IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4435

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP BERNARD FRIEND,

Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Richmond
The Honorable Henry E. Hudson, District Judge

BRIEF OF THE UNITED STATES

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ISSUE PRESENTED

I. Whether the district correctly denied Friend's motion to recuse as moot because by the time of resentencing the court had already withdrawn itself from consideration for the position of Director of the Federal Bureau of Investigation and thus eliminated any appearance of partiality.

II. Whether the district court abused its discretion and imposed a sentence that was procedurally and substantively reasonable when at resentencing pursuant to *Miller v. Alabama* it varied downward below the recommended guideline sentence of life and imposed a sentence of 65 years' incarceration.

STATEMENT OF THE CASE

After Friend's arrest, the government initiated transfer proceedings under 18 U.S.C. § 5032, and the district court certified his prosecution as an adult. JA 43-46, 691. On December 20, 1999, a federal grand jury returned a three-count indictment against the Friend family. JA 3, 652. Count 1 charged them with conspiracy to interfere with commerce by violence, in violation of 18 U.S.C. § 1951(a); Count 2 charged them with carjacking, in violation of 18 U.S.C. § 2119(1); and Count 3 charged them with carjacking resulting in death, in violation of 18 U.S.C. § 2119(3).

Friend entered a guilty plea to Counts 2 and 3. JA 652. The maximum term of imprisonment for Count 2 was 15 years, while the maximum term of

imprisonment for Count 3 was life. Based on the nature of the offense charged in Count 3, which related to the death of Mr. Lam, as well as a number of sentencing enhancements, the resulting guideline range was a term of life imprisonment. JA 684. As the U.S. Sentencing Guidelines were mandatory at the time of Friend's sentencing in October 2000, defense counsel moved for a downward departure, essentially based on his age at the time of the offenses, his tumultuous upbringing, and his role in the offenses. JA 165-78. After denying the motion, the district court sentenced Friend to life, consisting of 15 years' imprisonment as to Count 2 and a term of life imprisonment as to Count 3, to be served concurrently. JA 211, 214-15.

Friend filed his initial notice of appeal on November 24, 2000. JA 11. That appeal was ultimately dismissed. JA 12. After the dismissal, Friend filed a series of motions pursuant to 28 U.S.C. § 2255, most of which challenged the legality of his mandatory life sentence. JA 13-16. One of the successive petitions, which was filed in 2013, specifically challenged the constitutionality of his mandatory life without parole sentence pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012). JA 223. After the district court dismissed this successive petition, this Court Friended a certificate of appealability on the issue of whether Friend was entitled to resentencing in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). JA 222. Ultimately, this Court agreed with the government's concession that *Montgomery*

held that *Miller* was retroactive to cases on collateral review. JA 223. Accordingly, this Court vacated the district court's judgment and remanded the case for resentencing. JA 222.

Upon remand, District Judge Robert E. Payne, who originally presided over the Friend family case, set briefing schedules leading up to the resentencing hearing. JA 17-18. On February 9, 2017, Judge Payne issued an order transferring the resentencing to District Judge Henry E. Hudson. JA 18.

After hearing Friend's allocution, the district court imposed a total sentence of 65 years' imprisonment. JA 603, 607.

STATEMENT OF FACTS

I. FRIEND'S ROLE IN THREE CARJACKINGS THAT LED TO TWO MURDERS AND A MAIMING

Friend's participation in two murders and a maiming are not subject to any real dispute. Philip Friend was the youngest member of a family—his mother, Vallia; two older brothers, Eugene and Travis; a cousin, James Scruggs; and several associates—who during a period from March to April 1999 went on a crime spree that involved the carjacking or attempted carjacking of three commercial truck drivers. Their first victim, Soren Cornforth, was murdered on March 1, 1999. JA 430, 664. Their next victim, John Cummings, was brutally beaten and effectively crippled on April 10, 1999. JA 87-91, 654. Their final victim, Sam Lam, was murdered on April 25, 1999. JA 656-69.

The crime spree started as the brainchild of the eldest brother, Eugene. JA 394, 656. Eugene grew up to become a commercial trucker, much like his father, Melvin, who had been deceased for several years at the time of the Friend family's hijacking spree. JA 487, 670. Following Melvin's death in 1992, Eugene slipped into the role of head of household, being both the breadwinner for the family and, at his mother's request, disciplinarian for his two younger brothers. 486-7, 625, 669. When Eugene lost his job working for a legitimate trucking company, the family came on hard times. JA 486-7. Eugene determined they should target an older, independent trucker (whose absence would go unnoticed longer than someone working for a big commercial line would), steal his rig and go to the area of Laredo, Texas, where Eugene had heard they could pick up a load of marijuana and haul it back to the East Coast for a large profit. JA 394, 430, 654, 656.

Soren Cornforth's murder on March 1, 1999, was the first attack committed by the Friends but the last one actually tied to them by investigators. Earlier that evening Eugene, Travis, the defendant, Philip Friend, and their cousin James Scruggs had gone to the apartment of Eugene's then girlfriend, Jackie Robinson. JA 430. After hanging out at Robinson's apartment for a while, the entire group, including Robinson, went to the Shockoe Bottom area of Richmond where they saw Cornforth's truck parked outside of Loving's Produce to make a delivery of Idaho potatoes. JA 394-5, 430. Scruggs had brought along a .380 caliber handgun

that night, which eventually made its way into Travis's possession. *Id*. While Robinson remained in the car and Scruggs stood at the back of the trailer acting as a lookout, Eugene and Philip Friend physically attacked Cornforth in the cab of his truck where he had been sleeping. JA 412-3, 430. Both Philip Friend and Eugene fought with Cornforth, though Eugene was the primary aggressor. *Id*. When Cornforth put up a greater fight than expected, Eugene ordered Travis to shoot Cornforth with Scruggs's handgun. *Id*. Travis fired two rounds into Cornforth, killing him. *Id*. Fearing that the gunshots would draw attention and eventually the police, the group quickly fled without taking Cornforth's truck. *Id*.

On April 10, 1999, John Wesley Cummings, a 65-year-old truck driver from Georgia, was driving to New York with a load of produce and stopped at the Simmon's Truck Stop at Exit 8 on Interstate 95, just south of Emporia, Virginia. JA 654. The Friends' plan for that attack was to have their mom, Vallia, who was driving the family van, and Eugene's new girlfriend, Charlene Thomas, pose as prostitutes and lure Cummings to their van where Eugene and Philip Friend, who were in hiding, would attack him. *Id*. (Travis did not participate in this attack.) Vallia and Charlene approached Cummings's truck, and he got out of the truck to speak with them. *Id*. Cummings rejected their offer for sex and returned to his truck. *Id*. Upon seeing this, Eugene and the defendant rushed Mr. Cummings's

vehicle, entering it and overpowering him. The defendant used duct tape to bind Cummings's arms, legs, and head—including his mouth and nose. *Id*.

For the next six hours while Eugene drove the truck, the defendant beat Cummings with a BB gun and his fists, and kicked him as he lay helpless in the truck. JA 654-55. Additionally, the defendant threatened to kill Cummings by freezing him to death in Cummings's refrigerator unit in his trailer. JA 654. The defendant also told Cummings, "This is the end of your journey." JA 655. The defendant demanded Cummings's money and searched the truck to steal Cummings's personal items. *Id*. Later that night Eugene found an unattended trailer of logs parked by the roadside, which he hitched up to and took to a saw mill where he later obtained cash proceeds for the sale of the logs. *Id*.

About two weeks later, on April 25, the attack on Sam Lam involved the entire Friend family, with Vallia again driving the family van, all three brothers hiding in the back of the van along with another associate, Stanley Kirkwood, who also provided a 10 mm handgun for the occasion, and Charlene Thomas reprising her role as prostitute. JA 657. The group saw Lam, who was transporting houseplants from Florida to the Northeast, driving his rig on I-95 North in Caroline County, Virginia. *Id*. Vallia pulled the van alongside his truck and Charlene flashed her breasts and other body parts at him. Lam smiled in response and they all pulled into a rest stop at Mile Post 107. *Id*.

Vallia and Charlene Thomas approached Lam and both kissed him, and they arranged to go to a nearby hotel for sex. *Id*. Both vehicles went to the parking lot of the hotel and Lam approached the women in the van, whereupon all four males exited the van and attacked Lam. *Id*. Eugene knocked Lam unconscious. *Id*. The four males then put Lam into the truck. *Id*. The defendant placed a pillowcase over Lam's head and then taped it tightly with duct tape. *Id*. He also bound Lam's arms and feet with duct tape. *Id*. As Lam lay bound on the floor in the sleeper part of the truck, the defendant continued to kick and beat Lam. *Id*. Travis and Kirkwood were also in the truck. *Id*. Investigators later discovered that the pillowcase and truck cabin were covered in blood. *Id*.

The four males, with Eugene driving the truck, drove approximately one hour to a location south of Lake Anna in Louisa County, Virginia, where they originally intended to kill Lam and dump his body. JA 657-58. Vallia Friend and Charlene Thomas followed in the van. *Id*. Eugene unhitched Lam's trailer from Lam's truck and left the trailer at a location where he instructed both Vallia and Charlene to wait. JA 658.

Eugene, Travis, the defendant, and Stanley Kirkwood then drove off in Lam's truck to a secluded pond at the end of logging road off Route 522 in Louisa County, Virginia. *Id*. After parking Lam's truck on the dirt road, the four males dragged Lam, who was still alive and begging for his life, to a swampy area. *Id*.

After reaching the edge of the swampy area, Eugene told the other males that someone had to shoot Lam to death. *Id*. Travis, using Kirkwood's firearm, then shot Lam seven times, leaving his body somewhere in the swampy area. *Id*. After Travis fired the weapon at the victim, Lam tried to get away in the swamp, but Eugene grabbed Lam, choked him, and tried to drown him. *Id*. Lam escaped from Eugene's grip, but he was only able to move to another part of the swamp where the group heard him moaning, and where he later died. *Id*. After leaving Lam at the swamp, the four males drove in Lam's truck back to the location where Vallia Friend and Charlene Thomas were waiting. *Id*.

Shortly thereafter, the three brothers headed south to Texas via Tennessee, where they unloaded Lam's trailer at one truck stop and stole an unattended trailer at another. *Id*. They ultimately stopped in Laredo, Texas, where they hoped to find that mythical load of marijuana waiting to be transported up the East Coast. *Id*. After an unsuccessful search for the marijuana, they instead picked up a load of carrots in Weslaco, Texas, and began their return home. JA 658-59. They were eventually apprehended in Dade County, Georgia, when Georgia State Troopers ran the license plate on the trailer they were hauling and determined it had been reported stolen in Tennessee. JA 659.

II. MOTION FOR RECUSAL

In advance of the resentencing hearing scheduled in this case, the parties engaged in negotiations to determine whether they could reach a joint recommendation to the Court with regard to Friend's sentence. JA 228, 348. During those negotiations, counsel for the government informed defense counsel that, because of the nature of the case, any recommended sentence would have to meet with the approval of the executive leadership within the United States Attorney's Office, which included the United States Attorney himself. JA 348. After a thorough internal review of Friend's case within the U.S. Attorney's Office, the office determined that 60 years of incarceration was an appropriate sentence to pursue, and the undersigned counsel was instructed to advocate for that punishment in the government's position on resentencing. *Id*. This information was communicated in advance to counsel for the defendant. JA 228, 349. The next day Friend filed his Motion to Recuse. *Id*.

Friend based his Motion to Recuse on a confluence of facts that can only be described as unusual in the extreme. In summary, those facts and assumptions are the following:

1) The United States Attorney (USA) for the Eastern District of Virginia, Dana Boente, participated in discussions and ultimately decided what sentence to recommend in Friend's case;

2) Since January 30, 2017, USA Boente had held positions as Acting Attorney General and Acting Deputy Attorney General, and at the

time of sentencing was the Acting Assistant Attorney General for the National Security Division while simultaneously remaining the United States Attorney for the Eastern District of Virginia, and is directly connected to Attorney General Jeff Sessions and Deputy Attorney General Rod Rosenstein;

3) On March 8, 2017, Attorney General Sessions issued policy statements directing federal prosecutors to prioritize the investigation and prosecution of violent crime; and

4) On May 13, 2017, the presiding judge at sentencing, United States District Judge Henry E. Hudson, interviewed with Attorney General Sessions and Deputy Attorney General Rosenstein for the position of Director of the Federal Bureau of Investigation (FBI) following the highly publicized termination of James Comey from that position by President Donald Trump.

JA. 229-32, 349.

Friend's argument that full knowledge these circumstances would cause a reasonable person to question the district court's impartiality depended critically on the assumption that the court was interested in obtaining the position of FBI Director and speculation that the court might somehow attempt to curry favor with USA Boente through his actions in Friend's case in order to increase his odds of obtaining the FBI Director's position.

The inaccuracy of such assumptions was made clear, and Friend's motion made moot, approximately three weeks prior to resentencing when the district court issued its Memorandum Order denying Friend's motion. JA 362. In that order, the court informed the parties that it was the Attorney General (AG) and is staff, not the court, that had initiated discussions regarding interviewing for the

FBI Director's position, and that on May 16, 2017, after interviewing with the AG and DAG but prior to scheduling an interview with the President, the court informed the AG that he was not interested in pursuing the position further. *Id*. The order further made clear that USA Boente had not participated in the court's interview with the AG and DAG. JA 363.

III. RESENTENCING PROCEEDINGS

During the hearing, the defense first called Friend's aunt, Michelle Edmonds. JA 452. Ms. Edmonds testified about what she knew of the environment in which Friend grew up, specifically that Friend's father, Melvin, was abusive to his mother, Vallia, thereby creating a climate of fear in the house. JA 455. Ms. Edmonds also described how the family dynamics changed when Friend's father died, and how Vallia, who suffered from depression, could not manage her sons or be an effective parent. JA 455-57. Ms. Edmonds further described the interaction of the Friend brothers, observing that Philip looked up to and tried to please his older brother Travis. JA 458.

The defense next called Dr. Gillian Blair as an expert witness. JA 466. Dr. Blair identified herself as a clinical, forensic, and developmental psychologist in private practice. JA 467. Dr. Blair testified about her experience conducting evaluations for other defendants eligible for resentencing under *Miller*, as well as conducting a psychological evaluation of Philip prior to the resentencing hearing.

JA 470-73, 619. She also discussed research on the juvenile brain, noting that a human brain—in particular the prefrontal cortex, which is the part of the brain involved in decision-making, judgment and impulse control—does not fully mature until around age 25. JA 474-78.

Dr. Blair discussed at length what had already been well documented in Friend's PSR regarding the unhealthy environment in the Friend household. She described the Friend family as "dysfunctional and grossly unstable from the time of Philip's birth." JA 483. Dr. Blair testified that Philip's father was an alcoholic who was severely physically abusive to Vallia and the boys, and that Vallia also drank heavily, leaving Travis and Philip to fend for themselves. JA 480-82. Dr. Blair observed that, beyond the alcohol-fueled abuse, there were significant mental health issues in the household, with Travis exhibiting significant behavioral problems and being violent to Philip, and Vallia dealing with improperly treated bi-polar disorder and severe depression that led to, among other things, one suicide attempt in Philip's presence when he was about four or five years old. JA 484-85. This environment worsened when Friend's father died when he was nine years old. JA 486. Neither Travis nor Philip were attending school regularly, so Vallia persuaded Eugene, who had previously been banished from the house by Melvin, to return and take on the role of disciplinarian for his younger brothers, which he accomplished using abuse similar to what everyone received from Melvin. Id.

Dr. Blair testified that both Philip's age and the dysfunction in his household contributed to his involvement in the offense conduct. JA 490. She described a series of psychological tests she administered to the defendant, ultimately concluding that he had no emotional disturbance or psychotic disorder. JA 491-95.

On cross-examination, Dr. Blair acknowledged that, by definition, her work as a forensic psychologist involved the application of psychological knowledge to legal matters. JA 498. Dr. Blair agreed that in the federal system, and indeed most court systems, a factor courts consider at sentencing is the need for the sentence to protect the community from future harm. JA 500. Dr. Blair admitted that there are several tests based on actuarial data that have been cross-validated, such as the Violence Risk Appraisal Guide-Revised (VRAG-R), which can be used in forensic settings to assess the risk of future dangerousness. JA 501-06. Dr. Blair also admitted that there are widely accepted structured professional judgment instruments for assessing risk of future dangerousness, such as Historical Clinical Risk Management-20, also known as the HCR-20. Notwithstanding the availability of widely accepted tests to assess future risk, Dr. Blair surprisingly did not administer any, explaining that she did not believe that in Friend's case such tests were relevant. JA 501.

Similarly, even though Friend's conduct involved participating in three attacks on truck drivers resulting in two homicides and one crippling assault,

Dr. Blair testified that such conduct did not raise any red flags for her regarding the possible presence of psychopathy, and thus she did not administer any tests to assess for that potential risk. JA 509-10.

Dr. Blair also conceded that she did not administer any tests to assess response style, which is an area that experts ordinarily examine to ensure the validity of a person's responses in psychological testing and account for feigning, malingering, exaggerating and minimizing. JA 510-12. Finally, Dr. Blair admitted to using language in her report that was not objective, JA 522-23, and discounting certain violent conduct by Friend, both when he was a juvenile and an adult, evidently because such conduct in her assessment was not *that* violent, JA 520-22.

The final witness for the defense was Jack Donson, who retired after 23 years with the Bureau of Prisons ("BOP") where he worked primarily as a case manager. JA 528-29. Following his retirement from BOP, Donson became a consultant for a company called Prisonology. *Id.* Donson testified in summary that in his professional judgment, based on interviewing Friend and reviewing numerous records, Friend was an "exemplary model of rehabilitation." JA 540. Donson concluded that: 1) Friend did not succumb to peer pressure and become a member of a gang, notwithstanding his young age when introduced into the BOP adult prisoner population; 2) Friend had successfully completed BOP's BRAVE program, which is designed to give prisoners coping skills for life both behind bars

and after prison; 3) Friend's work history included positions indicating that he had earned considerable trust from BOP officials; 4) Friend's disciplinary record, while not flawless, was generally minor in light of the amount of time he had been incarcerated; and 5) when interviewed by Donson, Friend did not convey the impression of someone who had become institutionalized but rather was a person who remained forward looking and goal oriented. JA 540-48.

The government did not call any expert or lay witnesses. Several members of Soren Cornforth's family, as well as Sam Lam's adult son Felix, gave victim impact statements. JA 549-591. Not surprisingly, for many of the family members the severe pain and sense of loss caused by the murder of their loved ones continues to this day. J.A. 591-98.

In his allocution to the court, the defendant first turned to the Cornforth and Lam family members and addressed them as follows.

> *Your Honor, would you allow me a moment? I don't know if y'all heard it or not, but I want y'all to heard it from me that I'm sorry. I'm sorry for your loss, and I'm sorry for my actions and what they caused.*
>
> *To lose a loved one is hard.*
>
> * * *
>
> *To have your loved one taken from you is heart-wrenching. I know the same. And if I could undo it, I would if it was possible. I have to live with this shame and regret forever. People say all wounds -- people say time heals all wounds, but that's not true. Only love and forgiveness heals all wounds. I know that y'all can never love me, but I hope that y'all can forgive me.*

JA 599-600.

Friend continued his sentencing allocution with the court by highlighting a number of positive things he has accomplished while incarcerated, and concluded by saying:

> *I know I've done some bad things in my life, Your Honor. And I'm asking the Court -- I'm asking the Court to allow me to do some good things. If I'm ever released, I'd like to dedicate my life to humanitarian work helping people, children at risk, foster care, veterans, victim impact, elderly and senior care. I ask the Court to really give me a chance to pay my debt back to society and not be warehoused in a building.*

JA 601.

Before imposing sentence, the district court provided the following statement and explanation of his reasoning:

> *Well, Mr. Friend, as I hear your comments to the Court, and your desire for mercy, it does remind me that each of the victims that you so brutally tortured in this case begged for their life and begged for mercy from you, and you gave them none.*
>
> *When this case was before my colleague, Judge Payne, back in the year 2000, and based upon the brutality of these offenses, and based upon the torture you visited on the victims in this case, Judge Payne thought that a sentence of life without parole was appropriate. And based upon the record before him, it was appropriate.*
>
> *In the interim, the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit determined that sentences of life without parole, as you received, are unconstitutional. And this Court is duty-bound to bow to the direction of higher courts, and I must do so today.*

Mr. Friend, these weren't offenses that were just spur-of-the-moment. These were premeditated. You and your family planned how you were going to hijack these truckers. And there was no doubt in my mind that you knew that in the end there were going to be tragic consequences. And while you may not have killed them with your own hands, you were a brutal participant in the death of these individuals in taking away the loved ones of the families here in this courtroom. For that reason, there has got to be a significant penalty in this case.

I have reviewed the U.S. Sentencing Guidelines as advisory only. The guideline is for life, but, however, I think every lawyer in this courtroom understands that the constitutionality and legal firmness of that guideline is questionable at this point.

I have not only determined that they were properly computed in this case, but I've looked at all the factors set forth in 18, United States Code, Section 3553(a), and they have been addressed by counsel in this case. I have looked at the nature and circumstances of the offense, your prior background, which is considerable. I understand that you had a tough upbringing. I also look at what type of sentence would promote respect for the law, provide for deterrence and provide for just punishment.

All those factors having been considered, this Court feels that a sentence that will serve all those factors, and most importantly not only promote respect for the law and provide for deterrence, but reflect the nature and circumstances of this offense, would be commitment to the U.S. Bureau of Prisons for a term of 780 months.

JA 601-03

SUMMARY OF ARGUMENT

I. The district judge exercised proper discretion when denying as moot the defendant's motion to recuse. Judicial recusal is governed by 28 U.S.C. § 455. Section 455(a) provides that judges should recuse themselves "in any proceeding in which [their] impartiality might reasonably be questioned." Section 455(b)(1)

further provides that judges should recuse themselves where they have "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Friend predicated his recusal motion on the assumption that the district court was seeking, or at least affirmatively interested in, becoming the Director of the Federal Bureau of Investigation, which was the agency that in 1999 investigated the case that led to the current charges against the defendant. As the district court's memorandum order made clear, however, the district court had not sought that position but had participated in an interview with Department of Justice executives at the request of the Attorney General, and that three weeks prior to the defendant's sentencing the court informed the Attorney General he was not interested in the position of FBI Director. Having removed any appearance of partiality, the district court's did not abuse its discretion in denying the defendant's motion as moot, and Friend's appeal on this ground should be dismissed.

II. The district court's imposition of a below-guideline range sentence of 65 years for Friend was procedurally sound and substantively reasonable in light of *Miller v. Alabama* and *Montgomery v. Louisiana*. The district court properly explained the application of the sentencing factors under 18 U.S.C. § 3553(a) to the defendant's case, and varied below the guideline range of life imprisonment based on the teachings of *Miller* and *Montgomery*. When the district court

sentenced the defendant to a term of years but not life without parole there was no need to explicitly discuss whether or not the defendant's crimes as a juvenile reflected "irreparable corruption" or "permanent incorrigibility." Moreover, the Supreme Court has never held that a lengthy sentence for a juvenile constitutes a "virtual life sentence" or the functional equivalent of life without parole, so Friend's sentence, while lengthy, did not trigger a requirement for the district court to make such findings of "irreparable corruption" or "permanent incorrigibility."

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED FRIEND'S MOTION TO RECUSE.

A. Standard of Review

A district court's denial of a motion to recuse is reviewed by this Court for abuse of discretion. *See Sales v. Friend*, 158 F.3d 768, 781 (4th Cir. 1998); *United States v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995); *United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984).

B. Analysis

Judicial recusal is governed by 28 U.S.C. § 455. Judges should recuse themselves under § 455(a) "in any proceeding in which [their] impartiality might reasonably be questioned," and under § 455(b)(1) where they have "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

The standard for judicial recusal is an objective one, however, and is only required when a person with knowledge of the relevant facts might *reasonably* question the judge's impartiality. *See, e.g.*, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988); *United States v. Cherry*, 330 F.3d 658, 665-66 (4th Cir. 2003). Section 455 does not require a judge to recuse himself because of "unsupported, irrational, or highly tenuous speculation." *Cherry*, 330 F.3d at 665 (*citing United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998)). The "objective standard asks whether the judge's impartiality might be questioned by a reasonable, *well-informed* observer who assesses *all the facts and circumstances*." *United States v. Stone*, 866 F.3d 219, 230 (4th Cir. 2017) (emphasis in original) (quoting *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998)); *accord Carpenter v. Boeing Co.*, 456 F.3d 1183, 1204 (10th Cir. 2006) (district court properly denied motion to recuse judge, where that motion was based on unsubstantiated suggestions, speculations and opinions). Indeed, when there is no reasonable basis for questioning a judge's impartiality, it would be improper for the judge to recuse himself. *United State v. Glick*, 946 F.2d 335, 336-37 (4th Cir. 1991).

In support of his appeal of the district court's denial of his motion to recuse, Friend relies heavily on what he claims are analogous facts in *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). In *McMillen*, United States District Judge

Thomas McMillen was considering retiring from the bench and had retained a headhunter to facilitate his return to the practice of law. This headhunter contacted two firms who represented the plaintiff and defendants in an antitrust case that was then pending before the same judge. Though the judge had no realistic prospect of working at either firm because one did not call back the headhunter and the second expressly stated it was not interested in hiring him, the Seventh Circuit held that the judge should have recused himself:

> [W]e reluctantly conclude that recusal is required because of the appearance of partiality that would be created by Judge McMillen's continuing to preside in this case. Section 455(a) of the Judicial Code requires a federal judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned," and we have read this to require recusal whenever there is "a reasonable basis" for a finding of an "appearance of partiality under the facts and circumstances" of the case … The test for an appearance of partiality is … whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case. Recognizing the inherently subjective character of this ostensibly objective test, we are nevertheless forced to the conclusion that such an observer would entertain such a doubt in this case.

McMillen, 764 F.2d at 460-61.

The *McMillen* case is inapposite here because of at least one, significant factual distinction. In *McMillen*, it was undisputed that the judge was seeking private employment, potentially with two different firms that were representing respective parties in a lawsuit then pending before him. Unlike Judge McMillen, who was affirmatively seeking outside employment, Judge Hudson, as he made

clear in his memorandum order, was not seeking employment but had been asked by the Attorney General to interview for the position of FBI Director. Before interviewing with the President for this position, Judge Hudson affirmatively and formally withdrew himself from consideration, stating he was not interested in that post. Friend does not, because he cannot, point to any facts that would appear to a reasonable person that the judge had an interest in the litigation of his case. *Liljeberg v. Health Servs. Acquisitions Corp.*, 486 U.S. 847, 860 (1988) (appearance of partiality is created when it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the case).

Finally, while not critical to the Court's analysis on the question of recusal, some clarification is appropriate regarding Friend's assertion that the prosecutor representing the United States at Friend's re-sentencing hearing had been "instructed" to seek a 60-year sentence for the defendant by the United States Attorney himself. It should be completely apparent that Friend's case is a significant one that is important to the United States and to multiple victims' families for a variety of reasons that do not require belaboring. It is not uncommon within the Eastern District of Virginia, and other United States Attorney's Offices across the country for that matter, that in a case of unusual significance the sentencing position of the government is not left to the unfettered discretion of the line assistant prosecuting the case. Rather, as happened here, the United States

Attorney, who is the personification of the Department of Justice within the district in which he or she serves, will make the final decision regarding what will be the government's sentencing position. Personal involvement by a United States Attorney in determining the proper resolution of an unusually significant case is neither unusual nor undesirable. Such a decision can only be effectuated if it is communicated to the line assistant through some sort of order, directive, guidance or instruction.

The district court's memorandum order thus made clear that there was no reasonable basis for questioning whether the court had a personal interest in Friend's case. The court's denial of the motion to recuse was a proper exercise of its discretion, and Friend's appeal on this issue should be denied.

II. THE SENTENCING HEARING CONDUCTED BY THE COURT WAS PROCEDURALLY SOUND AND THE BELOW-GUIDELINE SENTENCE IMPOSED WAS SUBSTANTIVELY REASONABLE.

A. Standard of Review.

This Court reviews a sentence imposed by a district court "*only* 'under a deferential abuse-of-discretion standard,' regardless of whether the sentence imposed is 'inside, just outside, or significantly outside the Guidelines range.'" *United States v. Evans*, 526 F.3d 155, 161 (4th Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). This review requires appellate consideration of both the procedural and substantive reasonableness of a sentence. *Gall*, 552 U.S.

at 51. A defendant's challenge to a below-guideline sentence is, however, presumptively reasonable. *See, e.g.*, *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014) (rejecting challenge to reasonableness of sentence because of defendant's "age, health, and criminal history").

B. Analysis

Friend's guideline range for resentencing was life imprisonment. Friend's PSR, to which neither party had objection and which was accepted by the court, determined that Friend's Criminal History Category was I and his Offense Level Total was 46, thus yielding a guideline range of life. The ultimate driver of Friend's guideline range was the offense level total for Count Three, which charged him with carjacking resulting in death pursuant to 18 U.S.C. § 2119(3) relating to the attack on Sam Lam. The base offense level for Count Three was 43 pursuant to § 2A1.1(a) (First Degree Murder). The defendant also received enhancements of 2 points for vulnerable victim (§ 3A1.1(b)(1)), 2 points for restraint of victim (§ 3A1.3), and 2 points for obstruction of justice (§ 3C1.1). The Adjusted Offense Level for Count Three is thus 49. With credit for acceptance of responsibility, the defendant's Offense Level Total was reduced to 46. While Count Two relating to the carjacking of John Cummings did not group, its Adjusted Offense Level was only 40, more than 8 levels below Count Three, and therefore did not result in additional grouping units under USSG § 3D1.4.

Friend's PSR also noted multiple, encouraged bases for potential upward departure outside the applicable guideline range, including Abduction or Unlawful Restraint, pursuant to USSG § 5K2.4, Weapons and Dangerous Instrumentalities, pursuant to USSG § 5K2.6, Extreme Conduct, pursuant to USSG § 5K2.8, and Criminal Purpose, pursuant to USSG § 5K2.9. Even so, neither at Friend's original sentencing hearing nor at re-sentencing did the Government move for an upward departure or variance.

1. The District Court's Sentence Fully Considered and Adequately Explained All of the § 3553(a) Factors and was Procedurally Sound

Procedural reasonableness is determined by reviewing whether the district court properly calculated Friend's advisory Guidelines range and then considered the 18 U.S.C. § 3553(a) factors, analyzed any arguments presented by the parties, and sufficiently explained the selected sentence. *Gall*, 552 U.S. at 49-51. Friend does not argue that the district court incorrectly calculated the applicable Guidelines range or that the district court treated the range as mandatory. Nor does Friend dispute that the district court heard evidence and argument from the parties at sentencing. Friend does contend, however, that the district court failed to explain adequately how the § 3553(a) factors applied to his case. App. Br. 29. A failure to assess the § 3553(a) factors would constitute procedural error. *See Gall*, 552 U.S. at 50; *United States v. Pauley*, 511 F.3d 468, 473 (4th Cir. 2007).

Contrary to Friend's assertion, however, the district court expressly considered all of the § 3553(a) factors, implicitly acknowledged *Miller* and explained the basis of the sentence it imposed. While it did not engage in an ornate analysis of each and every § 3553(a) factor individually, there can be little doubt regarding the court's rationale in imposing the sentence it did. The court began essentially with a discussion of the nature and circumstances of the offense under § 3553(a)(1), emphasizing the brutality of the offenses and the similarly brutal torture Friend inflicted on victims even though he did not personally kill them himself. JA 601. In this vein, the court further noted that the offenses were premeditated, and had clearly foreseeable consequences. JA 602.

The court further acknowledged the constraints of *Miller*. The court expressly stated that the recommended guideline range of life was an appropriate sentence for Friend, but in the wake of *Miller* the legal firmness of that guideline range was questionable. JA 602. About Friend's youth at the time of the offense and his dysfunctional family background, the court informed the defendant: "I have looked at … your prior background, which is considerable. I understand that you had a tough upbringing." JA 603. In varying below the guideline range of life to a sentence of 780 months, which was considerably more than Friend had requested, the district court pointed out the other equally important § 3553(a) factors it needed to consider, *i.e.*, "I also look at what type of sentence would

promote respect for the law, provide for deterrence and provide for just punishment." JA 603.

Friend's argument that the district court did not address the parties' arguments or sentencing recommendations, in contravention of *Rita v. United States*, 551 U.S. 338, 357 (2007), is not supported by the record. The court specifically stated, "I've looked at all the factors set forth in 18, United States Code, Section 3553(a), and they have been addressed by counsel in this case." JA 602.

Friend's "particularly significant concern" that the district court did not discuss Friend's post-sentencing rehabilitation, App. Br. 30, is an argument that erroneously converts a possibility to an entitlement. While several courts, most notably the Supreme Court in *Pepper v. United States*, 562 U.S. 476 (2011), have held that a district court at resentencing *may* consider evidence of a defendant's post-sentencing rehabilitation, no court has held that the district court *must* do so. Neither *Miller v. Alabama* nor *Montgomery v. Louisiana* require as much in the context of a post-*Miller* re-sentencing proceeding.

During Friend's re-sentencing the evidence related to his post-sentencing rehabilitation was not even contested: there were no objections to, nor any cross-examination of, the defendant's expert witness, Jack Donson, or his report. The district court never once hinted that it believed it was unable to consider Friend's

post-sentence rehabilitation. A fair reading of the record, then, indicates that the district court considered such information but concluded that, when measured against the other evidence in the case such post-sentence rehabilitation did not affect the court's analysis concerning the proper punishment to impose.

The district court plainly provided an "'individual assessment' based on the particular facts of the case before it." *United States v. Carter*, 564 F.3d 325, 330 (4th Cir. 2009) (quoting *Gall*, 552 U.S. at 49-50). The law does not require the court to "robotically tick through § 3553(a)'s every subsection." *Carter*, 564 F.3d at 329 (internal citations and quotations omitted). Rather, "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 328 (quoting *Rita v. United States*, 551 U.S. at 356). Simply because the district court did not expound at length regarding Friend's age and dysfunctional background does not render the court's rationale deficient. The court amply explained its reasoning, a reasoning that "need not be elaborate or lengthy." *Id.* at 330. Simply put, the district court's sentence was procedurally sound.

Just as a district court need not recite every § 3553(a) factor, *see, e.g.*, *United States v. White*, 850 F.3d 667, 676 (4th Cir. 2017) (citing *United States v. Johnson*, 445 F.3d 339, 345 (4th Cir. 2006)), a district court need not catalogue and

repeat every sentencing argument that a defendant makes. A defendant's sentencing arguments do not assume greater importance than the sentencing factors that Congress wrote into § 3553(a). *See Rita*, 551 U.S. at 356 ("Sometimes a judicial opinion responds to every argument; sometimes it does not.... The law leaves much, in this respect, to the judge's own professional judgment."). Courts of appeals have repeatedly made this point. *See, e.g.*, *United States v. Pyles*, 862 F.3d 82, 90 (D.C. Cir. 2017) (citing *United States v. Chiolo*, 643 F.3d 177, 182 (6th Cir. 2011); *United States v. Paige*, 611 F.3d 397, 398 (7th Cir. 2010); *United States v. Gasaway*, 684 F.3d 804, 807 (8th Cir. 2012); *United States v. Perez-Perez*, 512 F.3d 514, 516 (9th Cir. 2008)). Moreover, this rule applies with additional force when a defendant is challenging a sentence that is within or below the guideline range. "When the district court imposes a sentence within the Guidelines, 'the explanation need not be elaborate or lengthy.'" *United States v. King*, 673 F.3d 274, 283 (4th Cir. 2012) (citation omitted).

2. The District Court's Below-Guideline Range Sentence Was Substantively Reasonable

Substantive reasonableness is determined by "the totality of the circumstances," although the applicable guidelines range "plays an important role." *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir. 2008). A sentence within the advisory guideline range is presumptively reasonable. *United States v. Johnson*, 445 F.3d 339, 344 (4th Cir. 2006) (endorsing presumption of reasonableness); *Rita*

v. United States, 551 U.S. 338, 351 (2007) (permitting presumption of reasonableness). This presumption may be rebutted by showing that the sentence is unreasonable when measured against the § 3553(a) factors. *United States v. Montes-Pineda*, 445 F.3d 375, 379 (4th Cir. 2006).

But in applying the § 3553(a) factors, a district court may choose to give "great weight" to a single sentencing factor, such as the seriousness of the offense, § 3553(a)(2)(A), or deterring criminal conduct, § 3553(a)(2)(B). *Pauley*, 511 F.3d at 476 (quoting *Gall*, 552 U.S. at 59). "[D]istrict courts have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors." *United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011).

Friend's argument that the district court did not follow the principles of *Miller v. Alabama*, thus rendering his sentence substantively unreasonable, is predicated largely on an assumed expansion of procedural requirements that *Miller* did not actually mandate. Friend complains that the district court "did not discuss whether…as a 15-year-old [he] had 'lessened culpability'," or "acknowledge the difficulty [he] would have as a 15-year-old in extricating himself from the influence and control of his family," or discuss whether Friend had the capacity to change or had changed since his original sentencing. App. Br. 30. However, *Miller* neither added add requirements nor altered the standard concerning what

constitutes a reasonable sentence that is less than life imprisonment for a juvenile homicide.

Friend maintains that his youth and family dysfunction at the time he committed the offenses of conviction call for a lower sentence than the 65 years imposed by the district court. But even if such a lower sentence could reasonably have been imposed, that is not sufficient to demonstrate that the below-Guideline sentence of 65 years was itself unreasonable. It is not enough that a reviewing court might select a different sentence than the one imposed. *Gall*, 552 U.S. at 59; *Pauley*, 511 F.3d at 474. More than one sentence may be reasonable, and this Court must give "due deference" to the sentencing court's judgment that its sentence satisfies "the § 3553 factors, on a whole." *Gall*, 552 U.S. at 51.

3. Friend's 65-Year Sentence Is Not a Virtual Life Sentence and Is Substantively Reasonable.

A. Friend's Actuarial Arguments are Factually Flawed

Friend argues that a prison sentence totaling 65 years is effectively the same as a sentence of life without parole and that "the sentence imposed by the district court in this case will very likely exceed Mr. Friend's life expectancy." App. Br. 39. Friend's current release date from BOP would make him 72 years old upon release. To support his virtual life sentence argument, Friend points to life expectancy tables published in a 2015 report by the Centers for Disease Control showing that the average life expectancy of an African-American male born in

1983 is 65.2 years.[1] The Government reads the same table differently and concludes the relevant age from the table is actually 63.8 years (rounding to 64 years). In either case, both of those table numbers are inaccurate.

First, the actuarial statistics relied on by the defendant generally do not include non-public data relating to individuals who were institutionalized, such as prisoners.[2] The precise effect of long-term incarceration on life expectancy, which could include both the life-shortening effects of greater stress and risks of violence and the life-lengthening effect of better and more consistent health care, does not

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[1] Centers for Disease Control and Prevention, Health, United States, 2015, Data Table for Figure 18: Life Expectancy at Birth by Sex, Race, and Hispanic Origin, United States 1980-2014, at 37, *available at* https://www.cdc.gov/nchs/data/hus/hus15.pdf#015.

[2] https://www.cdc.gov/nchs/data/hus/hus15.pdf, Appendix I. Data Sources, page 349:

> Different data collection systems may cover different populations, and understanding these differences is critical to interpreting the resulting data. Data on vital statistics and national expenditures cover the entire population. *However, most data on morbidity cover only the civilian noninstitutionalized population and thus may not include data for military personnel, who are usually young; for institutionalized people, including the prison population*, who may be of any age; or for nursing home residents, who are usually older. (Emphasis added).

See also Appendix II. Definition and Methods, pg. 409: "*Hospital units of institutions such as prisons* and college infirmaries that are not open to the public and are contained within a nonhospital facility *are not included in the category of community hospitals*." (Emphasis added.)

appear to be reflected in this table.

Second, even if the actuarial analysis relied on by the defendant were to include data reflecting prison populations, that data does not reflect Friend's expected life expectancy given his current age. Sixty-four years represents Friend's actuarial life expectancy measured from his birth, not from his current age of 34. At 34, his remaining life expectancy is 40.7 more years, meaning, on average, it exceeds 74 years.[3] *United States v. Bullion*, 466 F.3d 574, 576 (7th Cir. 2006) (correct starting point for determining average life expectancy uses current age; "remaining life expectancy increases with every year one lives"); *United States v. Wurzinger*, 467 F.3d 649, 651 n. 2 (7th Cir. 2006) (it is a "mistake" to equate an adult defendant's life expectancy to that "of a newborn child").

Moreover, a life expectancy of at least 74 means Friend has a 50% chance of dying before his 74th birthday and a 50% chance of dying after. *Bullion*, 466 F.3d at 576. It does not mean that Friend will not live considerably longer than 74, even in prison.

Simply put, Friend's actuarial support for his *de facto* life without parole argument is therefore wrong, even if one improperly ignores his current good

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[3] Nat'l Vital Statistics Reports, Vol. 66, No. 3, at Table 17 (April 11, 2017) *available at* https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_03.pdf

health. (JA 320, 670). *United States v. Johnson*, 685 F.3d 660, 662-63 (7th Cir. 2012) (properly made, arguments like Friend's require correct use of life expectancy tables and individual's health; even then, "the most refined statistical calculation of . . . life expectancy will leave considerable residual uncertainty"); *United States v. Tocco*, 135 F.3d 116, 132 (2d Cir. 1998) (sentence "close to a person's life expectancy based on actuarial tables is not the functional equivalent of a sentence for the actual life of the person"). Unlike a "life" sentence, which would guarantees that Friend will die in prison no matter how long he lives, Friend's current sentence provides the realistic chance that he may live for years outside of confinement.

Friend's virtual life sentence argument also ignores that, assuming he no longer is a "danger to the safety of any other person or to the community," he may qualify for release under 18 U.S.C. § 3582(c)(1)(A)(ii) when he reaches age 70, by which time he will have spent more than 30 years in prison.[4] That too, represents a meaningful opportunity for release. *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (not objectively unreasonable to conclude Virginia geriatric release program satisfied *Graham*'s requirement of meaningful opportunity for release).

[4] This is in addition to the good time credits Friend may earn pursuant to 18 U.S.C. § 3624(b)(1).

B. The Supreme Court Has Not Equated Lengthy Sentences to Life Without Parole

Friend repeatedly complains that his 65-year sentence is the practical equivalent of life without parole and thus runs afoul of *Miller* and *Montgomery* because the district court did not properly conclude or adequately explain why he was in the rarest category of juvenile offenders whose crimes reflect "irreparable corruption." The fundamental flaw with that chain of reasoning is that the Supreme Court has *not equated* any term of years sentences for juveniles, even those that do not result in release until old age, with life without parole. Instead, it repeatedly has *distinguished between* the two types of sentences.

That is clear from the basis for the Court's holding in *Graham*, which was the rarity of cases involving life without parole, compared to term of years sentences, as a penalty for juveniles convicted of non-homicide offenses. 560 U.S. at 64-67 (emphasizing "how rarely these sentences are imposed"). Although such rare sentences might be "unusual" within the meaning of the Eighth Amendment, that is not true of those routinely imposed. In *Miller*, the question for which certiorari was granted was whether mandatory life without parole for a juvenile "convicted of homicide" violated the Eighth Amendment given, once again, the "extreme rarity of such sentences." Petition for Writ of Certiorari, No. 10-9646, March 21, 2010, 2011 WL 5322568 at i. Building on *Graham*, "the foundation stone" of the majority opinion in *Miller*, 567 U.S. at 470 n. 4, the Court held such

rare sentences were unconstitutional, but, again, said nothing about term-of-years sentences. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari").

Montgomery also distinguished life without parole from other sentences. Life without parole can be "just and proportionate" for juveniles only when "exceptional circumstances" are present. 136 S. Ct. at 736. In all other cases, "*hope for some years* of life outside prison walls" must be provided. *Id.* at 737. However, the Court did not hold that there was any minimum number for those years.

Most recently, in *LeBlanc*, the Court drew another distinction. 137 S. Ct. at 1729. The question before the Court was whether a geriatric release program, which applies to lengthy sentences that do not permit release until old age, runs afoul of the Eighth Amendment. It declined the opportunity to hold it had condemned lengthy sentences in *Graham*. *Id.*

Other aspects of the Court's reasoning also make clear that lengthy sentences are not constitutionally equivalent to life without parole. For example, *Graham* expressly holds the Eighth Amendment does not "guarantee eventual freedom," *Graham*, 560 U.S. at 75, for juvenile offenders, let alone freedom while they are still young. *Id.* ("[t]he Eighth Amendment does not foreclose the

possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.").

Miller underscored that point when it refused to "categorically bar" any "penalty for a class of offenders or type of crime." 567 U.S. at 483. For that reason, even life without parole is not an unconstitutional, "excessive sentence" for juveniles when the nature of the crimes committed reflects irreparable corruption and not "transient immaturity." *Montgomery*, 136 S. Ct. at 734. *A fortiori*, Friend's shorter, term of years sentence, imposed for his conviction for two brutal carjacking offenses and his involvement in a related but uncharged third carjacking murder, after due consideration of his age at the time, cannot be constitutionally disproportionate.

Miller relied on a categorical rule for life sentences and did not subject all term-of-years sentences that are less than life to the same scrutiny as a life-without-parole sentence. *See, e.g., United States v. Farrar*, __F.3d__, 2017 WL 5762787, *11 (5th Cir. 2017) ("It would be improper to undertake a categorical analysis in this instance, because Farrar was subjected to a term-of-years sentence. The Court has undertaken categorical analysis only for death-penalty cases and those involving juvenile offenders sentenced to life-without-parole; in short, the Court has never established a categorical rule prohibiting a term-of-years sentence.").

Notwithstanding the number of times the Court has refused to equate term of years sentences with life without parole, Friend insists that unless his crimes reflect "permanent incorrigibility," *Montgomery*, 136 S. Ct. at 734, a sentence that keeps him in prison until he is 74, is disproportionate and, therefore, cruel and unusual. His reasoning, however, does not support his conclusion.

At sentencing, the relevant question was the degree of depravity Friend's crimes reflected, *Montgomery*, 136 S. Ct. at 734-35, not whether his post-incarceration record and potential for rehabilitation could have supported a shorter sentence. *Montgomery* distinguished between a *Miller* resentencing, which focuses on the degree of corruption reflected by the crime committed, and a parole hearing, where post-incarceration progress may be considered. The latter is an alternative procedure to a new sentencing. *Montgomery*, 136 S. Ct. at 736; *Miller*, 567 U.S. at 478-79 (distinguishing between the need to consider "possibility of rehabilitation" at sentencing and "demonstrated maturity and rehabilitation" at a later, "meaningful opportunity to obtain release").

The district court correctly kept its focus on the crimes Friend committed and did not abuse the considerable discretion that both reasonableness review and the Eighth Amendment grant a district judge when sentencing a defendant who participated in two murders and a maiming.

Conclusion

For the foregoing reasons, this Court should affirm defendant's sentence.

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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues have been thoroughly analyzed in the pleadings, and because the defendant has not shown that the district court abused its discretion his sentence can and should be affirmed without oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief does not exceed 13,000 words (**specifically 9281**), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in 14-point Times New Roman proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on **December 5, 2017**, I filed electronically the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to the attorney below:

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