No. _____

IN THE
Supreme Court of the United States

MICHAEL MAO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At issue is whether Petitioner is a career offender per U.S.S.G. § 4B1.1. Two distinct questions for this Court, both of which implicate circuit-splits, should be resolved in Petitioner's favor:

(1) Should this case be held, and eventually remanded, pending this Court's anticipated disposition of *Beaird v. United States*, 25-5343 (April 20, 2026) (order granting petition for certiorari), because the question presented in *Beaird* – "Whether *Stinson v. United States*, 508 U.S. 36 (1993), still correctly states the rule for the deference that courts must give to the commentary to the Sentencing Guidelines?" – controls one of the issues Petitioner presented to the court below?

(2) In reaching a decision contrary to the Fourth Circuit regarding whether Petitioner's Virginia-state conviction for using or displaying a firearm while committing a robbery, Va. Code Ann. § 18.2.-53.1, is a crime of violence per U.S.S.G. § 4B1.2(a) (2021), did the lower court misstate state law in a manner that raises federalism concerns and violates this Court's admonition to "defer considerably," *McMillan v. Monroe County*, 520 U.S. 781, 786 (1997), to the court of appeals with most experience interpreting the laws of the state in which it sits?

PARTIES TO THE PROCEEDING

Michael Mao, a/k/a "Whitebodian," a/k/a "Spook," a/k/a "Leno," petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Direct appeal: *United States v. Mao*, 24-2107 (1st Cir. 2026) (decision entered April 29, 2026).

Trial judgment: *United States v. Mao*, 1:23-cr-10009-FDS (D.Ma 2024). (judgment entered December 3, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Mao respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *United States v. Mao*, 174 F.4th 245 (1st Cir. 2026). Pet. App. 1A-20A. The trial court's unreported oral ruling is appended to this petition at Pet. App. 21A-64A.

JURISDICTION

The judgment of the court of appeals was entered April 29, 2026. Petitioner did not seek rehearing or reconsideration before the deadline for doing so, and his subsequent Motion to Recall the Mandate was denied by order of the court on June 9, 2026. (Pet. App. 65A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

To be deemed a career offender, a defendant must, among other things, "ha[ve] at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a).

As applicable to our case, "a crime of violence" is:

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> > (1) has an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2 (2021).[1]

Application Note 1 of the Commentary to § 4B1.2 (2021) contains a definition relied upon by the lower court:

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
>
> ***

The predicate Virginia-state offense, robbery using or attempting to use or displaying a firearm, is a compound offense. Virginia robbery is defined by common law, not statute. *White v. United States*, 863 S.E.2d 483, 484 (Va. 2021) ("In Virginia, robbery is a common-law crime."). And the use-or-display provision provides, in relevant part:

> It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit … robbery[….].

Va. Code Ann. § 18.2-53.1.

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[1] As the court below noted, "The parties agree that the 2021 Guidelines -- those in effect at the time Mao committed the instant offense -- govern here." Pet. App. 13A; *Mao*, 174 F.4th at 252 n. 7.

STATEMENT OF THE CASE

Petitioner pleaded guilty to conspiracy with intent to distribute and money laundering conspiracy.

Defendant pleaded guilty to the two counts for which he was indicted: conspiracy to distribute with intent to distribute Methylenedioxymethamphetamine ("MDMA") and Buprenorphine, in violation of 21 U.S.C. §§ 841(a)(1), 846; and money laundering conspiracy, 18 U.S.C. § 1956(a)(1)(A)(i), (a)(1)(B)(i), and (h). (Pet. App. 2A-3A). He had no plea agreement with the government.

The district court had jurisdiction because defendant was charged with violating federal criminal laws. 18 U.S.C. § 3231. Judgment was entered on December 3, 2024, and defendant timely filed a notice of appeal the following day. *See* Fed. R. App. P. 4(b). The First Circuit had jurisdiction over Petitioner's appeal of that final judgment. 28 U.S.C. § 1291.

The convictions involve conduct in both Virginia and Massachusetts.

According to the government, while imprisoned at a Virginia state correctional facility, defendant spearheaded an effort to smuggle the two drugs into the facility. (R.11 Tr. 14-15). By phone, defendant orchestrated efforts in Massachusetts by at least two co-conspirators to send the drugs to another conspirator in Virginia, Kenneth Owen, then a correctional officer at the prison. (R.11 Tr. 15-16). Owen, in turn, smuggled or facilitated the smuggling of the drugs into the facility. (R.11 Tr. 16-17).

Defendant directed those in Massachusetts to pay Owen via Cash App or similar accounts. (R.11 Tr. 17-19). These accounts were also used to collect the proceeds of the drug sales, (R.11 Tr. 17), and to compensate those who supplied the drugs. (R.11 Tr. 19). Either directly or through coconspirators, defendant communicated with family and friends of the recipients of the sales, seeking to collect payment. (R.11 Tr. 18-19).

The district court sentenced Petitioner to 151 months' prison.

Integral to the court's sentencing analysis are defendant's two sets of objections on which the Questions Presented herein are premised:

Relying on Guidelines Commentary, the district court determined that the instant count of conviction is a controlled substance offense

Petitioner objected that the instant offense of conviction – *i.e.*, conspiracy to distribute with intent to distribute – does not qualify as a controlled-substances offense per the applicable Guideline, § 4B1.2(b). In its response, Probation stated, "Defense counsel is correct that the Fourth Circuit has held that inchoate crimes such as conspiracy are not controlled substances offenses…." (S.Apx-70). Nevertheless, Probation maintained its position in light of First Circuit case-law reaching the opposite conclusion. (*Id.*; Apx-69-70). For its part, the government did not respond, omitting in its sentencing memorandum to state its position or otherwise address the objection.

At the sentencing hearing, defendant renewed his objection, but the court overruled him:

> Yes. Let me dispose of that quickly. In the Fourth Circuit, it's not[,] because they said it was an inchoate crime, but I think First Circuit precedence is fairly clear that it is, that is a conspiracy to distribute controlled substances is a controlled substance offense under the career offender guideline, and your objection is preserved.

(Pet. App. 26A). Though the court noted it lacked "discretion" to instead follow Fourth Circuit jurisprudence, it offered that it would take the divergence into account "as part of the mix of information that [it] would consider in the sentencing process…." (Pet. App. 26A-27A).[2] Subsequently, defense counsel renewed the objection. (Pet. App. 33A-34A).

The district court concluded that Petitioner's Virginia conviction for using or displaying a firearm while committing a robbery is a crime of violence.

Also, Petitioner argued that the predicate state convictions for robbery while using a weapon does not represent a crime of violence because it does not categorically require state prosecutors to prove (1) that a defendant used force against any person (rather than property), or (2) that he threatened force against another person (rather than himself). (Apx-62-63). Such a conviction, Petitioner sought to persuade the court, could have resulted from shooting to break a lock, or from a threat of self-harm during the course of a robbery, among other conduct. (*Id.*). Key to the government's opposition was its conception – misconception, respectfully, as Petitioner will show below – of the Virginia law's requirement that force or intimidation must be directed "'at the person of the victim.'" (Apx-87-89) (quoting *Winn v. Commonwealth*, 462 S.E.2d 911, 912 (Va. Ct. App. 1995)).

The parties renewed their positions along these fault-lines at the sentencing hearing. Defense counsel argued that a robbery might be committed by using a

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[2] The court later reflected, "Maybe it's the first time I ever heard anyone say they'd like to be sentenced in a circuit like the Fourth rather than the First Circuit, but normally sentences in the south are dramatically longer than those in New England…." (Pet. App. 56A).

firearm to open a lockbox, for example – *not* against the victim. (Pet. App. 27A). The government argued that such a hypothetical would not constitute robbery because Virginia law "does require the use of a [sic] or the taking from a person in his or her presence." (Pet. App. 31A).

The district court favored the government's analysis:

> All right. As I'm sure counsel is aware, this is an extraordinarily complicated set of cases and questions trying to figure out what exactly is a crime of violence, but I think I agree with probation and the government and the majority of the District Courts in Virginia that have considered this question that this statute does qualify as a crime of violence.
>
> The defendant was convicted of use of a firearm in the commission of a robbery, but, as I said, the statute goes much further, but the elements of the statute require that use or attempted use or threatened use of physical force against the person of another, in particular, the firearm must be used or displayed in a threatening manner, and it has to occur during the predicate offense.
>
> Exactly what it means to occur during the predicate offense is a bit complicated perhaps. The example of the lock box, if you have a gun and you break into someone's house and you tell the person show me the lock box, you're brandishing the gun, you're displaying it in a threatening manner.
>
> If the person complies, I think that that's enough. If you try to shoot the lock off right then and there, it doesn't really add much to the analysis. If you take the lock box out to the front yard and you have not displayed the gun but you try to shoot the lock off there, you never having shown the firearm, displayed it, or used it up to that point.

> The predicate offense is probably over at that point. It's not during the predicate offense. There's perhaps an argument that ensuring that your successful retreat or escape from a violent crime is itself part of the crime, so I don't see how you could be convicted of this offense in any of its iterations, again, without using or displaying the firearm during the predicate offense, and, of course, the mere display of the firearm is almost certainly, if not 100 percent of the time, the fact that you're making it known to the victim is itself a threatening manner or displaying it in a threatening manner.
>
> So I am going to follow the District Courts in Virginia. I have concluded it is a crime of violence, and, again, this is a guideline analysis that is a starting point, not necessarily an ending point, but I do think the career offender enhancement applies.

(Pet. App. 31A-33A). Once the court announced its ruling, defense counsel added another objection "out of an abundance of caution." (Pet. App. 33A-34A).

On direct appeal, the First Circuit affirmed.

Petitioner assigned error to the district court's rulings on both issues.

The First Circuit adhered to its "law of the circuit," concluding that conspiracy to distribute is a controlled substance offense.

"[B]ased on a reading of Application Note 1 to § 4B1.2," the court below noted, panels of the First Circuit have "repeatedly" held that inchoate offenses are encompassed by "controlled substance offense." (Pet. App. 13A). The court declined to break from that precedent, despite the entrenched circuit-split, reasoning that no "sound reason" justified doing so. (Pet. App. 13A-16A).

Specifically, the court disagreed that three of this Court's decisions occasioned a departure from its prior decisions:

> In [Petitioner's] view, *Loper Bright*[*v. Raimondo*, 603 U.S. 369 (2024)] and *Kisor*[*v. Wilkie*, 588 U.S. 558 (2019)] establish 'the Supreme Court's walk-back of judicial deference to agency interpretations,' and [*United States v.*]*Davis*, 588 U.S. 445 (2019)] underscores the separation of powers and due process principle that it must be clear that Congress itself has approved proscriptive laws.' However, we have explicitly rejected the argument that *Kisor* requires us to overturn our prior "controlled substance" holdings. *See United States v. Lewis*, 963 F.3d 16, 23-24 (1st Cir. 2020). Further, [Petitioner] concedes that *Loper Bright* 'applied to judicial deference to an agency's interpretations of statutes whereas the Court characterizes Commentary as more 'akin to an agency's interpretation of its own legislative rules." Appellant's Br. 47 (quoting *Stinson v. United States*, 508 U.S. 36, 45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993)).

(Pet. App. 16A) (cleaned up). In sum, "[Petitioner's] arguments are insufficient to overcome the law-of-the-circuit doctrine." (*Id.*).

Moreover, the First Circuit continued, "Even if we were to revisit our precedent, we see no reason to depart from our prior holdings that Application Note 1 is not inconsistent with § 4B1.2." (Pet. App. 17A). It noted that the text of § 4B1.2(b) "is silent as to whether inchoate crimes – such as conspiracy to distribute a controlled substance – fall within this provision." (*Id.*). Rather than believing that the Sentencing Commission purposely excluded "attempt and other inchoate crimes," as some other circuits have reasoned, the court below preferred to chalk this lack of inclusion up to the fact that completed and attempt/inchoate crimes embody "separate conceptual category[ies]." (Pet. App. 18A_. Thus, Application 1 was not "inconsistent" with § 4B1.2. (*Id.*).

Finally, the court expressed its opinion that "the structure, history, and purpose of the Guidelines support our precedent finding that Application Note 1 is not inconsistent with § 4B1.2." (*Id.*). "As to structure," the court observed, some provisions of the Guidelines explicitly exclude specific crimes whereas no such explicit exclusion of inchoate offenses is included in § 4B1.2(b). (Pet. App. 19A). "As to history," the panel continued, prior iterations of the Guidelines referred to "similar offenses," which the Commission "repeatedly clarified" was a term encompassing inchoate crimes. (*Id.*).

"[A]s to purpose," the court concluded: "[T]he Guidelines generally seek to hold defendants who have a relevant criminal history of repeated similar offenses more culpable, which would logically include attempts or conspiracies to commit such offenses." (*Id.*).

"Given these independent reasons for affirming our precedent on Application Note 1, [the First Circuit] decline[d Petitioner's] invitation to further entrench the circuit split on this issue." (Pet. App. 20A).

The First Circuit concluded that Petitioner's Virginia-state conviction for using a firearm during a robbery is a crime of violence.

The state conviction "categorically matches the career offender enumerated offense of robbery," the First Circuit wrote, because it "requires a type of force that creates an immediate danger to the person." (Pet. App. 8A-9A) (quotation marks omitted). And, according to the court, that conviction further qualifies as a crime of violence under the force clause because the offense "requires using a firearm while overcoming the victim by violence or intimidation." (Pet. App. 10A).

The Court briefly alluded to Virginia-state decisions and a Fourth-Circuit opinion holding that Virginia robbery need not entail violence or a threat of physical violence because robbery there can be achieved by threatening to accuse a victim of sodomy. (Pet. App. 10A). But it discounted this case-law, reasoning that, as opposed to plain-old robbery, using or displaying a firearm while committing a robbery requires such "<u>during the robbery</u>." (Pet. App. 11A-12A) (emphasis in original). The fact that the crime of conviction was "divisible" therefore "necessarily defeats" Petitioner's arguments. (Pet. App. 12A).

The very day after the First Circuit's mandate issued, the Fourth Circuit decided the identical issue, based on identical arguments, contrary to the First Circuit's opinion. *United States v. Scott*, 176 F.4th 806 (4th Cir. May 22, 2026). The opinion of the Fourth Circuit criticized the First Circuit's opinion, for, among other things, failing to even address Virginia-state case-law that enforces no requirement that the firearm must be used against another person. 176 F.4th at 16-17.

Petitioner quickly moved the First Circuit to recall its mandate and permit him to file a petition for rehearing, both by the panel and en banc. In his motion, Petitioner wrote of the federalism concerns and failure to adhere to this Court's admonition to "defer considerably" to a court of appeal presiding in the state whose laws it is interpreting. The court declined to recall its mandate or ameliorate its schism with the Fourth Circuit. (Pet. App. 65A).

REASONS FOR GRANTING THE PETITION

I. This Court ought to hold this petition in abeyance pending the anticipated decision in *Beaird*.

As to the First Circuit's decision that deference shall be accorded to Guidelines Commentary, Petitioner does not seek plenary review at the present time. Rather, Petitioner respectfully suggests that this Court hold the petition in abeyance until it has decided *Beaird* and then decide the proper course – *e.g.*, grant/vacate/remand, undertake plenary review, or deny the petition. Doing so comports with this Court's guidance:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam).

Because this Court has already granted review in *Beaird*, Petitioner dispenses with an argument about why the issues presented herein merit Supreme Court review – this Court recognizes they do. Instead, Petitioner explains why the First Circuit's legal analysis was wrong and how it impacted the ultimate outcome of the litigation – *i.e.*, why there is a "reasonable probability" that reconsideration would yield a different result.

A. There is a reasonable probability that, in light of the Court's anticipated decision in *Beaird*, the court below would reconsider its opinion.

Were *Beaird* decided favorably to Petitioner, there is good reason to believe that the First Circuit, on remand, would change course. Below, *Mao* turned on the court's reliance on *Stinson*:

> *Loper Bright*[*Enters. v. Raimondo*, 603 U.S. 369 (2024)] applied to judicial deference to an agency's interpretations of statutes whereas the Court characterizes commentary as more 'akin to an agency's interpretation of its own legislative rules.'

Mao, 174 F.4th at 253 (cleaned up; quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)). Indeed, the First Circuit's "law of the circuit," upon which the opinion below rests so heavily, is itself reliant on *Stinson* and its reasoning. *See*, *e.g.*, *United States v. Fiore*, 983 F.2d 1 (1st Cir. 1992) abrogated on other grounds by *United States v. Giggey*, 551 F.3d 27, 28 (1st Cir. 2008) (en banc) (First Circuit "will defer to the Commission's suggested interpretation of a guideline provision unless the Commission's position is arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law."). For all intents and purposes, this is indistinguishable from the holding of *Stinson* that is now in doubt in light of the grant in *Beaird*. *See Stinson*, 508 U.S. at 38 ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

B. The First Circuit wrongly decided the issue.

Kisor and *Loper Bright* are not just about interpretative tools, contrary to the First Circuit's reading. *See United States v. Lewis*, 963 F. 3d 16, 23-24 (1st Cir. 2020) (describing the "toolkit"). They reaffirm courts' Article-III prerogative "'to say what the law is.'" *Loper Bright*, 603 U.S. at 369 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Fidelity to the separation of governmental powers, though, limits this prerogative to only that which Congress has "clearly proscribe[d]." *United States v. Davis*, 588 U.S. 445, 464 (2019). Absent such clarity, courts therefore cannot adopt merely "possible," *id.* at 463, or "permissible," *Loper Bright*, 603 U.S. at 400, legal interpretations to expand, rather than narrow, criminal penalties. *Davis*, 588 U.S. at 464-65. These legal principles do not allow for how the First Circuit came about its "law of the circuit."

That body of case-law is explicitly tilted towards deference and works penalty-expansion rather than narrowing. Typically, courts, like the First Circuit, begin interpretation with an "inquiry by examining the plain text of the guideline." *United States v. Nolte*, 844 F.3d 331, 336 (1st Cir. 2016). Such was not the case in *Fiore*, the First Circuit's first foray into the question. Rather, the *Fiore* panel began its analysis by noting what "[t]he commentary … tells us": "conspiracy to commit a predicate offense is itself a predicate offense." 983 F.2d at 2 (citing Application Note 1). Immediately thereafter, *Fiore* noted that application notes are "'entitled to considerable respect,'" *id.* (quoting *United States v. Weston*, 960 F.2d 212, 219 (1st Cir. 1992)), such that the First Circuit "will defer" to them unless doing so is unreasonable, arbitrary, inconsistent with the guideline's text, or unlawful." *Fiore*, 983 F.2d at 2. Rather than first gauging whether the text of § 4B1.2(b) is genuinely ambiguous, *Fiore* instead assumes that the Commentary is binding absent "any cogent reason for rejecting the Commission's view." *Id.* at 2.

To underscore, the font of the First Circuit's law of the circuit, upon which *Mao* rests: (1) did not look first to the text but fell immediately to deference; (2) extends deference to interpretations so long as they are not "unreasonable" or "arbitrary"; and (3) ultimately rests on the Circuit's determination that there is no "cogent reason" to eschew deference. So much for finding "the best" interpretation, *Loper Bright,* 603 U.S. at 401; limiting criminal sanctions to only those conditions that Congress has "clearly proscribe[d]", *Davis*, 588 U.S. at 464; and narrowing, rather than expanding, criminal laws that are less than clear. *Id.* at 464-65.

Fiore's next interpretive tool was itself another form of deference. It concluded: "most courts would likely agree that deference is warranted here." 982 F.2d at 2. Such a conclusion could no longer be supported, as most circuits now do not "agree that deference is warranted here." Panels of six circuits have declined to extend such deference. *United States v. Nasir*, 982 F.3d 144, 157-60 (3d Cir. 2020) (en banc); *United States v. Campbell*, 22 F.4th 438, 447-49 (4th Cir. 2022); *United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc) (per curiam); *United States v. Castillo*, 69 F.4th 648, 663-64 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1279 (11th Cir. 2023); *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018). Whatever these decisions say about the meaning of § 4B1.2(b) (and Petitioner believes they say quite a bit), their mere existence belies any notion that the text of § 4B1.2(b) "clearly proscribe[s]" anything inchoate. Due process, separation of powers principles, and the rule of lenity thus do not countenance expansion of § 4B1.2(b) to encompass such offenses.

"'[T]here is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into'" § 4B1.2(b). *Lewis*, 963 F.3d at 27 (Torruella, J., concurring) (quoting *United States v. Soto-Rivera*, 811 F.3d 53, 60 (1st Cir. 2016)). The plain text of § 4B1.2(b) (2021) does not include inchoate offenses:

> The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

This, as other courts have recognized, is the whole ballgame. *E.g.*, *Nasir*, 982 F.3d at 159 ("The guideline does not even mention inchoate offenses. That alone indicates it does not include them."); *Winstead*, 890 F.3d at 1091 ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses."). Applying the canon *expressio unius est exclusio alterius*, because nothing more is included, nothing more can be included. *Nasir*, 982 F.3d at 159; *Campbell*, 22 F.4th at 445-46.

Adding something more, such as inchoate offenses, based on notions of "policy" or "guidance" would "raise[] troubling implications for due process, checks and balances, and the rule of law." *Lewis*, 963 F.3d at 28 (Torruella, J., concurring). Without requiring Congressional approval, "the Sentencing Commission would be empowered to use its commentary as a Trojan horse for rulemaking." *Id.* at 28. That is authority the Commission is not authorized to wield. *Nasir*, 982 F.3d at 159-60 (noting that 28 U.S.C. § 995(a)(20) authorized the Commission only to "make recommendations to Congress") (emphasis removed). Following *Davis* and *Loper Bright*, anything more offends due process and separations of powers and the rule of lenity because Congress has not "clearly proscribe[d]" it. *See Loper Bright*, 603 U.S. at 435; *see Davis*, 588 U.S. at 464. This Court should therefore confine the meaning of § 4B1.2(b) to only that which Congress has approved: its text. And because the text of § 4B1.2(b) does not "clearly proscribe" inchoate offenses, the First Circuit's chosen policy of deference is error.

II. This First Circuit's opinion disregards state law in a way that raises federalism concerns.

Separate from the Guidelines-deference issue, Petitioner's sentence hinges on whether his Virginia-state conviction for robbery while using or displaying a weapon constitutes a crime of violence. In concluding that it does, the court below disregarded rather clear state law and ignored the Fourth Circuit's authoritative opinion contrary to its own.

A. The opinion below fails to honor controlling state law.

Virginia's common-law robbery is an oddity. As the Supreme Court of Virginia recently reaffirmed, it can be committed without a threat of violence or actual violence. "[I]f one parts with his goods through fear of a threatened charge of sodomy, the taking is robbery." *White v. United States*, 863 S.E.2d 483, 484 (Va. 2021). As the Fourth Circuit has recognized, this theory does not include violence, or even any semblance of force, actual or threatened. *United States v. Parham*, 129 F.4th 280, 288 (4th Cir. 2025). “Therefore, because Virginia robbery can be committed by conduct broader than the generic form of robbery, it is not a crime of violence under the enumerated offenses clause of the Guidelines.” *Id.*

With this much, the First Circuit did not disagree, at least outwardly. And it rightly noted that Petitioner’s conviction is not just for robbery but for using or threateningly displaying a weapon during a robbery. Va. Code § 18.2-53.1;[3] *Mao*, 174 F.4th at 250). Rather, the court’s error was concluding that “using a firearm,” *Mao*, 174 F. 4th at 251 (emphasis in original), “necessarily implicates the threat of immediate violence….” *Id.* That is not so, either in law or logic.

As the Fourth Circuit has since opined about this error in *Mao*,

> [N]either the text of Virginia Code § 18.2-53.1 nor the decisions we have identified construing it—none of which are cited in the First Circuit's opinion—states that the required use of the firearm must be against or involve another person.

United States v. Scott, 176 F.4th 806, 815 (4th Cir. May 22, 2026). With all respect to the First Circuit, that much is plain from Virginia case-law. Virginia courts have long “refuse[d] to restrict application of Code § 18.2-53.1 only to situations in which the victim is aware of or able to comprehend the use of a firearm.” *Clanton v. Commonwealth*, 673 S.E.2d 904, 911 (Va. Ct. App. 2009). That is about as clear a statement as a state-court can give, and it is 180 degrees from the First Circuit’s opinion.

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3 It is "unlawful for any person to use or attempt to use any . . . firearm or display such weapon in a threatening manner while committing or attempting to commit," *inter alia*, “robbery.”

Indeed, as Petitioner had cited in his briefing before the First Circuit, there are several Virginia-state cases indicating that a firearm need not be displayed or wielded against a person per the statute of conviction. Simply, "[a] person 'uses' a firearm if he or she employs it." *Rowland v. Commonwealth*, S.E.2d 331, 334 (Va. 2011).[4] For example, a firearm might be used to break open a safe or some locked compartment. *Cf. Quesinberry v. Commonwealth*, 402 S.E.2d 218, 221 (Va. 1991) (describing how the defendant, convicted of, *inter alia*, robbery, used his pistol to "fire[] a shot which broke the lock on the drawer," while searching for "'a cash box'").[5] It might even be "used" by "bartering" – *e.g.*, trading a gun to a security guard to look the other way. *Rose v. Commonwealth*, 673 S.E.2d 489, 492 (Va. Ct. App. 2009). In Virginia, a firearm can be "used" other than against the victim and without the victim's knowledge of its existence.

Yet, the First Circuit continued to overlook Virginia-state law. It stated that a defendant who uses a firearm, for example, to open a lockbox after having left the presence of a victim could not have committed Virginia robbery "because that hypothetical defendant never used or displayed the firearm <u>during the robbery</u>…." *Mao*, 174 F.4th at 251. But that does not honor Virginia law.

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4 As the Fourth Circuit noted, Virginia law "defin[es] use as 'to employ for *some* purpose' or to 'put into service' rather than requiring that the use involve another person in any way." *Scott*, 2026 U.S. App. LEXIS 14899, * 14 (emphasis added by *Scott*, quoting *Rose*, 673 S.E.2d at 492, quoting Use, *Random House Webster's College Dictionary* 1414 (2d ed. 1997)).

5 Though *Quesinberry* also entails additional evidence of the defendant's use of a gun – *i.e.*, to later shoot the property owner – the shooting of the locking mechanism is relevant to us because it occurred "in the process of stealing money." 402 S.E.2d at 224.

Rather, Virginia robbery is a continuing offense that is not complete until the robber obtains "absolute control" over the loot. *Cf. Spencer v. Commonwealth*, 592 S.E.2d 400, 403-04 (Va. Ct. App. 2004) (A car owner who has left her keys in the ignition, remains in constructive possession of the car, even though the robber is attempting to drive it away but is blocked by the owner, and the robbery is not complete until the robber bumps the owner and forces her out of his path); *Broady v. Commonwealth*, 429 S.E.2d 468, 472-73 (Va. Ct. App. 1993) (A purse-snatcher who has repeatedly "fumbled" a purse and dropped it to the ground, even after having controlled it enough to toss it to his nearby accomplice, has not gained "absolute control" over that purse sufficient to constitute robbery). Virginia courts also refer to this notion as one marking the distinction between mere constructive possession, or "bare custody," and actual possession. *Pritchard v. Commonwealth*, 303 S.E.2d 911, 913 (Va. 1983). Only when "bare custody" is converted into actual possession have the taking and asportation elements of robbery been completed. *Id.* For example, a gas-station attendant who has pumped gasoline into a gas-tank has not been robbed until the vehicle owner takes the gasoline without payment. *Id.* Likewise, a store manager who witnesses a suspect hide a pair of shoes in his pants and leave the store without paying has not been robbed until, in the store's parking lot, the suspect refuses to return the shoes and compels the manager to cease pursuit. *Commonwealth v. Jones*, 591 S.E.2d 68, 71-72 (Va. 2004). For our purposes, imagine a safe or comparable locked container, taken from its owner upon threat of a sodomy accusation, only to later be accessed by gunshot. Or imagine car-keys given to a robber upon similar threat, the robber gaining absolute possession of the car itself only when he can shoot the locking mechanism on the garage door or the gate at the end of the driveway. Or consider a robber shooting a barrier to his entry into a victim's home, who, once inside, undertakes robbery by threatened accusation of sodomy.

Thus, Virginia cases uphold robbery convictions when the defendant and victim were not in one another's immediate presence but, rather, were on different floors or in different rooms of the same premises. *Price v. Commonwealth*, 722 S.E.2d 653, 655-56 (Va. Ct. App. 2012) (endorsing these scenarios). The First Circuit addressed none of these Virginia-state cases. By ignoring them – despite their inclusion in the briefing – the court below failed to heed binding Virginia law.

Tales of criminals using guns to shoot locks or safes or smashing other barriers are so commonplace that they have attained trope status. The Virginia-state decisions cited above indicate that there are also real-life examples. In other words, *obviously*, the use of the firearm itself need not be directed toward the victim. Rather, what really seems to have tripped up the First Circuit is its failure to appreciate the peculiar nature of Virginia robbery – neither force nor the threat of it need be directed against the victim. *See Scott*, 176 F.4th at 816 n. 4 (criticizing *Mao* for failing to "grapple with the oddity of concluding that the crime Virginia calls robbery is *not* robbery under the Guidelines but a violation of Virginia Code § 18.2-53.1 somehow is." (emphasis in original)). Respect for federalism does not permit that. The First

Circuit had to ignore a great deal of a sovereign state's law to reach its divergent opinion.

B. The First Circuit's opinion undermines Virginia-state law and withholds the deference properly accorded to the Fourth Circuit in interpreting it.

There are two principles in play here. One, federal courts cannot be permitted to rewrite state law, and the opinion below represents such a usurpation. Two, to best honor state law, this Court has admonished that federal courts are to "defer considerably" to the decisions of federal courts presiding in the states whose laws are in question. *McMillan,* 520 U.S. at 786. Yet, when given the opportunity to correct its mistakes and do just that, the court below demurred. (Pet. App. 65A). It thus created a needless circuit-split, differing from the circuit court that has the most experience interpreting Virginia laws and in which most defendants for whom this issue matters will be prosecuted.

"[A] State's highest court is the final judicial arbiter of the meaning of state statutes." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975). State criminal laws "are what the laws of the individual States make them…." *Rochin v. California*, 342 U.S. 165, 168 (1951). Federalism embraces the principle that states "'possess primary authority for defining and enforcing' criminal laws…." *Torres v. Lynch*, 578 U.S. 452, 464 n. 9 (2016) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). "Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). By disregarding Virginia's criminal laws, the court below took a good chunk of that sovereignty away.

For the states, there are real consequences to such tinkering. *See, e.g.*, *United States v. Faust*, 853 F.3d 39, 63 (1st Cir. 2017) (Barron, J., concurring) ("A state's choice to expand the scope of its crimes to encompass both violent and non-violent conduct may make great sense in terms of state policy. It certainly makes it easier for state and local prosecutors to make their cases."). "[A] concern solely of the federal government's – identifying repeat violent offenders – would distort state court criminal proceedings that, by design, seek to make the violent nature of the conduct irrelevant." *Id.* at 65. Now, there exists a federal appellate court decision interpreting Virginia-state law in a manner contradicting Virginia-state law as established by Virginia courts. Such inconsistency sows confusion, lack of notice, and disparate treatment. While federal courts are free to do so at their own peril, misstating the laws of a separate state sovereign has deleterious effects on the state.

This creates foreseeable problems. Virginia's supreme court was not simply theorizing; it observed four prior occasions in its history when it had recognized robbery-by-threat-of-sodomy-accusation. *White*, 863 S.E.2d at 484 (Va. 2021) (collecting cases). "Virginia's earliest legal treatises confirm" the theory's vitality. *Id.* All that needs to be added to them is a robber using a weapon outside of the victim's presence. State and federal courts in Virginia (and elsewhere within the Fourth Circuit) will conclude that such *is* robbery while using a firearm, in contravention of Va. Code Ann. § 18.2-53.1. Courts within the First Circuit, were they to know those facts, would now be compelled to hold that it is not. Virginia courts, not federal courts, should have that say.

For good reason, federal appellate courts "defer considerably" to the circuit court presiding in the state whose laws are at issue. *McMillian v. Monroe County*, 520 U.S. 781, 786-87 (1997) ("Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law.") (collecting cases); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 282-83 (2d Cir. 1981) (recognizing "the authoritativeness of decisions on the law of a particular state rendered by the court of appeals for the circuit in which the state is located"). Not only does this practice draw upon the experience of judges with superior knowledge of the laws of the state at issue, it serves other federalism and comity interests:

> [T]he state legislature will know that the decision of the pertinent court of appeals will determine legal rights, unless superseded by a later state supreme court decision. This knowledge will focus state legislative efforts on the appropriateness of a statutory change. Fairness to the public is promoted by making clear that there is a single, authoritative answer to the particular state law issue, instead of leaving the matter subject to the varying interpretations of the courts of appeals for the several circuits.

Id. at 282. The First Circuit erred by doing otherwise.

CONCLUSION

This Court should either grant the petition for a writ of certiorari, summarily granting, vacating and reversing, or calling for proceedings in the usual course, or holding the petition until *Beaird* is decided.

July 14, 2026

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 24-2107

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL MAO, a/k/a Whitebodian, a/k/a Spook, a/k/a Leno,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor, IV, U.S. District Judge]

Before

Gelpí, Lynch, and Howard,
Circuit Judges.

Rory A. McNamara and Drake Law LLC on brief for appellant.

Mark T. Quinlivan, Assistant United States Attorney, and Leah B. Foley, United States Attorney, on brief for appellee.

April 29, 2026

LYNCH, **Circuit Judge**. Michael Mao appeals from a 121-month sentence imposed after he pled guilty to conspiracy to commit drug trafficking and money laundering. On August 14, 2024, Mao pled guilty to conspiring with others to distribute controlled substances from at least December 2019 through May 2021 in the Virginia correctional facility where he was incarcerated. His appeal challenges the district court's determination that he was a "career offender" under the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G."), on two grounds. First, he argues that his prior Virginia conviction under Va. Code Ann. § 18.2-53.1 for using or displaying a firearm in the commission of a robbery was not a "crime of violence" as referenced in U.S.S.G. § 4B1.1. Second, he contends that his conviction for conspiring to distribute drugs was not a "controlled substance offense" under the Guidelines and that this court should overrule its precedent to the contrary. We hold Mao's first challenge is without merit and his second is foreclosed by the law-of-the-circuit doctrine, and even so, we see no reason to depart from our precedent. We affirm his sentence.

I.

Because Mao pled guilty, "we draw the facts from 'the change-of-plea colloquy, the presentence investigation report ("PSR"), and the sentencing record.'" United States v. Tang, 160

F.4th 237, 240-41 (1st Cir. 2025) (quoting United States v. De La Cruz, 91 F.4th 550, 551 (1st Cir. 2024)).

From at least December 2019 through May 2021, while incarcerated at the Buckingham Correctional Center in Dillwyn, Virginia, Mao conspired with others to distribute MDMA and buprenorphine (also known as Suboxone). Mao worked with two Massachusetts-based drug traffickers, Sathtra Em and Sarath Yut, and with Kenneth Owen, a correctional officer at Buckingham, to distribute the drugs within the facility and collect the proceeds.

A federal grand jury in the District of Massachusetts returned an indictment on January 11, 2023, charging Mao with one count of conspiring to distribute and to possess with intent to distribute MDMA and buprenorphine, in violation of 21 U.S.C. § 846, and one count of conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h). Mao pled guilty to both counts on August 14, 2024, and a sentencing hearing was held on November 18, 2024.

On November 8, 2024, the Probation Office filed Mao's PSR, which calculated a base offense level of 20 under U.S.S.G. § 2D1.1 and arrived at an adjusted offense level of 26. The PSR further determined that Mao qualified as a career offender under § 4B1.1 and, after a reduction for acceptance of responsibility, calculated a total offense level of 29 and an advisory Guidelines range of 151 to 188 months' imprisonment.

The PSR correctly noted that to qualify as a career offender under the Guidelines: (1) the defendant must be "at least eighteen years old at the time the defendant committed the instant offense of conviction"; (2) the defendant's instant offense must be "a felony that is either a crime of violence or a controlled substance offense"; and (3) the defendant must have "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). A "crime of violence" is defined under the Guidelines as:

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that -- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a). "Subsection (1) of this definition is known as the 'force clause,'" and "the segment of subsection (2) listing specific crimes is known as the 'enumerated offenses clause.'" United States v. Frates, 896 F.3d 93, 96 (1st Cir. 2018).

The PSR concluded that Mao's two predicate Virginia felony convictions -- a 2009 conviction for use of a firearm in the commission of a robbery and a 2009 conviction for attempted murder -- qualified as crimes of violence under § 4B1.1(a). It further found that Mao's instant conviction for conspiracy to distribute controlled substances qualified as a "controlled substance offense." Accordingly, the PSR found that the career offender enhancement should apply.

As relevant to this appeal, Mao objected to his classification as a career offender on two grounds. First, he argued that his prior conviction for use of a firearm in the commission of a robbery under Va. Code Ann. § 18.2-53.1 was not a "crime of violence" because it did not have as an element the use of force "<u>against the person of another</u>." Mao claimed that, under Virginia's common-law definition of robbery, a defendant could (i) use force against the robbery victim's <u>property</u>, as opposed to the victim's person, or (ii) threaten harm to himself rather than to the victim. Second, he argued that his instant conviction for conspiracy to commit drug trafficking was not a "controlled substance offense" because "[n]otwithstanding First Circuit precedent to the contrary," the Fourth Circuit has held that inchoate crimes such as conspiracy are not controlled substance offenses under the Guidelines.

Mao's sentencing memorandum renewed these objections, adding that his use-of-a-firearm conviction was not a crime of violence because it did not require proof of a <u>mens</u> <u>rea</u> greater than recklessness. He argued for a Guidelines range of 57 months' imprisonment.

The government's sentencing memorandum responded that Mao qualified as a career offender, contending that Mao's use-of-a-firearm conviction was a crime of violence "[b]ecause [Va. Code Ann. § 18.2-53.1] has the use of force as an element and is also a categorical match to generic robbery." The government recommended a sentence of 151 months' imprisonment, followed by four years of supervised release.

At the sentencing hearing, the district court "agree[d] with probation and the government and the majority of the District Courts in Virginia that have considered this question that [use or display of a firearm while committing a robbery] does qualify as a crime of violence." The court reasoned that the elements of Va. Code Ann. § 18.2-53.1 require that the firearm "must be used or displayed in a threatening manner" and must "occur during the predicate offense," here robbery.

The district court also rejected Mao's claim that his conviction for conspiracy to distribute controlled substances did not qualify as a "controlled substance" offense. The court held that, notwithstanding Mao's arguments under Fourth Circuit law, "First Circuit precedence [sic] is fairly clear that . . . a conspiracy to distribute controlled substances is a controlled substance offense under the career offender guideline."

After finding that Mao qualified as a "career offender," the district court determined that "the guideline range without the career offender enhancement is much too short, but . . . the career offender guideline is too long." The court imposed a sentence of 121 months' imprisonment, followed by four years of supervised release.[1]

II.

Mao's use or display of a firearm while committing his Virginia robbery qualifies as a crime of violence under U.S.S.G. § 4B1.1. "Whether a prior conviction qualifies as a predicate offense under U.S.S.G. § 4B1.1 is a question of law that we review de novo." United States v. Almenas, 553 F.3d 27, 31 (1st Cir. 2009) (citing United States v. Santos, 363 F.3d 19, 22 (1st Cir. 2004)).

Va. Code Ann. § 18.2-53.1 makes it "unlawful for any person to use or attempt to use any . . . firearm or display such weapon in a threatening manner while committing or attempting to commit" twelve enumerated offenses, including robbery. Because the statute "sets forth one or more elements of a particular offense in the alternative," it is divisible, and so we apply the "modified" categorical approach. United States v. Fish, 758 F.3d 1, 6 (1st Cir. 2014) (citing Descamps v. United States, 570 U.S. 254, 257 (2013)). "Under the modified categorical approach, we

[1] The district court ordered four years of supervised release as to the conspiracy to distribute controlled substances count and three years of supervised release as to the conspiracy to commit money laundering count, to run concurrently.

may examine certain documents in the record of conviction, such as the indictment, plea agreement, and plea colloquy, in order to determine under which prong of the divisible statute the defendant was actually convicted, and then ask whether that particular crime categorically falls within the generic offense." Villanueva v. Holder, 784 F.3d 51, 54 (1st Cir. 2015).

Mao concedes that violations of § 18.2-53.1 are divisible by the enumerated predicate Virginia offense -- here, the use or threatening display of a firearm while committing or attempting the enumerated offense of robbery. This dooms his arguments.[2]

Mao's conviction qualifies as a crime of violence under the career offender enumerated offenses clause because it categorically matches the career offender enumerated offense of "robbery." See U.S.S.G. § 4B1.2(a)(2). Specifically, his conviction for use of a firearm during the commission of a robbery is not broader than "generic robbery," which "requires a type of

[2] For example, Mao argues that "[e]ven when compounded with Virginia's use-or-display-of-a-firearm statute, Va. Code Ann. § 18.2-53.1, no force need be directed at any person, let alone the victim," and that "[c]ompounding robbery with the use-of-a-firearm prohibition, Va. Code Ann. § 18.2-53.1, does not move the needle into career-offender territory." (emphases added). The documents in the record further establish that the applicable predicate offense here under § 18.2-53.1 is the commission of a robbery.

force that creates an immediate danger to the person."[3] United States v. Rabb, 942 F.3d 1, 5 (1st Cir. 2019) (internal quotation marks omitted). Because "the elements of the prior offense encompass no more conduct than do the elements of the 'generic' version of an offense that the guideline expressly enumerates," Mao's prior conviction qualified as a crime of violence. United States v. Benítez-Beltrán, 892 F.3d 462, 466 (1st Cir. 2018) (citation omitted).

Mao's conviction also qualifies as a crime of violence under the force clause because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). Under Virginia law, "common-law robbery is defined as 'the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation.'" United States v. Williams, 64 F.4th 149, 153 (4th Cir. 2023) (emphasis added) (quoting Durham v. Commonwealth, 198 S.E.2d 603, 605 (Va. 1973)). Virginia law defines intimidation as "words or conduct of the accused" that "exercise such domination and control over the victim as to overcome the victim's mind and overbear the victim's will, placing the victim in fear of bodily harm." United

[3] The parties agree that because there is no definition of "robbery" in the 2021 Guidelines Manual, the Virginia conviction must be for a crime matching the elements of "generic" robbery. See Taylor v. United States, 495 U.S. 575, 595-96 (1990).

States v. Parham, 129 F.4th 280, 287–88 (4th Cir. 2025) (emphasis added) (quoting Jones v. Commonwealth, 496 S.E.2d 668, 670 (Va. Ct. App. 1998)). Because the use of a firearm under Va. Code Ann. § 18.2-53.1 must occur "while" committing the predicate offense, Mao's conviction requires using a firearm while overcoming the victim by violence or intimidation. This necessarily entails the use, attempted use, or threatened use of physical force and thus qualifies as a crime of violence under the Guidelines force clause.

Mao's arguments to the contrary are not persuasive. First, ignoring the Virginia statute's requirement of use of a firearm, Mao argues that Virginia's common-law robbery is not a crime of violence because "it can be committed based on a robber's threat to accuse a victim of sodomy," which is not a threat of physical force. He points to language in Parham, a factually different case, where the Fourth Circuit held that because there is "no immediate physical harm to a sodomy-threat victim . . . Virginia robbery can be committed by conduct broader than the generic form of robbery" and "is not a crime of violence under the enumerated offenses clause of the Guidelines." Id. at 288. However, the reasoning of Parham does not apply to Mao's charged offense of using a firearm in the commission of a robbery. Because § 18.2-53.1 requires that the defendant use a firearm -- a weapon clearly capable of causing physical harm or intimidating the victim -- it necessarily implicates the threat of immediate violence that the Parham court found lacking in a threat to accuse the victim of sodomy. See United States v. Alexander, No. CV 3:25CR39 (RCY), 2025 WL 1969913, at *5 n.5 (E.D. Va. July 16, 2025) ("The Government rightly identifies that the possibility of a defendant committing a robbery with only the constructive force identified in Parham but otherwise using a firearm within the meaning of Va. Code Ann. § 18.2-53.1 is virtually nonexistent, and therefore insufficient to place [the defendant's] underlying offenses outside the [Armed Career Criminal Act's] definition of violent felonies . . . Thus, the rule of Parham plays a limited role in the instant analysis.").[4]

Mao argues that a defendant could "use" a firearm without threatening physical force. He poses a hypothetical in which a defendant, who carries but does not display a firearm, threatens to accuse the victim of sodomy; then steals a locked box belonging to the victim; then uses his firearm to break the lock, outside the view of the victim. We agree with the district court that Mao's hypothetical does not fit with § 18.2-53.1 because that

[4] We have noted that "the terms 'crime of violence' under the career offender guideline and 'violent felony' under the [Armed Career Criminal Act] are nearly identical in meaning, so that decisions construing one term inform the construction of the other." United States v. Willings, 588 F.3d 56, 58 n.2 (1st Cir. 2009) (citing United States v. Richards, 456 F.3d 260, 263 n. 2 (1st Cir. 2006)).

hypothetical defendant never used or displayed the firearm during the robbery, as required by the statute.[5]

Mao's concession that § 18.2-53.1 is divisible necessarily defeats his argument that the statute does not require "proof of an intent to use force." Common-law robbery is a specific-intent crime that requires "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation." Durham, 198 S.E.2d at 605 (quoting Jones v. Commonwealth, 1 S.E.2d 300, 301 (Va. 1939)). Mao's conviction under § 18.2-53.1, where the enumerated offense is robbery, "necessarily requires a mens rea of more than recklessness because without proof of more than accidental, negligent, or reckless conduct in using, attempting to use, or displaying a firearm, the Commonwealth could not prove a requisite element of common-law robbery." Williams v. United States, No. 1:04-CR-160 (LMB), 2023 WL 6849433, at *5 (E.D. Va. Oct. 16, 2023) (internal quotation marks omitted).

[5] Mao also argues that Virginia common-law robbery does not require proof of force or threatened force against another because the defendant's threat may be to commit self-harm. Extrapolating from the facts in Breeden v. Commonwealth, 596 S.E.2d 563, 569 (Va. Ct. App. 2004), he argues that a defendant may "use or attempt to use" a firearm as a threat of force against himself, rather than against the victim. However, the defendant in Breeden "used a combination of threats and force to intimidate the complaining witness and overcome her will"; the case did not involve solely a threat of self-harm. Id. at 568. Breeden is also distinguishable because the predicate crime there was not robbery. Id.

III.

Mao further concedes that, under First Circuit law, conspiracy to distribute controlled substances is a "controlled substance offense" for purposes of the Guidelines. He now asks this court to "break from its precedent" and join other circuits in finding that inchoate crimes are not "controlled substance offenses" under U.S.S.G. § 4B1.2. Reviewing this question of law de novo, Almenas, 553 F.3d at 31,[6] we decline.

This court has repeatedly held that the terms "controlled substance offense" and "crime of violence" in the pre-2023 Guidelines encompass inchoate crimes such as conspiracy, based on a reading of Application Note 1 to § 4B1.2.[7] See, e.g.,

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[6] The government argues that plain error review applies because Mao argued to the district court that his drug trafficking conspiracy did not qualify as a "controlled substance offense" under Fourth Circuit law, but now argues that the First Circuit should overturn its precedent and hold the same. Regardless of whether Mao presents his position as a choice-of-law argument or as a request for the First Circuit to adopt the Fourth Circuit's reasoning, his briefing below was sufficient to identify his objection. See United States v. Hassan-Saleh-Mohamad, 930 F.3d 1, 6 (1st Cir. 2019) ("To preserve a claim of error for appellate review, an objection must be sufficiently specific to call the district court's attention to the asserted error." (quoting United States v. Soto-Soto, 855 F.3d 445, 448 n.1 (1st Cir. 2017))). The district court acknowledged Mao's objection in ruling on the issue: "I think First Circuit precedence [sic] is fairly clear that . . . a conspiracy to distribute controlled substances is a controlled substance offense under the career offender guideline, and your objection is preserved."

[7] The parties agree that the 2021 Guidelines -- those in effect at the time Mao committed the instant offense -- govern here.

United States v. Nieves-Díaz, 99 F.4th 1, 6 (1st Cir. 2024) ("We have repeatedly construed the term 'controlled substance offense' as it appears elsewhere in the Guidelines . . . to encompass conspiracy offenses."); United States v. Rodríguez-Rivera, 989 F.3d 183, 186 (1st Cir. 2021) ("Application Note 1 to [§ 4B1.2] adds that a 'controlled substance offense' 'include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.' . . . And our controlling circuit precedent deems that interpretation to be authoritative." (first alteration in original) (citation omitted)).

Under the law-of-the-circuit doctrine, "newly constituted panels in a multi-panel circuit court are bound by prior panel decisions that are closely on point." United States v. Wurie, 867 F.3d 28, 34 (1st Cir. 2017) (quoting San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010)). The exceptions to this rule "are extremely narrow and their incidence is hen's-teeth-rare." Id. (quoting San Juan Cable LLC, 612 F.3d at 33). These exceptions occur (1) "when the holding of the prior panel is 'contradicted by controlling authority, subsequently announced'"; or (2) "when 'authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.'" Lassend

v. United States, 898 F.3d 115, 124 n.6 (1st Cir. 2018) (quoting Wurie, 867 F.3d at 34).

Mao focuses on the latter exception. He principally takes issue with the reasoning of the First Circuit's precedent, noting that subsequent circuit courts have disagreed. These circuit courts have reasoned that Application Note 1 is "inconsistent" with the text of § 4B1.2(b), which does not specifically encompass conspiracy. See, e.g., United States v. Campbell, 22 F.4th 438, 444 (4th Cir. 2022). Mao's argument fails because "it is not our role to overturn binding circuit precedent for the purpose of resolving what the defendant perceives as a circuit split." United States v. Gerrish, 96 F.4th 67, 71 (1st Cir.), cert. denied 145 S. Ct. (2024). While other courts have adopted a contrary view, at least five circuits, including the First, "have continued to hold that inchoate crimes like attempt and conspiracy qualify as controlled substance offenses under U.S.S.G. § 4B1.2(b)." Campbell, 22 F.4th at 443.[8]

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[8] When Campbell was decided, the First, Second, Seventh, Eighth, and Eleventh Circuits had held that inchoate crimes qualify as controlled substance offenses under § 4B1.2(b). Campbell, 22 F.4th at 443. Since then, the Fifth and Tenth Circuits have held the same. See United States v. Vargas, 74 F.4th 673, 683-99 (5th Cir. 2023) (en banc); United States v. Maloid, 71 F.4th 795, 805-14 (10th Cir. 2023). The Eleventh Circuit, however, has reversed course to hold that that the "definition of 'controlled substance offense' in § 4B1.2(b) of the Sentencing Guidelines does not include inchoate offenses like conspiracy and attempt." United States v. Dupree, 57 F.4th 1269, 1280 (11th Cir. 2023) (en banc).

Mao also points to three recent Supreme Court cases -- Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024); United States v. Davis, 588 U.S. 445 (2019); and Kisor v. Wilkie, 588 U.S. 558 (2019) -- which he contends provide "sound reason" to deviate from the law of the circuit. In his view, Loper Bright and Kisor establish "the [Supreme] Court's walk-back of judicial deference to agency interpretations," and Davis "underscores the [separation of powers and due process] principle that it must be clear that Congress itself has approved proscriptive laws." However, we have explicitly rejected the argument that Kisor requires us to overturn our prior "controlled substance" holdings. See United States v. Lewis, 963 F.3d 16, 23-24 (1st Cir. 2020). Further, Mao concedes that Loper Bright "applie[d] to judicial deference to an agency's interpretations of statutes . . . whereas the Court characterizes Commentary as more 'akin to an agency's interpretation of its own legislative rules.'" Appellant's Br. 47 (quoting Stinson v. United States, 508 U.S. 36, 45 (1993)). We have also rejected the argument "that Application Note 1 violates the rule of lenity, due process, and the separation of powers," finding such an argument "foreclosed by our circuit precedent." Lewis, 963 F.3d at 21 n.8 (1st Cir. 2020) (citing United States v. Piper, 35 F.3d 611, 619-20 (1st Cir. 1994)). Mao's arguments are insufficient to overcome the law-of-the-circuit doctrine.

Even if we were to revisit our precedent, we see no reason to depart from our prior holdings that Application Note 1 is not inconsistent with § 4B1.2.

Mao argues on appeal that Application Note 1 is inconsistent with the text of § 4B1.2(b). Section 4B1.2(b) defines a "controlled substance offense" as an offense under federal or state law, punishable by more than one year of imprisonment, that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance)." The text is silent as to whether inchoate crimes -- such as conspiracy to distribute a controlled substance -- fall within this provision. Mao argues that this silence must mean that Application Note 1, which expressly includes inchoate offenses, is inconsistent with § 4B1.2(b).

We agree with the Fifth Circuit's holding in United States v. Vargas, 74 F.4th 673 (5th Cir. 2023) (en banc), that attempt and other inchoate crimes are fundamentally different from the discrete completed acts listed in the text of § 4B1.2(b).[9] See

[9] Some circuits have concluded that the omission of inchoate offenses from § 4B1.2(b) was intentional, pointing to the fact that § 4B1.2(a)(1) expressly includes the "attempted use" of force in defining "crime of violence." See United States v. Castillo, 69 F.4th 648, 658 (9th Cir. 2023) (The "distinction between definitions in neighboring subsections within the same provision shows that the drafters knew how to include inchoate offenses in defining 'controlled substance offense' for sentencing enhancement purposes, but chose not to do so."). But the two subsections are structured differently. Section 4B1.2(a) expressly includes

id. at 691-92. Because inchoate crimes are a separate conceptual category from the listed completed crimes in the Guidelines' text, we cannot say that their exclusion makes Application Note 1 inconsistent with the provision. "[T]he canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)); see also Piper, 35 F.3d at 617 ("Because [Application Note 1] neither excludes any offenses expressly enumerated in the guideline, nor calls for the inclusion of any offenses that the guideline expressly excludes, there is no inconsistency.").

Although Mao only brings a textual argument, we further agree with the Fifth Circuit that the structure, history, and purpose of the Guidelines support our precedent finding that Application Note 1 is not inconsistent with § 4B1.2. See Vargas, 74 F.4th at 698. In other words, while we do not agree that Kisor

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crimes that have "as an element the use, attempted use, or threatened use of physical force." U.S.S.G. § 4B1.2(a)(1) (emphasis added). By contrast, § 4B1.2(b) defines "controlled substance offense" by listing categories of prohibited conduct. The structural differences between the two subsections weaken the inference that the omission of inchoate crimes from subsection (b) reflects a deliberate exclusion.

applies here, the Kisor framework nevertheless supports our existing interpretation.

As to structure, other provisions in the Guidelines specifically exclude certain crimes. See, e.g., § 3D1.1(b)(2); § 4A1.2(c). By contrast, the authors chose not to exclude inchoate crimes from § 4B1.2(b). As to history, earlier versions of the Guidelines included the phrase "similar offenses" in the enumerated list of controlled substance offenses. See Vargas, 74 F.4th at 694-95. The Commission repeatedly clarified that "similar offenses" included inchoate crimes. Id. In 1989, the Guidelines were amended to include the current "prohibits" language, which is reasonably read to be consistent with the Guidelines' historical interpretation.[10] And as to purpose, the Guidelines generally seek to hold defendants who have a relevant criminal history of repeated similar offenses more culpable, which would logically include attempts or conspiracies to commit such offenses. See id. at 695-96; see also Piper, 35 F.3d at 617 (reasoning that the inclusion of inchoate offenses in Application Note 1 is consistent with § 4B1.2 because it represents a "logical step both from a lay

[10] Other circuits have reasoned that the use of the word "prohibits" in § 4B1.2 itself supports the conclusion that Application Note 1 is not inconsistent with the Guidelines. See, e.g., United States v. Richardson, 958 F.3d 151, 154-55 (2d Cir. 2020). Because to "prohibit" can mean to "prevent" or "hinder," the Application Note -- which would ban a conspiracy to sell a controlled substance -- would "hinder" the distribution of the substance. Id. at 155.

person's coign of vantage and from the standpoint of the Commission's (and Congress's) oft-demonstrated preoccupation with punishing drug traffickers sternly.").

Given these independent reasons for affirming our precedent on Application Note 1, we decline Mao's invitation to further entrench the circuit split on this issue.

Mao's sentence is **affirmed**.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Criminal Action
	)	
MICHAEL MAO,	)	No. 23-10009-FDS
Defendant	)	
	)	
	)	
	)	

BEFORE: CHIEF JUDGE F. DENNIS SAYLOR, IV

SENTENCING

John Joseph Moakley United States Courthouse
Courtroom No. 10
1 Courthouse Way
Boston, MA 02210

November 18, 2024
2:00 p.m.

Valerie A. O'Hara
Official Court Reporter
John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, MA 02210
E-mail: vaohara@gmail.com

APPEARANCES:

For The United States:

United States Attorney's Office, by FRED M. WYSHAK, III, ASSISTANT UNITED STATES ATTORNEY, 1 Courthouse Way, Suite 9200, Boston, Massachusetts 02110;

For the Defendant:

Law Office of John F. Palmer, P.C., by JOHN F. PALMER, ESQ. 18 Main Street Extension, Suite 201B, Plymouth, Massachusetts 02360.

PROCEEDINGS

THE CLERK: All rise. Court is now in session in the matter of United States vs. Michael Mao, Matter Number 23-10009-1.

Would counsel please identify themselves for the record starting with the government.

MR. WYSHAK: Assistant U.S. Attorney Fred Wyshak, III, for the United States of America. Good afternoon, your Honor.

02:01PM THE COURT: Good afternoon.

MR. PALMER: John F. Palmer for Michael Mao. Good afternoon, your Honor.

THE COURT: Good afternoon. All right. This is the sentencing of Michael Mao. I've received and read the pre-sentence report as revised through November 8th, the defendant's sentencing memorandum filed November 14th, and the defendant's separately filed on the docket his objections to the PSR, and there are various certificates from Wyatt attached, and I've also reviewed the 02:02PM government's sentencing memorandum filed November 15th.

To my knowledge, no other materials have been submitted to the Court. Is there anything else I should have seen that I have not, Mr. Wyshak?

MR. WYSHAK: And not to the government's knowledge, no, your Honor.

THE COURT: Mr. Palmer.

MR. PALMER: No, your Honor.

THE COURT: Let me take up the objections to the PSR. Basically there are three. One is the inclusion of background information, including information concerning gang ties. I'm going to overrule that objection. As I'm sure counsel is aware, it's common for PSRs to have extensive background information, alleged gang ties, which could be in some circumstances a question of fairness in the sentencing process.

02:03PM

We can address separately, if necessary, but it's very much a B.O.P. safety issue. The B.O.P. needs to know what are believed or reported to be gang affiliations for separation of safety purposes in the prison system, and it's an important part of the information in the PSR, and I'm not going to strike it.

The second objection is the role enhancement under 3B1.1(a) of the guidelines and in particular whether a four-level enhancement is appropriate. It seems to me that for the reasons identified by probation and for that matter by the government, the defendant is clearly an organizer or leader of criminal activity involving five or more participants that was otherwise extensive.

02:04PM

It was a long-standing criminal enterprise with multiple participants, not all of them, of course, there from start to finish, but I think it readily qualifies within the meaning of the guideline in terms of its numerosity and extent, and I will apply that enhancement.

The question of whether the career offender enhancement ought to apply is complicated, as it always seems to be. The basic question is is the Virginia predicate offense a crime of violence within the meaning of Section 4B1.2, the career offender guidelines.

The defendant was convicted in Virginia of use of a firearm in commission of a robbery. The Virginia statute covers a much broader range of conduct.

I don't know whether counsel have anything to add. I've read the submissions, and I've taken a look at the case law such as it is, and I understand the Fourth Circuit has not decided the issue, which is on appeal now, although some district courts in Virginia have.

Is there anything counsel wants to add to what's in their material? Mr. Palmer, anything you want to add to that?

MR. PALMER: Well, just a couple of things. I got the government's memo quite late, and they mention a couple things. It occurred to me after reading the government's memo, well, first of all, we're also claiming that the offense to of which he was convicted is not a controlled substance offense.

THE COURT: Yes. Let me dispose of that quickly. In the Fourth Circuit, it's not because they said it was an inchoate crime, but I think First Circuit precedence is fairly clear that it is, that is a conspiracy to distribute controlled substances is a controlled substance offense under the career offender guideline, and your objection is preserved.

MR. PALMER: Right. So the question, it's really a choice of law question as to which law the government would have you and probation would have you apply Virginia law in terms of whether it's a predicate, Fourth Circuit law, but First Circuit law as to whether or not there's a triggering conviction, so I would suggest that if I understand First Circuit law and I understand the Court's position, but I think the Court certainly has discretion, for whatever reason, to apply the Fourth Circuit law with respect to a triggering conviction, otherwise you have --

THE COURT: Just, I guess, to be clear on that, it is -- I don't think I have the discretion to apply Fourth Circuit law, however, I think I can take into account if I elect to the fact that this case could have been brought in Virginia because obviously a lot of the events occurred there, and had it been brought in Virginia in the Fourth Circuit, this would not have been a controlled substance offense, and, therefore, the guideline calculation would have been lower, so I think I can do that as part of the mix of information that I would consider in the sentencing process, but I don't see that I have a -- I don't see it as a choice of law issue, I think I'm obliged to follow First Circuit law. It may be a subtle distinction, but I think it's an important one.

MR. PALMER: Well, I think you stated the issue as to whether or not the use of a firearm as defined in Virginia is overbroad in terms of whether it's a predicate or not, and I was just thinking through some hypotheticals.

I wanted to add one for the Court's consideration. In Virginia, for example, if you had a person who went to rob somebody of a locked box in a house, and without displaying the weapon or averting to the weapon in any way, took the locked box by force but not violent force, and on the way out the door after he got out the door, he takes his gun and shoots the lock off the box, the locked box, that would be, under Virginia law, that would be use of a firearm while committing a robbery because the robbery continues during his flight and access to the contents of the box, but it's not a predicate for career offender purposes because he's not threatening the individual, he's not threatening or even displaying the gun at all. So that's just a hypothetical that I had not included in my brief.

THE COURT: Okay. Mr. Wyshak.

MR. WYSHAK: Thank you, your Honor. I do want to start off by acknowledging the government's late submission and sincere regret for that. I do acknowledge it was an imposition on the court, its personnel, probation and defense, and I appreciate everyone's efforts in making sure we are fully and adequately prepared for today's hearing.

I'll just quickly address a couple of things that defense counsel raised. I agree, I think, with the Court what the Court has suggested about whether this instant conviction is a controlled substance offense. It, I think, clearly falls within First Circuit precedence that it is. In terms of it being an equitable argument, I don't disagree with that, that that's something the Court should and can consider, but I do want to raise a couple of points with respect to that.

Yes, of course, this case could have been brought in Virginia hypothetically, but it is worth bearing notice that this whole investigation started with Sarath Yut, who was operating a pretty massive drug trafficking operation up in Lowell.

A lot of the evidence was developed here in Massachusetts, and that's just the logic of why it was brought in this district, and there was no forum shopping or anything of that part on behalf of the government, and also I think it's worth pointing out that even though defendant at all times was in Virginia during the conspiracy and his actions were in Virginia, it's not like the defendant didn't understand and know that he was directing actors who lived in Massachusetts, and he was directing tasks to be done, drugs to be sourced in Massachusetts, drugs to be mailed from Massachusetts, and specifically with respect to the Count Two conspiracy, that is the money laundering conspiracy, he delegated a lot of that conduct to Sathtra Em, who he knew lived in this district, and he had knowledge that that activity was taking place predominantly here.

So for that reason, your Honor, I would suggest the equities aren't really in the defendant's favor with respect to that.

With respect to the hypothetical that defense counsel raised regarding whether the armed robbery is a crime of violence under Subsection 4B1.2(a), that seems to be evoking the case he cited in his brief, which was the *Queensbury* case as an example of using a pistol to fire a shot, which broke the lock on a drawer containing money.

That is a real case, and I apologize, I don't mean to be putting words in your mouth, but it seems to be evoking that kind of example. I just want to point out that case was a conviction for use of a firearm in the commission of a burglary, not a robbery.

It's not a statute, it's not concerning the statute in question here, and, in fact, all of the authority that the defense cited in his brief concerning this issue did not pertain to the statute in question in this case, so to the extent that he's arguing that those cases demonstrate that this crime can be committed without force or the use of violent force, I would suggest that upon a further close reading, they don't really support that inference whatsoever.

That being said, the government does recognize this is a case upon appeal in the Fourth Circuit. It's possible, as the Court has noted, these categorical analyses can be complicated. It's hard to predict how the Fourth Circuit will come out, but as I suggested in my brief, and I just quickly want to reiterate here, I do think the Court should be guided by its previous decision in *Lassend* dealing with robbery in the first degree and New York Penal Law Statute 160.15, which I actually as a former prosecutor in New York dealt with.

It strikes me as an analogous kind of statute where it has the subsection for an enhancement on a robbery that's committed. It is that combination of the robbery with the use of and/or display of a firearm of what appears to be a firearm that renders this a categorically violent crime of violence.

In the hypothetical that defense counsel posed, it strikes me that that wouldn't constitute a robbery under Virginia law because robbery under Virginia law, as interpreted by its courts, does require the use of a or the taking from a person in his or her presence. That person firing a gun at a locked box is not, does not seem to me to satisfy the crime of the elements of common law robbery in Virginia.

02:16PM Finally, I would point out, again, not to be reiterating too much of my brief, but for a very long time, it was generally accepted that common law robbery in Virginia was a crime of violence until 2021, whereas I'm sure this Court has familiarized itself with the *Wright* case, I believe it was the *Wright* case in which there was a theory adopted by the Virginia Supreme Court and then adopted by the Fourth Circuit that the threat of sodomy could be a nonviolent way to commit that crime.

But, again, that being as it is, it doesn't strike 02:17PM the government that that crime could be committed without the use of violent force by displaying or using or attempted to use a firearm, which is what this statute in question for which the defendant was convicted requires.

THE COURT: All right. As I'm sure counsel is aware, this is an extraordinarily complicated set of cases and questions trying to figure out what exactly is a crime of violence, but I think I agree with probation and the government and the majority of the District Courts in Virginia that have considered this question that this statute does qualify as a crime of violence.

The defendant was convicted of use of a firearm in the commission of a robbery, but, as I said, the statute goes much further, but the elements of the statute require that use or attempted use or threatened use of physical force against the person of another, in particular, the firearm must be used or displayed in a threatening manner, and it has to occur during the predicate offense.

Exactly what it means to occur during the predicate offense is a bit complicated perhaps. The example of the lock box, if you have a gun and you break into someone's house and you tell the person show me the lock box, you're brandishing the gun, you're displaying it in a threatening manner.

If the person complies, I think that that's enough. If you try to shoot the lock off right then and there, it doesn't really add much to the analysis. If you take the lock box out to the front yard and you have not displayed the gun but you try to shoot the lock off there, you never having shown the firearm, displayed it, or used it up to that point.

The predicate offense is probably over at that point. It's not during the predicate offense. There's perhaps an argument that ensuring that your successful retreat or escape from a violent crime is itself part of the crime, so I don't see how you could be convicted of this offense in any of its iterations, again, without using or displaying the firearm during the predicate offense, and, of course, the mere display of the firearm is almost certainly, if not 100 percent of the time, the fact that 02:20PM you're making it known to the victim is itself a threatening manner or displaying it in a threatening manner.

So I am going to follow the District Courts in Virginia. I have concluded it is a crime of violence, and, again, this is a guideline analysis that is a starting point, not necessarily an ending point, but I do think the career offender enhancement applies.

So with that, let me turn to the calculation.

MR. PALMER: Your Honor, just out of an abundance 02:20PM of caution, could the defendant's objection be recorded to the court's finding?

THE COURT: Oh, yes, yes.

MR. PALMER: Both on the question as to whether or not the First Circuit or the Fourth Circuit determination of a controlled substance should apply and whether or not this qualifies as a predicate offense.

THE COURT: Yes.

MR. PALMER: Thank you.

THE COURT: Both those objections are preserved. With that, let me turn to the calculation. The base offense level is 16 based on drug weight. There's a two-level enhancement because the object of the offense was distribution in a prison, another two-level enhancement for bribery of a law enforcement officer. That brings us to a 02:21PM level 20. There's another two-level enhancement because there was a conviction under 1956, and a four-level enhancement, as I've described for being an organizer or leader. That brings us to a level 26.

Because he's a career offender, that bumps up to a Level 32 with three levels off for acceptance of responsibility with the third level available on government motion. Mr. Wyshak.

MR. WYSHAK: The government so moves.

THE COURT: That is granted. That brings us to a 02:22PM level 29. His criminal history score is 6. That produces a criminal history category of III except with the career offender adjustment, that takes us up to a level 6, criminal history category 6. That produces a guideline range of 151 to 188 months's imprisonment.

If it were a level 26, that is, without the career offender enhancement and a Criminal History Category III, that would produce a guideline range of 78 to 97 months, a supervised release range is three years, which is the mandatory minimum under Count One but the maximum under Count Two. The fine range is 30,000 to $1 million, and there's a special assessment of $100 on each count for a total of $200.

Is there any additional objection or correction or addition to that not previously resolved, Mr. Wyshak?

02:23PM MR. WYSHAK: Not from the government, your Honor.

THE COURT: Mr. Palmer.

MR. PALMER: I think in calculating the noncareer offender guideline, you didn't take the three points off for acceptance. Maybe I'm wrong.

THE COURT: You're right, so it would be 20, yes, you are correct with that, so that would be 23, thank you, so that's 57 to 71 months.

MR. PALMER: 57 to 71 months, yes. Thank you.

THE COURT: With that as our starting point, let 02:23PM me hear from the government as to its recommendation.

MR. WYSHAK: Thank you, your Honor. The presentence investigation report is thorough. I did submit extensive briefing, so I will keep my remarks brief. The recommended sentence here is 151 months's imprisonment to be followed by 48 months of supervised release.

This represents the low end of defendant's guideline sentencing imprisonment range and a slight bump variance upwards for his supervised release, which for reasons in the government's memo believes it's necessary, but this is a sufficient but not greater than necessary sentence to reflect the seriousness of this offense, promote respect for the law, to deter the defendant from future crimes generally and other prisoners specifically from engaging in this type of criminal conduct and to protect the public from future crimes of the defendant.

In making this recommendation, the government does take into account the nature and characteristics of this offense and the defendant's individualized circumstances.

The defendant was serving 15 years's sentences approximately in Virginia for very serious crimes when the offense conduct took place. It is important I think for the Court to note those crimes, because of their nature, just how egregious they were, the first was an armed robbery in which, as the presentence investigation disclosed, the defendant acting with others forced a female victim to lie down, put a gun to her head, and stole her purse and her cell phone, among other things.

The second incident was charged and pled as an attempted murder in which defendant fired three or four shots from a sub machine style rifle in a gang rival's home. These are extraordinary crimes, well worth a serious self-reflection and self-reformation in that kind of rehabilitation that one would think 15-year sentences would impose upon someone who has unfortunately the responsibility to serve, nevertheless while in custody in those 15 years, this Court finds itself at the tail end of those sentences or at the tail of those sentences having to adjudicate this kind of conduct, serious crimes in their own right, a drug trafficking conspiracy, a money laundering conspiracy, and not just isolated events or isolated schemes, long-running, growing, involving a cast of characters for periods of at least two years, most likely more based on evidence.

The evidence suggests, in fact, that by the time that the government's investigation came around to revealing the nature and scope of this kind of criminal conduct, there had been practices that had been put in effect that were well practiced and honed to conceal this kind of activity, which, of course, as I noted in the sentencing memo, this kind of activity required the surreptitious, clandestine, deceitful kind of actions by the defendant.

I use the analogy in my sentencing memo as a pebble being dropped in the water with the ripples emanating outwards. I thought that was appropriate under the circumstances of this case because there's possibly somewhat of a temptation maybe to underestimate the significance of defendant's crime.

For instance, out of the same investigation came the prosecution of one of defendant's co-defendants and co-conspirators Sarath Yut, who was operating a relatively massive drug operation in Lowell, and in his case, 14 other individuals were conspiring with him or with the gang were prosecuted, so by comparison, especially in terms of the 02:29PM amount of money involved and the amount of drugs that were seized and believed to be distributed, this could be looked at as fairly small potatoes, but I think that would be a mistake, and I think the sentence here is well warranted as significant as it is.

This case shows you how destructive this kind of prison drug activity can be. We have evidence of many people being harmed in this -- from these conspiracies. Sathtra Em, the co-defendant, has been charged and pled guilty, as was the corrupted prison guard, Kenneth Owen. 02:30PM His sentence is pending.

There have been uncharged people in this case. An individual, another inmate, who is believed to be conspiring with the defendant's cellmate with the initials MA, he had other suppliers that have not been charged but are believed to have been identified. He had someone who is believed to be a family member acting as a courier. Of course, there were his fellow inmates who he sold the drugs to who the government has interviewed at least one of them, who has talked to the government about how he was affected and his addiction was furthered by the defendant's distribution.

02:31PM The government has addressed the mother of one of the inmates, who recounted how she would receive threatening communications from the co-conspirator Sathtra Em, who we know from the recorded prison telephone system that her actions in contacting the mother were at the direction of the defendant, and the threatening things she said to that person were at the direction of the defendant, all in an attempt to, of course, collect on the drug debts owed to him by his fellow inmates.

These family members and friends all had to bear the burden of the financial hardship of trying to protect their loved ones in prison but also having to bear the guilt of fueling their drug habits as well.

02:31PM As the government's put in its sentencing memo as well, there are just many other more holistic reasons why this kind of activity is problematic both for the rehabilitation of prisoners and for the integrity of the judicial system.

The last thing I will address is just the amount of deception that was required for the defendant to keep this long-running scheme active and in effect at Buckingham for as long as he did.

It truly is fairly extraordinary I would submit to your Honor. Of course, as I've referenced, this kind of operation cannot exist if there aren't efforts, successful efforts to collect on drug debts, which in this day and age now with our financial technology, that can be done through third parties like we saw in this case.

02:32PM In furtherance of that, there was a fairly elaborate system that the defendant operated with his co-conspirator, Sathtra Em, that he used at least five electronic accounts that the government is aware of at this point. There are likely more but at least five during the time period in question in order to collect money from various individuals.

Sathtra Em collected that money and distributed it among her accounts, but she earmarked that money when she moved it within her accounts for the defendant, so she 02:33PM helped hide that money that actually belonged to him, and she was keeping for him until he was released.

The defendant with Sathtra Em and with others cycled through numerous telephone numbers and used multiple methods of electronic communication, some of which was encrypted, others were as clear from the PSR, this Google

Voice over Internet Protocol activity, which the defendant and his co-defendant believed incorrectly would be untraceable.

The defendant had a system of using other inmate's PIN numbers. I don't think it's apparent probably at first blush what that involves, but it is fairly sophisticated. In the Virginia Department of Correction, much like in institutions up here in Massachusetts, a PIN number can only be -- phone numbers can only be permissioned, a 02:34PM certain amount of phone numbers can only be permissioned to a certain PIN, so for the defendant to use other inmate's PIN numbers would first require those inmates to make an application to the Department of Correction to add certain numbers that defendant requested to their PIN so that the defendant could use the PIN to call.

There would be horse trading, as one can imagine, defendant would add certain numbers to his PIN or would negotiate with others to do this, but this was a system that was used because the defendant was aware that if 02:35PM investigators were monitoring his PIN, they would be focused on only the calls made from his PIN number but couldn't track the calls made with other inmate's PIN numbers unless, of course, those calls were being monitored as well, those PINs, I should say.

The defendant had several schemes to try to get the drugs into the prison. Obviously, in this case we see at least two of them, one through a corrupt prison guard, another through an attempt to secrete the Suboxone strips in between glued pages of a magazine.

Again, this is fairly -- requires some fairly practiced knowledge of the prison system and how the mail system operates. The defendant was aware that magazines generally were confiscated and made copies of if they weren't sent directly from the publishers, so the defendant 02:36PM directed Sathtra Em to repackage and label these magazines to make them appear as if they were coming directly from the magazine publishers.

There's evidence that defendant was working with other inmates, for instance, in this magazine scheme, other inmates were the addressees for the magazines. Obviously, there's a whole dynamic and culture within the prison, but defendant was able to work with these other inmates to prevent the discovery of the -- well, he couldn't prevent the discovery of the hidden drugs, he was able to work with 02:37PM the other inmates to prevent the discovery of the conspiracy at least at that time.

And, again, the PSR I would submit is full of, and I should last but not least, of course, is the use of Khomar, which was a fairly elaborate method that he used with Sathtra Em and Sarath Yut, his primary co-conspirators, to conceal successfully for a long time, prevented the detection and investigation of his enterprise.

Again, the use of the Khomar, I think as has been discovered with the use of professional Khomar translators. which I did share the Khomar English language translations with defense counsel.

The proficiency of the defendant and Sathtra Em and Sathtra Yut in formal Khomar was only moderate. It was 02:38PM a very, it was not formal Khomar. There are difficulties in translating because it was used in such an informal way, but they developed their own code language, their own terms, and, again, it points to how long and the duration and intensity of the practice of this scheming and subverting that took place in this case.

So, again, I will point to the mere fact that only two ounces or one ounce of MDMA was recovered, approximately 100, I think there were 127 Suboxone strips. Those Suboxone strips don't add much to the drug weight 02:39PM conversion calculus, and it ultimately doesn't matter whether the defendant is assigned a career offender, but I would argue that the guidelines don't really account for the significance of the introduction of the drug weight assigned by the guidelines under the circumstances of this case. It doesn't really account for the harm that those

Suboxone strips would have within the facility, notwithstanding what defense counsel has indicated in his memo, which I do not disagree with, which there can be under limited circumstances perhaps a remedial use of the Suboxone strips. That's what they're created for, but they're not created to be distributed illegally, as they were within the prison facility.

I'll just close with the fact that the government recognizes that defendant's background was filled with personal challenges. That is part of the reason why a low end guideline sentence of imprisonment is being recommended, but the government doesn't view that background as necessarily mitigating circumstances in this case that would make appropriate a variance below the guidelines.

The defendant was imprisoned for an extremely long time and had ample opportunity to try to rehabilitate himself and to, again, like I referenced before, to consider his suggestion and change his behaviors, and he deliberately chose not to do that.

And, again, we're not talking about a one-time thing, day after day after day, the defendant was preoccupied with smuggling narcotics, collecting money, and subverting the prison system. That was his preoccupation. That's what he thought about, and it is commendable that he has most recently been infraction-free at Wyatt, and he has been making efforts to improve himself, but I don't believe any of that justifies a downward variance in this case.

So, for all those reasons, your Honor, the government recommends the low end guideline sentence of imprisonment of 151 months to be followed by 48 months of supervised release, as the defendant, should he serve a substantial sentence in this case, will have been imprisoned for quite a long time, and I believe the extra

02:41PM term on supervised release will be important for him and the services that are available to him.

THE COURT: Am I correct it looks to me like Virginia has this what I think of as an antiquated system where there's a high nominal sentence, but much of it is suspended, so, you know, you give a sentence of 20 years but with a large portion of that suspended, which I guess is a form of probation, but am I correct that all of his putting aside whatever a Virginia court might choose to do in terms of unsuspending the sentence or otherwise

02:42PM violating him, he has served all of the time to which he was sentenced in Virginia, so he's only in federal custody now?

MR. WYSHAK: So that's a good question, your Honor. I don't know if I can give you a conclusive answer because I have explored this a little bit. I have contacted the prosecutor responsible for -- one of the prosecutors responsible for one of his convictions, and I have notified them of the existence of this case and the conduct that took place, and I am not aware of any efforts by the prosecutor to go back to the Court to advise the Court of the existence of this.

THE COURT: Regardless, at least as the sentence imposed stands, he's done his Virginia time?

MR. WYSHAK: Yes, I believe certainly as a sentence as it stands, he's finished his sentence down there. Whether -- under what circumstances he might be able to be re-sentenced, I don't know. I don't know if that's even possible at this point, but, yes, as it stands now, his sentence in Virginia is finished. That's my understanding.

THE COURT: All right.

MR. PALMER: Well, I've had some discussions with my client about this, but I haven't followed up with the authorities in Virginia, but my understanding is that it's like -- it's comparable to a sentence in Massachusetts where part of it is to be served and part of it is to remain open for a period of probation, if you will, so that's the defendant's understanding of the situation in Virginia.

THE COURT: So he is still under a criminal justice sentence in Virginia, but unless and until some judge does something, he has served his time?

MR. PALMER: That's my understanding, but I haven't confirmed it.

THE COURT: Okay.

MR. PALMER: Anyway, may I proceed?

THE COURT: Yes.

MR. PALMER: Thank you. I just want to pick up, as I say, I just got the government's memorandum, so this

02:45PM may be sort of not coherent in picking up some of the points that have been made. Most of the drugs in this case, and certainly I don't want to minimize the crime here because the Sentencing Guidelines, as I calculated them, certainly take into account the fact that many of the factories that the government is citing the seriousness of the offense, the role that he played in the offense, the length of the offense, the fact that it occurred in a prison, all of these factors are incorporated into the Sentencing Guidelines. It's not a reason to go beyond the

02:45PM Sentencing Guidelines.

The offense here at the end of the day, again, not to minimize, but it's Suboxone we're talking about. Suboxone, at least in Massachusetts now, and even with some of my clients at Wyatt is a medically-assisted treatment for people who have addiction, so certainly what the defendant here did is criminal, and certainly he's to be punished for it, but I think it gives a little perspective to keep in mind what he was transacting.

In addition, from the interviews with the co-defendant Owen, it appears that a lot of the so-called contraband that was being brought into the prison were things like tobacco and other items that weren't otherwise permitted, so it wasn't all drugs. Again, not to say that that's okay, but it puts in some context what the defendant was doing.

The other point that I wanted, I don't think the government is minimizing Mr. Owen's, the prison guard's conduct and involvement in this conspiracy, but the fact of the matter is he was not a passive or victim participant in this conspiracy, that he actually was involved in the business of soliciting these bribes from inmates, not to say that the inmates, including my client, weren't actively involved in the conspiracy, but Owen was certainly not a less culpable individual in that conspiracy.

I also wanted to bring to the Court's attention, which I mention in the memo the fact that the last date on this conspiracy, I think it was in May of 2021, the investigation had been essentially ended. The government, for whatever reason, delayed bringing the indictment until he had just about wrapped up his state sentence in 2023. I think he wrapped up on July 5th of 2023, so he lost the opportunity. Two years he was in custody while they had the information necessary to bring the indictment, and they delayed until February I think of 2023 to bring the indictment, so he lost the opportunity to get any kind of concurrent sentence were that a possibility.

The government puts in its memo and reiterates today that this offense involved violent conduct by the defendant or threats of violence. There's no indication of 02:49PM that in the record as I saw it. He didn't make any threats. He didn't conduct any violence. It's simply, it is a drug case.

The government recognizes the fact that he had what I would term a horrendous childhood. It's important to recognize this childhood, the nature of his childhood, not to excuse his conduct, but this is not somebody who has had it "easy in life" or had all the benefits of childhood growing up.

And I think that's relevant in terms of how 02:50PM severely you punish him. I think it is important to look at the record, the time that he's been at Wyatt. He has been infraction-free. He has taken advantage of the programming that's been available there. He has been participating in the work program, for which he's gotten excellent reviews.

This is important because it indicates to the Court that he's taken the initial steps anyway toward rehabilitating himself, that he's not somebody who is encourageable and unable to rehabilitate himself. He's shown potential, in other words.

He spent I think it's 14 years in prison before the indictment in this case, and he's been detained another year and a half or so since his indictment. He spent a long, long time imprisoned. I suggest in my memo, and I reiterate today that is it really necessary to send him away for more than what I would say is the noncareer offender guidelines in this case on the basis of even the Court recognizes, I certainly can consider it to be a very difficult question as to whether he's a career offender or not.

And the career offender guidelines here are two and a half, something like two and a half times what the regular guidelines are, and it just seems to me a rather extreme result to sentence him to a career offender guideline, which is so extreme on the basis of really a very difficult question of law.

If I could have a moment, your Honor? I'm sorry.

THE COURT: Yes.

MR. PALMER: Oh, I know, I wanted to -- I can't recall whether it was in the probation report, but given the defendant's stated problems at some point with substance abuse, I'd ask that the Court recommend the RDAP program in connection with any judgment that's rendered in the case. Thank you.

THE COURT: All right. Thank you. Mr. Mao, do you wish to address the Court?

THE DEFENDANT: Yes, I would. I wrote some, so I just want to read it.

THE COURT: Go ahead.

02:53PM THE DEFENDANT: As I stand here before you today, I pray that you don't have the impression that I've learned nothing after spending so much time in prison because I have, your Honor. Throughout my time in Virginia's custody, I put in real efforts into trying to become a better person; although I wasn't perfect and may have lost sight of my goals a few times, I always got back on track.

Soon after arriving in Virginia's DOC, I obtained my G.E.D., enrolled and completed a few vocational classes, including I've completed a bunch of programs that I really 02:53PM learned a lot from. I even completed a college math course, but, unfortunately, due to COVID, the college programs were discontinued. Even though it's just one course, and it's not a big deal, it was huge for me because I never thought I was capable of these kinds of accomplishments.

Your Honor, I know what I did was wrong, and for that, I accept full responsibility. There's not a day that goes by that I don't regret what I've done, and I'm very sorry and remorseful for committing these crimes, and not because I got caught. I let down and disappointed a lot of people in my life, a lot of important people in my life, most importantly, my grandmother and my son. They have never given up on me and they still haven't, and I wish they were here today so I could express to them how sorry I am.

02:54PM

Also I'd like to apologize to the government, the Court, and any agents or detectives who worked the case that I may have given a hard time or I was uncooperative with.

Lastly, I would like to apologize to any possible victims of drug use and addiction. I am truly sorry, and if I could undo what I've done, I would. I went to prison when my son was just two years old, and his mother wasn't always able to get everything that he needed or get the things he needed, and not being able to provide for him was tearing me apart.

02:55PM

As he got older, he started to need more. On top of that, my mom was on the streets, my younger brother was on the streets, 12 and 15 years old, and I was just starting to struggle bettering my life while feeling like my family needed me, and ultimately I took a turn down the wrong path.

But the more I was able to do for my family, the more I became convinced that what I was doing was right. The feeling I got from my son when I bought him things, it was amazing. I never felt that feeling before. It made me feel like I was doing something for him, and I started ignoring the fact that what I was doing was actually illegal.

02:56PM If you ask me today if the circumstances were the same would I do it again, I could answer absolutely not. Today I have a clear mind, and I'm refocused, and I know it wasn't worth losing all that I've lost. I lost some real special people in my life, and had I not gotten into this trouble, I could have shared a few last memories with my oldest brother, my father, and my grandmother, so, no, I would never, ever do anything like this ever again.

Today I accept your ruling 100 percent, but I'm hopeful and praying for your mercy and leniency, and I 02:56PM assure you that I will take advantage of as many education opportunities as possible, also plan to participate in as many programs as I can. Whatever way the B.O.P. has to offer to help me better my life and become a better person, I'm going to participate in.

It's not in my letter, but I wanted to add something because you touched on it a little bit here about gangs.

THE COURT: You can take a moment and communicate if you want to have a private conversation.

THE DEFENDANT: I don't know, it really saved my life, that's what I was getting at. Thank you, your Honor.

THE COURT: All right. Thank you. I want to start, as I generally do, with the crime. It's a serious crime, not just drug dealing and money laundering, of 02:58PM course, are serious crimes but basically smuggling drugs into prison and bribing a corrections officer, which as counsel pointed out, are reflected in the guidelines, but they are still a very serious form of crime, corruption in the prison system.

I doubt that Mr. Owen was an innocent victim, but, still, it involved corruption and the introduction of drugs into the prison population and a very elaborate scheme over a very long period of time.

When we look at -- when I look at defendants, it's 02:59PM not only, of course, the crime, but it's what their criminal record is and who they are and how they got to where they are, and so the punishment reflects not just what happened but what got us to this point.

Putting aside the career offender guidelines under the Sentencing Guidelines, which is a complicated legal problem, I think it's fair to say he's a career offender in the colloquial sense, that he's spent a great deal of time in the criminal justice system. He has what are effectively two predicates, but they're pretty serious ones, armed robbery and attempted murder.

It's hard for me to see how he had learned his lesson by the time these crimes were committed, and that's an important part of the mix, the point being I'm not simply sentencing him for the drug weight or even the drug weight plus the enhancements or bribery and introducing drugs into prison but his record and everything that got him to this point.

And, you know, to be blunt about it, there isn't much here to be terribly positive about. I am pleased that he seems to have performed well at Wyatt and is engaged in programs, and all of that is very important. He's been infraction-free, and that's great, and maybe that does mean he's turned a corner.

In terms of the gang affiliation or gang membership, he didn't deny it in the PSR, he declined to discuss it, and certainly there are lots of reasons based on the PSR to believe he has a gang affiliation or had one at one point, and that's not a positive fact.

Having said all that, this is one of those instances where the career offender guidelines do seem to result in a sentence that seems to me to be higher than necessary to achieve the goals of sentencing. I mean, I guess I'll say I agree with the basic premise of the career offender guideline. At some point, you have to say enough is enough, you committed a certain number of serious crimes, and the punishment needs to ramp up considerably.

Sometimes I agree with that proposition, but sometimes it doesn't quite match the situation, and I think this is one of those circumstances, and there are some 03:02PM other things here that I think that are part of the mix, this question of what would his sentence be if he was sentenced in the Fourth Circuit vs. the First Circuit. Maybe it's the first time I ever heard anyone say they'd like to be sentenced in a circuit like the Fourth rather than the First Circuit, but normally sentences in the south are dramatically longer than those in New England, but, still, it's part of the mix.

He did suffer abuse in his childhood. That matters in terms of how he got to where he is, and this 03:03PM business about the delay in the indictment and losing an opportunity for concurrent sentence is I would say a small factor, perhaps quite a small factor, but it's part of the mix as well.

So where do I come with all of that? I do think that the guideline range without the career offender enhancement is much too short, but I think the career offender guideline is too long. What I'm going to do is impose a sentence of 121 months, which is basically two to four offense levels below the guideline range to take into effect these matters I've discussed, and that's certainly a long sentence and certainly no longer sentence I think is necessary to achieve the goals of sentencing under the circumstances.

I don't do that out of any disrespect to the government's position, which I think is well articulated and in many ways well-founded. It's just my sense that that's enough under the circumstances to achieve the goals of sentencing.

I will make the recommendation for the or that the defendant be screened for the RDAP program. I'll leave it at that, and the Bureau of Prisons can do what it wants to do in that regard, and I will impose a 48-month term of supervised release, although I think I can only do that on Count One. Count Two, the max is three years; is that right? There's a minimum on Count One and the maximum --

PROBATION OFFICER: Mandatory minimum Count One of three years of supervised release and on Count Two not more than three years.

THE COURT: Not more than three years, okay. So 48 on Count One and 48 months, four years on Count One and three years on Count Two to run concurrently.

Mr. Palmer, do you have any other judicial recommendations such as place of imprisonment?

MR. PALMER: I also forgot to mention, would you make this sentence to be concurrent with any sentence that might be imposed in Virginia?

THE COURT: Well, I guess I'm reluctant to do that, partly I'm not sure -- first off, I'm going first. It always makes me uncomfortable to try to tie the hands of whatever another judge wants to do. You know, I wasn't there for that sentencing, it wasn't my sentence. That judge can certainly make it concurrent if it gets that far. And there's something in the guidelines, which I don't have the provision open in front of me that I forget if it's normally concurrent or typically concurrent.

MR. PALMER: Right. I don't mean to interrupt, but I don't know what the Virginia law is.

THE COURT: Just my reaction to it, attempted murder is a pretty serious offense. His sentence in terms of the amount of time served struck me as being on the low side. I'm going to leave it, I think it's appropriate for the judges in Virginia, if there is a request to impose an additional sentence, and there might not be, given what I've done here, I'm going to leave it to those judges to make whatever judgment they think is appropriate or that judge thinks is appropriate under the circumstances, and I'm putting that on the record with the expectation that that fact would be put in front of the judge.

I think the norm or the starting point, however it is it's framed is that these sentences should be concurrent. I am not going to make it concurrent because I don't want to tie the hands of the Virginia judge, but having said that, I am imposing a pretty significant sentence here, and, you know, if that judge thinks 122 months is appropriate, I'm not going to try to tie his hands, I guess I'll put it that way, so I'm not going to make it concurrent to a sentence that's not even been charged yet, much less imposed.

All right. Is there a recommendation on the place of incarceration?

THE DEFENDANT: Danbury would be right between my family, in the middle of where my family is. It would be nice if I could get to Danbury.

THE COURT: Okay. I'll say as close as possible to Metropolitan New York; would that work because Danbury or Fort Dix, which is New Jersey?

THE DEFENDANT: My son and my mom, they are in Mass. and some of my family is in New York.

THE COURT: Okay, I'll say Danbury or otherwise as close as possible to Massachusetts.

Would the defendant please stand. As is my practice, I'm going to formally state the sentence I'm going to impose followed by a formal statement of the reasons to the extent I haven't done so already, and then I'll give counsel a final opportunity to make any additions or corrections or objections.

Pursuant to the Sentencing Reform Act of 1984 and having considered the sentencing factors set forth at 18 United States Code, Section 3553(a), it is the judgment 03:09PM of the Court that the defendant Michael Mao is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 121 months. This term consists of 121 months on Counts One and Two to be served concurrently.

The Court makes a judicial recommendation that the defendant be incarcerated at the facility in Danbury or if that's not available or appropriate as close as possible to his family in Massachusetts.

The Court makes a judicial further recommendation that the defendant participate in substance abuse while in 03:09PM Bureau of Prisons's custody, and the Court makes a further judicial recommendation that the defendant be screened for participation in the Residential Drug Abuse Prevention or RDAP Program while in custody.

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

This term consists of terms of four years on Count One and three years on Count Two, such terms to run concurrently.

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

While on supervised release, the defendant shall comply with the following terms and conditions:

03:10PM He must not commit another federal, state, or local crime.

He must not unlawfully possess a controlled substance.

He must refrain from any unlawful use of a controlled substance.

He must submit to one drug test within 15 days of release from imprisonment, and at least two periodic drug tests thereafter, not to exceed 104 tests per year.

He must cooperate in the collection of DNA as directed by probation. 03:10PM

He shall comply with the standards conditions that have been adopted by the Court, which are set forth at Section 5D1.3C for the Sentencing Guidelines, and which will be set forth in detail in the judgment.

He must not knowingly communicate or otherwise interact with any known members of the TRG Gang or the CMF Gang.

He must submit to substance abuse testing, not to exceed 104 drug tests per year to determine if he has used a prohibited substance. He must not obstruct or tamper with the testing methods, and it is further ordered that he shall pay to the United States a special assessment of $200, which shall be due immediately.

You may be seated. In terms of the formal reasons
03:11PM for the sentence, it is a nonguideline sentence imposed for the reasons indicated, and I am imposing no fine, as the defendant has established that he is not able and even with the use of a reasonable installment schedule is not likely to become able to pay all or part of the fine required under the guidelines.

Do counsel have any addition or correction or objection to that sentence not previously raised?

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

MR. PALMER: No, your Honor.

03:12PM THE COURT: All right. The sentence is hereby imposed as stated.

Let me give Mr. Mao his advice of rights. Mr. Mao, you can appeal your conviction if you believe that your guilty plea was unlawful or involuntary, or if there was some other fundamental defect in the proceeding that has not been waived by your guilty plea. You have a right to appeal your sentence under some circumstances, particularly if you think the sentence was contrary to law.

If you're unable to pay the costs of appeal, you may ask permission to have those costs waived and appeal without pain.

You must file any notice of appeal within 14 days after the entry of judgment, and if you request, the clerk will immediately prepare and file a notice of appeal on

03:12PM your behalf.

All right. Is there anything further, Mr. Wyshak?

MR. WYSHAK: No, your Honor, thank you.

THE COURT: All right. Mr. Palmer.

MR. PALMER: No, your Honor, thank you.

THE COURT: Thank you, we'll stand in recess.

THE CLERK: All rise.

(Whereupon, the hearing was adjourned at. 3:12 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript, Pages 1 through 44 inclusive, was recorded by me stenographically at the time and place aforesaid in Criminal Action No. 23-10009-FDS, UNITED STATES of AMERICA vs. MICHAEL MAO and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated this April 2, 2025.

s/s Valerie A. O'Hara

____

VALERIE A. O'HARA
OFFICIAL COURT REPORTER

United States Court of Appeals
For the First Circuit

No. 24-2107

UNITED STATES,

Appellee,

v.

MICHAEL MAO, a/k/a Whitebodian, a/k/a Spook, a/k/a Leno,

Defendant - Appellant.

Before

Gelpí, Lynch, and Howard,
Circuit Judges.

ORDER OF COURT

Entered: June 9, 2026

Upon consideration, Appellant Michael Mao's motion to recall mandate and for leave to file an out-of-time petition for panel rehearing and rehearing en banc is denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Mark T. Quinlivan
Donald Campbell Lockhart
Alexandra W. Amrhein
Fred M. Wyshak III
Rory McNamara
Michael Mao