No. _____

IN THE
Supreme Court of the United States

TREMAYNE T. DOZIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Controlled Substances Act (CSA) imposes sentencing enhancements based on an offender's prior felony convictions. 21 U.S.C. § 841(b)(1)(A). A "felony" is defined, for purposes of the CSA, as "[a]n offense that is punishable by imprisonment for more than one year under any law of the United States or of a State." *Id.* § 802(44).

The question presented is whether an offense is "punishable by imprisonment for more than one year" when the maximum term permitted by the applicable statutory sentencing scheme at the time of conviction is one year or less.

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Tremayne T. Dozier respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 949 F.3d 322 and reproduced in the Appendix hereto at Pet. App. 1a-26a. The District Court for the Central District of Illinois's November 9, 2018 oral order denying Mr. Dozier's argument that a sentencing enhancement under 21 U.S.C. § 841(b)(1)(A) was inappropriate is unreported, but reproduced at Pet. App. 27a-36a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit entered its judgment on February 4, 2020, and denied both rehearing and rehearing *en banc* on March 6, 2020. Pet. App. 57a-58a. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari to and including August 3, 2020.

STATUTORY PROVISIONS INVOLVED

Before amendment by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, and as relevant here, 21 U.S.C. § 841(b)(1)(A), provided, in relevant part: "If any person commits such a violation after a prior

conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years."

Section 802(44) of 21 U.S.C. provides that "[t]he term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances."

Section 12.44(a) of the Texas Penal Code provides, in relevant part, that "[a] court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor."

Section 12.21 of the Texas Penal Code provides, in relevant part, that "[a]n individual adjudged guilty of a Class A misdemeanor shall be punished by ... confinement in jail for a term not to exceed one year."

INTRODUCTION

This case presents an important and recurring question about the interpretation of language applied throughout federal criminal law, on which the federal circuits are sharply divided. After petitioner Tremayne Dozier pleaded guilty to a drug offense in 2018, his sentencing court determined that his mandatory minimum sentence must be increased by ten years because of a 2006 Texas state conviction. The court applied 21 U.S.C. § 841(b)(1)(A), which provides that a defendant with a prior "felony drug offense" is subject to a mandatory minimum sentence of twenty years in prison. Congress defined "felony drug offense" to include specific drug-related offenses "that [are] punishable by imprisonment for more than one year under any law … of a State." 21 U.S.C. § 802(44).

At the time of Mr. Dozier's 2006 Texas state conviction and sentencing, he faced a maximum sentence of *less than* twelve months' jail time under the applicable Texas state-law sentencing regime. He had been sentenced pursuant to a Texas state-law sentencing regime that, upon the judge's acceptance of his plea, *required* the judge to sentence him to less than twelve months' jail time.

If the present case had arisen in the Fourth, Ninth, or Tenth Circuits, or likely in the Eighth Circuit, Mr. Dozier would not have received a sentence enhancement because of that prior conviction. Those courts hold that for purposes of the statutory language at issue in this case, an offense is punishable by more than a year only if *that defendant* could have been sentenced to more than one year of imprisonment *at the time of their conviction*. In contrast, a divided panel of the Seventh Circuit below

joined the First Fifth, and Sixth Circuits in construing the word "punishable" to include hypothetical sets of facts that could yield felony convictions carrying a sentence in excess of a year. Because of the Seventh Circuit's interpretation, Mr. Dozier received a mandatory minimum of twenty years in prison instead of ten.

The acknowledged and entrenched circuit split on this important question stems from disagreement about this Court's decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). In *Carachuri-Rosendo*, this Court considered whether a defendant had been "convicted of" a crime "punishable as a federal felony"—that is, a crime for which the "maximum term of imprisonment" under the CSA exceeded one year—for purposes of federal immigration law. *Id.* at 567-58 (citation omitted). The Court held that "[t]he mere possibility that the defendant's conduct, coupled with facts outside the record of conviction, *could have* authorized a felony conviction under federal law is insufficient." *See id.* at 582 (emphasis added). Dissenting below, Judge Hamilton explained that the panel's decision was "not consistent with *Carachuri-Rosendo* or the recent decisions of our colleagues in other circuits" because a sentence of more than one year "was legally impossible [for Dozier] after the judge accepted Dozier's binding plea agreement and convicted him." Pet. App. 15a, 24a.

The split here warrants review because it yields dramatically different sentences for defendants depending on where their case arises. The split also warrants review because it raises important federalism concerns. The Seventh Circuit's decision ignores the Texas legislature's choice of how to structure its state

sentencing and plea bargaining regimes. It forces federal judges to enhance sentences, despite "the particularized evaluation of the need for just punishment by a local prosecutor (an agent of a duly-elected, Constitutional officer of the sovereign State …), under the authority of state statutory law, of the actual facts at issue, and agreed to by a state judge (likewise, a duly-elected, Constitutional officer of the sovereign State …)." *United States v. Valdovinos*, 760 F.3d 322, 338 (4th Cir. 2014) (Davis, J., dissenting).

The Court should grant certiorari.

STATEMENT OF THE CASE

A. Mr. Dozier's 2006 Texas Conviction

In February 2006, Mr. Dozier was charged in Dallas County, Texas, with a violation of Texas Health and Safety Code § 481.115. That statute, which criminalizes possession of less than a single gram of cocaine, describes the offense as "a state jail felony." Tex. Health & Safety Code § 481.115(b). The Texas Penal Code sets out a multi-tiered sentencing regime for a § 481.115 conviction. By default, the offense is punishable by "[c]onfinement in a state jail for any term of not more than two years or less than 180 days." Tex. Penal Code § 12.35(a). But Texas provides two alternative paths. First, it allows prosecutors to prosecute a "state jail felony" like § 481.115 as a Class A misdemeanor, with a maximum twelve-month sentence. *Id.* § 12.44(b). Second, state jail felonies—even if prosecuted as such—can still be *punished* as a misdemeanor. That section, Texas Penal Code § 12.44(a), provides:

> A court may punish a defendant who is convicted of a state jail felony by imposing the confinement

> permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and [various other considerations], the court finds that such punishment would best serve the ends of justice.

Mr. Dozier pleaded guilty to violating § 481.115. The prosecutor recommended a sentence of nine months, citing § 12.44(a). The plea agreement and a joint motion were submitted to the court, asking to "find [Dozier] guilty of a State Jail Felony as charged and impose confinement for a Class A misdemeanor." Supplemental Appendix of Defendant-Appellant, Tremayne Dozier at 12, *United States v. Dozier*, 949 F.3d 322 (7th Cir. 2020) (No. 18-3447), ECF No. 13 ("CA7 Supp. App.").

The magistrate granted the motion, accepted the plea, and recommended a sentence of nine months to the presiding district judge. *Id.* at 28-30. The magistrate's entered plea order stated: "Defendant pleaded guilty to *the offense of* UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE TO-WIT: COCAINE 12.44a." CA7 Supp. App. at 28 (emphasis added). The state judge adopted the magistrate's order and entered the recommended sentence on May 3, 2006. *Id.* at 30; Pet. App. 52a. Mr. Dozier ended up serving nine months in Texas jail. As the plea agreement itself acknowledged, Mr. Dozier could "withdraw [his] plea if the Court rejects any plea bargain made in this case." CA7 Supp. App. at 24. Thus, because the judge accepted the agreement with its stipulated sentence under § 12.44(a), the maximum possible sentence was the misdemeanor range that statute permitted. Had the judge refused to be bound by the terms of § 12.44(a), Mr. Dozier could

have (and would have) exercised his right to withdraw the guilty plea—a fact stipulated to by all parties.

B. Mr. Dozier's 2017 Plea and Sentencing

More than a decade later, Mr. Dozier was charged in federal court with conspiracy to possess methamphetamine with intent to distribute. *See* 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A).[1] The government filed a notice under 21 U.S.C. § 851 informing the district court that it intended to rely on Mr. Dozier's 2006 Texas conviction to enhance his mandatory-minimum sentence under 21 U.S.C. § 841(b)(1)(A).

Mr. Dozier entered a guilty plea a few weeks later, but contested the § 851 notice filed by the government. Because the plain language of § 12.44(a), coupled with his plea agreement, meant that the Texas judge had been *required* to sentence his offense as a misdemeanor, Mr. Dozier argued his previous conviction was not a "felony drug offense" under the plain language of § 841. Indeed, had the Texas judge refused to sentence Mr. Dozier under § 12.44(a), Mr. Dozier would have been entitled to withdraw his plea, and the factual basis for Mr. Dozier's conviction would thus have collapsed. Mr. Dozier argued that his prior conviction might be called a "state jail felony" in Texas, but that the title of the state-law crime is immaterial for purpose of § 841. All that matters is whether the crime is "an offense that is punishable by imprisonment for more than one year under any law …. of a State." 21 U.S.C. § 802(44).

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[1] Mr. Dozier was also charged with possession of methamphetamine with intent to distribute, a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(viii). This charge was later dropped.

Acknowledging this was a difficult issue, and that the government's use of the § 851 notice to seek such a high mandatory minimum was "very harsh," Pet. App. 32a, the trial judge ultimately rejected Mr. Dozier's argument. The judge sentenced Mr. Dozier to a mandatory minimum of twenty years' imprisonment, followed by ten years' supervised release, concluding that this ruling was required "under the current state of the law." *Id.*

C. The Seventh Circuit's Decision Below

A split panel of the Seventh Circuit rejected Mr. Dozier's arguments on appeal. The majority concluded that Mr. Dozier's Texas state-jail conviction was "punishable" by more than one year's imprisonment because the offense had a two-year maximum sentence under some circumstances. Pet. App. 13a. The majority relied on Fifth Circuit precedent dealing with the CSA, as well as with the Armed Career Criminal Act—a piece of legislation whose "definition of 'felony' is materially identical" to that at issue here. Pet. App. 9a.

Judge Hamilton disagreed. As Judge Hamilton explained in his dissenting opinion, "[a]fter *Carachuri-Rosendo* …. it is not enough that Texas cited a drug-possession statute labelled as a felony as Dozier's offense of conviction." Pet. App. 14a-15a. The text of § 802(44) controls what a "felony drug offense" is; how a state refers to the crime is irrelevant. *See* Pet. App. 17a ("State-law labels do not control under 21 U.S.C. § 802(44)."). And under the plain language of that statute, the key question was whether the Texas judge, *at the time of conviction*, had legal authority to send *Mr. Dozier, specifically*, to prison. Simply put: "She did not." Pet. App. 15a.

Judge Hamilton further explained that this result was warranted by this Court's decision in *Carachuri-Rosendo*—a position with which circuit courts across the country have agreed. *See* Pet. App. 20a-21a (citing *United States v. Pruitt*, 545 F.3d 416 (6th Cir. 2008); *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc); *United States v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011); *United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019); *United States v. Brooks*, 912 F.3d 1215 (10th Cir. 2014)). As Judge Hamilton put it, "[t]he logic of *Carachuri-Rosendo* and [*United States v.*] *Rodriquez* shows that the focus must be the punishment legally available at the time of conviction." Pet App. 19a. This timely petition followed.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split On The Question Presented

The federal courts of appeals are divided on the question presented. Had Mr. Dozier's case come up through the Fourth, Ninth, or Tenth Circuits, or likely through the Eighth Circuit, he would not have received an extra ten years in prison. Those courts hold that a defendant's prior conviction is a "felony drug offense" only if *that defendant* could have been sentenced to more than one year of imprisonment under the applicable state sentencing statute *at the time of their conviction*. By contrast, the First, Fifth, Sixth, and Seventh Circuits have held that a defendant's prior conviction can be a "felony drug offense" even when their maximum possible sentence was *less than one year of imprisonment* under the applicable state sentencing statute at the time of conviction. In these circuits, it is enough that the offense *could have* a felony-length sentence under different circumstances.

This split results from the lower courts' divergent interpretations of this Court's decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563. In *Carachuri-Rosendo*, this Court held that when a state prosecutor has "specifically elected to abandon a recidivist enhancement under state law" when prosecuting a particular offense, that offense is "punishable" only to the extent authorized for non-recidivists. *Id.* at 579-80 (citations omitted). Mr. Carachuri-Rosendo was in fact a recidivist, and a different state prosecutor could have chosen to seek a recidivist enhancement. *See id.* at 570–71. Nonetheless, this Court held that later federal courts were precluded from considering the maximum sentence that Mr. Carachuri-Rosendo's underlying conduct might have warranted, had the state prosecutor made a different decision, in determining the extent to which Mr. Carachuri-Rosendo's offense was "punishable" for purposes of federal law. As this Court admonished, such federal overriding of state officials' discretionary sentencing decisions "denigrate[s] the independent judgment of state prosecutors to execute the laws of those sovereigns." *Id.* at 580.

A. The Fourth, Ninth, and Tenth Circuits, and Likely the Eighth Circuit, Hold That Convictions Like Mr. Dozier's Are Not "Punishable" By Imprisonment for More Than One Year

Mr. Dozier would have faced a mandatory minimum of 10 years rather than 20 years in prison had he been convicted of his federal offense in the Fourth, Ninth, or Tenth Circuit, or likely in the Eighth Circuit. After *Carachuri-Rosendo*, those circuits reconsidered their pre-*Carachuri-Rosendo* precedent addressing the

maximum term for which a defendant's prior offenses were "punishable" under the CSA and U.S. Sentencing Guidelines ("USSG").[2] These circuits agree that, following *Carachuri-Rosendo*, offenses cannot be "punishable" under the CSA or USSG for longer than the maximum term permitted for a particular defendant at the time of that defendant's conviction. *See United States v. Valencia-Mendoza*, 912 F.3d 1215, 1221-22 (9th Cir. 2019); *United States v. Brooks*, 751 F.3d 1204, 1213 (10th Cir. 2014); *United States v. Simmons*, 649 F.3d 237, 244-45 (4th Cir. 2011) (en banc); *United States v. Haltiwanger*, 635 F.3d 881, 883-84 (8th Cir. 2011). Mr. Dozier's Texas conviction would not have been a "felony drug offense" in these circuits.

In *United States v. Simmons*, for example, the *en banc* Fourth Circuit held that a defendant could not be

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[2] The felon-in-possession statute, CSA, and USSG all employ the same "punishable … for … [over] one year" formulation. *See* 18 U.S.C.§ 922(g)(1) ("a crime punishable by imprisonment for a term exceeding one year"); 21 U.S.C. § 802(44) ("[a]n offense that is punishable by imprisonment for more than one year"); U.S.S.G. § 4B1.2 cmt. app. n. 1 ("conviction for an offense punishable by death or imprisonment for a term exceeding one year"). Accordingly, federal courts use these definitions interchangeably. *See*, *e.g.*, *United States v. Bates*, 730 F. App'x 281, 285–86 (6th Cir. 2017) (applying career offender case to § 922(g)); *United States v. Brooks*, 751 F.3d 1204, 1211–13 (10th Cir. 2014) (appying CSA case to USSG). And although ACCA contains slightly different language, *see* 18 U.S.C. § 924(e)(2)(A) ("an offense . . . for which a maximum term of imprisonment of ten years or more is prescribed by law"), federal courts apply the same analysis to ACCA. *See*, *e.g.*, *United States v. Newbold*, 791 F.3d 455, 462 (4th Cir. 2015) (stating that CSA case "governs" reading of relevant ACCA language); *United States v. Romero-Leon*, 622 F. App'x 712, 718–19 (10th Cir. 2015) (finding that *Brooks* controlled reading of ACCA language).

deemed to have a prior "felony drug offense" for purposes of the CSA when he had not faced the possibility of a felony-length sentence at the time of conviction in his case. The prior state drug conviction in that case included neither findings of recidivism nor findings of other aggravating factors—both of which were needed to subject Simmons to a sentence of more than a year under applicable state law. *Simmons*, 649 F.3d at 241. Referring to *Carachuri-Rosendo*'s command to use "the conviction itself" as "the starting place," the Fourth Circuit decided it had to "focus first on *Simmons*'s 'conviction itself.'" *Id.* at 243-44 (quoting *Carachuri-Rosendo*, 560 U.S. at 576) (emphasis added). Because that conviction did not expose Simmons to a sentence exceeding one year—even though his "conduct, coupled with facts outside the record of conviction, *could have authorized a conviction* of a crime punishable by more than one year's imprisonment," *id.* at 244 (citation and internal quotation marks omitted) (emphasis added)—the Fourth Circuit held that Simmon's offense was not punishable by more than one year, *id.* at 250. The Fourth Circuit acknowledged that it was creating a circuit split with the Sixth Circuit on this point. *Id.* at 245 n.4.[3]

Mr. Dozier's Texas conviction would not have triggered an enhanced sentence under the Fourth

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[3] Following *Simmons*, the Fourth Circuit has continued to focus on the maximum sentence permitted under the state sentencing scheme applicable at the time of conviction. Accordingly, where a defendant was sentenced under a state sentencing provision permitting a felony sentence, the parties' ad hoc agreement to a lower sentence is not dispositive. *See Valdovinos*, 760 F.3d at 327-30.

Circuit's framework. The *Simmons* court ruled that *Carachuri-Rosendo* nullified any approach "requiring a federal court to calculate an offender's maximum punishment by interpreting a prior state offense in a manner *outlawed* by the state." 649 F.3d at 249. It also looked to the "procedural protections afforded to offenders" under state law. *Id.* at 245. Given § 12.44(a)'s role in Texas's "carefully crafted sentencing scheme," *id.* at 249—and the State's procedural protections for defendants who plead guilty in exchange for a misdemeanor sentence under that statute—the Fourth Circuit's approach would not have treated Mr. Dozier's offense as "punishable" by over one year.

The Tenth Circuit has adopted the same approach as the Fourth. *See Brooks*, 751 F.3d at 1212 n.6 ("[W]e agree with much of what the Fourth Circuit majority wrote in *Simmons*."). Like the Fourth Circuit, the Tenth noted *Carachuri-Rosendo*'s direction "to look at the conviction itself," and to what the state court actually found in the defendant's case—"not to what might or could have been charged." *Id.* at 1207 (citation omitted); *see also id.* at 1210 (stating that "a recidivist increase can *only* apply *to the extent that a particular defendant was found to be a recidivist*"). Also like the Fourth Circuit, the Tenth Circuit overturned precedent holding that courts "must 'focus on the maximum statutory penalty for the offense.'" *Id.* at 1210 (citation omitted). Instead, "in determining whether a state offense was punishable by a certain amount of imprisonment, the maximum amount of prison time a *particular* defendant could have received controls." *Id.* at 1213.

Later Tenth Circuit decisions have reaffirmed the breadth of *Brooks*'s holding. *See, e.g.*, *United States v.*

Romero-Leon, 622 F. App'x 712, 713 (10th Cir. 2015) (holding that the prosecutor's failure to give the defendant notice of potential aggravating factors, which limited the judge to a maximum one-year sentence, meant that the offense did not qualify as a felony); *United States v. Mulay*, 805 F.3d 1263, 1264 n.2 (10th Cir. 2015) (holding that under *Brooks*, a defendant who faced the possibility of only a nine-month sentence at the time of his conviction would not be a career offender).

Thus, in Mr. Dozier's case, the Tenth Circuit would have focused on the maximum sentence Mr. Dozier could have received when convicted—which, under § 12.44(a), was *not* "more than one year." 21 U.S.C. § 802(44).

The Ninth Circuit has gone even further. In *United States v. Valencia-Mendoza*, the Ninth Circuit refused to account for what the defendant's exposure could have been if different findings had been made, or what the potential exposure was at some pre-conviction stage. 912 F.3d at 1216. The defendant had been convicted of an offense that carried a maximum sentence of six months without certain aggravating factors, and up to five years if the jury or the judge found the aggravating factors. *Id.* Because neither the jury nor the judge made those findings and thus that particular defendant could not have been punished by a sentence exceeding one year, the court held that the prior conviction was not a felony under the USSG. *Id.* at 1223-24. The Ninth Circuit thus held that the "punishable" range for the prior offense was limited not only by the record of conviction, but also by the fact that the sentencing judge did not make certain aggravating findings even after a conviction was entered. *Id.*

Similarly, Texas law constrained Mr. Dozier's judge to apply a misdemeanor sentencing range once she accepted Mr. Dozier's plea and made the interests of justice findings that § 12.44(a) required. Because Mr. Dozier's "offense—as actually prosecuted and adjudicated—was punishable under [Texas] law by no more than [twelve] months in prison," Ninth Circuit law would have prohibited a district court from considering his prior conviction a felony drug offense. *Valencia-Mendoza*, 912 F.3d at 1224.

Finally, the Eighth Circuit's approach and reasoning are consistent with the Fourth, Ninth, and Tenth's. In *United States v. Haltiwanger*, 635 F.3d 881 (8th Cir. 2011), the Eighth Circuit explained that determining whether a prior conviction was punishable by more than one year "necessarily requires an examination of the maximum term of imprisonment to which [the defendant himself] was exposed." *Id.* at 883-84 (holding that "the hypothetical possibility that some recidivist defendants could have faced a sentence of more than one year is not enough to qualify [the defendant's] conviction as a felony"). Thus, in Mr. Dozier's case, the Eighth Circuit likely would have joined the circuits on this side of the split in looking to the maximum term of imprisonment to which Mr. Dozier was exposed upon his conviction. It, too, thus would have held that his conviction was "punishable" by less than one year.

B. By Contrast, the First, Fifth, Sixth, and Seventh Circuits Hold That Convictions Like Mr. Dozier's *Are* Punishable By Imprisonment for More Than One Year

Mr. Dozier's offense would be deemed "punishable" by more than one year in the Seventh Circuit and three

others. These circuits have continued to fix an offense's "punishable" term at various points prior to the time of conviction, even after *Carachuri-Rosendo*.

In this case, the Seventh Circuit majority held that a judge's pre-conviction approval of a plea agreement that limited the sentence Mr. Dozier could receive—pursuant to a statute with its own defined sentencing range—did not determine the term by which Mr. Dozier's offense was "punishable." *See* Pet. App. 13a. Because Mr. Dozier pleaded guilty to an offense titled a Texas "State Jail felony," the court determined that the "punishable" term for his offense remained the two-year maximum for generic State Jail felonies. As such, the Seventh Circuit set the point in time for defining an offense's "punishable" term at some point prior to conviction in this case. Had the district court rejected the plea agreement in this case, the Seventh Circuit reasoned, Mr. Dozier might then have faced a conviction with a sentence of up to two years. *See* Pet. App. 2a. The majority thus ignored Mr. Dozier's plea agreement, which required the judge to apply § 12.44(a)'s sentencing regime once she accepted his plea.

The Fifth Circuit takes a similar approach. Dealing with the same Texas law at issue in *Dozier*, the Fifth Circuit held in *United States v. Rivera-Perez*, 322 F.3d 350, 352 (5th Cir. 2003) (per curiam), that "the crime was 'punishable' by more than a year's imprisonment," regardless of "circumstances peculiar to the particular defendant," such as a sentencing regime that limited the sentence the defendant could receive upon conviction. The Fifth Circuit reaffirmed this holding in *United States v. Harrimon*, finding that the offense's "punishable" range is determined by "the maximum

term prescribed by the relevant criminal statute," regardless of "the sentencing judge's discretionary decision either to impose a lesser sentence *or* to allow the prosecutor to prosecute the offense *as a misdemeanor*." 568 F.3d 531, 534 n.3 (5th Cir. 2009) (emphasis added).[4] The Fifth Circuit has continued to follow *Rivera-Perez* and *Harrimon* in the years since *Carachuri-Rosendo*. *See, e.g.*, *United States v. Dixon*, 724 F. App'x 334, 335 (5th Cir.) (involving a plea agreement pursuant to 12.44(a), as in *Dozier*), *cert. denied*, 139 S. Ct. 250 (2018).

The First Circuit has ruled the same way, holding that a state-court offense was "punishable" up to the maximum term allowable for the criminal conduct in any of that state's courts. *United States v. Lopez*, 890 F.3d 332, 337 (1st Cir.) (holding that the maximum punishment a state *superior* court could have imposed for the offense—rather than that which could be imposed by the state *district* court in which the conviction was actually rendered—determined the "maximum term allowable"), *cert. denied*, 139 S. Ct. 261 (2018).

The Sixth Circuit also falls on the Seventh Circuit's side of the line. While it holds that a defendant is not deemed "punishable" up to the maximum sentence that the hypothetical worst offender could receive for the convicted offense, *United States v. Pruitt*, 545 F.3d 416, 422-23 (6th Cir. 2008), it still allows courts to consider

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[4] This holding goes beyond *Dozier*, finding that even if the offense was—pursuant to Texas Penal Code § 12.44(b)—*prosecuted and* sentenced as a misdemeanor, that offense remains punishable as a felony because the court was not obligated to approve the downward departure.

the maximum sentence permitted by a statute's "aggravated" range for a hypothetical defendant in the same criminal history category, *id.* at 420-21. The Sixth Circuit thus looks at whether the defendant "*could have faced* the aggravating factors necessary to impose a sentence within the aggravated range," rather than whether the defendant *did* face those factors. *Id.* at 421 (emphasis added).[5] The Sixth Circuit has continued to apply this rule following *Carachuri-Rosendo*. *See United States v. Bates*, 730 F. App'x 281, 286 (6th Cir. 2017) (finding Arizona's aggravated sentencing scheme susceptible to the same analysis as the North Carolina scheme in *United States v. Pruitt*).

Thus, in the Fourth, Ninth, and Tenth Circuits, and likely in the Eighth Circuit as well, Mr. Dozier's prior conviction would not be deemed "punishable by imprisonment for more than one year," because at the time of sentencing he could not have been sentenced under Texas law to more than twelve months' jail time. But in the First, Fifth, and Seventh Circuits, and likely in the Sixth Circuit, Mr. Dozier would be subject to a ten-year sentence enhancement—all because another, hypothetical defendant could have been sentenced to two years' imprisonment.

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[5] This approach fixes the offense's "punishable" range at a time prior to conviction, because under the state-law scheme at issue an aggravated sentence could only be imposed if aggravating factors were either found by the jury or admitted to by the defendant. *See Pruitt*, 545 F.3d at 420–21.

II. This Case Presents an Important, Recurring Question of Sentencing Law, and Is An Excellent Vehicle to Resolve That Question

This split among the courts of appeals means that defendants in some circuits are sentenced to significantly longer terms merely because of enhancements that would not apply in other circuits. Divergent interpretations of the phrase "punishable by … over one year" can make an enormous difference to defendants facing such enhancements. For Mr. Dozier, whether his prior conviction qualified as a felony determined whether he received a mandatory minimum of ten years or twenty under the CSA. Pet. App. 4a-5a. At times, the disparity is even starker: In felon-in-possession cases, for example, readings of the same language determine whether the conduct is not a crime at all or whether the conduct is a crime for which the defendant receives a mandatory ten-year minimum sentence. *See, e.g.*, *Dixon*, 724 F. App'x at 335. And as the broad and ongoing circuit split on this issue illustrates, the statutory interpretation question presented here repeatedly arises in criminal cases. *See supra* Part I.

This circuit split also strips many persons previously convicted in state courts of "fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). The split allows identical state convictions to qualify as felonies in some circuits but not others. It therefore leaves such defendants with "no sure way to know what consequences will attach to their conduct." *Id.*; *see also Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (holding that, to convict a person under 18 U.S.C. § 922(g), "the Government … must show that

the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it."). Only by resolving this question can this Court remedy these notice and due process problems.

The courts of appeals will not resolve this dispute on their own. The Fourth, Ninth, and Tenth Circuits have all set aside their pre-*Carachuri* precedent and held that offenses may not be deemed "punishable" by more than the maximum sentencing range to which a particular defendant was subject at the time of his conviction. In doing so, the Fourth Circuit acknowledged an explicit conflict with the Sixth Circuit. *See Simmons*, 649 F.3d at 245 n.4 ("We acknowledge that this conclusion is at odds with that of the Sixth Circuit."). The First, Fifth, Sixth, and Seventh Circuits, however, have stuck with (and in some instances reaffirmed) their precedent, even though *Carachuri-Rosendo* was decided ten years ago. *See, e.g.*, *Lopez*, 890 F.3d at 340-41 (acknowledging *Carachuri-Rosendo* but finding it inapplicable); *supra* n.3.[6]

Finally, no vehicle problem prevents the Court from addressing the question presented here. Mr. Dozier received a sentence of twenty years—the mandatory minimum for certain recidivists under 21 U.S.C. § 841(b)(1)(A) (2018)—solely because the district judge

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[6] Indeed, the decision below resembled the Seventh Circuit's pre-*Carachuri* reasoning in *United States v. Perkins*, 449 F.3d 794 (7th Cir. 2006). *Perkins* held that a defendant could be deemed to have committed a "serious" state offense based on a state conviction for which the state judge did not make the findings or provide the notice necessary to trigger the state's recidivism enhancements—and, in fact, did not subject the defendant to the higher sentence. *Id.* at 796. The court reasoned that the defendant was nevertheless "exposed" to the higher sentence. *Id.* at 797.

ruled that his prior conviction qualified as a "felony drug offense." Mr. Dozier presented and preserved his challenge to that determination in the lower courts. Pet. App. 5a. And there is no danger of the case becoming moot: Mr. Dozier's unlawful sentence enhancement extended his incarceration until at least 2034, and doubled his mandatory minimum term of supervised release from five to ten years.

III. The Seventh Circuit's Decision Is Wrong

As Judge Hamilton recognized below, the Seventh Circuit's decision cannot be reconciled with this Court's precedents. In *Carachuri-Rosendo*, this Court rejected a "hypothetical" approach to recidivist enhancements under the CSA. 560 U.S. at 581-82. To reach this holding—and to guide future federal judges through the complex statutory web of sentencing enhancements—the Court emphasized that the defendant's "conviction itself" was the "starting place" and the "relevant statutory hook." *Id.* at 576, 580. Facts "that could have *but did not* serve as the basis for the state conviction and punishment" could not determine the defendant's "punishable" term. *Id.* at 580. Instead, the defendant must be "*actually convicted* of a crime that is *itself* punishable as a felony under federal law." *Id.* at 582.

The Court explained this framework through a commonsense approach in *United States v. Rodriquez*, 553 U.S. 377 (2008):

> Suppose that the defendant asked his or her attorney, "What's the maximum term I face for the new offense?" An attorney aware of ACCA would surely not respond, "10 years," even though 10 years is the maximum sentence

> without the ACCA enhancement. See § 924(a)(2) (2000 ed.).
>
> Suppose that the defendant then pleaded guilty to the felon-in-possession charge. … If the judge told the defendant that the maximum possible sentence was 10 years and then imposed a sentence of 15 years based on ACCA, the defendant would have been sorely misled and would have a ground for moving to withdraw the plea.

Id. at 383-84.

This Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), reaffirmed the analysis outlined in *Rodriquez* and *Carachuri-Rosendo*, again looking to the maximum sentence that the particular defendant actually faced at the time of conviction. As the Court noted, *Carachuri-Rosendo* required that, "when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too." *Moncrieffe*, 569 U.S. at 195–96. The Court thus held in *Moncrieffe* that "to qualify as an aggravated felony [under the CSA], a conviction for the predicate offense must necessarily establish those factors as well." *Id.* at 196. This approach was designed to avoid "post hoc investigation into the facts of predicate offenses that [this Court has] long deemed undesirable," and to "preclude[e] the relitigation of past convictions in minitrials conducted long after the fact." *Id.* at 200–01.

Thus, "[t]he logic of *Carachuri-Rosendo* and *Rodriquez*"—as well as *Moncrieffe*—"shows that the focus must be the punishment legally available at the time of conviction." Pet. App. 19a (Hamilton, J.,

dissenting). Here, Mr. Dozier's prior conviction did not expose him to more than a year's imprisonment, because the trial judge, after considering factors enumerated in the Texas Penal Code, specifically found that a misdemeanor punishment would "best serve the ends of justice." Tex. Penal Code § 12.44(a). That determination bound the court to sentence Mr. Dozier to *less* than a year's imprisonment.

This mandatory sentencing range was not the result of ad hoc plea bargaining. It came from the Texas Penal Code. Texas law provided that the offense at issue in this case could be sentenced as a misdemeanor with a maximum sentence of 12 months if the trial court authorized that charge after making the requisite findings. § 12.44(a); *see Moncrieffe*, 569 U.S. at 196 (stating that marijuana distribution offense was "neither a felony nor a misdemeanor until we know whether the conditions in [the statute] attach," because "each [of the felony and misdemeanor provisions] is drafted to be exclusive of the other").

Under the Texas scheme, once the prosecutor moves the Texas court to make those findings, and the Texas court does so, the court "*must* sentence the defendant to misdemeanor punishment." Pet. App. 16a (emphasis in original). As Judge Hamilton noted below, "federal recidivist rules can be governed by the post-charging actions of a state prosecutor to *raise* the legally permissible sentence in an earlier case" under *Rodriquez* and *Carachuri-Rosendo*; there is "no reason to disregard similar actions that *lowered* the legally permissible sentence in an earlier case." Pet. App. 24a.

The approach taken by the Seventh Circuit and other circuits on its side of the split raises significant

federalism concerns. The Texas legislature's multi-tier state jail felony scheme reflects the legislature's judgment about the seriousness of the various offenses, and sets the label and punishable term accordingly. To let a federal judge "apply his own … enhancement after the fact so as to make the … offense 'punishable' as a felony ... would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns." *Carachuri-Rosendo*, 560 U.S. at 579–80. It would also implicate Congress's CSA sentencing scheme: the CSA's focus on the "punishable" term of imprisonment—not the label of the offense—was designed to bring a "measure of uniformity" to "divergent state classifications of offenses." *Burgess v. United States*, 553 U.S. 124, 134 (2008).

The Seventh Circuit ignored both these state and federal schemes by abstracting away the particular sentencing range to which Mr. Dozier was exposed by his conviction, and instead focusing on the umbrella label of "state jail felony." In so doing, the court below condemned Mr. Dozier to a minimum sentence ten years longer than Congress authorized.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

Appendix A

In the United States Court of Appeals For the Seventh Circuit

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No. 18-3447

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TREMAYNE T. DOZIER,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 18-CR-20002-001 – **James E. Shadid**, *Judge*.

ARGUED SEPTEMBER 5, 2019 — DECIDED FEBRUARY 4, 2020

Before SYKES, HAMILTON, and SCUDDER, *Circuit Judges*.

SYKES, *Circuit Judge*. Tremayne Dozier was arrested in 2017 for trafficking methamphetamine in Decatur, Illinois. A federal grand jury indicted him for conspiracy and possession of methamphetamine with intent to distribute. Under the terms of the Controlled Substances Act then in effect, Dozier faced increased

penalties if he had a prior conviction for a "felony drug offense." 21 U.S.C. § 841(b)(1)(A), (b)(1)(B)(viii).[1] A "felony drug offense" is a drug-related offense "that is punishable by imprisonment for more than one year under any law of the United States or of a State." *Id.* § 802(44). The government identified one such conviction: in 2006 Dozier was convicted in Texas of unlawful possession of cocaine, a "state jail felony" punishable by imprisonment of six months to two years.

Dozier pleaded guilty to the conspiracy count. At sentencing he objected to using the 2006 drug conviction to enhance his sentence. The Texas case had been resolved by plea bargain; in exchange for Dozier's guilty plea, the prosecutor agreed to a nine-month sentence based on section 12.44(a) of the Texas Penal Code, which gives the sentencing judge the discretion to punish a person convicted of a state jail felony by imposing a period of confinement permissible for a Class A misdemeanor—that is, a term not to exceed one year. *See* TEX. PENAL CODE ANN. §§ 12.21, 12.44(a). The Texas court accepted the plea agreement, found Dozier guilty of the state jail felony, and imposed a nine-month sentence.

Dozier argued that the Texas conviction was not a qualifying predicate because the terms of his plea agreement exposed him to confinement of not more than one year. The district judge rejected this argument and

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[1] The First Step Act of 2018, effective December 31, 2018, changed recidivist penalties for drug crimes. We refer throughout this opinion to the 2018 penalty provisions in the Controlled Substances Act.

imposed a sentence of 20 years, the mandatory minimum for an offender with a prior felony drug conviction.

On appeal Dozier again argues that his 2006 Texas conviction doesn't qualify as a felony drug offense. We disagree. Dozier pleaded guilty to and was convicted of a two-year state jail felony. It does not matter that the sentencing judge accepted the plea bargain and exercised the discretion conferred by state law to sentence Dozier as if he were a misdemeanant. Dozier was, in fact, convicted of a two-year drug felony. We affirm the judgment.

I. Background

In February 2006 Dozier was charged in Dallas County with possession of less than one gram of cocaine in violation of section 481.115 of the Texas Health and Safety Code. The crime is a "state jail felony" under Texas law, punishable by "[c]onfinement in a state jail for any term of not more than two years or less than 180 days."[2] TEX. PENAL CODE ANN. § 12.35(a). On May 3 Dozier agreed to plead guilty in exchange for a sentence of nine months. The written plea agreement, which he signed, lists the offense and its punishment range—"State Jail Felony, 180 days – 2 years State Jail"—and specifies an "agreed sentence" of nine months, citing

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[2] Texas law has five felony classifications: "(1) capital felonies; (2) felonies of the first degree; (3) felonies of the second degree; (4) felonies of the third degree; and (5) state jail felonies." TEX. PENAL CODE ANN. § 12.04(a). Section 481.115(b) of the Texas Health and Safety Code provides that the possession of a controlled substance in an amount "by aggregate weight, including adulterants or dilutants, [of] less than one gram" is "a state jail felony."

section 12.44(a) of the Texas Penal Code. That section provides:

> A court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice.

TEX. PENAL CODE ANN. § 12.44(a).[3]

The prosecutor submitted the agreement to a magistrate judge that same day along with a motion to "find [Dozier] guilty of a State Jail Felony as charged and impose confinement for a Class A misdemeanor." Dozier joined the motion. The magistrate granted it, accepted Dozier's guilty plea, and found him "guilty of a State Jail Felony as charged herein." The magistrate then recommended that the presiding district judge adopt the plea agreement and impose a sentence of nine months. The judge did so, entering judgment on May 3, 2006, convicting Dozier of the state jail felony and ordering him to serve nine months in jail.

Fast-forward to October 2017: Dozier was arrested in Decatur for dealing crystal meth. In January 2018 a

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[3] A different subsection of the statute permits a state prosecutor, with the court's approval, to *prosecute* a state jail felony as a misdemeanor offense: "At the request of the prosecuting attorney, the court may authorize the prosecuting attorney to prosecute a state jail felony as a Class A misdemeanor." TEX. PENAL CODE ANN. § 12.44(b). This subsection is not at issue here.

grand jury indicted him for conspiracy to possess methamphetamine with the intent to distribute, 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), and possession of methamphetamine with the intent to distribute, *id.* § 841(a)(1), (b)(1)(B)(viii). The government filed an information under 21 U.S.C. § 851 notifying the court that it intended to rely on Dozier's 2006 Texas conviction to enhance the applicable penalties under § 841. Specifically, with one prior conviction for a felony drug offense, Dozier faced a 20-year minimum sentence on the conspiracy count, *see* § 841(b)(1)(A), and a 10-year minimum on the possession count, *see* § 841(b)(1)(B).

Dozier pleaded guilty to the conspiracy count. At sentencing he objected to using the Texas conviction to enhance his sentence. He argued that the conviction wasn't for a felony offense because under the plea agreement, he wasn't exposed to imprisonment of more than one year. The judge overruled the objection, counted the conviction as a qualifying predicate, and sentenced Dozier to a prison term of 20 years, the mandatory minimum.

II. Discussion

Dozier reserved the right to appeal the judge's ruling that the Texas conviction qualifies as a predicate felony drug conviction, triggering the enhanced minimum sentence under § 841(b)(1)(A). We review de novo questions of law related to sentencing. *United States v. Woolsley*, 535 F.3d 540, 549 (7th Cir. 2008). When a district court determines that a prior conviction counts toward a recidivist sentencing enhancement, we review de novo that application of the law to the fact of the prior

conviction. *United States v. Burge*, 683 F.3d 829, 833 (7th Cir. 2012).

Under then-existing law, a conviction for conspiracy to distribute methamphetamine in the quantities at issue here normally carried a 10-year minimum sentence, but a prior conviction for a "felony drug offense" raised the mandatory minimum to 20 years. § 841(b)(1)(A). As we've explained, a "felony drug offense" is a drug-related offense "that is punishable by imprisonment for more than one year under any law of the United States or of a State." § 802(44). "The word 'punishable' in ordinary English simply means 'capable of being punished.'" *United States v. Nieves-Rivera*, 961 F.2d 15, 17 (1st Cir. 1992) (citations omitted).

Dozier asserts that he pleaded guilty to the Texas drug charge—a two-year felony—on the understanding that he was only exposing himself to punishment for a Class A misdemeanor, which limits confinement to one year. *See* TEX. PENAL CODE ANN. § 12.35(a) (penalties for state jail felonies); *id.* § 12.21 (misdemeanor penalties). His plea agreement referred to section 12.44(a) of the Texas Penal Code, which gives the sentencing judge the discretion to punish a person convicted of a state jail felony by imposing the confinement permissible for a Class A misdemeanor after considering certain factors about the circumstances of the crime and the character of the offender. If the judge had rejected the plea agreement and the magistrate's recommendation of a nine-month sentence, Dozier would have been entitled to withdraw his guilty plea. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2). Because his case was resolved under section

12.44(a), Dozier argues that the conviction doesn't qualify as a predicate felony drug conviction and should not have been used to enhance his sentence.

The Fifth Circuit, which includes Texas, has considered and rejected this argument, albeit in the context of a recidivist enhancement in the Sentencing Guidelines. In *United States v. Rivera-Perez*, the defendant was convicted of illegal reentry after deportation and objected to using his prior conviction for a Texas state jail felony to increase his base offense level under the Guidelines. 322 F.3d 350, 351 (5th Cir. 2003). The applicable offense guideline added 16 levels if the defendant was previously deported after a conviction for a felony "crime of violence"; using language materially identical to § 802(44), the application notes define "felony" as "'any federal, state, or local offense punishable by imprisonment for a term exceeding one year.'" *Id.* at 351–52 (quoting U.S.S.G. § 2L1.2(b)(1)(A) cmt. n.1(B)(iv) (Nov. 2001)). The defendant argued that his Texas conviction for a state jail felony did not trigger the enhancement because his plea agreement relied on section 12.44(a) of the Texas Penal Code and his actual sentence was just 90 days.

The Fifth Circuit disagreed, explaining that "[t]he plain language of [section] 12.44[a] indicates that the crime remains 'the felony committed' even though the defendant may be punished as if for a misdemeanor." *Rivera-Perez*, 322 F.3d at 352. The court pointed to a series of Texas cases confirming that the "crime remains a felony even if punished as a misdemeanor under [section] 12.44[a]." *Id.* (citing *Fite v. State*, 60 S.W.3d 314, 320 (Tex. Ct. App. 2001); *Arriola v. State*, 49 S.W.3d

374, 375–76 (Tex. Ct. App. 2000); *Hadnot v. State*, 851 S.W.2d 378, 379 (Tex. Ct. App. 1993)).[4] Finally, the court noted that the defendant's plea agreement clearly stated that "although [he] was being punished as for a misdemeanor, the judgment 'shall constitute *A FINAL FELONY CONVICTION FOR DEFENDANT*.'" *Id.* Accordingly, the court held that a conviction for a Texas state jail felony, a two-year felony under state law, qualifies as a predicate for the Guidelines enhancement "regardless [of] whether the defendant is sentenced under Texas Penal Code [section] 12.44[a]." *Id.*

Three years after *Rivera-Perez*, the Fifth Circuit reached the same conclusion in a case involving the recidivist provision in the Armed Career Criminal Act ("ACCA"), which raises the minimum sentence for certain gun crimes if the defendant has prior convictions for a "violent felony." *United States v. Harrimon*, 568 F.3d 531, 533 n.3 (5th Cir. 2009). The ACCA defines "felony" the same way as the Guidelines: "any crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B). Richard Ray Harrimon pleaded guilty to unlawfully possessing firearms, and the court had to decide whether his two Texas convictions for "fleeing by vehicle"—both state jail felonies—counted as predicate "violent felonies" under

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[4] Another Texas case can be added to the Fifth Circuit's list, one decided after *Rivera-Perez*. *See Ex parte Palmberg*, 491 S.W.3d 804, 805 n.1 (Tex. Crim. App. 2016) (affirming that a "felony *conviction* is all that an applicant must show for a claim to be cognizable in post-conviction habeas corpus proceedings" and stating that an applicant who was sentenced under section 12.44(a) was "convicted of a state jail felony").

the ACCA. *Harrimon*, 568 F.3d at 533 n.3. One of Harrimon's Texas cases had been resolved under section 12.44(a) with a misdemeanor-length sentence; he argued that it could not be counted as a predicate. The Fifth Circuit disagreed, reaching the same conclusion as it had in *Rivera-Perez*: "the relevant statute [describing the state jail felony] plainly authorizes up to two years of imprisonment … , a fact which is unaltered by the sentencing judge's discretionary decision [under section 12.44(a)] to impose a lesser sentence." *Id.*

The Fifth Circuit's reasoning is sound. We'd need a good reason to disagree—or at least a statutorily grounded basis for reaching a different conclusion under the recidivist provisions in the Controlled Substances Act. But the Act's definition of "felony" is materially identical to the definitions in the ACCA and the Guidelines. Dozier has given us no basis for treating his Texas state-jail-felony conviction differently in this context.

Dozier argues instead that *Rivera-Perez* and *Harrimon* have been called into question by the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). *Carachuri-Rosendo* arose under the Immigration and Nationality Act ("INA") and concerned eligibility for cancellation of removal, a form of discretionary relief available to immigrants in removal proceedings who have "not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). The INA's definition of "aggravated felony" includes a "drug trafficking crime," *id.* § 1101(a)(43)(B), a phrase further defined by cross-reference to the definitions in Title 18: a "drug trafficking crime" is "any felony punishable

under the Controlled Substances Act (21 U.S.C. §§ 801 *et seq.*)," 18 U.S.C. § 924(c)(2), and a "felony" is a crime for which the "maximum term of imprisonment authorized" is "more than one year," *id.* § 3559(a)(5).

Jose Carachuri-Rosendo was placed in removal proceedings based on two Texas misdemeanor convictions for simple drug possession. *Carachuri-Rosedo*, 560 U.S. at 570–71. He conceded removability but sought relief in the form of cancellation of removal. The government opposed cancellation, arguing that his second offense for simple possession could have been prosecuted in federal court with a recidivist enhancement, and in that scenario his offense would have been a felony punishable by up to two years in prison. *Id.* at 570. (State law, too, authorized a sentence enhancement for recidivists, but Carachuri-Rosendo was not convicted of a recidivist-enhanced offense. *Id.* at 570–71.) Because his conduct *could have been* prosecuted as a felony under the Controlled Substances Act (by application of a recidivist enhancement), the government insisted that Carachuri-Rosendo was ineligible for cancellation of removal.

The Fifth Circuit agreed, but the Supreme Court reversed. The Court held that the INA "limits the Attorney General's cancellation authority only when the noncitizen has actually been 'convicted of a[n] aggravated felony'—not when he merely could have been convicted of a felony but was not." *Id.* at 578 (quoting 8 U.S.C. § 1229b(a)(3)).

Carachuri-Rosendo does not undermine *Rivera-Perez* and *Harrimon*. The defendants in the two Fifth Circuit cases *actually were* convicted of felonies; they

were not convicted of misdemeanors that *could have been* prosecuted as felonies but were not. Just so here. Dozier was convicted of a two-year state jail felony but received a misdemeanor-length sentence pursuant to a plea bargain.

Dozier also relies on *United States v. Valencia-Mendoza*, 912 F.3d 1215, 1216 (9th Cir. 2019), but that case doesn't help him. In *Valencia-Mendoza* the defendant pleaded guilty to illegal reentry after removal; at sentencing the district court applied a Guidelines recidivist enhancement for offenders with a prior felony conviction based on the defendant's Washington conviction for possession of cocaine, a Class C felony. *Id.* State law specified a five-year maximum for that felony class, but the statutory scheme also set a *mandatory* six-month cap on the sentence unless certain aggravating factors were present. *Id.* at 1216–17. The six-month cap applied in the defendant's case because no aggravating factors were found; he was sentenced to just 30 days. *Id.* at 1217. Applying *Carachuri-Rosendo*, the Ninth Circuit reversed and remanded for resentencing without the enhancement. Because the statutory maximum penalty for the crime was six months, the defendant's offense wasn't punishable by a term exceeding one year as required for the enhancement. *Id.* at 1224.

Dozier's Texas conviction is different. Section 12.44(a) is discretionary, not mandatory.

For the same reason, Dozier's reliance on the Eighth Circuit's decision in *United States v. Haltiwanger* is also misplaced. In that case, the defendant was convicted of conspiracy to distribute drugs and (like Dozier) faced a

20-year mandatory minimum under § 841 if he had a prior conviction for a felony drug offense. 637 F.3d 881, 882 (8th Cir. 2011). The defendant had a Kansas conviction for failing to affix a drug tax stamp, a crime with a 13-month statutory maximum. The district court counted the conviction, imposed the 20-year minimum sentence, and the Eighth Circuit initially affirmed. *Id.* at 882–83. After the Supreme Court remanded for reconsideration in light of *Carachuri-Rosendo*, the Eighth Circuit reversed course. Because the defendant was not a recidivist, the statutory maximum penalty for his Kansas offense was seven months. *Id.* Accordingly, the court concluded that the conviction did not qualify as a prior felony drug conviction and remanded for resentencing. *Id.* at 884.

Again, Dozier's case is different. Under section 12.44, a Texas court has the *discretion* to punish a state jail felony by imposing a misdemeanor-length term of confinement. The statutory maximum for the offense is two years.

This case is closer to *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003). There the district court sentenced the defendant to the 20-year minimum term under § 841 based on his prior Illinois conviction for felony drug possession. *Id.* The defendant argued that the conviction did not count as a prior drug felony because the Illinois court had sentenced him to "first offender probation," which he successfully completed. *Id.* at 781. We rejected that argument, holding that the state court's decision to sentence the defendant to probation rather than prison "does not alter the fact that he possesses a prior drug-related felony conviction

qualifying him for the enhancement under § 841(b)(1)(B)." *Id.* at 783.

To sum up, Dozier pleaded guilty to and was convicted of a Texas state jail felony punishable by confinement of six months to two years. For purposes of the Controlled Substance Act's sentencing enhancements for prior felony drug convictions, the fact that the statutory punishment range for Dozier's offense of conviction extended beyond one year is all that matters. Texas law is clear that a conviction for a state jail felony *remains* a conviction for a state jail felony even if the sentencing court exercises the discretion conferred by section 12.44(a) and imposes a misdemeanor-length sentence. The district judge properly counted Dozier's Texas conviction as a predicate felony drug conviction under § 841.

AFFIRMED

HAMILTON, *Circuit Judge*, dissenting. No matter how we decide this appeal, Mr. Dozier will be punished severely for his 2018 federal methamphetamine conviction. Our question is whether the mandatory minimum sentence for his federal conviction is ten years or twenty, imposed before the First Step Act took effect. The answer depends on the legal effect of his 2006 conviction in Texas for possessing 0.4 grams of cocaine. More specifically, the question is whether that conviction counts as one for a prior "felony drug offense" under 21 U.S.C. § 841(b) (2018), defined in 21 U.S.C. § 802(44) as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to" various controlled substances.

The key word here is "punishable." If a defendant's prior sentence was more than a year in prison, it is easy to apply. If a defendant's prior sentence was less than a year in prison, it is also established that we focus on what the defendant's sentence for the crime could have been under the law, not what it actually was. But in applying that standard to a host of state statutes and sentencing guidelines, the deceptively simple word "punishable" becomes more complex. Two questions are decisive here: who must be punishable with more than one year in prison, and as of what point in the proceedings? My colleagues do not answer those questions directly, but the correct answers point toward reversal here.

After *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), it is not enough that Texas cited a drug-possession statute labeled as a felony as Dozier's offense

of conviction. It also is not enough that others convicted under that same statute might face more than a year in prison. The question is instead whether, *at the time of conviction*, the Texas judge had legal authority to send *Dozier himself* to prison for more than one year. She did not. Such a sentence was legally impossible after the judge accepted Dozier's binding plea agreement and convicted him. I would accordingly find that the 2006 conviction was, for Dozier, not for "an offense that is punishable by imprisonment for more than one year." Even if that conclusion is not correct, the use of the word "punishable" in the Controlled Substances Act is at least ambiguous as applied to this Texas conviction. I would apply the rule of lenity and still remand this case for resentencing.

I. *Offense "Punishable" by More than One Year?*

Dozier was charged with violating Texas Health & Safety Code § 481.115, which makes possession of less than a gram of cocaine a "state jail felony." Ordinarily, a state jail felony can be punished by up to two years in a state jail. Tex. Penal Code § 12.35(a). Dozier was certainly charged with an offense that was punishable by imprisonment for more than one year.

But the Controlled Substances Act speaks of "a prior conviction," of course, not a prior charge. Pursuant to a plea agreement, the Texas prosecutor and Dozier jointly moved the court to "find him guilty of a State Jail Felony as charged and impose confinement for a Class A misdemeanor as provided in Sec. 12.44(a) of the Texas Penal Code" (underlining in original). Section 12.44 gives judges and prosecutors two paths to ensure that a "state jail felony" is punished as a misdemeanor:

> (a) A court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice.
>
> (b) At the request of the prosecuting attorney, the court may authorize the prosecuting attorney to prosecute a state jail felony as a Class A misdemeanor.

Tex. Penal Code § 12.44. After committing to either the (a) path or the (b) path, the judge *must* sentence the defendant to misdemeanor punishment, which means "confinement in jail for a term not to exceed one year." *Id.* § 12.21. Dozier's binding plea agreement, for example, required a sentence of nine months.

The Texas trial court granted the joint motion under § 12.44(a). The final judgment described the offense of conviction using two phrases: "convicted of: state jail" and "punishment reduced to: Class A misdemeanor." Importantly, the judgment also stated that Dozier had the right to withdraw his guilty plea if the court had rejected the misdemeanor punishment.[1] As a result,

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[1] See Tex. Code Crim. Proc. art. 26.13(a)(2) ("[T]he court shall inform the defendant whether it will follow or reject the agreement in open court and before any finding on the plea. Should the court reject the agreement, the defendant shall be permitted to withdraw the defendant's plea of guilty . . . .").

Dozier's conviction barred the judge from sentencing him to more than one year.

Texas was still free to refer to the offense of conviction as a "state jail felony," of course, and to attach whatever collateral consequences that label carries in Texas. I assume that Texas in fact regarded Dozier's conviction as a state jail felony. The majority concludes that the label of the offense and the ordinary maximum of two years control here, relying on Fifth Circuit decisions that have so interpreted Texas Penal Code § 12.44(a). See ante at 12. But ours is a question of federal statutory interpretation, not Texas law as such. See *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003). State-law labels do not control under 21 U.S.C. § 802(44). *Burgess v. United States*, 553 U.S. 124, 129 (2008).

More important, the analysis must look beyond the maximum possible sentence for just any defendant. There is no doubt that some defendants convicted of the offense of conviction, possession of less than one gram of cocaine, can be punished with as much as two years in prison. See Tex. Health & Safety Code § 481.115(b); Tex. Penal Code § 12.35(a). As I read the Supreme Court's decisions most closely on point, however, we have answers to the two questions: who must be punishable, and as of when? The issue is not whether *anyone* convicted of the offense can be sentenced to more than one year, but whether *this defendant* could have been sentenced to more than one year. And that question must be answered as of the time of conviction, not any earlier stage, such as charging or plea negotiations.

In *United States v. Rodriquez*, 553 U.S. 377 (2008), and *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), the Supreme Court directed the focus to the situation of this individual defendant. In *Rodriquez*, the defendant was convicted in federal court of possessing a firearm as a felon in violation of 18 U.S.C. § 922(g). His maximum sentence was ten years, unless he had three previous convictions for violent felonies or "serious drug offenses," in which case he faced a minimum fifteen years in prison. "Serious drug offense" was defined for these purposes to include state drug offenses "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii); see 553 U.S. at 381–82. For a first-time offender, Rodriquez's three prior Washington drug felonies would have carried maximum five-year sentences. Because of his individual criminal record, though, the offenses Rodriquez had committed carried maximum sentences of ten years. *Id.* at 380–81. The Supreme Court held that the maximum sentences "prescribed by law" as "set by the applicable recidivist provision" *applicable to Rodriquez* were the relevant standards. *Id.* at 393. His state convictions therefore triggered the enhanced federal sentence.

Rodriquez thus teaches us to focus on the punishment this individual defendant faced in the prior case. So far, so good. Two years later in *Carachuri-Rosendo*, the Supreme Court rejected the government's effort to stretch the logic of *Rodriquez* to the punishment that some other hypothetical offenders might face. See 560 U.S. at 577 n.12 (distinguishing *Rodriquez*). In doing so, the Court reinforced the focus on the particular defendant and taught that the

punishment authorized by law must be measured at the time of the individual defendant's conviction, not the time of charging.

The question in *Carachuri-Rosendo* was whether, under immigration law, the petitioner had been convicted of an "aggravated felony." The government argued that the second of two drug possessions, which had been treated as a misdemeanor under Texas law, should count as an aggravated felony under federal immigration law. According to the government, since the offense *could have been* prosecuted as an aggravated felony under federal law, the petitioner should be treated as if he had been convicted of an aggravated felony. 560 U.S. at 570. The Supreme Court unanimously rejected that proposal to rely on what could have been. The record of the second conviction included no finding about the first conviction. That distinguished the case from *Rodriquez* and meant that the second conviction did not count as an aggravated felony. *Id.* at 576–78 & n.12.

The Court explained further in *Carachuri-Rosendo* that the aggravated felony determination for federal law had to be based on the record of conviction, not based on what a different prosecutor might have tried to do with a recidivist enhancement. *Id.* at 580–81. In other words, the defendant must "have been *actually convicted* of a crime that is itself punishable as a felony under federal law." *Id.* at 582.

The logic of *Carachuri-Rosendo* and *Rodriquez* also shows that the focus must be the punishment legally available at the time of conviction, not the time of charging. Both opinions stressed the facts that

recidivist enhancements (a) may not be known at the time of charging and (b) ordinarily must be the subject of formal notice and an opportunity to be heard and must be reflected in the record before they can be used to enhance a sentence. 553 U.S. at 389; 560 U.S. at 572, 576.

The same logic also works for the benefit of a defendant who agrees to plead guilty to a lesser charge. For example, my colleagues and I agree that a defendant who is charged with a low-level felony but who pleads guilty to a serious misdemeanor (maximum sentence of one year) has not been convicted of an offense "punishable" by more than one year in prison. That is so even if he faced more than one year at the time of charging, and even if his actual conduct could have fully justified a felony conviction and sentence. At the time of conviction, such a defendant was not facing more than one year in prison.

With the proper focus on the maximum sentence legally applicable *to this defendant*, *on this record*, *at the time of conviction*, I do not see a sound basis for distinguishing such a plea agreement from this case. At the time of his 2006 conviction, Dozier was not legally subject to a sentence of more than one year.

Our colleagues in other circuits have applied *Rodriquez* and *Carachuri-Rosendo* to mandatory state sentencing guidelines. Their decisions are consistent with my reading of those Supreme Court cases. A consensus is emerging that a maximum penalty set by state sentencing guidelines—as applied to a particular defendant—controls the federal question of what punishment was available. For instance, in *United States v. Pruitt*, 545 F.3d 416, 423 (6th Cir. 2008), the

Sixth Circuit interpreted *Rodriquez* to require asking whether "the particular defendant actually faced the possibility of the enhancement." Cases decided since *Carachuri-Rosendo* have continued this approach. See *United States v. Simmons*, 649 F.3d 237, 243 (4th Cir. 2011) (en banc) (prior conviction "punishable" only to extent that mandatory state sentencing guidelines permitted for the particular defendant); *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011) (same, notwithstanding state's label of prior conviction as "felony"); *United States v. Valencia-Mendoza*, 912 F.3d 1215, 1224 (9th Cir. 2019) (same); *United States v. Brooks*, 751 F.3d 1204, 1211 (10th Cir. 2014) (same, focusing on record of prior conviction); see also *United States v. Lockett*, 782 F.3d 349, 352 (7th Cir. 2015) ("under *Rodriquez*, if state court records do not demonstrate that Lockett actually faced the possibility of a recidivist enhancement, the 1990 convictions cannot be used as qualifying offenses").

These decisions point in the same direction I would take: focus on the legally available maximum sentence, on the state-court record, at the time of conviction. Take *Simmons*, in which the en banc Fourth Circuit followed *Carachuri-Rosendo* to overrule its prior precedents. See 649 F.3d at 241. North Carolina categorized the predicate offense as a "Class I felony." *Id.* at 240. Depending on a defendant's history and other factors established by state law, the maximum sentence could have been over a year or no time at all. *Id.* at 241. Before *Carachuri-Rosendo*, the Fourth Circuit had used a "worst possible criminal history" approach, imagining how North Carolina would treat the worst recidivist

charged with that crime. *Id.* at 241, 246. *Simmons* abandoned this method because *Carachuri* had rejected "considering hypothetical aggravating factors when calculating [the] maximum punishment." *Id.* at 244. Instead, the Fourth Circuit looked at the sentence to which Simmons himself was exposed based on the sentencing factors proved by the state. That sentence was only "community punishment," with no prison at all. *Id.* at 243.

This individualized evaluation cannot happen at the time of charging. The main dissent in *Simmons* pressed this very point: "the aggravated factors need not be part of the indictment or formal charge, nor is the conviction itself different from a conviction for the presumptive (or, indeed, mitigated) offense." *Id.* at 256 (Agee, J., dissenting). But the Fourth Circuit correctly rejected this argument as contrary to *Rodriquez* and *Carachuri-Rosendo*. *Id.* at 243 (majority). In *Rodriquez*, the Supreme Court explained that if state court records "do not show that the defendant faced the possibility of a recidivist enhancement, it may well be that the Government will be precluded from establishing that a conviction was for a qualifying offense." 553 U.S. at 389. *Carachuri-Rosendo* reiterated this limit on *Rodriquez*: "a recidivist finding could set the 'maximum term of imprisonment,' but only when the finding is a part of the record of conviction." 560 U.S. at 577 n.12; see also, e.g., *Brooks*, 751 F.3d at 1210 (following this limit on *Rodriquez* to overrule circuit precedent).

My colleagues err in concluding that *Simmons* and similar decisions are not relevant here. The majority distinguishes *Valencia-Mendoza*, 912 F.3d at 1216, and

Haltiwanger, 637 F.3d at 881, on the theory that the lower sentences in those cases were mandated by law, while the use of § 12.44(a) is discretionary. Ante at 10–11. The theory does not stand up to those opinions or the state-court record here. Both *Rodriquez* and *Carachuri-Rosendo* also dealt with decisions by prosecutors that were discretionary at the outset. The prosecutors could decide how to charge the defendants and whether to seek recidivist enhancements. Section 12.44, in both subsections (a) and (b), gives the judge alone or the judge and the prosecutor together discretion to reduce the available sentencing range. But once the judge exercised that discretion in Dozier's 2006 case to accept a binding plea with a § 12.44(a) agreement, the reduced range became as binding for Dozier as the reduced ranges were in *Valencia-Mendoza* and *Haltiwanger* and the other mandatory state-guideline cases.

A prosecutor's choice *after* charging to prove up a recidivist enhancement, which controlled in *Rodriquez*, is just the counterpart to a choice to offer a plea to a misdemeanor or a binding plea for a misdemeanor sentence under § 12.44(a). Under the North Carolina guidelines in *Simmons*, for instance, "[o]nce the judge identifies the appropriate range . . . he must choose the defendant's minimum sentence from within that range." 649 F.3d at 240; see also N.C. Gen. Stat. § 15A-1340.16(a) ("[T]he decision to depart from the presumptive range is in the discretion of the court."). In other words, a North Carolina judge has an initial and discretionary choice. After the choice is made, though, the sentence is capped as a matter of law. The same is true of the discretion

authorized by § 12.44(a) and used in Dozier's binding plea agreement.[2]

Perhaps the Supreme Court meant to establish a one-way ratchet in *Rodriquez*—so that a post-charging recidivist enhancement can raise a maximum sentence but a post-charging, legally binding cap cannot lower it. That seems to be the rule my colleagues implicitly adopt. But that is not consistent with *Carachuri-Rosendo* or the recent decisions of our colleagues in other circuits. Since federal recidivist rules can be governed by the post-charging actions of a state prosecutor to *raise* the legally permissible sentence in an earlier case, I see no reason to disregard similar actions that *lowered* the legally permissible sentence in an earlier case. And since Dozier retained an unqualified right to withdraw his guilty plea if the judge had rejected the misdemeanor punishment under § 12.44(a), his 2006 offense was not punishable by more than one year in prison when he was convicted. That cap was as legally binding as if Dozier had pleaded guilty to an offense labeled a misdemeanor.

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[2] In fact, the leading Fifth Circuit case analyzing § 12.44(a) emphasized the parallel to mandatory sentencing guidelines. In *United States v. Rivera-Perez*, relied on by the majority, ante at 6–7, the Fifth Circuit said that it was "apply[ing] the essential reasoning" of its decision the previous year in *United States v. Caicedo-Cuero*, 312 F.3d 697 (5th Cir. 2002). See 322 F.3d 350, 352. *Caicedo-Cuero* involved a Texas law that "provided a maximum sentence of two years but mandated that first-offenders should get suspended sentences and probation." *Id.* So while my colleagues seek to draw a sharp line between § 12.44(a) and mandatory sentencing guidelines, their similarities provided the "essential reasoning" of the case the majority relies on.

His mandatory minimum sentence in this case should have been ten years, not twenty.

II. *The Rule of Lenity*

At the very least, we should recognize that the Controlled Substances Act is ambiguous as applied to Dozier's case. The phrases "a prior conviction" and "an offense that is punishable by imprisonment for more than one year" simply do not dictate the treatment of binding plea agreements to hybrid convictions under § 12.44(a). To my knowledge, only one other circuit has examined a plea agreement with a binding sentencing term after *Carachuri-Rosendo*. A Fourth Circuit panel also split on the question. See *United States v. Valdovinos*, 760 F.3d 322 (2014); *id.* at 330 (Davis, J., dissenting). As here, the panel majority sided with the government, declining to extend the reasoning of *Simmons* to a binding plea agreement. But Judge Davis's dissent shows room for reasonable disagreement on how Congress meant courts to analyze a binding plea under an unusual statute like § 12.44(a).

I think the better reading is that Dozier's 2006 conviction should not count under § 841(b), but even if I thought the proper result were not clear, I would apply the rule of lenity. The rule of lenity "applies if at the end of the process of construing what Congress has expressed there is a grievous ambiguity or uncertainty in the statute." *Shaw v. United States*, 137 S. Ct. 462, 469 (2016) (quotations omitted). "When a statute remains ambiguous even after considering its text, context, structure, history and purpose, then—and only then—the rule of lenity may apply." *United States v. Marcotte*, 835 F.3d 652, 656 (7th Cir. 2016). "[T]he rule

has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing . . . ." *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).

Acknowledging the rule's limited scope, I believe this to be an appropriate case for its application. Section 12.44(a) sets up a hypothetical almost tailor-made to test the boundaries of the increasingly case-specific arithmetic mandated by the Supreme Court in this context. When such a hypothetical presents itself, we should err on the side of lenity because "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008).

I respectfully dissent. We should reverse and remand for resentencing without the enhancement based on Dozier's 2006 conviction.

Appendix B

[1]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	Docket No. 18-20002
Plaintiff,	Urbana, Illinois
vs.	November 9, 2018
	12:05 p.m.
TREMAYNE T. DOZIER,	
Defendant.	

CONCLUSION OF SENTENCING HEARING

BEFORE THE HONORABLE JAMES E. SHADID
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	RYAN FINLEN, ESQUIRE Assistant United States Attorney 201 South Vine Street Urbana, Illinois 61802 217-373-5875
For the Defendant:	JOHANES CHRISTIAN MALIZA, ESQUIRE Assistant Federal Public Defender

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Springfield, Illinois 62701
217-492-5070

GEORGE F. TASEFF, ESQUIRE
Assistant Federal Public Defender
401 Main Street, Suite 1500
Peoria, Illinois 61602
309-671-7891

Court Reporter: LISA KNIGHT COSIMINI, RMR-CRR
U.S. District Court
201 South Vine, Suite 344
Urbana, Illinois 61802

Proceedings recorded by mechanical stenography; transcript produced by computer.

[2] (In open court, 12:05 p.m.)

THE COURT: Let's go on the record in the matter of Tremayne Dozier, 18-CR-20002.

Resuming our sentencing hearing, we had, were in argument last time. The matter was continued to today for the parties to give some additional -- or supplemental authority if they wish. The defense filed document 55. The government responded with 56.

Are the parties ready to resume argument as to sentencing alternatives?

MR. MALIZA: Yes, Your Honor. But before we proceed, we would request leave to enter a stipulation agreed between the parties.

THE COURT: All right.

MR. MALIZA: And simply that if called to testify, Mr. Dozier would have testified that had the Texas judge not agreed to participate -- to proceed in sentencing under misdemeanor rules, he would have withdrawn his plea.

THE COURT: All right. Very good.

That's the stipulation, Mr. Finlen?

MR. FINLEN: Yes, Your Honor. If Mr. Dozier had testified, I believe that he would -- I would stipulate that he would testify that that would be his approach in Texas had the Texas district judge not [3] approved the plea agreement.

THE COURT: Okay. All right, then, where were we? Should we -- does the government wish to reargue first?

MR. FINLEN: Your Honor, I reviewed Pruitt. It doesn't change the government's position, mostly because Pruitt deals with recidivist statutes. There are state recidivist statutes. Just like the federal system in Section 841 has a recidivist aspect, so, too, do state systems where at the moment of charging the defendant is facing an increased penalty by virtue of the defendant's criminal history.

That's different than what the Texas provision Section 12.44 has, in that Section 12.44 in Texas law has an (a) and (b). Mr. Dozier was prosecuted under (a),

which says that the judge can apply misdemeanor penalties for a felony conviction, but it still remains a felony conviction.

Importantly, Section (b) says that the prosecutor can elect to charge and prosecute a defendant as a misdemeanor. And I believe this is set forth in our briefing; so I would rely on our briefing and simply state that Pruitt, which was brought up after our commencement of the sentencing hearing, doesn't change the government's position.

[4] THE COURT: Okay. Argument from the defense.

MR. MALIZA: Thank you, Your Honor, just two quick points.

One, I would address the government's argument that Elder is not really this case. I think it's inapposite. It's distinguishable because Elder dealt with the overbreadth of state Controlled Substances Act statutes and schedules, vis-à-vis federal statutes; and we're not dealing with an overbreadth problem here. We're dealing, really, with simply the operation of that 12.44(a), Your Honor.

And to, to the government's second point about what could have happened had the prosecutor hypothetically made a decision in a different circumstance and a different defendant to proceed under (b) in a different case, I would just reiterate, Your Honor, that we're not talking about a hypothetical defendant. We're talking about an actual defendant and an actual case; specifically, Mr. Dozier and Mr. Dozier's case with Mr. Dozier's specific option to withdraw his plea and plans to

withdraw his plea had the judge elected not to take advantage of Texas legislature's misdemeanor sentencings, Your Honor.

Thank you.

THE COURT: Thank you.

[5] So categorical approach, that's the government's position, right?

MR. FINLEN: It is, Your Honor.

THE COURT: Okay. All right. Mr. Dozier, at this time, you have an opportunity to make a statement if you wish. You can do so from there. You can go to the podium. Whatever you're most comfortable with.

Or, you, are you -- I was asking for arguments as to sentencing alternatives, too; so I'm sorry, let's do that.

MR. FINLEN: Sorry.

THE COURT: Let's back up. Let's do it.

All right, Mr. Finlen.

MR. FINLEN: Thank you for the clarification, Your Honor.

THE COURT: Well, actually, because that is the basis for the objection, right?

MR. FINLEN: It is.

THE COURT: So let's, let's address it in this fashion.

All right. I don't think there's any question under the circumstances that I have to find for the government and Probation on this issue. I do believe under the

circumstances that this approach with the 851 filing is harsh, is very harsh, but is the state of the [6] law.

I can't help but point out that in some cases, and in the sentencing right before me, that the government in a gun case took a, you know, argued that it -- in a sense, the categorical approach ignores reality, and, and it does ignore reality in this case. But it is the state of the law.

Under the circumstances, I believe the defendant has a felony conviction at the time of his charging, at the time through -- and I understand the defense position -- that he could not face more than a misdemeanor sentence at the sentencing; but I don't think it eliminates the fact that at one point, when charged, he was facing a term of imprisonment for more than one year, from the moment of the charging. And I believe, under the current state of the law, that that requires me to find for the government and Probation here. Maybe at some point, we'll be able to evaluate these cases a little different. But for today, that would be -- that's my ruling.

Okay. With that in mind, does that address all the objections that you have, Mr. Maliza?

MR. MALIZA: Just to make sure I'm not being accused of waiver, I believe it incorrectly addresses them; but, yes, Your Honor.

[7] THE COURT: I understand.

So given my ruling, then -- and there are no objections from the government, correct?

MR. FINLEN: That's correct, Your Honor.

THE COURT: Okay. Given my ruling then, we would have a total offense level of 31/criminal history

category IV. The guideline range would be 151 to 188 months; but the statutory minimum, given my ruling, would be 20 years.

And that would be ten years of supervised release; ineligible for probation; $30,000 to $20 million fine; restitution not an issue; and $100 special assessment.

Do the parties agree, given my ruling, that that -- those are the guideline ranges and the statutory mandatory minimum?

Mr. Finlen?

MR. FINLEN: I so agree, Your Honor.

THE COURT: Mr. Maliza?

MR. MALIZA: Yes, Your Honor, maintaining my objections.

THE COURT: Understood.

Okay. Then any formal evidence from either side?

MR. FINLEN: From the government, no.

[8] MR. MALIZA: No, Your Honor.

THE COURT: Any argument?

MR. FINLEN: For the government, I would simply request that, because of the statutory minimum, the Court sentence Mr. Dozier to the statutory minimum in this case, 240 months, followed by the ten years of supervised release. I don't believe a fine is appropriate in this matter. And I do wish to inform the Court that, upon sentencing, the government will move to dismiss Count 4.

THE COURT: All right.

Mr. Maliza, argument.

MR. MALIZA: Yes, Your Honor. May it please the Court.

THE COURT: You may.

MR. MALIZA: Mr. Finlen.

Your Honor, I'd like to begin by acknowledging that Mr. Dozier's fiancee is in attendance today to support him.

I feel compelled, based on some of the aggressive waiver arguments that my colleague has made in the past, the government, that we still ask for ten years; although, I understand your ruling.

At any rate, Your Honor, I know the government's asking for 20 years in which he said, "That's the minimum," but I want to make sure we discuss [17] government wish to be heard on this?

MR. FINLEN: No. We have no objection.

THE COURT: In Mr. Dozier's case, it will be waived.

MR. MALIZA: Thank you, Your Honor.

THE COURT: All right. Count 4, dismissed on motion of the government?

MR. FINLEN: Yes, Your Honor. Count -- I move to dismiss Count 4.

And the other issue I'd like to bring to the Court's attention is that the defendant has a, pursuant to his plea agreement, has waived his appeal rights with the exception of one issue. If I could just read the issue that the parties have agreed --

THE COURT: All right.

MR. FINLEN: -- to waive.

The issue that is preserved is whether the defendant's conviction in the 282nd Judicial District Court in Dallas County, Texas, Case Number F06-37199, is a crime punishable by imprisonment of more than one year, given that the judgment in Case Number F06-37199 and filings therein, which were attached to the plea agreement and submitted as an exhibit, include: (1) a plea agreement containing an agreed sentence applying Section 12.44(a) of the Texas Penal Code to Defendant's [18] guilty plea to a state jail felony and (2) a judgment that informs the defendant that 'if the Court rejected such agreement, the defendant would be given an opportunity to withdraw his plea prior to any finding on the plea.'"

THE COURT: Okay. Government -- or the defense agrees with that?

MR. MALIZA: Yes, Your Honor.

THE COURT: All right. Mr. Dozier, your appeal rights are within 14 days or ask Mr. Maliza or Mr. Taseff to do so on your behalf. Okay?

We'll be in recess. Thank you, everybody.

MR. FINLEN: Thank you, Your Honor.

THE COURT: And thank you for -- I apologize for getting us behind and through the noon hour.

(Hearing concludes, 12:25 p.m.)

* * * * * * * * * * *

REPORTER'S CERTIFICATE

I, LISA KNIGHT COSIMINI, RMR-CRR, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 4th day of December, 2018.

s/Lisa Knight Cosimini
Lisa Knight Cosimini, RMR-CRR
Illinois License # 084-002998

Appendix C

AO 245B (Rev. 09/17)Judgment in a Criminal Case
Sheet 1

FILED
NOV 14 2018
CLERK OF THE COURT
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA v. TREMAYNE T. DOZIER	**JUDGMENT IN A CRIMINAL CASE** Case Number: 18-20002-001 USM Number: 22310-026 George Taseff and Johanes Maliza Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1

☐ 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
21 U.S.C. §§ 841(a)(1),	**Conspiracy to Possess 50 Grams or More of**	**10/23/2017**	**1**
841(b)(1)(A) & 846	Methamphetamine with the Intent to Distribute		

The defendant is sentenced as provided in pages 2 through 6 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) 4 ☒ 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.

11/9/2018
Date of Imposition of Judgment

s/ JAMES E. SHADID
Signature of Judge

JAMES E. SHADID, Chief U.S. District Judge
Name and Title of Judge

11/14/18
Date

DEFENDANT: TREMAYNE T. DOZIER
CASE NUMBER: 18-20002-001

IMPRISONMENT

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

240 Months

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

1) It is recommended that the defendant serve his sentence at FCI Greenville.

2) It is recommended that he serve his sentence in a facility that will allow him to participate in the Residential Drug Abuse Program and maximize his exposure to educational and vocational opportunities.

3) Any fees incurred during defendant's stay at a half-way house are waived.

☒ 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: TREMAYNE T. DOZIER
CASE NUMBER: 18-20002-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

10 Years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any

other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C.§ 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the following conditions:

1. You shall not knowingly leave the judicial district in which you are approved to reside without the permission of the Court or probation officer, who shall grant permission unless the travel would significantly hinder your rehabilitation.

2. You shall report to the probation officer in a reasonable manner and frequency directed by the court or probation officer.

3. You shall follow the instructions of the probation officer as they relate to your conditions of supervision. You shall answer truthfully the questions of the probation officer as they relate to your conditions of supervision, subject to your right against self-incrimination.

4. You shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.

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: TREMAYNE T. DOZIER
CASE NUMBER: 18-20002-001

ADDITIONAL SUPERVISED RELEASE TERMS

5. You shall permit a probation officer to visit him or her at home or any other reasonable location between the hours of 6 a.m. and 11 p.m., unless investigating a violation or in case of emergency. The defendant shall permit confiscation of any contraband observed in plain view of the probation officer. You shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

6. You shall not knowingly possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921(a)(4) or any object that you intend to use as a dangerous weapon as defined in 18 U.S.C. § 930(g)(2).

7. You shall not purchase, possess, use, distribute, or administer any controlled substance or psychoactive substances that impair physical or mental functioning except as prescribed by a physician. You shall participate in a program for substance abuse treatment as approved by the U.S. Probation Office including not more than six tests per month to determine whether you have used controlled substances. You shall abide by the rules of the treatment provider. You shall pay the costs of the treatment to the extent you are financially able to pay. The U.S. Probation Office shall determine your

ability to pay and any schedule for payment, subject to the court's review upon request.

8. You shall refrain from excessive use of alcohol, as defined as the legal limit of impairment in the state in which you are located.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: TREMAYNE T. DOZIER
CASE NUMBER: 18-20002-001

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

☐ 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.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ 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:

** 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.

DEFENDANT: TREMAYNE T. DOZIER
CASE NUMBER: 18-20002-001

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 $ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

E. ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30*

or 60 days) after release from 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:

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 will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ 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:

Payment 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.

Appendix D

CAUSE NO. F06-37199

THE STATE OF TEXAS	§	IN THE 282nd DISTRICT
	§	COURT JUDICIAL
V.	§	DALLAS COUNTY,
	§	TEXAS
TREMAYNE DOZIER	§	

JUDGMENT – PLEA OF GUILTY OR NOLO CONTENDERE
JURY WAIVED – FELONY REDUCTION
REFERRAL TO MAGISTRATE

MAGISTRATE: TERRIE MCVEA	JANUARY TERM, A.D. 2006
JUDGE PRESIDING: KAREN GREENE	DATE OF JUDGMENT 5/3/06
ATTORNEY FOR STATE: JOSH HEALY	ATTORNEY FOR DEFENDANT: SUSAN ANDERSON
OFFENSE CONVICTED OF:	UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: COCAINE
DEGREE CONVICTED OF: STATE JAIL	DATE OFFENSE COMMITTED: 2/13/06
DEGREE PUNISHMENT REDUCED TO:	CLASS A MISDEMEANOR
CHARGING INSTRUMENT: INDICTMENT	PLEA: GUILTY
TERMS OF PLEA BARGAIN (IN DETAIL):	9 MONTHS COUNTY JAIL

PLEA TO ENHANCEMENT PARAGRAPH(S): N/A	FINDINGS ON ENHANCEMENT: N/A
FINDINGS ON DEADLY WEAPON, BIAS OR PREJUDICE, AND/OR FAMILY VIOLENCE:	N/A
DATE SENTENCE IMPOSED: 5/3/06	COSTS: $236
PUNISHMENT ASSESSED: 9 MONTHS CONFINEMENT IN THE COUNTY JAIL AND A FINE OF $0	DATE TO COMMENCE: 5/3/06
TIME CREDITED: 2/13/06-5/3/06	RESTITUTION/ REPARATION: N/A
CONCURRENT UNLESS OTHERWISE SPECIFIED	

On this day, set forth above, the above numbered and styled cause having been duly referred to a magistrate for the Criminal District Courts and District Courts which give preference to criminal cases of Dallas County came to trial pursuant to a negotiated plea as reflected above. The State of Texas and Defendant appeared by and through the above named attorneys and announced ready for trial. Defendant appeared in person in open court. Where defendant was not represented by counsel, the court admonished the defendant as to the dangers and disadvantages of self-representation and the defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel. Defendant in person in open court and in writing waived his right to trial by jury with the consent and approval of his attorney, the attorney for the State, and the Court. Where shown above that the charging instrument was by information instead of indictment, the defendant did, with the consent and approval of his attorney, waive his

right to prosecution by indictment and agreed to be tried on an information.

All such waivers, agreements, and consents were in writing and filed in the papers of this cause prior to the defendant entering his plea herein. The defendant was duly arraigned in open court and entered the above plea to the charge contained in the charging instrument. The defendant was admonished by the magistrate of the consequences of said plea and defendant persisted in entering said plea. It plainly appearing to the magistrate that the defendant was mentally competent and that said plea was entered freely and voluntarily, the said plea was accepted by the magistrate and is now entered of record as the plea herein of the defendant. The defendant in open court and in writing waived the reading of the charging instrument, the appearance, confrontation, and cross-examination of witnesses, agreed that the evidence may be by stipulation, and consented to the introduction of testimony orally, by judicial confession, by affidavits, written statements of witnesses, and any other documentary evidence. Such waiver and consent was approved by the magistrate in writing and filed in the papers of the cause. The magistrate having heard the defendant's waiver of the reading of the charging instrument, defendant's plea thereto, the evidence submitted, and argument of counsel was of the opinion from the evidence submitted, that the defendant was guilty of the offense as shown above and that the offense was committed by the defendant on the date set forth above.

After considering the gravity and circumstances of the felony committed and the history, character, and

rehabilitative needs of the defendant, the magistrate found that assessing punishment for a misdemeanor as set forth above would best serve the ends of justice. The magistrate further made its findings as to deadly weapon, family violence, bias or prejudice, and restitution and reparation as set forth above.

And when shown above that the charging instrument contains enhancement paragraph(s), which were not waived or dismissed, the magistrate, after hearing the defendant's plea to said paragraph(s) as set out above and after hearing further evidence on the issue of punishment, made its finding as set out above. If true, the magistrate was of the opinion and finds defendant has been heretofore convicted of said offense(s) alleged in the said enhancement paragraph(s) as may be shown above.

And when shown above that there was a plea bargain agreement, the defendant was informed as to whether the magistrate would follow or reject such agreement and that if the Court rejected such agreement the defendant would be given an opportunity to withdraw his plea prior to any finding on the plea.

When it is shown above that restitution has been ordered, but the court determines that the inclusion of the victim's name and address in the judgment is not in the best interest of the victim, the person or agency whose name and address is set out in this judgement will accept and forward the restitution payments to the victim.

And when it is shown below that payment of the costs of legal services provided to the defendant in this cause has been ordered, the magistrate found, and the Court

approved the finding, that the defendant has the financial resources to enable the defendant to offset said costs in the above rendered.

Thereupon the said defendant was asked by the magistrate whether he had anything to say, why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the magistrate that the defendant was mentally competent and understanding of the proceedings, the magistrate proceeded in the presence of the defendant and his attorney to pronounce sentence against the defendant.

The Court has reviewed the findings, actions, and recommendations of the magistrate in this cause, finds that the terms of the negotiated plea agreement in this cause have been followed and hereby adopts all findings and recommendations of the magistrate in this cause.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the said judgment as set forth above is hereby in all things approved and that the said defendant be adjudged guilty of the offense as shown above, and that the defendant be punished in accordance with the punishment set forth above, and the defendant is hereby sentenced to a term of confinement or fine or both, as set forth above. The defendant shall be taken by the Sheriff of Dallas County, Texas and immediately confined by him in accordance with this sentence and the provisions of the law of the State of Texas governing such punishments. It is further ordered that the defendant pay the fine, court costs, costs and expenses of legal services provided by the Court appointed attorney in this cause, if any, and restitution or reparation as set forth herein.

Appendix E

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 6, 2020

Before

DIANE S. SYKES, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-3447

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Central District of Illinois.
v.	No. 18-CR-20002-001
TERMAYNE T. DOZIER, *Defendant-Appellant.*	James E. Shadid, *Judge.*

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny

rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.