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APPENDIX:

A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America,

Plaintiff,

vs.

James Marione Butchee,
a/k/a Knowledge,

Defendant.

ORIGINAL

FILE NO. 3:17-cr-60

T R A N S C R I P T

O F

P R O C E E D I N G S

Initial Appearance, Waiver of Indictment,
Change of Plea - August 8, 2018

Pages 1-38

HELD AT: QUENTIN BURDICK UNITED STATES COURTHOUSE
655 FIRST AVENUE NORTH
FARGO, NORTH DAKOTA 58102

BEFORE: THE HONORABLE KAREN E. SCHREIER

COURT REPORTER: KELLY A. KROKE

A P P E A R A N C E S**MR. JACOB T. RODENBIKER****COUNSEL FOR PLAINTIFF;**

Office of US Attorney

655 1st Avenue North, Ste. 250

Fargo, ND 58102

MR. STORMY R. VICKERS**COUNSEL FOR DEFENDANT;**

Attorney at Law

112 North University Drive, Ste. 390

Fargo, ND 58102

P R O C E E D I N G S

(August 8, 2018: The following proceedings commenced at 9:30 a.m.):

THE COURT: Okay. This is the time scheduled for an initial appearance, waiver of indictment and change of plea in the matter entitled United States of America versus James Butchee.

Would counsel please note their appearances for the record.

MR. RODENBIKER: Good morning, Your Honor, Jake Rodenbiker for the United States.

MR. VICKERS: Stormy Vickers for Mr. Butchee.

THE COURT: And, Mr. Butchee, would you please stand and raise your right hand. The clerk's going to administer an oath to you to tell the truth.

THE CLERK: Please raise your right hand.
(Oath administered.)

THE CLERK: Okay. Please be seated.

THE COURT: Mr. Butchee, there was an information that was filed against you. Did you get a copy of that?

THE DEFENDANT: Yes.

THE COURT: And that is the charge that's been brought against you for conspiracy to possess with

1 the intent to distribute and distribute a controlled
2 substance, and I'll have the United States read that to
3 you so I make sure that you understand what the charge
4 is.

5 MR. RODENBIKER: The United States Attorney
6 charges from on or about January 1, 2016, and
7 December 9, 2016, in the Districts of North Dakota,
8 Minnesota and elsewhere, James Marione Butchee a/k/a
9 Knowledge, did knowingly and intentionally combine,
10 conspire, confederate and agree with others both known
11 and unknown to possess with intent to distribute and
12 distribute a mixture and substance containing a
13 detectable amount of heroin, a Schedule I controlled
14 substance, in violation of Title 21, United States Code,
15 Sections 841(a)(1), and Title 18, United States Code,
16 Section 2.

17 Overt acts: In furtherance of this
18 conspiracy and to effect and accomplish the objects of
19 it, one or more of the conspirators committed the
20 following overt acts: 1. It was a part of said
21 conspiracy that the defendant and others did possess
22 with intent to distribute and distribute a mixture and
23 substance containing a detectable amount of heroin, a
24 Schedule I controlled substance, within the states of
25 North Dakota, Minnesota, and elsewhere;

1 2. It was further a part of said conspiracy
2 that the defendant and others would and did attempt to
3 conceal their activities;

4 3. It was further a part of said conspiracy
5 that the defendant and others would and did use
6 telecommunication facilities;

7 4. It was further a part of said conspiracy
8 that the defendant and others would and did use United
9 States currency in their drug transactions; and in
10 violation of Title 21, United States Code, Section 846,
11 Pinkerton v. U.S., 328 U.S. 640 (1946), signed Brett M.
12 Shasky for the United States Attorney.

13 THE COURT: Mr. Butchee, do you understand
14 the Information charges you with conspiracy to possess
15 with intent to distribute or to distribute a controlled
16 substance?

17 THE DEFENDANT: Yes.

18 THE COURT: You do have the right to hire
19 your own lawyer or if you don't have money to hire a
20 lawyer the Court will appoint a lawyer to represent you.
21 Do you want Mr. Vickers to continue representing you?

22 THE DEFENDANT: Yeah, I gotta -- I was -- my
23 people was trying to, you know, trying to hire a lawyer,
24 you know what I'm saying? I don't know whoever they got
25 on that though, you know.

1 THE COURT: So do you have money right now
2 to hire your own lawyer?

3 THE DEFENDANT: Nah.

4 THE COURT: So since you don't have money
5 right now do you want Mr. Vickers to keep representing
6 you?

7 THE DEFENDANT: So are you saying I could
8 have a different attorney? That's what you're saying?

9 THE COURT: No. I'm saying you can either
10 hire your own lawyer or you can have Mr. Vickers.

11 THE DEFENDANT: Oh, okay, okay. I'll stay
12 with Mr. Vickers.

13 THE COURT: Okay. You do have the right to
14 a preliminary hearing. I want you to be aware that
15 you're not required to make any statement. If you have
16 made a statement you do not need to say more. If you
17 start to make a statement, you can stop at any time but
18 any statements that you make can be used against you in
19 future proceedings. Do you understand that?

20 THE DEFENDANT: So any statement that I make
21 right now can be used against me?

22 THE DEFENDANT: Right. Anything that you
23 say here in public court could be used against you
24 later. Do you understand that?

25 THE DEFENDANT: With the change of plea?

1 THE COURT: For instance, if you admitted
2 during the change of plea hearing that you possessed
3 heroin and distributed it to someone else and then later
4 on you wanted to withdraw your plea, the statements that
5 you make here today can be used against you if the case
6 went to trial or it could be used against you during
7 your sentencing hearing. Anything that you say here in
8 open court could be used against you by the government
9 later. Do you understand that?

10 THE DEFENDANT: Yeah, I understand. I was
11 told that it wasn't supposed to be used against me
12 though like if I -- you know, I --

13 THE COURT: Do you think that anything you
14 say here in Court can't be used against you?

15 THE DEFENDANT: No. I was told it wasn't
16 supposed to be used against me though.

17 THE COURT: Okay. Well, I'm letting you
18 know that it can be.

19 THE DEFENDANT: Oh, okay.

20 THE COURT: Do you understand that?

21 THE DEFENDANT: Yes, I understand.

22 THE COURT: Okay. Mr. Rodenbiker, would you
23 inform the defendant of the possible maximum penalties
24 on this charge?

25 MR. RODENBIKER: Your Honor, as charged

1 under the Information, the maximum penalty is a term of
2 imprisonment of 20 years, a fine of \$1 million,
3 supervised release for a period of five years and a
4 special assessment of a hundred dollars as well as
5 restitution to any identifiable victim.

6 THE COURT: Mr. Butchee, do you understand
7 what the possible maximum penalties are if you do plead
8 guilty?

9 THE DEFENDANT: Yeah, 20 years, yes.

10 THE COURT: Right, a maximum of 20 years.

11 THE DEFENDANT: Maximum of 20 years?

12 THE COURT: Right. Now I'm going to talk
13 about -- talk with you about whether you're willing to
14 waive your right to be indicted by a grand jury so I've
15 got a couple questions to ask you first. Can you tell
16 me your full name?

17 THE DEFENDANT: James Marione Butchee.

18 THE COURT: And how old are you?

19 THE DEFENDANT: I'm 33.

20 THE COURT: How far did you go in school?

21 THE DEFENDANT: Twelfth grade.

22 THE COURT: Did you graduate?

23 THE DEFENDANT: I got my GED.

24 THE COURT: And have you been employed
25 recently?

1 THE DEFENDANT: Yes.

2 THE COURT: Where at?

3 THE DEFENDANT: Work at a barbershop.

4 THE COURT: And it sounds like you do speak
5 and understand English?

6 THE DEFENDANT: Yes.

7 THE COURT: Are you currently or have you
8 recently been under the care of a physician or a
9 psychiatrist?

10 THE DEFENDANT: No.

11 THE COURT: Have you been hospitalized
12 recently?

13 THE DEFENDANT: No.

14 THE COURT: Have you been treated for a
15 narcotics addiction recently?

16 THE DEFENDANT: No.

17 THE COURT: Have you had any drugs, medicine
18 or pills or any alcoholic beverages to drink in the last
19 24 hours?

20 THE DEFENDANT: No.

21 THE COURT: And did you get a copy of the
22 Information that's the charge that's pending against
23 you?

24 THE DEFENDANT: Yeah. Right here?

25 THE COURT: Yup.

1 THE DEFENDANT: Yeah.

2 THE COURT: So that charge was brought by
3 the U.S. Attorney filing -- signing and filing the
4 Information. You have a constitutional right to be
5 charged by an Indictment that's brought by the grand
6 jury but you can waive the right to be indicted and you
7 can consent to being charged by an Information that's
8 filed by the U.S. Attorney. Unless you waive
9 Indictment, you can't be charged with a felony in
10 Federal Court unless the grand jury finds by return of
11 an Indictment that there's probable cause to believe
12 that a crime was committed and that you're the person
13 that committed the crime. If you do not waive
14 Indictment, the government can present the case to the
15 grand jury and ask the grand jury to indict you.

16 And a grand jury is made up of at least 16
17 and not more than 23 persons, and at least 12 of the
18 grand jurors would listen to the evidence and find that
19 there is probable cause to believe that you committed
20 the crime that you're charged with before you could be
21 indicted by the grand jury. The grand jury would listen
22 to the evidence and they either may or may not indict
23 you. If you waive being indicted by the grand jury,
24 your case will proceed against you on the U.S.
25 attorney's Information just as if you had been indicted.

1 Have you talked with your lawyer about
2 whether you're willing to waive your right to be
3 indicted by the grand jury?

4 THE DEFENDANT: No, we ain't talked about
5 that.

6 MR. VICKERS: Can I have just a second,
7 Judge?

8 (Mr. Vickers conferring with Defendant
9 Butchee.)

10 MR. VICKERS: Your Honor, I'll just explain
11 real quick. We have discussed -- that part of the Plea
12 Agreement was that he would be pleading to an
13 Information in lieu of the Indictment that's been filed
14 and the agreement called for him to agree to the
15 Information obviously. And so I've advised him that I
16 believe that this is in effect what we have discussed
17 just in perhaps different terms. So I think that he
18 will be willing to waive but obviously I'll let him
19 answer to that.

20 THE COURT: Mr. Butchee, did you have a
21 chance to talk with your attorney about whether you're
22 willing to waive the right to be indicted by a grand
23 jury?

24 THE DEFENDANT: No, we ain't talked about it
25 though.

1 THE COURT: Do you understand that you do
2 have the right to be indicted by the grand jury?

3 THE DEFENDANT: Yeah, I understand that. So
4 the first Indictment is getting dismissed and -- is that
5 correct though?

6 THE COURT: Right. So under the Plea
7 Agreement the government agreed that if you plead to
8 this Information then they would dismiss the Indictment.

9 THE DEFENDANT: Okay.

10 MR. RODENBIKER: If I may, at sentencing,
11 Your Honor, so it wouldn't be today.

12 THE COURT: So the Indictment would be
13 dismissed after you're sentenced on this charge, the one
14 that's in the Information.

15 THE DEFENDANT: So none of them aggravating
16 factors would apply to me then, is that correct, from
17 the first Indictment?

18 THE COURT: Right. The first Indictment
19 charged you with conspiracy to possess with the intent
20 to distribute or distribute a controlled substance
21 resulting in death. The Information only charges you
22 with conspiracy to possess with intent to distribute or
23 distribute a controlled substance. It doesn't have the
24 aggravating factor of resulting in death. Because of
25 that change, the penalty on the Information is lower so

1 it has a maximum penalty of 20 years in prison. With
2 the aggravating impact of resulting in death, you would
3 have had a mandatory minimum sentence of 20 years and a
4 maximum of life. So that's the difference between the
5 two charges.

6 THE DEFENDANT: Okay. So what is the
7 minimum on the Information?

8 THE COURT: There is no minimum. There's
9 not a mandatory minimum. It just has a maximum of 20
10 years.

11 THE DEFENDANT: Oh, okay, okay.

12 THE COURT: And I know you just talked with
13 your attorney now about whether you're willing to waive
14 the right to be indicted and allow the case to proceed
15 forward against you based on the Information. Have you
16 had a chance to discuss that enough with your lawyer or
17 do you need more time?

18 THE DEFENDANT: No, that's okay. So on the
19 Information no quantity -- quantity is not an issue then
20 because it wasn't --

21 THE COURT: No quantity is charged in the
22 Information.

23 THE DEFENDANT: So at sentencing there
24 wouldn't be no, you know, discrepancies about that or am
25 I right? I'm just asking.

1 {THE COURT}: I don't know if there are going
2 to be discrepancies at sentencing because I don't know
3 what the Presentence Investigation Report will indicate.
4 All I know is they haven't charged a quantity so there's
5 not a mandatory minimum and the maximum penalty that
6 could be imposed is 20 years.

7 {THE DEFENDANT}: So we got a binding -- don't
8 we have a binding agreement then what the penalty is?

9 {MR. VICKERS:} Judge, and he has some
10 questions and I think what Mr. Rodenbiker's going to
11 inform the Court as well that the language is confusing
12 but it is intended to be a binding agreement. I think
13 paragraph five indicates that it is a binding agreement.
14 11(c)(1)(C) applies and we're making a binding
15 recommendation in paragraph 17 of 136 months.

16 THE COURT: Mr. Rodenbiker?

17 {MR. RODENBIKER}: Yes, Your Honor, that is
18 correct. I was able -- I know I mentioned that I was
19 having trouble reaching the assigned AUSA but I was able
20 by text message before the proceeding began to confirm
21 with him that it is the United States' intention to
22 present this under 11(c)(1)(C) and it does indicate that
23 in paragraph five at the top of page 2 of the Plea
24 Agreement filed at docket 54.

25 The contradiction that concerned me -- well,

1 one, it's very unusual for us to do that so I hadn't
2 noticed that until Mr. Vickers brought it to my
3 attention. But the contradiction that concerned me that
4 I think can be resolved on the record is with respect to
5 page 7 at the top, paragraph 16 of the Plea Agreement,
6 which discusses whether or not the Court or probation
7 are bound by the Plea Agreement. And specifically it
8 does say "as to determining the Sentencing Guideline
9 range" and that the Court may depart. (And that
10 paragraph is a standard part of our Plea Agreements and
11 it seems to me to be contradictory or at least could be
12 interpreted and being contradictory to the parties')
13 intent to bind the Court as well as one another on the
14 136-month sentence that's presented in paragraph 17 just
15 below that on page 7. }

16 And so what I wanted to clarify is that the
17 United States intends to present this as a binding Plea
18 Agreement under 11(c)(1)(C) and that any language to the
19 contrary in paragraph 16 should be disregarded. (We can
20 debate whether it is actually contrary since it's just
21 guideline calculations, but at the end of the day I)
22 think it's fair to say that we expect the sentence to be
23 136 months and I think that may be part of the ,
24 defendant's underlying question.) And I hope that I've
25 resolved it and not made it more confusing.

1 THE COURT: So you would amend the Plea
2 Agreement to eliminate paragraph 16 so that there isn't
3 any ambiguity?

4 MR. RODENBIKER: I think that maybe the
5 cleanest way to do that, Your Honor, is to strike
6 paragraph 16 of the Plea Agreement for the record here.
7 And whether the Court is satisfied that we can do that
8 orally or whether the Court wants us to file something
9 after, I'm open to suggestions. But I think it will be
10 sufficient and I think especially given that probation
11 has -- is here today and is privy to this colloquy that
12 it will be addressed properly in the Presentence
13 Investigation Report when that's produced and that as
14 much as possible there won't be any confusion when it
15 comes to sentencing. We recognize that it may very well
16 be a different judge sitting on the bench at that point
17 in time and that poses unique challenges as well but I
18 don't know that doing it on the record versus filing an
19 amended Plea Agreement will ultimately make any
20 difference as far as clarity is concerned. And I regret
21 that we didn't resolve this sooner, Your Honor.

22 THE COURT: I think doing it orally is fine.
23 Mr. Vickers, do you agree that paragraph 16 should be
24 deleted from the Plea Agreement?

25 MR. VICKERS: I do, Your Honor.

1 THE COURT: And, Mr. Butchee, do you also
2 agree that paragraph 16 should be deleted from the Plea
3 Agreement?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. Then I'm going to
6 grant that request to have paragraph 16 deleted from the
7 Plea Agreement. So, Mr. Butchee, going back to your
8 question, the Plea Agreement is an 11(c)(1)(C) agreement
9 which means that it's binding on the Court, and under
10 that Plea Agreement if the Court accepts the Plea
11 Agreement the Court would have to sentence you to 136
12 months' imprisonment. The Court would be bound to do
13 that.

14 So with that information do you want to
15 waive your right to be indicted by the grand jury and
16 proceed forward based on this Information that was filed
17 against you by the U.S. Attorney's office?

18 THE DEFENDANT: So if the Court accepts the
19 Plea Agreement right here at the change of plea, then
20 it's bound at sentencing for the 136; am I right?

21 THE COURT: If the Court accepts the Plea
22 Agreement, then the Court would be bound to sentence you
23 to 136 months. But probably what I will do today is not
24 find you guilty and wait until the Presentence
25 Investigation Report has been prepared so that the Court

1 can decide whether or not to accept this Plea Agreement.
2 So I'd have you enter a plea but until the Presentence
3 Investigation Report is prepared the Court can't say
4 whether or not it's going to be bound by the 136 months.
5 So if the Court decided it wasn't going to be bound then
6 you'd be able to withdraw your plea and proceed forward?

7 THE DEFENDANT: Okay?

8 THE COURT: But I don't know anything about
9 you so I can't -- I don't know anything about your case
10 so I can't decide if 136 months is appropriate or not
11 today.

12 THE DEFENDANT: Okay.

13 THE COURT: Okay?

14 THE DEFENDANT: Yes.

15 THE COURT: So do you feel that you're at a
16 point where you can give up your right to be indicted by
17 the grand jury?

18 THE DEFENDANT: Yes?

19 THE COURT: And you've had a chance to talk
20 with your lawyer about that?

21 THE DEFENDANT: Yes.

22 THE COURT: You understand that you do have
23 the right to be indicted by a grand jury?

24 THE DEFENDANT: Yes.

25 THE COURT: Have any threats or promises

1 been made to induce you into waiving your right to be
2 indicted other than what's in the Plea Agreement?

3 THE DEFENDANT: No, ma'am.

4 THE COURT: Do you wish to waive your right
5 to be indicted by the grand jury?

6 THE DEFENDANT: Yes.

7 THE COURT: And, Mr. Vickers, are you aware
8 of any reason why the defendant should not waive
9 Indictment?

10 MR. VICKERS: No, Your Honor.

11 THE COURT: And do you have the Waiver of
12 Indictment form there?

13 MR. VICKERS: I do not have that form. I
14 apologize.

15 THE COURT: Here's one (indicating).

16 The record should reflect that the defendant
17 and his attorney have both signed the Waiver of
18 Indictment form here in open court. I find that the
19 waiver is knowingly and voluntarily made by the
20 defendant and it's hereby accepted and I've signed the
21 order.

22 So, Mr. Butchee, we'll now move on to the
23 change of plea part of the hearing and did you receive a
24 copy of the Information, which is the charge that's
25 pending against you?

1 THE DEFENDANT: Yes.

2 THE COURT: And have you had a chance to
3 discuss that charge and your case in general with
4 Mr. Vickers as your lawyer?

5 THE DEFENDANT: Yes.

6 THE COURT: Are you fully satisfied with the
7 counsel representation and advice that's been given to
8 you about your case by Mr. Vickers?

9 ~~THE DEFENDANT:~~ Yes.

10 THE COURT: And I see that you signed a Plea
11 Agreement and a Plea Agreement Supplement that's -- I
12 see that you signed a Plea Agreement that was amended
13 here orally in court and a Plea Agreement Supplement.
14 Did you have a chance to read and discuss those
15 documents with your lawyer before you signed them?

16 THE DEFENDANT: Yes.

17 THE COURT: And do the Plea Agreement and
18 the Plea Agreement Supplement represent in their
19 entirety all of the understandings or agreements that
20 you have with the government?

21 THE DEFENDANT: Yes. Can I ask you a
22 question?

23 THE COURT: Sure.

24 ~~THE DEFENDANT:~~ When we say that orally as
25 you said which was going to amend that, my lawyer said

1 like we might not have you for the judge. So is there
2 anything like I can have like somebody write something
3 in writing just in case it's a different judge?

4 THE COURT: You want this in writing?

5 THE DEFENDANT: Just in case it's a
6 different judge.

7 THE COURT: So the court reporter's taking a
8 transcript of everything that's said so if there was
9 some dispute she can prepare a transcript that will be
10 in writing so that the judge will know.

11 THE DEFENDANT: Oh, okay.

12 THE COURT: So if there's anything that
13 comes up at the next hearing she can prepare that
14 transcript.

15 THE DEFENDANT: Okay.

16 THE COURT: Okay?

17 THE DEFENDANT: Okay.

18 THE COURT: So I'm trying to figure out if
19 anybody, including the government, made you some
20 promises that weren't written down in your Plea
21 Agreement or the Plea Agreement Supplement other than
22 the amendment that we just talked about here in open
23 court. Anything else?

24 THE DEFENDANT: No.

25 THE COURT: Okay. Do you understand the

1 terms of the Plea Agreement and the Plea Agreement
2 Supplement?

3 THE DEFENDANT: Yes.

4 THE COURT: Has anyone made any promises or
5 assurances to you that are not in the Plea Agreement to
6 try to persuade you to accept that document?

7 ~~THE DEFENDANT~~: No, ma'am.

8 THE COURT: Has anyone threatened you in any
9 way to try to persuade you to sign the Plea Agreement
10 and the Plea Agreement Supplement?

11 ~~THE DEFENDANT~~: No.

12 ~~THE COURT~~: Because this is a plea under
13 11(c)(1)(C) which is binding on the Court. If the judge
14 decides to not follow the terms of the Plea Agreement,
15 then the judge will give you an opportunity to withdraw
16 your plea of guilty and if you choose to not withdraw
17 your plea then the judge could impose a more severe
18 sentence without being bound by the Plea Agreement. Do
19 you understand that?

20 ~~THE DEFENDANT~~: Yes.

21 THE COURT: Mr. Vickers, were all formal
22 plea offers by the government conveyed to your client?

23 MR. VICKERS: Yes, Your Honor. There were a
24 number of -- there were a number of amendments and we
25 went back and forth a number of times with formal

1 agreements. Also Mr. Butchee had a prior counsel that
2 it's my understanding had provided him with formal
3 agreements in that case as well.

4 THE COURT: Mr. Butchee, do you feel that
5 you received all formal plea offers by the government?

6 THE DEFENDANT: What do you mean "all formal
7 pleas"?

8 THE COURT: So any offer that the government
9 made, did your lawyer tell you about it?

10 THE DEFENDANT: Yes.

11 THE COURT: Mr. Butchee, has anyone
12 attempted in any way to force you to plead guilty today?

13 THE DEFENDANT: No.

14 THE COURT: Has anyone threatened you to try
15 to make you plead guilty?

16 THE DEFENDANT: No.

17 THE COURT: Are you pleading guilty of your
18 own free will because you are guilty?

19 THE DEFENDANT: Yes.

20 THE COURT: The offense that you're pleading
21 guilty to is conspiracy to possess with intent to
22 distribute or distribute a controlled substance and that
23 is a felony. If I accept your plea as a result you may
24 lose some valuable civil rights like the right to vote,
25 the right to hold public office, the right to serve on a

1 jury and the right to possess or carry any kind of
2 firearm. Do you realize you might lose those rights if
3 you plead guilty?

4 THE DEFENDANT: Yes.

5 THE COURT: You're charged with conspiracy
6 to possess with intent to distribute or distribute a
7 controlled substance. I wanted to go over with you what
8 the possible maximum penalties are if you do plead
9 guilty. There is a maximum period of imprisonment of 20
10 years, a maximum fine of not more than a million dollars
11 or both prison and a fine. If you are sentenced to
12 prison, it would be followed by a period of supervised
13 release of three years. If you violate any of the
14 conditions of your supervised release and it's revoked,
15 you could be sentenced to an additional period in prison
16 of not more than two years on each individual
17 revocation. Restitution may be ordered and there's a
18 \$100 special assessment to the victims assistance fund.

19 Do you understand that those are the
20 possible maximum penalties that you face if you plead
21 guilty?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT:) In deciding your sentence the
24 first thing the Court will look at is your advisory
25 guideline range under the federal Sentencing Guidelines.

1 In this case the Court would do that in deciding whether
2 or not to accept the binding Plea Agreement of both
3 sides. Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: And the Court's either going to
6 accept or reject that Plea Agreement, and if it's
7 rejected then you would have the option to withdraw your
8 plea of guilty. You understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: In the federal system parole has
11 been abolished so if you are sentenced to prison you
12 will not get out early on federal parole. Do you
13 understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: In your Plea Agreement it
16 indicates that you have waived, which means you've given
17 up, your right to appeal everything about your case
18 except if the Court does not sentence you to the binding
19 Plea Agreement you could appeal the sentence that was
20 imposed. Do you understand that?

21
22 MR. VICKERS: Your Honor, he also -- he's
23 going -- he's worried that he's losing all of his 2255
24 rights and one of those is ineffective assistance of
25 counsel and I think the Plea Agreement specifically says

1 ~~he~~ doesn't waive that.

2 THE COURT: I was going to go over that
3 next. So if the Court doesn't sentence you to the
4 agreed upon sentence, then you could appeal whether
5 that's done properly. Do you understand that?

6 THE DEFENDANT: If the Court doesn't
7 sentence me to the 136, don't I get to withdraw?

8 THE COURT: You could withdraw or the o
9 option you have is that you could appeal.

10 THE DEFENDANT: Oh, okay.

11 THE COURT: Either way.

12 THE DEFENDANT: Yes, ma'am.

13 ~~THE COURT:~~ And then you also have preserved
14 the right that if you think your lawyer is providing you
15 with ineffective assistance of counsel you can bring a
16 separate action to claim that. Do you understand that?

17 THE DEFENDANT: Yes.

18 ~~THE COURT:~~ But other than those things
19 you've given up your right to appeal. Do you understand
20 that?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: And do you understand that the
23 government does have the right to appeal?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: You have the right to plead not

1 guilty to the offense that you're charged with and you
2 could continue on with that plea. If you did so you
3 would have the right to a trial by jury. During the
4 trial you would -- the Court would tell the jury that
5 you're presumed to be innocent and the burden is on the
6 government to prove your guilt beyond a reasonable
7 doubt.

8 You would have the right to the assistance
9 of a lawyer that would help you with your defense and if
10 you didn't have money to hire your own lawyer one would
11 be appointed by the Court to represent you. Your lawyer
12 would represent you at trial and at every other stage of
13 the proceeding. You would have the right to see and
14 hear all the witnesses and have them cross-examined in
15 your defense. On your part you'd have the right to not
16 testify unless you voluntarily gave up that right. If
17 you had witnesses who you thought were helpful to your
18 side of the case, subpoenas could be served on those
19 witnesses and that would make them come here to court to
20 testify.

21 If you decided not to testify or not to
22 present any evidence, the Court would tell the jury that
23 those facts can't be used against you; that the burden
24 is on the government to prove your guilt beyond a
25 reasonable doubt. If you enter a plea of guilty today,

1 there will not be a trial and you'll have given up all
2 of the other rights I just described to you. Do you
3 understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: You're charged in the
6 Information with conspiracy to possess with the intent
7 to distribute and distribute a controlled substance. If
8 the case did go to trial the government would have to
9 prove that from on or about January 1, 2016 through
10 December 9, 2016, in the District of North Dakota, and
11 elsewhere, two or more persons reached an agreement or
12 came to an understanding to distribute a mixture or
13 substance containing a detectable amount of heroin; that
14 you voluntarily and intentionally joined in the
15 agreement or understanding either at the time it was
16 first reached or at some later time while it was still
17 in effect and that at the time you joined in the
18 agreement or understanding you knew the purpose of the
19 agreement or understanding.

20 Do you understand that that's what you're
21 charged with and that's what the government would have
22 to prove if the case did go to trial?

23 THE DEFENDANT: Yeah, I understand what -- I
24 understand what you're saying but I thought I'm just --
25 I thought I'm just pleading guilty. It's just me.

1 THE COURT: The charge is conspiracy to
2 possess with intent to distribute or distribute a
3 controlled substance and a conspiracy involves two or
4 more people so it's you and somebody else.

5 THE DEFENDANT: Who's the other person?

6 THE COURT: The Plea Agreement says that you
7 conspired with someone else known and unknown.

8 THE DEFENDANT: So who's the known person
9 then? Wouldn't I have to be --

10 THE COURT: So who did you get the heroin
11 from?

12 MR. VICKERS: That part's unknown, Judge.

13 THE COURT: Well, he got it from somewhere.

14 MR. VICKERS: He's --

15 THE COURT: So you tell me what the
16 conspiracy is.

17 MR. VICKERS: Your Honor, the discovery
18 materials suggest that Mr. Butchee provided heroin to
19 Sadie Braunberger, I believe. Sadie and Joe Kirkeby are
20 the two individuals that he provided heroin to.

21 THE COURT: And then did they redistribute
22 it to someone else?

23 MR. VICKERS: That's what the discovery
24 information suggests, yes, Judge.

25 THE COURT: So, Mr. Butchee, are those two

1 people that you distributed heroin to?

2 THE DEFENDANT: No, them ain't the two
3 people I distributed heroin to.

4 THE COURT: Pardon me?

5 THE DEFENDANT: No, no.

6 THE COURT: So did you distribute heroin to
7 anyone?

8 THE DEFENDANT: Yeah, but them wasn't the
9 two people. Them wasn't the two people though.

10 THE COURT: So the people that you
11 distributed the heroin to, what did they do with it?

12 THE DEFENDANT: They used it.

13 THE COURT: They didn't distribute it to
14 someone else?

15 THE DEFENDANT: Nah, Nah.

16 THE COURT: So how did you get the heroin?

17 THE DEFENDANT: I got it from somebody else,
18 buying it from somebody else for my personal use.

19 THE COURT: So that person didn't know that
20 you were going to distribute it to other people?

21 MR. VICKERS: Your Honor, can we -- I know
22 we're up against the next hearing. Could we take a
23 break and maybe continue this? I think I need to speak
24 with Mr. Butchee if the Court would allow that.

25 THE COURT: So I'll let you go down and meet

1 with him in the cell. I'm going to move on to my next
2 hearing.

3 MR. VICKERS: Thank you, Judge.

4 THE COURT: We'll be adjourned.

5 (Recess taken at 10:10 a.m. to 10:40 a.m.)

6 THE COURT: The record should reflect that
7 we're having a continuation of the sentencing hearing in
8 the matter entitled United States of America versus
9 James Butchee and both counsel are present along with
10 the defendant.

11 MR. VICKERS: Just to clarify, the Court
12 said "sentencing."

13 ~~THE~~ COURT: Oh, I'm sorry, change of plea
14 hearing. And, Mr. Butchee, when we took a short break
15 we were at the point where I was going over with you
16 what the government would have to prove if the case did
17 go to trial so I'll tell you the elements again; that
18 from on or about January 1, 2016 and December 9, 2016,
19 in the District of North Dakota, and elsewhere, two or
20 more persons reached an agreement or came to an
21 understanding to distribute a mixture or substance
22 containing a detectable amount of heroin; that you
23 voluntarily and intentionally joined in the agreement or
24 understanding either at the time it was first reached or
25 at some later time while it was still in effect and that

Judge try to give you
a way out of the
Conspiracy charge.

1 at the time you joined in the agreement or understanding
2 you knew the purpose of the agreement or understanding.

3 Do you understand that that's what the
4 government would have to prove if this case did go to
5 trial?

6 THE DEFENDANT: Yes.

7 THE COURT: And as part of your Plea
8 Agreement it included a factual basis statement on
9 page 2. Did you read that before you signed it?

10 THE DEFENDANT: Yes.

11 THE COURT: So it starts on page 2 and c
12 on to page 3. Is everything there the truth?

13 THE DEFENDANT: Yes.

14 THE COURT: So what was your role in the
15 conspiracy?

16 THE DEFENDANT: My role, I had a small role
17 in the conspiracy.

18 THE COURT: So you got heroin from somebody?

19 THE DEFENDANT: Yes.

20 THE COURT: And you distributed it to
21 someone else?

22 THE DEFENDANT: Yes.

23 THE COURT: And the person that you got the
24 heroin from, did they know that you were going to be
25 distributing it to other people?

1 THE DEFENDANT: No, they didn't know.

2 THE COURT: How big of a quantity were you
3 getting from that person?

4 THE DEFENDANT: Just a gram for my personal
5 use.

6 THE COURT: And then you sold that gram to
7 somebody else?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: And when you got the gram from
10 the supplier, did you pay him in cash?

11 THE DEFENDANT: Yes.

12 THE COURT: It wasn't fronted to you?

13 THE DEFENDANT: No.

14 THE COURT: So was there an agreement with
15 somebody about distributing drugs?

16 THE DEFENDANT: Yes.

17 THE COURT: What was the agreement?

18 THE DEFENDANT: I bought it from him and
19 then sold it to somebody else.

20 THE COURT: But if he didn't know that you
21 were going to sell it to someone else, I don't see what
22 the agreement is. What's the agreement?

23 THE DEFENDANT: The agreement that I was
24 buying it from him and then to sell it to somebody else.

25 THE COURT: So did he know you were going to

*You put yourself
back in the conspiracy
charge*

*Court don't know why
You PLEA to conspiracy
Judge trying to tell you
Not to take PLEA deal*

*You put yourself
back in the
conspiracy*

1 information, I find that there is an independent factual
2 basis for the plea.

3 Now we're going to move to the in-camera
4 part of the hearing.

5 (Courtroom cleared of all observers.)

6 THE COURT: Mr. Butchee, there was also a
7 Plea Agreement Supplement that was filed and it
8 indicates that there haven't been any promises made to
9 you that the government will make a motion to reduce
10 your sentence at a later time because they haven't asked
11 you to cooperate against other defendants or you haven't
12 been cooperating against other defendants. Do you
13 understand that after you're sentenced the government's
14 not going to make a motion to reduce your sentence
15 later?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: And now we'll move out of the
18 in-camera part of the hearing.

19 (Observers allowed to return to the
20 courtroom.

21 THE COURT: Mr. Butchee, would you please
22 stand. How do you plead to the charge in the
23 Information that charges you with conspiracy to possess
24 with the intent to distribute or distribute a controlled
25 substance, heroin? Guilty or not guilty?

This killed
your Appeal ↓

1 sell it to someone else?

2 THE DEFENDANT: Yeah, yeah.

3 THE COURT: He did?

4 THE DEFENDANT: Yeah.

5 THE COURT: And did you pay him with your
6 own money or with the money that the other people gave
7 to you? The people that you sold the drugs to, did you
8 use their money to repay him or did you use your own
9 money?

10 ~~THE DEFENDANT~~: I did both.

11 THE COURT: So you bought one-gram
12 quantities from him on a couple of times?

13 ~~THE DEFENDANT~~: Yes.

14 ~~THE COURT~~: So what you're telling me is
15 that some of the times that you bought the gram
16 quantities he knew you were going to be reselling it to
17 somebody else?

18 ~~THE DEFENDANT~~: Yes.

19 ~~THE COURT~~: And the Plea Agreement says that
20 you used telecommunication facilities. What was that?

21 ~~THE DEFENDANT~~: I used my cell phone.

22 ~~THE COURT~~: To make arrangements with the
23 supplier to buy more heroin?

24 THE DEFENDANT: Yes.

25 THE COURT: With that additional

quantities

1 THE DEFENDANT: I plead guilty.

2 THE COURT: You may be seated. It is the
3 finding of the Court in the case of United States versus
4 James Butchee that the defendant is fully competent and
5 capable of entering an informed plea; that he is aware
6 of the nature of the charges and the consequences of the
7 plea and that the plea of guilty is a knowing and
8 voluntary plea supported by an independent basis in fact
9 containing each of the essential elements of the
10 offense. The Court's going to reserve accepting the
11 plea until after the Presentence Investigation Report
12 has been finished and will reserve adjudicating the
13 defendant as guilty. The reservation is made because
14 it's an 11(c)(1)(C) plea.

15 Mr. Butchee, I wanted to tell you what will
16 happen next. Probation's going to prepare the
17 Presentence Investigation Report that we talked about
18 before and when that happens the probation officer will
19 meet with you and you can have your attorney present
20 during that meeting.

21 He's going to ask you questions about your
22 background, about your family, your education, your work
23 experience, if you've been in trouble with the law
24 before and about what happened here. And he'll put all
25 of that into the report and then file it and your

1 attorney will get access to the report and then he'll go
2 over it with you. And you should read it carefully and
3 let him know if there are any changes or things that are
4 not correct in the report. He can ask to have changes
5 made or he can file formal objections to the reports and
6 then there will be a sentencing hearing. And during the
7 sentencing hearing the judge will rule on any objections
8 that are made first and then that will determine what
9 your guideline range is. And the judge will decide
10 based on that whether to accept or not accept your plea
11 and whether to accept the binding Plea Agreement.

12 Your sentencing hearing is going to be on
13 Thursday, November 15th, at 1:30 and that will be before
14 Judge Hovland. During that hearing your attorney will
15 be able to make a recommendation on the sentence.
16 You'll be given an opportunity to speak so if there's
17 anything you want the judge to know about you you'll
18 have the chance to do that. And if you've got family or
19 friends who would like to come and speak, the judge will
20 listen to what they have to say and then listen to the
21 government's recommendation.

22 Anything further from either side?
23 Mr. Butchee, did you want to ask something?

24 THE DEFENDANT: He can go first.

25 THE COURT: Mr. Rodenbiker, anything

1 further?

2 MR. RODENBIKER: No, Your Honor. Thank you.

3 MR. VICKERS: Your Honor, Mr. Butchee is a
4 little concerned about the timing of the sentencing
5 hearing but I think that there's requirement time frames
6 for PSI reports that they have to get in.

7 THE COURT: It takes that amount of time to
8 get the report written and to check on information that
9 you provide and then to determine your advisory
10 guideline range, and then there has to be a period of
11 time for the attorneys to both object to things that are
12 in the report and then enough time for the judge to be
13 able to read it beforehand.

14 THE DEFENDANT: So can I get -- can I have a
15 hold to stay in Cass County then till that time?

16 THE COURT: The marshals service will decide
17 where you're located.

18 Anything else from either side?

19 MR. VICKERS: No, Your Honor.

20 THE COURT: Okay. We'll be adjourned.

21 (Adjourned at 10:55 a.m.)
22
23
24
25

CERTIFICATE OF REPORTER

I, Kelly A. Kroke, a duly appointed
Registered Professional Reporter;

DO HEREBY CERTIFY that I reported in
shorthand the foregoing proceedings had and made a
record at the time and place indicated.

I DO HEREBY FURTHER CERTIFY that the
foregoing and attached (38) typewritten pages contain an
accurate transcript of my shorthand notes then and there
taken.

Dated this 17th day of December, 2018.



KELLY A. KROKE - RPR, RMR
United States District Court Reporter
District of North Dakota
Southeastern Division

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America,)	
)	
Plaintiff,)	
)	
vs.)	File No. 3:17-cr-60-1
)	
James Marione Butchee,)	
)	
Defendant.)	

TRANSCRIPT OF SENTENCING

Taken at
United States Courthouse
Fargo, North Dakota
November 15, 2018

BEFORE THE HONORABLE DANIEL L. HOVLAND
-- UNITED STATES DISTRICT COURT JUDGE --

APPEARANCES

MR. BRETT SHASKY
U.S. Attorney's Office
Quentin N. Burdick United States Courthouse
655 First Avenue North, Suite 250
Fargo, North Dakota 58102-4932

FOR THE UNITED STATES

- - - - -

MR. STORMY R. VICKERS
Attorney at Law
112 North University, Suite 390
Fargo, North Dakota 58102

FOR THE DEFENDANT

- - - - -

Probation Officer - Zack Larson

Certificate of Court Reporter - Page 40

- - - - -

1 (The above-entitled matter came before the Court, The
2 Honorable Daniel L. Hovland, United States District Court
3 Judge, presiding, commencing at 1:30 p.m., Thursday,
4 November 15, 2018, in the United States Courthouse, Fargo,
5 North Dakota. The following proceedings were had and made of
6 record in open court with the defendant present:)

7 - - - - -

8 THE COURT: We'll open the record in the case of
9 United States of America versus James -- is it Butchee? Is
10 that how you pronounce it?

01:30

11 THE DEFENDANT: Butchee, sir.

12 THE COURT: Butchee?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Here on behalf of the federal
15 government is Assistant U.S. Attorney Brett Shasky.

01:30

16 Representing the defendant at this hearing is Attorney Stormy
17 Vickers from Fargo. Mr. Butchee, how are you today?

18 THE DEFENDANT: I'm doing fine. How you doing, sir?

19 THE COURT: I'm good. This is scheduled as a
20 sentencing hearing on a charge of conspiracy to possess with
21 intent to distribute and distribute a controlled substance.

01:31

22 Before today I have gone back and reviewed the
23 Presentence Investigation Report, the Sentencing Memorandum
24 submitted by Mr. Vickers on behalf of Mr. Butchee. I've
25 reviewed the attachments to the Sentencing Memorandum. I've

01:31

1 also gone back and looked at the Plea Agreement and the Plea
2 Agreement Supplement.

01:31 3 It's my understanding coming in here today that Judge
4 Karen Schreier had deferred acceptance of the terms of the
5 binding Plea Agreement until after the Presentence Report had
6 been prepared and reviewed. As the sentencing judge, I've
7 reviewed that report, and I will accept the terms and
8 conditions of the binding Plea Agreement of the parties under
9 the circumstances.

01:32 10 Mr. Butchee, were you given the opportunity to review
11 the Presentence Investigation Report?

12 THE DEFENDANT: Yes. Yes, I -- my lawyer had gave it
13 to me, yes, sir.

01:32 14 THE COURT: Okay. And you've talked to your lawyer
15 about what that report means for you?

16 THE DEFENDANT: We talked briefly, yeah.

17 THE COURT: All right.

18 THE DEFENDANT: Yes, sir.

01:32 19 THE COURT: Either counsel have any objections that
20 they wish to voice to the facts or the guideline calculations
21 outlined in the Presentence Investigation Report? Mr. Shasky?

22 MR. SHASKY: None from the United States, Your Honor.

23 THE COURT: Mr. Vickers?

01:32 24 MR. VICKERS: Your Honor, I don't object to the
25 facts. I don't object to the career offender calculation.

1 There is an objection to some of the points that were allocated
2 outside of that, but I -- I don't know that it academically
3 makes any difference because he is a career offender, so we
4 agree with the result of the -- of the PSI calculation.

01:33

5 THE COURT: So Mr. Vickers has made -- outlined some
6 objections that are contained in pages 28 and 29 of the
7 Presentence Report. It's the finding of this Court that the
8 Presentence Report, particularly the criminal history category,
9 was properly calculated. As -- as an unrefuted career

01:33

10 offender, these -- Mr. Butchee is certainly looking at a
11 criminal history category of VI, and regardless if there are
12 one or two or three convictions that may alter the number of
13 criminal history points that he has, it doesn't change the
14 criminal history category, so objections are noted for the
15 record. They're overruled.

01:33

16 The appropriate guideline range in this case is 151
17 to 188 months based on an overall offense level of 29, a
18 Criminal History Category VI.

19 Are there any witnesses that intend to testify?

01:34

20 MR. SHASKY: No, Your Honor.

21 MR. VICKERS: No, Your Honor.

22 THE COURT: So, Mr. Butchee, then I'll give both
23 attorneys an opportunity to outline their sentencing
24 recommendations. There's not going to be any surprises here in
25 terms of the length of the sentence because I've accepted the

01:34

01:34

1 binding Plea Agreement, but I'll give everybody a chance to
2 weigh in and tell me what they believe is an appropriate
3 sentence and how it should run relative to the sentence that
4 Mr. Butchee is serving in Minnesota. Start with Mr. Shasky's
5 recommendation.

01:35

6 MR. SHASKY: Your Honor, obviously we have the
7 recommendation as the Court has already identified, that we are
8 jointly recommending the 136 months. For the defendant,
9 really, I think the only issue that is outstanding is how his
10 current Minnesota state sentence that he's serving plays into
11 the overall sentence. I know they're asking for concurrent
12 time. I am asking that this 136 months of imprisonment be run
13 consecutive to his Minnesota sentence, entirely consecutive.

01:35

14 The reason for that, Your Honor, is simply that the
15 Minnesota matter was totally unrelated to this. It's
16 something -- and Mr. Vickers can correct me if I'm wrong on
17 this, but my recollection -- it's been a while, but my
18 recollection is that the conduct that he was involved with in
19 Minnesota was very similar in nature to what we have here. It
20 involved an overdose death, I believe, or -- over there, which
21 in Minnesota they did not have a specific charge for that, so
22 it became the second degree manslaughter charge.

01:35

01:36

23 And initially he may have been cooperating or
24 assisting the authorities on that, and then ultimately worked
25 out this deal with them. It took them a bit of time to get to

01:36

1 the point of doing that. And in the meantime, while that
2 matter was still pending, he had come up here from the Cities
3 and began doing the same thing, selling heroin. And I think as
4 a result of that, there's really no justification for running
5 these concurrent.

01:36

6 I think that, you know, he knew that he had committed
7 the crime and what he was doing was wrong in Minnesota. Took a
8 short break while he was supposedly working with those guys,
9 and then came up here and resumed the same activity. I think
10 that a consecutive sentence is appropriate under those
11 circumstances. And just to, you know, not beat a dead horse
12 here, I would simply ask that the Court impose the 136 months
13 consecutive to his Minnesota sentence.

01:37

14 THE COURT: And supervised release for how long?

15 MR. SHASKY: I think, Your Honor -- I guess I never
16 got around to --

17 THE COURT: The range is three years to life under
18 the guidelines.

01:37

19 MR. SHASKY: I think, you know, three years would be
20 sufficient, Your Honor, on that, but I will leave that to the
21 Court's discretion. I think our usual conditions that we place
22 on drug defendants would be appropriate.

01:37

23 There is, I know, an issue regarding restitution
24 here. The defendant did not ultimately plead to the offense
25 that involved the overdose death, but I think the relevant

1 conduct involved here did involve that.

01:38 2 And so the Court is aware, because I know you weren't
3 part of the plea hearing and so on, we essentially worked out
4 this deal because while this matter was pending trial, our
5 witnesses were dropping like flies. They were all heroin
6 addicts, and we had -- literally had three people in this case
7 that were main witnesses, all of whom died from overdoses while
8 it was pending, and one of them being more recent, I guess,
9 that ultimately caused us to tip the scales and do this. And
01:38 10 none of them are the ones that we're seeking the restitution on
11 because we can't prove that any of them necessarily died from
12 drugs that he supplied.

13 But there was an individual who -- a related
14 defendant, Joseph Kirkeby, has been ordered to pay restitution
01:38 15 on -- that individual died from heroin Kirkeby gave him, which
16 the evidence in this case, had we had all of our witnesses,
17 would have showed that it went from Mr. Butchee to Mr. Kirkeby
18 and then ultimately to the decedent in this case, so that's the
19 basis for my requesting the restitution be ordered joint and
01:39 20 several with Mr. Kirkeby.

21 THE COURT: And how much? How much?

22 MR. SHASKY: Pardon, Your Honor?

23 THE COURT: The amount of restitution --

24 MR. SHASKY: We're checking on that right now, Your
01:39 25 Honor. I don't seem to have that document in my file.

1 MR. VICKERS: It's in the PSI at 12,986, if that's
2 accurate.

3 MR. SHASKY: Okay.

4 MR. VICKERS: At paragraph 9.

01:39

5 MR. SHASKY: Right. Yep, 12,986 is the number that
6 was ordered in Mr. Kirkeby's case.

7 THE COURT: All right. Mr. Vickers.

01:40

8 MR. VICKERS: Your Honor, we are requesting that Mr.
9 Butchee receive either a concurrent sentence or at least a
10 partially concurrent sentence. He's currently been in custody
11 on this -- on this charge for 17 months. He's been in custody
12 since June of 2017.

01:40

13 As Mr. Shasky stated, there were some witness issues,
14 and I think the government had some serious proof problems. At
15 the end of the day, however, Mr. Butchee wanted to take
16 responsibility for this, and we came to an agreement where I
17 think the risk on both sides was alleviated by getting here.

01:40

18 We believe that a concurrent sentence would be
19 appropriate. Obviously the Court, having read the Sentencing
20 Memorandum that I submitted, is aware that the 3553 factors are
21 required to be considered. I won't go through those again, as
22 I already did. But we do believe that either partially
23 concurrent or fully concurrent would -- would be appropriate or
24 at least not inappropriate in this case.

01:41

25 I agree that a three-year supervised term seems

1 appropriate in this as well. I think that that's what would
2 typically be done with this -- with this charge here.

01:41 3 Your Honor, as to the restitution, the government's
4 case had a chain of custody six-people deep. It went from a
5 girl named Sadie, who called -- who she alleged to be Mr.
6 Butchee. She sent her boyfriend, Joe Kirkeby, to pick it up
7 from Mr. Butchee, but he ended up picking it up from two people
8 that weren't Mr. Butchee. He transfers it to another person.
9 That person had other suppliers of drugs as well, but says that
01:41 10 these drugs probably came from Mr. Butchee. I think he
11 actually gave two or three different statements about that. I
12 know there was at least two statements.

13 And so even -- even without that, there still were
14 some defenses available for Mr. Butchee related to whether he
01:42 15 was actually, in fact, the death -- but for death resulting in
16 this case. We maintain that Mr. Butchee shouldn't be
17 responsible for the restitution based in part on that and in
18 part on the charge that he entered a guilty plea to.

19 We are asking the Court to make a recommendation for
01:42 20 Oxford. We are asking the Court to make a recommendation for
21 Sandstone. Mr. Butchee is, although I don't -- I don't know
22 that that is appropriate, but he's asking for that, so I think
23 that it won't hurt anything.

24 We are asking for an RDAP recommendation.
01:42 25 Mr. Butchee, I think his history is replete with drug use, so I

1 think that would be an appropriate recommendation as well.

2 That's all, Your Honor. Thank you.

3 THE COURT: All right. So do either of you counsel
4 know in Minnesota, how they deal with offenders that are
5 subsequently sentenced in federal court?

6 I served on the parole board in North Dakota, so I
7 know how it works in North Dakota. Generally the parole board
8 is going to parole someone like Mr. Butchee to their federal
9 sentence as soon as that sentence is handed down to get them
10 off the state coffers and get them out of their hair, put them
11 in the federal system, but I don't know what they -- how they
12 approach these cases in Minnesota. Do either of you?

13 MR. VICKERS: Not with any certainty, Judge, no.

14 THE COURT: All right. So, Mr. Butchee, I'm required
15 to also give you an opportunity to speak, and maybe you know
16 how they handle it in Minnesota. You've maybe had a case
17 manager assigned to you that's talked to you about parole
18 hearings and being paroled to your federal sentence. If you
19 know anything about that, I'd appreciate finding out what you
20 may know. But I have to give you the same opportunity to
21 speak, so if there's anything you wish to say, sir, you're
22 welcome to speak at this time.

23 THE DEFENDANT: Yes, sir. My name is James Marione
24 Butchee. I'm currently -- I'm an addict -- recovering addict.
25 I gave myself to Jesus Christ. My core beliefs in life is my

01:44

1 country, God, myself, and my family. I believe I put myself
2 first because if I can't take care of myself, then how can I
3 take care of my family? I have two little girls, a
4 one-year-old and a five-year old. My mother is -- I never had
5 a daddy. My mother is not here. She's not present.

01:45

6 So basically what I'm saying, sir, like I made some
7 mistakes in my life, and I'm not proud of it. And I'm not
8 trying to minimize acceptance of responsibility. Your Honor,
9 my take on accepting responsibility is that I came up here
10 doing drugs. I sold some drugs. I came up here by myself, and
11 I'm not going to -- I'm not going to lie and say I didn't.

01:45

12 But I didn't take place on allegations that I got
13 indicted for. I never took place. I never knew a guy named
14 Joseph Kirkeby. I never seen him a day in my life. He was --
15 there was statements that he never seen me. He never -- he
16 didn't even know who I was. He couldn't even -- he couldn't
17 even point me out of a photo lineup, Your Honor. And I want to
18 apologize to behalf of you and this Court for -- for even
19 dealing with -- for even dealing with me, you know, on your
20 discretion.

01:46

21 And as far as -- I'm going to go back to what you was
22 just talking about. My case worker did talk to me before I
23 came up here, and I signed expeditions (sic) because I wanted
24 to take care of this matter because --

01:46

25 THE COURT: You signed a what?

1 THE DEFENDANT: The --

2 MR. VICKERS: Extradition.

3 THE DEFENDANT: The extradition.

4 THE COURT: Extradition. Okay.

01:46 5 THE DEFENDANT: I signed the extradition to come up
6 here right away, take care of this matter, so I wasn't -- I
7 wasn't running from and I wasn't hiding from it. You know, I
8 think I'm guilty of not being caught with nothing. I never got
9 caught -- never got caught with drugs, never -- they had a
01:46 10 picture of me coming from a -- from a gas station, and that's
11 what they went off of. That was -- that was the investigation,
12 so when I came --

13 THE COURT: Well, I'm sure they weren't going to go
14 to trial based on a picture found in a gas station, but --

01:47 15 THE DEFENDANT: You know, so that's -- when I came up
16 here, when I was asking my case worker, she told me like when I
17 -- when I come up here -- when I have to go -- when I come back
18 to Minnesota, I'll have to finish up my little time in
19 Minnesota, then go to finish up if I -- if I got to do some
01:47 20 more time. Then I have to get extradited -- you know what I'm
21 saying? -- back to the Feds and then finish up their time, so
22 that's why I was -- that's why I was asking my lawyer, Stormy
23 -- Stormy Daniels (sic) to see if my time could get ran
24 concurrent because I'm still doing the time.

01:47 25 THE COURT: Did you call him Stormy Daniels?

1 THE DEFENDANT: Stormy Vickers. I'm sorry. I
2 apologize.

3 MR. VICKERS: She makes more money than me, I think.

01:47

4 THE COURT: We've read more about Stormy Daniels than
5 Stormy Vickers lately, but --

6 THE DEFENDANT: No. Sorry.

7 THE COURT: That's all right.

01:48

8 THE DEFENDANT: I just messed -- so that's why I was
9 asking -- you know what I'm saying? -- my counselor that -- to
10 ask you, because I'm still going to do the time. It ain't like
11 I'm going to get out, or nothing, or -- you know what I'm
12 saying? I'm still doing the time regardless -- you know what
13 I'm saying? -- the 19 months I got left in the state, so I'm --
14 I was still doing the time regardless if -- you know what I'm
15 saying? The fact if it got ran consecutive, got ran
16 concurrent, if it got deducted off my time, I was still going
17 -- I was still going to be incarcerated.

01:48

18 THE COURT: Right, but I know parole boards in all
19 states more often than not parole people early, before their
20 sentence is completed, and parole them to their federal
21 sentence if that's the situation. I mean, I just don't know
22 how they handle it in Minnesota, but I'd be doubtful that they
23 force everybody to serve out their entire sentence when they're
24 looking at other sentences in other jurisdictions, but --

01:48

01:49

25 THE DEFENDANT: Yeah, they don't -- in Minnesota,

1 they don't have a parole board there. There's not a parole
2 board. You don't go to no parole board, or nothing. You just
3 finish. You just -- they have it like where you finish out
4 your time.

01:49

5 THE COURT: Do you get credit for good behavior?

6 THE DEFENDANT: Yeah, get credit for good behavior.

7 THE COURT: How much is that?

8 THE DEFENDANT: Two-thirds.

9 MR. VICKERS: You get a third off, Judge, and that's

01:49

10 -- the exhibit that I submitted has his anticipated release
11 date. That -- that considers his good-time reduction.

12 THE COURT: Oh, okay.

13 THE DEFENDANT: And so that's what they have in
14 Minnesota. You know, they don't -- they don't have no parole

01:49

15 board. It's just you do two-thirds, so if I'm doing 30 -- if
16 I'm doing 60 months, I'm doing 40 months, you know. And I
17 ain't had no disputes while I been down here. The 17 months I
18 been down here, I ain't had no disputes, no fighting, not even
19 a write-up.

01:49

20 THE COURT: All right. Good.

21 THE DEFENDANT: Not even one, you know. So, you
22 know, I just -- you know, I just want to just really just --
23 I'm really kind of disappointed in myself because I let my -- I
24 let my kids down. And, you know, I know how it feels to grow
01:50 25 up without a father, to be -- have a father presence in the

1 household, because I grew up without a father.

2 THE COURT: So who's raising the kids?

3 THE DEFENDANT: Her mother. My baby mama.

4 THE COURT: Where do they live?

01:50 5 THE DEFENDANT: They live in -- they live -- right
6 now they live in Wisconsin -- Racine, Wisconsin, and, you know,
7 it's kind of hard on them because she don't -- she's like
8 living with somebody else and, you know, it's like it's real
9 hard. It's real hard, so she --

01:50 10 THE COURT: It's always hard on the family that's
11 left behind.

12 THE DEFENDANT: Yeah. Yeah, so --

13 THE COURT: So why did you come up to North Dakota in
14 the midst of a criminal case in Minnesota here?

01:50 15 THE DEFENDANT: I'm going to be -- I'm going to be
16 honest with you. I'm going to be honest with you, Judge
17 Hovland, and I'm not going to sugar-coat or nothing. When I
18 got out, a young lady had -- had bailed me out. I took her
19 security -- like her whole security -- whole social security
01:51 20 and helped me bail out. She had chrome (sic) disease, and she
21 couldn't pay for her -- for her prescription, and it was like
22 \$1,500, to be honest with you, and you --

23 THE COURT: HUMIRA?

24 THE DEFENDANT: Huh?

01:51 25 THE COURT: What was she taking, Humira?

1 THE DEFENDANT: Camara (ph), yeah.

2 THE COURT: Yeah, I'm familiar with Crohn's disease.

3 THE DEFENDANT: Yeah. So you know what I'm saying?

4 She didn't -- she didn't have no -- she didn't have no money,

01:51 5 and they had -- and she had to come out of her pocket \$1,500,

6 so to be honest with you, sir, that's the reason why I came up

7 here, to repay her for bailing me out, and I never came back.

8 I never came back. I did it once and never came back, and

9 that's the honest to God truth. And I wasn't -- wasn't with

01:51 10 nobody. It was just me. Just me. Just me, Your Honor, and

11 that's the real reason why --

12 THE COURT: So how much dope did you bring with you

13 then?

14 THE DEFENDANT: To be honest with you, it was about

01:52 15 15 grams. About 15 grams, and that was it, and the --

16 THE COURT: What did you pay for that?

17 THE DEFENDANT: And the reason how I got -- and the

18 reason how -- the reason how I got it, the drugs, it was a

19 female. She was -- she had -- she was going through something

01:52 20 with her -- with her boyfriend, and she had found it in her

21 house, and I knew her, and she didn't know what it was. She

22 called me over there and asked me what it was, and I told her

23 what it was. And she said, "Just -- just get it out of my

24 house." And that's how I came up -- that's how I stumbled up

01:52 25 on it.

1 THE COURT: So did somebody front that quantity of
2 drugs to you, or --

3 THE DEFENDANT: No, it wasn't -- it wasn't a front.
4 It was -- it was a young lady that found it in her house and
5 didn't know what it was.

6 THE COURT: Oh.

7 THE DEFENDANT: And she -- and she told me to just --
8 just take it. I don't -- I don't want that in my house.

9 THE COURT: So what were you going to sell it for?

10 THE DEFENDANT: Excuse me, sir?

11 THE COURT: Or what did you sell it for?

12 THE DEFENDANT: I sold it for \$100.

13 THE COURT: All right. So you weren't even going to
14 make any profit on the sale yourself?

15 THE DEFENDANT: No, it wasn't -- it wasn't -- it
16 wasn't about this, sir. I was just coming up here -- you know
17 what I'm saying? -- to make some fast money to help a friend
18 that helping me.

19 THE COURT: All right. So what do you plan to do
20 with your life when you take care of all of these sentences?

21 THE DEFENDANT: When I take care of these -- all
22 these sentences, sir, to be honest with you, I plan to get a
23 job. I got a lot of credentials -- you know what I'm saying?
24 -- within myself. You know what I'm saying?

25 I plan first to get a job and start from the bottom.

01:53

1 And my plan is -- to be honest with you, sir, it's to start
2 like a transitional housing for -- you know what I'm saying? --
3 for people like myself getting out of prisons -- you know what
4 I'm saying? -- like the youth, helping the youth. You know
5 what I'm saying? And, you know, making a proposal, going to a
6 bank and see if the state will back me because I been through
7 it. You know what I'm saying?

01:54

8 And it's like I'm sick and tired of it, so I'm ready
9 to change. I'm ready to make a drastic change in my life, so
10 when -- when you ready to change and you know you ready to
11 change, I think you have a lot of success in life.

12 THE COURT: All right.

01:54

13 THE DEFENDANT: And the one thing I wanted to add
14 too, though, Your Honor, like I did a little research on my
15 own.

16 THE COURT: That's always an invitation for trouble,
17 but go ahead.

01:54

18 THE DEFENDANT: Okay. I say, Your Honor, with all
19 due respect, I would like to present a claim of error on the
20 record. The career offender enhancement application to the
21 calculation of my offense level is persidearly (ph) unsound and
22 substantially unreasonable under the law on several grounds.

01:55

23 The drug quantity is most also -- be treated as an
24 element of the offense; as such, must be charged and
25 established in charging information, see *United States versus*

1 *Sheppard*, 219 F.3D, 766, 767, Eighth Circuit, the year 2000.

2 THE COURT: But the drug quantities don't have
3 anything to do with whether somebody is a career offender or
4 not.

01:55

5 THE DEFENDANT: Yeah. Yeah. Yeah, I know. I'm
6 going to get to that, sir.

7 THE COURT: Okay.

01:55

8 THE DEFENDANT: For these reasons, in United States
9 Court of Appeals for the Eighth Circuit has held that drug
10 quantity must always in -- in conclude in the PSR report, see
11 Federal Rules of Criminal Procedure, of Rule 32 -- of Rule
12 32(b)(4)(B) and (b)(6)(A), also *United States versus Moss*, 252,
13 FD -- F.3d 993, Eighth Circuit, 2000.

01:56

14 Given the quantity is an element under the 18 USC
15 841, the information that charged -- that violates -- violation
16 of 841 and the Plea Agreement, they rely on this information.
17 Both have failed to specify the quantity of the drug that I'm
18 responsible for.

01:56

19 In the schedule that such quantity falls under, the
20 need for these two documents to establish quantity and the
21 subject is based on the argument that the quantity determines
22 the schedule, and the schedule determines the statutory minimum
23 and maximum. As such, for sentencing purposes, both categories
24 must be carefully calculated and established before the
25 application of the career offender enhancement in this case.

01:57

01:57 1 To this extent, the lack of specified quantity of
2 drugs in the -- in the Plea Agreement, that amounts to an
3 omission of applicable schedule in this case, enhances the
4 failure of the PSI report and charge in the information to
5 establish these two categories, deprives me of the correct
6 calculation of the base offense level. Without determining the
7 correct base offense level, the application of the career
8 offender enhancement becomes unmeasurable, persidearly (sic)
9 and unreasonable in this case. Thank you for your judicial
01:57 10 notice of this matter.

11 THE COURT: So what are you saying, that you're not a
12 career offender, or what?

13 THE DEFENDANT: I believe that the calculations of
14 the career offender was miscalculated.

01:57 15 THE COURT: Well, first of all, drug quantities have
16 nothing to do with determining whether an individual is a
17 career offender or not. But with respect to the drug
18 quantities in this case and the base offense level for those
19 quantities, in paragraph 13 of the Plea Agreement, which you
01:58 20 signed off on and agreed to, you agreed that the base offense
21 level for your conduct was a 32 based upon 60 to 80 grams of
22 heroin. You agreed to that in the Plea Agreement. You signed
23 a contract and agreed to that.

01:58 24 The career offender status was also addressed in that
25 same paragraph, which you agreed that you were a career

01:59 1 offender. But to become a career offender, and that's under
2 Section 4B1.1 of the guidelines, you have to be at least 18 at
3 the time of the offense, which you were; the instant offense,
4 this crime, is a felony; and if you have at least two prior
5 felony convictions for a crime of violence or a controlled
6 substance offense, that's what gets you into the career
7 offender designation. It's not the quantity of the drugs,
8 nothing to do with it. It's your prior criminal history and
9 the crime that you're charged with in this particular case.

01:59 10 You've got two prior crimes of violence or a felony
11 drug offense both out of Minnesota in 2005 and 2010. Those are
12 all listed in the Presentence Report that was not objected to.
13 And then when you get charged with this felony drug offense in
14 federal court, which you pled guilty to, it didn't matter what
01:59 15 the quantities are, you get three strikes. You're a career
16 offender.

17 You've got two prior felony drug offenses. You've
18 got one crime of violence conviction, so that's what triggers
19 this career offender designation. It's not anything to do
02:00 20 about quantities or case law on quantities, so I'm not sure
21 what you were getting at.

22 THE DEFENDANT: No, I was saying like my -- like due
23 to my offense level like --

24 THE COURT: Which you agreed to in the Plea
02:00 25 Agreement.

1 THE DEFENDANT: But how did it get to 20, though? I
2 don't understand that, though. And then how did it get from 20
3 to 32, because in --

02:00

4 THE COURT: Because of your career offender status,
5 that's what bumps you up on the offense level chart.

6 THE DEFENDANT: Okay. So when -- in the manual -- in
7 the guidelines manual, isn't it a three -- three-level
8 enhancement?

9 THE COURT: No. For what?

02:01

10 THE DEFENDANT: For the -- for the career -- for the
11 career offender.

12 THE COURT: No, I don't --

02:01

13 MR. SHASKY: Your Honor, one thing that I'm kind of
14 wondering if maybe he's getting at here, and I could be wrong
15 on this too, what he pled to was the offense that had the
16 maximum penalty of 20 years. So even as a career offender, I
17 think that he doesn't start out as high as we ordinarily would.

02:01

18 But I think he's not understanding that under the
19 guideline section for the career offender, he starts at a 32,
20 correct, with a maximum -- an offense that he pled to that has
21 a maximum penalty of 20 years, under the career offender
22 guideline starts him at 32.

23 THE COURT: Correct?

02:01

24 THE PROBATION OFFICER: Yes, that's accurate, Your
25 Honor.

02:02 1 THE COURT: So even if your offense level was a 14 or
2 a 18 or a 20, when you're a career offender, then under the
3 guidelines we turn to a table under Section 4B1.1, and that
4 tells us what your offense level increases to as a result of
5 being a career offender. In this case it goes from 20 to 32
6 just like that.

02:02 7 You don't want to be a career offender because it
8 always results in the longest of sentences in the federal
9 criminal justice system, but it usually bumps you up -- I don't
10 have a guideline in front of me, but it usually -- it's going
11 to bump you up, depending on the statutory maximum for the
12 underlying crime, anywhere from a 32 on up to a 36 or --

13 MR. SHASKY: Thirty-seven.

02:02 14 THE COURT: Thirty-seven is the highest that it could
15 be if the statutory maximum was higher for the crime that you
16 pled guilty to. But you're always going to be up in that 30
17 range somewhere as a career offender. It depends upon the
18 statutory maximum for the crime that you pled guilty to.

02:03 19 THE DEFENDANT: Okay. And I was just -- Your Honor,
20 I was just confused because when I read the case *United States*
21 *versus Lynch*, he was a career offender, and he started at 23.
22 And when they applied the career offender, he jumped to a 29.
23 I have the case too, to reference it too, so that's why I
24 was --

02:03 25 THE COURT: Go ahead.

02:03

1 THE PROBATION OFFICER: If I may, Your Honor, in
2 4B1.1(b)(3), if the offense statutory maximum is 20 years or
3 more but less than 25, which I believe is this case, the
4 offense level is 32. If the offense level would have been 29,
5 it would require that the offense statutory maximum be 15 years
6 or more, but less than 20 years.

02:03

7 THE COURT: So do you understand? If the crime that
8 you had pled guilty to carried a maximum penalty of 15 to
9 20 years -- or under 20 years, then it bumps up to an overall
10 adjusted offense level 29 as a career offender.

02:04

11 If the statutory maximum for the crime that you pled
12 guilty to is 20 years or more -- up to 25 years I guess it
13 would be, then it bumps up to an offense level of 32. It all
14 is based on the crime that you plead guilty to and what the
15 statutory maximum is for that crime.

02:04

16 That case that you cited, clearly that defendant was
17 looking at a statutory maximum sentence of something less than
18 20 years. That's why he ended up with a career offender
19 offense level of 29. If that crime, for example, would have
20 carried a life sentence, then he would have been up to an
21 offense level of 37 rather than 32 or 29. It just depends on
22 the crime that you plead guilty to and what the maximum penalty
23 is for that crime. That's what determines your offense level
24 as a career offender.

02:04

25 It's not -- I agree, it's not always so easy to

1 understand, but that's what is the big difference. And in your
2 case the statutory maximum was 20 years of imprisonment. That
3 correlates with a base offense level of 32 under the career
4 offender sentencing guideline.

02:05

5 THE DEFENDANT: Okay. So would've been my minimum
6 then?

7 THE COURT: Minimum is anywhere from zero to
8 20 years.

9 THE DEFENDANT: Oh, okay. Okay.

02:05

10 THE COURT: If the crime that you pled guilty to only
11 carried a statutory maximum of 15 years, then your base offense
12 level would've been 29 rather than 32.

13 THE DEFENDANT: Right.

02:05

14 THE COURT: But at the end of the day in this case,
15 the parties entered into a binding Plea Agreement that provided
16 for a sentence that was less than the sentencing guideline
17 range. In this case the sentencing guidelines for you turned
18 out to be 151 to 188 months.

02:06

19 Most of the time defendants tend to receive a
20 sentence that falls within the sentencing guidelines, but
21 because of the issues in this case from both sides, they
22 reached a binding Plea Agreement that was, you know, 15 months
23 less than the low end of the sentencing guidelines.

02:06

24 But I appreciate your bringing those points up
25 because, I mean, you raise some valid points. There's a lot

02:06 1 of -- everybody has a lot of questions about what it means to
2 become a career offender, and why does one career offender get
3 a base offense level of 29, and why does one get 32, and why
4 does one get 37? But it -- so it's not -- it's not always so
5 clear, but it all depends on the crime that you have pled
6 guilty to and what the maximum penalty is for that particular
7 crime. Do you have a little better understanding?

8 THE DEFENDANT: Yes.

02:07 9 THE COURT: Was there anything more that you wanted
10 to say?

11 THE DEFENDANT: I just -- I'm just sick and tired of
12 just -- you know, just being locked up, though, sir, you know.

13 THE COURT: Right. I understand. I understand that.

02:07 14 THE DEFENDANT: To be honest with you, though, you
15 know, like just -- you know, like to be honest, I'm dealing
16 with a lot of little mental -- mental -- you know what I'm
17 saying? -- issues on my -- in myself.

18 THE COURT: Right.

02:07 19 THE DEFENDANT: Within myself, though, you know, like
20 it just hurts my soul, though, you know, to -- that I got to go
21 through this, and -- but I look at it like only the strongest
22 survive. You know, the weak fall to the wayside. Just keep my
23 faith in God and, you know, I'll -- I'm going to prevail. I'm
24 going -- I'm going to do the right thing, though. I know I am.

02:08 25 I have to for my kids, for my two daughters. It ain't no ifs,

1 ands, buts about it.

2 THE COURT: All right. Anything else that either
3 counsel wished to say?

4 MR. SHASKY: No, Your Honor.

02:08

5 MR. VICKERS: No, Your Honor.

6 THE COURT: And I'll direct my question to both
7 counsel. Is there anything that I have said to Mr. Butchee in
8 an effort to explain this career offender status that either of
9 you feel was incorrect?

02:08

10 MR. SHASKY: No, Your Honor.

11 MR. VICKERS: No, Your Honor.

12 THE COURT: Okay. And in terms of the request for
13 restitution, is there anything more that the government is
14 offering other than paragraph 9 in the Presentence Report?

02:08

15 MR. SHASKY: I'm not sure I understand what the --

16 THE COURT: Well, I mean, the government has the
17 burden of proof in establishing the amount of restitution and
18 the causal connection to this offense. Is there anything more
19 that you intend to submit other than paragraph 9 of the
20 Presentence Report and your arguments about how there's some
21 causal connection here?

02:09

22 MR. SHASKY: Your Honor, I didn't provide copies, I
23 guess, of the receipts that we had. They were provided in the
24 related case with Mr. Kirkeby, but those do exist. I guess I
25 shouldn't -- I should have probably brought those.

02:09

02:09 1 I don't think that the dollar amount involved is
2 really the question. The question is whether or not he should
3 be responsible for it. I didn't know that he was going to be
4 fighting this issue until he filed that Sentencing Memorandum,
5 and I did not have an opportunity to really review that in
6 detail until today, so it was too late, but --

7 THE COURT: All right.

8 MR. SHASKY: -- I don't have anything further, no.

02:10 9 THE COURT: Okay. Well, I've reviewed the
10 Presentence Investigation Report. I accept all of the factual
11 information contained in that report, none of which has been
12 disputed. The appropriate sentencing guideline range in this
13 case is based on an overall offense level of 29, a criminal
14 history category of VI, with an advisory guideline range of 151
02:10 15 to 188 months.

16 The parties have entered into a binding Plea
17 Agreement for a sentence of 136 months, so both parties have
18 stipulated and agreed to a variance from the guidelines in this
19 case, which the Court has approved and agreed to.

02:10 20 There's no need to address any other basis for a
21 departure or a variance under the circumstances, but I'm well
22 aware of the sentencing factors under 18 USC Section 3553(a)
23 that I'm required to consider in every case. I've considered
24 all of those factors in this case.

02:11 25 I'm equally aware of Section 5G1.3 of the guidelines

02:11

1 and how it comes into play in determining whether a
2 consecutive, concurrent, or partially concurrent sentence
3 should be imposed. And I'm aware of the factors to be
4 considered under 18 USC Section 3584 in addressing that subject
5 matter.

02:11

6 And the Eighth Circuit Court of Appeals has said that
7 when judges look at the 3553(a) factors, the 3584 statutory
8 provisions, and 5G1.3, we are entitled to rely upon factual
9 information contained in the Presentence Report that hasn't
10 been objected to, information contained in sentencing
11 memorandums and exhibits, arguments of counsel, statements made
12 by a defendant, and I've relied upon all of that information.

02:12

13 Pursuant to the Sentencing Reform Act of 1984, Mr.
14 Butchee, it's the judgment of this Court that you shall be
15 committed to the custody of the Bureau of Prisons to be
16 imprisoned for a period of 136 months. I'll run that
17 concurrent with the remaining undischarged sentence in
18 Minnesota; in other words, concurrent from this day forward in
19 accordance with Section 5G1.3.

02:12

20 I'm placing you on supervised release for a period of
21 three years. I'm ordering that you pay a special assessment of
22 \$100. I'm not imposing a fine, and I'm not ordering any
23 restitution in this case on the basis that the government
24 hasn't sustained its burden of proof to establish the
25 connection here. And Mr. Kirkeby has already been ordered to

02:12

1 pay that restitution, as I understand it, restitution of
2 \$12,986, but I'm not ordering that you're responsible for that,
3 Mr. Butchee.

02:13 4 The conditions of supervised release that you'll be
5 required to comply with will be outlined in the Judgment that I
6 sign today, and you'll get a copy of that Judgment. But in the
7 federal system, everybody that's been ordered to serve a
8 sentence generally has to comply with what are known as
9 standard conditions of supervised release, and those generally
02:13 10 require that you live a law-abiding lifestyle. If you violate
11 any laws while you're on federal paper, then you've put
12 yourself in a position to be brought back into federal court.

13 The standard conditions of supervised release
14 prohibit you from using street drugs. They also prohibit you
02:13 15 from even associating with people that use street drugs.

16 You are now prohibited under federal law from even
17 associating with persons that have felony convictions on their
18 record, so if you associate with those types of individuals,
19 former drug-using friends, for example, you've put yourself at
02:14 20 great risk. Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And you're also prohibited from
23 possessing firearms or ammunition for the rest of your life.
24 The state system, it's a little bit different when you're
02:14 25 convicted of a felony as to when you can recover your right to

02:14

1 bear arms. In the federal system there's a lifetime ban on
2 people convicted of felonies. That penalty is determined by
3 Congress -- by Congress, not by judges, but there's a lifetime
4 ban from possessing firearms or ammunition. Do you understand
5 that?

6 THE DEFENDANT: Yes, sir.

02:14

7 THE COURT: And if -- and keep in mind that under
8 federal law, possession is a rather broadly defined term. It
9 certainly means you can't have a gun in your hands, but it also
10 means you can't be around guns, in close proximity to guns.
11 And if you put yourself in that position, they're going to
12 charge you with a crime of felon in possession, and with your
13 career offender status, you're going to get a ten-year
14 sentence, if not more. Do you understand?

02:15

15 THE DEFENDANT: Yes, sir.

02:15

16 THE COURT: And you'll be assigned a probation
17 officer that you'll have to report to regularly, and if you
18 don't report in to your federal probation officer, then
19 eventually they write you up and we're back in court again.
20 Any violation of these conditions of supervised release puts
21 you at risk for at least another two years in prison and
22 possibly more.

02:15

23 I'm also ordering some special conditions, and they
24 are as follows: I'm ordering that you shall participate in any
25 form of drug or alcohol treatment or any other classes,

1 programming or counseling that might be recommended by the
2 United States Probation Office.

02:16 3 You'll be required to submit to random drug, alcohol
4 screening or testing. If you -- if you don't show up for a
5 drug test, that's considered to be a violation of this
6 condition. If you've tried to tamper with a test in any way,
7 that's also considered a violation of this condition.

02:16 8 Another special condition that I'm ordering is that
9 you shall abstain from using alcohol, street drugs, inhalants
10 and synthetic drugs and all the other garbage that's out there.
11 Abstain means shall not use.

12 THE DEFENDANT: Yes, sir.

02:16 13 THE COURT: I'm ordering as a special condition that
14 you can be placed in a halfway house at any time while you're
15 on supervised release.

02:17 16 And in the federal system, if you're on good
17 behavior, which I trust that you will be, you're eligible to be
18 released after you've served 85 percent of your sentence. And
19 if you're on good behavior, you're generally allowed to serve
20 up to a year, sometimes more, of your sentence in a halfway
21 house with work release privileges. But if and when you get
22 into a halfway house, you're required to follow all of their
23 rules and regulations no matter how simple and petty they may
24 seem. Do you understand that?

02:17 25 THE DEFENDANT: Yes, sir.

02:17 1 THE COURT: And I'm also ordering a search clause for
2 you, which simply means that while you're on federal paper, you
3 can be searched any time, any place by a federal probation
4 officer. Despite what jailhouse lawyers might tell you, they
5 don't need search warrants to search you and search your
6 residence and search motor vehicles you're traveling in or
7 search cell phones or computers or any computer devices. They
8 have an absolute, clearcut right to do that without a warrant,
9 without a Court order. Do you understand?

02:17 10 THE DEFENDANT: Yes, sir.

11 THE COURT: It's left up entirely to the probation
12 officer. And search clauses are ordered for virtually every
13 defendant in the federal criminal justice system nationwide as
14 a part of a condition of supervision. Do you have any
02:18 15 questions about the conditions that I've ordered?

16 THE DEFENDANT: Yeah, I got -- I got a couple
17 questions.

18 THE COURT: Yep.

19 THE DEFENDANT: I'm -- I probably misinterpret it.
02:18 20 The recommend the treatment program in the facility that I'm
21 at --

22 THE COURT: At what?

23 THE DEFENDANT: The RDAP, I think it's called.

24 THE COURT: Yeah, I'll recommend that too. I haven't
02:18 25 got to that yet.

1 THE DEFENDANT: Oh, okay. No, I'm -- that's why I
2 was --

3 THE COURT: Okay.

4 THE DEFENDANT: I was kind of confused. That's all,
5 sir.

6 THE COURT: Fair enough. But any other questions
7 about the conditions of supervised release that I've ordered?

8 THE DEFENDANT: No, sir.

9 THE COURT: None of them are out of the ordinary.
10 They're fairly routinely ordered in cases involving drug
11 offenses such as this.

12 I will recommend to the Bureau of Prisons that they
13 look at placing you in Oxford, Wisconsin, or Sandstone,
14 Minnesota. Oxford is a medium security facility. Sandstone is
15 low, I believe.

16 I'll recommend to the Bureau of Prisons that they
17 give you an opportunity to participate in the RDAP program.
18 And you've heard about that, right?

19 THE DEFENDANT: Yes, my lawyer had told me about it,
20 yes.

21 THE COURT: Both of those facilities offer that
22 program. RDAP is a nine-month, 500-hour drug treatment
23 program. And if you get into the program and you successfully
24 complete it, you can have up to a year of your sentence
25 eliminated. And generally you're allowed to serve at least a

1 year in a halfway house of your sentence as well. It's a very
2 good program, and I'll recommend in my Judgment that BOP allow
3 you to participate in that.

02:20

4 But the final decision as to where you go and whether
5 you get into the RDAP program is the BOP's decision. They,
6 being the BOP, strongly urges federal judges to make
7 recommendations like I'm making for you. They tell all of us
8 federal judges that they try to follow the recommendations that
9 are made by the sentencing judge, but it doesn't always happen.

02:20

10 Sometimes where you end up is based upon the availability of
11 bed space or a whole lot of other criteria that BOP looks at
12 that I'm not even fully aware of.

02:20

13 Finally, I need to inform you that you do have a
14 right to appeal if you feel you haven't been treated fairly.
15 Every defendant that's sentenced in the federal system has a
16 right to appeal after their sentencing. You can appeal the
17 sentence, and you can appeal the conditions of supervised
18 release. The time period for any appeal, however, is extremely
19 short. You have 14 days to appeal starting today. Do you
20 understand that?

02:21

21 THE DEFENDANT: Yes, sir.

02:21

22 THE COURT: If you wish to appeal, you need to visit
23 with your attorney, Mr. Vickers, about that immediately to let
24 him know that that's the course of action that you want to
25 pursue. He, in turn, needs to file a simple document called a

1 notice of appeal. And when that notice of appeal is filed,
2 that protects your appeal rights, but it's got to be filed
3 within 14 days or you've lost that right to appeal forever. Do
4 you understand?

02:21

5 THE DEFENDANT: Yes, sir.

02:21

6 THE COURT: I would point out that in the Plea
7 Agreement that you signed, there was a paragraph called a
8 waiver of appeal, which means you agreed to give up your right
9 of appeal. And in the Plea Agreement you agreed that you would
10 not appeal in exchange for any sentence up to the high end of
11 the guidelines; in other words, any sentence up to 188 months,
12 you agreed that you would not appeal that. So I believe you've
13 clearly given up your right of appeal in the Plea Agreement, as
14 do most defendants. Virtually every defendant that signs a
15 Plea Agreement also agrees that they won't appeal after they've
16 been sentenced, but do you understand that?

02:22

17 THE DEFENDANT: Yes, sir.

02:22

18 THE COURT: Okay. Either counsel have any objections
19 to what I've ordered, or are there any counts to be dismissed
20 or anything else that anyone believes has been overlooked here
21 today?

02:22

22 MR. SHASKY: Your Honor, I guess we were just
23 discussing whether the Indictment had to be dismissed, but I
24 think that's automatically done by the filing of the
25 Information in its place, but --

1 THE COURT: If it's not, I'll order it dismissed.

2 MR. SHASKY: Thanks.

3 THE COURT: But any objections, Mr. Shasky, to what's
4 been ordered here today?

02:23 5 MR. SHASKY: No, Your Honor.

6 THE COURT: Mr. Vickers?

7 MR. VICKERS: No, Your Honor.

8 THE COURT: Mr. Butchee, any questions before we
9 close the hearing?

02:23 10 THE DEFENDANT: Yes, sir, I just got -- like I was
11 reading in the book, like the BOP, and when you said like my
12 prison sentence can get ran concurrent, like they -- they kind
13 of like really on the -- on the -- it said like they don't
14 really go by the -- like the Judge has to really stipulate
02:23 15 that.

16 THE COURT: I'll make it very clear in my Judgment.
17 I'll cite them to the specific sentencing guideline provision
18 that I'm relying upon. I'll make it very clear that it's
19 concurrent to the remaining sentence that you have in
02:23 20 Minnesota. I'll reference that particular case file number in
21 Minnesota.

22 And if there's a problem with it at some later date,
23 you can let your attorney know, and I can -- if BOP starts
24 blowing smoke in your face and telling you that they're not
02:24 25 going to honor what I did, then let your attorney know, and

1 I'll make sure that I correct the Judgment and they do what I
2 ordered.

3 THE DEFENDANT: Thank you, sir.

4 THE COURT: All right. Good luck to you.

5 We are adjourned.

6 (Proceedings concluded at 2:24 p.m., the same day.)

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02:24

18-3498

Mr. James Marione Butchee

#217364

MOOSE LAKE CORRECTIONAL FACILITY

1000 Lake Shore Drive

Moose Lake, MN 55767

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CERTIFICATE OF COURT REPORTER

I, Sandra E. Ehrmantraut, a Certified Realtime Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated: December 17, 2018

/s/ Sandra E. Ehrmantraut
Certified Realtime Reporter

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-3498

United States of America

Plaintiff - Appellee

v.

James Marione Butchee, also known as Knowledge

Defendant - Appellant

Appeal from U.S. District Court for the District of North Dakota - Fargo
(3:17-cr-00060-DLH-1)

JUDGMENT

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed in accordance with the opinion of this Court.

August 22, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 18-3498

United States of America

Plaintiff - Appellee

v.

James Marione Butchee, also known as Knowledge

Defendant - Appellant

Appeal from United States District Court
for the District of North Dakota - Fargo

Submitted: August 14, 2019

Filed: August 22, 2019

[Unpublished]

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

PER CURIAM.

James Butchee appeals after he signed a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement containing an appeal waiver, entered a guilty plea, and

was sentenced by the district court¹ in accordance with the plea agreement. In a brief filed under Anders v. California, 386 U.S. 738 (1967), his counsel acknowledges the appeal waiver, and presents Butchee's view that his base offense level was miscalculated. Counsel has also moved for leave to withdraw. In a pro se brief, Butchee argues that he was erroneously classified as a career offender, and that counsel was ineffective.

We decline, on direct appeal, to consider any claims of ineffective assistance of counsel. See United States v. Hernandez, 281 F.3d 746, 749 (8th Cir. 2002) (in general, ineffective-assistance claim is not cognizable on direct appeal; such claim is properly raised in 28 U.S.C. § 2255 action). As to the remaining issues, we enforce the appeal waiver. See United States v. Scott, 627 F.3d 702, 704 (8th Cir. 2010) (de novo review of validity and applicability of appeal waiver); United States v. Andis, 333 F.3d 886, 889-92 (8th Cir. 2003) (en banc) (appeal waiver will be enforced if appeal falls within scope of waiver, defendant knowingly and voluntarily entered into plea agreement and waiver, and enforcing waiver would not result in miscarriage of justice).

Having reviewed the record pursuant to Penon v. Ohio, 488 U.S. 75 (1988), we find no non-frivolous issues for appeal outside the scope of the appeal waiver. Accordingly, we dismiss this appeal, and we grant counsel leave to withdraw.

¹The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

**Additional material
from this filing is
available in the
Clerk's Office.**