

United States Court of Appeals
For the Eighth Circuit

No. 18-2489

United States of America,

Plaintiff - Appellee,

v.

Shane E. Jones,

Defendant - Appellant.

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

Submitted: May 17, 2019
Filed: August 19, 2019
[Published]

Before COLLTON, BEAM, and SHEPHERD, Circuit Judges.

PER CURIAM.

Shane Jones pleaded guilty to unlawful possession of a firearm as a previously convicted felon. *See* 18 U.S.C. § 922(g)(1). The district court¹ determined that he

¹The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri.

App A

was subject to an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), based on five prior Missouri convictions for sale of a controlled substance. *See Mo. Rev. Stat. § 195.211 (2003)*. The court then sentenced Jones within the advisory guideline range to a term of 190 months' imprisonment and five years of supervised release.

The ACCA enhancement applies when a defendant has "three previous convictions . . . for . . . a serious drug offense . . . committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Jones challenges the district court's determination that he qualified as an armed career criminal.

Jones first argues that none of his five Missouri convictions counts as a "serious drug offense." A "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The Missouri statute under which Jones was convicted made it a crime to "deliver . . . or attempt to . . . deliver . . . or to possess with intent to . . . deliver . . . a controlled substance." Mo. Rev. Stat. § 195.211.1 (2003).

To determine whether a state drug conviction qualifies as a "serious drug offense" under federal law, we apply a "categorical approach" and compare the elements of the state offense with the elements set forth in § 924(e)(2)(A)(ii). *See United States v. Bynum*, 669 F.3d 880, 885 (8th Cir. 2012). Jones argues that the Missouri statute is broader than a "serious drug offense" under federal law, because "controlled substance" in Missouri encompassed some substances that were not "controlled substances" under federal law. In Missouri, however, "the identity of the controlled substance is an element of the offense under § 195.211," so "the statute is divisible based on the drug involved." *Martinez v. Sessions*, 893 F.3d 1067, 1073

(8th Cir. 2018). In that circumstance, we may apply a modified categorical approach and look to judicial records to determine the Missouri offense of which Jones was convicted. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Here, the records show that Jones was convicted five times for selling cocaine base—a substance that qualified as a “controlled substance” under both state and federal law—so the state offenses match the federal definition on that score.

Jones also complains that the Missouri statute’s definition of “deliver” criminalized merely an “offer” to sell drugs, and that the federal statute does not encompass an offer to sell. We held in *United States v. Hill*, 912 F.3d 1135, 1136-37 (8th Cir. 2019) (per curiam), however, that an offer to sell in Missouri is categorically an offense “involving” the distribution of a controlled substance under § 924(e)(2)(A)(ii). So each of Jones’s five convictions under § 195.211 matches the offense defined in § 924(e)(2)(A)(ii) and was properly counted as a “serious drug offense.”

Jones’s final argument is that the district court impermissibly found that at least three of his Missouri offenses were “committed on occasions different from one another.” The judicial records showed that one offense was committed on or about November 8, 2007, another on or about November 28, 2007, and a third on or about January 28, 2009. These records adequately support the court’s finding of different occasions. *See United States v. Keith*, 638 F.3d 851, 852-53 (8th Cir. 2011); *United States v. Van*, 543 F.3d 963, 966 (8th Cir. 2008). Jones’s argument that the Sixth Amendment right to a jury trial prevented the court from making this finding is foreclosed by circuit precedent. *United States v. Harris*, 794 F.3d 885, 887 (8th Cir. 2015); *United States v. Cole*, 778 F.3d 1055, 1056 (8th Cir. 2015) (per curiam); *United States v. Evans*, 738 F.3d 935, 936-37 (8th Cir. 2014) (per curiam); *accord United States v. Blair*, 734 F.3d 218, 226-28 (3d Cir. 2013); *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013) (per curiam); *United States v. Elliott*, 703 F.3d 378, 382-83 (7th Cir. 2012); *United States v. Thomas*, 572 F.3d 945, 952 n.4 (D.C.

Cir. 2009); *United States v. Michel*, 446 F.3d 1122, 1133 (10th Cir. 2006); *United States v. Thompson*, 421 F.3d 278, 285-86 (4th Cir. 2005); *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004); *United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001).

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

3 UNITED STATES OF AMERICA)
4)
5 Plaintiff,) Case No.
6 vs.) 17-00138-01-CR-W-SRB
7 SHANE E. JONES,)
8)
9 Defendant.)

SENTENCING HEARING

BEFORE THE HONORABLE STEPHEN R. BOUGH
JUNE 27, 2018
KANSAS CITY, MISSOURI

APPEARANCES

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WEDNESDAY, JUNE 27, 2018

5 MR. KAVANAUGH: Brad Kavanaugh on behalf of the
6 United States, Your Honor.

7 THE COURT: Mr. Kavanaugh.

8 MR. RAYMOND: Good morning, Judge. Bill Raymond on
9 behalf of Mr. Jones, who appears in person.

10 THE COURT: Mr. Raymond, Mr. Jones.

11 Mr. Kavanaugh, sir, have you had an opportunity to
12 review the presentence report and make any objections, sir?

13 MR. KAVANAUGH: Yes, Your Honor.

14 THE COURT: No objections?

15 MR. KAVANAUGH: No objections, Your Honor.

16 THE COURT: Very good.

17 Mr. Raymond, I see you have made three objections.

18 | What would you like to tell me about that?

19 MR. RAYMOND: Judge, we made an objection
20 specifically related to the determination by the presentence
21 report that Mr. Jones was subjected to enhanced punishment
22 pursuant to 18 U.S.C., Section 924(e). Specifically, at
23 Section 924(e), the Armed Career Criminal Act requires
24 increased punishment if a person has three prior convictions
25 for a serious controlled substance offense or violent

1 felonies.

2 Specifically, the presentence report determined on
3 the basis of paragraphs 38 and 44 that Mr. Jones had five
4 serious controlled substance offenses. In paragraph 38 they
5 included three controlled substance offenses that were charged
6 in the same information, and paragraph 44 they included two
7 controlled substance offenses that were charged in the same
8 information. And so in our objections to the presentence
9 report and our sentencing memorandum, we basically argued four
10 reasons as to why we believe these convictions shouldn't
11 qualify as serious controlled substance offenses.

12 Our first reason, Judge, was that under the Missouri
13 Revised Statute that charges sales of a controlled substance,
14 which is Missouri Revised Statute 195.211, Mr. Jones was
15 convicted of violating that statute. And in that statute,
16 what it says is that it is unlawful for any person to
17 distribute, deliver, manufacture, produce, or attempt to
18 distribute, deliver, manufacture, or produce or to possess
19 with the intent to distribute, deliver, manufacture, or
20 produce a controlled substance.

21 It goes on to define delivery of a controlled
22 substance to include barter, exchange, or gift or offer,
23 therefore. And so under Missouri law to be convicted of sale,
24 you're not -- of a controlled substance, you're not required
25 to prove that an actual delivery took place. You could offer

1 to do that and be convicted --

2 THE COURT: I've read those. Help me understand the
3 distinction between your argument and Judge Benton's two
4 decisions that came down April 10th, 2018, in the Reid and
5 Thomas cases. I've printed those off and read those as well.
6 So I'm trying to figure out how I reconcile those -- your
7 argument with those two cases.

8 MR. RAYMOND: Judge, I think there is a split among
9 circuits in terms of this issue. There are circuits that
10 agree with what we're arguing here. The Eighth Circuit has
11 issued those opinions that is -- that are referenced there.

12 We think that the Missouri law, though, is overbroad
13 and that the court should follow the arguments that have been
14 adopted by the other circuits on that issue, Judge. I
15 understand the opinion that came down, I think, April 8th or
16 9th, or whenever it was --

17 THE COURT: 10th.

18 MR. RAYMOND: 10th -- from the Eighth Circuit, that
19 does state differently. We believe, Judge, that this statute
20 is overbroad. When the court looks at the Supreme Court case
21 law on the issue in Descamps and other things like that, that
22 it should be considered overbroad. For those reasons, we'd
23 object to it being considered a predicate offense.

24 THE COURT: I'm going to overrule his objection
25 assuming you don't want to make any argument on that.

1 MR. KAVANAUGH: I don't, Your Honor. I would have
2 cited the same thing you had.

3 THE COURT: So I feel I have to follow the Eighth
4 Circuit case law since it's spoken on this. Obviously your
5 office and others have had some success in getting the Eighth
6 Circuit overturned on these particular issues, but they have
7 spoken, and I shall follow the precedent as set out in Thomas
8 and in Reid.

9 So that initial objection is overruled. What's your
10 next one, sir?

11 MR. RAYMOND: Our next objection, Judge, is that 18
12 United States Code, Section 924(e) requires the court to make
13 a factual finding that these offenses were committed on
14 occasions different from one another. In order to sentence
15 Mr. Jones to this enhanced punishment with a 15-year minimum,
16 the court has to prove that these are separate, distinct
17 criminal episodes. The court has to make that factual finding
18 rather than it being part of a continuous course of conduct.

19 And, again, in this case, these convictions, the
20 date that the offenses occurred is not an element of the
21 offense. Mr. Jones hasn't admitted that these offenses
22 occurred on a specific date. Indictments, like the ones
23 against Mr. Jones here, often include the language that they
24 occurred on or about a specific date. So there's been no
25 evidence, no factual findings by any courts below that these

1 offenses occurred on a specific date, just on or about a date.

2 And so there's no evidence by which we believe the
3 court could find -- make a factual finding that these offenses
4 occurred on separate, distinct dates, and they were part of
5 actual different criminal episodes, which is what's required
6 for 18 United States Code, Section 924(e).

7 THE COURT: Tell me those paragraphs from the PSR
8 you want me to look at.

9 MR. RAYMOND: 38 and 44, Judge.

10 THE COURT: And help me understand how your argument
11 relates to the decision in United States v. Cole.

12 MR. RAYMOND: I'm sorry, Judge, can you say that
13 again?

14 THE COURT: U.S. v. Cole. I believe that's the case
15 that says that I can look at the fact of prior convictions and
16 the dates of them. I believe that's in essence what it holds.

17 MR. RAYMOND: Judge, couple things. One is, first,
18 in order to be convicted of this crime, there's no requirement
19 that it be proven on a specific date. There's no element in
20 the charge or in the requirement in Missouri of the offense
21 for there to be a specific date of conviction. In fact, as we
22 said, many of these charges and the documents here suggest
23 that these crimes are often charged on or about the specific
24 date. It wouldn't be a defense -- let's say they said this
25 crime occurred on November the 28th. It wouldn't be a defense

1 that, no, it really happened on November the 20th so I'm,
2 therefore, innocent because of the language of "on or about."
3 So there's been no finding of the actual date that the offense
4 would have taken place, and, therefore, there's no evidence
5 that these are on separate and different occasions that have
6 been proven. So that's our first response to that is simply
7 that they -- there's been no evidence of it, and we can't
8 consider that.

9 But the other evidence -- the other thing would be
10 is that we can't look to those other documents, Judge, because
11 this isn't a divisible statute. It's not an issue like that
12 where we're going to go into looking at other documents.
13 We've got to look at what's been proven and what's before the
14 court.

15 So in this case -- in these cases and these types of
16 cases, especially Mr. Jones' situation, there's no evidence on
17 what date these offenses occurred and no evidence that
18 Mr. Jones ever admitted that these offenses occurred on times
19 different from one another. So that would be our argument in
20 relation to that, Judge.

21 Then our next argument, Judge, that we've outlined
22 in our sentencing memorandum, I'll just leave it to what's in
23 the sentencing memorandum. I'm not going to add anything to
24 that now.

25 Our final argument is that the -- basically that --

1 which is contained in our sentencing memorandum, it's under
2 the heading of number four, and that is that the Missouri
3 statutory definition for controlled substances is too broad to
4 be considered a serious drug offense under the Armed Career
5 Criminal Act without a finding of fact. What we're saying
6 there, Judge, is that, again, Missouri makes it illegal to
7 sell a controlled substance, and it doesn't specifically
8 require any proof of what the controlled substance was.
9 Missouri goes through and lists a number of substances in
10 their table of what's considered a controlled substance, and
11 their list of controlled substances is broader than what the
12 federal list is.

13 And so we think, Judge, since their scheduled
14 controlled substances is broader than the federal scheduled
15 controlled substances, that -- and includes drugs that aren't
16 on the federal list of controlled substances, that, therefore,
17 the statute is overbroad and it shouldn't be considered a
18 serious drug offense for that reason; because, again, similar
19 to the date, there's no requirement that a specific controlled
20 substance is proved. It's just required that you sold -- it's
21 alleged that you sold a controlled substance. And so it
22 wouldn't be a defense to say, well, they're saying I sold
23 crack cocaine but I really sold methamphetamine. That
24 wouldn't be a defense to that charge because they don't have
25 to prove what substance it was, just that it was a controlled

1 substance. But because some of the controlled substances that
2 Missouri says are illegal aren't on the federal schedule,
3 we're arguing that that's overbroad and, therefore, shouldn't
4 be a serious controlled substance offense.

5 Thank you.

6 THE COURT: I'm going to overrule all your
7 objections.

8 Mr. Kavanaugh, is there anything you'd like to say
9 in addition to what you filed in your sentencing memorandum,
10 sir?

11 MR. KAVANAUGH: Nothing further than those cases I
12 cited, Your Honor.

13 THE COURT: Very good.

14 Mr. Jones, let me ask you some questions, sir. If
15 you could please rise.

16 Sir, have you had an opportunity to review the
17 presentence report?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And have you had the opportunity to
20 discuss the presentence report with your attorney?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Beyond the objections that have just
23 been argued by your counsel, is there anything that you
24 believe is incorrect or wrong in the presentence report?

25 THE DEFENDANT: No, sir.

1 THE COURT: Very good. I'll make a finding of a
2 total offense level of 30, criminal history category 6, which
3 would normally result in a guideline range of 168 to 210
4 months, but there's a statutory minimum sentence of 180 months
5 to 210 months would then be the range.

6 Mr. Kavanaugh, I've read your sentencing memorandum,
7 sir. What is the government's recommendation for sentencing
8 in this case?

9 MR. KAVANAUGH: Your Honor, the government is
10 recommending a sentence of 210 months incarceration, which is
11 the highest end of the guidelines as calculated by the court.
12 I reference my sentencing memo in support of that, but a
13 couple of comments, Your Honor.

14 Before you is a defendant who is now on his 17th
15 adult felony conviction. Of those convictions, five of those
16 are predicate offenses that gets him to ACCA. We only need
17 three. He's at five of those. He has 42 criminal history
18 points. To date that may be the most criminal history points
19 I have seen in any defendant in any PSR since I've joined the
20 U.S. Attorney's Office.

21 The largest category, the greatest category we have
22 for criminal history score under the United States Sentencing
23 Guidelines is a category 6. You need 13 points to get to the
24 greatest category we have to work with under the sentencing
25 guidelines. This defendant has more than threefold that. We
10

1 don't have a category 7. We don't have a category 8, but his
2 42 points warrants consideration of a category 8 or a 9 or a
3 10.

4 The longest sentence this defendant has received to
5 date is nine years. I think, as the court looks through the
6 PSR and looks at the facts underlying the offense, the
7 defendant in four months after being released on that long
8 sentence, which is a combination of cases that ran concurrent,
9 he repaid that leniency by coming into possession of this
10 firearm four short months later.

11 As the court is very much aware, looking through the
12 very long and storied criminal history of this defendant, the
13 court is much aware of the fact that this defendant has been
14 shown leniency in the form of probation, light sentences, and
15 parole, and has repaid that to the courts and the justice
16 system in kind by committing another offense and committing
17 another offense and committing another offense.

18 This defendant's criminal history and
19 characteristics on its own, without looking at any of the
20 other factors, warrants justification for an upward variance
21 beyond the guidelines as calculated by the court, variance
22 under the statute, departure under the guidelines, because of
23 the now 17th felony conviction, the 42 criminal history
24 points, the fact that this defendant has been given so many
25 opportunities and bites at the apple, and all he has done in

1 response to those opportunities is commit another crime, is
2 commit another felony. So for those reason, Your Honor, we're
3 recommending the highest end of the guidelines as calculated
4 by the court at a bare minimum.

5 And one other consideration, Your Honor, that I
6 would put before the court before imposing sentence is there
7 -- the court must look to under the 3553(a) factors of
8 unwarranted sentencing disparity, and I know this will not be
9 the first defendant this court has sentenced for being a felon
10 in possession of a firearm or more importantly a felon in
11 possession of a firearm who qualifies under the Armed Career
12 Criminal Act. It takes three predicate offenses to get there.

13 This defendant has five of them. How could we avoid
14 an unwarranted sentencing disparity? If this defendant were
15 to receive the mandatory minimum of 180 months with the
16 criminal history that he brings to this court here today, how
17 could we avoid the unwarranted disparity versus those other
18 ACCA cases who only had three predicate offenses and were only
19 on their fourth felony, which was the FIP? Their situation,
20 bare minimum would qualify for 180 months. By statute,
21 mandatory minimum would be four felonies. How should they
22 receive the exact same sentence, or, more importantly, how
23 should he receive the same sentence as those defendants when
24 he has 17 that he's brought to the table?

25 Your Honor, for all of those reasons, I have not --
12

1 the government has not made a recommendation of an upward
2 variance or departure, but it is certainly warranted. At a
3 bare minimum, based upon this defendant's characteristics, his
4 history, we're asking that no less than the top end of the
5 guidelines as calculated by the court. Thank you, Your Honor.

6 THE COURT: Thank you, sir.

7 Counsel.

8 MR. RAYMOND: Thank you, Judge.

9 Let's start where the government left off with the
10 criminal history. The guidelines in this case are obviously
11 168 to 210. 180 is the statutory minimum but right in the
12 middle of the guideline range for this offense.

13 As the court's aware, 98.4 percent of people
14 convicted of gun-related offenses receive a sentence within or
15 below their guideline range; and so to sentence outside of the
16 guideline range would actually probably create an unwarranted
17 sentencing disparity. But when you look at the criminal
18 history that we're talking about here, what we see is a
19 history that there's no felonies for any crimes of violence.
20 There's nothing really but drug-related offenses in his
21 criminal history. Over and over again what you see is someone
22 with a drug problem and someone that has issues with
23 controlled substances.

24 And you say how do we wind up with this drug
25 problem, with this severity of drug problems? Well, you don't

1 have to look too far to figure that out. You look back at his
2 history, and you see that Mr. Jones -- to say Mr. Jones had a
3 tough row to hoe would be an understatement.

4 This is someone that at 18 months old is diagnosed
5 with liver cancer, has treatment that's required, chemotherapy
6 and surgery, to remove the tumors on his liver. The long-term
7 effects of that treatment is learning disabilities and
8 behavioral issues.

9 We see that, as he goes on, Mr. Jones is treated
10 repeatedly for mental health issues. Eight, nine years old is
11 diagnosed with learning disabilities, intellectual
12 disabilities. What's noted again -- we call them intellectual
13 disabilities, but what's noted when he was nine-years-old is
14 mild mental retardation. And you look at that and you look at
15 the history of the number of times he was hospitalized for
16 physical health issues where the treatment for those side
17 effects of those were mental health potential problems and
18 learning disabilities, and it's not hard to see how someone
19 could wind up in this situation where Mr. Jones is just based
20 on that.

21 You say, well, maybe they won't find their way to
22 this seat sitting next to me in front of Your Honor in a
23 federal courtroom if maybe they had a supportive family. What
24 do we see with Mr. Jones? We've got an uninvolved father
25 who's never in his life, and we've got a mom with depression,

1 mental health issues, alcoholism, who's never in his life, and
2 you see stories in there about how they're not involved in
3 treatment. They're not even really concerned with following
4 up on treatments. Not for things like, you know, a cold.
5 Cancer in an 18-month-old; brain bleeding in a nine-year-old.

6 So the fact that Mr. Jones is still sitting here
7 today and still has hope and is still the man that I've come
8 to know in the last couple of years is a testament to him and
9 a tribute to him.

10 And does he have a significant substance abuse
11 issue? Yes. Does he need treatment for that substance abuse
12 issue? Yes. Does he have significant learning disabilities
13 and intellectual disabilities? Yes. Should he be someone
14 that gets 210 months or 240 months or anything above 180
15 months? No. No.

16 Because, I mean, again, look at everything that we
17 outlined in our sentencing memorandum. Look at what's
18 contained in the records that were obtained by the probation
19 office and detailed in here in his presentence report, and
20 it's easy to understand how Mr. Jones sits here.

21 You know -- and it's important to note too, Judge,
22 that he's here on a writ. So he's got to go back to Missouri,
23 and finish off his sentence there before he ever even starts
24 whatever sentence you give him here. The presentence report
25 notes that his release date there is March of 2019. So saying

1 that somehow he's getting a break by giving him 15 years in
2 addition to the time he's been in custody here, I don't think
3 is a break and it's not consistent with what happens in other
4 cases.

5 But also I think it's important to also consider the
6 fact that in this case, just look at the facts of the case.
7 This is a gun that was purchased from a pawn shop by
8 Mr. Jones' fiance at the time. Purchased for protection. The
9 gun was kept under the seat of her car. Mr. Jones drove that
10 car to work on this date.

11 He was at work. He had been working a job upon his
12 release, and obviously he pled guilty to that. But this was a
13 gun that was kept for protection. It should be noted that his
14 girlfriend was subsequently murdered; so there was a reason
15 for the need to have the protection.

16 But ultimately, Judge, this isn't a case where he's
17 again out there selling drugs, around drugs, doing things. He
18 was on his way to work with a gun under the seat of his
19 girlfriend's car that he admitted he had knowledge of it. Did
20 accept responsibility of it. There's nothing factually about
21 the facts of this case that suggests this is a case where he
22 deserves a sentence outside of the guideline range or even
23 outside of what's the middle of the guideline range, which is
24 180 months.

25 And, again, we also, Judge, there's -- we cited in
16

1 our -- I don't need to go into them, I don't think, but
2 there's nothing more deterrent about a 210-month sentence or a
3 180-month sentence. There's no message going to be sent to
4 the public or to Mr. Jones by adding a 30-month sentence.
5 There's no additional learning or treatment that needs to be
6 provided that's going to take 30 more months.

7 So we don't think, Judge, that that sentence would
8 be appropriate when the court takes into account all the
9 factors of 3553, when the court takes into account the
10 sufficient but not greater than requirement of 3553. We think
11 that a sentence of 180 months would be sufficient but not
12 greater.

13 We're also asking Your Honor to recommend placement
14 at the facility in Yazoo, Mississippi. Asking that the court
15 recommend that Mr. Jones receive mental health counseling;
16 that he receive substance abuse counseling so that, you know,
17 when he completes his sentence in 12 or 13 or 14 or 15 years
18 from now, whenever they determine that to be, that hopefully
19 his mental health condition is stable -- is stabilized as much
20 as it can be, that he's provided substance abuse treatment so
21 that he can address the issues that he has.

22 So for all of those reasons, Judge, we'd ask the
23 court to impose a sentence of 180 months. Thank you.

24 THE COURT: Mr. Jones, is there anything you'd like
25 to tell the court, sir?

1 THE DEFENDANT: Yes, Your Honor. I would like to
2 apologize to the courts for my wrongdoings. I'd like to
3 apologize to my family for time taken out. I'm going to take
4 this as a lesson learned, Your Honor, and get out and be a
5 productive citizen in society. I hope the best, Your Honor.
6 That's all I can say.

7 THE COURT: Pursuant to 18 U.S.C. 3553, this court
8 is required to impose a sentence that is sufficient but not
9 greater than necessary to comply with the provisions of the
10 statute. I've considered the advisory guidelines, which in
11 this case I've calculated to be 180 to 210 months. I've also
12 considered the 3553 factors. In this case, the nature and
13 circumstances of the offense, it is a felon in possession of a
14 firearm, and Congress has determined that we don't want people
15 who have committed felonies having a gun.

16 I think in your own life, you've probably seen that
17 play out in that your girlfriend at the time was murdered. We
18 don't want you getting murdered. We don't want your
19 girlfriend getting murdered. We don't want your kids getting
20 murdered. We don't want anybody getting murdered. So that's
21 the concern and why we ban that.

22 Mr. Kavanaugh has a very good point that part of
23 your history and characteristics are that you have managed to
24 rack up over your relatively short life a host of criminal
25 history points. As we look back over the presentence report,

1 if we toss out everything that happened before 18, you had
2 numerous encounters with law enforcement at 18 and 19. And
3 then when you were 21 and 22, it seems like basically every
4 month you had some sort of encounter with law enforcement,
5 many of those involving possession of controlled substances or
6 different drugs. You spent a good period of time incarcerated
7 before getting out again.

8 Your lawyer has a good point that you did have a
9 tough row to hoe, that from the beginning of your life you've
10 had health issues and probably not the best support system, if
11 any, support system to get you along the way. I note that you
12 report that you don't have any mental health issues, but the
13 medical records, the PSR, and your own lawyer seem to indicate
14 otherwise. And I'm confident that those issues, as well as
15 your drug addiction, led you down a pretty tough road.

16 I've got to come up with a sentence to reflect the
17 seriousness of the offense and the fact that your history
18 keeps leading you back here. To some extent, it's a -- the
19 mandatory minimum of 180 months makes this an easier decision,
20 but combining the arguments by counsel and your criminal
21 history, I think Mr. Kavanaugh has a point that you've worked
22 pretty long and hard to get yourself this criminal history
23 category, and by all accounts you keep going back to a life of
24 crime and drugs. And in this case, then possessing a gun, and
25 I can only assume that you possessed the gun or your

1 girlfriend had the gun under her car and that you admit you
2 touched it a couple of times for some reason. And I'm
3 assuming that reason is somebody was after your girlfriend or
4 you. You had it for protection reasons. And that concerns me
5 too, that whatever's going on in your life, that you need a
6 gun to protect you from somebody else because I don't want
7 anybody getting shot.

8 So after considering all of that information, it's
9 the judgment of this court that the defendant is sentenced to
10 the Bureau of Prisons for 190 months. I find that you do not
11 have the means to pay a fine, waive any fine as required by
12 law. \$100 special assessment, five years of supervised
13 release. I'll make the recommendation for mental health drug
14 treatment and Yazoo.

15 I believe there's an outstanding issue that hasn't
16 been argued by either party as to consecutive or concurrent,
17 and I believe that 5G1.3 comment note in C states that when --
18 if the defendant was on federal or state probation, parole, or
19 supervised release at the time of the instant offense and had
20 such probation, parole, or supervised release been revoked
21 consistent with the policies in 7B1.3, the commission
22 recommends that the sentence for the instant offense be
23 imposed consecutive to the sentence imposed for the
24 revocation. Mr. Jones is here on a writ and will be going
25 back.

1 Mr. Kavanaugh, what's the position of the United
2 States Government on consecutive versus concurrent pursuant to
3 5G1.3?

4 MR. KAVANAUGH: Your Honor, I believe it should run
5 consecutive. Couple comments regarding that under the factual
6 basis. The court will note in the PSR that when the defendant
7 was arrested for having this firearm four short months after
8 being released on parole, he stated to law enforcement that he
9 had no idea where the girlfriend got it, assumed that she had
10 bought it herself at a pawn shop while he was in prison. That
11 can be found at paragraph 6 of the PSR.

12 Then pointing the court to paragraph 9, after his
13 in-custody interview, the case agent went to the pawn shop
14 after doing a trace, pulled the surveillance tape, and there
15 was the defendant with his girlfriend on the date she's
16 purchasing the firearm and as caught, he's counting money.
17 Those facts, Your Honor, four short months after he's released
18 on parole, at a pawn shop counter, he's seen on surveillance
19 with his girlfriend when she's purchasing the firearm and he's
20 counting out money, those things warrant consecutive time,
21 Your Honor.

22 THE COURT: Counsel from the defense, what's your
23 position on consecutive versus concurrent pursuant to 5G1.3?

24 MR. RAYMOND: Judge, we're asking the court run them
25 concurrently. We don't think there's anything extra egregious

1 about this case that's any different than any other felon in
2 possession case that would suggest that it ought to run
3 consecutive. What Mr. Jones was stating is that he believes
4 had he still been in the Missouri Department of Corrections,
5 there's a chance that -- the possibility that he would have
6 been paroled and in essence would have been back here with
7 this time counting towards his sentence.

8 So in essence, he's already received to some extent
9 a consecutive sentence because any time up to today he won't
10 receive credit from the Bureau of Prisons for. So that in
11 essence is he's been here on a writ since May the 5th of 2017.
12 So he's already got one year that he won't receive credit
13 towards his federal sentence.

14 So running this concurrent has already in essence
15 given him a year consecutive because the earliest the Bureau
16 of Prisons would start crediting his sentence if the court
17 ordered it concurrent would be today because all that sentence
18 before would be going towards the Missouri sentence. That's
19 already giving him a year consecutive.

20 What Mr. Jones was stating is that he thinks he
21 would have had a parole hearing in August of 2017, and they
22 would have considered whether or not they would have paroled
23 him. And so the fact that he was here in federal custody
24 caused him to miss that parole hearing and, therefore, lose
25 all the time for credit that he would have got towards this

1 sentence, Judge.

2 THE COURT: I'm going to follow 5G1.3 and order it
3 to be consecutive. While on supervised release, you shall
4 comply with all standard conditions of supervised release that
5 have been adopted by this court and the special and mandatory
6 conditions of supervision as set forth in part D of the
7 presentence report.

8 To the extent that you've not waived your right to
9 appeal this judgment and sentence pursuant to the plea
10 agreement you've entered in this case, you have 14 days from
11 the entry of judgment in your case to file a notice of appeal.
12 If you do not file a notice of appeal within 14 days of the
13 date of judgment, you will forever lose your right to appeal.
14 If you cannot afford to file an appeal, you can file a motion
15 to proceed in forma pauperis. If you so request, the clerk of
16 the court shall immediately prepare and file a notice of
17 appeal on your behalf.

18 Anything additional from the government?

19 MR. KAVANAUGH: No, Your Honor. Thank you.

20 THE COURT: Anything additional from the defendant?

21 MR. RAYMOND: No, Your Honor.

22 THE COURT: We'll be in recess.

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REPORTER'S CERTIFICATE

3 I certify that the foregoing pages are a correct
4 transcript from the record of proceedings in the
5 above-entitled matter.

Date

Registered Merit Reporter