

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

TYRONE KELLY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fourth Circuit*

**Appendix to
Petition for a Writ of Certiorari**

Howard W. Anderson III
LAW OFFICE OF
HOWARD W. ANDERSON III
P.O. Box 6661
Pendleton, SC 29670
864-643-5790
howard@hwalawfirm.com
CJA Counsel for Petitioner

APPENDIX CONTENTS

Appendix A: Opinion of the United States Court of Appeals for the Fourth Circuit, <i>United States v. Tyrone Kelly</i> , Nos. 23-4353 & 23-6704 (May 22, 2026).....	1a
Appendix B: Excerpts of Sentencing Hearing in <i>United States v. Tyrone Kelly</i> , No. 3:21-cr-00522-JFA-7 (D.S.C. June 16, 2023).....	8a
Appendix C: Denial of Motion for Reconsideration in <i>United States v. Tyrone Kelly</i> , No. 3:21-cr-00522-JFA-7 (D.S.C. June 28, 2023).....	50a

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4353

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TYRONE KELLY,

Defendant - Appellant.

No. 23-6704

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TYRONE KELLY,

Defendant - Appellant.

Appeals from the United States District Court for the District of South Carolina, at
Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:21-cr-00522-JFA-7)

Submitted: April 30, 2026

Decided: May 22, 2026

Before AGEE and HARRIS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Howard W. Anderson III, Pendleton, South Carolina, for Appellant. Bryan P. Stirling, United States Attorney, Andrea Gwen Hoffman, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Tyrone Kelly pleaded guilty, pursuant to a written plea agreement, to two counts of using a telephone to facilitate the commission of a felony under the Controlled Substances Act, in violation of 21 U.S.C. § 843(b). The district court sentenced Kelly to 45 months' imprisonment for each conviction and ordered the sentences to run consecutively. Kelly filed a pro se motion to reconsider his sentence and asserted that the maximum sentence that the district court could have imposed was 48 months. The district court denied the motion. Kelly appealed the criminal judgment (No. 23-4353) and the order denying his motion to reconsider his sentence (No. 23-6704), and this court consolidated the appeals.

On appeal, Kelly's counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there were no meritorious grounds for appeal but questioning whether the district court committed an error when grouping the offenses under U.S. Sentencing Guidelines Manual § 3D1.1 (2021). Kelly filed a pro se supplemental brief and more than 50 supplements. Kelly also filed a motion to amend his pro se supplemental brief (ECF No. 45),¹ which we now grant.

Upon conducting our *Anders* review of the record, we identified two nonfrivolous appellate issues, that is, (1) Whether under Fed. R. Crim. P. 11(b)(1)(G), Kelly understood the nature of each charge to which he pleaded guilty, and (2) Whether under Fed. R. Crim. P. 11(b)(3), there was a factual basis for Kelly's guilty pleas. We directed the parties to file supplemental briefs addressing those issues.

¹ ECF citations are to the lead case, No. 23-4353.

After receiving Kelly's counsel's supplemental brief, we relieved counsel of his duties, appointed new counsel for Kelly, and ordered another round of supplemental briefing on those two issues.

Kelly's new counsel thereafter submitted a supplemental opening brief addressing those two issues and raising a new issue—that Kelly was deprived of the benefit of his plea bargain because he was not permitted to argue at sentencing that he did not distribute drugs and possessed them only for personal use. Kelly's counsel represents, however, that Kelly does not wish to challenge his convictions and wants to challenge only his sentence. (Appellant's Second Supp. Br. (ECF No. 131) at 16 n.3). Kelly's counsel thus seeks resentencing based on this new argument. Kelly has filed two pro se letters confirming that he does not wish to challenge his convictions at this time. (ECF Nos. 134, 136). The Government has also filed a supplemental brief addressing the two issues on which we ordered supplemental briefing and the new issue Kelly's counsel has raised. For the reasons that follow, we affirm the criminal judgment and the district court's order denying Kelly's motion to reconsider his sentence.

We start with the validity of Kelly's guilty plea, which was the subject of this court's supplemental briefing order. Because Kelly and his counsel have represented that Kelly does not wish to challenge his guilty plea and that he wants to challenge only his sentence, we decline to resolve the issues on which we ordered supplemental briefing.² *See Clark v.*

² For the same reason, we do not reach Kelly's challenges to his convictions that he raised in his earlier pro se filings.

Sweeney, 607 U.S. 7, 9 (2025) (explaining that, under “the principle of party presentation,” “[t]he parties frame the issues for decision, while the court serves as neutral arbiter of matters the parties present” (internal quotation marks omitted))).

Insofar as Kelly’s counsel now contends that Kelly did not receive the benefit of his plea bargain because the district court did not allow him to argue the personal use versus distribution issue at sentencing, we reject that contention. The sentencing transcript reflects that both defense counsel and Kelly argued at sentencing that Kelly possessed drugs for personal use and did not distribute them. But the district court found based on abundant testimony at the sentencing hearing that Kelly distributed drugs to other people in addition to possessing them for personal use. For example, one of Kelly’s codefendants testified that Kelly purchased heroin despite not using that drug. That codefendant also confirmed that Kelly provided heroin and other drugs to the codefendant and to employees of Kelly’s business. *See United States v. Washington*, 41 F.3d 917, 919 (4th Cir. 1994) (explaining that “[d]istribution under 21 U.S.C. § 841(a)(1) is not limited to the sale of controlled substances” and that “sharing drugs with another constitutes distribution under § 841(a)(1)” (internal quotation marks omitted))).

Turning to Kelly’s sentence, we have reviewed each of Kelly’s challenges to his sentence, including that the district court made an error in grouping the offenses under USSG § 3D1.1, that the district court erred in calculating the drug quantity attributable to him under USSG § 2D1.1, that he was improperly denied acceptance of responsibility under USSG § 3E1.1, that the district court erred in determining his criminal history score, that the witnesses who testified at the sentencing hearing were not credible, that the district

court contravened *United States v. Booker*, 543 U.S. 220 (2005), that the district court should have ordered his two terms of imprisonment to run concurrent, and that there is an unwarranted disparity between his sentence and the sentence of a codefendant. We reject each of these contentions.

With respect to Kelly's challenges to the district court's calculation of his advisory Sentencing Guidelines range, we conclude that the district court's factual findings were not clearly erroneous and that the district court did not commit an error of law. *See United States v. Henderson*, 136 F.4th 527, 535 (4th Cir. 2025) ("[W]e grant a district court's factual findings based upon assessments of witness credibility the highest degree of appellate deference." (alteration and internal quotation marks omitted)); *United States v. Gross*, 90 F.4th 715, 720 (4th Cir. 2024) ("[W]hen assessing a Guidelines calculation . . . , we review the district court's factual findings for clear error and its legal conclusions de novo." (internal quotation marks omitted)).

As for Kelly's other challenges to his sentence, we conclude that Kelly has not shown a legal error in his sentence and that the district court did not abuse its discretion in imposing the sentence that it chose after considering the 18 U.S.C. § 3553(a) factors. *See United States v. Nance*, 957 F.3d 204, 212 (4th Cir. 2020) ("We review the reasonableness of a sentence under . . . § 3553(a) using an abuse-of-discretion standard, regardless of whether the sentence is inside, just outside, or significantly outside the Guidelines range." (alteration and internal quotation marks omitted)); *United States v. Lynn*, 912 F.3d 212, 217 (4th Cir. 2019) (explaining district court's discretion to impose consecutive sentences).

Finally, we discern no reversible error in the district court's order denying Kelly's motion to reconsider his sentence. *United States v. Kelly*, No. 3:21-cr-00522-JFA-7 (D.S.C. June 28, 2023).

Accordingly, we affirm the criminal judgment and the district court's order denying Kelly's motion to reconsider his sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

1 THE COURT: Any redirect?

2 MS. TAYLOR: No, Your Honor.

3 THE COURT: All right. Thank you, sir. You may
4 step down.

5 MS. TAYLOR: Your Honor, that was our final
6 witness.

7 THE COURT: All right. Anything else from the
8 Government on the drug quantity objection?

9 MS. TAYLOR: No further evidence, Your Honor.

10 THE COURT: All right. Does the defendant care
11 to put up any evidence on the drug quantity objection?

12 MR. WATKINS: I'm sorry?

13 THE COURT: Does the defendant want to put up any
14 documentary evidence on the drug calculation objection?

15 THE DEFENDANT: I don't have --

16 MR. WATKINS: You have to talk to me.

17 No, sir. We had a discussion about arguments or
18 evidence. We have no evidence.

19 THE COURT: Let's hear argument on this first
20 objection first. Ms. Taylor, you go first. It's the
21 Government's burden of proof by a preponderance of the
22 evidence to establish drug quantity for the purposes of
23 guideline calculation.

24 MS. TAYLOR: Yes, Your Honor. So we have
25 established that during the two-month period of the

1 wiretap, agents calculated from the wire, which includes
2 phone calls and texts, that Mr. Kelly, along with Ms.
3 McManus, acting in concert were responsible for 71.1
4 kilograms of a converted drug weight.

5 Your Honor, Ms. McManus testified that she and
6 Mr. Kelly had been involved with Mr. McKie. And by saying
7 "involved," I mean had been receiving drugs, purchasing
8 drugs from Mr. McKie for a period that she believed was
9 approximately a year. And she told us that during that
10 year, that Mr. Kelly would purchase approximately 3.5
11 grams of different drugs, to include heroin and
12 methamphetamine and cocaine, and on occasion, crack
13 cocaine. And she also indicated that to her recollection,
14 the two months on which -- during which we were on the
15 wire were fairly consistent and representative of each
16 month in which they dealt with Mr. McKie. And so that
17 would be about a year, or six times that 71 kilograms.

18 Your Honor, Mr. McKie also testified that he was
19 engaged in dealing drugs to Ms. McManus and Mr. Kelly.
20 And his memory was that it was approximately November of
21 the previous year until the date of their arrest in August
22 of 2021. So something somewhat short of a year, but still
23 close. And he again testified that Mr. Kelly would
24 purchase quantities of 3.5 grams of the various drugs, to
25 include heroin, cocaine, and methamphetamine, and that on

1 occasion, he would get a gram of cocaine.

2 Both Ms. McManus and Mr. McKie indicated that
3 they knew that Mr. Kelly was, in fact, a user. But Ms.
4 McManus tells us that much of the drugs, the heroin
5 specifically and some of the ice, that Mr. Kelly purchased
6 was for her use. And, therefore, he distributed those
7 drugs to her. She also testified that Mr. Kelly used some
8 of those drugs to pay his employees, and then that he also
9 used cocaine and then sometimes methamphetamine.

10 Mr. McKie -- while Ms. McManus said that her
11 recollection was that the dealing was steady for
12 approximately a year, Mr. McKie narrowed that down a
13 little bit. And so in the light most favorable to Mr.
14 Kelly, Mr. McKie claims that in the period beginning
15 approximately May of 2021 to the time of their arrest in
16 August of 2021, about a four-month period, this was the
17 peak of their dealing, and that each of those months in
18 that four-month period were substantially the same.

19 And so that would be, if we looked at two months
20 being 71.1 grams, four months being 142.2 grams, which
21 would result in a level 24, for a guideline range of 100
22 to 125 months.

23 Furthermore, Your Honor, I asked both Mr. McKie
24 and Special Agent Eckhoff, I believe, about the
25 terminology that was used. The terminology that was used

1 in those calls indicated that Mr. Kelly was purchasing 3.5
2 grams and single grams, consistent with Travis McKie's
3 testimony and Ms. McManus's testimony, indicating that the
4 agents' interpretation of those calls was accurate, and
5 there's been nothing to show otherwise.

6 Your Honor, Sergeant Mastrianni testified that he
7 took a statement from this defendant during the course of
8 this conspiracy. And Mr. Kelly was actually less generous
9 than some of his witnesses against him. And he actually
10 said that he was purchasing 7 grams, which would be two
11 eight-balls, as opposed to one 8-ball on these occasions.
12 And he claims to have been dealing with Mr. McKie every
13 other day. So even dismissing the fact that Mr. Kelly has
14 put more weight on his own self, he claims to have been
15 dealing with Mr. McKie for six months, but buying twice
16 the weight.

17 Any way you look at it, Your Honor, we far exceed
18 guidelines that would put him at a range of 96 months,
19 which is the highest sentence he can receive. And so we
20 believe that we have --

21 THE COURT: Do the math with me. The drug
22 weights -- give me the total drug -- take a second and
23 give me the total drug weight. And let's see what
24 guideline level we are looking at, offense level.

25 MS. TAYLOR: Yes, sir. I did not write down

1 what everyone specifically testified to and add up those
2 drug weights.

3 THE COURT: We can take a recess. Probation has
4 taken good notes as well.

5 MS. TAYLOR: We can do that, Your Honor. But let
6 me start with this. So the agent has testified that
7 during the two-month period of the wire, there was
8 cocaine, crack cocaine, meth, and heroin, that when added
9 together and converted, under the guidelines, added up to
10 71.1 kilograms of converted drug weight. That was for a
11 two-month period.

12 If we double that and went with the four-month
13 period that Mr. Travis McKie said he was selling to Mr.
14 Kelly at about the same amount every month, that would
15 take us to 142.2 kilograms. That would be a level 24
16 under the guidelines. And with a Criminal History VI,
17 that would be 100 to 125 months.

18 PROBATION OFFICER: And, Your Honor, I could just
19 say that we could definitely do the math. That would be
20 the most conservative approach from my notes and listening
21 to some of the weight that separately Ms. McManus and Mr.
22 McKie put on Mr. Kelly during their entire time with him.
23 That four-month period, just looking at that small
24 four-month period, I think is the most conservative
25 approach.

1 THE COURT: That conservative approach gets us a
2 level -- what did you say again, Ms. Taylor?

3 MS. TAYLOR: A level 24. Ms. Major has looked
4 back at what Mr. Kelly put on his own self, which would
5 not be as conservative. He put a total of 761 kilograms
6 of converted drug weight. So we have taken a very
7 conservative approach giving Mr. Kelly the benefit of the
8 doubt.

9 THE COURT: So 24-6 gives you a guideline
10 sentencing range of 110 to 125 months, which is in excess
11 of --

12 MS. TAYLOR: I wrote 100 to 125.

13 THE COURT: What did I say?

14 MS. TAYLOR: I thought you said 110.

15 THE COURT: I think I did. It's 100 to 125. You
16 are right. Offense level 24, Criminal History Category
17 VI, 110 to 125 --

18 MS. TAYLOR: 100 to 125.

19 THE COURT: 100, I'm sorry. If the Government is
20 correct, by preponderance of the evidence, that would
21 almost moot out all the other objections. So let's don't
22 get in a hurry here. Let me hear from the defendant.

23 Mr. Watkins, I would be glad to hear from you on
24 this point.

25 MR. WATKINS: Thank you, sir. The main point

1 that I think we want to make is that he pled to the phone
2 charge.

3 You've got to sit down.

4 THE COURT: Use of phone to commit a felony?

5 MR. WATKINS: Well, he's saying that that was a
6 misdemeanor and all these -- he's not in a conspiracy, so
7 that is not relevant conduct.

8 THE COURT: I thought the statute said we are
9 dealing with 843B.

10 MS. TAYLOR: It does require a felony, Your
11 Honor.

12 THE COURT: And he's pled guilty. It shall be
13 unlawful for any person, knowingly or intentionally, to
14 use any communication facility in committing or causing or
15 facilitating commission of any act or acts constituting a
16 felony under any provision of this subchapter or
17 subchapter 11. Each separate communication shall be a
18 separate offense under this subsection.

19 So it has -- he had to plead to -- otherwise, his
20 plea is defective if the objection is well taken.

21 MR. WATKINS: Yes, sir, I understand.

22 THE COURT: We went through that when we took the
23 plea.

24 MR. WATKINS: You did, Your Honor. But I feel an
25 obligation --

1 THE COURT: I am not faulting you for making the
2 argument. I'm just asking you if the record doesn't
3 defeat what you are arguing. Please, Mr. Watkins, don't
4 think I'm admonishing you at all. I'm just trying to be
5 sure --

6 MR. WATKINS: I know that.

7 THE COURT: Mr. Kelly, you want to say something?

8 THE DEFENDANT: Yes, sir. The point -- argument
9 I was making was, the guideline referred back to the
10 underlining offense. You know what I'm saying? The
11 guideline referred back to the underlining offense. If
12 there's no underlining offense, there can't be a
13 conviction of 843.

14 THE COURT: So you are saying you are not guilty?
15 You pleaded guilty under oath, but you are telling me
16 today you are not guilty?

17 THE DEFENDANT: Sir, no. I pleaded to the 843.

18 THE COURT: Which requires a felony.

19 THE DEFENDANT: Which requires a felony. But the
20 Government don't have a felony. You know? I am not
21 convicted of any distribution or possession with intent to
22 distribute. I only pleaded to the phone count. I only
23 pleaded to making two phone calls to buy two misdemeanor
24 amounts of drugs. That's the only thing I pleaded to.
25 Now, as far as level of conduct, that applies to the

1 conspiracy. Conspiracy is the only charge where you
2 accentuate offenses, not 843B.

3 PROBATION AGENT: Your Honor, I think you asked
4 me to be prepared to respond to that when he earlier
5 brought that to the Court's attention. I can respond.

6 THE COURT: Go ahead. Respond to it.

7 PROBATION AGENT: Your Honor, he's correct,
8 843B -- 21 U.S.C. 843B does direct us to 2D1.6 -- I'm so
9 sorry. 21 U.S.C. 843B is found in the guideline 2D1.6.
10 It tells you to take the base offense level to be
11 calculated from the guideline for the underlying offense,
12 as the defendant points out. Then line of offense in this
13 case, I referred back to the indictment. And the
14 indictment, Counts 10 and 12, which he pled guilty to, I
15 can read them verbatim if the Court wishes to --

16 THE COURT: Go ahead. Read it.

17 PROBATION AGENT: Counts 10 and 12 of the
18 superseding indictment charge that on or about the dates
19 set forth below, in the District of South Carolina and
20 elsewhere, the defendants listed below knowingly and
21 intentionally did use a communication facility, that is a
22 telephone, to facilitate commission of a felony under the
23 Controlled Substance Act, to wit, conspiracy to
24 distribute, possession with intent to distribute, and
25 distribution of controlled substances, in violation of 21

1 U.S.C. Section 841(a)(1), 846. So I took the underlying
2 offense to be an 841(a)(1) and 846.

3 THE COURT: Which is the plain language of the
4 indictment?

5 PROBATION AGENT: Yep, which directs us to 2D1.1.
6 So through guideline 2D1.6, I used 2D1.1 to establish the
7 base offense level with prior -- the drug value, the drug
8 amounts under Rule 34. However, the Court today, if it
9 finds that there's a more appropriate level based off
10 these findings, approximate drug amount is instead 24, we
11 are still in 2D1.1.

12 THE COURT: All right. Mr. Kelly?

13 THE DEFENDANT: Your Honor, where a defendant is
14 not convicted of an underlining felony, a conviction upon
15 the 843 may not be sustained, because there is no felony
16 facilitated. One cannot violate 843 by facilitating a
17 nonexistent distribution. I didn't plead to distribution.
18 I pleaded to using the phone to facilitate possession of
19 these drugs. That doesn't necessarily say I possessed
20 those drugs. I just pleaded to the phone count. I didn't
21 plead to possession.

22 THE COURT: Mr. Kelly, at your guilty plea --

23 THE DEFENDANT: Yes, sir.

24 THE COURT: -- first thing we did was have you
25 placed under oath. And I reminded you all your answers

1 had to be truthful --

2 THE DEFENDANT: Yes, sir.

3 THE COURT: -- in every respect. And then I told
4 you that I had to ask you a long series of questions, if
5 you didn't understand my questions, you should tell me so
6 that I could go over them with you in detail.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And I told you if at any time you
9 needed to speak to your attorney, Mr. Watkins, if you gave
10 me a signal, I would let you take a recess and talk with
11 counsel.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Then about halfway through the
14 proceedings, I asked you if you had read the indictment
15 and knew what the charges were. And you told me you did.
16 And then I read those charges to you.

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And specifically, I read that the two
19 counts that you pleaded guilty to alleged that on or about
20 May 5th, 2021, in the District of South Carolina and
21 elsewhere, you, Tyrone Kelly, knowingly and intentionally
22 did use a communication facility, that is a telephone, to
23 facilitate the commission of a felony.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: I used the word "felony" under the

1 Controlled Substances Act, to wit, conspiracy to
2 distribute, possession with intent to distribute, and
3 distribution of controlled substances. So the indictment
4 itself, the very plain, unambiguous, explicit language of
5 the indictment, charge you with using a telephone to
6 commit a felony. And you pleaded guilty with your eyes
7 open to that fact.

8 THE DEFENDANT: Yes, sir. But, once again, there
9 must be a felony committed. You understand? I pleaded to
10 a phone count. But they don't have an underlining
11 offense. With no underlining offense, you can't come up
12 with the correct offense level.

13 THE COURT: The indictment gives us the
14 underlying offense, which is --

15 THE DEFENDANT: But I've got to be convicted
16 under the underlining offense.

17 MR. WATKINS: Your Honor, during our discussions,
18 we've had some problems communicating certain legal terms.
19 I have explained to him that a plea is a conviction.

20 THE DEFENDANT: I understand a plea is a
21 conviction, but I pleaded to the phone count. I pleaded
22 to the phone count, 10 and whatever. Those was the only
23 two counts that I pleaded to. And they can't cram -- you
24 are the judge, but just my argument, they can't cram all
25 that drug weight into two counts. Relevant conduct

1 connects -- simply says -- let me read it to you.
2 Relevant conduct says: Conversely, when 3D1.2(d) does not
3 apply, so that convictions on multiple counts are
4 considered separately in determining the guideline
5 sentencing range, the guidelines prohibit aggregation from
6 quantities from other counts in order to avoid double
7 counting.

8 You know, that's under relevant conduct. It's
9 the last paragraph, relevant conduct. It says with 1 --
10 says: Conversely, when 3D1.2 does not apply, so that
11 convictions on multiple counts are considered separately
12 in determining the guideline sentencing range, the
13 guidelines prohibit aggregation from quantities from other
14 counts in order to avoid double counting.

15 PROBATION OFFICER: Your Honor, his point --
16 that's correct. I did not separate Counts 10 and 12.
17 Paragraph 98 explains my grouping analysis. I grouped
18 both counts together because it was based off an aggregate
19 total amount of drugs.

20 THE COURT: Right. So there was no double
21 counting when you grouped?

22 PROBATION AGENT: Correct, Judge. I did one
23 guideline for both counts. So I did follow his point.

24 THE DEFENDANT: And the statutory -- and when you
25 group them, Your Honor, the statutory maximum is the 0 to

1 4. The statutory maximum is that of one count, not two,
2 when you group them together under the grouping.

3 THE COURT: Bear with me just a minute. I've got
4 my notes out of order here. One second.

5 All right. Anything in reply by the Government?

6 MS. TAYLOR: Your Honor, I will say a couple of
7 things. I am not quite sure I understood his last
8 argument, but to the extent that Mr. Kelly contends that
9 he has to have been convicted of the underlying felony,
10 that is not the law. And so we have alleged a number of
11 underlying felonies in this case. His argument is that he
12 was buying these drugs just for his own use. Of course,
13 we've offered evidence that it was more than that, that he
14 was distributing some of these drugs to his girlfriend,
15 Jessica, but also to his workers in the tree and landscape
16 business.

17 But even in, again, the light most favorable to
18 Mr. Kelly, if he were, in fact, purchasing these drugs for
19 his own use, that still would be a felony, because
20 possession of any of these drugs that we've named, heroin,
21 methamphetamine, crack cocaine, and cocaine, carries more
22 than one year and is, in fact, a felony. So that argument
23 holds no weight.

24 THE DEFENDANT: Your Honor --

25 MR. WATKINS: Sit down. Sit down.

1 THE DEFENDANT: Your Honor --

2 THE COURT: All right. I will let him -- go
3 ahead and respond.

4 Ms. Taylor, were you finished on that point?

5 MS. TAYLOR: I guess so.

6 THE COURT: All right. What's your response, Mr.
7 Kelly?

8 THE DEFENDANT: My response is, Your Honor, the
9 response is, I wasn't convicted of a possession with
10 intent to distribute.

11 THE COURT: You've said that many times.

12 THE DEFENDANT: Yes, sir. And the law is --

13 THE COURT: I know you weren't convicted. You
14 don't have to tell me that again.

15 THE DEFENDANT: And I'm just going to read this
16 to you. It says: The occurrence of the underlying drug
17 felony is a fact necessary to finding a violation of 843,
18 because due process clause protects accused against
19 conviction of except upon proof beyond a reasonable doubt
20 of every fact necessary to constitute the crime in which
21 he is charged.

22 And it says: We hold that the drug felony
23 alleged facilitated by the use of a violation of 843B must
24 be proven not by a preponderance of the evidence but
25 beyond a reasonable doubt.

1 And there is no statute that says that drug
2 weight -- and it says the identity and drug weight must be
3 proved beyond a reasonable doubt, not by a preponderance.

4 THE COURT: All right. I think I've heard
5 enough. I'm going to overrule the defendant's objections
6 No. 1 and No. 2.

7 No. 1 objection to the drug weight calculations
8 in the presentence report, specifically paragraphs 30
9 through 35 and 90, I find that the Government has produced
10 evidence to prove by a preponderance of the evidence that
11 the defendant's total drug weight is sufficient to put him
12 in Criminal History Category (sic) 20 -- I'm sorry, 22.
13 No? 24, 24.

14 MS. TAYLOR: Offense level, Your Honor.

15 THE COURT: Offense level 24. We will talk about
16 criminal history in just a minute.

17 The second objection is also overruled to the
18 extent that the defendant complains about using other
19 telephone calls other than the two calls that he pleaded
20 to. The concept of relevant conduct allows all other
21 calls to be taken into account in calculating drug weight.

22 The Government has proved the records of drug
23 weight two different ways -- actually, three different
24 ways, one by the defendant's admission after being
25 Mirandized; two, by the testimony of Ms. McManus, his

1 girlfriend, and Travis McKie; and three, by the agents who
2 testified on the phone taps. In my view, there's no doubt
3 the Government has carried its burden of proof on those
4 drug weight issues.

5 To the extent the defendant argues that he has to
6 have been convicted of an underlying felony to be guilty
7 of the telephone offense, I reject that as a matter of
8 law. So that takes care of those first two objections.

9 PROBATION AGENT: Your Honor, how that will
10 reflect and impact the presentence report, in the
11 statement of reasons as well, paragraph 99 of the
12 presentence report summarizes the base offense level.
13 That will be reflected in statement of reasons why the
14 Court found base offense level is 24 rather than based off
15 the information presented by the Government.

16 Paragraph 104, the adjusted offense level,
17 offense level will, again, become 24. And until the Court
18 hears on acceptance of responsibility, paragraph 107, the
19 total offense level will also become 24.

20 THE COURT: 24. All right. Then we come to
21 criminal history. And this gets into a timing issue about
22 whether some of these previous convictions are time
23 countable, I guess is the word. Once again, the
24 Government bears the burden of proof by preponderance of
25 the evidence on these.

1 Ms. Taylor, what's the Government's position?

2 MS. TAYLOR: Your Honor, I believe the Probation
3 Office has very well summarized the law on this. And if I
4 have understood the defendant's objections, his first
5 objection was to a 2004 conviction resulting in a
6 three-level or three-point addition to his criminal
7 history. And he alleges it's because it was outside the
8 15-year criminal history -- I mean -- yes, outside the
9 15-year time period prior to this offense. However, as
10 the probation officer has noted, the defendant's
11 probationary term was revoked in 2007, at which time he
12 was sentenced to five years for that revocation and was
13 not released from custody until 2011.

14 2011 was well within the 15 years of the
15 instant -- beginning of this offense. And so that three
16 points was correctly attributed to him.

17 THE COURT: All right. Mr. Watkins, any response
18 to that? The law is clear that when probation is revoked,
19 the 15-year look-back window changes then, and you look at
20 his release from incarceration for the revocation.

21 MR. WATKINS: And I have gone over that with him.

22 THE DEFENDANT: Yes, sir. My argument was that I
23 did not get revoked in 2007. They terminated my
24 probation because they send me to Morris Village with
25 drug-proof. And judge said once I get out -- it was just

1 a mix-up in paperwork. The judge said once I went to
2 Morris Village and got out, the probation was terminated.
3 If you have the sentencing sheet for 2007, it's not going
4 to have a probation violation on there. Only thing it's
5 going to have is just the charge that I went to prison
6 for. I wasn't on probation when I went to prison. And
7 that's why I argued that for the three points. It's not
8 relevant.

9 Now, the three points that are relevant are the
10 ones when I went to prison 2007. And then in 2013, I
11 got -- I took an *Alford* plea to three separate charges.
12 But it was one plea and one time.

13 THE COURT: Well, there were three separate
14 charges separated by an intervening arrest for each one.

15 THE DEFFENDANT: Yes, sir.

16 THE COURT: You committed a crime, were arrested,
17 committed a crime, were arrested, committed another crime,
18 and they were all disposed of on the same day.

19 THE DEFENDANT: Yes.

20 THE COURT: But you were arrested three different
21 times.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And the guideline say we count those
24 as three separate offenses.

25 MR. WATKINS: He's also made the argument that

1 the *Alford* plea was not a plea of guilty; therefore, that
2 doesn't count. I've gone over that with him. I want the
3 Court to understand the argument.

4 THE DEFENDANT: The argument was I didn't -- I
5 did an *Alford* plea. And my argument was that -- but you
6 said they charged them separate. How many points per
7 count, because I didn't go to prison for them?

8 THE COURT: Can Probation help us with this?

9 THE DEFENDANT: Yeah, I didn't go to prison for
10 that.

11 PROBATION AGENT: Your Honor, I am looking for
12 the records.

13 THE COURT: Let's take a recess. We've been
14 going a good while. Let's take a 15-minute recess and let
15 Probation look over the records. We will be in recess for
16 15 minutes.

17 (Whereupon, recess transpired.)

18 THE COURT: Just for the sake of keeping a clear
19 record here, my ruling on the first objection on drug
20 weight, I said would support criminal history category
21 IV -- I'm sorry, would support a total offense level 24.
22 That was based upon a finding that the Government has
23 proved by a preponderance of the evidence that the
24 defendant should be held accountable for at least 100
25 kilograms of converted drug weight. And I find that for

1 the record.

2 Now, during the recess, I asked Probation to look
3 at the state court records over whether the defendant was
4 sentenced for a probation violation. What did you find?

5 PROBATION OFFICER: Yes, Your Honor. Through my
6 investigation and obtaining the defendant's criminal
7 history documents, as normally I do, I sent the
8 information request to South Carolina Department of
9 Probation, Parole and Pardon Services, and also sent a
10 request to South Carolina Department of Corrections, and
11 they did respond for both requests.

12 South Carolina Department of Probation, say PPP
13 for short, they have internal records that's an automated
14 computerized printout. As the Court is aware, the Fourth
15 Circuit advised we can rely upon computer-automated
16 printouts for the purposes of criminal history. In this
17 computer-generated document, it has an entry for the same
18 indictment number, which is the one under "contested" in
19 paragraph 56 ending in 01572. In the case, probation
20 sentence began October 5th, 2004, and it ended on August
21 14th, 2007, in a revocation C.

22 Judge, I was an employee of PPP at some point in
23 the past. I know rev' C in this code indicates a
24 revocation for a new conviction.

25 THE COURT: New conviction?

1 PROBATION AGENT: A new conviction revocation
2 related to the offense. When I compare that to South
3 Carolina Department of Corrections documents, also an
4 automated computerized-generated document, he entered the
5 prison on August 23rd, 2007. So about a week later, he
6 enters the prison. The indication on this document says
7 he entered the prison on three new offenses. Two are new
8 convictions, which are for paragraph 61 and paragraph 60.
9 The third is for the revocation in paragraph 56. They are
10 all five years, all three to run concurrent.

11 There's a lot of information about the agreements
12 he makes within the prison system and up until April 28th,
13 2013, when he is released from prison. I'm sorry, Judge,
14 April 29th, 2011, he is released. April 29th, 2011, he is
15 released on those three charges, including our probation
16 revocation.

17 THE COURT: So he said earlier he was sent to
18 Morris Village, but it was not that it was a probation
19 revocation?

20 PROBATION AGENT: Judge, I mentioned this to Mr.
21 Watkins. So this all happened the same day. As we know
22 how state court works, typically, you will go in and you
23 could plead guilty to new charges and also be revoked all
24 in the same hearing. That is what it looks like happened
25 here, Judge. The revocation is April 14th, 2007, which is

1 the same day as the other two new convictions. So he gets
2 two new convictions of five years and the probation
3 revocation of five years, all in the day wrapped up
4 concurrently.

5 There might have been some past probation
6 violations that we'll address potentially with this Morris
7 Village, but this particular violation ended in a
8 revocation of five years to run concurrently to two new
9 sentences for new offenses. Again, that's corroborated
10 from PPP documents, SCDC documents, and the court
11 documents that I've obtained through my investigation.

12 THE COURT: All right. The next objection
13 related to --

14 MR. WATKINS: Your Honor, I've looked at the
15 records. They are consistent with some information that I
16 have, but I would move to move those records into the
17 record.

18 THE COURT: All right. Any objection?

19 MS. TAYLOR: No, Your Honor, I was going to make
20 the same motion.

21 THE COURT: Let's put those in the record for the
22 purposes of appeal. Good idea.

23 The next objection relates to convictions in 2012
24 and 2013 that we mentioned just before the break when he
25 says -- the defendant says he was sentenced one time for

1 three offenses. But the presentence report indicates they
2 were all separated by intervening arrest. And under
3 clearly established law, those are separately point
4 countable. So that objection is respectfully overruled.

5 So does that do it with regard to criminal
6 history category now?

7 THE DEFENDANT: I've got one more question, Your
8 Honor. As far as the three points for the probation, is
9 it three points for probation?

10 MR. WATKINS: No.

11 THE DEFENDANT: Okay. That's what -- I know it
12 can't be three points for the probation and three points
13 for the revocation.

14 THE COURT: No, it was not.

15 THE DEFENDANT: Okay. Thank you, sir.

16 THE COURT: All right. Now, I think that covers
17 all the objections to the criminal history, correct?

18 MR. WATKINS: All that I know about.

19 THE COURT: All right. Then we move on to
20 Objection No. 4, guideline calculations, paragraphs 98
21 through 107. I think these have all been ruled upon. If
22 you look at them, Mr. Watkins, this is a restatement of
23 the earlier things about drug weight, underlying felony
24 offense?

25 MR. WATKINS: Yes, sir.

1 THE COURT: I took responsibility -- that's all
2 repeat of what we've already ruled on?

3 MR. WATKINS: Yes, sir.

4 THE COURT: Then we move on to No. 5, custody
5 sentencing options, paragraph 119 and 120. The defendant
6 says: I object to the Government stacking the phone
7 counts. There's no case law or statute supporting the
8 Government's position. The First Step Act bars stacking.

9 And, Mr. Kelly, for your edification, the First
10 Step Act bars stacking of 924(c) convictions. That's
11 dealing with felon in possession of a firearm.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: That's no application in your case
14 here.

15 THE DEFENDANT: Yes, sir.

16 THE COURT: That argument is not correct.

17 THE DEFENDANT: But the argument I was making --
18 like I told you, the argument I was making, he already
19 corrected. He said he already grouped them together.

20 THE COURT: A grouping under the guidelines is
21 different from the statute.

22 THE DEFENDANT: I understand that now.

23 THE COURT: And, Mr. Schirra, you want to put on
24 the record again how you went about the grouping, if you
25 would, please?

1 PROBATION AGENT: Judge, just again, I think I
2 will reiterate, in a case where you have -- sorry, Judge.
3 Beg the Court's indulgence. Paragraph 97 of the
4 presentence report summarizes exactly what the defendant
5 said: In 3D1.1, when a defendant has been convicted of
6 more than one count, the court shall group the counts
7 resulting in conviction into distinct groups of closely
8 related -- sorry, related counts, i.e., groups, by
9 applying the rules specified in 3D1.2; determine the
10 offense level applicable to each group by applying the
11 rules specified in 3D1.3; and determine the combined
12 offense level applicable to all groups taken together by
13 applying the rules specified in 3D1.4.

14 Specifically, 3D1.2(d) says: When the offense
15 level is determined largely on the basis of the total
16 amount of harm or loss, the quantity of a substance
17 involved, or some other measure of aggregate harm, they
18 shall be grouped.

19 Judge, I did group Counts 10 and 12 together.
20 And under 3D1.3(b), when the case groups are -- the case
21 counts grouped together, under 3D1.2(d): The offense
22 level applicable to a group is the offense level
23 corresponding to the aggregated quantity determined in
24 accordance with Chapters 2 and parts A, B, and C of
25 Chapter 3.

1 And, Judge, paragraph 99 through 107 just reflect
2 that I did one total guideline calculation for both
3 counts, 92 separate counts. I did not double count
4 anything.

5 THE COURT: For the reasons just stated by the
6 probation officer, the last objection is overruled.

7 Now, wasn't there something about -- I'm looking
8 for it. I thought there was an argument about acceptance
9 of responsibility or reduction for acceptance. I thought
10 I read that in one of these objections, something I read.

11 MR. WATKINS: The loss of acceptance of
12 responsibility based on the letters that were sent.

13 THE COURT: Right.

14 THE DEFENDANT: But I took the plea. I took
15 responsibility for the plea. So, I mean, like you said, I
16 took the plea.

17 THE COURT: Mr. Kelly, you took the plea, but you
18 wrote me 26 letters.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Twenty-six letters, and I told you
21 verbally in this courtroom and on written order not to
22 write me letters, you were hurting your case. I made it
23 very clear. In many of these letters, you denied that you
24 were guilty of anything, which means you did not accept
25 responsibility for your actions. And some of those were

1 copied to -- not all of them, not all 26, but some were
2 copied to the probation officer. And that's why he took
3 away your three-level reduction for acceptance of
4 responsibility.

5 So to the extent there is an objection to the
6 probation officer failing to reduce by three levels for
7 acceptance, I would overrule that objection.

8 I think, Ms. Floyd, to be safe, some of these I
9 think you've clocked in. I thought we probably ought to
10 put all of these in the record for appeal purposes,
11 because that is the basis for denying acceptance, although
12 it might be a moot point, might be an academic point
13 looking at the guidelines.

14 THE COURT DEPUTY: They were not filed.

15 THE COURT: None of them have been? All right.
16 Any objection to putting these in?

17 THE COURT DEPUTY: Any of the ones that you have
18 there have not been filed.

19 THE COURT: All right. I counted 26 separate
20 letters. And several of those letters the defendant
21 denied any criminal responsibility whatsoever.

22 THE COURT DEPUTY: Do you want me to make those
23 Court's exhibits?

24 THE COURT: Make them Court's exhibits, yes.

25 (Court's Exh. 1 and 2 are marked for

1 identification.)

2 THE COURT: All right. Now, Mr. Schirra, do we
3 need to go back and take another look at our total offense
4 level when we went to 24, or is that still correct? That
5 was the base offense level, not the total offense level.

6 PROBATION AGENT: Judge, I summarized it earlier.
7 The implications of that base offense level, based on your
8 ruling, the total drug quantity attributable to the
9 defendant in this case, there are no specific offense
10 characteristics that were attributed to him. And at the
11 time I gave you the total offense level of 24, I indicated
12 that it could be changed based off of the Court's
13 determination on acceptance of responsibility. Based off
14 the Court's ruling, that acceptance is appropriately not
15 applied here, then nothing has changed. We are still at a
16 total offense level of 24, which is surpassed the 96
17 months.

18 THE COURT: Come look at this just a minute.

19 (Whereupon, an off-the-record discussion takes
20 place.)

21 THE COURT: All right. Based upon my rulings,
22 I'm going to adopt the presentence report as the Court's
23 findings for the purposes sentencing in this case.

24 THE DEFENDANT: Your Honor --

25 THE COURT: Yes, sir.

1 THE DEFENDANT: The fact I'm making is, because
2 he grouped them, he grouped them -- when he grouped, it's
3 just as considered as one count. And when you do one
4 count, statutory maximum is 0 to 4.

5 THE COURT: All right. Well, I respectfully
6 disagree. You can take that up with the Court of Appeals.

7 All right. I'm adopting the presentence report
8 as the Court's findings for the purposes of sentencing in
9 this case. That means we are looking at the following:
10 Under Count 10, there's a maximum sentence of fours years.

11 Under Count 12, there's a maximum sentence of
12 fours years; a total of 96 months, total maximum sentence.

13 Under the advisory guideline provisions, the
14 total offense level is 24. The defendant's criminal
15 history category is VI. That gives us a sentencing range
16 of 100 to 125 months under the guidelines. But in this
17 case, the statutory maximum would catch the guidelines and
18 trump the guidelines. And so the guideline range is 96
19 months, the maximum allowed by statute.

20 Supervised release for Count 10 and 12 is one
21 year. The fine was not calculated due to inability to
22 pay. There's no restitution in this case. And a special
23 assessment is \$100.

24 Do we have a preliminary order of forfeiture
25 order in this case, Ms. Floyd?

1 MS. TAYLOR: No. No, Your Honor. I don't
2 believe there's any forfeiture with regards to Mr. Kelly.

3 THE COURT: None?

4 MS. TAYLOR: No.

5 THE COURT: Forfeiture allegations, if any, are
6 dismissed.

7 All right. With that, anything from the
8 Government regarding sentencing generally?

9 MS. TAYLOR: Your Honor, nothing more than what I
10 think is obvious from the record, this is a case in which
11 Mr. Kelly could have been facing upwards of 20 years. We
12 did take into consideration the fact that he is a drug
13 addict and that that, I'm sure, contributed in some way to
14 his involvement in this conspiracy. But Mr. Kelly has
15 been a drug dealer for many years. We gave him what we
16 believe is an extraordinarily generous offer. The
17 guidelines, even after having reduced the evidence that we
18 had against him, exceed 96 years (sic), and we think --
19 I'm sorry, 96 months, not 96 years, that 96 months is the
20 appropriate sentence.

21 THE COURT: All right. Mr. Watkins, I will hear
22 from you and then I will hear from Mr. Kelly.

23 MR. WATKINS: The only thing I would perhaps
24 bring to the Court's attention is the disparity in some of
25 the sentences. He is basically an addict. And eight

1 years would be a long time for an addict based on some of
2 the other sentences, particularly look at the girlfriend
3 who they basically did the drugs together, which is Ms.
4 McManus. But in reaching your decision, I would urge you
5 to consider the disparity in some of the sentences.

6 Mr. Kelly has done the best that he can in terms
7 of trying to help himself. And in some of those helps, he
8 has hurt himself. And, of course, I've advised him
9 against writing letters and other things, but we are where
10 we are.

11 THE COURT: All right. Thank you, Mr. Watkins.
12 We appreciate your service in this case.

13 Now, Mr. Kelly, you have a right at this time to
14 make any statement that you wish about your sentence
15 generally. This is your chance to speak. I will be glad
16 to hear anything you want to say.

17 THE DEFENDANT: Yes, sir. I'm basically an
18 addict, you know, drug user. I did -- I mean, most of my
19 drug charges are based upon me getting caught with drugs
20 that I was using, you know, me being high. I didn't go
21 out in the general world.

22 I've got two daughters that I've got to try to
23 locate. I've got an 87-year-old mama that I want to see.
24 Eight years, I know I am not going to see her anymore.

25 And I'm pleading -- I pleaded to a phone count.

1 Jessica pleaded to conspiracy. And we were doing -- we
2 were identical. Ms. Taylor said at the hearing that me
3 and her case was identical. I might have a little more
4 categorical history, but, you know, I'm asking you to be
5 lenient on me so I can get back home to my family. Eight
6 years, that's a long time for just getting high. You
7 know?

8 I have my tree service business going on, you
9 know, and I was doing that. And, you know, basically, I
10 did pay my guys in cash, but, you know, they wanted other
11 things. But I wasn't distributing no drugs. I never sold
12 anybody any drugs or nothing like that. Basically, I'm
13 asking you to please be lenient and give me a
14 reasonable -- reasonable time, Your Honor, because I
15 didn't commit -- I didn't commit no crime at all. You
16 know? And I didn't go distributing no drugs. I wasn't
17 caught with no large amount of drugs. All the drugs I
18 bought was for my personal use, getting high. And when I
19 went and bought mine, I went and bought Jessica's. You
20 know what I'm saying? Me being her old man, I bought
21 hers. We went to the room and we got high.

22 As you see, they don't have any -- if the police
23 actually thought I was selling drugs, they would have
24 conducted a controlled buy, or either when they came to my
25 motel room, they would have got drugs. But they got

1 needles that she was shooting. And they got other
2 paraphernalia that I was using to do cocaine and ice.
3 That's the only thing they got. They didn't get no drugs.
4 I am not no drug dealer. And I know it look bad how they
5 did it, but, you know, I am not no drug dealer. I was
6 just buying drugs, small quantities of drugs, you know, on
7 different occasions. I wasn't going in buying no 2 or 3
8 kilos or 2 or 3 ounces. I was buying grams and grams,
9 just getting high.

10 I wasn't selling no dope to the community. The
11 only person I was hurting by buying the dope was myself,
12 you know what I'm saying, me and Jessica. I was -- I
13 wasn't selling no dope to the community. I was working
14 every day, Monday through Friday. I got high on Saturdays
15 and Sunday, went back to work on Monday. That's exactly
16 what I did.

17 THE COURT: All right. Any response by the
18 Government?

19 MS. TAYLOR: No, Your Honor.

20 THE COURT: All right. I would like to take -- I
21 hate to do it, but I would like to take another quick
22 five-minute recess and confer with Probation. We will be
23 back in five minutes.

24 (Whereupon, recess transpired.)

25 THE COURT: All right. I took a break just to

1 confer with the probation officer to see what sentences I
2 had handed out to other co-defendants in this case. And
3 we heard about Ms. McManus getting 37 months. Did she
4 already get a 5K1 departure to get that 37 months?

5 MS. TAYLOR: Your Honor, Ms. McManus cooperated
6 basically from the start. And much of the drug weight
7 that went on this defendant was because Ms. McManus
8 cooperated, whereas, this defendant did not cooperate.
9 She -- she did get a 5K. She also didn't have as
10 extensive a criminal history as Mr. Kelly.

11 THE COURT: Quite different. But, you know, I'm
12 supposed to look at the need to avoid unwarranted
13 disparity. So I want to look at these other -- Probation
14 tells me most all the other defendants in this case were
15 wiretap defendants, not controlled purchase defendants.
16 So to that extent, they are pretty much similar to this
17 defendant here.

18 MS. TAYLOR: That's correct, Your Honor.

19 THE COURT: Ms. Taylor, let me just ask you this.
20 I just wonder if the defendant shouldn't deserve just a
21 slight reduction because of his addiction, like, six
22 months off the 96 months.

23 MS. TAYLOR: Well, I will remind Your Honor that
24 we've already cut from 20 years down to 8.

25 THE COURT: You gave him a huge break.

1 MS. TAYLOR: We gave him a huge break. We capped
2 him. And he's the only defendant for whom I did that.

3 THE COURT: This was the only one that pled to a
4 telephone count?

5 MS. TAYLOR: I'm sorry, Your Honor?

6 THE COURT: This is the only defendant that pled
7 to a telephone count?

8 MS. TAYLOR: He's the only one that I made that
9 offer to. If you recall, he did not agree to a
10 continuance when the others did. And we actually appeared
11 for jury selection. And on that day, I had discussions
12 with him and what his concerns were. And perhaps against
13 my better judgment, but I did make him the offer to plead
14 to the two phone counts so it would cap him so we would
15 have some certainty as to what he was going to get. His
16 drug weights, Your Honor, are considerably higher than the
17 other defendants in this case.

18 THE COURT: All right.

19 MS. TAYLOR: Additionally, Your Honor, not only
20 did Ms. McManus get a reduction for her cooperation, but
21 she also had acceptance of responsibility.

22 THE COURT: Right. Right. All right. Having
23 calculated and considered the advisory sentencing
24 guidelines and having also considered the relevant
25 statutory sentencing factors of Section 3553(a) in Title

1 18, it is the judgment of the Court that the defendant,
2 Tyrone Kelly, is hereby committed to the custody of the
3 Bureau of Prisons to be imprisoned for a term of 90
4 months, consisting of 45 months on Count 10 and 45 months
5 on Count 12 to run consecutively.

6 Pursuant to the provisions of guideline 5D1.3(c),
7 this term shall run concurrently to the anticipated terms
8 of imprisonment for the offenses listed in paragraphs 90,
9 91, and 92 of the presentence report. I find that Mr.
10 Kelly does not have the ability to pay a fine, therefore,
11 the fine is waived. He shall, however, pay the mandatory
12 special assessment of were \$100 -- I'm sorry, special
13 assessment of \$200, \$100 for each count of conviction, due
14 immediately.

15 Upon his release from imprisonment, the defendant
16 shall be placed on supervised release for a term of one
17 year, consisting of one year on Count 1 -- I'm sorry, one
18 year on Count 10, and one year on Count 12 to run
19 concurrently.

20 While on supervised release, Mr. Kelly shall
21 comply with the mandatory conditions of supervision
22 outlined in Section 3583(d) of Title 18 and Guideline
23 5D1.3(a), and also the standard discretionary conditions
24 outlined in Guideline 5D1.3(c), all of which is noted in
25 paragraphs 125 and 128 of the presentence report. My

1 reasons for imposing all of these customary standard and
2 mandatory conditions are set out on a green sheet of paper
3 that we placed on counsel table. The Fourth Circuit has
4 indicated we can incorporate by reference our writing
5 setting forth our reasons. Mr. Watkins, can you confirm
6 you have those reasons, and you and your client are
7 apprised of them?

8 MR. WATKINS: We have the sheet, Your Honor.

9 THE COURT: I can read them right now.

10 MR. WATKINS: Can I get another copy?

11 THE COURT: Let me just go ahead and say it now.

12 Let me just say, standard conditions of supervision 1
13 through 9 and 13 serve the statutory sentencing purposes
14 of public protection and rehabilitation pursuant to 18
15 U.S.C. Section 3583 -- excuse me, 3553(a)(2)(C) and (D).

16 Standard conditions 10 and 12 serve the statutory
17 sentencing purposes of public protection pursuant to 18
18 U.S.C. Section 3553(a)(2)(C).

19 Standard condition of supervision 11 ensures that
20 the defendant does not engage in activities that may
21 potentially conflict with the other conditions of
22 supervision and that may pose risks to the defendant's
23 probation officer.

24 The defendant shall also comply with the
25 following special condition: The defendant must submit to

1 substance abuse testing to determine if he's used a
2 prohibitive substance. If able, he must contribute to the
3 cost of this program according to the Probation Office's
4 sliding scale for services. He must also cooperate in
5 securing payment from any potential third-party, such as
6 insurance or Medicaid. This condition is imposed based on
7 the defendant's admitted substance abuse history, the
8 nature of the offense of conviction, and also to deter and
9 detect potential future illicit drug use, and also to
10 assist the defendant in gaining sobriety, and also to
11 serve the statutory purposes of public protection,
12 deterrence, and rehabilitation.

13 Mr. Kelly, you have a right to appeal the
14 sentence the Court has imposed today. If you wish to
15 appeal and cannot afford an attorney, the Court would
16 appoint one for you. If you wish to appeal, you would
17 have to file your notice of appeal within 14 days from the
18 day the judgment order containing your sentence is filed
19 with the clerk.

20 THE DEFENDANT: Can I do it right now?

21 THE COURT: Let me finish. Mr. Kelly is already
22 in custody, so I do not need to make a finding regarding
23 voluntary surrendering.

24 My reasons for imposing this sentence are as
25 follows: The defendant pleaded guilty to two counts of

1 use of a telephone in furtherance of a felony. That is a
2 drug crime.

3 Regarding the nature and circumstances of the
4 offense, beginning in October of 2016 and continuing 'til
5 his arrest in August of 2021, the defendant was involved
6 with Jessica McManus, Travis McKie, and others to obtain
7 and distribute quantities of cocaine, crack cocaine,
8 heroin, and methamphetamine throughout South Carolina.

9 In Mr. Kelly's case, the distribution was
10 primarily to his girlfriend, Ms. McManus, and to his
11 employees of his landscaping company. The defendant --
12 deputies in Kershaw and Richland County made contact with
13 both Kelly and McManus and others while they were in
14 possession of cocaine, marijuana, and fentanyl. This was
15 primarily a wiretap case that broke the case open. The
16 defendant was implicated on two of these wiretap calls.
17 And we've already been through the drug quantity that he's
18 held accountable for based not just on the call, but the
19 testimony of cooperating informants, and also the
20 defendant's admission after having been Mirandized, and
21 also the wiretap conversations revealed by the agents who
22 took the stand. I did shave six months off because of the
23 defendant's admitted drug addiction.

24 Regarding the history and characteristics of the
25 defendant, Mr. Kelly's criminal history begins at age 17

1 and consists of a good many felonies, possession of crack
2 cocaine, first offense, receiving stolen goods,
3 distribution of cocaine base, distribution of cocaine, two
4 counts of possession of less than 1 gram of meth,
5 possession of other controlled substances, manufacturing,
6 distributing, possessing drugs, Schedule A, B, and C,
7 trespassing, disorderly conduct, driving under suspension,
8 animal cruelty, and fraudulent check, and also resisting
9 arrest. So a very extensive criminal history generated
10 the Category VI in this case.

11 Regarding the history and characteristics of the
12 defendant, Mr. Kelly is 47 years old, single, from
13 Chester, South Carolina, with three adult children and two
14 minor children. Prior to his arrest, he had resided in
15 various hotels and motels around Myrtle Beach and Columbia
16 with his girlfriend and co-defendant, Ms. McManus. He
17 reports to Probation that he's in overall good physical
18 health and denied any mental or emotional health problems.
19 He's occasionally used cocaine prior to his arrest and
20 experimented with marijuana and Ecstasy. He'd previous
21 been hospitalized for extreme hallucination while using
22 cocaine and was required to attend inpatient abuse
23 treatment for substance abuse.

24 I've also considered the need for the sentence
25 imposed in this case to reflect the seriousness of the

1 offense, to promote respect for the law, to provide
2 adequate deterrence to the defendant and others not to
3 engage in this type conduct in the future. As I've
4 indicated earlier, I've also carefully look at the
5 sentences of comparable co-defendants in this case and
6 tried to do my best to avoid unwarranted disparity with
7 the sentencing of similarly situated co-defendants.

8 Those are my reasons. Anything further?

9 MS. TAYLOR: Not from the Government, Your Honor.

10 THE COURT: All right.

11 THE DEFENDANT: Yes, Your Honor. I want to
12 address the Court that all the rest of the people pleaded
13 to conspiracy, a more serious crime, the more serious
14 crime than I pleaded to the phone count, the more lesser
15 crime, then you gave me 90 months. All due respect, you
16 gave me 90 months to a phone count, when the people that
17 pleaded to the actual conspiracy -- you know what I'm
18 saying? -- was given five years.

19 THE COURT: I understood your position. We
20 disagree.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. We will be in recess.

23 (Whereupon, the proceedings are adjourned.)
24
25

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States of America,

CR No. 3:21-cr-00522-JFA

v.

ORDER

Tyrone Kelly,

This matter is before the court on Defendant, Tyrone Kelly's ("Defendant") *pro se* Motion for Reconsideration of his sentence. (ECF No. 658). Defendant filed this motion asking this Court to reconsider the imposed sentence of ninety (90) months. The government did not file a response in opposition. For the reasons set forth below, Defendant's motion is denied.

On November 2, 2022, Defendant pleaded guilty to two counts (count 10 and count 12) of use of a telephone in furtherance of a drug crime in violation of 21 U.S.C. § 843(b). (ECF No. 495). Thereafter, on May 16, 2023, this Court sentenced Defendant to a term of ninety (90) months in prison, one (1) year of supervised release and a \$200.00 special assessment fee.

Generally, a judgment of conviction and sentence of imprisonment is a final and unmodifiable judgment. 18 U.S.C. § 3582(b); *United States v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010). Section 3582 dictates that the Court may only modify a sentence if the Director of the Bureau of Prisons moves for a reduction, the Sentencing Commission

amends the applicable Guidelines range, or another statute or Rule 35 expressly permits the Court to do so. *Id.* § 3582(c). Rule 35 of the Federal Rules of Criminal Procedure provides two avenues for a Court to use to modify a sentence. Rule 35(a) states the Court can correct a sentence within fourteen days after sentencing if the sentence “resulted from arithmetical, technical, or other clear error.” Rule 35(b) permits the Court to reduce a sentence for substantial assistance. Fed. R. Civ. P. Rule 35.

Here, Defendant’s argument for modification of sentence does not fit neatly into any of the above stated grounds for relief. Defendant’s argument is closest to a motion pursuant to Rule 35(a) as Defendant argues this Court incorrectly sentenced him to a term of ninety (90) months when he should have been sentenced to forty-eight (48) months. Accordingly, as Defendant filed this motion *pro se*, this Court will consider his motion as one pursuant to Rule 35(a) to determine whether this Court incorrectly sentenced Defendant based on an “arithmetical, technical, or other clear error.”

Defendant’s argument is a reiteration of the argument he Defendant he made in his written objections to the Presentence Report (“PSR”) and at his sentencing hearing. Because Defendant was charged and pleaded guilty to two violations of the same statute, § 843(b), he argues they should be “grouped” together such that they only count as one violation. Defendant reasons his violations are the result of “two or more acts or transaction connected by a common criminal objective or constituting a part of a common scheme or plan.” (ECF No. 663-1) citing U.S.S.G. 3D1.2(b). Once grouped together, Defendant argues he should face a term of imprisonment equal to forty-eight (48) months which is the maximum sentence for a single violation of § 843(b).

However, as explained in the PSR as well as at the sentencing hearing, counts ten and twelve were grouped together for purposes of determining the aggregate total offense level. Defendant's argument is a misapplication of § 3D1.2 because it does not function to address guideline imprisonment ranges or the structure of punishments between counts. Rather, this Court must look to U.S.S.G. § 5G1.2(d) which provides "if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment." Because Defendant's guideline range was determined to be 262 to 327 months and the maximum sentence authorized by statute on count ten or count twelve was less than the guideline range at forty-eight (48) months, this Court was required to impose consecutive terms of imprisonment for each count. Thus, the guideline sentence became ninety-six (96) months.¹ See *U.S. v. Angle*, 254 F.3d 514 (4th Cir. 2001) citing § 5G1.2(d) ("In the case of multiple counts of conviction, the sentencing guidelines instruct that if the total punishment mandated by the guidelines exceeds the statutory maximum of the most serious offense of conviction, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment.").

Notwithstanding the guideline sentence being ninety-six (96) months, this Court ultimately sentenced Defendant to ninety (90) months. Defendant's arguments do not

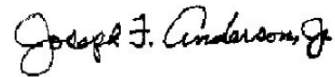
¹ Forty-eight (48) months for count ten plus forty-eight (48) months for count twelve equals ninety-six (96) months.

demonstrate an error in this Court's sentencing which would warrant a modification or correction to forty-eight (48) months as Defendant requests in the instant motion.

Therefore, Defendant's Motion is denied. (ECF No. 658).

IT IS SO ORDERED.

June 27, 2023
Columbia, South Carolina

A handwritten signature in black ink, reading "Joseph F. Anderson, Jr." in a cursive script.

Joseph F. Anderson, Jr.
United States District Judge