[11] With respect to his substantive due process claim, Patel fails to identify any summary judgment evidence raising a genuine fact issue that Defendants "did not actually exercise professional judgment" in resolving the cheating allegations, *Ewing*, 474 U.S. at 225, 106 S.Ct. 507, or that the result of the process was "beyond the pale of reasoned academic decision-making," *Wheeler*, 168 F.3d at 250. Instead Patel merely asserts, for example, that Jones failed to exercise professional judgment by reporting him for cheating and that Todd and the panel failed to adequately investigate the allegations against him. These conclusory allegations cannot create a genuine fact issue sufficient to defeat summary judgment. *See, e.g., Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). The record is devoid of evidence even suggesting that any Defendants acted unreasonably in reporting, investigating, or resolving the allegations against Patel. To the contrary, the record reflects that Defendants followed protocol in reporting and investigating the allegations and that the result of the process was supported by evidence. In response to this, Patel only offers evidence suggesting, at most, it may have been reasonable for the university to conclude that he did not in fact plagiarize or cheat. Again, this misses the point: the applicable constitutional standard asks not whether Patel in fact cheated but instead whether the decision-maker "did not actually exercise professional judgment" in reaching its decision. *Ewing*, 474 U.S. at 225, 106 S.Ct. 507. We thus conclude that Patel's substantive due process claim was properly dismissed on summary judgment.

[12, 13] Patel likewise fails to demonstrate a genuine issue of material fact as to his equal protection claim. He alleges that Jones only reported Patel even though Jones received an anonymous report that two other unnamed students may have cheated. This "class of one" equal protection claim requires Patel to show that "(1) he . . . was intentionally treated differently from others similarly situated and (2) there was no rational basis for the difference in treatment." *Lindquist v. City of Pasadena Tex.*, 669 F.3d 225, 233 (5th Cir. 2012); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Patel points to no summary judgment evidence creating a genuine fact issue as to either prong. That is, nothing in the record suggests that Patel was intentionally treated in a manner irrationally different from other similarly situated students. *See Ewing*, 474 U.S. at 228 n. 14, 106 S.Ct. 507 (even when student identifies possible academic comparators through statistical evidence, courts "are not in a position to say" those students were "similarly situated" for purposes of challenging academic decisions). We therefore conclude the district court properly granted summary judgment dismissing Patel's equal protection claim.

AFFIRMED

UNITED STATES of America, Plaintiff-Appellee,

v.

Tony SPARKS, Defendant-Appellant.

No. 18-50225

United States Court of Appeals, Fifth Circuit.

FILED October 24, 2019

Background: Federal inmate filed successive motions to vacate, set aside, or correct

process claims. In any event, it has no bearing on this case.

sentence. The United States District Court for the Western District of Texas, Lee Yeakel, J., 2018 WL 1415775, granted motions and resentenced inmate. Inmate appealed.

Holdings: The Court of Appeals, Oldham, Circuit Judge, held that:

(1) inmate's 35-year sentence did not violate Eighth Amendment prohibition against sentencing juvenile offender to mandatory life sentence without possibility of parole;

(2) sentence satisfied procedural requirement that court consider inmate's youth and its attendant characteristics; and

(3) district court did not abuse its discretion in increasing inmate's offense level by two points for obstructing justice and denying him two-point reduction for accepting responsibility.

Affirmed.

1. Sentencing and Punishment ⚿1607

Eighth Amendment prohibits sentencing juvenile offenders to mandatory life sentence without possibility of parole. U.S. Const. Amend. 8.

2. Sentencing and Punishment ⚿1607

If sentencing court has option to choose sentence other than life without possibility of parole, it can sentence juvenile offender to life without parole without violating Eighth Amendment. U.S. Const. Amend. 8.

3. Sentencing and Punishment ⚿1607

Eighth Amendment does not prohibit sentencing juvenile offender to mandatory sentence of life imprisonment with possibility of parole or early release or to term of years. U.S. Const. Amend. 8.

4. Sentencing and Punishment ⚿1607

Term-of-years sentence cannot be characterized as de facto life sentence, and thus does not violate Eighth Amendment prohibition against sentencing juvenile offender to mandatory sentence of life without possibility of parole. U.S. Const. Amend. 8.

5. Infants ⚿3011
Robbery ⚿30
Sentencing and Punishment ⚿1607

Defendant's 35-year sentence for aiding and abetting carjacking while he was juvenile did not violate Eighth Amendment prohibition against sentencing juvenile offender to mandatory life sentence without possibility of parole; defendant's sentence was discretionary and was for term of years. U.S. Const. Amend. 8; 18 U.S.C.A. § 3553(a).

6. Sentencing and Punishment ⚿108, 996

Defendant's federal sentence for aiding and abetting carjacking committed while he was juvenile satisfied procedural requirement that court consider defendant's youth and its attendant characteristics before imposing sentence of life without parole, regardless of whether court made specific findings regarding defendant's incorrigibility, where district court considered statutory sentencing factors, including defendant's youth. 18 U.S.C.A. § 3553(a); U.S.S.G. § 5H1.1.

7. Criminal Law ⚿1156.2

Court of Appeals reviews district court's factual findings at sentencing for abuse of discretion, which occurs when court relies on clearly erroneous facts.

8. Sentencing and Punishment ⚿283, 300

Generally, presentence report (PSR) bears sufficient indicia of reliability to be considered as evidence by sentencing

judge in making factual determinations, and district court may adopt facts contained in PSR without further inquiry if those facts have adequate evidentiary basis with sufficient indicia of reliability.

9. Sentencing and Punishment ⇨761, 765

District court did not abuse its discretion at sentencing in increasing defendant's offense level by two points for obstructing justice and denying him two-point reduction for accepting responsibility, in light of evidence in presentence report (PSR) that defendant attempted to escape from his detention center, including testimony that witness heard him discussing escape plan with another inmate and repeatedly flushed toilet to mask sound of prison guard's screams when other inmate attacked her, and defendant's admission to probation officer that he participated in escape attempt. U.S.S.G. §§ 3C1.1, 3E1.1.

Appeal from the United States District Court for the Western District of Texas, Lee Yeakel, U.S. District Judge.

Joseph H. Gay, Jr., Assistant U.S. Attorney, Michael Robert Hardy, Esq., Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, San Antonio, TX, for Plaintiff-Appellee.

David Kenneth Sergi, Sergi & Associates, P.C., San Marcos, TX, for Defendant-Appellant.

Before ELROD, GRAVES, and OLDHAM, Circuit Judges.*

ANDREW S. OLDHAM, Circuit Judge:

Tony Sparks and his fellow gang members carjacked Todd and Stacie Bagley at gunpoint. The gang locked the Bagleys in the trunk for hours, emptied the Bagleys' bank account, and tried to pawn Stacie's wedding ring. During the gang's crime spree, the Bagleys sang gospel songs from the trunk and told their captors about Jesus. Eventually one of the gang members popped the trunk, cursed at the couple, and executed Todd in front of his wife. That same gang member shot Stacie in the face but failed to kill her. Others incinerated the car to destroy the evidence and burned Stacie alive.

For his role in this crime, Sparks received a below-Guidelines 35-year sentence. Sparks says that violates the Eighth Amendment. We disagree.

I.

A.

On June 20, 1999, Tony Sparks went to a convenience store in Killeen, Texas, with Christopher Vialva and Christopher Lewis.[1] The three of them were members of a local gang known as the 212 PIRU Bloods. They planned to dupe a Good Samaritan into giving them a ride before carjacking him or her at gunpoint. Sparks brought the gun, a .22 caliber pistol.

Police initially thwarted the plan by detaining the trio for violating the city's juvenile curfew law. (Sparks was 16 at the time.) Before being detained, Lewis threw the pistol into the bushes. Sparks's mother picked up Sparks and Lewis, and Vialva was released because he was an adult.

* Judge Graves concurs in the judgment only.

1. We previously reported the factual background of this case in *United States v. Bernard,* 299 F.3d 467 (5th Cir. 2002). The factual recitation here comes principally from *Bernard,* as supplemented by Sparks's record.

The following day, Sparks, Vialva, and Lewis regrouped. They recruited two other members of their gang, Brandon Bernard and Terry Brown, to help with the carjacking. Vialva and Bernard retrieved the .22 caliber pistol that Lewis had discarded the night before. Because it was wet with dew, they worried that it would not function. So Bernard obtained a Glock .40 caliber pistol to use for the carjacking.

That afternoon, the five gang members went to an IGA supermarket to find a carjacking victim. Bernard and Brown acted as lookouts while Sparks, Vialva, and Lewis approached potential victims to ask for a ride. No one offered them a ride, so they drove to a "Mickey's" convenience store. Bernard and Brown went to a nearby laundromat to play video games. Sparks, Vialva, and Lewis went to the front of the convenience store.

Shortly after arriving at the convenience store, Sparks found Todd Bagley using a payphone outside. Todd and his wife Stacie were youth ministers from Iowa. They'd previously lived in Killeen because Todd was a veteran of the U.S. Army and had been stationed at Fort Hood. The young couple had gone to church at Grace Christian, where they worked with the youth group. They were back in Killeen on a vacation to see old friends and attend a revival meeting at the church.

Sparks approached Todd and asked if he would give Sparks, Vialva, and Lewis a ride to another location. Todd conferred with Stacie, and the young couple unsuspectingly agreed to give the gang members a ride. Bernard and Brown returned to their homes to wait for further instructions from Vialva.

Sparks, Vialva, and Lewis got into the back seat of the Bagleys' car. Todd drove while his wife sat in the front passenger seat. In accordance with their plan, Sparks and Vialva pulled out two handguns, and Vialva pointed his gun at Todd. Vialva told the Bagleys that the "plan had changed," and he forced Todd to drive to a semi-rural location near the edge of Killeen. While Vialva pointed a gun at the Bagleys, Sparks and Vialva robbed them of their money, wallets, purse, debit card, identification, and jewelry. Vialva demanded their bank account's pin number and then forced the Bagleys into the trunk of their car.

With the Bagleys locked in the trunk, Sparks, Vialva, and Lewis went on an hours-long crime spree. They went to an ATM to steal all of the Bagleys' money. That effort was frustrated, however, because the youth ministers had less than $100 in their bank account. They tried to pawn Stacie's wedding ring. They used what little money they could steal from the Bagleys to buy cigars, cigarettes, and fast food from Wendy's.

Meanwhile, the Bagleys evangelized from the trunk. According to Lewis (who later testified), the Bagleys asked him and Sparks about God, Jesus, and church. The Bagleys acknowledged not having earthly wealth, but they told their captors that faith in Jesus is more valuable than money. The Bagleys talked about the revival meeting at Grace Christian. And the Bagleys urged their captors to have faith in Jesus Christ. The Bagleys begged for their lives.

As night began to fall, Sparks told the gang that he needed to go home to avoid violating his 8 p.m. probation curfew for a previous robbery conviction. The group dropped Sparks off at his home. Sparks took the Bagleys' jewelry with him. But Vialva asked Sparks not to take his .22 caliber handgun. After initially refusing, Sparks agreed.

Bernard and Brown purchased fuel to burn the Bagleys' car. Vialva and Lewis picked them up, and the four gang mem-

bers drove (again, with the Bagleys still locked in the trunk) to the Belton Lake Recreation Area on the Fort Hood military installation. Vialva parked the Bagleys' car on top of a little hill. Brown and Bernard poured lighter fluid on the interior of the car. All the while, the Bagleys sang and prayed in the trunk.

Stacie's last words were "Jesus loves you," and "Jesus, take care of us." Vialva crudely cursed at her, told Lewis to pop the trunk, and then executed Todd in front of his wife. Vialva shot Todd in the head with the .40 caliber Glock, killing him instantly. Then Vialva shot Stacie in the face but failed to kill her. Bernard set the car on fire and burned Stacie alive. Todd was 26. Stacie was 28.

B.

Sparks pleaded guilty to aiding and abetting a carjacking, and he hoped to receive an offense-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1. But as he was awaiting sentencing, Sparks was implicated in a plot to escape from his detention center. As Sparks himself acknowledges, another inmate, Christopher Kirvin, choked a prison guard unconscious and stole her keys. The Pre-Sentence Report ("PSR") implicated Sparks based on a witness who heard Sparks planning the escape attempt with Kirvin. Sparks flushed a toilet repeatedly during the assault to mask the sound of the prison guard's screams. Based on the escape attempt, the PSR added two points to Sparks's offense level for obstructing justice. *Id.* § 3C1.1. It also denied Sparks an offense-level reduction for accepting responsibility. *Id.* § 3E1.1. Given the nature of the crime and the Bagleys' murders, the PSR recommended an offense level of 45—two levels above the highest value on the sentencing table.

When the district court sentenced Sparks in 2001, it agreed with the PSR's factual findings and sentencing calculation. Applying the Guidelines, which were mandatory before *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the court sentenced Sparks to life in prison without the possibility of parole ("LWOP").

We affirmed Sparks's sentence on direct appeal. *See United States v. Sparks*, 31 F. App'x 156 (5th Cir. 2001). In 2003, Sparks filed a pro se motion under 28 U.S.C. § 2255 to vacate his sentence, and the district court denied it. Sparks filed an appeal, but we dismissed it for want of prosecution. *United States v. Sparks*, No. 03-50781 (5th Cir. Nov. 19, 2003).

Since then, several Supreme Court decisions involving the Eighth Amendment raised constitutional concerns about Sparks's LWOP sentence. In *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the Court held that juveniles may not be sentenced to life without parole for non-homicide offenses. In *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the Court held that juveniles may not receive mandatory sentences of life without parole. And in *Montgomery v. Louisiana*, —— U.S. ——, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), the Court made *Miller* retroactive to cases on collateral review.

We authorized Sparks to file a successive § 2255 motion based on *Graham*. *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011). The district court denied the motion. But we granted a certificate of appealability, *United States v. Sparks*, No. 13-50807 (5th Cir. July 10, 2014), and remanded the case for reconsideration at the Government's request, *United States v. Sparks*, No. 13-50807 (5th Cir. Feb. 10, 2015). We also authorized Sparks to file a successive § 2255 motion based on *Miller*, which the

Government did not oppose. *In re Sparks*, No. 16-50973 (5th Cir. Nov. 18, 2016).

Upon joint motion of the parties, the district court consolidated the motions and ordered a resentencing. It provided Sparks with court-appointed experts and conducted a five-day sentencing hearing. At the hearing, the Government introduced evidence that Sparks committed repeated acts of brutal violence during his first decade in prison. In 2004, Sparks participated in a riot involving approximately 600 inmates, carrying a baseball bat during the fighting. In July 2006, Sparks stabbed his cellmate 12 times in the back, neck, head, and right arm. In September 2007, he stabbed another inmate in the neck, resulting in a spinal cord injury that left the inmate unable to walk or urinate by himself. In March 2008, Sparks attempted to murder an inmate by stabbing him repeatedly in the head, resulting in brain damage and the loss of the victim's right eye. Sparks's violence led to his transfer to ADX Florence in Colorado, a supermax facility where the nation's most dangerous federal prisoners are located. Before that transfer, he had been sanctioned for at least 23 incidents. And in 2014, Sparks instructed two inmates to assault another inmate.

The district court carefully examined Sparks's youth and its attendant characteristics in a twenty-six-page memorandum opinion. The district court included a thorough discussion of *Miller* and the 18 U.S.C. § 3553(a) factors. The court also considered the PSR, which could not identify any basis under § 3553(a) for varying from the recommended sentence of life imprisonment. The district court could not "imagine a worse offense, nor [could] the court imagine a more callous perpetrator than the defendant." Nonetheless, the district court chose to vary downward and sentenced Sparks to 35 years, with credit for time in custody. Sparks appealed.

II.

Sparks's principal argument on appeal is that the district court violated *Miller v. Alabama*. That case held the Eighth Amendment prohibits mandatory LWOP sentences for juveniles. *Miller*, 567 U.S. at 465, 132 S.Ct. 2455. It's not clear from Sparks's briefs whether he thinks his below-Guidelines sentence violates the substantive or procedural aspects of the *Miller* decision. At argument, his counsel urged us to consider both. We do so.

A.

[1] *Miller* announced a substantive Eight Amendment rule: The Constitution prohibits sentencing a juvenile to *mandatory* LWOP because it "poses too great a risk of disproportionate punishment." 567 U.S. at 479, 132 S.Ct. 2455. But *Miller* did "not consider" whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." *Ibid.*

[2] Three corollaries follow from *Miller*'s substantive rule. First, it "did not foreclose a sentencer's ability to impose life without parole" on a *discretionary* basis. *Montgomery*, 136 S. Ct. at 726; *see also Miller*, 567 U.S. at 483, 132 S.Ct. 2455. Our sister circuits' post-*Miller* decisions recognize as much. *See Contreras v. Davis*, 716 F. App'x 160, 163 (4th Cir. 2017); *Kelly v. Brown*, 851 F.3d 686, 687–88 (7th Cir. 2017); *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016); *Davis v. McCollum*, 798 F.3d 1317, 1320–21 (10th Cir. 2015); *Croft v. Williams*, 773 F.3d 170, 171 (7th Cir. 2014); *Evans-Garcia v. United States*, 744 F.3d 235, 241 (1st Cir. 2014); *Bell v. Uribe*, 748 F.3d 857, 869–70 (9th Cir. 2014); *United States v. Reingold*, 731 F.3d 204, 214 (2d Cir. 2013).[2]

2. The Fourth Circuit in *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), held that *Mont-*

Numerous state courts have reached the same conclusion. *See, e.g.*, *Lucero v. People*, 394 P.3d 1128, 1132 (Colo. 2017); *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669, 676 (2018); *Jones v. Commonwealth*, 293 Va. 29, 795 S.E.2d 705, 722 (2017). Thus, if a sentencing court has the option to choose a sentence other than life without parole, it can choose life without parole without violating *Miller*.

[3] Second, *Miller* has no relevance to sentences less than LWOP. *See United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013) (per curiam). This means that sentences of life *with* the possibility of parole or early release do not implicate *Miller*. *See Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 197 (4th Cir. 2019); *Goins v. Smith*, 556 F. App'x 434, 440 (6th Cir. 2014); *Lucero*, 394 P.3d at 1132; *Lewis v. State*, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014). Nor do sentences to a term of years. *See Walton*, 537 F. App'x at 437; *United States v. Morgan*, 727 F. App'x 994, 997 (11th Cir. 2018) (per curiam); *United States v. Lopez*, 860 F.3d 201, 211 (4th Cir. 2017); *Lucero*, 394 P.3d at 1133. All of these sentences can be imposed on a mandatory basis for juveniles without implicating *Miller* because they are not LWOP sentences.

[4] Third, a term-of-years sentence cannot be characterized as a *de facto* life sentence. *Miller* dealt with a statute that specifically imposed a mandatory sentence of life. The Court distinguished that sentencing scheme from "impliedly constitutional alternatives whereby 'a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years.' " *Lucero*, 394 P.3d at 1133 (quoting *Miller*, 567 U.S. at 489, 132 S.Ct. 2455). Given *Miller*'s endorsement of "a lengthy term of years" as a constitutional alternative to life without parole, it would be bizarre to read *Miller* as somehow foreclosing such sentences.

A panel of the Third Circuit nevertheless tried. *See United States v. Grant*, 887 F.3d 131 (3d Cir. 2018), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018). In *Grant*, the panel sought to "effectuate" *Miller* by inventing a "rebuttable presumption" that a juvenile offender "should be afforded an opportunity for release before the national age of retirement." *Id.* at 152–53. The panel conceded it had no "principled basis" for drawing that line. *Id.* at 150. The panel further conceded it couldn't be sure what line it was drawing: "We cannot say with certainty what the precise national age of retirement is, as it is a figure that incrementally fluctuates over time." *Id.* at 151. It also admitted that reliance on a "national retirement age" would fail to account for "locality, state, gender, race, wealth, or other differentiating characteristics." *Ibid.* The panel went on to discuss the history of Social Security, Gallup polls, and one academic study before pronouncing a "national retirement age" of sixty-five. *Id.* at 151–52. But even in its pronouncement of the rule, the panel appeared to recognize the arbitrariness of its decision: "Without definitively determining the issue, we consider sixty-five as an adequate approximation of the national age of retirement to date. However, district courts retain the discretion to determine the national age of retirement at sentencing, and remain free to consider evidence of the evolving nature of this estimate." *Id.* at 152. Such reasoning is not bound by law.

gomery expanded *Miller* to cover discretionary LWOP sentences. *Id.* at 273–74. The Supreme Court granted certiorari. —— U.S. ——, 139 S. Ct. 1317, 203 L.Ed.2d 563 (2019) (mem.).

[5] Sparks cannot show a substantive *Miller* violation. First, he received a discretionary sentence under § 3553(a) rather than a mandatory sentence. Second, he was sentenced to thirty-five years in prison rather than life without parole. Because Sparks did not receive a mandatory sentence of life without parole, he has failed to demonstrate a violation of *Miller*'s substantive requirements.[3]

B.

The procedural component of *Miller* "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S. Ct. at 734. In *Miller* and *Montgomery*, the Supreme Court considered state laws in Alabama and Louisiana imposing mandatory LWOP sentences on juveniles. But *federal* prisoners have procedural protections that state prisoners do not have—namely, the sentencing factors in § 3553(a) and the advisory Sentencing Guidelines.

Under § 3553(a), a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. In choosing an appropriate sentence, the court must examine "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). It must also consider the policy statements of the Sentencing Commission, *id.* § 3553(a)(5), which expressly allow for consideration of the defendant's age, "including youth," U.S.S.G. § 5H1.1, p.s.

[6] The § 3553(a) analysis satisfies *Miller*'s procedural requirement that the court consider the defendant's youth and its attendant characteristics before imposing a sentence of life without parole. *See Moore v. United States*, 871 F.3d 72, 79 (1st Cir. 2017); *Lopez*, 860 F.3d at 211; *Jefferson*, 816 F.3d at 1018 n.3 (noting that the "Supreme Court has not yet applied its constitutional decision in *Miller* to a life sentence imposed by a federal court," and questioning *Miller*'s applicability to a sentence imposed under the advisory Guidelines). Thus, a sentence that satisfies § 3553(a)'s procedural requirements cannot be challenged under the procedural component of the *Miller* decision.

Reflecting some confusion over the procedural requirements of *Miller*, the district court's opinion contains separate discussions of *Miller* and § 3553(a). Other courts have similarly treated the so-called "*Miller* factors" as separate from the § 3553(a) factors. *See, e.g.*, *United States v. Orsinger*, 698 F. App'x 527, 527 (9th Cir. 2017) (per curiam) (noting that the district court considered the evidence in "light of the factors identified in *Miller* and in 18 U.S.C. § 3553(a)"); *United States v. Garcia*, 666 F. App'x 74, 78 (2d Cir. 2016) (per curiam) (referring to "*Miller* and § 3553(a) factors" as separate and distinct); *United States v. Guzman*, 664 F. App'x 120, 122 (2d Cir. 2016) (per curiam) (noting that the district court "gave ample consideration to each of the *Miller* factors, together with the sometimes-overlapping § 3553(a) factors"); *United States v. Guerrero*, 560 F. App'x 110, 112 (2d Cir. 2014) (per curiam) (holding that the "district court properly

3. It is unclear whether Sparks also intended to challenge the substantive reasonableness of his sentence under *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The issue is not adequately briefed, but even if it were, Sparks has failed to show an abuse of discretion. *Id.* at 51, 128 S.Ct. 586. Sparks has a remarkable history of violence in prison. Even so, the district court varied down from the Guidelines, sentencing him to 35 years. Sparks has not rebutted the presumption that his below-Guidelines sentence is reasonable. *See United States v. Simpson*, 796 F.3d 548, 557 (5th Cir. 2015).

considered all of the *Miller* factors . . . and other mitigating factors under 18 U.S.C. § 3553(a)"), *aff'g United States v. Maldonado*, No. 09-CR-339-02, 2012 WL 5878673, at *9 (S.D.N.Y. Nov. 21, 2012) (discussing "*Miller* factors" separately from § 3553(a) factors).

In a recent en banc opinion, the Ninth Circuit vacated a sentence imposed under § 3553(a) after hearing "evidence related to a number of the *Miller* factors" because the district court's "sentencing remarks focused on the punishment warranted by the terrible crime Briones participated in, rather than whether Briones was irredeemable." *United States v. Briones*, 929 F.3d 1057, 1066 (9th Cir. 2019) (en banc). Though the Ninth Circuit claimed not to hold that "the district court erred simply by failing to use any specific words," *id.* at 1067, that appears to be exactly what the court did, *see id.* at 1073 (Bennett, J., dissenting). We reject the view that a procedurally proper sentence imposed under § 3553(a) can be vacated merely because the district court failed to quote certain magic words from the Supreme Court's *Miller* decision. As the Court has clearly said, "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Montgomery*, 136 S. Ct. at 735. The Court was "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Ibid.* Hence, the Court reiterated, "*Miller* did not impose a formal factfinding requirement." *Ibid.*

In this case, the district court appointed taxpayer-funded experts for Sparks, held a lengthy five-day hearing, and wrote twenty-six pages explaining its sentence. This fulsome process gave Sparks far more than the minimum procedure necessary to conduct a proper § 3553(a) analysis. And we agree with the Government that *Miller* does not add procedural requirements over and above § 3553(a).

III.

Sparks also argues that the district court erred in calculating the offense level under the Guidelines. The district court increased Sparks's offense level by two points for obstructing justice, U.S.S.G. § 3C1.1, and denied him a two-point reduction for accepting responsibility, *id.* § 3E1.1. Those decisions were based on the court's finding that Sparks attempted to escape from his detention center. Sparks claims he was not involved in the attempt.

[7, 8] We review the district court's factual findings for abuse of discretion, which occurs when the court relies on "clearly erroneous facts." *Gall*, 552 U.S. at 51, 128 S.Ct. 586. "Generally, a PSR 'bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.' " *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (quoting *United States v. Nava*, 624 F.3d 226, 231 (5th Cir. 2010)). A district court may adopt facts contained in the PSR "without further inquiry" if those facts have an "adequate evidentiary basis with sufficient indicia of reliability." *Ibid.* (quoting *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)).

[9] Sparks's PSR contains reliable evidence that he tried to escape from his detention center. That evidence includes an interview with a witness who heard Sparks discussing the escape plan with another inmate, Christopher Kirvin. The witness said that when Kirvin attacked a prison guard, Sparks repeatedly flushed a toilet to mask the sound of her screams. Sparks also admitted to a probation officer that he participated in the escape attempt.

The district court reasonably relied on the PSR.

* * *

Sparks's sentence is AFFIRMED.

UNITED STATES of America, Plaintiff - Appellee

v.

Kenneth James BARFIELD, Defendant - Appellant

No. 18-50399

United States Court of Appeals, Fifth Circuit.

FILED October 25, 2019

Background: Defendant was convicted, upon a guilty plea, in the United States District Court for the Western District of Texas, David Counts, J., 2018 WL 4761326, of possession with intent to distribute methamphetamine, and was sentenced to a 360-month prison term. Defendant appealed.

Holdings: The Court of Appeals, Higginbotham, Senior Circuit Judge, held that:

(1) account given by defendant in his post-arrest statement to police investigators satisfied similarity and temporal-proximity requirements for pattern of criminal conduct;

(2) as a matter of apparent first impression, where a defendant does not introduce evidence to rebut his post-arrest admission of relevant conduct, the district court may consider it at sentencing; and

(3) district court's reliance on presentence investigation report's account of defendant's post-arrest admission was not clearly erroneous.

Affirmed.

1. Criminal Law ⚿1139, 1158.34

The district court's interpretation or application of the Sentencing Guidelines is reviewed on appeal de novo, while its factual findings are reviewed for clear error. U.S.S.G. § 1B1.1 et seq.

2. Criminal Law ⚿1158.34

A factual finding at sentencing is not "clearly erroneous" if it is plausible in light of the record as a whole.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⚿1158.34

The Court of Appeals will find clear error upon review of a factual finding at sentencing only if a review of all the evidence leaves the Court of Appeals with the definite and firm conviction that a mistake has been committed.

4. Sentencing and Punishment ⚿668

In determining a defendant's base offense level, a sentencing court may consider other offenses in addition to the acts underlying the offense of conviction, as long as those offenses constitute relevant conduct as defined in the Sentencing Guidelines. U.S.S.G. §§ 1B1.3(a)(1)(A), 2D1.1.

5. Sentencing and Punishment ⚿973.3

Like all factual findings used in sentencing, relevant conduct must be proven by a preponderance of the relevant and sufficiently reliable evidence. U.S.S.G. § 1B1.3(a)(1)(A).