. A55; SA79. Within the hour, Santiago and Moss were in the car heading toward Reading. SA67, 77.

Finally, on October 28, after Moss and Santiago had returned from Reading, Moss sent text messages to numerous contacts broadcasting that he had "ice" or "ice cream" for sale (*e.g.*, "Hey if u no anybody who mess wit ice I got Oz for 450 for u"). A56; SA31–33. To reiterate, TFO Riccobon testified that both "ice" and "ice cream" are street slang for crystal methamphetamine. A56. TFO Riccobon also testified that Moss did not generally send text messages announcing that he had methamphetamine for sale, *id.*—which suggests that, after the trips to Reading, Moss had more methamphetamine on hand than usual.

Taken together, the evidence set forth above proves by more than a preponderance that Moss and Santiago bought ten pounds of methamphetamine in late October 2021. Thus, the District Court's finding of a ten-pound purchase would survive even de novo review. But of course, that finding is reviewed only for clear error. *See Freeman*, 763

F.3d at 337. The clear-error standard is a "deferential" one that is satisfied so long as the factual finding is "'plausible in light of the record viewed in its entirety.'" *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)). The District Court's finding of a ten-pound purchase clears that low bar.

2. Moss's arguments do not show that the District Court clearly erred in finding a ten-pound purchase.

At bottom, Moss's argument with respect to the ten-pound purchase is that the District Court should have weighed one of the calls between Moss and Santiago on the morning of October 27 (in which Santiago stated that he wanted to buy only five pounds) more heavily than the call between Moss and Rodriguez on November 3 (in which Moss directly stated, "we bought 10 pounds of ice"). *See* Appellant's Br. 21 ("[T]he District Court should have given more weight to the phone call between Mr. Moss and Mr. Santiago rather than the phone call with Mr. Rodriguez.").

As an initial matter, it is not enough for Moss to convince this Court that it would have "weighed the evidence differently" if it were standing in the District Court's shoes. *Anderson*, 470 U.S. at 574. That is because,

"where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (cleaned up). Here, the single best evidence of how much methamphetamine Moss and Santiago purchased is Moss's direct statement about how much they purchased: "we bought 10 pounds of ice." A57; SA35. Given that statement, it is certainly a "plausible" interpretation of the evidence that Moss is responsible for at least ten pounds of methamphetamine. *Anderson*, 470 U.S. at 573–74.

If anything, it is Moss's interpretation of the two relevant calls that is implausible. Moss claims that, when he told Rodriguez they had "bought 10 pounds of ice," he was exaggerating in an attempt to persuade Rodriguez (who then only sold fentanyl with Moss) to also join him in selling methamphetamine. Appellant's Br. 20–21. But Moss offers no explanation for why ten pounds of methamphetamine would persuade Rodriguez but the still substantial quantity of five pounds would not.

As for Santiago's statement that "we only gonna get 5, because I ain't trynna get the whole 10," *see* A54; SA27, Moss ignores the second call he and Santiago had just minutes later. In that call, Santiago reported telling the middleman that he was only going to "grab 5" this

time, but that next time, he would "grab the 10 *by myself*." A54–55; SA79 (emphasis added). That suggests that that the late-October deal was for ten pounds total—with Moss and Santiago each supplying the funds for five pounds. Indeed, that is how TFO Riccobon interpreted the call. A54 ("But he's ultimately saying that they're going to go half . . . That's indicating that he's going half with five and then Mr. Moss is . . . getting the other five. Because then he indicates the next time he comes up, 'I'm just going to grab the ten myself.' . . . Mr. Santiago's just going to buy that himself next time."). And TFO Riccobon's interpretation is particularly reasonable in light of Moss's later statement that they "bought 10 pounds" in Reading. A57; SA35.

3. Because the District Court did not clearly err in finding a ten-pound purchase, any error in finding a five-pound purchase would be harmless.

If this Court agrees that the factual finding with respect to the ten-pound purchase is not clearly erroneous, then the Court need not consider the second, five-pound purchase. "If a district court makes an error in its drug quantity determination that does not affect the base offense level or Guidelines range, the error is harmless." *See United States v. Diaz*, 951 F.3d 148, 159 (3d Cir. 2020). That is the case here: at the relevant purity

level (62%), ten pounds of methamphetamine and 15 pounds of methamphetamine result in the same base offense level (36).[5] Thus, any error with respect to the five-pound purchase would be harmless.

4. Moss and Santiago bought another five pounds of methamphetamine in mid-November.

But there was no error—much less clear error—with respect to the five-pound purchase. On the afternoon of November 11, Moss texted a friend, "I'm trying to grab this ice ima hit u back." A58; SA42. Phone-location data shows that, shortly thereafter, Moss's and Santiago's phones moved north into Pennsylvania. A58; SA71, 75. While the two men's phones were around Glenmoore, Moss sent another co-conspirator, Pankins, a text message identifying a street address in Reading. A58; SA43. Moss's phone then continued north to Reading. A58; SA71. Phone-location data puts Moss's phone within meters of the address he had texted to Pankins. A58. Later that evening, Moss's phone returned

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[5] Ten pounds (or approximately 4.5 kilograms) of a mixture that is 62% methamphetamine equals approximately 2.8 kilograms of actual methamphetamine. Fifteen pounds (or approximately 6.8 kilograms) of a mixture that is 62% methamphetamine equals approximately 4.2 kilograms of actual methamphetamine. Any weight between 1.5 kilograms and 4.5 kilograms of actual methamphetamine results in a base offense level of 36. U.S.S.G. § 2D1.1(c)(2).

to Delaware, first stopping near Pankins's home, and then continuing on to the home of another co-conspirator, RL. A49, 59; SA71. As noted, Moss and Santiago stored methamphetamine at both Pankins's and RL's homes at various points during the conspiracy. A49, 60.

Here too, Moss's and Santiago's statements reveal the purpose of their trip to Reading. The next morning, Santiago called Moss to discuss the "pound traps" they had lined up. A59; SA16. As TFO Riccobon explained, Moss and Santiago used the term "trap" to refer to a sale of methamphetamine. A52, 59. Santiago listed out five "pound traps" he and Moss had between them: "I got three (3) plus that, another one (1) and then that's four (4) and then you got one (1), that's five (5)." A59; SA16. Thus, after the trip to Reading, Moss and Santiago had enough methamphetamine to cover at least five one-pound drug deals—that is, at least five pounds.

And that five pounds must have come from Reading, as opposed to being methamphetamine that Moss and Santiago had on hand before their trip on November 11. On another call the morning after they got back, Moss and Santiago discussed the methamphetamine they had before they re-upped in Reading. A139–40. Santiago thought they had

about 170 grams total. A140. But he could find only "70 something grams" in one bag. *Id.* And he was unsure where they had stashed another "quarter." *Id.* Moss reminded Santiago that they had, in fact, already sold that "quarter." *Id.* Thus, before Moss's and Santiago's trip to Reading, the two seem to have had approximately 70 grams of methamphetamine. That is nowhere close to the more than 2,250 grams they needed to make the five one-pound drug deals they had lined up. That helps confirm that Moss and Santiago bought at least five pounds in Reading on November 11.

5. Moss's arguments do not show that the District Court clearly erred in finding a five-pound purchase.

Moss offers a different interpretation of the two relevant calls from November 12. With respect to the "five pound traps" call, Moss suggests that he and Santiago were discussing drugs they planned to acquire in Reading moving forward, rather than drugs they had already acquired there. Appellant's Br. 24. That does not square with what Moss and Santiago actually said. The two discussed the mere possibility of going back to Reading. SA16. ("*If* we go up there . . ."). That would make little sense if they definitively needed drugs to complete deals they had already

agreed to. It is much more consistent with them having the drugs they currently need, and considering the possibility of buying even more from the Reading suppliers in the future.

Similarly, Moss says that, when he and Santiago discussed 70 grams of methamphetamine, they were discussing the quantity they possessed even after their trip to Reading on November 11. Appellant's Br. 24. Again, though, that makes little sense in light of the fact that Moss and Santiago had committed to sell five pounds (or more than 2,250 grams). And Moss's explanation is further belied by another call that he and Santiago had later that day. SA24. In that call, Santiago stated that he was about to complete a deal for a "plate" (or pound) with a buyer named "Jeff." *Id.*; *see* A52 (members of the conspiracy used "plate" to mean pound). That imminent deal for a pound—which is approximately 450 grams—would not be possible if the pair had only 70 grams even after their trip to Reading on November 11.

* * *

In sum, the government proved by a preponderance that Moss was responsible for at least 15 pounds of methamphetamine—ten pounds purchased in late October, and at least five pounds purchased in mid-

November. At an absolute minimum, the government's proof made it "plausible" that Moss was responsible for that amount of methamphetamine. *Anderson*, 470 U.S. at 573–74. Thus, the District Court's finding on drug quantity was not clearly erroneous.[6]

B. The drug-purity finding is not clearly erroneous.

The finding that the 15 pounds of methamphetamine purchased in Reading was at least 62% pure—the lowest purity level of any methamphetamine seized in connection with the conspiracy—also is not clearly erroneous.

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[6] The government argued below that, even if the District Court could not determine the quantity of methamphetamine that Moss and Santiago purchased in Reading, the Court could still set a base offense level of 36 by finding that Moss was responsible for the 1,549.7 grams of 86% pure methamphetamine seized from Pankins's home and the 296 grams of 98% pure methamphetamine seized from RL's home. *See* A119–23; SA57 (lab report for Pankins's home), SA61 (lab report for RL's home). Because the District Court found that it could determine the quantity of methamphetamine purchased in Reading, the District Court expressly declined to find whether Moss was responsible for the methamphetamine in Pankins's and RL's homes. A12. If this Court holds that the drug-quantity finding based on the Reading purchases is clearly erroneous, then the Court should remand so that the District Court can make factual findings on whether the methamphetamine from Pankins's and RL's homes can be properly attributed to Moss.

1. A sentencing court can use the purity of seized drugs to estimate the purity of unseized drugs, especially where additional evidence supports doing so.

In determining drug quantity and purity, "some degree of estimation must be permitted." *United States v. Collado*, 975 F.2d 985, 998 (3d Cir. 1992). That is because "the government usually cannot seize and measure all the drugs that flow through a large drug distribution conspiracy." *Id.*

Accordingly, laboratory testing of controlled substances "cannot [be] . . . required in every case." *See United States v. Williams*, 19 F.4th 374, 380 (4th Cir. 2021); *see also United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008) ("Narcotics need not be seized or tested to be held against a defendant at sentencing"). A district court must instead "have latitude to consider whatever reliable evidence is available to make its . . . purity determination." *Williams*, 19 F.4th at 380.

When the government seizes some of the drugs involved in a conspiracy, the purity of the seized drugs can be used to estimate the purity of any unseized drugs. *See United States v. Lopes-Montes*, 165 F.3d 730, 732 (9th Cir. 1999) ("We agree with our sister circuits that using the purity of drugs actually seized to estimate the purity of the total

quantity of drugs . . . is an appropriate method of establishing the base offense level."); *United States v. Newton*, 31 F.3d 611, 614 (8th Cir. 1994) (similar). When the seized drugs are of varying levels of purity, a district court should "err on the side of caution and select the most conservative estimate." *United States v. Johnson*, 94 F.4th 661, 664 (7th Cir. 2024) (cleaned up). In *Johnson*, for example, one seized sample of methamphetamine was 83% pure, and a second seized sample was 39% pure. *Id.* The Seventh Circuit held that the lower, 39% figure should be used to estimate the purity of the unseized drugs at issue. *Id.*

In estimating drug purity, district courts can also consider the way that dealers and users have described the product at issue. At higher purity levels, methamphetamine has a crystalline appearance, which is why dealers and users refer to it using terms like "ice," "glass," and "crystal." So if dealers or users have used those terms (or similar descriptors) in discussing a particular product, that is evidence that the product was relatively pure. *See, e.g.*, *United States v. Harris*, 36 F.4th 827, 831 (8th Cir. 2022) (the fact that "dealers and users in this case . . . referred to the drugs being sold as 'ice'" was evidence that helped establish the drug was "ice" for purposes of the Guidelines, that is,

methamphetamine that was at least 80% pure); *United States v. Castaneda*, 906 F.3d 691, 694 (7th Cir. 2018) (testimony that the methamphetamine at issue looked like "glass shards" helped establish that the drug was "ice" for purposes of the Guidelines).

2. The District Court properly assigned the unseized methamphetamine a purity level of 62%.

Here, the District Court did not clearly err by assigning the unseized methamphetamine a purity level of 62%—which was far and away the lowest purity level of any methamphetamine seized in connection with the conspiracy. In total, there were seven samples of methamphetamine seized and tested in this case. Four came from controlled purchases where Moss himself was the seller. A40–41, 60–61; SA52–53, 55–56. Those four samples had purity levels of 95%, 95%, 94%, and 62%. A41, 60–61; SA52–53, 55–56. The other three samples were seized from the homes of his co-conspirators, Santiago, Pankins, and RL. A44, 49, 60; SA 57–58, 61. Those three samples had purity levels of 98%, 94%, and 86%. A44, 49, 60; SA 57–58, 61. The simple average of those seven purity levels is 89%. And the average weighted by drug quantity

is 86%.[7] But the District Court did not use either of those figures to estimate the purity level of the unseized methamphetamine. Instead, it used the lowest test result in the case—62%. A14. And it did so with the express purpose of affording Moss and Santiago "lenity." A14. In short, the District Court did exactly what other appellate courts have required: it "erred on the side of caution and selected the most conservative estimate", *Johnson*, 94 F.4th at 664 (cleaned up)—here, an estimate that was more than 20 percentage points lower than the next closest test result.

The District Court's approach was particularly reasonable in light of when the methamphetamine with 62% purity was seized. A confidential source purchased that methamphetamine from Moss sometime in November 2021. A60–61. The bulk purchases in Reading were on October 27–28, 2021, and November 11, 2021. So the longest it could have been between a purchase in Reading and the seizure of the methamphetamine with 62% purity is approximately 19 days. That tight

[7] The weighted average is calculated as follows: (.95 * 27.5 grams) + (.95 * 27.5 grams) + (.94* 54.6 grams) + (.62 * 213.2 grams) + (.98 * 296 grams) + (.94 * 1.6 grams) + (.86 * 1,549.7 grams) = 1,332.74 grams; 1,332.74 grams/1549.7 grams = .86.

timeline underscores the reasonableness of using 62% as a purity estimate.

Other evidence supports the District Court's finding that the methamphetamine purchased in Reading was at least 62% pure (and potentially, substantially purer). To begin, as Moss himself pointed out in his sentencing memorandum, "nearly all methamphetamine seized [today] is more than 90% pure." A162. Indeed, "[i]n the first half of 2019, methamphetamine sampled through [a DEA testing program] average[d] 97.2 percent purity." *Id.* (quoting U.S. Drug Enf't Agency, DEA-DCT-DIR-008-21, *2020 National Drug Threat Assessment* 19–20 (2021)). Standing alone, those general statistics might not be enough to prove purity by a preponderance. But when viewed alongside test results showing that six of seven seized samples were more than 85% pure, Moss's statistics help confirm that it is quite likely the methamphetamine purchased in Reading was at least 62% pure.

How Moss himself referred to the product also supports the District Court's drug-purity finding. Moss told Rodriguez that the ten pounds he purchased in October was "ice." A57; SA35. After that purchase, he texted numerous customers that he had "ice" or "ice cream" for sale. A56;

SA31–33. And just before the five-pound purchase in November, he texted a friend that he was going to "grab this ice." A58; SA42. The fact that Moss—an admitted large-scale methamphetamine trafficker—repeatedly referred to the product as "ice" is evidence that it was methamphetamine of relatively high purity. *See Harris*, 36 F.4th at 831.

Moss and his co-conspirators also described the appearance of the product in ways that are consistent with high-purity methamphetamine. On October 31, just days after the ten-pound purchase in Reading, Moss called a co-conspirator, Christina Chamberlain, and asked her to have Santiago bring him an ounce of methamphetamine. SA14. Moss specified that the methamphetamine had to be "chunky." *Id.* Similarly, on November 15, just days after the five-pound purchase, Alfaro specifically asked Moss for "that chunky shit." SA48. Moss replied, "Gotchu." *Id.* Both TFO Riccobon and SA Bethel explained that "chunky" methamphetamine is of higher quality, A79, 83—and shortly after each purchase in Reading, Moss confirmed that he had such "chunky" methamphetamine. That evidence of how the methamphetamine appeared is further support for the District Court's drug-purity finding. *See Castaneda*, 906 F.3d at 694.

Taken together, the evidence set forth above is more than sufficient support for assigning the unseized methamphetamine the lowest purity level of any methamphetamine seized in connection with the conspiracy.

3. Moss's arguments do not show that the District Court clearly erred in assigning the unseized methamphetamine a purity level of 62%.

Moss's argument on drug purity boils down to an assertion that it was improper to use the purity of the seized drugs to estimate the purity of the unseized drugs—even though the District Court used the most conservative estimate available. Appellant's Br. 25–26. Moss identifies no precedent that supports his argument. And there is ample precedent cutting against it. *See Johnson*, 94 F.4th at 664; *Lopes-Montes*, 165 F.3d at 732; *Newton*, 31 F.3d at 614; *see also United States v. Barton*, 2023 WL 2810052, at *2 (5th Cir. Apr. 6, 2023); *United States v. Sebastian*, 2023 WL 3617840, at *2 (4th Cir. May 24, 2023) (per curiam).

Moreover, Moss identifies no alternative approach to estimating the purity level of unseized methamphetamine. Presumably, then, his position is that, whenever a defendant is sentenced for unseized methamphetamine, the drugs must be treated as a mixture containing methamphetamine. That approach is equivalent to treating any

unseized methamphetamine as though it were only 10% pure. *See* U.S.S.G. § 2D1.1(c) (ten grams of a mixture containing methamphetamine is equivalent to one gram of actual methamphetamine).

Perhaps that approach makes sense where there is no evidence whatsoever as to the purity of the drugs at issue in the case (although perhaps not, given Moss's own statistics about the average purity of methamphetamine today, *see supra* p. 33). But the approach makes little sense where, as here, there are numerous test results from seized samples showing purity levels far above 10%, *see supra* p. 31—plus additional circumstantial evidence of high purity, *see supra* pp. 32–34. On those facts, it was more than reasonable for the District Court to assign the unseized drugs a purity level of 62%. And reasonableness is all that is required. *See United States v. Sewell*, 780 F.3d 839, 850 (7th Cir. 2015) ("[A] district court's estimate on drug quantity . . . need only be reasonable—not absolutely precise."); *Collado*, 975 F.2d at 998 (in determining drug quantity and purity, "some degree of estimation must be permitted").

II. The factual findings underlying the obstruction-of-justice enhancement are not clearly erroneous.

Standard of Review

This Court "exercises plenary review over a district court's interpretation" of the Sentencing Guidelines, but it reviews "factual findings relevant to the Guidelines for clear error." *Grier*, 475 F.3d at 570.

Argument

The District Court applied an obstruction-of-justice enhancement under U.S.S.G. § 3C1.1. The Court found that Moss had obstructed or attempted to obstruct justice in two ways, either of which was independently sufficient to trigger the enhancement. A290–93. First, while in prison, Moss sent a series of notes to Alfaro, attempting to dissuade him from testifying against Moss. The last of those notes threatened harm to Alfaro's mother and son. A292–93. Second, Moss arranged for his friend, Sharee Christian, to video record the evidentiary hearings at which (Moss thought) Alfaro would testify. Moss did so with the intent of exposing Alfaro as a cooperator. A290–91.

Once again, Moss does not challenge the District Court's legal interpretation of the relevant Guidelines provision. That is, he does not

challenge the legal conclusion that threatening a witness's family or arranging to have a witness's testimony recorded for the purpose of outing him as a cooperator constitutes actual or attempted obstruction.[8] Instead, Moss objects only to the factual findings the District Court made under the obstruction provision. Those facts needed to be proven by a preponderance. *Grier*, 475 F.3d at 568. And they are reviewed for clear error. *United States v. Brennan*, 326 F.3d 176, 200 (3d Cir. 2003).

A. Moss has forfeited any challenge to the finding that he sent notes to Alfaro attempting to dissuade him from testifying, which is an independently sufficient basis for the enhancement.

To begin, Moss's opening brief says nothing about the District Court's finding that he sent a series of notes attempting to dissuade Alfaro from testifying against him. Moss has therefore forfeited any challenge to that factual finding. *See, e.g., United States v. Savage*, 970 F.3d 217, 273 n.61 (3d Cir. 2020).

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[8] For good reason. "[T]hreatening, intimidating, or otherwise unlawfully influencing a . . . witness . . . or attempting to do so" is quintessential obstruction. U.S.S.G. § 3C1.1 cmt. n.4(A). That is true whether the witness is made to fear for his own safety or that of his family. *See, e.g.*, *United States v. Walker*, 392 F. App'x 919, 933 (3d Cir. 2010) (obstruction-of-justice enhancement upheld where the defendant "threatened to kill members of a witness's family").

And standing alone, that forfeiture dooms Moss's challenge to the obstruction-of-justice enhancement. That is because, where there are multiple "independent grounds upon which the district court based its [ruling], each of which is individually sufficient to support that [ruling]," a litigant must challenge *each* of the multiple grounds. *See Nagle v. Alspach*, 8 F.3d 141, 143–44 (3d Cir. 1993). That rule applies here because Moss's sending threatening notes to Alfaro is an independently sufficient ground for the obstruction enhancement, as the District Court recognized. A293 (stating that the "even [Alfaro's] testimony"—which concerned only the notes, not the plan to record the evidentiary hearings—"would constitute evidence by a preponderance of obstruction"). For that reason alone, Moss's challenge to the enhancement fails.

B. Moss sent notes to Alfaro attempting to dissuade him from testifying, including a note that threatened Alfaro's family.

In any event, the District Court's factual finding that Moss sent the notes to Alfaro is not clearly erroneous. At sentencing, Alfaro testified that he and Moss were both detained at FDC Philadelphia. A229, 235. He further testified that, by using the plumbing, inmates at FDC

Philadelphia can get notes from one unit to another. A229–233. Alfaro stated that, in late November 2022, he received three notes that had been passed through the plumbing. A229, 246–47. The notes were labelled with the nickname "Chewy," which Moss knew Alfaro by. A233. The first two notes said, in essence, "I can't believe you're doing this to me." A234. And the third said something to the effect of, "I know where your mother and son live. Don't have me do this. Don't testify." *Id.* (cleaned up). In response to those notes, Alfaro refused to testify at the evidentiary hearing on December 12, 2022, and the rescheduled hearing on December 21, 2022. A236.

There is ample evidence that the messages came from Moss. For one thing, Moss was the only person whom Alfaro was slated to testify against. A280, 319. Moss was also the only person at FDC Philadelphia who knew about Alfaro's close relationships with his mother and son. A235. Moreover, the timing of the notes is consistent with Moss sending them. The first one was sent shortly after Moss's attorney was told that Alfaro was cooperating. A246–47, 289. And all three notes were sent in the couple weeks before the evidentiary hearing at which Alfaro was scheduled to testify against Moss (and only Moss). A246–47.

Taken together, that evidence proves by more than a preponderance (i) that Alfaro received a series of notes attempting to dissuade him from testifying, (ii) that the last of those notes threatened to harm Alfaro's mother and son, and (iii) that Moss sent those notes. Thus, the District Court's factual findings on those points are not clearly erroneous.

C. Moss's argument that Alfaro is not credible cannot establish clear error.

To reiterate, Moss's opening brief says nothing about the notes Alfaro received in prison. At sentencing, however, Moss's position was that the only evidence of the notes was Alfaro's testimony, which (Moss said) was not credible. A276–78. The District Court expressly disagreed. A292 ("I found that it was more probable than not Mr. Alfaro was telling the truth.").

If Moss attempts to resurrect that credibility challenge in his reply brief here, the challenge must fail. "Determining the credibility of witnesses is uniquely within the province of the trial court and this court will not review such determinations." *United States v. Bethancourt*, 65 F.3d 1074, 1081 n.4 (3d Cir. 1995) (cleaned up). Thus, any challenge to the District Court's factual findings regarding the notes must fail twice

over: both because the challenge has been forfeited, and because the challenge seeks to overturn an unreviewable credibility determination.

D. Moss arranged to have the evidentiary hearings recorded for the purpose of exposing Alfaro as a cooperator.

The District Court found that there was a second, independently sufficient ground for the obstruction enhancement: Moss arranged to have the evidentiary hearings recorded for the purpose of exposing Alfaro as a cooperator. To reiterate, Moss does not challenge the District Court's legal conclusion that such action constitutes actual or attempted obstruction. Nor does he challenge the District Court's finding that he did, in fact, arrange to have the hearings recorded. A289–90 (defense counsel conceding that point at sentencing). Instead, Moss takes issue only with the District Court's finding that he arranged to have the hearings recorded for the purpose of outing Alfaro. That factual finding is also reviewed for clear error. *Brennan*, 326 F.3d at 200.

There is ample evidence that Moss's intent was to expose Alfaro as a cooperator. To begin, on December 6, Moss sent an email to his girlfriend, Shannon Ruth, discussing Alfaro and the person who had introduced Moss and Alfaro, somebody named "Hov." A268–69; SA94.

Moss stated, if "u b seeing anyone who chills wit the boy Hov tell him his ppl Chewy [which is Alfaro's nickname] getting onn that stand on me on the 12th." A268–69; SA94. In short, by at least December 6, Moss knew Alfaro intended to testify against him—and he wanted other people to know it too.

Next, on the day before the evidentiary hearing, Moss spoke with Ruth again, this time by phone. A252; SA88. Moss's and Ruth's mutual friend Sharee Christian was also on the line. A252; SA88. Christian said she would be at the hearing. A253; SA88. And she said she would have her phone with her: "phone's gonna be in there and everything." A253; SA88. Moss responded, "Oh shit." A253; SA88. He then told Christian there was "something I don't want to talk to you about over this motherfucker," referring to the recorded phone line. A256; SA88. Christian agreed, "Yeah, 'cause you know you get to talking too much over the phone." A256–57; SA88.

An email Moss sent that same day reveals the subject that he and Christian were hesitant to broach over the phone. In the email, Moss stated that an associate was "going to record it so everyone will see the whole court hearing." A267; SA94. Tellingly, Moss said that he hoped a

"video" in which "chew [a derivation on Alfaro's nickname] wore a wire" would be played at the hearing. A267–68; SA94. In tandem, this call and the email discussed immediately above show (i) that Moss was in on the plan to record the hearing, and (ii) that the purpose of recording the hearing was to get proof that Alfaro was cooperating against Moss.

The government and Moss were in court the next day, December 12, but as explained, the hearing did not move forward because Santiago was in quarantine. Before the District Court recessed, however, the government stated in open court that Alfaro was backing out of his agreement with the government and no longer intended to testify against Moss. A26–27. Ruth and Christian both attended the hearing, as planned. A258. But crucially, they arrived late—*after* the government had discussed Alfaro. *Id.*

Later that same day, Moss again spoke with Ruth by phone. He asked, "Was she all videoing?" in reference to Christian. A259; SA89. Ruth responded, "Yeah, she was." A259; SA89. Moss then told Ruth that, because she and Christian were late, they had missed "the real good shit." A259; SA89. Specifically, they missed, "[t]he n***a that's fuckin' telling. The fuck. Right before y'all walked in they just got done talking about

the n*** telling, literally." A259; SA89. Ruth clarified, "Who? Chewy?" A259; SA89. Moss responded, "Yeah. Alfaro." A259–60; SA89. Moss continued, "They was talking about how the boy snitchin'. I'm like, yo, why the fuck they miss the most important part if they was gonna be in here recording." A260; SA90. Ruth apologized for missing that portion of the hearing, but said that, at the rescheduled hearing, "I'm pretty sure they're gonna talk about what he said." A262; SA90. Moss agreed, "they probably is." A262; SA90. In sum, Moss told Ruth that the "most important part" of the hearing to record was the discussion about Alfaro "snitchin." Moss and Ruth then agreed that they would have another opportunity to record that discussion at the rescheduled hearing.

The next day, Moss had a similar conversation with a female friend. A262–63. He told the friend that he wished Ruth and Christian had arrived earlier "because they talking about Chewy wrote the judge a letter talkin' about he don't want to testify now." A263; SA101. Moss then told the friend that, although Alfaro "had his proffer hearing, already," Moss was "gonna get my people's to fuckin' video it." A263; SA102. In short, Moss again stated that he wished Ruth and Christian had recorded the discussion about Alfaro at the hearing on December 12.

But he stated that they would have another chance to do so, referring to the rescheduled hearing on December 21.

Christian did indeed attempt to use her phone to record the rescheduled hearing. The U.S. Marshals saw what Christian was up to, confiscated her phone, and informed the Court. A99. Judging by the lack of video evidence on Christian's phone, her efforts were unsuccessful. But in an email sent after the rescheduled hearing, Moss confirmed what he and Christian had planned. Moss said that "sharee . . . was there videoing the hearing" and that "the feds tried to book her for videoing." A269–70; SA96. Moss continued that Christian had "heard bout all them rat n***s." A269–70; SA96. Thus, this final email confirms that Moss and Christian had planned to record the rescheduled hearing for the purpose of exposing Alfaro as a "rat."

As the District Court found, those calls and emails supply "overwhelming" evidence that Moss arranged to have the evidentiary hearings recorded to expose Alfaro as a cooperator. A290. That factual finding was not clearly erroneous.

E. Moss's arguments do not show that the District Court clearly erred in finding that Moss's purpose for recording the evidentiary hearings was to retaliate against Alfaro.

Moss's position is that he sought to have the evidentiary hearings recorded to prove that he was not cooperating with the government, rather than to prove that Alfaro was cooperating. Appellant's Br. 29–31. As the District Court pointed out, that theory makes little sense. There can, of course, be more than one cooperating witness in a case. So showing that Alfaro was cooperating would tell outsiders little about whether Moss was also cooperating. A280 ("So how does . . . videoing Alfaro indicate in any way that Moss is not cooperating against somebody else?").

Besides, Moss's theory is belied by the very evidence he points to as support. Moss now claims that Alfaro and his friend "Hov" were accusing Moss of working with the government. Appellant's Br. 29–31. He points to three emails and a call that, he says, support that claim.

The first is Moss's call with a female friend on December 13, as discussed above. *See supra* pp. 45–46; SA101–103. On the call, neither party said anything about Alfaro or Hov accusing Moss of cooperating. Instead, they talked about Moss's belief that Alfaro was cooperating—

and Hov's refusal to believe that about Alfaro. That made Moss mad. He told the friend to relay a message to Hov: "Tell Hov I'm gonna knock him straight the fuck out too on everything I love, bro. He's a police too." SA103. Thus, Moss was angry enough to threaten violence against anyone he thought was "police" (meaning, working with the government). That further supports the District Court's finding that Moss arranged for the recordings to retaliate against Alfaro for cooperating.

Next, Moss points to emails he sent on December 14 and 15. SA98–99. But he does not say in either message that Alfaro and Hov are accusing him of cooperating. Indeed, in one message he says that Hov is "talkin real heavy . . . bout i aint gonna b out in a long time." SA98. As the District Court recognized, that seems inconsistent with Hov accusing Moss of working with the government. A283 ("[I]f you're spending a long time in jail . . . and somebody's real heavy talking about that, that doesn't seem to be consistent with saying that that same person is talking about Mr. Moss cooperating."). Moreover, in the emails, Moss continues to express anger at Hov because "his folks videoed me serving," SA 98, and because "his ppls is just the one who had a wire," SA99. Moss is angry enough with Hov that he issues another threat: "let him no il see him

when I touchdown for running his mouth." SA97. Again, Moss's anger with Hov and his "folks" or "ppls" is further evidence that Moss was out to get Alfaro for cooperating against him.

The final email Moss cites is the only one that lends any support to the notion that someone had accused him of being a cooperator. As Moss notes, the email begins: "yo wassup with chunk telling ppl im police." SA96. Crucially, however, that email was sent on January 5, 2023. *Id.* That is after both the date of the original evidentiary hearing (December 11, 2022), and the date of the rescheduled evidentiary hearing (December 21, 2022). A24, 38. Thus, the email does nothing to show that anyone had accused Moss of being a cooperator before he arranged to have Alfaro's testimony recorded. If anything, the email suggests the opposite: Moss refers to "chunk tellin ppl im police" as though it is a new development. SA96.

Thus, there is little support for Moss's explanation as to why he arranged to have the evidentiary hearings recorded. If anything, the relevant communications tend to underscore how angry Moss was with Alfaro (and by extension, Hov)—which makes it more likely that his intent was to retaliate against Alfaro.

F. Taken together, the notes sent to Alfaro and the efforts to record the evidentiary hearings are more than sufficient proof of actual or attempted obstruction.

As noted, the District Court found that there were two independently sufficient grounds for applying an obstruction-of-justice enhancement. But the Court also found that each ground reinforced the other. A292–93. Given that Moss made calls and sent emails expressing his anger at Alfaro, it is even more likely that Moss attempted to keep Alfaro from testifying by threatening his mother and son. And given that Moss threatened Alfaro's mother and son, it is even more likely that his reason for recording the evidentiary hearings was to retaliate against Alfaro, rather than clear his own name. Especially when the evidence supporting the two grounds is taken together, there was more than sufficient proof that Moss obstructed or attempted to obstruct justice. Thus, there was no clear error with respect to the factual findings underlying the obstruction-of-justice enhancement.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's judgment.

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Date: July 2, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3059

UNITED STATES OF AMERICA,
APPELLEE,

v.

MALIK MOSS,
APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE (D. Del. No. 1:22-cr-00024-CFC-1)

REPLY BRIEF OF APPELLANT

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Dated: August 5, 2024

ARGUMENT

I. The Government's argument that Mr. Moss purchased 15 pounds of 62% pure methamphetamine from a supplier in Reading, Pennsylvania in late October of 2021 and November 11, 2021 is not legally or factually supported by the record.

A. The evidence, at best, showed that Mr. Moss purchased 5 pounds of methamphetamine in late October of 2021.

The Government asserts that the District Court's factual findings regarding Mr. Moss' 10 pound purchase of methamphetamine in late October of 2021 were not clearly erroneous. (Answer at 17). In support of this argument, the Government, like it did in its related sentencing filing,[1] points to Mr. Moss' cellular communications leading up to and after the late October trip to Reading as evidence of said purchase. (Answer at 18-20). The Government's argument is unpersuasive.

Starting with Mr. Moss' phone calls with Mr. Santiago in the days and hours leading up to the late October trip to Reading, Pennsylvania. Although the Government is correct that Mr. Moss and Mr. Santiago discussed potentially purchasing a larger amount of methamphetamine on October 21st, 2021,[2] it is clear on the record that the purchase plan was not finalized until the morning of October 27th. And, as described in the Opening Brief,[3] the best evidence of the purchase plan is Mr.

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[1] A124; A128.
[2] Answer at 18 (citing A53; SA11).
[3] Opening at 20.

Santiago's phone call to Mr. Moss at 8:39 am on October 27th during which Mr. Santiago made it abundantly clear that Mr. Moss and Mr. Santiago were only going to collectively purchase 5 pounds of methamphetamine.[4]

Nevertheless, in an attempt to refute the clear evidence of Mr. Moss and Mr. Santiago's intent to only collectively purchase 5 pounds of methamphetamine, the Government highlights a phone call between Mr. Moss and Mr. Santiago that took place approximately 40 minutes later, during which Mr. Santiago described his communications with the supplier. (Answer at 19-20, 22-23). The Government would like this Court to believe that this communication is evidence that Mr. Santiago and Mr. Moss, less than an hour later, apparently changed their minds and were now planning to split a ten pound purchase. (Answer at 19-20, 22-23). This conclusion is not supported by the record.

A closer examination of the relevant portions of this phone call show that Mr. Santiago informed the supplier that Mr. Santiago and his "folks" were "*gonna go half*", however, that was no longer that case because his "folks" were not ready. (SA79) (emphasis added). In other words, Mr. Santiago described in this phone call

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[4] SA27 (emphasis added) ("[H]e said 10 for 24 but *we only gonna get 5*, because I ain't trynna get the whole 10, for real."); *see also* A68 (Detective Riccoban conceding on cross examination that his interpretation of this phone call was that Mr. Moss and Mr. Santiago had planned to only purchase 5 pounds, rather than 10 pounds.).

what he informed the supplier that he and Mr. Moss were no longer able to purchase the 10 pounds as may have been previously discussed or proposed. (SA79). Thus, contrary to the Government's argument, this phone call actually supports Mr. Moss' assertion that the evidence, at best, established that Mr. Moss and Mr. Santiago collectively purchased 5 pounds of methamphetamine in late October of 2021.

Similarly, the Government's reference to Mr. Moss' phone call with Mr. Rodriguez on November 3rd, 2021 also does not support the argument that a ten pound purchase was made by Mr. Moss and/or Mr. Santiago just a few days before. As argued in the opening brief,[5] the statements made by Mr. Moss to Mr. Rodriguez during this phone call must be analyzed in the context of the other evidence as well as the entirety of the phone call. The November 3rd phone call between Mr. Moss and Mr. Rodriguez is in direct conflict with the phone calls between Mr. Moss and Mr. Santiago on the morning of October 27th during which Mr. Santiago set forth the plan to only purchase 5 pounds of methamphetamine. (SA27; SA79; A68). As Mr. Moss' phone call with Mr. Santiago on October 27th, 2021 actually involve those who were going to participate in the methamphetamine purchase, those statements hold more weight than the braggadocious statements Mr. Moss made to another co-defendant not involved in the sale of methamphetamine.

[5] Opening at 20-21.

Additionally, it is clear from the November 3, 2021 phone call between Mr. Moss and Mr. Rodriguez that Mr. Moss was attempting to recruit and/or sell Mr. Rodriguez on the idea of selling methamphetamine.[6] As noted in the Opening Brief,[7] Mr. Moss told Mr. Rodriguez that there was no way he could lose selling methamphetamine, that selling methamphetamine was "where the bread [was] at", and that Mr. Moss was able to "stay[] a float" by selling methamphetamine.[8] It is apparent that Mr. Moss was clearly promoting the sale of methamphetamine as a real money making opportunity in an attempt to convince Mr. Rodriguez to start selling methamphetamine. In light of the clear salesmanship, it is logical to conclude that Mr. Moss was also embellishing about the details concerning his recent trip to Reading. (SA34-36). Thus, when Mr. Moss' phone call to Mr. Rodriguez is considered in the context of the other evidence, it is apparent that this phone call does not lend much support, if any to the Government's argument.

Lastly, the Government's reference to the series of text messages sent by Mr.

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[6] *See* SA35 ("my boys all down there hustling right now."); *Id*. ("But, one of them is like a millionaire, though, bro."); *Id*. ("I swear to you [U/I] it's like, a dope flip bro, you ain't gonna lose, I swear you not, ain't no . . . way you can lose bro. . . ."); SA36 (" I promise you bro, that's where the bread is at."); *Id*. ("That's how I be staying a float. . . ."); *Id*. ("Times like this, the ice money be coming through bro, I am telling you, that shit save me every time.").

[7] Opening at 20-21.

[8] SA35-36.

Moss on October 28th "broadcasting that he had 'ice' or 'ice cream' for sale" does not prove that there was a recent 10 pound purchase of methamphetamine. (Answer at 20). This is evident as Mr. Moss was not advertising the sale of larger amounts of methamphetamine that could have been considered evidence that he recently purchased 10 pounds of methamphetamine. Rather, Mr. Moss was advertising that he had ounces for sale.[9] Thus, as the record makes it clear that Mr. Moss and Mr. Santiago formulated a plan to only purchase 5 pounds of methamphetamine collectively, the Government's argument that the evidence proved a 10 pound purchase has no merit. Therefore, the District clearly erred when it found that the Government had met its burden of proof for a 10 pound purchase and that this 10 pound purchase was attributable to Mr. Moss for calculating Mr. Moss' base offense level under the U.S. Sentencing Guidelines.

B. The record does not support the Government's argument that Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021.

The Government also asserts that the District Court did not err "with respect to the five-pound purchase" that allegedly occurred on November 11, 2021. (Answer at 24). Just as the District Court found, the Government points to Mr. Moss' cell phone location data and communications made the following day as evidence of this

[9] SA31-33.

5 pound purchase. (Answer at 24-25). However, when the noted evidence is considered in totality of the other evidence presented, it is clear that the noted evidence did not prove Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021. Therefore, the Government's argument is unpersuasive.

As noted in the Opening Brief,[10] law enforcement took no actions on November 11, 2021 to confirm their suspicions that Mr. Moss traveled to Reading, Pennsylvania on that day to purchase a large amount of methamphetamine from a supplier located there. Although law enforcement were able to track Mr. Moss' cell phone location data which showed that his phone traveled to Reading, Pennsylvania,[11] law enforcement terminated their surveillance efforts once Mr. Moss left Delaware. As such, law enforcement did not physically observe Mr. Moss in Reading, Pennsylvania on November 11, 2021, let alone make a large multi-pound drug transaction. (A65-66). Additionally, despite their suspicions, law enforcement did not stop Mr. Moss on his return to Delaware. (A66). As such, Mr. Moss' cell phone location data, at best, established that Mr. Moss's cell phone was in the vicinity of Reading, Pennsylvania, but fell short of proving that he purchased methamphetamine on that day.

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[10] Opening at 23.
[11] SA71.

Additionally, Mr. Moss' phone calls on November 12th do not provide sufficient factual support for the Government's argument. This is because the Government only argues tiny snippets of two phone calls out of context as evidence of Mr. Moss's purchasing 5 pounds of methamphetamine on November 11th. (Answer at 25). However, when the highlighted sections of the calls are analyzed with other relevant portions of the phone calls, it becomes clear that the Government's argument holds no weight.

The Government is correct that during a November 12th phone call between Mr. Moss and Mr. Santiago, it appears that Mr. Santiago "listed out five 'pound traps' he and Moss had between them". (Answer at 25 (citing A59; SA16)). However, the Government only considers this statement in a vacuum, not giving proper consideration to the rest of the phone call. Specifically, the Government fails to give proper weight to the fact that right after Mr. Santiago listed out the "pound traps", Mr. Santiago states that he is trying to "go up" to Reading while also voicing concerns over the price that would need to be paid to the supplier. (SA16-18). Additionally, later in the call, Mr. Santiago expresses his concern about being able to fill some of the orders that he already had lined up and Mr. Moss and Mr. Santiago can be heard discussing how they only had a few ounces left at Ms. Chamberlain's residence. (SA17; SA18). As it is clear that Mr. Santiago is concerned about his ability to meet

his customers' demand, it is apparent that these are not the statements of an individual who, within the last 24 hours, just purchased 5 pounds of methamphetamine.

This conclusion is further buttressed by Mr. Moss and Mr. Santiago's phone call later that morning during which Mr. Moss and Mr. Santiago discuss how they have only 70 grams left. (A139-40). Thus, as the noted phone calls demonstrate that Mr. Moss and Mr. Santiago's methamphetamine supply was low, the Government's argument that these phone calls prove that a five pound purchase of methamphetamine was made on November 11th has no merit. Therefore, the District Court clearly erred when it found that Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021 for purposes of calculating Mr. Moss' base offense level under the U.S. Sentencing Guidelines.

Lastly, the Government's asserts that Mr. Moss incorrectly interprets the November 12th phone calls. (Answer at 26). Specifically, the Government asserts that Mr. Moss' interpretation "does not square with what Moss and Santiago actually said. The two discussed the mere possibility of going back to Reading. SA16 ("*If* we go up there. . ."). " (Answer at 26). Again, the Government's argument fails because the argument only singles out tiny portions of the call and does not give proper consideration to the totality of the phone call. Specifically, the Government does not take into consideration that immediately after saying "if we go up there" Mr. Santiago

tells Mr. Moss that he was "trying to", meaning that he is trying to go to Reading, presumably to make a purchase. (SA16). Additionally, if it's the Government's interpretation of the November 12th phone call that is correct and there was a recent 5 pound purchase of methamphetamine, then why is Mr. Santiago worried about "los[ing] out on a . . . three(3), three(3) pound . . . trap. . . ." (SA16-17). If Mr. Moss and Mr. Santiago had just made a 5 pound purchase of methamphetamine on November 11th, it would "make little sense" why, less than 24 hours later, Mr. Santiago is already voicing concerns about his ability to make these sales. (Answer at 26). Thus, it is the Government's interpretation of these phone calls that is inconsistent with "what Moss and Santiago actually said." (Answer at 26).

C. As the Government did not present any evidence linking the 62% pure methamphetamine recovered during a controlled purchase to the methamphetamine allegedly purchased by Mr. Moss from Reading, Pennsylvania, the District Court unreasonably relieved the Government of its obligation to prove the drug purity level.

The Government asserts that the District Court "did not clearly err by assigning the un-seized methamphetamine a purity level of 62%" because this purity level "was far and away the lowest purity level of any methamphetamine seized in connection with the conspiracy." (Answer at 31). In support, the Government asserts that "the District court did exactly what other appellate courts have required: it 'erred on the side of caution and selected the most conservative estimate". (Answer at 32) (citing

United States v. Johnson, 94 F.4th 661, 664 (7th Cir. 2024)). However, the Government's argument fails to reconcile how the 62% purity level is an appropriate purity level for all of the alleged methamphetamine purchased by Mr. Moss from Reading, Pennsylvania when there was no evidentiary link between the two events. As such, the argument has no merit.

As described in the Opening Brief,[12] "[d]ue process . . . guarantee[s] a convicted criminal defendant the right not to have his sentence based upon 'materially false' information."[13] Thus, "a sentencing court considering an adjustment of the offense level. . . need only base its determination on the preponderance of the evidence with which it is presented."[14] This means that due process required the Government to prove by a preponderance of the evidence both the weight and the purity level attributable to Mr. Moss.[15]

Here, because law enforcement did not seize any methamphetamine from Mr. Moss and/or Mr. Santiago upon their return from Reading, Pennsylvania in late

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[12] Opening at 25-26.

[13] *United States v. McDowell*, 888 F.2d 285, 290 (3d Cir. 1989) (*Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Cifuentes*, 863 F.2d 1149, 1153 (3d Cir. 1988)).

[14] *Id*. at 291 (citing *United States v. Lee*, 818 F.2d 1052, 1056 (2d Cir. 1987); *United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir. 1989); *United States v. Restrepo*, 832 F.2d 146, 150 (11th Cir. 1987)).

[15] *Id*.

October or on November 11th, the District Court was required to carefully review the Government's evidence "to ensure that [the Government's] estimate[for purity level was] proven by a preponderance of the evidence."[16] However, the Government did not present any evidence linking the 62% pure methamphetamine obtained during the controlled buy with Mr. Moss and the alleged methamphetamine purchased by Mr. Moss from the supplier in Reading, Pennsylvania. This sheer lack of evidence linking the two incidents is highlighted by the Government's argument. Specifically,

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[16] *United States v. Collado*, 975 F.2d 985, 998 (3d Cir. 1992); *see also Johnson*, 94 F.4th at 664 (citing *United States v. Carnell*, 972 F.3d 932, 939 (7th Cir. 2020)) ("[I]f the district court chooses to rely on the quantity of actual methamphetamine in a mixture . . . the court must ensure that the government has provided reliable, factual basis to compute it."); *United States v. Williams*, 19 F.4th 374, 380 (4th Cir. 2021) (noting that while the district court may consider non-lab report evidence for determining drug purity, this other evidence "must be sufficiently reliable and specific that it actually supports the Government's position" in relation to drug purity.); *Id*. at 380, n.3 (noting that "[d]istrict court are better equipped than circuit courts to make these determinations in the first instance and their determinations will, of course, be based on the records presented in their entirety. But to explain out instruction that indirect evidence of 80% purity be sufficiently reliable and specific, evidence that Ice was commonly used in the geographic area of the conspiracy, for example, would not without some indirect evidence specifically connected to the defendant, be sufficient."); *United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008) (citing *United States v. Dalton*, 409 F.3d 1247, 1251 (10th Cir. 2005); *United States v. Ruiz-Castro*, 92 F.3d 1519, 1543 (10th Cir. 1996)) ("When the actual drugs underlying a drug quantity determination are not seized, the trial court may rely upon an estimate to establish the defendant's guideline offense level so long as the information relief upon has some basis of support in the facts of the particular case and bears sufficient indicia of reliability.").

the Government can only speculate that the 62% pure methamphetamine must have come from the alleged methamphetamine purchased from Reading, Pennsylvania because the controlled purchase occurred generally around the same time as Mr. Moss' trips to Reading, Pennsylvania. (Answer at 32-33). As mere speculation is insufficient[17] and there was no evidentiary link between the 62% pure methamphetamine and the alleged methamphetamine from Reading, Pennsylvania, it was inappropriate to assign all of the methamphetamine the 62% purity. And in doing so, the District Court improperly relieved the Government of its burden of proof to prove drug purity by a preponderance of the evidence.[18]

In further support of its argument, the Government cites to this Court's decision in *United States v. Collado*, 975 F.2d 985 (3d Cir. 1992). (Answer at 29, 36). However, the decision in *Collado* does not lend any support to the Government's argument that it was proper for the District Court to apply the 62% purity level to all of the methamphetamine attributed to Mr. Moss.

In *Collado*, the defendants were charged and convicted with conspiracy to

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[17] *Collado*, 975 F.2d at 998 ("This is not to say that calculations of drug amounts may be based on mere speculation. . . .").

[18] *Johnson*, 94 F.4th at 664 (citing *Carnell*, 972 F.3d at 939); *Williams*, 19 F.4th at 380; *Id*. at 380, n.3; *Verdin-Garcia*, 516 F.3d at 896 (citing *Dalton*, 409 F.3d at 1251; *Ruiz-Castro*, 92 F.3d at 1543); *Collado*, 975 F.2d at 998; *McDowell*, 888 F.2d at 291 (citing *Lee*, 818 F.2d at 1056; *Urrego-Linares*, 879 F.2d at 1237-38; *Restrepo*, 832 F.2d at 150).

distribute heroin in the United States District Court for the Eastern District of Pennsylvania.[19] During the sentencing proceedings, the defendants challenged the "government's estimate of the quantities [of heroin] involved in two specific transactions."[20] However, the district court disagreed and ruled against the defendants. On direct appeal, the defendants challenged the district court's inclusion of the contested quantities when determining the defendants' base offense level[21] and this Court agreed with the defendants' argument in relation to one of the transactions.[22] This Court recognized that while "some degree of estimation must be permitted" when calculating drug quantities, the "calculations of drug amounts [cannot] be based on mere speculation. . . ."[23] This Court further noted that due to "the dramatic effects such estimates have on the defendant's sentence, the sentencing court must carefully review the government's submissions to ensure that its estimate are proven by a preponderance of the evidence."[24] And when this Court reviewed the District Court's findings, it held that "there [was] no evidentiary basis for concluding that [one of the] transaction[s] involved" the purported amount of heroin and

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[19] 975 F.2d at 988.
[20] *Id*. at 989.
[21] *Id*. at 998.
[22] *Id*. at 998-99.
[23] *Id*. at 998.
[24] *Collado*, 975 F.2d at 998.

therefore, it was clear error for the district court to include this amount in its base offense calculation.[25]

Here, similar to *Collado*, there was "no evidentiary basis for concluding" that the 62% pure methamphetamine was linked to the alleged methamphetamine purchased from the Reading supplier. At best, the Government's evidence demonstrated that at some point in time in November of 2021, Mr. Moss participated in a controlled drug sale during which Mr. Moss sold methamphetamine that was 62% pure. (A60-61). The evidence also showed that Mr. Moss traveled to Reading, Pennsylvania in late October and on November 11th and that a purchase of methamphetamine was made in late October.[26] However, the Government did not present any evidence linking the methamphetamine sold during the controlled buy with any of the methamphetamine purchased from Reading, Pennsylvania. Thus, like in *Collado*, this Court must find that it was inappropriate to assign the 62% purity level to all of the methamphetamine attributed to Mr. Moss.

The Government also asserts that Mr. Moss' argument is improper because Mr. Moss is proposing that "whenever a defendant is sentenced for un[-]seized methamphetamine, the drugs must be treated as a mixture containing

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[25] *Id*. at 998-99.
[26] Opening at 19-25; *supra* at 1-9.

methamphetamine." (Answer at 35). In support, the Government notes that this "approach is equivalent to treating any un[-]seized methamphetamine as though it were only 10% pure." (Answer at 35-36). While this may be true, ultimately, the burden proof for the drug purity lies exclusively with the Government.[27] And in this case, the Government had every opportunity to confirm their suspicions that Mr. Moss purchased large amounts of methamphetamine from a supplier in Reading, Pennsylvania in late October and on November 11, 2021 by stopping him upon his return to Delaware. However, the Government, through law enforcement, did not do so. (A65-66). In light of this fact, the Government should not still receive the benefit of the doubt in relation to the applicable purity level when it made a strategic decision to not stop Mr. Moss in late October or on November 11, 2021.

In sum, it was the Government's burden of proof to prove by a preponderance of the evidence the drug purity for the methamphetamine attributed to Mr. Moss for purposes of calculating Mr. Moss' base offense level under the U.S. Sentencing Guidelines. As the Government did not present any evidence linking the 62% pure methamphetamine to the alleged methamphetamine purchased from Reading,

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[27] *McDowell*, 888 F.2d at 290 (citing *Townsend*, 334 U.S. at 741; *Cifuentes*, 863 F.2d at 1153); *Id*. at 291 (citing *Lee*, 818 F.2d at 1056; *Urrego-Linares*, 879 F.2d at 1237-38) *Restrepo*, 832 F.2d at 150).

Pennsylvania, the District Court improperly relieved the Government of their burden of proof by assigning a 62% purity to all of the methamphetamine attributed to Mr. Moss for purposes of determining Mr. Moss' base offense level. By doing so, the District violated Mr. Moss' due process rights and its holding was clearly erroneous.[28]

[28] *McDowell*, 888 F.2d at 290 (citing *Townsend*, 334 U.S. at 741; *Cifuentes*, 863 F.2d at 1153); *Id*. at 291 (citing *Lee*, 818 F.2d at 1056; *Urrego-Linares*, 879 F.2d at 1237-38) *Restrepo*, 832 F.2d at 150).

II. The Government's assertion that there was ample evidence to support the District Court's finding that Mr. Moss engaged in or attempted to obstruct justice is not supported by the factual record.

A. The District Court overruled Mr. Moss' obstruction of justice objection on the basis of Mr. Moss' actions and communications surrounding his attempt to have someone record his sentencing proceedings.

The Government takes the position that Mr. Moss has forfeited his ability to challenge the District Court's "finding that he sent notes to Alfaro attempting to dissuade him from testifying, which is an independently sufficient basis for the" obstruction of justice enhancement. (Answer at 38). The Government's argument has no merit as the District Court's basis for overruling Mr. Moss' obstruction of justice objection was his actions and communications surrounding his attempt to have someone record the sentencing proceedings.

After hearing from the Parties in relation to the obstruction of justice enhancement, the District Court ruled on Mr. Moss' objection:

> THE COURT: And it seems – I don't know whether you want to dispute it, but it seems to me overwhelming evidence that the defendant had made arrangements for his girlfriend's friend, Sharee, to video record the proceedings in this courtroom on December 10th.
>
> Is that disputed?
>
> MR. BRESLIN: Your Honor, based on the transcripts, you know –
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> THE COURT: I don't know how you could dispute it.
>
> MR. BRESLIN: Exactly, Your Honor.
>
> THE COURT: It's overwhelming evidence. So if you do dispute it, it doesn't matter. I find it.

> I think that alone would be sufficient to justify an obstruction of justice enhancement. That's blatant intimidation. That's planning to expose publicly somebody from coming in, doing what more people should do in this country, which is tell the truth, cooperate, put an end to the unlawfulness that's rampant. People out to pay a price, and a severe price, when they enlist others to engage in that kind of activity.
>
> That alone would be sufficient, in my mind, to justify the obstruction of justice, but there's more.
>
> I think read in their totality, the e-mails are very clear that the defendant believes some combination of Hove or, rather, either Hove in combination with Alfaro, or Alfaro alone, were going to cooperate. And he wanted to do his best to put a stop to that.
>
> And I think the e-mails provide evidence that the defendant was prepared to do harm and certainly wanted to express to others that he would do harm to somebody cooperating against him. In the words of the defendant, that when he touched down, he'd get the person for running his mouth. That's from the 12/14/2022 e-mail.
>
> And from the 12/15/2022 e-mail, "He got his bitch-ass. For real, for real."
>
> So I think there's compelling evidence beyond a preponderance of the evidence sufficient to justify the enhancement. I'm not going to go over it in detail. I made specific findings throughout, especially with my questioning of Mr. Ibrahim to indicate I agreed with the Government, except when I indicated otherwise, I agree with its interpretation of the e-mails of the telephone call transcripts, and do I think the enhancement should apply.
>
> MR. BRESLIN: Understood, Your Honor. Thank you.
>
> THE COURT: All right. Are there any other objections to Presentence Report?

(A289-91).

Noticeably absent from the District Court's ruling is any indication that the District Court was finding that the obstruction of justice enhancement was warranted based upon the evidence that Mr. Alfaro's allegedly received threatening notes

through FDC Philadelphia's plumbing system. In fact, the appendix pages cited to by the Government in support of their argument are the portions of the sentencing transcript where the District Court is ruling on Mr. Moss' objection to a reduced acceptance of responsibility application. (Answer at 39 (citing A293)). Thus, the Government's argument that Mr. Moss forfeited his ability to challenge a non-finding has no merit.

B. The evidence did not support the conclusion that Mr. Moss sent the threatening notes that Mr. Alfaro allegedly received.

Although the District Court ruled that the obstruction of justice enhancement was warranted solely based upon Mr. Moss' attempt to record the sentencing proceedings,[29] the Government nevertheless asserts that the District Court properly applied the obstruction of justice enhancement because there was "ample evidence" that Mr. Moss sent threatening notes to Mr. Alfaro through FDC Philadelphia's plumbing system. (Answer at 39-40). In support, the Government notes various factual circumstances as evidence that these messages must have come from Mr. Moss. (Answer at 40-41). However, noticeably absent from the Government's answer are critical facts that rebut this argumentative assumption. The failure to consider these critical facts renders the Government's argument without merit.

[29] A289-91.

First, the Government's answer fails to describe in any meaningful way how Mr. Moss sent these notes to Mr. Alfaro. While Mr. Alfaro alleged to have received these notes through the plumbing system at FDC Philadelphia, the Government failed to present any evidence that established that either Mr. Moss personally handed these notes to Mr. Alfaro or that Mr. Moss used the plumbing system to do so. In fact, the Parties, prior to Mr. Alfaro's testimony, stipulated that there was no direct connection between Mr. Moss' cell and Mr. Alfaro cell which would allow Mr. Moss to send these notes to Mr. Alfaro. (A197).

Secondarily, the Government's answer does not address the suspicious circumstances as to how Mr. Alfaro came into possession of these notes and how he made the Government aware of the receipt. As drawn out during cross examination, Mr. Alfaro was originally scheduled to testify against Mr. Moss during the sentencing evidentiary hearing as a condition of his plea agreement with the Government. (A239-41). However, he backed out of the agreement last minute, thereby breaching the terms of his plea agreement and placing into jeopardy all of the benefits who would have received had he testified. (A241-43).

Conveniently after Mr. Alfaro was informed that he would be losing out on the all of the benefits, he reached out to the Government and made the Government aware that he allegedly received threatening notes through the prison's plumbing system.

(A243). However, Mr. Alfaro did not report the receipt of these messages to any prison staff member and was not able to produce these alleged notes to the Government because Mr. Alfaro, on his initiative, destroyed the notes before anyone could have seen them. (A243-45).

At the conclusion of cross examination, Mr. Alfaro admitted that he was testifying against Mr. Moss because he hoped that his testimony would result in the Government filing a 5K motion on his behalf. (A245-46).

The circumstances in which Mr. Alfaro allegedly received these threatening messages is incredibly suspect. It certainly raises some eyebrows that Mr. Alfaro reached out to the Government about the alleged receipt of threatening messages after he learns that the Government was no longer going to provide him with any of the benefits outlined in his plea agreement. It is also concerning that there was no way to confirm that Mr. Alfaro actually received these threatening messages as he personally destroyed each message before reporting the alleged messages to the Government. (A243-45). As such, the credibility of Mr. Alfaro's testimony about his receipt of the threatening messages was questionable at best. Thus, contrary to the Government's argument, there was not amble evidence to support the conclusion that Mr. Moss sent threatening messages to Mr. Alfaro and therefore, the alleged receipt of threatening messages by Mr. Alfaro was not a proper basis for the District

Court to apply the obstruction of justice enhancement.

C. The Government fails to give proper weight to Mr. Moss' communications which establish his non-nefarious intent for trying to have someone record his sentencing proceedings.

The Government also asserts that the District Court properly applied the obstruction of justice enhancement based upon the evidence that Mr. Moss took steps to have the evidentiary hearing recorded. (Answer at 42). Specifically, the Government argues that the evidence does not support Mr. Moss' argument and interpretation of the evidence as Mr. Moss' communications support the District Court's conclusion that Mr. Moss had the hearings recorded to expose Mr. Alfaro as a cooperator. (Answer at 42-49). The Government's argument fails because, like it did in previous arguments,[30] the Government only considers specific snippets of communications in a vacuum without giving proper consideration to other parts of the communications or other relevant communications that explain Mr. Moss' motive for recording the proceedings. (Answer at 42-49).

As noted in the Opening Brief,[31] Mr. Moss' emails on December 14, 2022, December 15, 2022, and January 5, 2023 as well as a phone call he placed on December 13, 2022 provide the necessary context for his communications and make

[30] *Supra* at 1-3, 7-9.
[31] Opening at 29-31.

it clear that Mr. Moss was being accused of being a cooperator by Mr. Alfaro and "Hove" and that he was trying to clear his own name by having the hearings recorded. (A262-63; A279-86). In the December 14, 2022 email, Mr. Moss wrote "why the 'N word' Mexican Hove talking real heavy, talking about I ain't going to be out in a long time and his folks Chewy not telling." (A282). In the December 15, 2022 email, Mr. Moss wrote "[n]ot his peoples, it's just the one who had the wire and camera on, but the 'N word' Hove talking – shit talking about I'm paranoid and that his folks solid over there. . . ." (A285). In the January 5, 2023 email, Ms. Moss wrote "what's up with Chunk telling people I'm police". (A279). And during the December 13, 2023 phone call, Mr. Moss advised the other caller that he was not cooperating and that anyone could learn who a cooperator was by going to Pacer.com. (A286).

These communications establish that there was an ongoing dispute between Mr. Moss, Mr. Alfaro, and "Hove" as to who was cooperating with the Government. (A278-87). It also provides the necessary context for Mr. Moss' actions as it explains that Mr. Moss attempted to recruit someone to film his sentencing proceedings so that he was not incorrectly labeled a cooperator. (A278-87). As the Government does not give the above noted communications proper consideration when evaluating Mr. Moss' actions and his other communications, their argument has no merit. Thus, the District Court clearly erred when it overruled Mr. Moss' objection to the obstruction

of justice enhancement.

D. Even taken together, there was insufficient evidence to overrule Mr. Moss' obstruction of justice objection.

Lastly, the Government asserts that when the evidence of Mr. Alfaro's alleged receipt of threatening notes through the plumbing system at FDC Philadelphia is considered together with Mr. Moss' attempt to recruit someone to film his sentencing proceedings, "there was more than sufficient proof that Moss obstructed or attempted to obstruct justice." (Answer at 50). However, as described above,[32] neither Mr. Alfaro's alleged receipt of threatening messages or Mr. Moss' attempt to have the sentencing proceedings recorded was a sufficient independent basis to overrule Mr. Moss' objection to the obstruction of justice enhancement. As such, cumulatively, they are also not a sufficient basis for the obstruction of justice enhancement and therefore, the Government's argument has no merit.

[32] *Supra* at 16-22.

CONCLUSION

WHEREFORE, Malik Moss respectfully requests that this Honorable Court overturn the District Court's judgment and remand this case to the District Court with instructions that the District Court grant Mr. Moss a new sentencing hearing.

Respectfully Submitted,
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