No. 19-2204

In the United States Court of Appeals for the First Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

EMILIANO EMMANUEL FLORES-GONZÁLEZ,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MOTION FOR LEAVE TO FILE *CORRECTED* APPELLANT'S SUPPLEMENTAL EN BANC BRIEF

Appellant Emiliano Emmanuel Flores-González, through counsel, respectfully moves this Honorable Court for leave to file a corrected supplemental en banc brief. The corrected brief contains modifications to Table 1 and Figures 1-2, at pp. 24-26, a modified sentence immediately preceding Table 1, and minor typographical and textual corrections inserted to improve readability.

As mentioned in previous motions, the Court's data inquiries relate to complex analyses. While we have objected to post-sentencing reliance on fact-bound statistics in this sentencing appeal, we sought to answer the Court's inquiries and

consulted with social scientists to do so in the limited time allotted. And though we endeavored to thoroughly proof our brief before submission, we detected the need for these corrections over the weekend. Since these corrections are slight and will hopefully better facilitate the Court's review of the case, the corrected brief is not anticipated to cause any delay.

WHEREFORE, it is respectfully requested that this Court grant this motion and accept the attached Appellant's Supplemental En Banc Brief (Corrected).

RESPECTFULLY SUBMITTED on October 23, 2022.

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***CERTIFICATION:** I ECF-filed this Motion, notifying the parties/government counsel.

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On Appeal from the United States District Court
for the District of Puerto Rico
Case No. 19-cr-335-FAB
Hon. Francisco A. Besosa, U.S. District Judge

APPELLANT'S SUPPLEMENTAL EN BANC BRIEF (CORRECTED)

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Hon. Francisco A. Besosa, U.S. District Judge

APPELLANT'S SUPPLEMENTAL EN BANC BRIEF

TO THE HONORABLE COURT:

The defendant-appellant, Emiliano Emmanuel Flores-González ("Emiliano Flores"), represented by the Federal Public Defender for the District of Puerto Rico through undersigned counsel, respectfully states and requests:

INTRODUCTION

Emiliano Flores-González is a non-violent first offender who was convicted of simple possession of a handgun that, as modified, met the definition of a machine gun. Nothing about nineteen-year-old Emiliano's particular history or characteristics or the characteristics of his offense warranted increased punishment. The district court acknowledged this. Still, the court imposed an above-guideline sentence, asserting that the offense deserved extra punishment for falling within a category of crimes ("weapons crimes") in a general location ("the entire island of Puerto Rico"). The panel opinion correctly reversed this sentence as procedurally unreasonable. This Court's precedent requires this result, as does the Sentencing Reform Act of 1984 ("SRA") and the Supreme Court's interpretation of the SRA, the Federal Rules for Criminal Procedure, and the Due Process Clause.

The central command of federal sentencing is that the court must "'impose a sentence sufficient, but not greater than necessary, to comply with'" the statutory purposes of sentencing. *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017) (quoting 18 U.S.C. § 3553(a)). As the Supreme Court has relentlessly repeated, in determining that sentence, it "has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518

U.S. 81, 113 (1996); *see also Concepción v. United States*, 142 S. Ct. 2389, 2393 (2022); *Pepper v. United States*, 562 U.S. 476, 487 (2011); *Gall v. United States*, 552 U.S. 38, 52 (2007); *Rita v. United States*, 551 U.S. 338, 361 (2007).

Thus, this Court's has rightfully insisted that a district judge not base a sentence increase on community features without any connection to the particular individual. And it follows that, in using an above-guideline sentence to punish nineteen-year-old Emiliano's first-time automatic-gun possession, the district court erred in failing to fashion its sentence on an "individualized assessment based on the facts presented." *Gall*, 552 U.S. at 49.

Instead, the district court elevated the sentence based on his claim that Puerto Rico is home to a more violent society. The judge even played a video depicting an apparent machine-gun attack that had nothing to do with this case. This is unlawful in its own right, illustrating the need for this Court to take special care when reviewing community-based sentencing increases that necessarily burden the members of a racially, ethnically distinct, and politically disempowered territory.

This Court should vacate and remand Emiliano's sentence. To the extent that *United States v. Flores-Machicote*, 706 F.3d 16 (1st Cir. 2013), prevents this disposition, this Court should overrule *Flores-Machicote* or clarify that the opinion was a fact-bound ruling that does not endorse reliance on any particular community

concept that is unsupported by reliable evidence and a non-invidious case-specific nexus.

ARGUMENTS AND AUTHORITY

I. THIS PANEL DECISION IS CONSISTENT WITH THE SRA, SUPREME COURT PRECEDENT, AND THIS COURT'S PRECEDENT. [Q. 1]

A. The panel properly reversed the district court.

The panel properly reversed the district court, which erred by basing Emiliano's sentence on generalized, anecdotal, and inflammatory views of Puerto Rico's societal tendencies, rather than his individual characteristics and those of his specific offense.

Emiliano was arrested outside a McDonald's in Barrio Coto Laurel in eastern Ponce for non-violently possessing a prohibited handgun. Op. 108. It is prohibited due to an aftermarket, rapid-fire modification. Since it was not manufactured before 1986, the handgun met the federal definition of an unlawful "machine gun." *See* 18 U.S.C. § 922(o). Emiliano pleaded guilty. Op. 108.[1]

At sentencing, he had a total guideline offense level of 17. A25-A26. Since he had no criminal history, he was category I and had a 24-to-30-month guideline sentence range ("GSR"). Op. 108. The defense requested 24 months and the government

[1] "Op." refers to *United States v. Flores-González*, 34 F.4th 103, 117 (1st Cir. 2022), *reh'g en banc granted, opinion withdrawn*, 2022 WL 3583654 (1st Cir. Aug. 22, 2022); Other abbreviation used herein are to Appellant's Appendix "A[]"; the Supplemental Appendix ("SA"); Appellant's Opening Brief ("AOB").

30. Op. 108. The court instead imposed a 48-month sentence. It acknowledged that there was no reason to think that the "crime itself[,] was more harmful than others similar to his…." Op. 110. Instead, rather than weigh the characteristics of Emiliano's offense, the court focused on a "*category* of offenses, gun crimes, that the [c]ourt, considering the particular situation in Puerto Rico, views as more serious here than if they had occurred in a less violent society." Op. 110 (original brackets) (emphasis added).

Given these facts, the panel correctly concluded the district court erred in imposing a sentence that was 18 months above the GSR's high end (and the government's recommendation), where no "case-specific nexus" linked the court's primary sentencing concern (violence in Puerto Rico) to Emiliano or his case. Op. 108. The panel properly found that the district court's reasoning was at odds with case law and the purposes of the SRA. The district court did not identify its actions as a policy disagreement. Op. 108-109, 109 n.8, 114 n.12. But regardless, generic concerns about violence in a particular community should not be construed as a permissible policy disagreement with a particular guideline. Indeed, this Court has long understood that the SRA aimed to "dispense with inequalities based on localized sentencing responses." Op. 114 (citing *United States v. Águilar-Peña*, 887 F.2d 347, 352 (1st Cir. 1989); 28 U.S.C. § 991(b)(1)(B)).

B. A court's reliance on "community characteristics" "go[es] too far" when such characteristics overwhelm the required focus on the individual before the court. [Q. 1]

The panel properly rejected the government's argument that Supreme Court precedent allows a court to punish gun-possession offenses in Puerto Rico more harshly based on a perception that Puerto Rico is an extra violent society. *See* Op. 114-15. Supreme Court precedent does not permit a defendant to be punished for the crimes of others, merely because they reside in the same community or in nearby communities.

Question 1(a). The overriding principle of sentencing is to impose a sentence that is sufficient but not greater than necessary to satisfy the statutory purposes of sentencing. § 3553(a). The Supreme Court has consistently reiterated that federal sentencing considers the "whole person" "as an individual." *Concepción*, 142 S. Ct. at 2395; *see also id.* at 2398-99 (noting history of judicial discretion to consider broad scope of information about a convicted person's life and conduct).

Although deterrence is one of the statutory purposes of sentencing, all sentences must be individualized, and a district court may not increase one individual's — or worse, every individual's — sentence within a community based solely on perceptions of crime and unarticulated, speculative, or discredited theories of deterrence. As discussed in additional detail in Section III, infra, the court's reliance on ideas about Puerto Rico crime rates rendered the sentence procedurally

unreasonable. Unlike the criminal-history-based variance approved of in *Flores-Machicote*, the variance here did not involve any community-based facts with a "case-specific nexus" to nineteen-year-old Emiliano Flores. *United States v. Rivera-Berríos*, 968 F.3d 130, 136 (1st Cir. 2020). Crucially, unlike in *Flores-Machicote*, where the affirmed variance focused on unobjected-to findings of non-scoring drug-trafficking offenses and the "defendant's likely recidivism" in his felon-in-possession-of-a-firearm offense, *see Flores-Machicote*, 706 F.3d at 21-24, no such facts linked Emiliano to any of the criminal conduct the court alluded to below.

Not only was a reliable indicator of atypical population violence not shown, Emiliano's case is not even a felon-in-possession case, and no information supplied a link between Emiliano and the court's sua sponte discussion of crime in Puerto Rico. And Emiliano, though born in Ponce, came of age in Maryland. SA 6. He came to Puerto Rico after graduating high school in Maryland and learning his father was ill. SA 6. Although unarticulated, the court appeared to think it could justify Emiliano's 18-months-above-the-GSR sentence on some theory that this increased punishment of Emiliano would deter violent crime in Puerto Rico. But, as described in Section III, there is not one shred of evidence that longer sentences deter, and there is quite a bit of evidence that they do not deter firearm offenses.

Question 1(b). *Kimbrough* did not sanction what occurred in this case. Here, the court used its personal perceptions of violent crime levels in Puerto Rico to

increase the sentence for an individual who was not involved in violent crime and could not be said to have been responsible in any way for what the court believed to be the unusually high crime rate of the community.

While the Supreme Court in *Kimbrough* held that judges may disagree with a particular guideline for policy reasons, *Kimbrough* did not supplant the individualized § 3553(a) analysis. In linking the scope of individualization and explanation, the Court in *Nelson v. United States*, 555 U.S. 350, 351 (2009) (per curiam), stated that "the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter."

Neither did *Spears v. United States*, 555 U.S. 261, 263 (2009), alter individualized sentencing requirements. That opinion merely holds that the absence of additional "special mitigating circumstances" does not pose an obstacle to a downward variance based on a policy concern with a particular guideline, as where "the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates an unwarranted disparity within the meaning of § 3553(a), and is at odds with § 3553(a)." *Id.* at 263-64 (cleaned up). In *Beckles*, the Court reiterated that "[a]lthough the Guidelines remain 'the starting point and the initial benchmark' for sentencing, a sentencing court may no longer rely exclusively

on the Guidelines range; rather, the court 'must make an individualized assessment based on the facts presented' and the other statutory factors." *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (citing *Gall*, 552 U.S. at 49, 50). *Beckles* also affirmed that "the individualized sentencing required by the other § 3553(a) factors" is no "different in kind from that required by the Guidelines." *Id.* at 896.

This Court has properly understood *Kimbrough* to "open[] the door for a sentencing court to deviate from the guidelines in an *individual* case even though that deviation seemingly contravenes a broad policy pronouncement of the Sentencing Commission." *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008) (emphasis added) (citing *Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007)). But still, the district court must "ground the defendant's sentence in case-specific considerations, which is the accepted practice in the post-*Gall* world." *Id.*

Question 1(c). This Court has asked whether *Kimbrough*'s "closer review" discussion is implicated here. It is not, since the variance here was not a "policy disagreement" with a particular guideline at all. *See* Op. 111-15. However, to the extent that it could be interpreted as such, the "closer review" rationale strongly supports the panel opinion. The Supreme Court in *Kimbrough* indicated that "closer review [of policy-based variances] may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." 552 U.S.

at 109. This is related to the notion that "a district court's decision to vary from the advisory Guidelines may attract greatest respect when' it is based on the particular facts of a case." *Peugh v. United States*, 569 U.S. 530, 537 (2013) (citing *Kimbrough,* 552 U.S. at 109). "[I]n the ordinary case," in contrast, "the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" *Kimbrough*, 552 U.S. at 108 (citing *Rita*, 551 U.S. at 350). Thus, if this Court were to interpret the district court's sentencing discussion in this case as some sort of policy disagreement, then it would be an inappropriate policy disagreement.

Questions 1(d), (e), & (f). The panel properly read both *Flores-Machicote* and *Rivera-Berríos*. Because each case must be weighed individually based on evidence adduced at sentencing and an individualized application of § 3553(a) factors, the panel correctly understood *Flores-Machicote* as not endorsing any specific weight a judge can ascribe to population[2] characteristics with a demonstrated nexus to a specific offense. Op. 117. It also correctly read *Rivera-Berríos* as rejecting variances based solely on Puerto Rico's population characteristics. Op. 117.

[2] While this Court has discussed the subject variance as reflecting "community-based and geographic factors," we refer throughout to the variance as based on "population." We believe this to be a more accurate description of the level of analysis since the district court's focus was on the behavior of a large group of people which it believes to encompasses a "more violent society" than other distinct populations.

It is axiomatic that sentences may not be based on unreliable evidence or improper factors. Thus, *Flores-Machicote* is best interpreted as merely permitting passing reference to beliefs about a population without ascribing weight to them absent evidence and a case-specific nexus. Since *Flores-Machicote*, this Court has repeatedly rejected the use of unreliable indicia of criminal propensity as a basis to vary upwards.

This includes reliance on mere arrest or mere filing of state-court charges to vary upward at sentencing; to do so is procedural error. *See, e.g.*, *United States v. Castillo-Torres*, 8 F.4th 68, 71-72 (1st Cir. 2021); *United States v. Marrero-Pérez*, 914 F.3d 20, 23-24 (1st Cir. 2019). And that's because information used "to enhance a defendant's sentence must 'ha[ve] sufficient indicia of reliability to support its probable accuracy.'" *United States v. Colón-Maldonado*, 953 F.3d 1, 9-10 (1st Cir. 2020) (quoting USSG § 6A1.3); *see also id.* (citing *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948), for the proposition that it violates due process to base a sentence on factual "assumptions" that are "materially untrue"). To the extent that *Flores-Machicote* is read to hold that a sentence can be based on invidious, *see infra*, pp. 19-20, or improper perceptions about community characteristics, it must be over-ruled.

As for *Rivera-Berríos*, the panel correctly read that case as rejecting variances based exclusively on Puerto Rico's population characteristics with no case-specific

nexus. Op. 117. This holding was first reached in *United States v. Ortiz-Rodríguez*, 789 F.3d 15, 19-20 (1st Cir. 2015). There, the court faced a GSR that was enhanced by the presence of a firearm. *Id.* at 19. The court's focus on the gun — already included in the GSR — became more acute when the court referenced its perception of "the pervasiveness of gun crime in Puerto Rico." *Id.* at 19. But "the District Court's reference to the section 3553 factors and contextualizing comments about gun crime in Puerto Rico [did] not explain why an upward variance" of fifteen months "was warranted." *Id.* at 20.

The unanimous *Ortiz-Rodríguez* panel picked up on *Flores-Machicote*'s implication that there exists no generally accepted link between any one individual's non-violent gun possession and beliefs about broader gun-misuse offenses. So, like here, absent any case-specific link or alternative ground for affirmance, *Flores-González* correctly applied this Court's case law to vacate the court's population-characteristics-only variance.

Question 1(g). This Court has asked the parties to address whether *United States v. Zapete-García*, 447 F.3d 57 (1st Cir. 2006), clashes with *Kimbrough*, *Gall*, or *Rita*. The answer is no. But first, it is important to note that the panel opinion in this case rejected the government's argument that the judge's comments about Puerto Rico supported a *Kimbrough* variance. *See* Op. 117-18. The panel correctly held that these comments did not form a coherent theory showing a "'case-specific

nexus' between the community-based characteristics" referenced by the court "and the circumstances of [Emiliano's] situation beyond his machinegun possession." Op. 116. So understood, this case does not implicate this Court's "extra-weight requirement" (permitting district courts to vary upward based on factors already accounted for by the Guidelines, if they deserve "extra weight") because the court in this case was not giving any factor extra weight; rather it was increasing the sentence based on unsupported perceptions of crime in Puerto Rico and undeveloped speculation that increasing this sentence would deter others in Puerto Rico.

In any event, *Zapete-García*'s "extra weight" language is entirely consistent with *Gall*'s uncontroversial requirement that a sentencing court explain the reasons for its choice of a particular sentence. *See* 18 U.S.C. § 3553(a), (c). As *Rita* instructed, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *See Rita*, 551 U.S. 338, at 347-48. The next step is "an individualized assessment based on the facts presented." *Id.* Once the facts are settled, if a court "decides that an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *See Gall*, 552 U.S. at 50. Thus, "a major departure should be supported by a more significant justification than a minor one." *Id.* As such, it naturally follows that variance-justifying circumstances aren't readily apparent, and "a sentencing court

relies on a factor already accounted for by the sentencing guidelines to impose a variant sentence, it must indicate what makes that factor worthy of extra weight." *Rivera-Berríos*, 968 F.3d at 136 (cleaned up).

This "allow[s] for meaningful appellate review and … promote[s] the perception of fair sentencing." *Id.* (citing *Rita*, 551 U.S. at 351). This case law coheres with the broader aims of individualized, "whole person" sentencing, *Concepción*, 142 S. Ct. at 2395, "the need to avoid unwarranted sentence disparities," § 3553(a)(6), and the fact that the applicable GSR remains a factor that courts "must consult … and take … into account when sentencing." *See United States v. Booker*, 543 U.S. 220, 264 (2005) (citing § 3553(a)(a)(4), (5)). So, the "extra weight" language is consistent with the requirement that a court still "given respectful consideration to the Guidelines…." *Kimbrough*, 552 U.S. at 101 (citations omitted). And in situations where "closer review" is justified, 552 U.S. at 109, this language is even more appropriate. Thus, *Zapete-García*'s failure-to-explain analysis remains good law, and to the extent that it has any relevance it supports the panel opinion in this case.

Question 1(h). *Concepción* provides no authority for endorsing the court's Puerto Rico population-targeting variance. To the contrary, *Concepción* confirmed the importance of individualized sentencing, stressing that every sentencing calls for the "'judge to consider every convicted person as an individual….'" *Concepción*, 142 S. Ct. at 2399 (quoting *Koon*, 518 U.S. at 113). And although the Court in

Concepción placed no limits on the kind of information a court may consider, it did not suggest that it would be appropriate to increase sentences based on unreliable information or speculative deterrence rationales.

Breaking no new ground relevant to this case, *Concepción* simply reiterated that "the 'federal sentencing framework' … allows sentencing judges to consider the 'fullest information possible concerning the defendant's life and characteristics.'" *Id.* at 2399 (citing *Pepper*, 562 U.S. at 488, 490 (internal quotation marks omitted from second quoted phrase)). Just as important to this framework is that, aside from independent inquiries by Probation in the presentence investigation, information at sentencing must be derived from "evidence" the parties present at sentencing, which remains an adversarial proceeding. *See Concepción*, 142 S. Ct. at 2395-2405 (referring 28 separate times to "evidence" when evaluating post-sentence rehabilitation that could be considered in First Step Act sentence modifications).

II. THE COURT'S PUERTO RICO-POPULATION-FOCUSED SENTENCE, ABSENT RELIABLE EVIDENCE OF A CASE-SPECIFIC NEXUS, CONFLICTS WITH THE SRA AND THE CORE PURPOSE OF AVOIDING UNWARRANTED DISPARITIES, AND RISKS INVIDIOUSLY DISCRIMINATORY APPLICATION. [Q. 2]

Question 2. The court's upward variance transparently relied solely on a non-rigorous claim that Puerto Rico harbors an unusually violent society. This is not consistent with the SRA or core sentencing considerations. The reference to non-specific "community factors" did not involve reliable case-specific facts with a nexus to Emiliano's offense or history and characteristics. It left unsatisfied the

purposes of individualized sentencing and avoidance of unwarranted disparities. It also likely improperly gave weight to prohibited considerations inherent in fashioning a sentence aimed at discrete minority population.

A. The upward variance was inconsistent with the SRA.

As the Supreme Court explained in *Rita* and *Kimbrough*, guidelines will, in many cases, recommend a sentence to meet the statutory purposes of sentencing because the Commission based most sentences on empirical federal sentencing data which evolves continuously based on continuing sentencing practices, ongoing dialogue with stakeholders, and study. *See Rita*, 551 U.S. at 350; *See* Op. 112-13 (citing *Booker*, *Kimbrough*, and sources describing ongoing guidelines changes).

The Commission-establishing statute "adds that the Commission must seek to 'provide certainty and fairness' in sentencing, to 'avoi[d] unwarranted sentencing disparities,' to 'maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices,' and to 'reflect, to the extent practicable, [sentencing-relevant] advancement in [the] knowledge of human behavior.'" *Id.*; 28 U.S.C. § 991(b)(1)(B)-(C).

With continued institutional focus on § 3553(a)(2), § 991 directs the Commission to engage in criminological study to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting

the purposes of sentencing as set forth in" 18 U.S.C. § 3553(a)(2).28 U.S.C. § 991(b)(2).

A sentence based on someone's presence in Puerto Rico conflicts with the SRA's focus on refining "national sentencing standards" — a fundamental purpose of the Act. *See Kimbrough*, 552 U.S. at 108. The panel illustrated a conflict between this purpose and the court's variance when observing that it could not "see how a judge using *Kimbrough* can highlight a guideline's nationwide focus as the sole reason for not employing the guidelines as a starting point for applying the § 3553(a) factors to the specific case at hand." Op. 114.

Together with individualized sentencing, avoiding unwarranted disparities (somewhat distinct from uniformity, which is not a statutory purpose of sentencing) is at the heart of the Guidelines. "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." USSG Ch. 1 Part A.1.3. The SRA directs sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). As noted above, when *Kimbrough* condoned the informed-policy-disagreement-based variance in that case, it did not disavow the importance of fairness in sentencing, or of avoiding unwarranted disparities. *See Kimbrough*, 552 U.S. at 108-109. The variance there was not an abuse of discretion,

in part, because it could be squared with 18 U.S.C. § 3553(a)(6) and other sentencing factors. *See id.*; § 3553(a)(6). *Kimbrough* ultimately was consistent with the view that "[t]he *Booker* remedy was designed, and has been subsequently calibrated, to … promote sentencing uniformity while avoiding a Sixth Amendment violation." *Peugh*, 569 U.S. at 550.

In *Kimbrough*, the Court was satisfied with record evidence showing that unwarranted disparity resulted from the applicable GSR as promulgated. *Id.* at 108-110. That GSR, for cocaine-base offenses, was infected by a base-versus-powder disparity that "produces" "disproportionately harsh sanctions, *i.e.*, sentences for crack cocaine offenses 'greater than necessary' in light of the purposes of sentencing set forth in § 3553(a)." *Id.* at 110. So the *Kimbrough* variance to account for a disparity within the guidelines actually serves "the need to avoid unwarranted sentence disparities…." § 3553(a)(6). Recognizing that "it is unquestioned that uniformity remains an important goal of sentencing," the *Kimbrough* court reiterated that "advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'" *Kimbrough*, 552 U.S. at 107-08 (quoting *Booker*, 543 U.S. at 264).

While *Kimbrough* eventually goes on to distinguish the differing institutional strengths between individual courts and the Sentencing Commission, *Rita* highlights

Congress's particular endowment of responsibility on the Commission regarding § 3553(a)(2) factors. "[O]ne of the Commission's basic objectives is to 'assure the meeting of the purposes of sentencing as set forth in [§ 3553(a)(2)].'" *Rita*, 551 U.S. at 348; § 991(b); *see also* Op. 114-115.

As described above, federal sentencing statutes, and the Supreme Court's interpretation of them, require individualized sentencing, which the SRA values above the need for uniformity. This is why the *Booker* remedy permitted that some departures "from uniformity were a necessary cost" of discretionary guidelines. *Kimbrough*, 552 U.S. at 107-08. Hence, the SRA, and thereafter Commission policy, seeks policies and practices reducing *unwarranted* disparities rather than unbridled uniformity. As the Commission has described: "Fair sentencing is individualized sentencing. Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways…." U.S. Sent'g Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004). The Commission report captures what is considered "unwarranted uniformity," that is "similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." *Id.*; *see also Gall*, 552 U.S. at 55 (describing the need both to avoid unwarranted disparities and also unwarranted "similarities" among defendants who are not similarly situated).

Increasing a sentence based solely on a court's perception of a person's community (as encompassing an unusually "violent society") violates both principles: it violates the requirement of individualized sentencing because it permits a focus on the community to overwhelm the required focus on the characteristics of the individual and his offense; and it causes unwarranted disparity to increase a sentence based not on any characteristic of the individual or his offense.

Thus, the reasons for varying here constitute a far cry from *Kimbrough*, which approved of a policy-based variance because the crack-powder disparity itself was leading to unwarranted disparity. *See Kimbrough*, 552 U.S. at 110.

B. Modern and history sentencing laws do not allow more severe sentences driven by unreliable evidence or invidious bases.

Here, increasing sentences based on a racially, ethnically distinct territory of the United States will almost certainly lead to disparities not warranted by any of the statutory purpose of sentencing. A defendant's race, national origin, or ethnicity may play no adverse role in the administration of justice, including at sentencing. *See United States v. Kaba*, 480 F.3d 152, 156 (2d Cir. 2007); USSG § 5H1.10 (certain factors, including national origin, "are not relevant in the determination of a sentence"). A court errs if it rests a sentence decision in any part on national origin. *United States v. Guzmán*, No. 21-1325, 2021 WL 7286956, at *1 (1st Cir. Dec. 14, 2021). "Congress says that sentencing must be 'entirely neutral as to ... national origin.' *Id.* (citing 28 U.S.C. § 994(d)).

As to laws discriminating based on race, even the 1883 Supreme Court, in *Pace*, realized — despite the entrenched racism evident it *Pace*'s now-overruled workaround — that equal protection, at a minimum, "prevent[s] hostile and discriminating … legislation against any person or class of persons … , whatever his race," such that "in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment." *Pace v. State*, 106 U.S. 583, 584 (1883), *overruled by Loving v. Virginia*, 388 U.S. 1 (1967).

Thus, it bears further emphasis that the panel correctly observed that "judges act arbitrarily and capriciously by varying upward from the advisory range based solely on the characteristics of the broader community where the defendant's conduct took place." Op. 115. This is especially so given Puerto Rico's distinct ethnic, cultural, racial, and national character.

III. NO DATA SUPPORTED, OR COULD SUPPORT, THE DISTRICT JUDGE'S DECISION TO INCREASE EMILIANO'S SENTENCE BASED ON HIS PERCEPTION THAT PUERTO RICO IS AN UNUSUALLY VIOLENT COMMUNITY. [Q. 3]

The Court's third set of questions relate to the mode of analysis a district court must use if it were permitted to upwardly vary based solely on "community characteristics." Some of these questions are not implicated in this case because the district court provided no data source at all; nevertheless, the defense endeavors to answer them. We maintain, however, that the record cannot be expanded at the appellate stage and the very need to resort to data underscores the lack of adequate ex-

planation for the court's sentence. It is a foundational truth that this Court is not "a nisi prius court" such that "evidentiary matters not first presented to the district court are … not properly before" it. *United States v. Correa-Torres*, 326 F.3d 18, 25 n. 5 (1st Cir. 2003) (citation omitted). Regardless, though, the sentencing record in this case is devoid of any data, much less notice of any data on which the court intended to rely, so nothing at all supported either (1) the court's statements that the entire island of Puerto Rico was unusually violent, or (2) its conclusion that this purportedly unusual level of violence warranted a higher sentence in this case.

This section addresses the Court's questions in reverse order, for clarity. It first describes the most complete data available on violent-crime statistics, which reflect that both Puerto Rico as a whole, and also the island's major municipalities, have low violent-crime rates when compared with the states on the mainland and their major municipalities. Moreover, even if that were not the case, violent-crime rates in Puerto Rico could not justify higher sentences to work a general deterrent effect because, contrary to popular perception, longer sentences do not in fact deter gun violence. And given the gap between the perception of violence in Puerto Rico and reliable information as to both violent-crime rates and the deterrent effect of longer sentences, if this Court decides to permit upward variances based solely on "community characteristics," it must insist that these sentencing decisions be based on reliable data and subject to a notice requirement and adversarial testing.

A. Statistics show that the per capita rate of violent crime in Puerto Rico (and its major municipalities) is *lower* than most mainland states (and their major municipalities). [Q. 3(d)]

Question 3(d). As this Court has admonished, a "sentence must be based on information [that] has sufficient indicia of reliability to support its probable accuracy." *United States v. Rivera-Ruiz*, 43 F.4th 172, 182 (1st Cir. 2022). Yet here, the judge cited no source of information to support its statement that "crime in Puerto Rico far exceeds the known limits on the mainland," A27, or its conclusion that "gun crimes" are "more serious here than if they had occurred in a less violent society," A28. The judge noted that the prosecutor had "mentioned" these purported facts, A27, but the prosecutor, like the court, did not cite any support for its statement that "[w]e know that Puerto Rico is a hotspot for gun violence." A23-A24.[3]

In other words, the judge provided *no* support for its assertions about the violent-crime rate in Puerto Rico, or how it compares to the rate on the mainland on which the court assumed the Guidelines are based. This is sufficient to establish procedural error, given that the court based an upward variance on these unsupported statements. *See United States v. González-Castillo*, 562 F.3d 80, 83 (1st Cir. 2009).

[3] The PSR reflects no submission of statistical evidence from the government. After receipt of the en banc briefing order, we asked government counsel on September 12, 2022, whether trial counsel submitted any statistics or other information to the probation officer or provided any videos depicting shootings in Puerto Rico to the probation officer. Government counsel neither confirmed nor denied any such submissions.

The sentencing court purported to make no findings of fact about handgun possession links or an abnormal level of crime in Puerto Rico, and the government's argument about atypical violence in Puerto Rico, "on reviewing the entire record" "lacks any supporting evidence whatsoever." *United States v. Texeira-Nieves*, 23 F.4th 48, 59-61 (1st Cir. 2022) (McCafferty, J., concurring).

This lack of development is particularly glaring when *Flores-Machicote* itself instructs that "[s]tatistical evidence that fails to satisfy minimum standards of reliability proves nothing." *Flores-Machicote*, 706 F.3d at 24 (citation omitted). Since trial judges are "presumed to know the law and to apply it," *Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997), the court here knew if it wished to base an upward variance upon factual findings not present in the PSR or parties' arguments, it needed to provide notice and rely on reliable record evidence. *United States v. Zuleta-Álvarez*, 922 F.2d 33, 35-36 (1st Cir. 1990). This leaves no basis to consider factual evidence regarding the court's unsupported, generic statements that crime rates in Puerto Rico's "violent society" called for greater punishment for nonviolent gun possession.

But as it turns out, the statements were not merely unsupported, they were wrong. The federal government's own violent-crime statistics reflect that, in 2019, the violent-crime rate of the Ponce metropolitan statistical area, in which this offense

occurred, was 165 per 100,000, a rate lower than the Boston-Cambridge-Newton metropolitan statistical area.[4]

Geographical Area	Population	Violent Crime Rate (per 100,000)
Boston-Cambridge-Newton (MSA)	4,880,689	277.7
Ponce, PR (MSA)	215,295	165.4
Massachusetts	6,892,503	327.6
Puerto Rico	3,193,694	202.9

Table 1. Violent crime rate and population from FBI UCR 2019 dataset (table 4 and 6). Violent crime rates as defined by the FBI UCR dataset (2019) are a combination of murder and non-negligent manslaughter, rape, robbery, and aggravated assault.

* * *

No doubt, violent-crime statistics (like all other statistics) cannot be accepted uncritically; experts sometimes disagree about the reliability of various sources of data. But the data cited here come from the FBI's Uniform Crime Reporting Program ("UCR"). That is, it is the federal government's own data — and the most reliable crime data we have, despite its omission of several major U.S. metropolitan areas —

[4] For original source data, *see* DOJ, FBI Uniform Crime Reporting Program ("UCR"), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-6 (last visited Oct. 20, 2022).

that reflects that in 2019, the violent-crime rates for the major municipalities in Puerto Rico were lower than most other major municipalities in the United States:

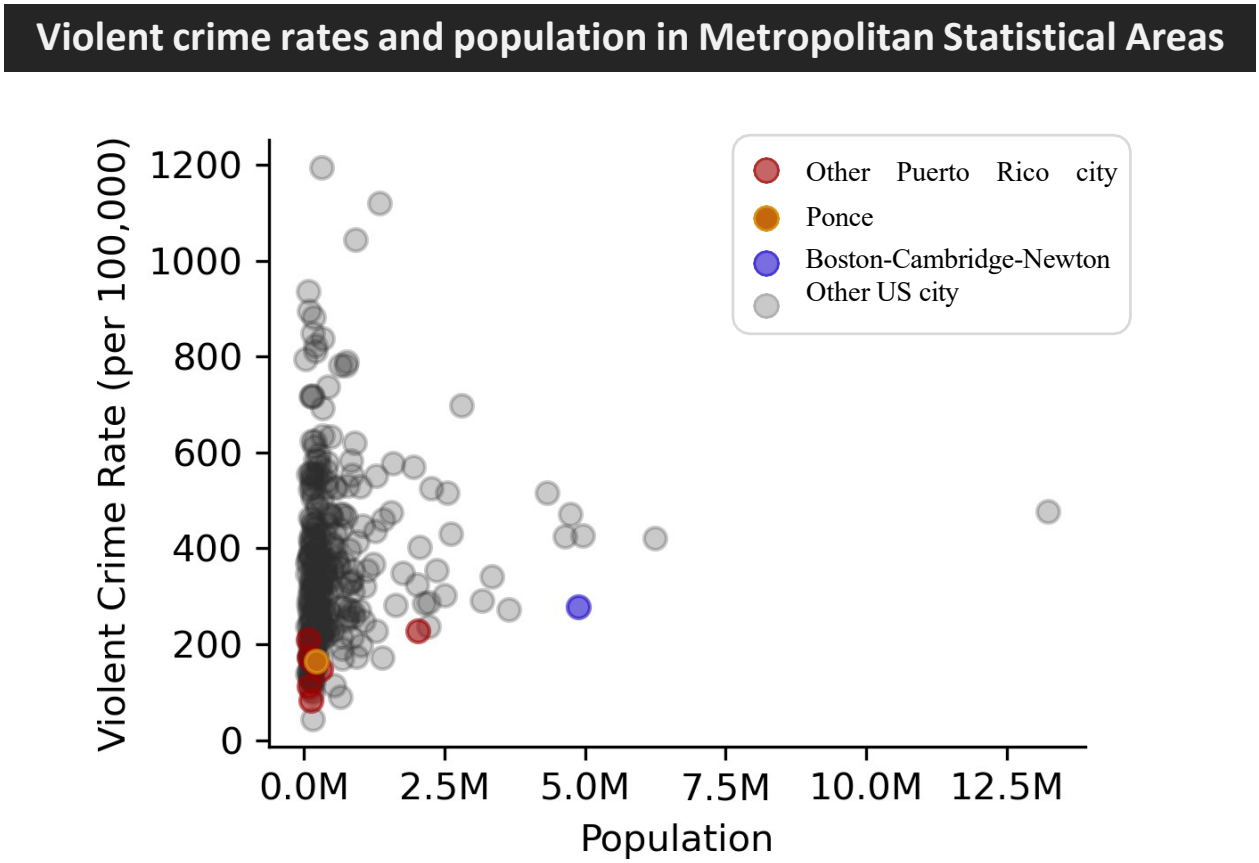

Figure 1. Violent crime rates as defined by the FBI UCR dataset (2019) are a combination of murder and nonnegligent manslaughter, rape, robbery, and aggravated assault. The data used for these figures were extracted from the FBI UCR 2019 dataset (table 6). FBI data were incomplete and missing reports from some major cities including but not limited to: New York City, St. Louis, Pittsburgh, Philadelphia, Chicago, Dallas, and Houston.

* * *

Similarly, if the Court zooms out to examine the violent-crime rate on the "entire island of Puerto Rico," which was the judge's stated parameter, A28, the rate is again lower than the states on the mainland:

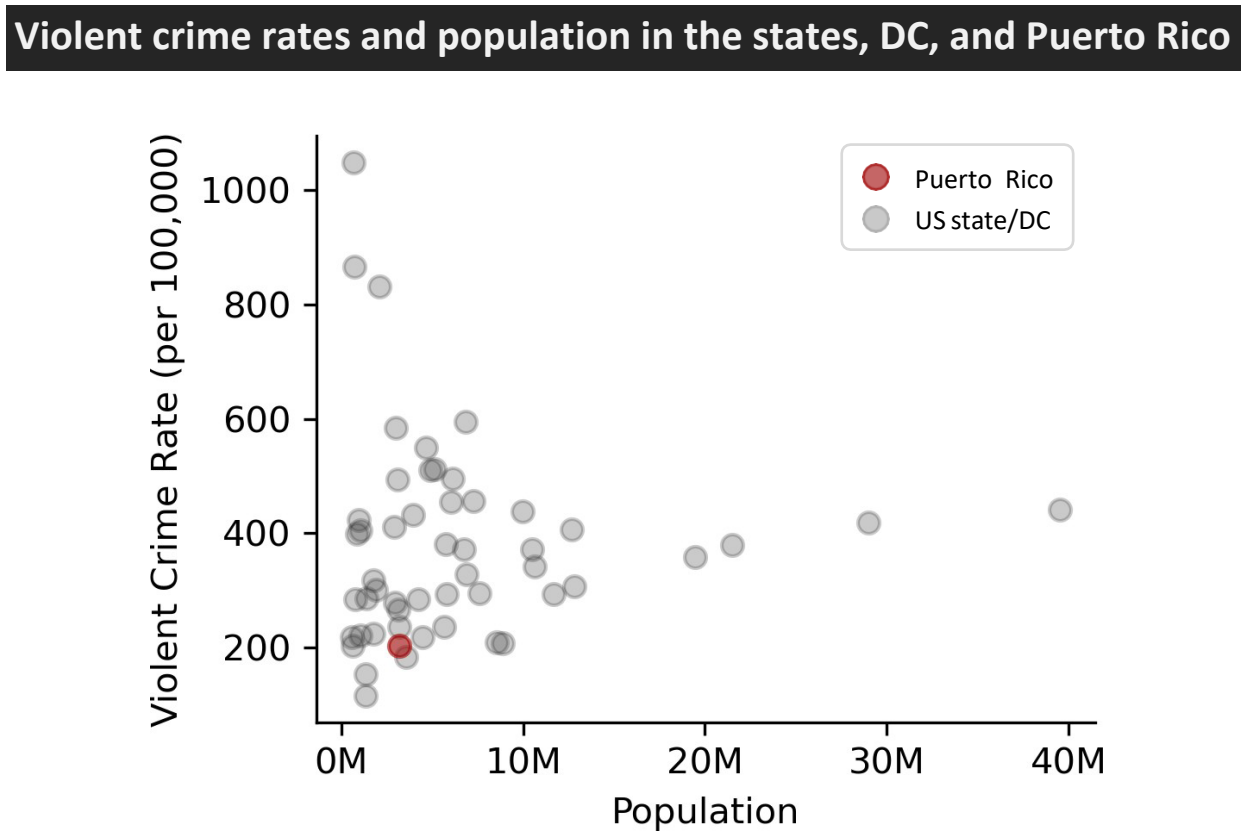

Figure 2. Violent crime rates as defined by the FBI UCR dataset (2019) are a combination of murder and nonnegligent manslaughter, rape, robbery, and aggravated assault. The data used for these figures were extracted from the FBI UCR 2019 dataset (table 4). FBI data were incomplete and missing reports from some major cities including but not limited to: New York City, St. Louis, Pittsburgh, Philadelphia, Chicago, Dallas, and Houston.

* * *

To be clear: Puerto Rico's violent-crime rate is among the lowest when compared to the states on the mainland. Thus, whatever the source of the judge's statement that "crime in Puerto Rico far exceeds the known limits on the mainland," A27, it was not data.[5] As discussed above, this Court must guard against judges

[5] Had data been presented, Emiliano would have welcomed the opportunity to test it and develop the material presented here, but the lack of development renders a remand for such purposes unnecessary. And since Emiliano has served more than a GSR sentence and moved home to Maryland pending resolution of the appeal, "the

sentencing based on anecdote, emotion, or recent high-profile events. Further, as argued below, this Court should insist that any crime data a sentencing court intends to rely on to increase a sentence be subject to the same rigorous requirements of reliability, adversarial testing, notice, and opportunity to contest as other information on which sentencing courts rely on to increase a sentence.

B. Regardless of data, there is no cause to impose harsher sentences in Puerto Rico for firearm and machinegun possession compared to other districts. [Q. 3(d)]

Question 3(d), cont'd. As set forth above, neither Puerto Rico as a whole, nor Ponce in particular, has a higher violent-crime rate than most other states and metropolitan areas. But, *even if they did*, this would not show that Puerto Rico requires harsher treatment for firearm and machinegun possession compared to other districts because the judge's underlying assumption here — that higher sentences generally deter violent crime — is faulty. Despite decades of studying the relationship between higher sentences and a general deterrent effect, researchers have failed to find a causal relationship.

The Court has asked whether violent-crime statistics in Puerto Rico "show that upwardly variant sentences are having a deterrent effect." Not only is there no evidence to support such a finding regarding Puerto Rico, there is no evidence sup-

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prejudice to [Emiliano] of starting from scratch is obvious." *United States v. Vélez-Vargas*, 32 F.4th 12, 15 (1st Cir. 2022).

porting such a finding *anywhere*.[6] Indeed, for decades, researchers have attempted, and failed, to document the intuitive causal relationship between sentence length and general deterrence — the idea that we can "send a message" by imposing higher sentences.[7] Even the U.S. Department of Justice, National Institute of Justice, has acknowledged publicly that "[i]ncreasing the severity of punishment does little to deter crime."[8] It explained: "Laws and policies designed to deter crime by focusing

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[6] Jay Gormley et al., *Report: The Effectiveness of Sentencing Options on Reoffending*, Sentencing Council 22-25 (2022); *see also* E. Berger and K. Scheidegger, *Sentence Length and Recidivism: A Review of the Research* (June 2022) https://ssrn.com/abstract=3848025 or http://dx.doi.org/10.2139/ssrn.3848025 ("Overall, the effect of incarceration length on recidivism appears too heterogeneous to draw universal conclusions, and findings are inconsistent across studies due to methodological limitations."); Nat'l Res. Council, The Growth Of Incarceration In The United States: Exploring Causes And Consequences 90 (J. Travis et al., eds. 2014), http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf ("insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects… [n]early every leading survey of the deterrence literature in the past three decades has reached the same conclusion."); D. S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199, 201 (2013) ("[T]here is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs."); G. Kleck & J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a "Collective Wisdom"?*, 59 Crime & Delinq. 1006, 1031-33 (2013); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006).

[7] I. Piliavin et al., *Crime, Deterrence, and Rational Choice*, 51 Amer. Sociological Rev. 101 (1986).

[8] DOJ, NIJ, Five Things About Deterrence (2016), https://nij.ojp.gov/topics/articles/five-things-about-deterrence. This comes from the NIJ's "Five Things" Series, which "distills what we know from years of rigorous scientific inquiry." NIJ "Five Things Series, https://nij.ojp.gov/library/nij-five-things-series.

mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes." *Id.*

This is the consensus position not only with respect to crime generally, but also for gun crimes specifically. *United States v. Lawrence*, 254 F. Supp. 3d 441, 444 (E.D.N.Y May 23, 2007). In *Lawrence*, after expressing the need to impose a relatively long prison term to achieve general deterrence, the district court continued sentencing in a gun case to hear an expert witness on the question whether increasing the length of incarceration had a general deterrent effect. At that hearing, Professor Jeffrey Fagan, Ph.D., Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and a Professor in the Department of Epidemiology at the Mailman School of Public Health at Columbia University, concluded — without contradiction from a government expert — that "the deterrent effect of criminal sanctions for gun violence are specific to the risks of detection, not to the severity of punishments." *Id*. at 443; *see also* Add. 1-15 (Def's Exh. B (Report of Jeffrey Fagan, Ph.D.); Add. 16-114 (Reporter's Transcript, Sentencing, February 28, 2017))).[9]

Professor Fagan explained that there is little evidence that longer sentences have a deterrent effect on crime, and studies have shown that there is no marginal effect on the crime rate for each additional year of incarceration in felony cases.

[9] Credentials and Curriculum Vitae of Professor Jeffrey Fagan available here: https://www.law.columbia.edu/faculty/jeffrey-fagan (Click "Download full CV").

Add. 3, 6-8; Add. 27. In cases specifically involving enhanced federal sentences for gun crimes, the evidence shows that there is no general deterrent effect from additional years of incarceration. Add. 3, 8-12; Add. 27-36.[10] Professor Fagan described two studies that examined the general deterrent effects of Project Exile, a federal prosecution effort to divert prosecutions for firearm cases into federal court where penalties were higher. Add. 8; Add. 27-36. There were even billboards projecting gun-offense punishment information placed in the neighborhood with the highest rate of "gun crimes." Add. 35-36. And still, "[e]ach study concluded that there is no evidence of a general deterrent effect of lengthy sentencing enhancements that impose additional years of incarceration for crimes committed with firearm." Add. 9; Add. 28. Professor Fagan testified that some research suggests that the prospect

[10]Citing S. Raphael & J. Ludwig, *Prison Sentence Enhancements: The Case of Project Exile, in* Evaluating Gun Policy 251 (J. Ludwig & P. J. Cook, eds., 2003); R. Rosenfeld, et al., *Did* Ceasefire, Compstat, *and* Exile *Reduce Homicide?*, 4 Criminology & Pub. Pol'y 419 (2005); C. Loftin & D., *"One with a Gun Gets You Two": Mandatory Sentencing and Firearms Violence in Detroit,* 455 Annals Am. Acad. Pol. & Soc. Sci. 150 (1981); C. Loftin, M. Heumann & D. McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control,* 17 L. & Soc'y Rev. 287 (1983); C. Loftin & D. McDowall, *The Deterrent Effects of the Florida Felony Firearm Law,* 75 J. Crim. L. & Criminology 250 (1984); D. McDowall, C. Loftin & B. Wiersema, *A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crime,* 83 J. Crim. L. & Criminology 378 (1992); J. J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin, in* Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom 269 (S. Raphael & M. Stoll eds., 2009); T. A. Loughran, et al., *Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders,* 47 Criminology 699 (2009).

of longer sentences might deter drunk-driving or tax crimes, because of the rational cost-benefit analysis the individual might engage in before engaging in that type of conduct. But "[w]hen it comes to violent crime, there is no reliable evidence of a general deterrent effect." Add. 65. And as mentioned above, when a court or the government singling out the Puerto Rico population for heightened punishment, such actions likely implicate an invidious rationale at work. *See supra* pp. 19-20.

Thus, even if Puerto Rico had comparatively high rates of violent crime — it does not — that would not justify community-focused upward departures.

C. The appropriate parameters for a district court to rely on in imposing an upward variance based on a "community characteristic" would depend on the stated rationale for the variance. [Q. 3(a)]

Question 3(a). The court asks what parameters — state/Commonwealth, county, city, or town — must a sentencing court rely on in imposing an upward variance based on a "community characteristic." If this Court approves of courts increasing sentences based on community characteristics, the appropriate parameter may vary, depending on the district court's reasoning regarding the characteristic's significance and its relationship to a valid sentencing factor. But whatever parameter a court would rely on, if it is attempting to draw *comparisons* between communities, it must take care that it is comparing like communities. And indeed, the determination of whether communities are like or not may itself depend on the characteristic at issue and the court's rationale — again, its theory regarding the characteristic's

significance and its relationship to a valid sentencing factor. Without identifying both the specific community characteristic and also the rationale for imposing a higher sentence based on that characteristic, it is impossible to articulate in the abstract what the parameters should be.

Here, the judge's claim was that residents of a more violent community (Puerto Rico) should receive longer sentences in order to deter others in the community. As explained, both assumptions underlying this claim are wrong: Puerto Rico is not more violent than other federal districts — not in the District of Puerto Rico generally, not in Ponce in particular — and there is no support for the notion that longer sentences deter others from committing violent or firearm offenses. Thus, regardless of what might be thought to be an appropriate parameter, no finetuning of the parameter to define the community could correct the judge's error here.

D. In determining whether to increase a sentence based on "community characteristics," the court may rely only on reliable information. [Q. 3(b), 3(c)]

Question 3(b)-(c). A sentencing court may not increase a sentence unless its information sources — including data — are reliable and subject to a notice requirement and adversarial testing. A "sentence must be based on information [that] has sufficient indicia of reliability to support its probable accuracy." *Rivera-Ruiz*, 43 F.4th at 182 (internal quotation marks and citations omitted). "This fundamental precept is not only explicitly set forth in the Guidelines, *see* USSG § 6A1.3(a), but also

rooted in due process, which guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect." *Id.* (cleaned up) (citing *United States v. Watts*, 519 U.S. 148, 156-57 (1997) (per curiam); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *Colón-Maldonado*, 953 F.3d at 10; *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993); *United States v. Berzón*, 941 F.2d 8, 18 (1st Cir. 1991)). Even on plain error review, this Court will vacate a sentence based on a non-existent material fact. *See, e.g.*, *González-Castillo*, 562 F.3d at 83. As this Court recently noted, "the unifying principle in any context is that information used to 'form the basis for a longer term of imprisonment than the court would have [otherwise] imposed' must be sufficiently reliable." *Rivera-Ruiz*, 43 F4th at 182 & n. 6 (quoting *Castillo-Torres*, 8 F.4th at 71). And this fundamental principle holds regardless of whether a sentencing court is considering a personal characteristic of a criminal defendant or a "community characteristic."

It is the adversarial process that ensures the sentencing court relies on accurate, reliable information. That process is protected by USSG § 6A1.3 ("When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."); by the Rules of Criminal Procedure, Fed. R. Crim. Proc. 32(i); and by the Constitution's Due Process Clause. *Rivera-Ruiz*, 43 F.4th at 182.

Most fundamentally, a defendant has a right to notice of information on which the district court intends to rely in imposing sentence and a reasonable opportunity to contest that information. *See United States v. Rondón-García*, 886 F.3d 14, 21 (1st Cir. 2018) ("a defendant must be given adequate notice of those facts [on which the district court intends to rely] prior to sentencing and the court must timely advise the defendant that it heard or read, and was taking into account those facts") (cleaned up); *see also Berzón*, 941 F.2d at 18 (recognizing that Rule 32's requirement that counsel be allowed to comment on any "matters relating to an appropriate sentence" would be meaningless without notice of what those matters are); *United States v. Acevedo-López,* 873 F.3d 330, 342 (1st Cir. 2017) (holding that even where Rule 32 does not apply directly, a "defendant must be provided a meaningful opportunity to comment on the factual information on which his or her sentence is based") (citation and internal quotation marks omitted).

A court must "afford the defendant a fair opportunity to examine and challenge" information used to increase his sentence. *Id.* This Court has applied these requirements to crime statistics as with any other factual allegations. *Id.* (holding district court erred in relying on public corruption statistics without prior notice but finding error harmless). In *United States v. Pantojas-Cruz*, 800 F.3d 54 (1st Cir. 2015), however, this Court appeared to suggest that a district court may rely on community-crime statistics without prior notice if the court relies on such statistics

to vary on the "garden variety considerations" of community-based factors and the need for deterrence. *Id.* at 60-61 & n.4. This Court should use this opportunity to correct any suggestion that notice is not required when the sentencing court intends to vary upward based on its perceptions regarding the violent-crime rate. As this case shows, perceptions do not always match reality.

The district court's (mis)perception in this case — that "crime in Puerto Rico far exceeds the known limits on the mainland" — has become something of a "garden variety" consideration for an upward variance in Puerto Rico. This does not mean that it can be excepted from statutory and constitutional rules. It is only by requiring that crime data be reliable, like all other information on which a court relies at sentencing, that this Court can honor its long-standing insistence that a defendant be sentenced only on reliable information. That is, the district court must cite data (rather than rely on emotion, anecdote, or the most recent high-profile crime), give the defendant notice of the data on which it intends to rely, and subject the data to adversarial testing.

Professor Fagan's expert testimony in *Lawrence* illustrates that in the adjacent context of the relationship between sentence length and general deterrence, even entrenched misapprehensions have the opportunity to be corrected when subject to adversarial testing. After personally probing the witness about his conclusions and the bases for them, the district court in that case ultimately expressed regret that "for

quite a few years" it had been sentencing under the "misapprehension" that a heavier sentence would deter others. Add. 70. "I think, all tol[]d, you can say that tens of thousands of extra months or days in prisons was served as a result of the misapprehension." Add. 70.

This case reveals a gap between perceived and actual violent crime rates in Puerto Rico as well as misapprehension of the relationship between sentence length and general deterrence. These gaps make notice of, and an opportunity to contest, the information on which a court intends to increase a sentence on this basis even more important.

E. Not only was the judge's sentencing in this case not based on reliable data, the court illustrated as much with inflammatory material that was irrelevant to Emiliano's case. [Q. 3(a)]

Question 3(a), cont'd. The sentencing court's statements about the prevalence of violent crime in Puerto Rico, which it used to justify an above-guideline sentence for a first-time defendant, appears to have been based on no data at all, much less reliable data. Certainly, the court did not describe any data source. And moreover, as discussed, the most reliable data available — FBI crime data — indicates the opposite of what the court said. Thus, the record reveals no basis for this Court to find that the "community characteristics" used to upwardly vary from the Guidelines range in this case were based on data that was accurate or reliable, as opposed to anecdotes, emotions, or biases.

What's more, the judge effectively demonstrated that his perceptions about Puerto Rico were based on anecdote rather than data. In a case that did not involve any violent crime, and a defendant with no criminal history, the court referenced "murders" that were occurring "at all hours of the day, in any place on the island." A27. He granted that Emiliano's case involved no such things but noted that his crime involved a machine gun, and then explained that there'd been a "recent massacre which occurred at the Ramos Antonini Public Housing [Complex] where six persons were machine-gunned to death in a matter of seconds." A28-A30. And then, remarkably, the court proceeded to actually play a video of those murders. A30. Murders that Emiliano had no connection to, which occurred in a public housing complex in the San Juan area almost two hours' driving distance from where Emiliano lived without a car.[11] The record has never reflected how the judge obtained the video, but it was available on YouTube, in an all-caps posting entitled "TERROR AND WAR IN PUERTO RICO GANGS OUT OF CONTROL," *available at* https://youtu.be/4Ibsg2icjZU (last visited Oct. 21, 2022); *see also* Appendix (CD Exhibit).

This publication, at Emiliano's sentencing hearing, of an inflammatory video of a mass murder that had absolutely nothing to do with Emiliano underscores that

[11] *See* https://www.google.com/maps (Search for driving directions from Coto Laurel, Ponce, Puerto Rico to Recidencial Ernesto Ramos Antonini, San Juan, Puerto Rico.).

the district court did not base its ideas about "community characteristics" on information — data — that was reliable or accurate. Reversal would thus be required regardless what information this Court determines is appropriate for consideration, what sort of testing it should undergo, and what notice must be given.

IV. THIS COURT'S PRECEDENT IS CONSISTENT WITH SUPREME COURT PRECEDENT AND IS NOT INCONSISTENT WITH SIBLING CIRCUITS. [Q. 4]

Variance-vacating cases like *Flores-González*, *Rivera-Berríos* and *United States v. Carrasquillo-Sánchez*, 9 F.4th 56, 61 (1st Cir. 2021), are not in tension with either Supreme Court precedent or *Flores-Machicote*, and other geographic-disparity cases are distinguishable.

As discussed, Supreme Court precedent requires an individualized assessment based on the facts presented. *See supra* pp. 5-9, 11-14. This Court's cases vacating upwardly variant sentences based on a court's personal perceptions of violence in the community and speculative, non-case-specific deterrence theories honors this higher precedent by ensuring that purported community characteristics not overwhelm the SRA's required focus on the individual. *See supra* pp. 5-9, 11-14.

Flores-Machicote itself reflects this individualized sentencing requirement: while "the incidence of particular crimes in the relevant community appropriately informs and contextualizes the relevant need for deterrence," "[a] sentencing judge's resort to community-based characteristics does not relieve him or her of the obligation to ground sentencing determinations in case-specific factors." *Flores-*

Machicote, 706 F.3d at 23-24. *Flores-Machicote* is thus best read as a cautious approval of "community-based and geographic factors" consideration at sentencing — a "limited grant of authority" that courts must not "stray beyond." *United States v. Bermúdez-Meléndez*, 827 F.3d 160, 166 (1st Cir. 2016).

And *Flores-Machicote* is easily distinguished. *Flores-Machicote* and also *Politano*, unlike here, were carried by facts supporting the sentencing courts' conclusions that each defendant's criminal history was underrepresented. *See Flores-Machicote*, 706 F.3d at 21-22; *United States v. Politano*, 522 F.3d 69, 71-72, 74-75 (1st Cir. 2008). *Flores-Machicote*, in sum, endorses the view that sentencers may consider community concerns, so long as those concerns are not exalted over individual ones and are instead grounded on case-specific factors. *See* Op. 115 n.13; *United States v. Rivera-González*, 776 F.3d 45, 50 (1st Cir. 2015).

Far from straying from Circuit precedent, *Rivera-Berríos*, *Carrasquillo-Sánchez*, and the panel decision in this case correctly followed and applied *Flores-Machicote*. Applying the "case-specific factors" requirement to the facts therein, *Rivera Berríos* scoured the record for a "case-specific nexus" but found it "totally lacking." *Rivera-Berríos*, 968 F.3d at 136 (citation omitted).[12] Likewise,

[12] The *Rivera-Berríos* decision also answered with an emphatic "no" a question *Flores-Machicote* left unaddressed: whether a sentencer could "rely *exclusively* on community characteristics" to vary upward. Op. 117.

Carrasquillo-Sánchez noted that the lower court had considered generic violence concerns "unmoored from any individual characteristics of either the offender or the offense" and only then concluded that concerns about local crime could not "serve as building blocks for an upward variance." 9 F.4th at 61 (citation and quotation marks omitted). Like those decisions, Emiliano's case lacks an evidentiary record of a case-specific nexus to aggravating community factors or other aggravating circumstances and so the panel reached the correct outcome under both *Rivera-Berríos* and *Flores-Machicote*. Op. 116.

Nor do these cases conflict with Supreme Court precedent. The *Gall* Court held that "[i]n reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may … take the degree of variance into account and consider the extent of a deviation from the Guidelines." *Gall*, 552 U.S. at 47. *Gall* further requires a sentencing court to "consider the extent of the deviation [from the guideline range] and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50. To the Supreme Court, it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one," and that sentencers ought to "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. The practice of policing arbitrariness seen in *Rivera-Berríos* and its progeny also coheres with *Kimbrough*'s observation that

"closer review" is warranted when a variance is not grounded in the district court's "discrete institutional strengths." *Kimbrough*, 552 U.S. at 109; *see also United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008).

As for other circuits' decisions, Mr. Flores disagrees with the conclusions reached in *Cavera* and *Hatch*. But this Court need not split with them here: in each instance the district court did not rely exclusively on community characteristics — each court relied primarily on the characteristics of the offenses and offenders. Those cases involved the illegal trafficking of over a dozen firearms from states with lax gun laws into urban areas with stringent gun laws, and the courts noted that illegally trafficked firearms were involved disproportionately in other crimes.

Cavera, a split decision criticized by then-Circuit Judge Sonia Sotomayor, did not hold that *simple* gun possession had a case-specific nexus to a region or population. Instead, the main opinion observed that accounting for a "locality-based" consideration in sentencing was not, in and of itself, suspect, since "[t]he environment in which a crime was perpetrated may, in principle, inform a district court's judgment as to the appropriate punishment in any number of ways." *Cavera*, 550 F.3d at 195. It also acknowledged the need for specificity in doing so: "the more specifically in the purposes of sentencing a district court's rationale is grounded, the more likely it is to survive appellate inspection." *Id.* at 195.

Because the circuit judges did not reach a consensus on the adequacy of one of the grounds offered by the sentencing court for its upward variance (community-based concerns), the court's holding in the case relied only on the second ground: deterrence. *Id.* at 196. It concluded that the sentencing court was allowed to apply a six-month upward variance to a firearms trafficker illegally selling guns bound for New York City since the enforcement of strict local gun laws was likely to make gun trafficking more profitable there, resulting in a need for a correspondingly higher penalty for purposes of deterrence. *Id.* Critically, the main opinion emphasized that, in crafting its sentence, the district court had "reached an individualized assessment." *Id.* at 197. Since the facts in that case provided a nexus between the locality concerns and the particular offense, the approach taken in *Cavera* is perfectly consistent with the approach this Court has taken in *Flores-Machicote*, *Rivera-Berríos* and *Carrasquillo-Sánchez*.

Likewise, in *Hatch* we see a defendant with ties to a "large-scale" Chicago gun dealer who purchased, over three trips, firearms in neighboring Indiana to sell in Chicago. *United States v. Hatch*, 909 F.3d 872, 874 (7th Cir. 2018) (per curiam). Of the 17 guns Hatch trafficked into Chicago, five were recovered from prohibited persons: "felons" and a juvenile. *Id.* At sentencing, the court explained its variance in case-specific terms, citing unchallenged statistics showing that most local homicides involved illegal guns and "21% of illegal guns recovered in Chicago are trace-

able to Indiana." *Id.* The court also noted Hatch's failure to accept responsibility fully for the offense because, even after pleading guilty, he "denied knowing what the guns were for." *Id.*

Unlike cases involving offenders introducing illegal guns into urban areas with stringent gun laws, the offense here was simple prohibited-firearm possession by a non-violent defendant who accepted responsibility fully, and there is no allegation that defendant used the firearm in any additional criminal conduct. The cases, in short, are distinguishable, and this Court's precedent does not conflict with that of the Second Circuit, the Seventh Circuit, or Supreme Court precedent.

V. THE VARIANT SENTENCE WAS ALSO SUBSTANTIVELY UNREASONABLE.

For reasons already argued, the upwardly variant sentence was substantively unreasonable. *See* AOB 22-26. Though the issue was not reached in the panel opinion, Op. 118, this Court should hold that the district court's sentence was substantively unreasonable.

CONCLUSION

The Court should vacate and remand the sentence here to a different judge with instructions that the Court sentence Emiliano consistent with the § 3553(a) factors and the sentencing framework requiring an individualized sentence free from improper factors.

RESPECTFULLY SUBMITTED on October 23, 2022.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the 45-page limit set by the Court's briefing order.

2. This brief — using a proportionally spaced typeface and 14-point Times New Roman font — complies with Fed. R. App. P. 32(a)(5)-(a)(6)'s requirements.

October 23, 2022

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CERTIFICATE OF SERVICE

I ECF-filed this Supplemental En Banc Brief (Corrected), notifying the parties, including government counsel.

October 23, 2022

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No. 19-2204

In the United States Court of Appeals for the First Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

EMILIANO EMMANUEL FLORES-GONZÁLEZ,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Puerto Rico
Crim. Case No. 19-cr-335-FAB
Hon. Francisco A. Besosa, U.S. District Judge

ADDENDUM TO APPELLANT'S SUPPLEMENTAL EN BANC BRIEF

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INDEX

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. MURRAY LAWRENCE, also known as "Shawnie Pooh," Defendant.	No. 16-CR-243 Judge Jack B. Weinstein

REPORT OF JEFFREY FAGAN, Ph.D.

I. OVERVIEW

A. Qualifications

1. I am the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and a Professor in the Department of Epidemiology at the Mailman School of Public Health at Columbia University. My curriculum vitae are attached in Exhibit A.

2. I am an elected Fellow of the American Society of Criminology. I am a former member and past Vice Chair of the Committee on Law and Justice of the National Research Council. I was a former member of the National Consortium on Violence Research at Carnegie Mellon University. I was a founding member of the MacArthur Research Network on Adolescent Development and Juvenile Justice. I am past Chair of the National Policy Committee of the American Society of Criminology. I served as Executive Council (elected) to the American Society of Criminology. I served on peer review panels for the National Institute of Mental Health and the National Science Foundation. I have served on two Scientific Review Committees of the National Research Council.

3. My research has been published in the leading journals in criminal law, sociology and criminology, including the *Journal of Empirical Legal Studies,* the *Columbia Law Review*, the *University of Chicago Law Review*, the *Journal of Quantitative Criminology*, the *Fordham Urban Law Journal*, *Criminology*, *Criminology & Public Policy,* the *American Sociological Review*, the *Lancet*, and *PLOS One.* I have

published over 100 articles in peer reviewed journals, and numerous chapters in edited volumes.

4. I am past editor of the *Journal of Research in Crime and Delinquency.* I currently serve on the editorial board of the *Journal of Criminal Law and Criminology*, and have served on the editorial boards of numerous professional and academic journals in criminology including *Crime & Justice*, the *Journal of Quantitative Criminology* and *Criminology.* My research has been supported by the National Institute of Justice, the National Institute of Mental Health, the National Institute on Drug Abuse, the National Science Foundation, the Office of Juvenile Justice and Delinquency Prevention, the Centers for Disease Control, the Rockefeller Foundation, the John D. and Catherine T. MacArthur Foundation, the Annie E. Casey Foundation, the Russell Sage Foundation, the Robert Wood Johnson, the Open Society Foundations, and the Russell Sage Foundation

B. Issues and Questions Addressed

1. Issues to be addressed

In this Report, I provide analysis of the empirical research evidence on deterrence to address two principal claims by the Government.

a. The Government claims that lengthening the sentence imposed on Murray Lawrence will have a specific deterrent effect on Mr. Lawrence that will reduce the likelihood that he will engage in violent crime and gun violence upon his release from incarceration.

b. The Government also claims that lengthening the sentence imposed on Murray Lawrence by including additional years in prison will deter other persons from engaging in gun crimes and violence in the future.

2. Specific questions to be addressed

To address these issues, I provide analysis of the theory and research on the following questions:

a. What is the theory of general deterrence?

b. What are the components and processes in general deterrence?

c. What is the theory of specific deterrence?

d. What are the elements and processes of specific deterrence?

e. Is there a consensus in empirical research on the effectiveness of general and specific deterrent effects of lengthy periods incarceration on future criminal behavior?

f. Is there a consensus that lengthy sentences for gun crimes have a deterrent effect on crime generally or on gun crime?

g. How do the theories and evidence apply to Murray Lawrence and other members of the community?

h. What interventions are available in New York to prevent future crime by Murray Lawrence and others in the community?

C. Summary of Opinions

a. The deterrent effect of criminal sanctions are specific to the risks of detection, not to the severity of punishments.

b. There is little evidence that longer sentences have a deterrent effect on crime, and studies have shown that there is no marginal deterrent effect on the crime rate for each additional year of incarceration in felony cases.

c. Specifically in cases involving enhanced federal sentences for gun crimes, the evidence shows that there is no general deterrent effect from additional years of incarceration.

d. The imposition of a longer sentence in Mr. Lawrence's case will have no marginal general deterrent effect beyond the incarceratory period he has already served.

II. RESPONSES

1. What is general deterrence?

a. Together with retribution, incapacitation and rehabilitation, deterrence is one of the essential justifications for criminal punishment.[1]

b. General deterrence, as opposed to specific deterrence, is the threat or use of punishment intended to discourage others from committing crimes. "The theory of deterrence is predicated on the idea that if state-imposed sanction costs are

[1] Schulhofer, Stephen A., et al., Criminal Law and Its Processes, 10th ed. (2017).

sufficiently severe, criminal activity will be discouraged, at least for some."[2] General deterrence, then, is the imposition of sanctions on one person to demonstrate to the rest of the public that there are costs to criminal acts that they can expect to receive, thereby to discourage criminal behavior among the general population and especially among would-be offenders.[3]

c. The main components of general deterrence are the likelihood of punishment and the severity of punishment.

d. In the federal criminal justice system, judges are obligated to consider general deterrence in their sentencing, alongside the other basic purposes of criminal punishment.[4]

2. What are the components of general deterrence?

a. A "rational offender" will decide whether or not to commit a crime by weighing the benefit of not committing a crime with the benefit of committing the crime without being caught and the benefit of committing a crime that results in being caught and punished.[5]

b. "In such a formulation, the individual chooses to commit a crime if and only if the following condition holds: … [the] crime is worthwhile so long as its expected utility exceeds the utility from abstention." [6]

[2] Apel, R. and Nagin, D., "Deterrence," In *Emerging Trends in the Social and Behavioral Sciences* (Robert Scott and Stephen Kosslyn, eds.) 1,1 (2015).

[3] *See* Blumstein, A., Cohen, J., and Nagin, D, "Report of the Panel on Research on Deterrent and Incapacitative Effects," In *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington D.C.: National Academy of Sciences, 1978); Nagin, Daniel S., "Crime rates, sanction levels, and constraints on prison population," 12 *Law and Society Review* 341-366 (1978).

[4] *See* S. 668 (98th): Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984). The Act created the U.S. Sentencing Commission, and it directed the Commission to establish sentencing policies that meet "the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code," 28 U.S.C. § 991(b)(1), including "to afford adequate deterrence to criminal conduct."

[5] Becker, Gary, "Crime and Punishment: An Economic Approach," 76 Journal of Political Economy 169-217 (1968).

[6] Chalfin, Aaron and McCrary, Justin, "Criminal Deterrence: A Review of the Literature," *Journal of Economic Literature 1,1* (2014).

c. Becker concludes that: "(1) the supply of offenses will fall as the probability of apprehension rises, (2) the supply of offenses will fall as the severity of the criminal sanction increases and (3) the supply of offenses will fall as the opportunity cost of crime rises."[7]

d. Robinson and Darley show that deterrence requires knowledge by a would-be offender of the law that prohibits an act (legal knowledge), and that the offender understands the risks of detection and the risks of punishment. Their formulation also requires that an actor be rational in weighing the benefits of crime compared to the costs of punishment and the risks of detection (rational choice), and that the perceived benefits outweigh the costs (perceived net benefit hurdle).[8]

e. While Robinson and Darley are generally optimistic about the prospects of deterrence for most crimes, they find that there is no deterrent effect for murder. And with respect to felony murder, they report that a felony-murder rule may inhibit non-fatal robberies, the presence of a felony murder statute tends to increase the incidence of fatal robbery-murders.[9]

3. What is the theory of specific deterrence?

a. Where general deterrence refers to the effect of criminal punishment on potential offenders, specific deterrence refers to the effects of criminal punishment on those who have committed crimes and received punishment. The goal of specific deterrence is to persuade persons through the actual experience of punishment who experience punishment to desist from further criminal behavior.[10]

b. Offenders are thought to be deterred from further crime if the punishment they receive is swift (celerity), certain (highly likely) and severe (lengthy periods of confinement and attenuated liberty.[11]

[7] *Id*. at 7.

[8] Robinson, Paul and Darley, John M. "Does the Law Deter? A Behavioral Science Investigation," 24 *Oxford Journal of Legal Studies* 173-205 (2004).

[9] *Id*. at 203.

[10] Andenaes, Johannes, Punishment and Deterrence, University of Michigan Press, Ann Arbor (1974).

[11] Marchese di Beccaria, Cesare, *An Essay on Crimes and Punishments*, Philip H. Nicklin, 1819.

4. What are the elements and processes of specific deterrence?

a. Specific deterrence requires that the offender perceive sanction threats in response to her or his criminal activity.

b. Sanction threat perceptions include both the risk or certainty (threat) of punishment and the consequences of that punishment. These perceptions and evaluations of threat and severity are modified in response to an offender's punishment experiences relative to his criminal activity. Specifically, an offender's involvement in criminal activity will depend on the consequences that may or may not follow from this criminal activity. The model is premised on the idea of "belief updating." That is, rather than being static, sanction threat perceptions continuously evolve in response to ongoing experiences of the actor.[12]

5. Is there a consensus in empirical research on the deterrent effects of lengthy periods incarceration on future criminal behavior?

a. Two factors complicate efforts to estimate the general deterrent effects of incarceration. First, it is difficult to disentangle the effects of incapacitation from the deterrent effects of incarceration. Changes in the risks of detection and punishment may will have a mixture of deterrence and incapacitation effects that complicate isolating the unique contribution of either.[13] And, updating processes that shape learning of risks and punishment contingencies may also be mixed up by simultaneous incapacitation and deterrence effects.

This consensus among researchers has been repeated across decades. A National Academy of Sciences review panel on criminal sanctions and deterrence concluded in the 1970s that "[B]ecause the potential sources of error in the estimates of the deterrent effect of these sanctions are so basic and the results sufficiently

[12] Pogarsky Greg et al., "Modeling Change in Perceptions about Sanction Threats," 20 *Journal of Quantitative Criminology* 343 (2004); McCrary, Justin, and Lee, David S, "The Deterrence Effect of Prison: Dynamic Theory and Evidence," *Berkeley Program in Law & Economics, Working Paper Series* (2009).

[13] Chalfin and McCrary, *supra*.

divergent, no sound, empirically based conclusions can be drawn about the existence of the effect, and certainly not about its magnitude."[14]

In 1998, Steven Levitt reviewed the literature on deterrence and concluded that "few of the empirical studies [regarding deterrence of adults] have any power to distinguish deterrence from incapacitation and therefore provide only an indirect test of the economic model of crime."[15]

b. Second, experiments on incarceration effects are not feasible, for obvious ethical, legal and policy considerations. The alternatives to experiments, including panel studies comparing offenders in different eras or different locales, all offer contributions to the general and specific deterrence literature, but are unable to account for differences both criminal records in offenders assigned to alternate incarceration conditions. And given the importance of updating of risk preferences and crime utilities, failure to randomize can lead to confounding of correctional experience with risk preference, making a "clean" estimate unavailable.

c. Recent reviews[16] conclude that the deterrent effect of criminal sanctions are specific to the risks of detection, not to the severity of punishments, net of any incapacitation effects. Specifically, studies on general deterrence have shown that people are *more motivated* by the probability of being caught than by the severity of the punishment,[17] and that "increased sanctions do not substantially reduce future recidivism but instead produce only a small deterrent[18] or incapacitation effect[19] on recidivism.

d. Laboratory experiments simulating deterrence conditions confirm the primacy of

[14] Blumstein, Alfred, Cohen, Jacqueline, and Nagin, Daniel S., "Report of the Panel on Research on Deterrent and Incapacitative Effects," *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington D.C.: National Academy of Sciences 42 (1978).

[15] Levitt, Steven A., "Juvenile Crime and Punishment," 106 *Journal of Political Economy* 1156, 1158 at n2 (1998).

[16] Nagin, Daniel S., "Deterrence in the Twenty-First Century," 42 *Crime & Justice* 199 (2013); Chalfin and McCrary, *supra*.

[17] Tyler, Tom R., "Legitimacy and Criminal Justice: The Benefits of Self-Regulation," *Ohio State Journal of Criminal Law* 307, 308 (2009).

[18] Bhati, Avinash Singh, and Piquero, Alex R., "Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?" 98 *The Journal of Criminal Law and Criminology* 207 (2007).

[19] Piquero, Alex R., and Blumstein, Alfred, "Does Incapacitation Reduce Crime?" 23 *Journal of Quantitative Criminology* 267 (2007).

punishment certainty over punishment severity. For example, random samples of college students were asked to estimate how likely they were to drive with a blood-alcohol level above the legal limit under varying conditions of certainty and severity of punishment.[20] The researchers reported that the certainty of punishment had a significantly greater influential in deterring students from driving drunk compared to the severity of the punishment.

e. Nor is there evidence that longer sentences have a deterrent effect on crime. At the individual level, it is both obvious and logical that sentences that may lead to deterrence also typically lead to incapacitation. The incapacitated person has no window in which to commit crimes that would "prove" or establish a deterrent effect. Even if deterrence is possible, the fact that prison generates simultaneous incapacitation effects makes it likely that any deterrent effect would be small.[21]

6. Is there a consensus that lengthy sentences for gun crimes have a deterrent effect on crime generally or on gun crime?

a. Two studies specifically examined the general deterrent effects of enhanced and lengthy sentences on gun crimes. The studies evaluated the effects of Project Exile, a prosecution effort that aimed to enhance the penalties for "felon in possession of a firearm" cases,[22] drugs/guns cases,[23] and domestic violence/gun cases.[24] There also was an advertising campaign designed to inform potential offenders of the risk of swift, certain and severe sentences for gun crimes.[25] These cases were diverted from state court into federal court, where prison sentences are typically more

[20] Nagin, Daniel S. and Pogarsky, Greg, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence," 39 *Criminology*, 865 (2001).

[21] Chalfin and McCrary, *supra* at 20.

[22] U.S. Code Title 18, 922(g) (1).

[23] U.S. Code Title 18, 924 (c).

[24] In principle, the local U.S. Attorney for Richmond also had the option of prosecuting those who sell a handgun or ammunition to juveniles under U.S. Code Title 18, 924 (x), although federal prosecutors rarely take such cases, in part because the penalty for the first conviction of this offense is simply probation. See, Raphael, Steve and Ludwig, Jens, "Do Prison Sentence Enhancements Reduce Gun Crime? The Case of Project Exile," in Evaluating Gun Policy (Jens Ludwig and Philip J. Cook, eds.) 251-86 (2003).

[25] For a detailed description of Project Exile, see the summary statement of the U.S. Attorney's Office for the Eastern District of Virginia, *available at* http://www.vahv.org/Exile/Richmond/PE-R005.html.

severe than those found in most state sentencing statutes. Each study concluded that there is no evidence of a general deterrent effect of lengthy sentencing enhancements that impose additional years of incarceration for crimes committed with a firearm.

b. The first study was published in 2003. Researchers compared gun homicide rates in Richmond, Virginia, the originating federal court for Project Exile, before and after the implementation of Project Exile prosecutions.[26] Gun homicides declined sharply in Richmond in 1997-8, following a 40% increase in gun homicides in the preceding two-year period. However, comparing Richmond to other cities that also has large increases in homicide in the 1996-7 period, the subsequent decline in Richmond and elsewhere suggested that the decline in Richmond would have occurred in the absence of the program. The researchers noted parallel results for other felony crimes in the same period, crimes that were not prosecuted under Project Exile. In a second comparison, which used juvenile homicides as a benchmark,[27] the researchers show that in Richmond, the ratio of adult homicide arrests to juvenile homicide arrests grew larger during the exile period and after, whereas in other cities, the ratio remained constant. The researchers conclude that "[t]hese findings, taken together, call into question the empirical evidence commonly offered as evidence of Exile's impact."[28]

c. The researchers then extended their analysis to examine the effects of federal "felon in possession" gun crime prosecutions in other cities. The regressions in this part of the analysis showed that for the period 1994-1999, there was no statistically significant relationship between the number of federal firearm prosecutions and city-level murder rates.[29]

d. The second study[30] compared three cities with different strategies for reducing gun violence: New York, Boston and Richmond. The authors compared homicide trends in each of these three cities with 92 other cities with populations greater than 175,000 residents for a 10 year period from 1992-2001. This period spans the shorter time frame for the Raphael-Ludwig study. These researchers estimate a

[26] Raphael and Ludwig, *supra*.

[27] Juvenile homicides are not eligible for prosecution in the adult courts in the federal system, whereas adult homicides by definition are eligible.

[28] Raphael and Ludwig, *supra*.

[29] *Id*.

[30] Rosenfeld, Richard, Fornango, Robert, and Baumer, Eric, "Did *Ceasefire*, *Compstat*, and *Exile* Reduce Homicide?" 4 *Criminology and Public Policy* 419-50 (2005).

series of regressions that identify the slope or rate of change over time. They report no statistically significant differences in the slope of the homicide trends for New York and Boston compared to a national average that includes Richmond.[31] They report a small but statistically significant downward trend for Richmond.[32] However, an inspection of Figure 1[33] shows that after the initial period of decline from 1997-98, the homicide rates remained constant through 2001.

e. The comparisons, however, are not a conclusive test of general deterrence of gun homicides. While Exile relied on prosecutions to create a general deterrent effect, the other two cities employed non-prosecution methods based largely on preventive police tactics in New York[34] and a program of targeted police-probation-community interventions in Boston.[35] As a result, the comparative theories of these three interventions were quite different, and only the Richmond case study offered a test of general deterrence of gun crimes through prosecution and enhanced sentences. The correct comparison for estimating the Exile effect, and in turn, the effect of sentence enhancements, is to compare prosecutions in federal court with other prosecutions in the same place in state court. This was the design of Raphael and Ludwig.

f. There are other differences in the two Exile studies that render the comparisons unreliable. The Rosenfeld et al. study examined all homicides, while the Raphael and Ludwig study examined only gun homicides.[36] The point of Exile was to deter gun crimes, as is the point of the federal sentencing statute at issue in this case.[37] The Raphael and Ludwig study included measures of the actual number of federal prosecutions that took place in Richmond during the Exile period, and also federal prosecutions in other cities during the same time. This created a measure of "dosage" that is critical to understanding and measuring the effects of a

[31] *Id*. at 433-436 and Table 1.

[32] *Id*. at 436-8 and Table 1.

[33] *Id* at 433.

[34] *See id*. for a description of the Compstat program and the program of investigative street stops and frisks by police in New York.

[35] *See id*. for a description of the Ceasefire program in Boston where probation officers and clergy combined to intervene with youths thought to be at risk for gun violence, and offered youths intensive social services at the same time that the probation-clergy teams delivered strong threats of harsh sentences for any further criminal violations.

[36] Neither study asked whether Exile's focus on prosecution of FIP cases might have led offenders to substitute other weapons for firearms in felony crimes or murders.

[37] *Supra* note 4.

"treatment" such as Project Exile. The Raphael and Ludwig study also excluded the 1997 peak homicide year, a strategy that avoids the influence or undue leverage of the unusually high gun homicide rate in that year, and removes the threat of over-estimating the Exile effect through what may more likely be simply a regression to the mean in Richmond.

g. These differences in the two studies are important when considering the issues in this case: whether enhanced sentences have a marginal deterrent effect on gun homicide rates. The narrow question here suggests that the Raphael and Ludwig research has greater probative value in considering the sentencing options for this Court.

h. The absence of a general deterrent effect is consistent with several earlier studies that considered sentence enhancements for specific crimes, including gun crimes. They all found little reliable evidence of deterrence.[38] A 2009 review of the literature on general deterrence based on incarceration for felony crimes, including gun crimes, concluded much the same: there was no marginal deterrent effect for each additional year of a prison sentence on the overall crime rate.[39]

i. A study of specific deterrence among 1,354 felony offenders ages 16-24 examined recidivism rates following conviction in criminal court or a delinquency adjudication in juvenile court.[40] Several of these offenders were convicted of gun crimes, others convicted of felony violent or property crimes. About half were placed on probation and the remainder placed in correctional confinement. Recidivism rates after four years showed that there were no differences in recidivism rates between those placed and those who remain in their community

[38] Loftin, Colin and McDowall, David, "'One with a Gun Gets You Two': Mandatory Sentencing and Firearms Violence in Detroit," 455 *Annals of the American Academy of Political and Social Science* 150–67 (1981); Loftin, Colin, Heumann, Milton, and McDowall, David, "Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control." 17 *Law and Society Review* 287–318 (1983); Loftin, Colin and McDowall, David (1984), "The Deterrent Effects of the Florida Felony Firearm Law," 75 *Journal of Criminal Law and Criminology* 250–59 (1984). McDowall, David, Loftin, Colin, and Wierseman, B, "A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crime," 83 *Journal of Criminal Law and Criminology* 378-394 (1992).

[39] Donohue, John J. III, "Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin," in *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom* (Steven Raphael and Michael Stoll, eds.) 269-342 (2009).

[40] Loughran, Thomas A., Mulvey, Edward P., Schubert, Carol A., Fagan, Jeffrey, Piquero, Alex R., and Losoya, Sandra H., "Estimating a dose-response relationship between length of stay and future recidivism in serious juvenile offenders," 47 *Criminology* 699-740 (2009).

on probation. The analysis also estimated a dose-response effect for the marginal value of additional years in confinement among those placed in correctional institutions, and found no net marginal benefits of additional months of confinement.

7. How do the theories and evidence apply to Murray Lawrence?

a. Because the strongest general deterrent effect derives from the certainty as opposed to severity of punishment, any additional term of incarceration beyond what Mr. Lawrence has already served will provide little if any marginal effect on the deterrence of gun crimes by other individuals in the community.

b. Under the economic model of crimes, general deterrence requires knowledge by a would-be offender of the law that prohibits an act, as well as the risks of detection and the risks of punishment. Even if a rational offender knew what sentence was ultimately imposed by the Court in Mr. Lawrence's case, the rational offender would also need to have an understanding of the likelihood of detection, the likelihood and factors determining prosecution in federal as opposed to state court, and a knowledge of the operation of the federal sentencing guidelines as they would be applied in the rational offender's case.

c. The economic model also requires that an actor be rational in weighing the benefits of crime compared to the likelihood and costs of punishment—assuming, first, that the actor is able to assess those costs. To the extent that individuals are rationally engaging in this calculus,[41] the literature does not suggest that the cost-benefit analysis would be responsive to the punishment imposed in Mr. Lawrence's case.

d. The severity of the punishment in Mr. Lawrence's case will have no marginal deterrent effect on gun crime if rational potential offenders are unaware of the sentences imposed in this and other similar cases.[42] Furthermore, any significant gain in deterrence requires community-based interventions such as those discussed below, including informing high-risk offenders of the consequences of illegal conduct, positioning the consequences of offending in the context of choice, creating collective accountability and reducing peer dynamics that promote

[41] *See* "Five Things About Deterrence," National Institute of Justice, U.S. Department of Justice (May 2016); *see also* Patton, D. E. "Guns, Crime Control, and a Systemic Approach to Federal Sentencing," 32 *Cardozo Law Review* 1427 (2011).

[42] *See* Patton, D. E. "Guns, Crime Control, and a Systemic Approach to Federal Sentencing," 32 *Cardozo Law Review* 1427 (2011).

violence, and offering group members an "honorable exit" and supported path from gun crime.[43]

8. What interventions are available to prevent future crime by Murray Lawrence and others in the community?

a. "Research on procedural justice and legitimacy suggests that compliance with the law is best secured not by mere threat of force, but by fostering beliefs in the fairness of the legal systems and in the legitimacy of legal actors."[44] This theory was substantiated by "using a unique survey of active offenders called the Chicago Gun Project (CGP). The CGP was designed to understand how the social networks of offenders influence their perceptions of the law and subsequent law-violating behavior."[45] Programs such as Operation Ceasefire in Boston, Project Safe Neighborhoods (PSN) in Chicago and the Drug Market Initiative in North Carolina incorporate "the principles of procedural justice, a precursor to legitimacy, into what has traditionally been the exclusive domain of deterrence theory. Initiatives such as these relied upon two inter-related strategies: (1) informing high-risk offenders of the consequences of illegal conduct consistent with theories of deterrence, and (2) promoting legitimacy by simultaneously positioning the consequences of offending in the context of choice and by recasting the tone and quality of law enforcement interactions with offenders."[46] Wallace et al. concluded in their examination of these programs that they reduce the risk of recidivism.

b. Such alternatives do exist in New York, though not necessarily in the jurisdiction at issue here. David Kennedy at the National Network for Safe Communities, through John Jay College, began the Group Violence Intervention (GVI) program,

[43] *See* Section 8, *infra*.

[44] Papachristos, A. V., Meares, T. L., and Fagan, J. "Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders," *Journal of Criminal Law and Criminology*, 397-98 (2012); *see also* Papachristos, A. V., Meares, T. L., and Fagan, J. "Attention Felons: Evaluating Project Safe Neighborhoods in Chicago." *Journal of Empirical Legal Studies* 223 (2007).

[45] Papachristos, A. V., Meares, T. L., and Fagan, J. "Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders," *Journal of Criminal Law and Criminology*, 397-98 (2012).

[46] Wallace, D., Papachristos, A. V., Meares, T., and Fagan, J, "Desistance and Legitimacy: The Impact of Offender Notification Meetings on Recidivism among High Risk Offenders," *Justice Quarterly* 1, 2 (2015).

"designed to reduce street group-involved homicide and gun violence."[47] It was modeled after Boston's Project Ceasefire and has been implemented in cities across the country. Notably, in Stockton, California, Operation Peacekeeper was implemented and the city saw a 42 percent reduction in gun homicide from 1997-2002. The implementation of programs such as the GVI would reduce gun violence by implementing strategies that aim to "reduce peer dynamics in the group that promote violence by creating collective accountability, to foster internal social pressure that deters violence, to establish clear community standards against violence, to offer group members an "honorable exit" from committing acts of violence, and to provide a supported path for those who want to change."[48]

[47] "Strategy: Group Violence Intervention," *National Network for Safe Communities*, John Jay College, *available at* https://nnscommunities.org/our-work/strategy/group-violence-intervention.

[48] *Id.*

DECLARATION

I have been compensated for this work at the rate of $400 per hour. My compensation is not dependent on my opinions or the outcome in this matter.

Jeffrey Fagan, Ph.D.
New York, NY

February 16, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	16-CR-243(JBW)
-against-	:	United States Courthouse Brooklyn, New York
MURRAY LAWRENCE, Defendant.	:	Tuesday, February 28, 2017 11:15 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

(In open court.)

(Defendant present in open court.)

COURTROOM DEPUTY: All rise. The United States District Court for the Eastern District of New York is now in session. The Honorable Jack B. Weinstein is now presiding.

(Honorable Jack B. Weinstein takes the bench.)

COURTROOM DEPUTY: Calling criminal cause for sentencing in Docket No. 16-CR-243, *United States of America against Murray Lawrence*.

Counsel, please note your appearances for the record.

MR. LIFSHITZ: For the United States of America, Assistant United States Attorney Allon Lifshitz.

Good afternoon, your Honor.

MR. JACOBSON: Samuel I. Jacobson for Murray Lawrence.

Good afternoon, your Honor.

(Defendant enters the courtroom at 12:01 p.m.)

THE COURT: Sorry to have kept everybody waiting.

MR. JACOBSON: Good afternoon, your Honor.

COURTROOM DEPUTY: Criminal cause for sentencing, case 16-CR-243, United States versus Murray Lawrence.

Counsel, state your name for the record.

MR. LIFSHITZ: Allon Lifshitz and Mathew Miller. We are joined by Probation Officer Michelle Murphy.

MR. MILLER: Matthew Miller, your Honor, for the United States.

MR. JACOBSON: Sam Jacobson Federal Defenders on behalf of Murray Lawrence who is present in court today. We are joined today by Isadora Harcourt, a paralegal in our office; Ms. Rose Graham, Murray Lawrence's mother. And a number of members of Mr. Lawrence's family who are in the back of the courtroom.

THE COURT: What school are you from?

THE WITNESS: I graduated from Barnard College. I'm a paralegal.

MR. JACOBSON: She's a paralegal in our office.

THE COURT: Are you calling a witness?

MR. LIFSHITZ: We are, your Honor, on the subject of the weight that should be accorded general deterrence as a statutory sentencing factor.

THE COURT: You objected to the witness and I overruled your objection.

MR. LIFSHITZ: Yes, your Honor.

THE COURT: Have you provided a report?

MR. JACOBSON: We have, your Honor. It was produced to the Government a little over a week ago, and it has been provided to the Court in the defendant's exhibit binder.

THE COURT: Fine. Thank you.

You may proceed.

MR. JACOBSON: Defense calls Professor Jeffrey Fagan.

(Witness takes the witness stand.)

MR. JACOBSON: Where would you like the witness to sit, your Honor?

THE COURT: Probably if everybody moves over here and you moved over right in front, then the court reporter wouldn't have to move.

Swear the witness, please.

COURTROOM DEPUTY: Please raise your right hand.

JEFFREY FAGAN, called by the Defendant, having been first duly sworn, was examined and testified as follows:

THE WITNESS: Yes.

COURTROOM DEPUTY: State your name for the record.

THE WITNESS: Jeffrey Fagan.

COURTROOM DEPUTY: Have a seat.

THE COURT: I'm sorry to have kept you, Professor, but the last case was very vexing.

MR. JACOBSON: I think we started right on time, your Honor.

THE WITNESS: We understand.

MR. JACOBSON: With the Court's permission, Professor Fagan could have the Defense Exhibit binder in front of him.

THE COURT: Yes.

MR. JACOBSON: I apologize, it's an a little bit awkward to ask you questions sitting next to you side by side.

THE WITNESS: I know.

DIRECT EXAMINATION

BY MR. JACOBSON:

Q Good afternoon.

A Do you want me to speak into a mic?

THE COURT: Yes, it would probably be better.

Q Professor Fagan, if I could direction to you Defense Exhibit A in the binder marked for identification.

A Yes.

Q Do you recognize this document?

A This is my CV, curriculum vitae.

MR. JACOBSON: Your Honor, I'd off Exhibit A into evidence.

MR. MILLER: No objection.

THE COURT: You may.

(Defendant's Exhibit A was marked in evidence as of this date.)

Q I would like to ask you a few questions about your résumé, Professor Fagan.

What's educational back?

A I have a Bachelor's Degree in Engineering from New York University. I have a Masters Degree in Human Factors

Engineering from State University of New York at Buffalo, and a Ph.D. in a public policy program in the Civil Engineering Program at State University of New York at Buffalo.

Q And what is your current professional position?

A I am a professor of law at Columbia Law School, and a Professor of Epidemiology at the Melman School of Public Health at Columbia University.

Q Can you describe your prior professional background?

A I was a professor for several years, I don't remember exactly the number, six or seven, at Rutgers University in the School of Criminal Justice. Before that, I taught for a year at John Jay College of Criminal Justice. Before that, I was a Senior Research Fellow at the New York City Criminal Justice Agency in Manhattan. And before that, I was in private business.

Q And what does your scholarly research focus on?

A Policing, capital punishment, juvenile justice, drug policy and drug law; firearms, firearms research, firearms control.

Q And are you involved in any relevant professional organizations?

A I am a member and an elected fellow of the American Society of Criminology.

Q Have you written articles or other writings for peer reviewed journals on these subjects?

A A lot, yes. I lost count, actually.
Q And were any of these articles you've authored on the topic of deterrence?
A Yes.
Q What were those articles?
A I wrote -- I've written articles on the deterrent effects of execution, capital punishment, on general deterrent effect of execution on murder rates. I've written on deterrent effects of waiving adolescent offenders to the criminal court to the juvenile court. The deterrent effects of lengthy sentences for adolescents. Very serious, young adult and somewhat adolescent offenders. Deterrent effects of criminal sanctions on drug offenders. Deterrent effects of criminal sanctions on a person who is charged with domestic violence.
Q And have you authored any books on criminal law?
A No. I'm not a book writer, I'm an article writer.
Q And have you taught any relevant courses at Columbia Law School?
A I've taught criminal law. I've taught seminars in criminology; seminars on drug control policy; seminars on firearm regulation and control. Seminars on courses on juvenile justice, courses on the death penalty.
Q Have you been admitted as an expert in federal court before?
A Yes.

Q Have you been admitted as an expert before this particular court?
A Yes.
MR. JACOBSON: Your Honor, I move to qualify Dr. Fagan as an expert in the general deterrent effect of punishment on gun crime.
MR. MILLER: No objection.
THE COURT: Admitted.
EXAMINATION BY
MR. JACOBSON:
(Continuing.)
Q If I could refer you, Professor Fagan, to Defense Exhibit B.
A Okay.
Q Are you familiar with this document?
A Yes, I am.
Q What is it?
A This is a report that I prepared for this case on general deterrent facts, and specific deterrent effects, of lengthy sentences on gun offenders.
Q And does it include your affidavit pursuant to the Civil Rules?
A Yes.
MR. JACOBSON: I'd offer Defense Exhibit B into evidence, your Honor.

MR. MILLER: No objection.

THE COURT: Admitted.

(Defendant's Exhibit B was marked in evidence as of this date.)

Q If I could direct you now to Defense Exhibit C through J.

A Yes.

Q Briefly flip through them. Do you recognize these materials?

A Yes. These are materials that are reviewed in preparation in preparing the affidavit for this case.

MR. JACOBSON: Your Honor, I'd offer Defense Exhibits C through J in evidence.

MR. MILLER: No objection.

THE COURT: You may.

(Defendant's Exhibits C through J were marked in evidence as of this date.)

Q Professor Fagan, I'd like to ask you some questions about general deterrence.

Can you summarize the theory for the Court and what it is?

A Well, succinctly, general deterrence --

THE COURT: Excuse me, you're all here, I take it, in connection with this case, are you?

MR. JACOBSON: They're all family members.

THE COURT: They can't hear back there. Do you want

to come up here and sit in the jury box so you can see what's going on?

THE WITNESS: We're okay.

THE COURT: Okay.

A Okay. The question was?

Q If you could briefly describe the theory of general deterrence?

A The theory of general deterrence is fairly simple. That, by heightening the risks of detection and conviction and punishment for an offender that other offenders, having observed these risks and costs of punishment, will decide not to engage in crime.

Q And what are the components of general deterrence?

A There are three. Perceptions of risk of detection and apprehension. Well, apprehension and detection. The risk of punishment having been apprehended, and the length and cost of punishment.

The other components of it are consideration of the rewards or benefits of crime, and consideration of the costs or rewards of forgoing crime.

Q Can you describe for the Court the rational offender economic approach to deterrence?

A Deterrence relies very heavily on rational offenders, and the assumption is that they will make an accurate perception and calculation of those costs. They would engage in an

accurate decision-making process that rationally weighs those costs, costs of punishment against benefits of doing the crime. They will arrive at a net cost benefit calculation that would persuade them not to engage in the crime.

Q And is there a consensus, according to your research, as to the empirical studies on the effectiveness of general deterrence?

A Most of the studies agree that there is very little deterrent effect associated with lengthy costs of punishment. That if there is a deterrent effect from criminal justice activity, from enforcement activity, it's in raising the risk of apprehension. In other words, the detection of the crime and, therefore, ultimately, assuming one is convicted, a conviction for the crime.

But the consensus of the literature is that deterrence effects really stop there; that lengthy sentences don't add much to the cost benefit calculation. Most offenders have a hard time seeing, really, the difference between 3 years, 5 years, 10 years, or 20 years. It really all kind of telescopes inward.

Q And is there a consensus as to general deterrence as it relates gun crimes specifically?

A There have been a very small number of studies that have looked at general deterrence and gun crimes. Both of those studies, in particular, looked at federalization under

programs like Trigger Lock. And both of those studies concluded that they were very limited if no -- actually, one study concluded no effects of deterrent -- no deterrent effects.

THE COURT: If you would just slow down so the reporter can make an accurate record.

A One study concluded there was no -- there were no deterrent effects, general deterrent effects, of pursuing gun cases in federal court. The other study compared three different law enforcement regimes one involving a kind of a joint probation/policing/religious sector effort. They found dramatic reductions in crime including gun crimes and murders.

The other involved a New York City policing experiment which was very strong street-level enforcement using stop and risk and border maintenance policing. They found no deterrent effects there.

The third study looked at the effects of Trigger Lock, or Project Exile, which it was called, in Richmond, Virginia. And they looked at the effects of murders. They didn't distinguish gun crimes from other crimes. They concluded there was a short-term deterrent effect, but they did not -- were not able to identify a specific deterrent effect related to gun crimes or gun murders.

Q Did they he studies look at federalizing those particular gun offenses?

A The one in Richmond did. That was a program that federalized some gun offenses, not all. One of the issues that seems to come up in a study like that is the uncertainty, or really, the fact that it is unknown among would-be offenders as to which cases would likely to be federalized and, therefore, running the risk of a lengthy prison sentence. There's no way for that information will get communicated down on the street because, generally, it's a random selection process.

Q So how does that interact with the economic approach, or rational offender, model of general deterrence?

A Well, if you don't know what the sanctions are going to be -- let's assume for the moment that we think that there might be some effect of lengthy sentences. And if you don't know whether or not you're going to get the kind of lengthy sentences, then it's very hard to make a rational calculation.

There's also -- it's not clear at all that among would-be offenders in communities where there are considering the possibility of crime that they have any knowledge at all with respect to what the likely risk is of apprehension, and if apprehended what the sentencing risks will be, the length of punishment. This information is just generally not circulated.

Q And just to clarify your answer.

Is there an issue both with the knowledge that the

rational offender has about the repercussions as well as whether someone is a rational offender to begin with?

A Yes. There is very little data to show the rationality of an offender in making these kinds of calculations, sort of, on the spot when one is considering doing a crime. Of course, you can imagine doing the difficulty of doing that kind of research. There have been simulations of it in laboratories under varying conditions, and they generally seem to think that the costs of punishment are much less salient to deterrence than other risks of possibility of detection and of the length of punishment.

In other words, much of deterrence, and I think it's a very strong consensus in the theoretical and empirical literature on this relies on the perceptions of the risks of apprehension, and the risk of detection. Less so than the risk of punishment, and certainly, not on the costs of punishment.

Q And, Professor Fagan, I'd like to ask you in particular about Mr. Lawrence's case.

Have you reviewed any documents in his case?

A I reviewed the complaint from the Government, and I reviewed the presentence report from the probation office.

Q And applying the studies and your research on general deterrence, in general, what are some of the factors that make it difficult to be a rational offender, specifically, with

regards to the federal offense that Mr. Lawrence is charged with?

A Well, one would be knowledge of what the sentencing regime would be. I don't know that there's any way for a person in a community contemplating the possibility of a crime to know whether or not there was a -- what the risks of the case would be if tried in state court versus federal court would be. There's no way of that knowledge to be disseminated through a community.

Decision making on the spot is probably more contingent on the circumstances on the spot. I think rationality is sacrifice at that moment for a calculation that has to do with events as they're unfolding. There is a kind of a net benefit issue. I think the net benefit is where somebody would make that kind of a calculation that, well, here's the cost and here's the benefits. And if the costs are too great, then benefits are not sufficient, or don't match up to the costs. So I'm unlikely to do the crime because I perceive -- we have not much evidence outside of the laboratory context that that rationality or net benefit calculation is made in the midst of a criminal activity.

Q And one of the factors that you just mentioned is that there's a great deal of uncertainty about where an individual would be prosecuted; is that right?

A They have no idea whether a case is going to be

propertied if they're caught. If not, they probably have little realistic estimate of the likelihood of being caught. But, if caught, they have no way of estimating whether that case is going to be tried in federal court with a longer state, or in a state court with a somewhat shorter sentence.

Q Now, assuming that an individual is prosecuted in federal court, is there any uncertainty about a future offender about what that punishment might be?

A There's been no study about whether or not that information is communicated widely whether it's understood, whether there's knowledge of it in different communities. One can -- you might make an inference of it if there seems to be some deterrent effect. But we don't seem to observe deterrent effects so it's hard to say.

Q And it sounds like what you're saying is that general deterrence requires that that be communicated?

A Yes. Without knowing that the costs are greater under one regime than the other, then we can't assume that there's a deterrent effect of that regime.

Q Within a particular regime like the federal regime, an offender, a future offender, would have to know how the guidelines worked, for example; is that right?

A Yes, they would have to know what the risk -- what the risk of detection would be, and so they would have to have some clearance of the clearance rate for a particular crime.

In other words, the rate of which offenders are arrested relative to the number of crimes that are done. Then they would have to get some sense of the risk of being convicted having been punished, or being convicted of the crime for which they are arrested. We often know that there are plea bargains.

And then they would have to know what the sentencing risks would be. In other words, they have to know what the punishment is that they could expect and that information is just not widely shared or widely communicated. And even if it is communicated, I'm not sure that it's communicated accurately we don't really have that much evidence about that, but my guess would be there is myth and rumor than there is actual knowledge being passed around.

Q From your research, Professor Fagan, do you have a you sense of whether most gun offenses are prosecuted in the state versus federal regimes?

A I believe that the majority of them, at least in New York, are punished in the state regime.

Q And does that affect which courts would be best situated, if there could be a general deterrent effect, would be best situated to provide that effect?

A I can't say, actually. I don't know the answer to that.

Q And based on what you've discussed in your research and your review of the empirical literature, do you have a

conclusion about how all of these factors affect Mr. Lawrence's case?

A I think it's unlikely that either if Mr. Lawrence, specifically, under the theory of specific deterrence; or in general for people in the communities, community in which Mr. Lawrence lives, that being given a sentence with, or an extend the sentence, an enhanced sentence, under the federal guidelines, under federal statute, would have much of a deterrent effect either for him or in general in the community.

Only were there to be extraordinary measures to disseminate that information would there be the possibility of deterrence. But all of the research that we've done including on gun crimes suggest that even where there's knowledge of lengthy sentences that's not the key to deterrence. The key to deterrence is the risk of punishment.

Q And you did just touch on knowledge of what those punishments might be. Can you briefly discuss how that, how community based interventions should or do play a role in that.

A Well, they can. I mentioned --

MR. MILLER: Objection, your Honor. Community based interventions don't have anything to do with the deterrent effect of this sentence in this case.

THE COURT: Does it have any relevance?

A Well, there are ways to deter gun offenders, we've observed them. I've participated in experimental research along those lines. So we could say there are alternatives which do bear on how we think about deterrence.

Q And --

THE COURT: What if a community decided that guns was the biggest problem they had, and decided to advertise that anyone with a gun is going to go to prison because of unproved apprehension and speeded up time.

THE WITNESS: Right.

THE COURT: And whether you're in the federal or the state court, the punishments -- of incarceration -- are going to be great.

Let's assume they even said what they would be. Could that have any impact?

THE WITNESS: We, in Project Exile, there was fairly strong advertising about -- through, I think, there were tall billboards that were posted in the neighbors or communities that had the highest rates of gun crimes. And they didn't seem to, at least the research that I've reviewed, really were only a couple of studies on this, and they were very well done studies, took notice to reach any conclusions about the effect of advertising. And, in fact, both of those studies had -- one of those studies said there wasn't any general deterrent effect of the Exile Program and the other was sort of

inconclusive.

So if even with an advertising component there was no deterrent effect, then it's possible that that information -- the information could be put out there whether it's internalized and used in the decision-making process I think is really quite a different matter. And from the lab experiments, we seem to think that those elevated risks seem to get internalized.

THE COURT: You couldn't do, for example, what the cigarette companies did in projecting some of the special advertising to so of the ghetto communities, which seemed to have an effect on the usage of the cigarettes they were pushing. That wouldn't affect what happened in the gun-carrying group.

A I could only speculate, your Honor. My sense is that cigarette smoking is a much more widespread behavior. The act of smoking a cigarette is not in itself inherently dangerous. The risk of cancer and illness are somewhat remote, they're down the road. So I think it's -- just simply the people who smoke are probably quite a -- much closer to the general profile of a community than would be people who are involved in violent crimes.

THE COURT: Go ahead.

MR. JACOBSON: Nothing further, your Honor. Thank you.

THE COURT: How prevalent is the carrying of guns, and has it changed with respect to age groups or ethnic groups or educational groups or however you want to strategize.

THE WITNESS: There are different estimates depending on the way the research is conducted. Research is conducted by doing face-to-face interviews shows a somewhat higher rate of gun caring than research done by, say, a telephone survey or something like that. Whether it's legal gun carrying or illegal gun carrying?

THE COURT: Illegal.

THE WITNESS: It seems to be more prevalent. Well, we don't really know about -- we only know gun carrying behaviors in communities where there's higher rates of both nonfatal and fatal injuries.

THE COURT: What.

THE WITNESS: Fatal and nonfatal injuries. That's where the research seems to focus. One thing that's happened in the last few years is that gun carrying varies very much by community. In Chicago, it seems to be very common based on what the community surveys have shown there. In New York, it's a little bit less common because of there seems to be a more of a norm of using shared guns in certain areas. There being one gun that would be shared by different people. It's generally left at home and carried only when there's a situation that somebody might feel is a situation that would

require somebody to carry a gun. But the evidence again is really hard to get an of good, solid point estimate of gun carrying.

THE COURT: Go ahead.

(A brief pause in the proceedings was held.)

MR. MILLER: Thank you, your Honor.

THE COURT: You may.

CROSS-EXAMINATION

BY MR. MILLER:

Q Professor, you agree that one of the essential justifications of punishment, criminal punishment, is deterrence; right?

A Yes.

Q And you agree that the principle that harsher sentences deter crime --

THE COURT: You're talking about when you use the terms. You're using it with respect to general deterrence on persons not before the court, or deterrence on the defendant?

MR. MILLER: I'll break it down, Judge. I meant both.

Q But you agree that general deterrence is one of the essential justifications of criminal conduct?

A Yes.

Q And that specific deterrence is one of the essential justifications of criminal punishment?

A Depending on the texts that you read, specific deterrence is much closer to the essential justifications for punishment than is general deterrence.

Q But both specific and general deterrence are among the essential justifications for criminal punishment?

A Yes.

THE COURT: And what we're dealing with within the statute, there isn't any question that, is there, §3553(a) of Title 18 factors to be considered in imposing a sentence 2(V) "to afford adequate deterrence to criminal conduct that that encompasses both general and specific deterrence."

THE WITNESS: Yes.

THE COURT: That's what Congress had in mind.

THE WITNESS: Okay.

THE COURT: I don't think anyone doubts that. So we start with the congressional finding that it must have some relevance.

THE WITNESS: Okay.

EXAMINATION BY

MR. MILLER:

(Continuing.)

Q You agree that the harsher sentences deter crime at least to some extent has a long history in the academic literature, right?

A Well, it was in the early formulations of deterrence

theory where they did emphasize harsher sentences. I think modern deterrence theory tends to shy away from longer sentences as a key ingredient in deterrence and more towards the fact that they're sentencing.

Q But the question is: There's a long history in the academic literature that harsher sentences deter crime at least to some extent; correct?

A There is a long history. It's a history that changes over time, but there's a history.

THE COURT: I'm sorry.

THE WITNESS: There is a history that changes over time, and it is a long history, yes.

Q Now, in preparing for today's hearing, you read and summarized the academic literature on general and specific deterrence?

A Yes. I focus more closely on deterrence of gun crimes, but yes.

Q Those are the articles that are cited in the report and the exhibits here. Did you conduct any studies yourself in preparing for this hearing?

A No.

Q In preparing for this hearing, did you conduct any experiments?

A No.

Q Did you conduct any interviews yourself?

A No.
Q Did you talk to the defendant?
A No.
Q Did you talk to the defendant about the impact his sentence would have on, well, if you didn't talk to him about the impact his sentence would have on his future criminal conduct, did you?
A I did not speak to the defendant at all.
Q Did you talk to people who commit crimes about the effects of harsher sentences in this case?
A In this case, no.
Q Did you talk --
A In other cases yes.
Q But not in this case?
A No.
Q Not in preparing for this testimony today?
A No.
Q Did you talk to anyone in Brooklyn about how their conduct would be affected by harsher sentences in Brooklyn gun cases?
A No.
Q Did you talk to any criminals about the likelihood of offending in preparing for this testimony today?
A No. I've done it before in my career but not in this case.

Q Now, the studies that you've read and summarized, did any of them specifically study criminal conduct in Brooklyn?
A In Brooklyn? No.
Q Did any of them specifically study gun crimes in Brooklyn?
A No. Well, I take it back. The study that compared Exile with Project Cease Fire in Boston and with the Comp Stat program in New York did, since Brooklyn is part of New York, to encompass criminal activity in New York.
Q But other than that, none that you could provide?
A In preparation for this, no.
Q Now, you agree that it's hard to measure the general deterrent effects of harsher sentences; correct?
A I don't know that I necessarily agree with that. It depends on what you mean by "study." If we look at places that have one sentencing regime compared to another, and we look at the deterrent effects of those, we look at the deterrences in crime rates, we can make some inferences about deterrence.
Q What I asked is, is it hard -- do you agree that it's hard to measure the general deterrent effects of harsher sentencing?
A No, I don't agree actually. You can measure by looking at reductions in crime rates.
Q So I would like to direct you to your report which we are

introducing as Government Exhibit 1, it's the same report that you introduced earlier.

MR. MILLER: I offer Government Exhibit 1, your Honor, the professor's report.

MR. JACOBSON: It's already in evidence as Defense Exhibit B.

(Government's Exhibit 1, Professor Fagan's report, was received in evidence as of this date.)

Q Turn to Page 6 if you would, Professor. In Paragraph 5(a), your report says, "Two factors complicate efforts to estimate the general deterrent effects of incarceration."

Did you write that?

A Yes.

Q Two factors that complicate the efforts to estimate the general deterrent effects of incarceration; correct?

A Yes.

Q Okay. The first is that it's difficult to disentangle the effects of incapacitation from the deterrent effects of incarceration; correct?

A Yes.

Q And incapacitation is putting people in prison?

A Yes.

Q "Second, experiments on incarceration effects are not feasible." Correct?

THE COURT: It's not putting them into prison, it's keeping them in prison.

MR. MILLER: Yes.

Q Incapacitation is keeping and putting people in prison; correct?

A Somebody who is in prison is incapacitated.

Q And so, the longer they are in prison, the longer they are incapacitated?

A Yes.

Q The second factor that complicates efforts to estimate the general deterrent effects of incarceration is that experiments on incarceration effects are not feasible; right?

A True experiments are not feasible. Quasi-experiments are feasible.

Q Okay. You wrote here that experiments on incarceration effects are not feasible; right?

A Right.

Q Okay. And, in fact, one of the exhibits that you cite, one of the articles that you cite, the Raphael and Ludwig article, says that disentangling the effects of deterrence of incapacitation is difficult; correct?

A Yes.

Q I would like to show you a video, Professor. This is Government Exhibit 6.

THE COURT: You can turn the screen so the audience

can see it as well as us at the table. And those people in that section move over.

Can you all see it now?

THE WITNESS: Yes.

THE COURT: Okay. Six is admitted.

(Government's Exhibit 6, Video, was received in evidence as of this date.)

MR. JACOBSON: Your Honor, I don't know what six is; yet, if I can preserve an objection as to the admission to the exhibit.

MR. MILLER: It's the video that we previously submitted to the Court.

MR. JACOBSON: Then I do object to this exhibit coming into evidence, your Honor. We've now viewed this video at least four times in this courtroom. It's far beyond the scope of today's testimony from Professor Fagan.

MR. MILLER: Professor Fagan has never seen the video. I would like to ask him a hypothetical about the video.

THE COURT: I'm sure he's interested in it. It's an interesting video.

MR. MILLER: I am having a little technical trouble, your Honor, I am hoping to fix it.

(A brief pause in the proceedings was held.)

MR. MILLER: This is, for the record, which camera

it was. It was Camera 1 in the exhibit, and I'm going to begin playing it at 10:03:20 p.m.

THE WITNESS: Your Honor, can we pull that a little bit closer?

THE COURT: It's easier to go closer to the fire the Indians used to say. If you want to stand up and look at it, you may.

MR. JACOBSON: Judge, before the video is played, if I could briefly be heard on this exhibit.

THE COURT: Yes.

MR. JACOBSON: Professor Fagan has read the criminal complaint in this case which details step by step exactly what's in the video so he knows what is this. There's really nothing additional provided by the video that he hasn't already read and gone over in preparation for this testimony.

THE COURT: Even professors respond to emotional matters. I think it would help the cross-examination if he saw it, the event that.

MR. MILLER: Thank you, your Honor.

(Video file played in open court.)

Q Before you see two men walking down the street, a man in a dark shirt and a man in a light shirt?

A Yes.

Q And now one has walk off camera. The man in the dark shirt, the man in the white shirt, appears to be waiting

around?
A Yes.
Q Do you agree?
A Yes.
Q Now, the one in the dark shirt has come back up into the frame from the bottom of the screen; correct?
A Correct.
Q It appears the two men shoot guns down the street; correct?
A Correct.
Q And run off back up the way they came?
A Right.
Q You agree with me that it seems that they know each other?
MR. JACOBSON: Objection, your Honor.
THE COURT: Sustained.
A I have no way of answering that question.
THE COURT: Sustained.
Q The two men walked into the frame together; right, Professor?
A They didn't exchange words.
Q But they came together?
A They showed up at the same time, yes.
Q And they were both on the corner together?
A Yes.

Q They both shot guns together?
A Yes.
Q They both left running away together?
A Yes.
Q Looks dangerous; right?
MR. JACOBSON: Objection.
THE COURT: What was the question?
Q Looks dangerous?
THE COURT: It looks dangerous? They were shooting down the street in an area that's residential, and there were people walking around on the street.
THE WITNESS: Are we done?
THE COURT: Yes, in that direction. The only one that was hit was the co-conspirator, if he was a co-conspirator, who shot him.
Q Professor, let's say the person in the dark shirt gets arrested hours later and is convicted for having the gun, all right?
A Mm-hmm.
Q Is it your opinion that the man in the light-colored shirt is unaffected by the length of the sentence imposed on the man in the dark-colored shirt?
MR. JACOBSON: Objection. It seems like he's alluding to retribution or some other goal of sentencing.
THE COURT: If you can't answer --

THE WITNESS: What does unaffected mean?

THE COURT: If he doesn't want to answer any question or want it clarified say so.

THE WITNESS: I don't know what's unaffected or affected. What does that mean?

Q Is there any affect on the man in the white shirt from the length of the sentence on the man in the dark shirt?

A My guess is that the man in the light shirt would probably internalize more, be more affected by the fact that the first guy was caught than the fact that he was facing a punishment of 15 years or 10 years or 5 years.

Q That's not my question. My question is, is there any effect on the man in the white shirt on the length of the sentence imposed on the man in the dark shirt?

A No.

Q That's your opinion?

A The research is fairly conclusive about that.

Q Your opinion is that the guy in the light-colored shirt is indifferent to whether the guy in the dark shirt is sentenced to probation or ten years imprisonment?

A Well, that's a different question. I think he might be -- well, it's an interesting question. The best research that we have suggests that there is not a great deal of effect on a particular population of offenders of sending somebody to prison or probation or intensive supervision in the community.

So that's the first part of the question. What was the second part.

Q Are they indifferent between probation and a sentence of ten years?

A Well, nobody would be indifferent to it, but the fact is, and the evidence suggests, that over a population of people perhaps like those two young men of color in a residential neighborhood that there seems to be overpopulation of people no difference in how they're affected by probation or prison sentences.

We've cited a study to that effect of which I'm a coauthor. It was done with 1,350-some-odd young men in two different cities with fairly high rates of gun violence.

Q Now, in your report --

THE COURT: No difference between no prison and a long sentence, or any prison?

THE WITNESS: We looked at -- it's an -- it is counterintuitive.

THE COURT: It is.

THE WITNESS: But we looked at these young when given probation sentences and young men sentenced to a variety of incarceration experiences, and then we contacted them after their incarceration experiences, and we studied them over a period of time for about eight years. And the research came up, fairly rigorous research, peer reviewed and so to show

there was what we call a null effect of incarceration.

THE COURT: On them?

THE WITNESS: On those, yeah. On these young them.

THE COURT: We're talking about on others than the person sentenced. I take it that's your question.

MR. MILLER: Yes, your Honor.

THE COURT: That's what we're concerned about. General deterrence.

THE WITNESS: We don't have any data that would suggest that there's unless -- well, I can only go back and tell you what the evidence has shown. The evidence has shown fairly consistently that it's the risk of apprehension that has a deterrent effect, a general deterrent effect, and not necessarily the risk of imprisonment or particular punishment caused.

THE COURT: If apprehension didn't result, or never resulted in any incarceration, in a court or told perhaps don't do it again and that would have the same result on people who know what happened as a sentence to prison.

THE WITNESS: I don't think we have any evidence about any effect. I'm hard pressed to think of a regime that for a crime like this, of a gun crime, or of a serious felony crime where the risk of a prison sentence isn't on the table.

THE COURT: So every one of the cases assumes at least some incarceration if you're caught.

THE WITNESS: For crimes of this sort, yes.

THE COURT: And the ones incarcerated you say it doesn't make much difference how long.

THE WITNESS: This seems to be what the evidence has shown.

THE COURT: Have you examined the new statistical analysis of the Sentencing Commission on what effects recidivism? They have some interesting table, the only one that seemed particularly telling me to me was the one on prior convictions. If there was no prior conviction, recidivism would be substantially less whatever the sentence.

THE WITNESS: So a first incarceration?

THE COURT: Yes.

THE WITNESS: Yes. That would make some sense.

THE COURT: It's so counterintuitive. It's very hard to accept it.

THE WITNESS: Well, it's been done in a number of different contexts, and, in fact, if I'm not mistaken, I'm fairly sure that the conclusion that I'm reciting about the effects of extended periods of incarceration was also cited by the National Academy of Sciences Panel on Incarceration. It was chaired by Jeremy Travis, who I think you know, and Bruce Wesner. And I think they reported out in 2014, perhaps '15, a very thick report, and part of the report was the deterrent effects of incarceration. And I believe they reported out the

same finding.

THE COURT: The American Law Institute is doing research on the effects of fencing on six offenses. Don't they assume that a longer sentence will have an impact on general deterrence?

THE WITNESS: I haven't seen that work, your Honor.

THE COURT: Have you studied their proposals? They're about to adopt them finally.

THE WITNESS: No, I have not.

THE COURT: Professor Wexler at Columbia.

THE WITNESS: Herb Wexler.

THE COURT: Yes. He did the penal studies. Didn't he assume with Michael in his original study of crime that there would be an impact.

THE WITNESS: Of sentence lengths?

THE COURT: Of sentence lengths.

THE WITNESS: Yes, they did. They were writing in the 1930s and '40s.

THE COURT: I know, I studied their stuff in '46, and I taught it in '53 and it sounded very convincing to me. I took the position that that's the way it was. You got a longer sentence people would pay attention. Maybe there was a difference in the type of criminal, white collar criminal, was used to calculating benefits and detriments might see a greater impact than the kid out in the street who acts quickly

on emotional grounds and doesn't think of future benefits and detriments might have less of a feeling about sentences. Does that fit into the picture in any way? People who are used to calculating profit and loss might be affected by the length of the sentence?

THE WITNESS: I think that I would speculate that that's the case. The more that the person is working a framework or thinking and acting in a framework based on those kinds of rational calculations, then the more likely they would be to do the crime cost benefit analysis things that are applied in deterrence research.

There is also a field that's growing quite a bit and I think actually drives some of the modern theorizing about this which is behavioral economics where deterrence and rationality is based on conventional conviction and cost benefits calculation.

And behavioral economists talk a lot things, for example, like discounting; that they simply make decisions based on what's in front of them, and some of the long term effects are discounted cognitively, meaning, they just they simply will reduce the salience of what they calculation of what that cost might be.

They do that often in the service of achieving a particular goal. And they also tend to inflate the value of the goal in front of them. If the goal in front of them, I'm

not sure what the contest was between the shooters and the people they were shooting at.

THE COURT: They weren't shooting at anybody, they were just shooting. There's a supposition that they might have been in gangs, or on the edge of a different gang territory and just wanted -- that there was a division at that point. But they weren't trying to kill any particular person, they were just firing, in naval parlance, a shot before the bow.

THE WITNESS: In addition to discounting the costs, if somebody wants something or wants to do something, they will tend to inflate the benefits. And we see this in common behavior by people in shopping situations, and there's a moment at which rationality is compromised. And, again, modern research, and this is something I haven't written about this in here, but it seems to be quite prominent and quite widely accepted. The more -- the hotter the cognition, as we say, the less rationality is present. And you've mentioned emotional in your questions and I think emotion is part of it.

THE COURT: Go ahead.

MR. MILLER: Thank you, your Honor.

EXAMINATION BY

MR. MILLER:

(Continuing.)

Q Professor, you concluded in your report that any

additional term of incarceration beyond what Mr. Lawrence has already served will provide little, if any, marginal effect on the deterrence of gun crimes by other individuals in the community; right?

A Yes.

Q At the time that you wrote your report, were you aware of how much time Mr. Lawrence had served in prison?

A I know he still was in a pretrial incarceration period of time, but I don't believe he had served this. This was not post sentence.

Q Do you know how long he had served?

A I did know and then I forgot.

Q Okay. It was 66 days.

A Okay.

Q Are you aware of the maximum sentence in this case?

A In federal court?

Q Yes.

A Under §924(c)?

Q §922(g)?

A §922(g). An additional ten years.

Q Correct.

Is it your opinion that Mr. Lawrence would be indifferent to a sentence of 66 days, or a sentence of ten years would affect his future?

A A sentence of ten years or a sentence of?

Q 66 days?
A Indifferent, no.
Q So it might have some effect?
A Yes.
Q And is it --
A I don't know if deterrence would be one of those effects, but he would certainly be affected by it.
Q Is it your opinion that he would be indifferent from a deterrence perspective to a sentence of 66 days and 10 years?
A It's possible that he would be indifferent. I would have to spend some time with Mr. Lawrence to figure that out.
Q It's possible that he would not be indifferent?
A Yes.

MR. JACOBSON: I'm sorry, are you talking about specific deterrence?

MR. MILLER: With respect to Mr. Lawrence, specific deterrence.

MR. JACOBSON: I don't know that that's the question at issue today.

MR. MILLER: Well, specific deterrence is one of the factors and one of the bases of Professor Fagan's report so I think it is quite proper.

THE COURT: Stay on the general deterrence track.

Q Is it your opinion, Professor, that all of the individuals in Mr. Lawrence's community are indifferent from a

general deterrence point of view between the sentence of 66 days and the sentence of ten years?

A I have no way of knowing that.

Q You have no way of knowing?

A Right.

Q Now, we've talked about a few studies that you've cited in your report today, I just wanted to turn --

A Can I clarify that answer?

THE COURT: Yes, go ahead.

THE WITNESS: So when you ask that question in a community, I'm sure people in the community at large would be affected by the difference in the sentences. Would people who were engaged or thinking about the possibility of engaging in gun violence be affected by the difference in those sentences, that would be the right question. And without doing a fairly systemic inquiry, I would not be able to say.

Q So you're not able to say?

A No.

THE COURT: So what does that mean? That a middle class person would be more affected by general deterrence?

THE WITNESS: They have more to lose, your Honor, yes. The costs would be much greater for them.

THE COURT: So you'd have to up the sentences, if it had any affect at all, on the lower than middle class.

THE WITNESS: The calculation on deterrence is

generally a net cost/net benefit calculation. And if there is little to be gained by not doing the crime, then that's offset by the costs of doing the crime.

THE COURT: Can you go to lunch and come back?

THE WITNESS: I have a seminar at 4:00, your Honor. I have to get uptown.

THE COURT: You don't have to prepare for it?

THE WITNESS: No, fortunately.

THE COURT: So you could leave here for Columbia at 3:00.

THE WITNESS: Yes.

MR. MILLER: Judge, we don't have much more.

THE COURT: I have Board of Judges meeting. They are up there assembled.

MR. JACOBSON: My redirect will be very brief.

THE COURT: Why don't you take a half hour lunch.

THE WITNESS: Okay.

THE COURT: I'll show my face, as in a faculty meeting, and leave to come back.

THE WITNESS: You've been in faculty meetings before. Unless you're on the agenda.

THE COURT: I find this fascinating because it goes counter to everything the statute says, that Congress believes, and that the average middle class, and I assumed everybody knew. Let me ask this young man.

Would you have been affected more by a thought that if you were caught you'd let get a longer sentence than you would if you were caught and not a short sentence.

MR. JACOBSON: Can I ask that he not answer that?

THE COURT: Don't answer it.

Okay. Take a half hour for lunch and then come back.

THE WITNESS: If it's of any relevance, I'm enjoying this.

THE COURT: It's disturbing.

(Defendant exits from courtroom at 1:02 p.m.)

THE WITNESS: And the wrote a big article on the impact Wexler when penal code. I teach Wexler and Michael when I teach a death penalty course. That's one the first readings.

(Luncheon recess taken; 1:03 p.m.)

(Continued on the following page.)

AFTERNOON SESSION

(In open court.)

(Parties present.)

(Defendant enters the courtroom.)

THE COURT: Let's proceed, shall we?

MR. JACOBSON: Let's proceed.

THE COURT: Well, we were discussing, I think generally, does general deterrence have more of an impact when you're dealing with defendants who are used to calculating? That's the last point we were making. We had that security crook that got 150 years, what was his name?

THE WITNESS: Madoff.

THE COURT: That was directed, I take it, at people who were involved in securities that had more of an impact than on other groups who aren't used to that kind of day-to-day calculations. Their calculations are very closed.

THE WITNESS: My guess and, again, white collar crime, unfortunately, is not as well researched as it ought to be. But my guess is that other people considering running a scheme like Madoff or some other white collar fraud activity would think -- would observe what happened to Madoff and worry more about how not to get caught.

THE COURT: I see.

THE WITNESS: They would be more careful in how they

put their scheme together.

THE COURT: What about adolescents whose frontal brain hasn't fully developed and don't calculate consequences so well? Would this have less of an effect on them, deterrence, general deterrence.

THE WITNESS: Yes. All of the research that I was involved in the McArthur Commission, McArthur Research Network, that actually investigated this for a fairly long period of time. And all of the research on this suggests that adolescents are compromised with respect to sort of judging the consequences of what they do. They're much more impulsive in their decision making. They have a hard time regulating their emotions whether they be anger or fear or want or lust.

There's just a number of deficits to their ability to act rationally, to do the kind of rational calculation of cost and benefits that an older person would be able to do. This was recognized by the Supreme Court in a series of cases which I'm sure you know.

THE COURT: So age would enter into it possibly?

THE WITNESS: Absolutely. I didn't opine about it in my report, but there is a conversation going on amongst psychologists and neuroscience scholars about when brains reach their full maturation and whether or not there should be some realignment of legal institutions, particularly, juvenile courts to recognize diminished capacity that extends beyond

the age of 18 well into the early 20s. The evidence is not conclusive, but it certainly is strong enough that there are sustained efforts to study exactly this.

THE COURT: So what do we do when we get an adolescent as against a 40-year-old criminal? A 40-year-old criminal who is beginning to slow down for physical reasons, but he can think, or she can think, compared to an adolescent with respect to general deterrence? Do we just ignore it, or do we give greater weight to any class, any age group, any people that have prior incarcerations. All of the things that we might consider.

THE WITNESS: Let me cite back to some of the research that I did where I actually -- one of the things that I think that is a very important study. It wasn't necessary -- some of the people in the study were gun offenders.

THE COURT: Were what?

THE WITNESS: Some of the people in the study that I want to talk about, that I mentioned before, the 1,350 young men, mostly young men. I think there were only about 110 women, so it's roughly 1,200 men who were in two cities, Philadelphia and Phoenix. Very high crime cities, particularly, at the time when we recruited them. It was in the early 19 -- it was the late 1990s when we recruited them into the study and we followed them for years.

And we interviewed them extensively, repeatedly, over the period of eight or nine years. It was eight years, actually. What we found was those young men were much more -- we found no difference in their recidivism rates following their incarceration for whether they had served six months or a year or two years. I think the maximum that somebody had served in the study was about three years.

And we did -- one of the strengths of that study is that we did a very careful matching process. So we were able to match people of different sentence lengths depending on their prior record, depending on prior commitments to institutions, and so on.

So we were able to say that -- we were able to approximate, all things being equal, to the person with one year incarceration would recidivate more or less than the person three years of incarceration. And the answer was, no, they did not. There was just the same amount of recidivism between the two groups. And the strength of the study, as I mentioned, is we actually were able to control statistically for all the background factors that you're suggesting we should do. It was published in the Journal of Criminology and it's somewhere in my curriculum vitae.

THE COURT: So what would an academic say we should do with the direction from Congress to consider that to assume that there is general deterrence. That's what they're saying.

THE WITNESS: There is general deterrence for some people. I think much of the literature on tax compliance --

THE COURT: On what?

THE WITNESS: Tax compliance.

THE COURT: Tax, yes.

THE WITNESS: Suggested that there is some general deterrent effect. Some of the literature on drunk driving, it varies quite a bit, but there's some deterrent effect on drunk driving. Not as much as there is on tax, for example.

So it really depends on the offense and the offender that we're concerned about. When it comes to violent crime, there is no reliable evidence of a general deterrent effect.

THE COURT: Well, we're interested in deterring the carrying of guns on the assumption is if there are fewer guns out there, we'll have fewer people killed and fewer serious crimes.

THE WITNESS: I think that's true.

THE COURT: And particularly, if you have gun-to-gun adolescents.

THE WITNESS: Can I describe, your Honor, some research that did happen in New York and, in fact, Brooklyn was one of the places where we did the study. So I think -- I didn't raise it in here because it really wasn't research about deterrence, but what it was research about people who -- young men who were between the ages of 18 and 25 or 26 who

were engaged in gun violence.

So it give you a very quick study. We interviewed 400 young men. The interviews were done by people who -- myself and my colleagues.

THE COURT: Is that a published study?

THE WITNESS: Published. I can give you particular points in my can CV of the studies.

THE COURT: Are they in your report?

THE WITNESS: It's not in the report. I didn't include it, your Honor, because I think it was not about deterrence. The study wasn't about deterrence, it was about the decision making, the process the young men went through in deciding whether or not to carry a gun and whether or not to use a gun.

So we interviewed 400 young men. This took place between 1996 and 1999, 1998. And the articles were published in '99, 2002, and 2005 and so on. So what we found was the reasons why they carried a gun largely had to do with self-defense. In some instances, they carried a gun because it gave them some status in the community. In some cases, it would help them as an instrument to complete a robbery if there was something they wanted to get, money or some other thing, or in some cases drugs. It's interesting that drugs were not a big issue for this group of people. The two neighborhoods, by the way, were East New York and the

South Bronx where we did the interviews.

I also interviewed people who were in jail as well as people who were on the street as well as people who had been shot themselves and who were victims of gun violence. So it was a very elaborate study.

The thing that they told us which was interesting was we asked them, actually, at some point about the police. When I started to think about deterrence and policing and thinking about my studies on the New York City policing regime. We asked them -- we went back and look at all of the interviewed transcripts and we looked for mentions of the police. And some number, some percentage of them mentioned the police in one way or another. But most of them said the police were never around, and police just weren't a factor in their decision making as to whether or not to use a gun and whether or not to carry a gun.

Later on, some people had said they had started to carry, they had used shared guns because they were somewhat afraid of being caught by the police with a gun, in which case, they would have been arrested. But, you know, I don't know if they knew it or not, but simply carrying a gun in New York doesn't get you a very stiff sentence. It essentially can be a misdemeanor or a very low-level felony.

But they were conscious of the fact that there were no police so there were no risks of apprehension. The idea of

going to prison almost never came up in any of the, in any of the interviews that we gave including some of the young men who had spent a year in Rikers. Very few of them had done any kind of time upstate.

So what I think what's interesting this cost benefit calculation had much more to do with the events immediately when they were making their decision about whether or not to use a gun or even to carry a gun. And, again, they did it -- a lot of it was done out of threat when they felt, they perceived a threat to themselves; or for reasons that were, as you mentioned, really childish reasons: They want status, they want to look like a big man, and so on.

Some of them had some mental illness. There was one young man who said, he just didn't feel comfortable without carrying a weapon and his reasons were very strange. I'm not a psychologist, but it wasn't hard to tell that there was some symptoms at work with this young man. And this was a time just really coming off the peak of gun violence in New York in the late 1990s. The violence had peaked around '96 or so.

So the lack of presence of the police in studying these 400-and-some-odd young men, I think, was really quite prominent, and it speaks to the questions that I tried to address in the report. There was no deterrent effect for these guys because there was no police around and this was even in an era when stop and frisk was really ramping up in

New York.

MR. MILLER: Your Honor, may I ask a question?

EXAMINATION BY

MR. MILLER:

(Continuing.)

Q Just on that point that you were just discussing, you're saying effectively that the people you interviewed didn't think about prison, right, just wasn't part of the what came up in the discussion.

A No. The only thing -- that's right, it didn't come up in discussions. They did think about the police, and they -- the ones who were asked about the police said the police aren't around, we're not worried about it.

Q You also said that the state prison sentences for gun crimes during that time were quite low?

A Well, for carrying a gun.

Q Correct.

A Right.

Q Yes. Okay.

A I think it's important. Carrying a gun is different than an armed robbery. It's a very different offense and the prison sentences as you know are quite high.

THE COURT: We put a lot of effect on carrying in federal.

MR. MILLER: It's the crime that's at issue.

THE WITNESS: Felon in possession, yes. It's different than New York State.

THE COURT: I give a lot of weight to carrying. My calculus is you carry a gun, you're going to get a heavy sentence. Much heavier because it will deter you and incapacitate you, but it will also deter others. That's the way I've been sentencing now for quite a few years. I think probably most judges in this court sentence that way. We're all under that misapprehension.

I think, all tolled, you can say that tens of thousands of extra months or days in prisons was served as a result of the misapprehension of me and other judges in this courthouse that if we hit them with a heavy sentence that we can.

I remember, and I sometimes get ashamed when I think of it, at one of the first sentences I had was a man who was otherwise pretty good he had a good marriage, he had children, he gave to charity, had been a veteran and he did something, I forget the crime, it was a white collar crime, substantial tax evasion or something like that. And I gave him a stiff sentence and he blanched.

So I explained to him, and in retrospect it sounds absurd, you can think of yourself as making a contribution to society in deterring other people from doing the same thing. But I take it that at least in most crimes that we have here

involving drugs and things like that that was an insane statement to make almost; right?

THE WITNESS: Unless the statute -- it is an insane statement. It's an inefficient statement. I can't go to the mental state of the people.

THE COURT: It's got no rationality, I would say it's insane.

THE WITNESS: Unless there is some underlying unspoken theory of incapacitation.

THE COURT: Well, you know, we've gone through this with respect to specific crimes. The Rockefeller thesis was if you're really whack them hard, it's a good thing because other people won't get involved. That didn't work at all, right, that was clear.

We had it with the guns. We have to with the people who look at child pornography, I think, to a large extent based on what I've observed. And what crime may be fraud by a securities person.

THE WITNESS: I would think white collar crimes would be an appropriate target for a deterrence based sentencing rationale.

THE COURT: General deterrence and also specific.

THE WITNESS: Both.

THE COURT: On the ground, first, that they're used to thinking more rationally perhaps and they got more to lose.

THE WITNESS: Yes.

MR. MILLER: May I, Judge.

THE COURT: Yes, I'm just trying to see what impact all of this has on this defendant.

CROSS-EXAMINATION

BY MR. MILLER:

(Continuing.)

Q Professor, can I direct your attention to Government Exhibit 2, which is one of the reports, one of the studies that you cite in your report?

A Yes.

Q It's the Bhatti and De Caro Study. Did I say that correctly?

A Yes.

Q This is one the studies you cite as a recent review of deterrence literature?

A Yes De Caro is my research assistant.

Q I would like to direct your attention to the abstract that's on the first page of the report?

A Yes.

Q About five lines up from the bottom, it says, "Results indicate that a comparison of the counterfactual and actual offending patterns suggest that most releasees were either deterred from future offending, 40 percent, or merely incapacitated by their incarceration, 56 percent." Correct.

That's what the report says, yes?
A Yes.
Q And the report says that most releasees were either deterred -- one of the things is they were deterred from future offending, that's 40 percent of the releasees?
A Correct.
MR. MILLER: Your Honor, I move to admit this study.
THE COURT: Admitted.
(Government's Exhibit 2 was received in evidence as of this date.)
Q Now, turning to Government Exhibit 3 that's Nagen and Pogarski; is that right?
A Pogarski, Greg Pogarski.
Q This is also one of the studies you cite in your report?
A Yes.
Q This is a study that you cite in your report as a laboratory experiment simulating deterrence conditions?
A Yes.
MR. MILLER: I move to admit Government Exhibit 3.
THE COURT: Yes. Admitted.
(Government's Exhibit 3 was received in evidence as of this date.)
Q This is generally an experiment on college students on whether they would drive drunk under certain conditions?
A Correct.

Q I would like to direct your attention to Page 877 of the report. I want to take your attention to the first sentence of the last paragraph on the page. This is in the results section; correct?
A Mm-hmm.
Q And the report here says, "We find both a certainty and a severity effect."
A Yes.
Q And this is studying a model of general deterrence; correct?
A Yes. For college students in the condition of drunk driving.
Q This is an experiment on general deterrence?
A Of drunk driving, not of gun violence.
Q And they found both a certainty and a severity effect?
A For drunk driving, yes.
Q Okay. And if you look at the bottom of Page 878?
A Yes.
Q Four lines up from the bottom, it says, "As for the severity effect, its coefficient estimate applies that a ten-month increase in the suspension period would reduce the drunk driving probability by 6.8 percent." Correct?
A For drunk driving, yes.
Q That's what the report says.
A Yes.

Q Now, I would like you to turn to Government Exhibit 4.

Government Exhibit 4 is a report that you cite by Rosenfeld, Formango, and Balmer; correct?

A Yes.

MR. MILLER: And I move to admitted Government Exhibit 4.

THE COURT: Admitted. 3 and 4 are admitted.

(Government's Exhibits 3 and 4 were received in evidence as of this date.)

Q This is one of the studies that you talk about before that studied the effects of Project Exile?

A Correct.

Q And that is a gun sentencing enhancement study -- regime in Richmond, Virginia?

A Correct.

Q I would like you to turn to Page 424 of Government Exhibit 4 and Page 437 of Government Exhibit 4.

And on Page 437 of Government Exhibit 4, I direct your attention to the last paragraph. And the report says, "In summary, we find evidence consistent with an intervention effect on homicide trends for Richmond's Project Exile. Richmond's firearm homicide rate fell more rapidly than the average firearm homicide rate among large U.S. cities with other influences controlled." Correct?

A Yes.

Q And Project Exile was premised on bringing enhanced prison sentences for firearms offenses; correct?
A Yes.
Q I would like to turn your attention to Government Exhibit 5 which is the Raphael and Ludwig study; correct?
A Yes. Can we -- am I allowed to ask questions.
Q No, I ask the questions right now.
THE COURT: Exhibit 5?
MR. MILLER: Yes, we'd like to move that into evidence, your Honor Government Exhibit 5.
(Government's Exhibit 5 was received in evidence as of this date.)
Q Let's turn to Page 254 of Government Exhibit 5.
This is again a study on Project Exile; correct?
A Correct.
Q About halfway down the page, the first sentence of the last page, "The most compelling effort to date to isolate the causal effects of sentencing enhancements come from Daniel Kessler and Steven Levitt who analyzed the effects of enhancements introduced by Proposition 8 in California.
That's what the report says; correct?
A What page are you on?
Q 255?
A Okay. Yes.

Q And down the page about five lines up from the bottom, the authors -- the report says, "The authors find a short-term reduction in crimes covered by the enhancements of around four percent, presumably, the result of the law's deterrent effect on criminals." Correct?
A Yes.
Q Now, we look at Page 263. I want to take you to the last paragraph. This is the authors of this report writing, "Taken at face value, the patterns discussed above are not inconsistent with the real effect of Project Exile on the number of homicides committed with firearms." Correct?
A Correct.
MR. MILLER: No further questions, your Honor.
THE COURT: Any redirect.
MR. JACOBSON: Briefly, your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. JACOBSON:

Q Professor Fagan, the Government just took you on a tour of some snippets of the studies that were cited in your report, can you speak to whether the Richmond study, for example, was able to tease out specific versus incapacitory versus general deterrent effects and how that would affect the model in these studies?
A No, they were trying to look at -- it's not clear whether -- certainly, they weren't able to control for

incapacitation effects.

But as I recall the study, if we go on past Page 264 and into 265 and beyond, I think we find a little bit more equivocal evidence on the claims that they make. And I think if we go to the bottom of 267 and beyond, they say, "to summarize the large increase in homicide rates occurring during the late 1980s in Richmond coupled with the inverse relationship between earlier and later changes in homicide rates observed among other U.S. cities, cast serious doubt on the validity of previous claims about the effect of Project Exile. And adjusting the decline in Richmond's homicide rates for the increase in murder rates during the 1980s, leaves little residual decline in need of explanation."

Q And the Government mentioned what those -- exactly what deterrent effects came out of it in terms of the number. Is that statistically significant in terms of the general deterrent effect that they found versus isolating for incapacitation and specific deterrence?

A If you look at Table 7-3 on Page 270 there don't seem to be statistically significant effects there.

Q And since we're talking about incapacitation as it relates to these studies, would you say that incapacitation is more closely linked to the notion of specific deterrence, or generally deterring future offenders?

A It confounds any attempt to identify a general deterrent

effect because a person -- because it assumes that people who are in prison, who were active gun offenders, may not be shooting their guns when they're out on the street.

And so, if there's a reduction in homicides, it could be because there's a general deterrent effect, or because the people who were the active shooters don't have the opportunity to shoot and we cannot disentangle those two effects.

Q And is the question of recidivism a question of specific or general deterrence?

A Specific deterrence.

Q You had discussed -- testified previously about the difference in decision making between white collar defendants and gun offenders. And the Government has also asked you about a drunk driving study. Is there reason to believe that decision making amongst a pool of potential drunk drivers would be different from gun offenders in, say, Brooklyn?

A Well, drunk drivers are a fairly large swath of the population, unfortunately. We don't know how large because we don't know the true rates of drunk driving but we know that check points for drunk driving seem to be able to catch a number of drunk drivers.

I don't believe that there are -- that that population of drunk drivers is comparable in any way to the population of people who carry guns, and certainly, not

comparable to the population of people who use guns. So extrapolating from drunk driving -- gun carrying to gun violence is more than risky.

Q And you had also discussed the interviews that you conducted with potential offenders in East New York.

Does that point to considerations that they had that would be different from the larger pool of drunk drivers as you said?

A I think they were a very, very different population than the larger pool of drunk drivers. There's really nothing quite comparable.

Q And the Court asked you or pointed to the statute §3553(a) and it does say that one of the purposes of sentencing or factors in sentence something to afford adequate deterrence; is that right?

A Yes.

Q Does the statute say what weight should be placed on the notion of general deterrence for any specific defendant or type crime?

A Not in my reading of the statute. And my read is that it doesn't seem to distinguish. The text doesn't seem to distinguish from specific to general deterrence.

MR. JACOBSON: Nothing further, your Honor.

MR. MILLER: Nothing further from the Government.

THE COURT: So if you had an area in New York or any

other place, and there are differences in crime committed and differences in carrying guns, and you had a high gun-carrying area. If you were economically given a certain amount of money, I take it your feeling would be put it out and police on the street so they could catch quickly and, what, punish lightly, relatively, compared to picking up people at random as a small percentage of the total gun carriers and giving them heavy sentences and paying the costs in prison and the like?

THE WITNESS: The National Academy report is consistent with much of the writing in this area.

THE COURT: Do we have it?

THE WITNESS: No, I didn't cite to it, your Honor, I'm sorry. I think the studies that I cited actually were --

THE COURT: Excuse me?

THE WITNESS: The studies that I cited in the report, in my report, are actually consistent with the conclusions of the National Academy report.

THE COURT: When was that report?

THE WITNESS: It was issued, I believe, in either I want to say 2014. It's very recent. It's very recent.

One of the things --

THE COURT: Give us a citation and we'll get it for our library.

THE WITNESS: Okay. I can send it by e-mail --

THE COURT: Yes.

THE WITNESS: -- to Mr. Mr. Jacobson.

One thing I wanted to say is they do go into recommendations, or at least the implications of the research. And one of the implications of the research is that funding should be redirected from prisons to police. Under the assumption that they would there would be a much greater effect on crime of increasing the risk of apprehension than there would be by lengthening the sentences that convicted offenders receive. They were very, very clear on that.

They don't necessarily talk specifically about gun violence, but I think they're making assumptions that this applies across the board. There's a couple of other papers that go that this detail and fairly sophisticated empirical arguments about those, so I would be happy to produce those cites to the Court.

THE COURT: That would also imply, wouldn't it, greater reliance on picking up people almost at random rather than waiting for crimes to be committed.

THE WITNESS: I think the theory is that the presence of police and a fairly proactive enforcement regime where they respond to signals of crime very immediately seems to be a way to communicate to the offender that there is risk. We don't have really good experiments to say whether or not the effect is achieved simply by the presence of police, or by

what the police do when they're actually on the ground in those places and that would be very helpful to know. And I think that much of the stop and frisk regime, not to debate about that in New York, tried to disentangle that question.

But my strong sense of reading the literature on this, and my own research, is the presence of police is a much more effective deterrent than a regime where people are arrested and put away.

When Professor Zimmering did his report on the study crime decline in New York that was published in 2011, his conclusions, after reading the data, were very much the same; that it was the heightened presence of the police much more so than incarceration. He did actually look at incarceration effects --

THE COURT: They weren't proactively stopping and searching?

THE WITNESS: He ducked that question, your Honor.

THE COURT: He ducked it.

THE WITNESS: Yes. He said there's something about the police. The way the police are managed, the way the police are deployed, the way they're allocated to very specific hot spots of crime to exert their influence there, but you stopped short of saying that any particular tactic was more effective than another tactic take. This was the conclusion of the Academy report as well.

THE COURT: Of course, it might antagonize the local population to have all those people, right? That's another factor. And the privacy factors of having the police flood an area.

THE WITNESS: Yes, your Honor. That's absolutely right. I've written about that as well. It's a very delicate balance to deploy the police.

THE COURT: In any event, is it accurate to sum up your testimony at least with respect to adolescents up to the age of 25, let's say, that heavier sentences do not lead to proportionally less crimes through general deterrence?

THE WITNESS: For violent crimes and for gun crimes. That seems to be where the evidence goes.

THE COURT: Well, of course, that's why we're punishing gun crimes to avoid gun crimes.

THE WITNESS: Correct. In my report, your Honor, just on this question, we mentioned a particular program in Chicago that I was involved in evaluating the program called the Project Safe Neighborhoods Program which was really an alternative to the -- it was a deterrence model, but it was very much of a specific deterrence model coupled with the idea of raising the benefits of not doing the crime. And when -- and this was for gun offenders in Chicago who were, like gun offenders in any other places, mostly poor, living in conditions of poverty and other high-crime neighborhoods and

so on.

And in this effort, what they did what the program did was to raise the net benefit of avoiding crime by intervening with gun offenders who had been on probation or parole, and giving them job training and access to jobs and housing support and mental health and healthcare. Just the range of social services and interventions. And they stayed out of crime and we compared them.

We compared different neighborhoods. We had two otherwise perfectly matched neighborhoods. And in the neighborhoods where the gun offenders were participating in the PSN Program, the gun violence rates went down fairly dramatically in five years while we were in the program.

And this is the same situation that was studied in Cease Fire in Boston, which is mentioned in one of the items that I reviewed, but it's a pretty well-known program where they did the same thing. There was a religious element to that program where the police and the probation officers and the clergy all intervened together and gave the same message: If you mess up, if you commit another crime, we're going to lock you up. If you get a job and go to school and obey the law, we will give you every support you need to stay straight and avoid crimes. So they raised the benefit of going straight and also raised the cost of doing the crime. And this program was extremely successful for five or six years.

THE COURT: The cost being what? Elimination from the program?

THE WITNESS: No, the cost would be if you were caught doing another crime you would be in prison.

THE COURT: General deterrence.

THE WITNESS: Yes. Specific deterrence in that case. It was specific. But the results of that program in the neighborhoods was concentrated. Actually, it was in several neighborhoods in Boston. The juvenile homicides rates in Boston went to zero for two or three years and stayed at an extremely low level for several years.

THE COURT: Well, it's hard to tell whether that's the job programs. You get jobs for people, they don't get driven to crime because they're not -- they don't have money in their pockets.

THE WITNESS: From a deterrence perspective, your Honor, it also suggests that if you think about the net benefit/net cost ratio, then the net benefit of avoiding the crime is much greater and the cost --

THE COURT: Is what?

THE WITNESS: Much greater.

The cost of doing the crime is the same. If you're caught, you're going to get punished. But the net benefit of avoiding the crime increases and then competes with, or if not exceeds the benefit of doing the crime.

THE COURT: So with respect to an adolescent and gun crimes, we ignore general deterrence taken into consideration of possible specific.

THE WITNESS: That's a hard question, your Honor. I think if you take a strictly utilitarian view, there can be -- there might be a general deterrent effect, but certainly, we don't need extremely long sentences to achieve it.

THE COURT: What's an extremely long sentence?

THE WITNESS: Well.

THE COURT: Where do you draw that line when you cross over from a light sentence into one that is very harsh?

THE WITNESS: That's a difficult question, your Honor. My guess is that there are many factors that would go into that calculation. The nature of the incarceration itself. Going to Attica would be quite different than going to a small residential program with 30 young men in a pod in a facility.

THE COURT: I've in a number of recent opinions, you have to consider the nature of the incarceration in determining the length of the sentence.

THE WITNESS: Yes, I think that's right.

THE COURT: Some of these criminals have mental problems that, I guess, make it more difficult for them to respond in a sensible way.

THE WITNESS: That seems to be the evidence.

THE COURT: Okay. Well, Counsel, I have nothing to ask. I would like to go up and listen to your lecture but unfortunately I have other matters to attend to.

THE WITNESS: It's "women in prison" today.

THE COURT: Excuse me.

THE WITNESS: It's "women in prison." It's a seminar on incarceration.

THE COURT: Women in Prison. Okay. Thank you very much.

THE WITNESS: Thank you, your Honor.

THE COURT: And if you want to send us that other study.

MR. JACOBSON: We'll file a letter with the Court with the citations.

THE COURT: The American Academy of Arts and Sciences have a publication on just this issue, too?

THE WITNESS: I haven't seen it.

THE COURT: Okay. Thank you very much. Are we going to have another witness?

MR. LIFSHITZ: Your Honor, the Government is prepared to proceed to sentence. I don't think there are any witnesses from either side.

THE COURT: I'm not prepared. I want to think it through. Based on everything we knew, what's your number?

MR. LIFSHITZ: Ten years, your Honor.

THE COURT: How much?

MR. LIFSHITZ: Ten years to protect the community, which far outweighs all the other statutory factors the Court has to consider.

THE COURT: Incapacitation being a major factor.

MR. LIFSHITZ: Exactly, yes. The factors are weighed differently in each case, and in this case the defendant tried to murder people in the middle of Brooklyn. It can be no more dangerous man appearing before your Honor for sentencing.

THE COURT: Even if they ever showed they tried to murder, it's certainly what we call reckless.

MR. LIFSHITZ: Your Honor, at a minimum. I think earlier your Honor may have suggested he was not trying to murder people. We can't show you the people he was trying to kill because the camera footage doesn't show had a side of the street.

THE COURT: It shows some of the people running across he crossing the street.

MR. LIFSHITZ: I strongly oppose reaching the opposite conclusion that he was somehow not trying to murder people. If he was not trying to murder people, the best way to do that would not -- would be not to fire a gun down the middle of a residential street.

THE COURT: I notice this is a piece of evidence

that shots were fired which seemed to be parallel to the ground, not up into the air which would be a warning kind of thing. Parallel to the ground.

MR. LIFSHITZ: Yes.

THE COURT: Before the bullets fell to the ground, it would have damaged people that would have been passed.

MR. LIFSHITZ: Let's not forget that he almost killed his own co-conspirator. That would have been a complete tragedy.

THE COURT: You want to submit any more papers on the basis of this evidence.

MR. JACOBSON: We would rest on our submissions, your Honor. I think we would like the opportunity to argue it. I'm happy to respond to the Government's points. I think one thing that they've been unable to do is to say why the guidelines, which already have all of that conduct built into them, are inappropriate in this case.

THE COURT: The guidelines are what?

MR. JACOBSON: The guidelines that were originally agreed upon by the parties was a Total Offense Level of 15. With his Criminal History Category of II that resulted in 21 to 27 months. We're not asking for any extreme departure. We're just asking for the guidelines that were agreed upon between the parties and provided to the Court in the plea penalty sheet at the guilty plea.

THE COURT: Were those the agreed-upon guidelines?

MR. LIFSHITZ: Your Honor, there is no plea agreement in this case. There is no agreement on anything.

MR. JACOBSON: The Government provided a penalty sheet to the Court which had these exact guidelines in them.

THE COURT: Now, what do the calculations lead to.

MR. LIFSHITZ: Your Honor, the PSR has a base offense level of 14, an enhancement for discharging a firearm which is not disputed; and an enhancement for a victim sustaining bodily injury which is not disputed; and the reduction for acceptance of responsibility which we don't dispute.

The result is an offense level of 21 and because he's in Category II the guidelines range is 41 to 51 months in custody. That seems to be the accurate guidelines calculation. We're asking for more but. We don't dispute that that's the correctly determined range.

THE COURT: Make a note of that.

MR. JACOBSON: There is some dispute about the guidelines only because the Government did provide the lower guideline to the Court in the plea penalty sheet.

THE COURT: They're not bound by it.

MR. JACOBSON: Of course they're not bound by it, but that's what they thought this case was worth in terms of the guidelines that's what we continue to believe it's worth

in terms of the enhancements. Even with Probation's additional enhancements, it's still encompasses all the conduct and all of the factors that the Government has now decided warrants a ten-year sentence. So it's hard to see why those enhancement aren't sufficient in the Government's eyes.

The ideas of incapacitation and specific deterrence are already built in to Congress's determinations to the enhancement that Probation has applied in their calculation. If anything, we think all of the other factors in the case would warrant a sentence below the PSR's calculation of 41 months. Mr. Lawrence has spent eight months on home incarceration already.

THE COURT: He's not getting credit for that under the guidelines.

MR. JACOBSON: Not under the guidelines, but it was tantamount to the incarceration at MDC. He was confined to his home. His entire family has been here at the court proceedings and has told the Court their feelings about Mr. Lawrence and the support network that they will be providing for him after his incarceratory period is over.

Ms. Graham, who is Mr. Lawrence's mother, has actually spoken to the Court on a number occasions and spoken about her son and her feelings about the case and how she's already started to help get on the right track.

If your Honor remembers, Mr. Lawrence was actually

out on bail for much longer than a year in this case before it was federalized. He was out on bail for ten months and then another number of months on federal bail after he was brought here on this criminal complaint. No violations that led to revocation. He was doing well, he was being a good father to his children, which is what he's told the Court a number of owe times is what he wants to do and he has young kids that he would like to be there to provide for.

And so, what Professor Fagan said, which, I think is important, in a number of cities they have used more community-based interventions as a replacement for just a longer incarceratory sentence. They can provide the same, both specific and general deterrent effects.

And so, what we're asking the Court for is because there's no official program in New York City, the Court can craft a community-based intervention that would provide that same support and that same model.

THE COURT: You mean through Probation?

MR. JACOBSON: Through Probation, absolutely. And Ms. Guevara, a social worker in our office, can speak more pointedly to that. There's a reentry plan that she has prepared with Mr. Lawrence's family and with Mr. Lawrence.

THE COURT: Has that been supplied to the Court?

MR. JACOBSON: We can provide it by letter. She does have a copy that we can hand up to the Government and to

the Court now. But as the Court is aware, and in addition to just an incarceratory sentence, their interventions like community service and confinement in a community reentry center, and then supervised release with strict conditions, that, if were violated would bring Mr. Lawrence back before the Court subject to additional incarceration.

THE COURT: Court Exhibit 1 of today's date.

(Court's Exhibit 1 was marked in evidence as of this date.)

MR. JACOBSON: I think another important point is Mr. Lawrence, on this case, for this conduct has been out on bail and he's been confined now for a couple months. But before that, he was out on bail for almost a year and a half. No additional charges, no violations that led to revocation.

So I think if we can opinion that positive trajectory. And I know Ms. Guevara can speak better to what some of those interventions could look like if the Court would it hear from her.

THE COURT: It's your case. I'm not calling witnesses.

MR. LIFSHITZ: Your Honor, can I respond to some of what was just said?

THE COURT: Yes.

MR. LIFSHITZ: There is absolutely no basis to say there have been no violations. When he was arrested on his

federal case, he had fraudulent bank cards in his backpack. We moved for detention, Judge Scanlon ordered him released. We appealed to Judge DeArcy Hall and she allowed him to remain released. She didn't find that he didn't commit the bank fraud. He had cards in his backpack that were used recently in Brooklyn despite being in the names of people who live outside of New York State. So he was absolutely committing crimes while on release.

And now we're talking about him like he's some adolescent who was caught shoplifting. He's a 25-year-old man who tried to kill people in the middle of Brooklyn. The community has to be protected for as long as possible. No good citizen of Brooklyn should be condemned to live in the same neighborhood as Murray Lawrence for the next ten years. They've tried to make this case. They're trying to look at it through this very narrow lens of general deterrence, so this expert came and testified.

I would submit that if everything the expert said is believed at worst the factor is simply a wash. He's not saying that a long sentence somehow undermines the purpose of general deterrence, he's just saying it's not served. And if you listen closely to what he said, what he wrote in his report and what's written in all the reports he relied on, is that you can't disentangle the effect of deterrence versus incapacitation and a million other societal factors that lead

to people committing crimes.

He concedes that in some studies drunk driving is reduced by deterrence. He told you that white collar crime can be reduced by deterrence. That he would have the Court believe that Mr. Murray Lawrence is part of some community of irrational people who will commit gun crimes whether people who did that are sentenced to probation or ten years. And I think the Court observed that that was counterintuitive.

I think it's crazy. It borders on offensive and racist to treat people differently in the white collar context and in this context. And if it were true, he wouldn't be fighting so hard for a lenient sentence. He wants the most lenient sentence he can possibly get. He cares about what sentence he gets. People who are considering committing the crime he committed care about the same thing. And we know he committed this crime with another person. If only that other person can be deterred by sentencing Murray Lawrence to ten years, then general deterrence supports a sentence of ten years.

So the specific deterrence -- but, again, we've gone down this rabbit hole of deterrence. It's a statutory factor we absolutely believe it favors a serious sentence. But, in this case, the need to protect the community from Murray Lawrence outweighs everything else, and a ten-year sentence is warranted.

THE COURT: All right. Give me a date about a month from today and we'll sentence him on that date.

COURTROOM DEPUTY: Monday April 24th at 10:30.

MR. JACOBSON: That's fine for us. Thank you.

MR. LIFSHITZ: That's fine.

THE COURT: Split a set of the transcripts. See that I get a copy quickly.

Thank you very much.

MR. LIFSHITZ: Thank you.

MR. JACOBSON: Thank you.

(Defendant exits from courtroom at 2:31 p.m.)

(WHEREUPON, this matter was adjourned to April 24, 2017, at 10:30 a.m.)

* * *

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

Anthony D. Frisolone

Anthony D. Frisolone, FAPR, RDR, CRR, CRI
Official Court Reporter

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