

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROY O. FRANKLIN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(CA8 No. 23-3118)**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments permit a sentencing court to use conduct of which the jury acquitted the defendant to increase the defendant's advisory Sentencing Guidelines range, and ultimately the sentence imposed under 18 U.S.C. Section 3553(a).

LIST OF PARTIES

Petitioner Roy O. Franklin, Jr., was a defendant-appellant below. Respondent United States of America was the plaintiff-appellee. The consolidated appeal also included defendants-appellants Ladele D. Smith, Gary O. Toombs, and David J. Duncan, IV. No corporation is a party.

RELATED PROCEEDINGS

United States District Court for the Western District of Missouri

United States v. Roy Franklin, et al., No. 4:19-cr-00315-DGK-2 (W.D. Mo.), judgment entered September 19, 2023.

United States Court of Appeals for the Eighth Circuit

United States v. Franklin, et al., Nos. 23-3118, 23-3123, 23-3228, and 23-3280 (8th Cir.), judgment entered June 1, 2026.

TABLE OF CONTENTS

Question Presented.....	ii
List of Parties.....	iii
Related Proceedings.....	iii
Table of Contents.....	iv
Table of Authorities.....	vi
Petition for Writ of Certiorari.....	1
Opinions Below.....	1
Jurisdiction.....	1
Constitutional and Statutory Provisions Involved.....	1
Statement of the Case.....	2
A. The Jury’s Verdict.....	2
B. Sentencing.....	2
C. The Decision Below.....	3
Reasons for Granting the Petition.....	4
I. The question is exceptionally important and recurring.....	5
II. Developments since the briefing below make this an appropriate time and vehicle for review.....	7
A. The Commission has repudiated acquitted conduct in calculating the range.....	7
B. Post-amendment cases reveal a new and unstable boundary.....	8
C. <i>Erlinger</i> confirms the constitutional direction.....	9

III. The decision below cannot be reconciled with the Fifth and Sixth Amendments.....	10
A. A jury’s acquittal must have operative force.....	10
B. Booker does not authorize the practice.....	11
C. The advisory Guidelines’ anchoring effect supplies the necessary constitutional link.....	11
IV. This case cleanly presents the question and warrants correction.....	12

Appendix A

Opinion, United States v. Franklin, et al., No. 23-3118 (8th Cir., June 1, 2026)

Appendix B

Judgment in a Criminal Case, United States v. Roy O. Franklin, Jr., No. 4:19-CR-00315-DGK (W.D. Mo., September 19, 2023)

Appendix C

18 U.S.C. Section 3553(a)

Appendix D

18 U.S.C. Section 3661

TABLE OF AUTHORITIES

Table of Authorities

Cases

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013).....	10
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	9-10
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	10
<i>Erlinger v. United States</i> , 602 U.S. 821 (2024)	4, 9
<i>Gall v. United States</i> , 552 U.S. 38–50 (2007)	6
<i>Jones v. United States</i> , 574 U.S. 948–49 (2014)	6
<i>McClinton v. United States</i> , 143 S.Ct. 2400 (2023)	5
<i>Molina-Martinez v. United States</i> , 578 U.S. 189–200 (2016)	6, 12
<i>Peugh v. United States</i> , 569 U.S. 530 (2013)	6, 12
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	11
<i>United States v. Franklin</i> , 177 F.4th 915 (8th Cir. 2026)	1
<i>United States v. Lasley</i> , 832 F.3d 910 (8th Cir. 2016)	3

<i>United States v. Myore</i> , 142 F.4th 606 (8th Cir. 2025)	<u>3</u>
<i>United States v. Pharms</i> , No. 24-14191, 2026 WL 311607 (11th Cir. Feb. 5, 2026)	8
<i>United States v. Ralston</i> , 110 F.4th 909–21 (6th Cir. 2024)	8
<i>United States v. Schneider</i> , 178 F.4th 437 (8th Cir. 2026)	8, 13
<i>United States v. Texidor</i> , 164 F.4th 248–55 (3d Cir. 2026)	8
<i>United States v. Ware</i> , 141 F.4th 970 (8th Cir. 2025)	8
<i>United States v. Watts</i> , 519 U.S. 148 (1997)	7,11
Constitutional Provisions	
U.S. Const. amend. V	1, 3, 8-11, 13
U.S. Const. amend. VI	1, 3, 8-11, 13
Statutes	
18 U.S.C. § 3553(a)	1,2, 4,8
18 U.S.C. § 924	2, 3,12
18 U.S.C. § 3231	1
18 U.S.C. § 3582	7
28 U.S.C. § 1254	1
28 U.S.C § 3661	8,11
Sentencing Guidelines	
U.S.S.G. § 1B1.3(c)	7
U.S.S.G. § 1B1.10(d)	7

U.S.S.G. app. C, amend. 826 (2024)	4-8, 11, 13
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Other

Supreme Court Rules 13.1, 29.2 and 30.1	1
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PETITION FOR WRIT OF CERTIORARI

Roy O. Franklin, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals was filed in Nos. 23-3118, 23-3123, 23-3228, and 23-3280 on June 1, 2026. It is published at *United States v. Franklin*, 177 F.4th 915 (8th Cir. 2-26). A copy of the opinion is included in Appendix A.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals entered judgment on June 1, 2026. App. A. The ninetieth day was Sunday, August 30, 2026; this petition was filed Monday, August 31, 2026, by delivery to a third-party commercial carrier for delivery to the Clerk within 3 calendar days, and is timely under Rules 13.1, 29.2 and 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

The Sixth Amendment provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

18 U.S.C. Section 3553(a) requires a sentence sufficient, but not greater than necessary, after considering, among other things, the United States Sentencing Guidelines range. App. C. 18 U.S.C. Section 3661 provides that no limitation shall be

placed on information concerning the background, character, and conduct of a convicted person. App. D.

STATEMENT OF THE CASE

A. The jury's verdict

This case concerns the constitutional effect of a jury's acquittal at sentencing. After a multi-defendant trial, the jury convicted Franklin of a drug conspiracy but expressly rejected the government's allegation that the conspiracy involved heroin. It found him responsible for less than 500 grams of cocaine, oxycodone, and marijuana. The jury also convicted Franklin of firearm and marijuana-distribution offenses. The district court later sentenced him to 360 months.

The jury's rejection of the heroin theory mattered enormously under the Guidelines, or would have, if the district court permitted the verdict to control its sentence. The cocaine and marijuana conduct found by the jury corresponded to 58.36 kilograms of converted drug weight and a base offense level of 18. The probation office and district court nevertheless attributed 707.2 kilograms of heroin-driven converted drug weight to Franklin based on the same heroin theory the jury had rejected. That finding raised the base offense level ten levels, from 18 to 28. After other adjustments, Franklin's total offense level was 32 rather than 22.

B. Sentencing

With a criminal-history category of III and total offense level 32, the court calculated an advisory range of 151 to 188 months on the grouped counts, plus a mandatory consecutive 120 months on the 18 U.S.C. § 924(c) count. The court

imposed 151 months on the grouped counts—the bottom of the inflated range—and varied upward on the § 924(c) count from 120 to 209 months, producing a total sentence of 360 months.

Without the acquitted heroin conduct, offense level 22 and criminal-history category III would have produced a range of 51 to 63 months on the grouped counts. Thus, before the separate variance, the acquitted-conduct finding shifted the advisory range from 51–63 months to 151–188 months. It increased the low end by 100 months and nearly tripled the sentencing anchor.

Franklin preserved an objection under the Fifth and Sixth Amendments. The district court overruled it under circuit precedent permitting a judge to consider acquitted conduct proved by a preponderance.

C. The decision below

The Eighth Circuit affirmed. App. A. It recognized that Franklin argued the “use of acquitted conduct to increase his sentence violated his Fifth and Sixth Amendment rights.” App. A, p. 12. It nevertheless held that “a sentencing court may consider the conduct underlying an acquitted charge so long as that conduct has been proved by a preponderance of the evidence.” *Id.* (quoting *United States v. Lasley*, 832 F.3d 910, 914 (8th Cir. 2016)). The court added that a preponderance standard at sentencing generally satisfies due process and observed that it had recently rejected the same constitutional claim in *United States v. Myore*, 142 F.4th 606, 613 (8th Cir. 2025). App. A, p. 12.

The panel noted that, after Franklin’s sentencing, the Sentencing Commission adopted Amendment 826, which generally excludes acquitted conduct from relevant conduct used to calculate the Guidelines range. App. A, p. 12 n.3. But because the Guidelines ordinarily direct courts to use the Manual in effect at sentencing, the panel afforded Franklin no relief. *Id.*

REASONS FOR GRANTING THE PETITION

The Court should resolve whether a judge may override a jury’s acquittal and use the rejected charge to set the benchmark for imprisonment. Four recent developments make review especially appropriate.

First, Members of this Court have repeatedly recognized that the practice raises grave constitutional questions. Second, *Erlinger v. United States*, 602 U.S. 821 (2024), reinforces that facts necessary to sustain a defendant’s punishment belong to a jury applying the reasonable-doubt standard. Third, the Sentencing Commission has now repudiated the practice for Guidelines calculations, confirming both its systemic importance and its corrosive effect on public confidence. Fourth, post-amendment decisions have exposed an unstable two-track regime: the same acquitted conduct is excluded from the Guidelines calculation but may still be used by many courts to select a sentence under § 3553(a).

Franklin’s case cleanly presents the anterior constitutional question. His objection was preserved and decided on the merits. The acquitted heroin conduct caused a ten-level increase and moved the range from 51–63 months to 151–188

months on the grouped counts. And because Amendment 826 was not made retroactive, only this Court can remedy the continuing constitutional injury.

I. The question is exceptionally important and recurring.

This Court has already identified the issue as one of exceptional importance. When the Court denied certiorari in *McClinton v. United States*, 143 S.Ct. 2400 (2023), Justice Sotomayor, joined by Justices Gorsuch and Kavanaugh, explained that acquitted-conduct sentencing implicates “fairness and perceived fairness of the criminal justice system.” *Id.* at 2401 (statement respecting denial). An acquittal, she explained, has “special weight” because the jury has spoken after trial. *Id.* at 2402. Justice Kavanaugh, joined by Justices Gorsuch and Barrett, separately agreed that using acquitted conduct to alter the Guidelines range raises “important questions.” *Id.* at 2403.

The Court deferred review in *McClinton* because the Sentencing Commission had announced that it would address the subject. The separate statements cautioned that the denial should not be misunderstood as approval of the constitutional status quo. *Id.* at 2403. The Commission has now acted, yet its amendment does not help defendants sentenced before November 1, 2024, and it leaves open the use of acquitted conduct outside the Guidelines calculation. The reason for deferral has therefore run its course; the constitutional question remains.

Moreover, the issue recurs throughout federal sentencing. Before Amendment 826, every circuit allowed acquitted conduct in calculating the advisory range if a judge found it by a preponderance, notwithstanding sustained criticism from judges

across the country. That uniformity reflects the force of circuit precedent, not considered agreement about the Constitution. In *Jones v. United States*, 574 U.S. 948, 948–49 (2014), Justice Scalia, joined by Justices Thomas and Ginsburg, called for review where judge-found facts produced dramatically higher sentences despite acquittals. Judges now on this Court likewise questioned the practice before joining the Court.

The Guidelines’ advisory character does not make the question academic. District courts must begin with the correctly calculated range and keep it in view. *Gall v. United States*, 552 U.S. 38, 49–50 (2007). The range is “the framework for sentencing” and exerts a “real and pervasive effect” even when nonbinding. *Molina-Martinez v. United States*, 578 U.S. 189, 198–200 (2016); *Peugh v. United States*, 569 U.S. 530, 544 (2013). That anchoring force is concrete here. Acquitted conduct moved Franklin’s range by 100 months at the bottom, and the court selected 151 months—the bottom of the higher range—for the grouped counts before adding the separate upward variance.

That outcome is difficult to explain to any juror or defendant: the jury rejected heroin beyond a reasonable doubt, but a judge reinstated heroin by a preponderance and used it to add roughly a decade to the starting point. The injury is not merely optical. It had an outsize impact on Mr. Franklin’s liberty.

II. Developments since the briefing below make this an appropriate time and vehicle for review.

A. The Commission has repudiated acquitted conduct in calculating the range.

Effective November 1, 2024, Amendment 826 added § 1B1.3(c): “Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.” The Commission also removed citations to *United States v. Watts*, 519 U.S. 148 (1997), from the Guidelines commentary.

The Commission explained that the change responded to persistent concerns about acquitted-conduct sentencing and would promote respect for the law and the perceived fairness of sentencing. The amendment is a considered institutional judgment based on nationwide sentencing experience: an acquittal should constrain calculation of the federal sentencing benchmark.

But Amendment 826 is not listed among the retroactive amendments in § 1B1.10(d). Franklin therefore cannot obtain a reduction under 18 U.S.C. § 3582(c)(2). The panel merely noted the amendment and applied the historical rule. App. A, p. 12 n.3. The amendment thus sharpens rather than moots this case: similarly situated defendants now receive different constitutional treatment solely because of sentencing date, and defendants like Franklin have no avenue for relief other than direct review.

B. Post-amendment cases reveal a new and unstable boundary.

In *United States v. Schneider*, 178 F.4th 437 (8th Cir. 2026), the Eighth Circuit vacated a sentence because a court sentencing after Amendment 826 used acquitted conduct to impose a four-level Guidelines enhancement. *Id.* at 442-43. The panel recognized a reasonable probability that the higher range affected the sentence. *Id.* That holding demonstrates the range's practical force and confirms that the very calculation used against Franklin would be impermissible at a sentencing today.

Schneider also exposed the unresolved boundary. Judge Loken's concurrence reasoned that, although acquitted conduct is excluded from the range calculation, it may still be considered under § 3553(a) when choosing a sentence within or outside that range. *Id.* at 443. The Eighth Circuit had earlier taken that position in *United States v. Ware*, 141 F.4th 970, 974 n.2 (8th Cir. 2025). The Third Circuit has agreed. *United States v. Texidor*, 164 F.4th 248, 254–55 (3d Cir. 2026). So have the Sixth and Eleventh Circuits in analogous post-*Booker* contexts. See *United States v. Ralston*, 110 F.4th 909, 920–21 (6th Cir. 2024); *United States v. Pharms*, No. 24-14191, 2026 WL 311607, at *4–5 (11th Cir. Feb. 5, 2026).¹

Those cases do not resolve Franklin's claim. His acquitted conduct was used at the first step to calculate and anchor the range itself. But they show why constitutional guidance is now indispensable. The Commission can define relevant conduct; it cannot decide what the Fifth and Sixth Amendments allow. Section 3661

¹ The defendant in *Pharms* filed a petition for writ of certiorari in this Court on March 18, 2026. (Case No. 25-1086). Amicus briefs in support of granting the writ on Mr. Pharms's nearly identical question presented have been filed by 18 Former Federal Judges, Douglas Berman, the Cato Institute, and the National Association of Criminal Defense Lawyers.

addresses the information a court may receive. It does not answer the distinct question whether a court may give a jury-rejected allegation operative weight in fixing imprisonment.

Without this Court’s intervention, courts will continue to draw formal lines between “calculating” and “varying,” while the same acquitted allegation produces the same additional years. The constitutional protection cannot sensibly depend on which paragraph of a sentencing explanation contains the judge-found fact.

C. Erlinger confirms the constitutional direction.

After Franklin filed his Eighth Circuit brief, this Court decided *Erlinger*. The Court held that the Fifth and Sixth Amendments require a unanimous jury to decide beyond a reasonable doubt whether prior offenses occurred on different occasions when that fact increases punishment under the Armed Career Criminal Act. 602 U.S. at 834–35.

Erlinger described *Apprendi*’s rule as a constitutional “guardrail”: a judge may not find a fact necessary to sustain a greater punishment than the jury verdict alone authorizes. *Id.* at 833–35. It reaffirmed that the reasonable-doubt standard and jury trial travel together when fact finding determines punishment. Those principles apply with special force when the jury did not merely fail to find a fact but affirmatively acquitted the defendant of the charge embodying it.

It is true that *Erlinger* involved a statutory enhancement and the Guidelines are advisory. But advisory Guidelines are the mandatory starting point and appellate benchmark. A judge who raises that benchmark by ten levels based on acquitted

conduct does more than consider a defendant's background. The judge replaces the jury's answer to a charged question with a contrary factual finding under a lesser burden, then uses that finding to establish the framework for punishment.

III. The decision below cannot be reconciled with the Fifth and Sixth Amendments.

A. A jury's acquittal must have operative force.

The Fifth Amendment places the burden on the government to prove charged criminal conduct beyond a reasonable doubt. The Sixth Amendment assigns the decision to a jury. *Apprendi* holds that facts increasing legally available punishment must be submitted to that jury; *Blakely* identifies the relevant maximum as the punishment authorized by the facts reflected in the verdict; and *Alleyne* applies the same principle to facts increasing a mandatory minimum.

The rule below empties those guarantees of practical force at sentencing. The government alleged a heroin conspiracy and tried that allegation to a jury. It failed to secure a guilty verdict. Yet at sentencing it obtained the same factual determination from a single judge under a preponderance standard, and that determination added ten offense levels. If the jury is a constitutional check on government power, its answer cannot become irrelevant at the moment punishment is fixed.

The jury's verdict need not be treated as a finding that the defendant is factually innocent in every sense. An acquittal establishes that the government failed to prove charged conduct beyond a reasonable doubt. That is precisely the constitutional

allocation. Permitting punishment based on a contrary preponderance finding converts the reasonable-doubt rule from a limit on punishment into a trial-stage formality.

B. *Booker* does not authorize the practice.

Booker rendered the Guidelines advisory to cure a Sixth Amendment violation. 543 U.S. 220, 245 (2005). It did not hold that a court may negate an acquittal. Its observation that judges historically considered conduct underlying acquitted charges addressed the severability remedy and relied on *Watts*. *Id.* at 251.

Watts, in turn, was a summary *per curiam* decision addressing Double Jeopardy and the then-mandatory Guidelines. 519 U.S. at 154–55. It expressly acknowledged that an acquittal proves only failure of proof beyond a reasonable doubt and did not decide the Fifth and Sixth Amendment question presented here. *Booker* later described *Watts* as presenting a “very narrow question.” 543 U.S. at 240 n.4.

Nor does § 3661 settle the issue. A statute allowing broad information at sentencing cannot override constitutional limits on who must find a fact, under what burden, and with what legal effect. Courts may learn about a wide range of conduct without using a jury-rejected charge to raise the Guidelines benchmark. Amendment 826 itself demonstrates the distinction.

C. The advisory Guidelines’ anchoring effect supplies the necessary constitutional link.

The government may respond that Franklin’s statutory maximum did not change. But constitutional doctrine looks to operation as well as labels. *Peugh* held

that advisory Guidelines can violate the Ex Post Facto Clause because they create a significant risk of increased punishment. *Molina-Martinez* recognized that an incorrect range ordinarily affects substantial rights because it anchors the sentence. The same institutional facts matter here.

The range was not a passing reference. Federal law required the district court to calculate it and begin there. Appellate law reviewed the resulting sentence in relation to it. Acquitted heroin increased Franklin's starting range from 51–63 to 151–188 months, and the district court imposed exactly the bottom of the higher range on the grouped counts. The additional § 924(c) variance does not erase the constitutional error embedded in that starting point; sentencing proceeded from the wrong anchor.

At minimum, the Due Process Clause requires more than a preponderance before jury-rejected conduct can add a decade to the benchmark. But the sound constitutional rule is categorical for charged-and-acquitted conduct: once the government elects to charge a fact and the jury acquits, the fact may not be used to increase the Guidelines range or otherwise aggravate punishment.

IV. This case cleanly presents the question and warrants correction.

Franklin preserved his Fifth and Sixth Amendment objection. The Eighth Circuit squarely decided it and relied on a rule applied throughout that circuit. There is no procedural obstacle and no dispute that the heroin conduct drove a ten-level increase.

The error was consequential. The correct range on the grouped counts was 51–63 months; the court instead used 151–188 months and imposed 151. The Eighth

Circuit's own later decision in *Schneider* recognizes that an acquitted-conduct error affecting the range creates a reasonable probability of a lower sentence. The upward variance on the consecutive firearm count rested on separate considerations and does not make the range error harmless.

Franklin also cannot benefit from Amendment 826 through ordinary retroactive review. This case therefore offers a direct and concrete vehicle to decide the question that Members of this Court have repeatedly identified, that *Erlinger* has clarified, and that the Commission's intervention has made more urgent.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should reverse the judgment below or vacate and remand for resentencing without using conduct underlying the heroin acquittal to increase Franklin's punishment.

Dated: August 31, 2026

Respectfully submitted,

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Appendix A

Opinion, United States v. Franklin, et al., No. 23-3118 (8th Cir., June 1, 2026)

United States Court of Appeals
For the Eighth Circuit

No. 23-3118

United States of America

Plaintiff - Appellee

v.

Roy O. Franklin, Jr., also known as Roy

Defendant - Appellant

No. 23-3123

United States of America

Plaintiff - Appellee

v.

Ladele D. Smith, also known as Dellio, also known as Dog

Defendant – Appellant

No. 23-3228

United States of America

Plaintiff - Appellee

v.

Gary O. Toombs

Defendant - Appellant

No. 23-3280

United States of America

Plaintiff - Appellee

v.

David J. Duncan, IV, also known as DeeJ, also known as DJ

Defendant - Appellant

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: January 15, 2025

Filed: June 1, 2026

Before GRASZ, STRAS, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Roy Franklin Jr., Ladele Smith, Gary Toombs, and David Duncan IV were members of a sprawling drug-trafficking conspiracy in Kansas City, Missouri that lasted from 2011 to 2019. A jury found them guilty of various drug, firearm, and money-laundering offenses. We affirm their convictions and sentences.

I. Background

Smith and Duncan were close friends who formed a music group called 246, named after the Kansas City streets where they grew up. Smith was the star, and he rapped about guns, violence, selling drugs, and making money. Social media posts and music videos show Smith, Duncan, and Franklin with guns, luxury goods, and large amounts of cash. According to the group’s sound engineer, their music was meant to be “catchy, flashy, street,” and the lyrics suggested “a persona of a certain lifestyle” that was meant to sell albums. They hung out and stored guns at a house Toombs rented on Kensington Avenue, where various drug-trafficking activity took place.

One evening in September 2019, Franklin went to the house and loaded guns into a black Jeep Cherokee. Franklin and Smith then sped to the intersection of 35th and Woodland, where Duncan had a store. Franklin drove, while Smith shot at two men outside the store. They turned around, drove by again, and fired more shots. The men returned fire. Franklin and Smith returned to the Kensington Avenue house less than 15 minutes after they had left. Franklin then regaled a cooperating individual (CI) with the story, explaining that Duncan called and said that two men outside the store were going to kill him. The CI took photos of the Jeep’s shattered back windshield and damaged passenger-side mirror.

Before trial, the district court¹ denied Franklin’s motion to suppress evidence from social media searches and wiretaps. It also denied motions in limine to exclude Smith’s rap lyrics and evidence about the defendants’ affiliation with the 246 group. The district court decided to admit the cooperating individual’s testimony about the drive-by shooting.

During the three-week trial, the Government argued that the 246 group was also a drug-trafficking organization. Smith, Duncan, Franklin, Toombs, and several others sold drugs, including marijuana, oxycodone, cocaine, and heroin. The Government presented evidence of controlled buys, photos and videos from police surveillance, social media posts and music videos by the defendants, messages among 246 gang members, and texts and recorded phone calls among the members and with others. A search of the Kensington Avenue house revealed drugs and paraphernalia, including 295 grams of heroin, seven cell phones, five guns, a tactical vest labeled “246 Brotherhood,” ammunition, and other evidence of drug-cutting and distribution. Financial records revealed that Duncan and Smith deposited substantial amounts of cash into their bank accounts and spent lavishly, despite having no reported income.

The district court refused Franklin’s request to instruct the jury on entrapment and Toombs’s request for a buyer-seller instruction. The jury convicted the defendants on the counts discussed below.

II. Discussion

A. Roy Franklin Jr.

Franklin was convicted of nine offenses: conspiracy to distribute less than 500 grams of cocaine, some amount of oxycodone, and a mixture containing marijuana,

¹The Honorable David Gregory Kays, United States District Judge for the Western District of Missouri.

21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846; conspiracy to possess firearms in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(o); drive-by shooting, 18 U.S.C. § 36; discharging a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii); maintaining a drug-involved premises, 21 U.S.C. § 856(a)(1) and (b); two counts of distribution of marijuana, 21 U.S.C. § 841(a)(1) and (b)(1)(D); and two counts of distribution of marijuana near a school, 21 U.S.C. §§ 841(a)(1) and 860. He was sentenced to 360 months in prison.

1. Motion to Suppress Evidence of Instagram Posts and Messages

Franklin argues that the district court erred in denying his motion to suppress. He claims that the search warrant for his Instagram account was not supported by probable cause. See U.S. Const. amend. IV (“no Warrants shall issue, but upon probable cause”). “Probable cause exists when the totality of circumstances shows ‘a fair probability that contraband or evidence of a crime will be found in a particular place.’” *United States v. Ivey*, 91 F.4th 915, 917 (8th Cir. 2024) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Our review is limited to whether the issuing judge had a “substantial basis” for finding probable cause. *Id.* (citing *Gates*, 462 U.S. at 238–39).

FBI Special Agent Douglas McKelway’s warrant application and affidavit provided that “substantial basis.” He stated that confidential sources, the Kansas City Police Department, and the FBI had identified Franklin as a member of the 246 organization. He attached information discovered in an earlier search of Smith’s Instagram account. In an April 2018 group chat among 246 members, the group discussed disrespect by someone they thought was an ally and “handling shit.” Franklin wrote “Hit em up GANG.” Franklin later wrote “Gtta start Droppin shit them pull ups be a waste of time,” which McKelway interpreted as using a drop location for drugs instead of having the dealer meet the buyer. And in a conversation between the same 246 members in May, they seemed to discuss killing a rival gang member, although Franklin did not say anything.

Franklin’s affiliation with the group and his participation in group chats discussing violence against rivals and drug distribution provided a basis for the issuing judge to find that evidence of a drug-trafficking conspiracy would probably be found in Franklin’s Instagram records. Franklin argues that his two comments were not enough, but the judge properly considered the full transcript of the group chat. *Cf. United States v. Lukassen*, 103 F.4th 1325, 1329 (8th Cir. 2024) (“Whether an officer has established probable cause to search depends on the totality of the circumstances.”). And Franklin’s argument that his comments “could mean anything” is unpersuasive when Agent McKelway explained the context and what they meant to drug dealers. *See United States v. Mims*, 122 F.4th 1021, 1031 (8th Cir. 2024) (“Conduct that appears innocuous . . . may be significant to an officer with training and experience in ‘the practices of drug smugglers and the methods used to avoid detection.’” (citation omitted)).

Franklin also argues that the warrant failed to “particularly describ[e] the place to be searched,” U.S. Const. amend. IV. The Fourth Amendment’s particularity requirement prevents “a general, exploratory rummaging in a person’s belongings.” *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *see Payton v. New York*, 445 U.S. 573, 585 (1980). “In assessing whether a warrant is sufficiently particular, we consider the purpose for which the warrant was issued, the nature of the items to which it is directed, and the total circumstances surrounding the case.” *Ivey*, 91 F.4th at 918.

The warrant required Instagram to disclose information and activity related to Franklin’s account. *See* 18 U.S.C. § 2703 (required disclosure of customer communications or records). It then authorized officers to seize evidence related to certain drug-distribution and money-laundering offenses from January 2017 to September 2018. *See* Fed. R. Crim. P. 41(e)(2)(B); *Lindell v. United States*, 82 F.4th 614, 621–22 (8th Cir. 2023) (explaining that Rule 41(e)(2)(B) “provides for a two-step process to search electronic items”). That evidence included communications and photographs about drug trafficking and manufacturing, gang involvement, firearms, homicides, violence, recruitment of new members, strategies to avoid

apprehension, and destruction of evidence, as well as records identifying who created, used, or communicated with Franklin’s Instagram account.

The warrant was sufficiently particular. It identified the Instagram account to be searched, the information to be seized, and the time frame for the data. This is not meaningfully different from the warrant we upheld in *United States v. Ivey*, which authorized the search of a cell phone “for evidence related to firearms, ammunition, and possession and ownership of the seized firearm.” 91 F.4th at 917. That Franklin’s Instagram account likely contained information unrelated to the criminal investigation “did not transform the warrant into an impermissible general warrant.” *See id.* at 918 (“Evidence of the offense could have been found anywhere in the phone, and ‘a warrant need not be more specific than knowledge allows.’” (citation omitted)); *Lindell*, 82 F.4th at 620 (“While the phone very likely also contains a plethora of information unrelated to the government’s investigation, . . . this fact does not transform the warrant into a general warrant.”). And where the affidavit included information about an ongoing drug conspiracy with specific incriminating conversations in April and May 2018, the request for data from January 2017 to September 2018 was not overbroad.² *See United States v. Zelaya-Veliz*, 94 F.4th 321, 340 (4th Cir. 2024) (while a “total lack of a time period in a social media warrant raises a problem,” a two-year period of disclosure was sufficiently particular because the “extensive nature of the conspiracy being investigated . . . meant that less temporal specificity was required” (cleaned up)).

2. Motion to Suppress Wire and Electronic Communications

The Government received authorization to tap two of Franklin’s phones, “target telephone 6” (TT6) and “target telephone 9” (TT9). The issuing judge found that the application met the requirements of 18 U.S.C. § 2518(3): there was probable cause to believe that Franklin was committing drug-trafficking and firearm offenses;

²Facebook (then Instagram’s parent corporation) produced data from September 2017 to September 2018.

he had used the phones in connection with those offenses; normal investigative procedures had failed, would fail, or were too dangerous; and interceptions would likely reveal communications about drugs and guns.

Franklin argues that the district court erred in denying his motion to suppress because the wiretap application failed to establish probable cause that he was engaged in criminal activity or that a wiretap would reveal evidence of criminal activity. “The probable cause requirement in § 2518(3) is the same as the Fourth Amendment’s probable cause requirement,” and our review is once again “limited to determining whether the judge had a ‘substantial basis’ for finding probable cause.” *Mims*, 122 F.4th at 1030 (citation omitted).

Agent McKelway’s affidavits establish a fair probability that wiretaps on TT6 and TT9 would reveal evidence of drug-trafficking and firearm offenses. They included information from a confidential source who told law enforcement Franklin was involved in drug sales, but mainly worked as an enforcer for the 246. TT6 was linked to Franklin’s Instagram account, and the affidavit included direct-message conversations with previous and potential buyers. Franklin gave TT6’s number to buyers and others, while using coded language to discuss drug sales and possibly a firearm purchase. Previous wiretaps intercepted calls with Franklin using TT6 to sell high-grade marijuana, Percocet, and codeine cough syrup and using TT9 to plan a robbery and buy “pills.”

Franklin argues that the evidence from his Instagram account was illegally seized and should not be used to establish probable cause for the wiretaps, but we have previously decided that it was legal. He argues that Agent McKelway’s interpretations of the “vaguely worded conversations” could not establish probable cause, but we have already explained why a judge could credit those interpretations. *See Mims*, 122 F.4th at 1031 (weight given to agent’s interpretation of the “allegedly innocuous conversations” as discussing the purchase and sale of drugs). And even if we were to excise the information given by the confidential source, which Franklin argues is unreliable, the application would still establish a substantial basis for

finding that the TT6 and TT9 wiretaps would likely reveal evidence of criminal activity. *See O’Neil v. United States*, 966 F.3d 764 (8th Cir. 2020) (considering whether the affidavit was sufficient to establish probable cause after removing incorrect information).

Franklin also claims that the affidavit failed to establish necessity and that officers should have been required to use additional traditional investigative efforts before a wiretap. Section 2518(3)(c)’s “necessity requirement is satisfied when law enforcement establish that ‘conventional investigatory techniques have not been successful in exposing the full extent of the conspiracy and the identity of each coconspirator.’” *Mims*, 122 F.4th at 1029 (cleaned up). The requirement “prevents the government from routinely using wiretaps as the initial step in an investigation,” but officers need not “exhaust all possible techniques before applying for a wiretap.” *United States v. Perez-Trevino*, 891 F.3d 359, 370 (8th Cir. 2018) (cleaned up).

The district court did not clearly err in finding that the wiretaps were necessary. *See id.* (standard of review). Agent McKelway explained that officers had conducted surveillance on Franklin and others associated with the 246 organization but had limited success because the men used a variety of vehicles, were aware of surveillance, and used counter-surveillance to elude officers. Officers also used GPS technology, cell site locations, and covert surveillance cameras to monitor movement, but these techniques could produce only limited evidence. Confidential sources provided some historical and organizational information, but generally did not complete controlled buys or record conversations, because they lacked access or it was too dangerous. Associates typically refused to talk after their arrests. And although a financial investigation was ongoing, nothing revealed a large-scale movement of money. Franklin argues that officers should have done more, but officers are not required to use wiretaps only as a “last resort.” *Mims*, 122 F.4th at 1029 (citation omitted). He also claims that Agent McKelway’s claims of necessity were not sufficiently specific, but “[b]oilerplate assertions of necessity are not fatal to the affidavit” because “[d]rug conspiracies contain common elements that render some conventional investigatory techniques ineffective in each case.” *Id.*

3. Entrapment Instruction on Conspiracy to Distribute Cocaine

At trial, Franklin’s attorney elicited evidence that government agents gave the CI the idea to purchase cocaine; that Franklin had not previously sold the CI cocaine, but said it “ain’t shit to get”; that the CI paid Franklin \$200 as a finder’s fee to get cocaine; and that Franklin didn’t usually deal cocaine but served as a middleman to make some money. Based on that testimony, Franklin requested an entrapment instruction on cocaine. The Government objected and proffered that it had video evidence of Franklin telling a story about how he and a co-defendant “bust[ed] serves of cocaine.” The Government had agreed to not introduce the video, but—if the court allowed the entrapment instruction—it would present it to show that Franklin was predisposed to selling cocaine. The district court ruled that Franklin was not entitled to the instruction, and the Government did not introduce the video.

We review *de novo* the denial of an entrapment instruction. *United States v. John*, 27 F.4th 644, 649 (8th Cir. 2022). “[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.” *Mathews v. United States*, 485 U.S. 58, 63 (1988). “If the defendant exhibits any predisposition to engage in the criminal conduct, the district court need not instruct the jury on entrapment.” *United States v. Berg*, 178 F.3d 976, 980 (8th Cir. 1999); *United States v. Neal*, 990 F.2d 355, 358 (8th Cir. 1993) (“[I]f predisposition exists, then there is not sufficient evidence from which a reasonable jury could find entrapment.”).

Even if we were to agree with Franklin that the Government induced him to sell cocaine, he has not shown a lack of predisposition. “Predisposition . . . focuses upon whether the defendant was an ‘unwary innocent’ or, instead, an ‘unwary criminal’ who readily availed himself of the opportunity to perpetrate the crime.” *Mathews*, 485 U.S. at 63 (citations omitted). Franklin was not an “unwary innocent.” He was a longtime member of a drug conspiracy that involved the sale of cocaine, even if he usually sold marijuana and sometimes sold codeine and oxycodone. Cocaine may not have been Franklin’s “forte,” but the CI testified that Franklin

“always talked about it. I mean, like, it ain’t nothing to get.” *See Neal*, 990 F.2d at 358 (defendant predisposed when he knew people who could supply cocaine, called a potential supplier, and intended to make a profit off a drug deal); *Berg*, 178 F.3d at 980 (“His never having ‘cooked’ such a large batch [of methamphetamine] need not necessarily mean he was not predisposed to do so.”). Because the evidence showed that Franklin was “predisposed—*i.e.*, willing and ready” to sell cocaine when the opportunity arose, he was not entitled to an entrapment instruction. *See United States v. Lard*, 734 F.2d 1290, 1293 (8th Cir. 1984).

4. Sentencing

The district court grouped together the counts of conviction, U.S.S.G. § 3D1.2(b) and (d), except for discharging a firearm in furtherance of a crime of violence, which required a mandatory consecutive sentence, 18 U.S.C. § 924(c)(1)(A)(iii). Franklin’s total offense level was 32, his criminal history category was III, and the Guidelines range was 151 to 188 months in prison, plus 120 months on the firearm count. The district court imposed concurrent sentences for the grouped counts, the greatest being 151 months in prison. It varied up to 209 months on the firearm count, for a total sentence of 360 months in prison.

Franklin argues that the upward variance was substantively unreasonable because the conduct the court relied on for the variance—his criminal history, a fight while incarcerated, underlying offense conduct—was already accounted for in the Guidelines calculations. But “[a] district court is not prohibited ‘from determining that the weight the Guidelines assigned to a particular factor was insufficient.’” *United States v. Donahue*, 959 F.3d 864, 867 (8th Cir. 2020) (citation omitted). The district court explained that Franklin’s criminal history revealed a disregard for the safety of others. The court found that Franklin’s beating of an inmate “t[old] a story [of] what we can expect from Mr. Franklin if he’s let go.” And most importantly, the facts underlying the firearm conviction justified the variance: Franklin committed a drive-by shooting in the early evening on a street lined with stores, homes, and a daycare. The district court found it necessary to protect the public

from further crimes by Franklin, saying “we make the community maybe just a little bit safer when we take people out who engage in drugs and guns and drive by shootings . . . like we had in this case.” We have affirmed upward variances in other cases involving dangerous shootings, even when the conduct was already accounted for in the Guidelines, and we do so again here. *See, e.g., United States v. Vaca*, 38 F.4th 718, 723–24 (8th Cir. 2022) (78-month upward variance where defendant shot at another person); *United States v. Godfrey*, 863 F.3d 1088, 1099–1100 (8th Cir. 2017) (83-month upward variance where the defendant shot seven bullets into a neighborhood park).

Franklin also argues that the district court’s use of acquitted conduct to increase his sentence violated his Fifth and Sixth Amendment rights. But “a sentencing court may consider the conduct underlying an acquitted charge so long as that conduct has been proved by a preponderance of the evidence.” *United States v. Lasley*, 832 F.3d 910, 914 (8th Cir. 2016) (citation omitted); *see United States v. Webb*, 545 F.3d 673, 677 (8th Cir. 2008) (“A preponderance of evidence standard of proof applies to judicial fact finding at sentencing, a standard that satisfies both the Fifth Amendment’s guarantee to due process and the Sixth Amendment right to trial by jury.”). Franklin acknowledges our precedent, but seeks to preserve his argument for further review.³ *See United States v. Myore*, 142 F.4th 606, 613 (8th Cir. 2025) (“These constitutional issues are the subject of ongoing debate, but our panel is bound by this controlling Eighth Circuit precedent.”).

B. Ladele Smith & David Duncan

Ladele Smith was convicted of conspiracy to distribute 1 kilogram or more of heroin and some amount of mixture containing marijuana, 21 U.S.C. §§ 841(a)(1),

³After Franklin was sentenced, the U.S. Sentencing Commission amended U.S.S.G. § 1B1.3 to generally exclude acquitted conduct from relevant conduct. U.S.S.G. App. C., amend. 826 (effective Nov. 1, 2024); *see* U.S.S.G. § 1B1.11(a) (“The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.”).

(b)(1)(A), and 846; conspiracy to possess firearms in furtherance of drug trafficking, 18 U.S.C. § 924(o); possession of firearms in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c)(1)(A)(i); drive-by shooting, 18 U.S.C. § 36; discharge of a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii); maintaining a drug-involved premises, 21 U.S.C. § 856(a)(1) and (b); distribution of marijuana, 21 U.S.C. § 841(a)(1) and (b)(1)(D); distribution of marijuana near a school, 21 U.S.C. §§ 841(a)(1) and 860; four counts of distribution of heroin, 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)–(C); and four counts of distribution of heroin near a school, 21 U.S.C. §§ 841(a) and 860. He was sentenced to 420 months in prison.

David Duncan was convicted of conspiracy to distribute less than 100 grams of heroin and some amount of oxycodone, 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 846; drive-by shooting, 18 U.S.C. § 36; discharge of a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii); possession with intent to distribute oxycodone and hydrocodone, 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); possession of a firearm in furtherance of drug trafficking, 18 U.S.C. § 924(c)(1)(A)(i); and five counts of money laundering, 18 U.S.C. § 1956(a)(1)(B)(i). He was sentenced to 360 months in prison.

1. Evidentiary Rulings

Over Smith’s and Duncan’s objections, the CI testified to what Franklin had told him about the drive-by shooting. The district court ruled that the testimony was not hearsay because it was a statement “offered against an opposing party” and “made by the party’s coconspirator during and in furtherance of the conspiracy.” *See* Fed. R. Evid. 801(d)(2)(E). We review evidentiary decisions for abuse of discretion. *United States v. Goodman*, 88 F.4th 764, 767 (8th Cir. 2023).

A statement is not hearsay if the Government proves by a preponderance of the evidence that (1) a conspiracy existed, (2) the defendant and declarant were members of the conspiracy, and (3) the declaration was made during the course and in furtherance of the conspiracy. *United States v. Cathey*, 997 F.3d 827, 834 (8th

Cir. 2021). Smith and Duncan do not dispute the conspiracy's existence; that the CI, Franklin, Smith, and Duncan were members; or that the statements were made during the conspiracy. They argue only that the Government failed to prove that the statements were made "in furtherance of the conspiracy" because Franklin's statements about the drive-by shooting did not advance the conspiracy but merely informed the CI of past activities unconnected to the drug conspiracy. *See United States v. Mitchell*, 31 F.3d 628, 632 (8th Cir. 1994) ("A statement that simply informs a listener of the declarant's criminal activities is not made in furtherance of the conspiracy; instead, the statement must 'somehow advance the objectives of the conspiracy.'" (citation omitted)). And without a nexus between the statements and the conspiracy, they argue that the CI's testimony was inadmissible hearsay.

We disagree. Consider the context. The CI was becoming a more valuable and trusted member of the conspiracy when Franklin told him about the shooting. A few weeks before the shooting, Smith offered him distribution quantities of heroin, a drug the CI had not sold before. And for a \$1,000 fee, Smith taught the CI his "million dollar game" recipe to cut heroin, reduce the drug purity, increase the quantity, and make more money on each sale.

When Franklin told the CI about the shooting immediately after returning to the Kensington Avenue house, he identified a threat the conspirators faced and taught the CI how they handled it. *See United States v. Darden*, 70 F.3d 1507, 1529 (8th Cir. 1995) (statements describing past events are "in furtherance of the conspiracy" if they "keep co-conspirators abreast of current developments and problems facing the group"); *see also United States v. Rivera-Donate*, 682 F.3d 120, 132 (1st Cir. 2012) (statements about related murder were "in furtherance of the conspiracy" because they "served to keep the members of the conspiracy up-to-date on important developments relating to the organization"). When Franklin relayed Duncan's command to kill the two men who were plotting an ambush, he was telling the CI that Duncan was a valuable member who relied on Franklin for protection. When Franklin told the CI that he and Smith went to protect Duncan and recounted the shooting, he gave context about their roles as enforcers within the conspiracy

and the group’s reputation for violence and retaliation. *See United States v. Kitchen*, 149 F.4th 1019, 1025 (8th Cir. 2025) (“statements that identify a co-conspirator’s role” are “in furtherance of the conspiracy”). So the district court neither clearly erred nor abused its discretion in finding that the statements were “in furtherance of the conspiracy.” *See Goodman*, 88 F.4th at 767 (noting the “open question whether admissibility under Rule 801(d)(2)(E) is reviewed under an abuse of discretion standard or whether the 801(d)(2)(E) factfinding is first reviewed for clear error and the ultimate decision to admit or exclude is then reviewed for abuse of discretion”).

Turning to the rap lyrics and gang affiliation, the district court denied Smith’s and Duncan’s motions to exclude the evidence as irrelevant and unfairly prejudicial. This evidence included five minutes of interview clips, including one where Duncan wore a 246-branded baseball hat and talked about how the group came together and their music. He referred to the 246 as “the gangway” and said that he “be talking that real shit, spittin’ that real shit. . . . Everything 100% authentic.” It also included seven minutes of clips from music videos that featured Smith rapping, with Duncan and others making appearances. For example, in one clip, Smith raps:

Ah, shit. Gang, gang, gang.
246. Talk to them, bro.
...
Sellin’ chicken out the window like I work at Popeyes.
...
All I talk is Gs. All I sell is units.
...
I sell dope, I don’t sell Kush because that shit is slow.
\$15k profit every week, know I’m getting dough.
...
Gang. Gang. Gang. Gang. Gang. 246.

And in another, Smith raps:

Got our pistols in the party, ops better not come in.
Gripping on this ten, bro got the FN.

Yeah I killed ya mans, that 50 made him dance.
Got dissed by some rappers, they used to be my fans, damn.

This evidence was properly admitted. Its relevance is obvious, tending to show that Smith and Duncan were part of a drug-trafficking conspiracy. *See* Fed. R. Evid. 401; *United States v. Moore*, 639 F.3d 443, 448 (8th Cir. 2011) (“The recordings [of the defendant rapping] were relevant to prove that he knew cocaine prices, used drug code words, and sold drugs to supplement his income.”). Smith’s lyrics showed they knew the lingo, they knew about selling drugs, they knew about guns. The videos showed the defendants hanging out together with guns and cash. And the interview with Duncan explained the group’s origins and suggested there was truth to the lyrics.

Against the high probative value of the evidence, we consider the danger of unfair prejudice. *See* Fed. R. Evid. 403. Unfair prejudice is “an undue tendency to suggest decision on an improper basis,” *id.* advisory committee note, and we agree with the district court that there was little danger of that here. The district court explained that the evidence was limited both in time—“under 12 minutes of what will likely be a 3-week trial”—and in weight—“it is commonsense that not all music is autobiographical fact.” D. Ct. Order of Aug. 22, 2022 at 13–14. The Government did not refer to 246 as a gang, and Smith’s and Duncan’s references to “gang” or “the gangway” were “not gratuitous or unfairly prejudicial.” *Id.*; *see United States v. Gaines*, 859 F.3d 1128, 1131 (8th Cir. 2017) (“[G]ang-related evidence is often admissible where the defendant is a gang member himself, the issues in the case concern the mere fact of a defendant’s gang membership rather than sanctioning a wide ranging inquiry into the generic criminality and violent dispositions of gangs, and the evidence is generally an unavoidable incident of presenting other permissible evidence.” (cleaned up)). The music videos and interview were prejudicial only “in the sense of being detrimental to” Smith’s and Duncan’s cases, which is not unfair prejudice.⁴ *See United States v. Huyck*, 849 F.3d 432, 440 (8th Cir. 2017).

⁴Smith and Duncan claim that the admission of the rap lyrics violated their First, Fifth, and Sixth Amendment rights, but neither developed any argument for

Smith and Duncan complain that the Government insinuated that the 246 was a gang and that the jury found them guilty by association. But this case is not like the one they rely upon, *United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991). There, the Government called an expert witness and an undercover agent to testify about the nationwide Hell’s Angels motorcycle club, its structure and numerous chapters, and its illegal drug activities. *Id.* at 1430–31. The “theme of the trial” was “guilty by association,” and the Government “relentless[ly] attempt[ed] to convict Appellant through his association with the motorcycle club.” *Id.* at 1434, 1432. Here, the defendants’ association with the 246 did not secure their convictions. The evidence proved each defendant’s role in the conspiracy and individual criminal conduct. *See United States v. Ellison*, 616 F.3d 829, 834 (8th Cir. 2010) (“Our concern under Fed. R. Evid. 403 is that the relevance of gang related evidence not be overwhelmed by the risk that the jury will rest a guilty verdict solely on a defendant’s gang affiliation.”). The evidence also proved that this specific, local group—the Kansas City-based 246—both made music and trafficked drugs, so there was nothing improper about the Government calling the 246 a drug-trafficking organization in opening statement or closing argument. *See United States v. Shoff*, 151 F.3d 889, 893 (8th Cir. 1998) (no prosecutorial misconduct when “opening was limited to describing what the government would attempt to prove” and “closing was carefully limited to arguing what the evidence had proved”).

2. Sufficiency of the Evidence for the Drive-by Shooting Convictions

The drive-by shooting statute prohibits firing a weapon into a group of two or more people “*in furtherance . . . of a major drug offense* and with the intent to intimidate, harass, injure or maim.” 18 U.S.C. § 36(b)(2) (emphasis added); *see id.* § 36(a)(2) (defining “major drug offense” to include drug-trafficking conspiracies).

reversal or for excluding the evidence based on their constitutional rights. *See United States v. Midder*, 139 F.4th 649, 652 n.3 (8th Cir. 2025) (declining to consider an argument where defendant made only a “passing reference” to it and did not cite any legal authority).

Smith and Duncan argue that the evidence was insufficient to establish that the September 2019 shooting was “in furtherance of” the drug-trafficking conspiracy.⁵ We review sufficiency of the evidence *de novo*, viewing the evidence in the light most favorable to the jury’s verdict. *United States v. Blamah*, 143 F.4th 1010, 1015 (8th Cir. 2025). We affirm “unless no reasonable jury could have found the defendant guilty beyond a reasonable doubt.” *Id.* (citation omitted).

The evidence showed that Smith shot into a group of two or more people, causing grave risk of harm to human life. After Duncan called for protection, Franklin went to the Kensington Avenue house in his Cadillac. The pole camera showed Franklin loading guns into a black Jeep in the driveway at 7:07 p.m. The CI testified that Smith joined Franklin, and city cameras recorded the Jeep driving west toward the intersection of 35th and Woodland. The Shot Spotter system recorded shots fired. Franklin’s cell phone pinged near the area. Video from the pole camera showed the Jeep return to the Kensington Avenue house at 7:21, where the men exited and walked toward the door. Agent McKelway identified Franklin and Smith, with Smith holding a gun in his right hand.⁶ Casings from the scene matched guns that were later seized from the Jeep and the Kensington Avenue house. The CI told the jury what Franklin said happened.

And a reasonable jury could find that the shooting was in furtherance of the drug-trafficking conspiracy. Franklin and Smith answered the call to protect Duncan, who was an important member of the conspiracy. They met at the house

⁵Smith and Duncan ask to incorporate their hearsay arguments, but under Federal Rule of Evidence 801(d)(2)(E), we consider whether Franklin’s statements to the CI were in furtherance of a conspiracy. For conviction, the record must support a finding that the shooting itself was in furtherance of the drug-trafficking conspiracy.

⁶Smith argues that “insufficient evidence exists to even place [him] at the scene of the alleged shooting,” but the CI’s testimony, the pole camera footage, and Agent McKelway’s identification is enough.

where they stored guns and trafficked drugs. They grabbed guns from the house, shot at the men who were threatening Duncan, and returned to the house. We have said that the term “in furtherance of” means “furthering, advancing, or helping forward.” *United States v. Fuget*, 137 F.4th 690, 691 (8th Cir. 2025) (citation omitted). So while there is no direct evidence about who the men were or the motive of the threats against Duncan, a fair inference—given the timing, the conspirators involved, and the circumstances—is that the shooting was related to drug-trafficking. And even if it wasn’t, a reasonable jury could find that the shooting furthered the conspiracy by protecting Duncan and promoting the group’s reputation for swiftly and violently responding to threats.⁷ See *United States v. Flax*, 988 F.3d 1068, 1075 (8th Cir. 2021) (sufficient evidence to prove that defendant “was furthering the conspiracy by protecting the [gang’s] reputation and influence and thus the organization’s ability to further its criminal enterprise”); *United States v. Carter*, 481 F.3d 601, 611 (8th Cir. 2007) (holding certain acts of violence were “in furtherance of drug trafficking” when evidence indicated “protection” of the drug-trafficking conspiracy and “retaliation” against rivals), *reinstated in relevant part by* 538 F.3d 830, 831 (8th Cir. 2008).

3. Sentencing

Smith and Duncan objected to the drug-quantity findings in their presentence reports. The Guidelines instruct the district court to “approximate the quantity of the controlled substance” when the amount of drugs seized “does not reflect the scale of the offense.” U.S.S.G. § 2D1.1 cmt. n.5. The court may convert seized or laundered money into drug quantities after considering “the price generally obtained” for the drug and “financial or other records.” See *id.*; *United States v. Grays*, 638 F.3d 569, 571–72 (8th Cir. 2011). It may also “consider all transactions known or reasonably foreseeable to the defendant that were made in furtherance of

⁷Having affirmed the drive-by shooting convictions, we likewise affirm the convictions for discharging a firearm during and in relation to the drive-by shooting, 18 U.S.C. § 924(c)(1)(A)(iii).

the conspiracy.” *United States v. Johnson*, 75 F.4th 833, 846 (8th Cir. 2023) (citation omitted). We review drug-quantity findings for clear error. *Id.*

Officers seized \$32,127 in cash from Smith’s home, which was converted into 321.27 grams of heroin based on evidence that heroin sold for \$100 per gram. Officers seized \$7,181 from Duncan’s home, and financial records revealed that he laundered \$272,231 through his bank account, which together was converted into 2,794.12 grams of heroin. Their presentence reports relied on these heroin amounts, which drove up their base offense levels and their Guidelines sentencing ranges. Smith specifically objected to the cash to drug-weight conversion, and the probation officer responded that the cash was converted because it was found at his home “along with firearms, drugs, cell phones, and other evidence of drug distribution activity.” Duncan objected to “all the drug calculations” and “the drug weights used to calculate” his base offense level and argued that he should be held responsible only for the 108 grams of heroin he sold to a cooperating witness and the 10.35 kilograms of oxycodone found in his home. The district court overruled the objections and adopted the PSR’s findings.⁸

Smith argues that the Government failed to prove that the seized cash was drug-trafficking proceeds, citing his success as a rapper. An IRS agent testified that Smith received approximately \$28,000 from music aggregators but otherwise had no legitimate income. Of the cash officers seized from Smith’s home, \$20,000 was hidden in his closet, \$1,600 was stacked next to his Gucci fanny pack on the couch, and \$10,000 was tucked into the fanny pack, which Smith had been wearing at the Kensington Avenue house mere hours before his arrest. Officers also found codeine, expensive jewelry, cell phones, several magazines, and boxes of ammunition. The Government presented evidence of Smith’s spending, including tens of thousands of dollars at an upscale department store and on rental cars. With evidence that Smith

⁸Smith and Duncan argue that the district court failed to make specific factual findings on the cash to drug-weight conversions, but the court relied on the evidence it heard at trial and probation’s response to their objections, which is specific enough.

sold heroin, had little legitimate income, spent lavishly, kept an unusual amount of cash, and had been involved in a yearslong drug-trafficking conspiracy, the district court did not clearly err in converting the cash to heroin.

Duncan similarly argues that the Government failed to prove that the seized cash and laundered funds were heroin-trafficking proceeds. The evidence that Duncan had worked at a car dealership when he was a teenager and that his aunt occasionally gave him a few hundred dollars could neither account for the cash or laundered funds nor pay for his luxury apartment, designer clothes, expensive jewelry, or Dodge Challenger. So the money was drug money, and any error in converting it into heroin instead of oxycodone was harmless. The district court said, “If you had won all of your objections, I would have still come out in the same place . . . based upon 18 U.S.C. § 3553(a) and my review of those factors.”⁹ See *United States v. Fisher*, 965 F.3d 625, 632 (8th Cir. 2020) (“An incorrect Guidelines calculation is harmless error where the district court specifies the resolution of a particular issue did not affect the ultimate determination of a sentence, such as when the district court indicates it would have alternatively imposed the same sentence even if a lower guideline range applied.” (citation omitted)).

Smith argues that the district court erred by increasing his offense level by 2 for possessing a firearm, U.S.S.G. § 2D1.1(b)(1), because the conduct was already punished in his consecutive 60-month sentence for possessing firearms in

⁹Citing *Booker*, Duncan argues that it was error to attribute the conspiracy’s drug quantities to him—including the 295 grams found at the Kensington Avenue house—because the jury found that he conspired to distribute less than 100 grams of heroin. See *United States v. Booker*, 543 U.S. 220 (2005). But *Booker* did not disturb the precedent “that a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt).” *Id.* at 251; see *Johnson*, 75 F.4th at 847 (a district court can rely on acquitted conduct at sentencing, “so long as that conduct has been proved by a preponderance of the evidence” (citation omitted)).

furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c)(1)(A)(i).¹⁰ See U.S.S.G. § 2K2.4 cmt. n.4 (specific offense characteristic for possession of a firearm does not apply to the underlying drug-trafficking offense when “a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense”); see *United States v. Mays*, 967 F.3d 748, 753 (8th Cir. 2020) (“The Commission in Application Note 4 logically concluded that double counting occurs when a guidelines enhancement ‘for possession . . . of an explosive or firearm’ is imposed for an underlying offense when the total sentence will include consecutive punishment for a § 924(c) firearm offense.” (citation omitted)). We agree, but the error was harmless. The district court said it would have imposed the same sentence even if it had sustained Smith’s objection. See *Fisher*, 965 F.3d at 632.

C. Gary Toombs

Gary Toombs was convicted of conspiracy to distribute 100 grams or more of heroin and some amount of mixture containing marijuana, 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846; conspiracy to possess firearms in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(o); and maintaining a drug-involved premises, 21 U.S.C. § 856(a)(1) and (b). He was sentenced to 151 months in prison.

1. Sufficiency of Evidence on All Counts

Toombs argues that the Government failed to prove that he joined the conspiracy to distribute heroin and marijuana and to possess firearms in furtherance of drug-trafficking. But the evidence showed that Toombs rented the Kensington Avenue house, the utilities were in his name, and he went there occasionally. He

¹⁰The district court imposed concurrent 240-month sentences on his conspiracy, drive-by shooting, and heroin distribution convictions; concurrent 60- and 120-month sentences on his marijuana distribution convictions; and consecutive 60- and 120-month sentences on his convictions for possession of firearms in furtherance of a drug-trafficking crime and discharge of a firearm in furtherance of a crime of violence.

had a conversation with Smith about “black” or “black ops,” during which Toombs said he had “a couple of plays that should land.” Agent McKelway testified that “black ops” is a code word for heroin; and a Kansas City Police detective testified that “black” also means heroin. During another recorded conversation, Franklin said he had a half-pound of marijuana for \$1,750, and Toombs replied that he would “be over when [he] g[o]t off.” There was also surveillance video of Toombs leaving the Kensington Avenue house with a bulge under his shirt that McKelway testified was consistent with the size of a one-pound bag of marijuana. Based on this, a reasonable jury could find that Toombs knowingly and intentionally joined the conspiracy to distribute heroin and marijuana, that he knew of the drug trafficking that occurred and the cache of firearms that were kept at the Kensington Avenue house, and that he maintained the drug-involved premises. And the district court did not abuse its discretion when it denied Toombs a buyer-seller jury instruction, when the evidence showed that Toombs purchased the drugs for resale. *See United States v. Shavers*, 955 F.3d 685, 696 (8th Cir. 2020) (defendant not entitled to buyer-seller instruction “when the evidence shows that drugs are purchased for resale.”); *United States v. Boykin*, 794 F.3d 939, 948 (8th Cir. 2015) (“Buyer-seller relationship cases involve only evidence of a single transient sales agreement and small amounts of drugs consistent with personal use.” (cleaned up)).

2. Sentencing

Toombs’s Guidelines sentencing range was 108 to 135 months in prison. The district court varied up to 151 months, citing Toombs’s role in the conspiracy and his extensive criminal history, which included felony drug distribution and domestic violence convictions. Toombs argues that his sentence is substantively unreasonable because the conduct the court relied upon for the variance was already accounted for in the Guidelines calculations. Again, “[a] district court is not prohibited ‘from determining that the weight the Guidelines assigned to a particular factor was insufficient,’” *Donahue*, 959 F.3d at 867 (citation omitted), and the district court did not abuse its discretion in imposing a sentence 16 months above the Guidelines range.

III. Conclusion

Affirmed.

Appendix B

Judgment in a Criminal Case, United States v. Roy O. Franklin, Jr., No. 4:19-CR-00315-DGK (W.D. Mo., September 19, 2023)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

ROY O. FRANKLIN, JR.

§ **JUDGMENT IN A CRIMINAL CASE**

§

§

§ Case Number: **4:19-CR-00315-DGK(2)**

§ USM Number: **34404-045**

§ **John Justin Johnston**

§ Defendant's Attorney

THE DEFENDANT:

☒	was found guilty on Counts 1, 2, 6, 7, 8, 19, 20, 21, and 22 after a plea of not guilty.
-------------------------------------	--

The defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
Conspiracy to Distribute Less Than 500 Grams of Cocaine, Some Amount of Oxycodone, and Some Amount of a Mixture or Substance Containing a Detectable Amount of Marijuana 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 846	10/01/2019	1s
Conspiracy to Possess Firearms in Furtherance of a Drug Trafficking Crime 18 U.S.C. § 924(o)	10/02/2019	2s
Drive-by Shooting 18 U.S.C. § 36	09/09/2019	6s
Discharging a Firearm in Furtherance of a Crime of Violence 18 U.S.C. § 924(c)(1)(A)(iii)	09/09/2019	7s
Maintaining a Drug Involved Premises 21 U.S.C. §§ 856(a)(1) and (b)	10/01/2019	8s
Distribution of Marijuana 21 U.S.C. §§ 841(a)(1) and (b)(1)(D)	06/21/2019	19s
Distribution of Marijuana Near a School 21 U.S.C. §§ 841(a)(1) and 860	06/21/2019	20s
Distribution of Marijuana 21 U.S.C. §§ 841(a)(1) and (b)(1)(D)	07/18/2019	21s
Distribution of Marijuana Near a School 21 U.S.C. §§ 841(a)(1) and 860	07/18/2019	22s

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

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

September 18, 2023

Date of Imposition of Judgment

/s/ Greg Kays

Signature of Judge

GREG KAYS

UNITED STATES DISTRICT JUDGE

Name and Title of Judge

September 19, 2023

Date

DEFENDANT: ROY O FRANKLIN, JR
CASE NUMBER: 4:19-CR-00315-DGK(2)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

151 months as to each of Counts 1, 2, 6, and 8; 120 months as to Counts 20 and 22; and 60 months as to Counts 19 and 21; all concurrent, plus 209 months on Count 7, to run consecutive to all other counts, for a total custody term of 360 months.

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

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROY O FRANKLIN, JR
CASE NUMBER: 4:19-CR-00315-DGK(2)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years on Count 8 and 5 years on Counts 1, 2, 6, 7, 19, 20, 21, and 22, the terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: ROY O FRANKLIN, JR
CASE NUMBER: 4:19-CR-00315-DGK(2)

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: ROY O FRANKLIN, JR
CASE NUMBER: 4:19-CR-00315-DGK(2)

SPECIAL CONDITIONS OF SUPERVISION

- a) You shall submit your person and any property, house, residence, office, vehicle, papers, computer, other electronic communication or data storage devices or media and effects to a search, conducted by a U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; you shall warn any other residents that the premises may be subject to searches pursuant to this condition.
- b) You shall successfully participate in any outpatient or inpatient substance abuse counseling program, which may include urinalysis, sweat patch, or alcohol breath testing, as approved by the Probation Office and pay any associated costs as directed by the Probation Office.
- c) You shall provide the Probation Office with access to any requested financial information as it relates to income and debt.
- d) You shall take measurable actions to resolve any felony warrants and/or pending charges within 60 days of release to supervision, and every 6 months thereafter, until the matters have been resolved, and you shall provide documentation of the actions taken to the Probation Office.
- e) You shall comply with the Western District of Missouri Offender Employment Guideline which may include participation in training, counseling, and/or daily job searching, as directed by the Probation Officer. If not in compliance with the condition of supervision requiring full-time employment at a lawful occupation, you may be required to perform up to 20 hours of community service per week until employed, as approved by the Probation Officer.
- f) If you do not earn a GED while incarcerated, you shall provide documentation of participation in GED classes while on supervision, and shall provide documentation that you have taken the GED exam.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have read the conditions of supervision set forth in this judgment and I fully understand them. I have been provided a copy of them.

I understand that upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant

Date

United States Probation Officer

Date

DEFENDANT: ROY O FRANKLIN, JR
CASE NUMBER: 4:19-CR-00315-DGK(2)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$900.00		\$0.00		\$0.00

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

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

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

SCHEDULE OF PAYMENTS

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

Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the Defendant shall pay to the United States a special assessment of \$900.00 for Counts 1s, 2s, 6s, 7s, 8s, 19s, 20s, 21s and 22s , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

FORFEITURE

The Preliminary Order of Forfeiture is finalized and imposed in the amount of \$103,650.

Appendix C

18 U.S.C. Section 3553(a)

[18 USCS § 3553, Part 1 of 8](#)

Current through Public Law 119-102, approved July 12, 2026.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > Part II. Criminal Procedure (Chs. 201 — 238) > CHAPTER 227. Sentences (Subchs. A — D) > Subchapter A. General Provisions (§§ 3551 — 3559)

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2)** the need for the sentence imposed—
 - (A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B)** to afford adequate deterrence to criminal conduct;
 - (C)** to protect the public from further crimes of the defendant; and
 - (D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3)** the kinds of sentences available;
- (4)** the kinds of sentence and the sentencing range established for—
 - (A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i)** issued by the Sentencing Commission pursuant to [section 994\(a\)\(1\) of title 28, United States Code](#), subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii)** that, except as provided in section 3742(g) [[18 USCS § 3742\(g\)](#)], are in effect on the date the defendant is sentenced; or
 - (B)** in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\) of title 28, United States Code](#), taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5)** any pertinent policy statement—
 - (A)** issued by the Sentencing Commission pursuant to [section 994\(a\)\(2\) of title 28, United States Code](#), subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B)** that, except as provided in section 3742(g) [[18 USCS § 3742\(g\)](#)], is in effect on the date the defendant is sentenced.[:]

18 USCS § 3553, Part 1 of 8

- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.

(1) In general [[*Caution: In United States v. Booker \(2005\) 543 US 220, 160 L Ed 2d 621, 125 S Ct 738*](#), the Supreme Court held that [18 USCS § 3553\(b\)\(1\)](#), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the requirements of the Sixth Amendment and therefore must be severed and excised from the Sentencing Reform Act of 1984.]. Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 [[18 USCS § 1201](#)] involving a minor victim, an offense under section 1591 [[18 USCS § 1591](#)], or an offense under chapter 71, 109A, 110, or 117 [[18 USCS §§ 1460](#) et seq., [2241](#) et seq., [2251](#) et seq., or [2421](#) et seq.], the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

- (i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;
- (ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—
 - (I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;
 - (II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and
 - (III) should result in a sentence different from that described; or
- (iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have

18 USCS § 3553, Part 1 of 8

due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

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

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

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

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555 [[18 USCS § 3555](#)], the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [section 994 of title 28, United States Code](#).

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the [Controlled Substances Act \(21 U.S.C. 841, 844, 846\)](#), section 1010 or 1013 of the Controlled Substances Import and Export Act ([21 U.S.C. 960, 963](#)), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

18 USCS § 3553, Part 1 of 8

- (1) the defendant does not have—
- (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
 - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
 - (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the [Controlled Substances Act](#) [21 USCS § 848]; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense. As used in this section, the term “violent offense” means a crime of violence, as defined in section 16 [18 USCS § 16], that is punishable by imprisonment.

History

HISTORY:

Added Oct. 12, 1984, [P. L. 98-473](#), Title II, Ch II, § 212(a)(2), [98 Stat. 1989](#); Oct. 27, 1986, [P. L. 99-570](#), Title I, Subtitle A, § 1007(a), [100 Stat. 3207-7](#); Nov. 10, 1986, [P. L. 99-646](#), §§ 8(a), 9(a), 80(a), 81(a), [100 Stat. 3593](#), 3619; Dec. 7, 1987, [P. L. 100-182](#), §§ 3, 16(a), 17, [101 Stat. 1266](#), 1269, 1270; Nov. 18, 1988, [P. L. 100-690](#), Title VII, Subtitle C, § 7102, [102 Stat. 4416](#); Sept. 13, 1994, [P. L. 103-322](#), Title VIII, § 80001(a), Title XXVIII, § 280001, [108 Stat. 1985](#), 2095; Oct. 11, 1996, [P. L. 104-294](#), Title VI, § 601(b)(5), (6), (h), [110 Stat. 3499](#), 3500; Nov. 2, 2002, [P. L. 107-273](#), Div B, Title IV, § 4002(a)(8), [116 Stat. 1807](#); April 30, 2003, [P. L. 108-21](#), Title IV, § 401(a), (c) (j)(5), [117 Stat. 667](#), 669, 673; May 27, 2010, [P. L. 111-174](#), § 4, [124 Stat. 1216](#); Dec. 21, 2018, [P.L. 115-391](#), Title IV, § 402(a), [132 Stat. 5221](#).

United States Code Service
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End of Document

Appendix D

18 U.S.C. Section 3661

18 USCS § 3661

Current through Public Law 119-102, approved July 12, 2026.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > Part II. Criminal Procedure (Chs. 201 — 238) > CHAPTER 232. Miscellaneous Sentencing Provisions (§§ 3661 — 3673)

§ 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

History

HISTORY:

Added Oct. 15, 1970, [P. L. 91-452](#), Title X, § 1001(a), 84 Stat. 951; Oct. 12, 1984, [P. L. 98-473](#), Title II, Ch II, § 212(a)(1), 98 Stat. 1987.

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