UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CAUSE NO. 3:05-CR-131(01) RM
	)	
BERNARD ELLIS	)	

SENTENCING FINDINGS

A jury found Bernard Ellis guilty of five counts of aiding and assisting the making of false statements in connection with purchases of firearms from a federally licensed firearms dealer, 18 U.S.C. §§ 924(a)(2) & 2, and four counts of possessing a firearm after a felony conviction, 18 U.S.C. § 922(g)(1). The government had no objection to the presentence report. Mr. Ellis objected to a quarter of the 134-paragraph presentence report, specifically objecting to:

¶¶ 20-29 of the report, which are a subsection of the government's version of the offense entitled, "Additional Information regarding the defendant."

¶ 49 of the report, which recommends a base offense level of 26 because of Mr. Ellis's criminal history and the nature of the firearms.

¶ 50 of the report, which recommends an enhancement based on the number of firearms.

¶ 51 of the report, which recommends the offense level enhancement required for an offender who trafficked in firearms.

¶ 53 of the report, which recommends an enhancement in the offense level for Mr. Ellis's role in the offense.

¶ 54 of the report, which recommends an enhancement in the offense level for obstruction of justice.

¶ 55 of the report, which recommends that Mr. Ellis be found to be an armed career criminal.

¶ 59 of the report, which recommends the assessment of three criminal history points for a 1985 robbery sentence.

¶¶ 60, 64, 76, 78, 80, 83, 85, 87, 89, 92, 95, 97, and 99 of the report, to the extent they disclose information drawn from police reports.

¶ 65 of the report, which recommends the assessment of one criminal history point for a 2004 sentence for harassment by telephone.

¶¶ 69 and 70 of the report, which recommend the assessment of three criminal history points for a 2008 sentence for possessing firearms as a felon.

¶ 72 of the report, which recommends the assessment of two criminal history points because Mr. Ellis was on probation at the time of the crimes for which he is being sentenced today.

The court adopts as its own findings ¶¶ 1-19, 30-48, 52, 56-58, 61-63, 66-68, 71, 73-75, 77, 79, 81-82, 84, 86, 88, 90-91, 93-94, 96, 98, and 100-134 of the presentence report, specifically including ¶¶ 107-120 concerning the defendant's financial condition and earning ability. Other pertinent facts of the case are set

forth as needed and appropriate as the objections are addressed. The presentence report was prepared under the May 1, 2008 version of the sentencing guidelines. The court must apply the November 1, 2008 version now, but the November 1 amendments brought no changes that affect Mr. Ellis.

At the originally scheduled sentencing hearing on October 30, the court afforded Mr. Ellis additional time within which to decide whether to present evidence in support of his objection to ¶ 49 of the presentence report. Mr. Ellis has informed the court that he intends to present evidence on that issue, so in this order, the court resolves all other objections to the presentence report.

A.

1.

Before setting forth the facts of the case, the court must resolve Mr. Ellis's objections to ¶¶ 20-29. Mr. Ellis says the information in those paragraphs is improper for the court's consideration. First, the information does not amount to relevant conduct; second, a prosecution is not permitted "to indict defendants on relatively minor offenses and then seek enhancement sentences later by asserting that the defendant has committed other more serious crimes for which . . . the defendant was not prosecuted and has not been convicted." United States v. Artley, 489 F.3d 813, 824 (7th Cir. 2007). Third, Mr. Ellis says he denies the statements of Shawn Denton (who cooperated with the government in another

case), so Mr. Denton's statements should be stricken. The court overrules Mr. Ellis's objections.

Generally, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661; *see also* Fed. R. Crim. P. 32(d)(2)(A)(iii) ("The presentence report must also contain the following information: . . . any circumstances affecting the defendant's behavior that may be helpful in imposing sentence."). Accordingly, while the court agrees with Mr. Ellis that the information in ¶¶ 20-29 does not amount to relevant conduct within the meaning of U.S.S.G. § 1B1.3, the information need not constitute relevant conduct to be properly included in the presentence report. Indeed, some of the information was presented to the jury at trial.

The simple inclusion of factual material in a presentence report does not run afoul of the "tail wagging the dog" concept against which the Artley court warned. Sentences are enhanced, whether properly or improperly, by the use of information, not by the information's inclusion in the presentence report. Finally, Mr. Ellis's denial of Mr. Denton's statement does not mean Mr. Denton's statement must be excluded or even ignored. *See* United States v. Hawkins, 480 F.3d 476, 477 (7th Cir. 2007) ("[A] defendant 'must produce more than a bare denial, or the judge may rely entirely on the [report].'") (*quoting* United States v. Mustread, 42 F.3d 1097, 1101-1102 (7th Cir. 1994)).

The court overrules Mr. Ellis's objections to ¶¶ 20-29 of the presentence report.

2.

According to his statement to law enforcement officials, corroborated by statements by others, Mr. Ellis was "chief enforcer" of the Gangster Disciples in Chicago. The chief enforcer needs weapons, and Mr. Ellis, a convicted felon, couldn't obtain them legally. He turned to his nephews in Elkhart, Indiana, whose names were Jermaine Ellis and Kevin Ellis, and caused them to turn to their girlfriends and/or the mothers of their children. In March 2003, Mr. Ellis had Jermaine Ellis get his girlfriend, Denise Kalam, to agree to purchase a firearm for Mr. Ellis. Bernard and Jermaine Ellis shopped around and found the gun Mr. Ellis wanted at Newman's Gun Shop in Osceola, Indiana. Mr. Ellis drove Ms. Kalam, a friend of Ms. Kalam's, and Jermaine Ellis to the gun store on March 27, 2003, gave Ms. Kalam $400, and sent her into the store, where Ms. Kalam paid for the AK-47 assault rifle Mr. Ellis had selected. Ms. Kalam returned to Mr. Ellis's car with the gun. Mr. Ellis told Ms. Kalam to wait a few weeks, then report the gun stolen. Mr. Ellis took the gun.

Also in March 2005, Kevin Ellis asked Dionne Johnson to buy a pair of semi-automatic pistols for Bernard Ellis. Ms. Johnson declined. Bernard Ellis spoke with Ms. Johnson, who was to give birth to Kevin Ellis's child in less than a week, very close to her, threatening her, and telling her she was going to get the guns for him. Ms. Johnson, who was frightened because she had seen Bernard

Ellis lift Kevin Ellis off the ground by his throat in the past, agreed to make the purchase. On March 29, 2005, Bernard Ellis drove Ms. Johnson and Kevin Ellis to Newman's Gun Shop and sent her into the store. She completed the paperwork, but wasn't allowed to pick up the guns that day. Ms. Johnson gave birth by Cesarian section on April 3. The day she was released from the hospital, Bernard and Kevin Ellis drove her back to the gun store, where they sent her into the store with $400. She picked up the two handguns. As with Ms. Kalam, Bernard Ellis took the guns and told Ms. Johnson to report the guns stolen, kicking in the door to her apartment to give the story authenticity. Ms. Johnson did as she was told.

In April 2003, Bernard Ellis asked his Elkhart girlfriend, Kathlyn Burnett (mother of a girl Kevin Ellis dated), who had an Indiana ID and no felony convictions, to buy a gun for him. She said no at first, but then relented. On April 18, 2003, Bernard Ellis drove Ms. Burnett and Kevin Ellis to Newman's Gun Shop. Bernard Ellis sent Ms. Burnett into the store with money and instructions; she walked out with the AK-47 assault rifle Bernard Ellis had requested. After storing the gun in the apartment Ms. Burnett shared with four children, Mr. Ellis took the gun.

Tabitha Jones was another of Kevin Ellis's girlfriends. When Bernard Ellis told her he wanted her to get some guns for him, Ms. Jones refused. Bernard Ellis brandished a gun, asked if she knew who he was, and told her that her family (she had a son) would face the consequences if she refused. Ms. Jones relented. On May 21, 2003, Bernard Ellis drove Ms. Jones, Kevin Ellis, and another woman to

Newman's Gun Shop, gave Ms. Jones money, identified the guns he wanted (two semi-automatic 9mm pistols), and sent her into the store. Ms. Jones came out with the guns and gave them to Bernard Ellis, who gave one to Kevin Ellis, himself a convicted felon. Bernard Ellis told Ms. Jones to report the guns stolen and even provided a name (Tashwan Bonds) to give police as a suspect.

In June 2005, Bernard Ellis and Kevin Ellis (accompanied by a female friend of Bernard Ellis's) picked up Denise Kalam, who thought she was getting a ride to the bank. Instead, they took her to Newman's Gun Store again and sent her into the store with money to buy two particular handguns. She did as she was told, and Bernard Ellis took the guns.

In each of the purchases thus far, the woman involved filled out an ATF-473 form, stating falsely that she was the true purchaser.

Law enforcement officers quickly traced the guns in the June 2005 purchase to Mr. Ellis in Chicago. Remarkably, when they questioned Mr. Ellis, he offered to retrieve the firearms in the hopes of getting his money back. He admitted having purchased the guns through his nephew's girlfriend for about $175 each, plus $75 to the girlfriend. Mr. Ellis retrieved one of the guns from the upstairs of his mother's house (where he was living) and retrieved the other from another Gangster Disciple called "OG," who is known in other settings as Augustine Satchel. Mr. Ellis explained a great deal to the officers about the Gangster Disciples and what his job was for the organization, including extorting money out of drug dealers by such techniques as heating a coat hanger and

inserting it into a dealer's rectum, which Mr. Ellis described as pretty successful. (Mr. Denton said he had seen Mr. Ellis use a different interrogation technique, involving stabbing, that produced more blood than information.) Mr. Ellis told police he provided "missiles" (firearms) to others because of his position as chief enforcer and he was always looking for firearms to protect himself and his family.

Mr. Ellis was convicted in the Northern District of Illinois of possessing the firearms Ms. Kalam purchased for him in June 2005.

B.

A sentencing court must first compute the guidelines sentence correctly, then decide whether the guidelines sentence is the correct sentence for that defendant. United States v. Santiago, 495 F.3d 820, 825 (7th Cir. 2007). The court employs the 2008 version of the sentencing guidelines.

Because all nine counts of conviction involve the same victim and two or more acts or transactions connected by a common criminal objective, they are grouped together and treated as a single count of conviction for purposes of determining the sentencing guidelines's recommendation. U.S.S.G. § 3D1.2(b).

1.

The base offense level for unlawful possession or fraudulent acquisition of firearms depends on the type of weapon and why the possession was unlawful. U.S.S.G. § 2K2.1(a)(1) sets a base offense level of 26 if the firearm was a semiautomatic firearm capable of accepting a large capacity magazine and the

defendant committed any part of the crime after sustaining at least two felony convictions of either a crime of violence or a controlled substance offense. Application Note 2 to that guideline explains that a semiautomatic firearm capable of accepting a large capacity magazine is one with the ability to fire many rounds without reloading because at the time of the offense a magazine or similar device that could accept more than fifteen rounds of ammunition was attached to, or was in close proximity to, the firearm. The government and presentence report recommend application of this guideline; Mr. Ellis objects.

The court defers ruling on the issue of whether the offense conduct involved one or more semiautomatic firearms capable of accepting a large capacity magazine; that is the issue on which Mr. Ellis requested an opportunity to present additional evidence.

Mr. Ellis was convicted of robbery in 1985 and of armed robbery in 1993. Robbery is a crime of violence within the meaning of U.S.S.G. § 2K2.1(a)(1). Application Note 1 to U.S.S.G. § 2K2.1; Application Note 1 to U.S.S.G. § 4B1.2. Mr. Ellis objects on the ground that the United States District Court for the Northern District of Illinois found that he only had one prior felony conviction. The court discusses Mr. Ellis's collateral estoppel argument in greater detail later. It is sufficient at this point to hold that nothing in this record suggests that the Northern Illinois district court held that Mr. Ellis had one felony; that court decided that still another of Mr. Ellis's prior convictions was not a crime of violence.

Mr. Ellis committed the entire group of crimes after having been convicted of two crimes of violence (robbery and armed robbery). The court overrules Mr. Ellis's objection to ¶ 49 of the presentence report to the extent Mr. Ellis contends he didn't have two prior convictions for crimes of violence. If the crimes involved a semiautomatic firearm capable of accepting large capacity magazines — an issue to be resolved at the November 10 sentencing hearing — U.S.S.G. § 2K2.1(a)(1) sets the base offense level at 26. If the crimes did not involve such a firearm, Mr. Ellis's offense level is 24. U.S.S.G. § 2K2.1(a)(2).

2.

U.S.S.G. § 2K2.1(b)(1)(B) ordinarily requires a four-level enhancement in the offense level of an offender whose crimes involved 8 to 24 firearms, but U.S.S.G. § 2K2.1(b)(4) prevents an enhancement that would take the offense level over 29. The government and presentence report both contend that the enhancement is appropriate. Mr. Ellis objects, arguing that because he already has been convicted in the Northern District of Illinois of the unlawful possession of two of the guns he acquired in Elkhart, it would constitute double jeopardy for his offense level to be enhanced based on those firearms.

The court disagrees with Mr. Ellis for two reasons. First, Mr. Ellis wasn't convicted in the Northern District of Illinois of aiding and abetting false statements in the course of acquiring those two firearms, so his conviction in this district for that crime doesn't implicate the double jeopardy clause. There is no additional prohibition against counting those guns in deciding Mr. Ellis's sentence for

fraudulently acquiring those guns. Second, the double jeopardy clause has no independent place in the sentencing process; were it otherwise, the court could never consider prior convictions.

Mr. Ellis had Denise Kalam buy an assault rifle for him in March 2003. He had Dionne Johnson buy two semiautomatic pistols for him in March 2003. Mr. Ellis had Kathlyn Burnett buy an assault rifle for him in April 2003. He had Tabitha Jones buy two semiautomatic pistols for him in May 2003. Finally, Mr. Ellis had Denise Kalam buy two semiautomatic pistols for him in June 2005. That makes eight firearms, so Mr. Ellis's offense level is increased pursuant to U.S.S.G. § 2K2.1(b)(1)(B). The court overrules Mr. Ellis's objection to ¶ 50 of the presentence report.

The extent of that enhancement depends on the court's ruling on the large-capacity magazine issue. If the court finds that the crimes involved a semiautomatic firearm capable of accepting large capacity magazines, this enhancement cannot exceed three levels, and his offense level is increased from level 26 to level 29. If the court finds that the crimes didn't involve such a firearm, Mr. Ellis's offense level is increased by four levels, from level 24 to level 28.

3.

U.S.S.G. § 2K2.1(b)(5) requires a four-level enhancement if Mr. Ellis "engaged in the trafficking of firearms," and Application Note 13 to that guideline explains that the enhancement applies regardless of whether anything of value was exchanged if the defendant "transported, transferred, or otherwise disposed

of two or more firearms to another individual [and] knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual" whose possession of the firearm would be unlawful or whose intent to use or dispose of the firearm unlawfully. The government and the presentence report recommend this enhancement. Mr. Ellis objects on the ground that there is no evidence that he knew or had reason to know that anyone to whom he intended to transfer a firearm was a prohibited person or intended to use or dispose of it unlawfully.

That Mr. Ellis had his nephews' friends buy the firearms, and not the nephews themselves, leads the court to find that Mr. Ellis had ample reason to believe Kevin Ellis could not legally possess the handgun that Tabitha Jones bought for Bernard Ells and Bernard Ellis gave to Kevin Ellis. Given Bernard Ellis's description to agents of the Gangster Disciples' activities, the court also finds that it is more likely than not that Bernard Ellis had reason to know, when he provided a firearm to "OG" in 2005, that "OG" intended to use it unlawfully. The court overrules Mr. Ellis's objection to ¶ 51 of the presentence report and increases his offense level by four levels because Mr. Ellis trafficked in firearms within the meaning of U.S.S.G. § 2K2.1(b)(5).

If the court finds that the crimes involved a semiautomatic firearm capable of accepting large capacity magazines, this enhancement increases Mr. Ellis's offense level from level 29 to level 33. If the court finds that the crimes didn't

involve such a firearm, Mr. Ellis's offense level is increased from level 28 to level 32.

4.

The sentencing guidelines require a four-level enhancement for an organizer or leader in criminal activity that included five or more criminal participants. U.S.S.G. § 3B1.1(a). Citing Mr. Ellis's relationship to Kathlyn Burnett, his nephews, and his nephews' girlfriends, the government and presentence report recommend this enhancement. Mr. Ellis objects because the number of criminal participants was less than five. He notes Kevin Ellis's testimony that Tabitha Jones purchased the firearms for herself, and he contends that the two firearms covered by Count 9 weren't purchased for him.

It would be difficult to find one who was more of a leader in criminal activity than Mr. Ellis. He directed his nephews to recruit women to perform the tasks he wanted, and he himself bullied two of the women into service. Mr. Ellis's past violence against one of the nephews also convinced one of the women to participate. He controlled Jermaine and Kevin Ellis, Denise Kalam, Dionne Johnson, Kathlyn Burnett, and Tabitha Jones. Count 9 makes no difference to this finding.

The court overrules Mr. Ellis's objection to ¶ 53 of the presentence report and increases his offense level by four levels because Mr. Ellis was a leader in criminal activity that involved five or more criminal participants. U.S.S.G. § 3B1.1(a).

If the court finds that the crimes involved a semiautomatic firearm capable of accepting large capacity magazines, this enhancement increases Mr. Ellis's offense level from level 33 to level 37. If the court finds that the crimes didn't involve such a firearm, Mr. Ellis's offense level is increased from level 32 to level 36.

5.

Soon after his arrest in Chicago in August 2005, Mr. Ellis called his wife and dictated false affidavits that she was to get signed. Mrs. Ellis did as she was told. Bernard Ellis's mother and Jermaine Ellis's grandmother pressured Jermaine Ellis to sign the affidavit Bernard Ellis had dictated for his signature, and Jermaine Ellis did so. The Ellis family asked Denise Kalam to sign her false affidavit, and she did so. Bernard Ellis then told his wife to get the signed affidavits notarized, and those affidavits now bear the stamp of a notary who vehemently denies attesting to or stamping the affidavits.

Denise Kalam was an inmate in the same facility as Bernard Ellis in 2006, having pleaded guilty to lying on the ATF-473 forms. Through an illicit mode of communication, Mr. Ellis directed her to a specific book in the facility library, in which she found a letter from Mr. Ellis and an affidavit Ms. Kalam was to sign, have notarized, and leave in the library. The letter promised her an article of clothing. That affidavit, too, was false.

Mr. Ellis provided the false 2005 affidavits of Jermaine Ellis and Denise Kalam to his attorney in this case, who disclosed them to the government in

anticipation of using them at trial. The government quickly investigated the affidavits and uncovered the circumstances under which they were created. Three days after learning of the affidavits, and four days before trial, the government moved to exclude the affidavits from evidence. Mr. Ellis's attorney, on the same day, filed a motion to determine the affidavits' legitimacy. The court wasn't required to rule on those motions because the defense told the court it wouldn't use the affidavits at trial.

U.S.S.G. § 3C1.1 requires a two-level enhancement in offense level for an offender who attempted to obstruct justice. Among the examples of what the guideline means by obstructing justice are attempting to suborn perjury and attempting to produce a false document during a judicial proceeding. Application Note 4, U.S.S.G. § 3C1.1. The government and the presentence report recommend enhancement of Mr. Ellis's offense level under this guideline; Mr. Ellis objects because (a) the affidavits weren't offered into evidence; (b) Mr. Ellis denies directing or obtaining false or fraudulent affidavits; and (c) the government and defense agreed not to use the affidavits at trial.

Mr. Ellis attempted to obstruct justice within the meaning of U.S.S.G. § 3C1.1. As already noted, a defendant's simple denial of the content of a presentence report doesn't require the court to disregard the report's content, and the report leads the court to find by a preponderance of the evidence that Mr. Ellis orchestrated the false affidavits. That the affidavits weren't introduced into evidence doesn't mean there was no attempt to obstruct justice. The only possible

reasons for giving the affidavits to counsel was for counsel to use them to get charges dismissed on false pretenses, to keep witnesses from giving true testimony, or to impeach witnesses with statements Mr. Ellis knew to be false because he procured them.

The court overrules Mr. Ellis's objection to ¶ 54 of the presentence report and increases his offense level by four levels because Mr. Ellis attempted to obstruct justice within the meaning of U.S.S.G. § 3C1.1.

If the court finds that the crimes involved a semiautomatic firearm capable of accepting large capacity magazines, this enhancement increases Mr. Ellis's offense level from level 37 to level 39. If the court finds that the crimes didn't involve such a firearm, Mr. Ellis's offense level is increased from level 36 to level 38.

6.

U.S.S.G. § 4B1.4 contains provisions for the base offense level for a person who meets the definition of an "armed career criminal" set forth in 18 U.S.C. § 924(e), meaning one who has three previous convictions for a violent felony. Noting Mr. Ellis's prior convictions for robbery, armed robbery, and intimidation (Mr. Ellis's 1995 murder conviction was reversed on appeal), the government and the presentence report contend that Mr. Ellis is an armed career offender. Mr. Ellis disagrees, basing his arguments on a decision by his sentencing judge in the Northern District of Illinois case.

It appears that plea negotiations in the Illinois case bogged down over the question of Mr. Ellis's status as an armed career criminal, so the attorneys asked the judge for an advisory opinion. The judge decided that Mr. Ellis's earlier Indiana conviction for intimidation was not a violent felony, meaning that Mr. Ellis was not an armed career criminal. Consistent with that ruling, the judge eventually sentenced Mr. Ellis to concurrent ninety-month sentences. The government has appealed that sentence, and the appeal pends. Pointing to that ruling, Mr. Ellis argues that the double jeopardy clause and principles of collateral estoppel require the court to abide by the ruling in the Illinois case and hold, without independent inquiry, that Mr. Ellis's intimidation conviction was not a conviction for a violent felony.

As earlier noted, the double jeopardy clause is not implicated at sentencing. The extent to which collateral estoppel ever affects the sentencing process is unclear, *see, e.g.,* S.E.C. v. Monarch Funding Corp., 192 F.3d 295, 306 (2d Cir. 1999) ("[P]recluding relitigation on the basis of [sentencing] findings should be presumed improper. While we do not foreclose application of the doctrine in all sentencing cases, we caution that it should be applied only in those circumstances where it is clearly fair and efficient to do so."); Prince v. Lockhart, 971 F.2d 118, 123 (8th Cir. 1992) (In a criminal case, a fact previously determined "is not an 'ultimate fact' unless it was necessarily determined by the [fact-finder] against the government and, in the second prosecution, that same fact is required to be proved beyond a reasonable doubt in order to convict."), but in any event,

it can't apply as Mr. Ellis thinks it does. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970). The estoppel doctrine is premised on "an underlying confidence that the result achieved in the initial litigation was substantially correct. In the absence of appellate review, or of similar procedures, such confidence is often unwarranted." Standefer v. United States, 447 U.S. 10, 23 n.18 (1980). There is no finality with respect to the decision by the Illinois district court; that ruling is before the court of appeals for review.

This court, then, may and must make its own decision as to whether the intimidation crime of which Mr. Ellis was convicted was a violent felony. In making that decision, this court disagrees with the Illinois court. A violent felony is one that has "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). The court is to employ the "categorical approach," which requires the court to "look only to the fact of conviction and the statutory definition of the prior offense" and not the "particular facts disclosed by the record of conviction." James v. United States, 550 U.S. 192, 127 S. Ct. 1586, 1593-1594 (2007). "[T]he proper inquiry is whether the conduct encompassed by the elements of the offense . . . presents a serious potential risk of injury to another. . . . As long as an offense is of a type that, by its nature,

presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision." 127 S. Ct. at 1597.

Indiana's felony crime of intimidation of a police officer requires a threat with the intent that the threatened person be placed in fear, IND. CODE § 35-45-2-1(b); Hendrix v. State, 615 N.E.2d 483, 484 (Ind. Ct. App. 1993), but contemplates a wide range of threats, not all of which involve force against the person. IND. CODE § 35-45-2-1(c). Because reference to the statutory definition of the crime doesn't resolve whether Mr. Ellis was charged with, and convicted of, a crime of violence, the court may look to the charging document and the plea transcript. Shepard v. United States. 544 U.S. 13, 16 (2005).

The charging information demonstrates that Mr. Ellis was charged with the version of intimidation of a police officer that has as an element the threatened use of physical force against another person. The information alleges that Mr. Ellis "unlawfully and feloniously communicate[d] a threat to Patrolman Dan Drust . . . with the intent that said officer be placed in fear of retaliation [and] commit[ted] said acts by threatening to harm Patrolman Drust." The transcript of the plea colloquy indicates that Mr. Ellis quibbled about what he said and exactly what he meant, but he was charged with threatening to harm the officer, and the trial judge found him guilty of that charge. A review of the forms of communication that constitute threats for purposes of the intimidation statute reveals only one that encompasses a threat "to harm:" Indiana Code § 35-45-2-1(c)(1) (defining

"threat" as intention to "unlawfully injure the person threatened or another person, or damage property").

The intimidation crime of which Mr. Ellis was convicted is a violent felony within the meaning of U.S.S.G. §§ 4B1.2 and 4B1.4. When that conviction combines with Mr. Ellis's age at the time of these federal crimes (37 to 39) and his other violent felony convictions for robbery and armed robbery, Mr. Ellis is an armed career criminal within the meaning of U.S.S.G. § 4B1.4 and 18 U.S.C. § 924(e). The court overrules Mr. Ellis's objections to ¶ 55 of the presentence report. This finding also triggers the enhanced penalty provisions of 18 U.S.C. § 924(e)(1).

The base offense level for an armed career criminal who possessed a weapon like the assault rifles purchased for Mr. Ellis is the greater of the offense level determined without regard to his armed career criminal status, U.S.S.G. § 4B1.4(b)(1), the offense level he would have as a career offender, U.S.S.G. § 4B1.4(b)(2), and 34, U.S.S.G. § 4B1.4(b)(3)(A). Because Mr. Ellis faces life imprisonment on the felon-in-possession counts, his offense level as a career offender would be 37. U.S.S.G. § 4B1.1(b)(A). Of these three possibilities, the greatest offense level results from the calculations without respect to his status as a career offender or an armed career criminal; those calculations produce an offense level of either 39 or 38, depending on the outcome of the large capacity magazine issue.

Mr. Ellis's final adjusted offense level is 39 if the court finds that the crimes involved a semiautomatic firearm capable of accepting large capacity magazines, or 38 if the court finds that the crimes didn't involve such a firearm.

7.

Mr. Ellis raises objections to several paragraphs of the presentence report that recommend assessing criminal history points for various of his prior sentences. An armed career criminal who possessed a weapon such as the assault rifles involved in this case is assigned to criminal history category VI regardless of the number of criminal history points he otherwise would be assessed, U.S.S.G. § 4B1.4(c)(2), so the court needn't determine how many criminal points otherwise would be assessed. The court overrules as moot Mr. Ellis's objections to ¶¶ 59, 65, 69, 70, and 72 of the presentence report.

Mr. Ellis objects to other paragraphs of the presentence report that contain criminal history information drawn from police reports. He argues that the information is hearsay, exceeds the scope of information the court may consider under Shepard v. United States, 544 U.S. 13 (2005), isn't germane to the crimes of conviction, and furthers the impermissible goal of sentencing an offender for crimes more serious than those for which he has been convicted.

Hearsay is admissible (subject to due process concerns) in sentencing proceedings. FED. R. EVID. 1101(d)(3). Shepard limits only what a court may consider in determining whether a prior conviction was for a violent felony; the court already having made that decision within the evidentiary confines of

Shepard, those confines no longer restrict the court's inquiry. The court agrees that the remaining information is not relevant conduct within the meaning of U.S.S.G. § 1B1.3; the court already has determined Mr. Ellis's offense level. Finally, the admonitions that prosecutors should not indict on a relatively minor offense and seek sentencing on uncharged and unrelated conduct doesn't apply here; Mr. Ellis faces four life sentences, so the underlying conduct can hardly qualify as relatively minor offenses. The court overrules Mr. Ellis's objections to ¶¶ 60, 64, 76, 78, 80, 83, 85, 87, 89, 92, 95, 97, and 99 of the presentence report.

C.

Mr. Ellis's offense level is 38 or 39 and his criminal history category is VI. For either offense level, the sentencing guidelines recommend a sentencing range of 360 months to life imprisonment. U.S.S.G. § 5A.

The sentencing hearing will be reconvened at 9:30 a.m. on November 10, 2008.

ENTERED: November 6, 2008

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court