Petition Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. MARCUS SCOTT CRUM, *Defendant-Appellee*.	No. 17-30261 D.C. No. 1:17-cr-00147-BLW-1 OPINION

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted December 5, 2018
Seattle, Washington

Filed August 16, 2019

Before: William A. Fletcher, Jay S. Bybee, and
Paul J. Watford, Circuit Judges.

Per Curiam Opinion;
Dissent by Judge Watford

SUMMARY*

Criminal Law

The panel vacated a sentence and remanded for resentencing in a case in which the district court held that delivery of methamphetamine in violation of Oregon Revised Statutes § 475.890 does not qualify as a "controlled substance offense" under U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(b).

The district court agreed with the defendant that Oregon's delivery-of-methamphetamine offense is overbroad as compared to the federal definition of "controlled substance offense" because only the former encompasses soliciting the delivery of methamphetamine. The panel held that *United States v. Shumate*, 329 F.3d 1026 (9th Cir. 2003) (construing the same Oregon definition of "delivery"), compels the holding that § 475.890 is not overbroad on the basis that it encompasses soliciting delivery. The panel that the district court erred in applying *Sandoval v. Sessions*, 866 F.3d 986 (9th Cir. 2017), which is inapplicable in that it involved the different analysis employed for determining whether an offense qualifies as a "drug trafficking crime" under the Controlled Substance Act.

The defendant asked the panel to reconsider this court's decision in *Shumate* on the ground that the commentary to § 4B1.2 (Application Note 1), on which *Shumate* relied to hold that "controlled substance offense" encompasses

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

solicitation offenses, lacks legal force because it is inconsistent with the text of the guideline. The panel wrote that if it were free to do so, it would hold that the commentary improperly expands the definition of "controlled substance offense" to include other offenses not listed in the text of the guideline, but that it is bound by this court's decision in *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993), which held that Application Note 1 of § 4B1.2 is "perfectly consistent" with the text of § 4B1.2.

The panel rejected the defendant's argument that Oregon's delivery-of-methamphetamine offense sweeps more broadly than the federal definition of "controlled substance offense" because the Oregon offense criminalizes the mere offer to sell methamphetamine. The panel explained that as noted in *Sandoval*, offering to sell a controlled substance constitutes soliciting delivery of a controlled substance, and because solicitation does fall within the definition of "controlled substance offense" under § 4B1.2, an offer to sell a controlled substance under Oregon law is a categorical match for solicitation of a "controlled substance offense" under § 4B1.2.

The panel concluded that the district court should therefore have applied a base offense level of 20 under § 2K2.1(a)(4)(A).

Dissenting, Judge Watford wrote that the Oregon offense criminalizes more conduct than the federal offense does, rendering the Oregon offense overbroad, because a mere offer to sell does not constitute solicitation of a "controlled substance offense."

COUNSEL

Francis J. Zebari (argued), Special Assistant United States Attorney; Bart M. Davis, United States Attorney; United States Attorney's Office, Boise, Idaho; for Plaintiff-Appellant.

Theodore Braden Blank (argued) and Robert K. Schwarz, Federal Defender Services of Idaho, Boise, Idaho, for Defendant-Appellee.

OPINION

PER CURIAM:

Marcus Crum pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The United States Sentencing Guidelines assign a higher base offense level for that offense if the defendant has previously been convicted of a "controlled substance offense." U.S.S.G. § 2K2.1(a)(4)(A). The question before us is whether Crum's prior conviction for delivery of methamphetamine in violation of Oregon Revised Statutes § 475.890 qualifies as a "controlled substance offense." We conclude that it does, and remand to the district court for resentencing.

I

We use the categorical approach to determine whether a defendant's prior conviction qualifies as a federal "controlled substance offense." *See United States v. Brown*, 879 F.3d 1043, 1046 (9th Cir. 2018). Under that approach, we compare the elements of the state offense to the elements

of the federal definition of "controlled substance offense" to determine whether the state offense "criminalizes a broader range of conduct than the federal definition captures." *United States v. Edling*, 895 F.3d 1153, 1155 (9th Cir. 2018).

Section 4B1.2(b) of the Sentencing Guidelines defines the term "controlled substance offense" to mean, as relevant here, an offense under state law that prohibits the "distribution[] or dispensing of a controlled substance." U.S.S.G. § 4B1.2(b).[1] The commentary to § 4B1.2, specifically Application Note 1, further provides: "'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." § 4B1.2 cmt. n.1. Crum contends that Oregon's delivery-of-methamphetamine offense is overbroad as compared to the federal definition of a "controlled substance offense."

The elements of the Oregon offense are fairly simple. Oregon Revised Statutes § 475.890 makes it unlawful "for any person to deliver methamphetamine." Under Oregon law, "delivery" of a controlled substance means, as relevant here, the "actual, constructive or *attempted transfer* . . . from one person to another of a controlled substance." Or. Rev. Stat. § 475.005(8) (emphasis added). Attempted transfer, in

[1] Section 4B1.2(b) reads in full:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

turn, has been construed to include soliciting another person to deliver a controlled substance, *see State v. Sargent*, 822 P.2d 726, 728 (Or. Ct. App. 1991), as well as offering to sell a controlled substance, *see State v. Pollock*, 73 P.3d 297, 300 (Or. Ct. App. 2003). Crum argues that neither soliciting delivery nor offering to sell is encompassed within the federal offense, thus rendering the Oregon offense overbroad.

The district court agreed with Crum, relying primarily on our decision in *Sandoval v. Sessions*, 866 F.3d 986 (9th Cir. 2017). There, we held that delivery of a controlled substance under Oregon law does not constitute a "drug trafficking crime" under the Controlled Substances Act because the term "drug trafficking crime" does not include solicitation, whereas Oregon's delivery-of-a-controlled-substance offense does. *Id.* at 989–93. Having concluded that Crum's prior conviction did not qualify as a "controlled substance offense" under § 4B1.2(b), the district court sentenced him using a base offense level of 14 rather than 20.

The government challenges the district court's ruling on appeal.

II

We first address Crum's argument that Oregon's delivery-of-methamphetamine offense sweeps more broadly than the federal "controlled substance offense" because it criminalizes soliciting the delivery of methamphetamine. We hold that Oregon's statute is not overbroad on this basis.

A

Our conclusion is compelled by our court's prior decision in *United States v. Shumate*, 329 F.3d 1026 (9th Cir.

2003), which held that delivery of marijuana under Oregon law qualifies as a "controlled substance offense" under § 4B1.2(b). *Id.* at 1028–31. That case dealt with delivery of a controlled substance under Oregon Revised Statutes § 475.992 (now codified at § 475.752), rather than the delivery-of-methamphetamine offense under § 475.890 at issue here. But because the definition of "delivery" is the same under both statutes, *see* Or. Rev. Stat. § 475.005, the analysis in *Shumate* applies here.

We concluded in *Shumate* that the definition of "controlled substance offense" in § 4B1.2 encompasses solicitation offenses. We acknowledged that the commentary to § 4B1.2 does not mention solicitation, even though it expands the definition of "controlled substance offense" to include aiding and abetting, conspiring, and attempting to commit such an offense. *Shumate*, 329 F.3d at 1030–31. However, we concluded that the commentary's "failure to mention solicitation has no legal significance." *Id.* at 1031 (internal quotation marks omitted). We explained that the commentary does not provide an exhaustive list of the offenses that are encompassed by the term "controlled substance offense" because the commentary uses the word "include." *Id.* at 1030–31. And since our court had previously relied on the same commentary to hold that the term "crime of violence" in § 4B1.2 includes solicitation offenses, we determined that the term "controlled substance offense" encompasses solicitation offenses as well. *Id.* (discussing *United States v. Cox*, 74 F.3d 189 (9th Cir. 1996)). We therefore held that delivery of a controlled substance under Oregon law is a categorical match under § 4B1.2, even though the Oregon statute encompasses soliciting the delivery of a controlled substance. *Id.*

Shumate controls here. The district court thus erred in applying *Sandoval*, which involved the term "drug trafficking crime" under the Controlled Substances Act. Although we held in *Sandoval* that the term does not encompass solicitation offenses, 866 F.3d at 989–90, the analysis for determining whether an offense qualifies as a "drug trafficking crime" under the Controlled Substances Act is different from the analysis for determining whether an offense qualifies as a "controlled substance offense" under the Sentencing Guidelines. *See Shumate*, 329 F.3d at 1030 n.5. The Controlled Substances Act "neither mentions solicitation nor contains any broad catch-all provision that could even arguably be read to cover solicitation." *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999). In contrast, although the commentary to § 4B1.2 does not mention solicitation either, it does contain a catch-all term ("include") that we have interpreted to encompass solicitation. *See Shumate*, 329 F.3d at 1030. In this regard, our decision in *Sandoval* is inapplicable to this case.

B

Crum asks us to reconsider our decision in *Shumate* on the basis of an argument that was not considered in that case. Crum contends that Application Note 1 of § 4B1.2 lacks legal force because it is inconsistent with the text of the guideline—an assertion that, if true, would preclude courts from relying on the commentary to expand the definition of "controlled substance offense" to include solicitation. *See Stinson v. United States*, 508 U.S. 36, 45–46 (1993). In Crum's view, because the plain text of § 4B1.2(b) does not encompass solicitation (or any of the inchoate offenses discussed in the commentary), the commentary may not expand the definition of "controlled substance offense" to include those offenses.

Our sister circuits are split on this issue. The First, Third, and Eleventh Circuits have held that the commentary is consistent with the text of § 4B1.2(b), as the commentary does not include any offense that is explicitly excluded by the text of the guideline. *United States v. Smith*, 54 F.3d 690, 693 (11th Cir. 1995); *United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994); *United States v. Hightower*, 25 F.3d 182, 187 (3d Cir. 1994). On the other side of the split, the Sixth and D.C. Circuits have held that the commentary conflicts with the text of § 4B1.2(b). *United States v. Havis*, 927 F.3d 382, 385–87 (6th Cir. 2019) (en banc); *United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018). The D.C. Circuit explained that the text of § 4B1.2(b) provides a "very detailed definition" of "controlled substance offense," which does not include the offenses listed in the commentary. *Winstead*, 927 F.3d at 1091 (internal quotation marks omitted). The court also pointed out that the Sentencing Commission included attempt offenses in § 4B1.2(a) when defining "crime of violence," but chose not to include such offenses in § 4B1.2(b) when defining "controlled substance offense." *Id.* Those drafting choices support the conclusion that the definition of "controlled substance offense" excludes attempt and the related offenses listed in the commentary. *Id.*

If we were free to do so, we would follow the Sixth and D.C. Circuits' lead. In our view, the commentary improperly expands the definition of "controlled substance offense" to include other offenses not listed in the text of the guideline. Like the Sixth and D.C. Circuits, we are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of "controlled substance offense" in this way, without any grounding in the text of § 4B1.2(b) and without affording any opportunity for congressional review. *See Havis*, 927 F.3d at 386–87;

Winstead, 890 F.3d at 1092. This is especially concerning given that the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1.

We are nonetheless compelled by our court's prior decision in *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993), *overruled on other grounds by Custis v. United States*, 511 U.S. 485 (1994), to reject the Sixth and D.C. Circuits' view. In *Vea-Gonzales*, we held that Application Note 1 of § 4B1.2 is "perfectly consistent" with the text of § 4B1.2(b). 999 F.2d at 1330. We explained that the text of § 4B1.2(b) defines the term "controlled substance offense" as encompassing violations of laws prohibiting the manufacture, import, export, distribution, or dispensing of drugs, and that aiding and abetting, conspiring, and attempting to commit such offenses constitute violations of those laws. *Id.* We thus concluded that Application Note 1 properly interprets the definition of the term "controlled substance offense" to encompass aiding and abetting, conspiracy, attempt, and other forms of the underlying offense. *Id.* No intervening higher authority is "clearly irreconcilable" with the reasoning of *Vea-Gonzales*, so we cannot overrule that precedent as a three-judge panel. *See United States v. Pepe*, 895 F.3d 679, 685–86 (9th Cir. 2018). As a result, we are not free to depart from the holding in our prior cases that the term "controlled substance offense" as defined in § 4B1.2(b) encompasses both solicitation and attempt offenses. *See Shumate*, 329 F.3d at 1029–31; *Vea-Gonzales*, 999 F.2d at 1330.

III

We turn next to Crum's argument that Oregon's delivery-of-methamphetamine offense sweeps more broadly

than the federal definition of "controlled substance offense" because the Oregon offense criminalizes the mere offer to sell methamphetamine.

Crum's argument turns on the Oregon Court of Appeals' decision in *Pollock*, which was issued after our court decided *Shumate*. In *Pollock*, the Oregon Court of Appeals held that an individual can be convicted of delivery of a controlled substance under Oregon law if he has offered to sell that substance to another person. 73 P.3d at 300. In Crum's view, merely offering to sell a controlled substance does not constitute either soliciting or attempting to commit a "controlled substance offense." Thus, even if the definition of "controlled substance offense" under § 4B1.2 encompasses solicitation and attempt, Crum argues that Oregon's delivery-of-methamphetamine offense is still overbroad.

We reject Crum's argument. As we noted in *Sandoval*, offering to sell a controlled substance constitutes soliciting delivery of a controlled substance. 866 F.3d at 990–91 (discussing *Pollock*, among other Oregon cases); *see also United States v. Lee*, 704 F.3d 785, 790 n.2 (9th Cir. 2012). Solicitation does not fall within the definition of "drug trafficking crime" under the Controlled Substances Act, which is the term we were construing in *Sandoval*. But solicitation does fall within the definition of "controlled substance offense" under § 4B1.2 of the Sentencing Guidelines. *See Shumate*, 329 F.3d at 1030. Thus, an offer to sell a controlled substance under Oregon law is a categorical match for solicitation of a "controlled substance offense" under § 4B1.2.

* * *

In sum, Crum's prior conviction for delivery of methamphetamine qualifies as a "controlled substance offense," as that term is defined in § 4B1.2 of the Guidelines. The district court should therefore have applied a base offense level of 20 rather than 14. *See* U.S.S.G. § 2K2.1(a)(4)(A). We vacate Crum's sentence and remand for resentencing.

VACATED and REMANDED.

WATFORD, Circuit Judge, dissenting:

I would affirm. In my view, Oregon's delivery-of-methamphetamine offense is overbroad, even if the term "controlled substance offense" under U.S.S.G. § 4B1.2(b) encompasses solicitation, as the majority concludes. Oregon law permits conviction for delivery of a controlled substance based on a mere offer to sell the drug to someone else. *See State v. Pollock*, 73 P.3d 297, 300 (Or. Ct. App. 2003). Because a mere offer to sell does not constitute solicitation of a "controlled substance offense," the Oregon offense criminalizes more conduct than the federal offense does, rendering the Oregon offense overbroad.

The problem with the majority's solicitation analysis, as I see it, is this. Solicitation is enticing or encouraging someone else to commit a crime. *See* Model Penal Code § 5.02(1) (American Law Institute 1985). Here, for our purposes, the crime that's covered by the federal definition of "controlled substance offense" is distributing or dispensing a controlled substance. To solicit that offense, the defendant must entice or encourage someone else to distribute or dispense drugs to a third party. If the defendant merely offers to sell drugs to someone else, he has not

solicited a "controlled substance offense" under the Guidelines. At most, a mere offer to sell amounts to soliciting the other person to commit the crime of simple possession. Simple possession, however, is not covered by the Guidelines' definition of "controlled substance offense"; only possession with the intent to distribute is. U.S.S.G. § 4B1.2(b).

Our decision in *Sandoval v. Sessions*, 866 F.3d 986 (9th Cir. 2017), on which the majority relies, reflects an incorrect view of what solicitation means. In *Sandoval*, we equated offering to sell a controlled substance with soliciting delivery of a controlled substance, *id.* at 990–91, but for the reason just stated they are not the same thing. That analytical error was not necessary to the conclusion we ultimately reached. So I do not view that aspect of *Sandoval*'s reasoning as binding here, and I would not perpetuate the error we made there.

UNITED STATES DISTRICT COURT

District of Idaho

UNITED STATES OF AMERICA

v.

MARCUS SCOTT CRUM

JUDGMENT IN A CRIMINAL CASE

Case Number: 0976 1:17CR00147-001

USM Number: 19088-023

Robert Schwarz
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18§922(g)(1)	Unlawful Possession of Firearm	04/04/2017	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 28, 2017
Date of Imposition of Judgment

Signature of Judge

B. Lynn Winmill, Chief United States District Judge
Name and Title of Judge

November 29, 2017
Date

DEFENDANT: Marcus Scott Crum
CASE NUMBER: 0976 1:17CR00147-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 25 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant will be credited with all time served in federal custody and will be placed in a facility in Sheridan, Oregon. It is recommended that the defendant participate in the RDAP program while incarcerated.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By: DEPUTY UNITED STATES MARSHAL

DEFENDANT: Marcus Scott Crum
CASE NUMBER: 0976 1:17CR00147-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on supervision and to a maximum of 5 periodic drug tests a month thereafter for the term of supervision as directed by the probation officer. The cost to be paid by both the defendant and the government based upon the defendant's ability to pay.
   - ☐ The above drug testing condition is suspended, based on the courts determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
4. ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
6. ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(Check, if applicable.)*
8. ☒ You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. ☐ If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. ☒ You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Marcus Scott Crum
CASE NUMBER: 0976 1:17CR00147-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

Upon a finding of a violation of supervision or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

A U.S. probation officer has instructed me on the conditions specified by the Court. I fully understand the conditions and have been provided with a written copy of this judgment containing these conditions.

Defendant's Signature _____ Date _____

U.S. Probation Officer/Witness _____ Date _____

DEFENDANT: Marcus Scott Crum
CASE NUMBER: 0976 1:17CR00147-001

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall pay any special assessment or other financial obligation that is imposed by this judgment in accordance with the Schedule of Payments as ordered by the Court.

The defendant shall submit his or her person, property, house, residence, vehicle, papers, or office, to a search conducted by a United States probation officer. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

The defendant shall participate in a program of testing and treatment for drug and alcohol abuse, as directed by the probation officer. The cost to be paid by both the defendant and the government based upon the defendant's ability to pay.

The defendant shall abstain from the use of alcohol and shall not be present in any location where alcohol is the primary item of sale.

The defendant shall participate in a program of mental health treatment, as directed by the probation officer. The cost to be paid by both the defendant and the government based upon the defendant's ability to pay.

As directed by a mental health professional, the defendant shall take all medications as prescribed. The cost of medication to be paid by both the government and the defendant based upon the defendant’s ability to pay.

If determined by the results of the Test of Adult Basic Education (TABE) that the defendant has the cognitive ability to do so, the defendant shall obtain their General Education Development (GED) degree or High School Equivalency (HSE) during the term of supervised release. The costs of education and testing shall be paid by the defendant.

Special Conditions of supervised release shall supersede any standard condition that is inconsistent with the special conditions.

DEFENDANT: Marcus Scott Crum
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution	JVTA Assessment*
TOTALS	**$100**	**Waived**	**No restitution**	**Not applicable**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$	$

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

While in custody, the defendant shall submit nominal payments of not less than $25 per quarter pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

During the term of supervised release, the defendant shall submit nominal monthly payments of 10% of gross income, but not less than $25 per month, unless further modified by the Court. The defendant shall pay any special assessment or financial obligation owing to the Clerk of the Court, 550 W Fort Street, Boise, ID 83724.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment (8) penalties, and (9) costs, including cost of prosecution and court costs.

FILED

OCT 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. MARCUS SCOTT CRUM, Defendant-Appellee.	No. 17-30261 D.C. No. 1:17-cr-00147-BLW-1 District of Idaho, Boise ORDER

Before: W. FLETCHER, BYBEE, and WATFORD, Circuit Judges.

Judges W. Fletcher and Bybee vote to deny the petition for panel rehearing; Judge Watford votes to grant the petition for panel rehearing. The panel unanimously votes to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed September 30, 2019, is DENIED.