APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1112

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DEVAN PIERSON,
Defendant-Appellant.

Decided: July 21, 2020

Before DIANE S. SYKES, *Chief Judge*,
MICHAEL S. KANNE and DAVID F. HAMILTON,
Circuit Judges.

ORDER

A jury found appellant Devan Pierson guilty of possessing drugs with intent to distribute, possessing a firearm in furtherance of drug trafficking, and—most relevant here—possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). On May 31, 2019, we affirmed his convictions and sentence, including the mandatory life sentence imposed for the drug charge. *United States v. Pierson*, 925 F.3d 913 (7th Cir. 2019).

A few weeks after our decision, the Supreme Court held that, in § 922(g) prosecutions, the government must show not only that "the defendant knew he possessed a firearm" but also that "he knew he had the relevant status when he possessed it." *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019). *Rehaif* changed the applicable law for the elements of § 922(g) charges in every federal circuit, including this one, so it is relevant for a large number of pending cases. Pierson filed a petition for certiorari raising the *Rehaif* issue for the first time in this case. The Supreme Court granted Pierson's petition for certiorari, vacated our judgment, and remanded the case for further consideration in light of *Rehaif*. *Pierson v. United States*, 140 S. Ct. 1291 (2020) (mem.). After further consideration, including review of the parties' submissions under Circuit Rule 54, we again affirm Pierson's conviction on the § 922(g)(1) charge and his sentence.

We limit our discussion to Pierson's felon-in-possession conviction, the only charge for which *Rehaif* is relevant. Indianapolis police officers found a gun in the center console of Pierson's car while executing a search warrant at his apartment on August 18, 2016. Pierson's indictment charged him with violating § 922(g) using the following language: "DEVAN PIERSON, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year … did knowingly possess in and affecting interstate commerce, a firearm … ." At trial, the district court instructed the jury that the government was required to prove that Pierson knowingly possessed a firearm and had been previously convicted of a felony, but not that he *knew*

he was a felon. Pierson did not object to the indictment or jury instructions. He nevertheless argues that we should vacate his § 922(g) conviction based on *Rehaif* errors in the indictment and jury instructions and remand for a new trial and/or resentencing.

Our recent decision in *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020), explained how to apply *Rehaif* to § 922(g) jury verdicts on direct appeal when it was decided. We review unchallenged *Rehaif* issues for plain error, including deficient indictments and jury instructions. *Id.* at 956-57. We apply the familiar four-prong test for plain error, looking for (1) an "error" that is (2) "plain" and that (3) "affects substantial rights." If these prongs are satisfied, we may exercise discretion to correct the error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 956, quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997). To assess the third prong—the effect on substantial rights—we limit ourselves to evidence actually presented to the jury. *Id.* at 961; see also *United States v. Miller*, 954 F.3d 551, 558 & n.17 (2d Cir. 2020). In exercising our discretion at prong four, however, we may also consider "a narrow category of highly reliable information outside the trial records: the defendants' prior offenses and sentences served in prison, as reflected in undisputed portions of their PSRs." *Maez*, 960 F.3d at 963.

Applying these principles to Pierson's case is straightforward. As the government concedes, under *Rehaif* there was "error" that is "plain" in both the indictment and jury instructions. The defects in Pierson's indictment and jury instructions are

identical to those in Cameron Battiste's case, one of the consolidated appeals we considered in the *Maez* opinion. See *id.* at 965-66 (finding plain errors).

The similarities to Battiste's appeal continue as we turn to the third element of the plain-error test, effect on substantial rights. As at Battiste's trial, the jury heard some evidence relating to Pierson's status as felon. *Id.* at 965. Like most felon-in-possession defendants before *Rehaif*, Pierson stipulated to a prior felony conviction under *Old Chief v. United States*, 519 U.S. 172 (1997). In addition, Pierson's probation officer testified that he met with Pierson regularly. Finally, Pierson's police interview from the day of his arrest was admitted into evidence; he acknowledged during the interview that he was on supervised release. These facts were "at least probative" of Pierson's knowledge of felon status, but perhaps not so "overwhelming" as to rule out any prejudicial effect of the *Rehaif* errors. *Maez*, 960 F.3d at 965; cf. *United States v. Carson*, 870 F.3d 584, 603 (7th Cir. 2017) ("An inaccurate jury instruction constitutes harmless error where the evidence is one-sided or overwhelming.").

Even if the first three steps of the plain-error inquiry are satisfied, however, at the fourth step we decline to exercise our discretion to correct the errors. As in the appeals in *Maez*, there is no risk here of a miscarriage of justice that would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993), quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Our limited review of Pierson's PSR shows that he "has spent most of his adult life in

prison," as had defendant Maez. 960 F.3d at 964. Pierson was convicted of two felony drug charges in state court at the age of 18 and sentenced to ten years in prison. Though most of that sentence was suspended at first, he ultimately served at least eight years of it because of probation and parole violations. In fact, while on parole, he assisted in the distribution of cocaine, leading to a federal drug conviction and an additional 151-month prison sentence. Less than eight months after his release from federal prison, Pierson was rearrested for the offenses in this case. We are confident that at the time of the offense charged here, Pierson knew he had a prior felony conviction.

Pierson argues that, despite his extensive criminal history, we can and should recognize the *Rehaif* errors so that he can be resentenced on the separate drug charge. When Pierson was sentenced, his conviction for possession with intent to distribute after two prior felony drug offenses carried a mandatory term of life in prison. See 21 U.S.C. § 841(b)(1)(A)(viii) (Jan. 2018). If he were to be sentenced today, he would face a mandatory minimum of only 25 years under the First Step Act. See Pub. L. No. 115-391, § 401(a)(2)(A)(ii), 132 Stat. 5194, 5220 (2018). But this disparity does not show an effect on the "fairness, integrity or public reputation of judicial proceedings" that would call for us to order a new trial to correct the *Rehaif* errors. See *Olano*, 507 U.S. at 736. For one, we doubt that the *Olano* inquiry properly considers such an indirect effect on another conviction untouched by the error in question. Moreover, as we explained in our earlier decision in this case, Congress chose not to apply this reduction to sentences imposed before its effective date. *Pierson*, 925 F.3d at 927-28.

We cannot say that affirming a result mandated by Congress will negatively affect the fairness or integrity of judicial proceedings.

The judgment of the district court is again AFFIRMED.

Appendix B

SUPREME COURT OF THE UNITED STATES

No. 19-566

DEVAN PIERSON,

Petitioner,

v.

UNITED STATES,

Respondent.

Filed: Apr. 10, 2010

ORDER

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court in this cause is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Rehaif* v. *United States,* 588 U. S. ___ (2019).

March 9, 2020

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1112

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DEVAN PIERSON,
Defendant-Appellant.

Argued: Feb. 6, 2019
Decided: May 31, 2019

Before KANNE, SYKES, and HAMILTON,
Circuit Judges.

OPINION

HAMILTON, *Circuit Judge*. A jury found appellant Devan Pierson guilty of possessing drugs with intent to distribute and two related firearm crimes. Because of Pierson's prior criminal record, his mandatory sentence was life in prison. He raises three issues on appeal. The first, raised for the first time on appeal, is whether events at his trial added up to a constructive amendment of the two firearm charges in his indictment, which charged him with possession of

one particular gun. Under our precedent in *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991), we conclude that an error occurred. It was not, however, a "plain error" that warrants reversal, and it did not affect Pierson's substantial rights. Second, Pierson argues that the court erred under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by imposing the mandatory life sentence without having the jury find that he had two prior felony drug convictions. This argument is foreclosed by controlling Supreme Court precedent. See *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Third, he seeks the benefit of the First Step Act, which was enacted while Pierson's appeal was pending and which lowered the mandatory minimum sentence. The Act does not apply to Pierson, whose sentence was imposed before the Act took effect. We affirm Pierson's convictions and sentence.

I. Factual and Procedural Background

A. The Search and Arrest

The Indianapolis Metropolitan Police Department obtained a warrant to search an apartment where they suspected defendant Pierson was distributing drugs. Before executing the warrant, officers saw a disheveled, jittery man who, they said, looked like a substance abuser. The officers watched him ride a bicycle to the apartment parking lot and get into the passenger seat of a gray Chevrolet Malibu. Moments later, the man got out of the Malibu and rode away. Pierson then emerged from the driver's seat, retrieved a white bag from the trunk, and entered the apartment building.

Officers then executed the search warrant. In the apartment, they found the white bag sitting on top of

the shoes that Pierson had been wearing when he entered the building. The white bag contained 91.25 grams of heroin, 6.34 grams of cocaine, and 100.47 grams of actual methamphetamine. Next to the white bag, the officers found two more bags. One contained 19.49 grams of cocaine. The other contained 2.38 grams of cocaine, 7.45 grams of methamphetamine, and 7.58 grams of heroin. Throughout the apartment, officers found other evidence of drug trafficking: surgical masks, plastic gloves, digital scales, and a bottle of lactose. In a kitchen drawer, officers found a Taurus Model PT 24/7 G2 .45 caliber handgun.

Officers then searched the Malibu. They found papers indicating that Pierson had purchased and insured the car. They also discovered that the center console had been modified to create a hidden void, where they found a second firearm, a Taurus Model PT 145 .45 caliber handgun. Both handguns were checked for fingerprints, but Pierson's prints were not on either. No fingerprints were recovered from what we will call the "car gun." A fingerprint belonging to an unknown person was recovered from the "kitchen gun."

B. Indictment and Trial

The indictment charged Pierson with three crimes: (1) possessing controlled substances with intent to distribute in violation of 21 U.S.C. § 841(a)(1); (2) possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); and (3) possessing a firearm as a previously convicted felon in violation of 18 U.S.C. § 922(g)(1). In Counts II and III, the indictment

specified only the car gun as the firearm charged—"that is, a Taurus Model PT 145 .45 caliber handgun."

Though only the car gun was charged, the government presented evidence at trial regarding both guns. Both were shown to the jury, and pictures of both were sent to the jury for deliberations. An ATF agent testified that both guns were manufactured in Brazil (providing a nexus with foreign commerce) and that both were stolen. After explaining where he found the kitchen gun, an officer testified that drug traffickers commonly possess firearms for protection. Pierson did not object to any of this evidence.

The government also presented evidence specific to the charged car gun. An officer testified that it was not unusual that Pierson's fingerprints were not on the car gun. Later, an officer explained the value of keeping a gun in a center console for purposes of drug trafficking. An officer also explained to the jury that a drug trafficker may, for protection and privacy, choose to keep a larger stash of drugs in the trunk while dealing drugs within the passenger compartment.

Before closing arguments, the district court gave the final jury instructions that both sides had approved. Using this circuit's pattern criminal jury instructions, the district court's instructions on Counts II and III did not signal that the car gun was the only firearm at issue. In closing argument, the government focused the jury on the car gun, making at least five statements that either tied the car gun to the drug trafficking crime of Count I or clarified that the car gun was the gun at issue in Counts II and III. When the prosecutor referred briefly to the kitchen gun in closing, he again clarified that the kitchen gun

was not the gun charged: "The indictment deals with the gun in the car. What is charged in Count II and III is the stolen handgun behind the panel of the Defendant's car." In rebuttal, the prosecutor repeated the point: "We are talking about the gun in the Defendant's car, not the gun in the kitchen … That is the gun that is the subject of Counts II and III."

In deliberations, the jury had a copy of the indictment, which contained the language specifying the model of the car gun. The verdict form referred the jury to the indictment, requiring the jury to mark "guilty" or "not guilty" for each charge "as described in the Indictment." The jury returned guilty verdicts on all counts.

C. Sentencing

Before sentencing, the government filed an Information pursuant to 21 U.S.C § 851 alleging that Pierson had two prior felony drug convictions. Under the law at the time, these convictions required a mandatory term of life in prison for the drug charge. See 21 U.S.C. § 841(b)(1)(A)(viii) (Jan. 2018). The jury was not asked to find that Pierson had those prior convictions; the district court made that finding, without objection, based on the § 851 Information. In addition to the mandatory life term, Pierson was sentenced to five years on Count II to be served consecutively to his life sentence, and a ten-year concurrent term for Count III.

II. Analysis

A. Constructive Amendment

On appeal, Pierson argues that his two firearm convictions should be vacated and remanded for a new

trial because his indictment was constructively amended in violation of his Fifth Amendment rights. He argues that the combination of admitting evidence of the kitchen gun and the court's jury instructions, which did not specify that guilt could be found based only on the car gun, allowed the jury to convict him on grounds outside of the indictment.

1. Standard of Review

At trial, Pierson did not object to the kitchen gun evidence or the jury instructions, but we may still reverse under Federal Rule of Criminal Procedure 52(b), which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." On plain-error review, we may reverse if: (1) an error occurred, (2) the error was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the fairness, integrity, or public reputation of the proceedings. *United States v. Olano*, 507 U.S. 725, 732-738 (1993); *United States v. Duran*, 407 F.3d 828, 834 (7th Cir. 2005). An error is a deviation in the district court from a legal rule that the defendant did not waive. See *Olano,* 507 U.S. at 732-33. An error is "plain" if the law at the time of appellate review shows clearly that it was an error. See *Henderson v. United States*, 568 U.S. 266, 279 (2013).[1]

---

[1] In applying plain-error review, we draw a distinction between waiver and forfeiture. Where a right is waivable and the defendant waived it by intentionally choosing not to exercise it, appellate review simply is not available. Forfeiture—the failure to make a timely assertion of a right—may still permit consideration of the error under Rule 52(b). See *Olano*, 507 U.S at 733-34.

In *United States v. Olano*, the Supreme Court explained the third prong, affecting substantial rights: "in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." 507 U.S. at 734 (internal citation omitted). The defendant bears the burden of showing this prejudice. *Id.*

The fourth prong of plain-error review is addressed to the appellate court's discretion. See *id.* at 732, 736-37. If the first three prongs are satisfied, we may reverse if we determine that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. "[I]n most circumstances, an error that does not affect the jury's verdict does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process." *United States v. Marcus*, 560 U.S. 258, 265-66 (2015), quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997).

2. The Constructive Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. Only the grand jury can broaden an indictment through amendment; neither the government nor the court may do so. See *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). This rule both enforces the Fifth Amendment and helps to ensure that a defendant is given reasonable notice of the allegations against him so that he may best prepare a defense. See *United States v. Trennell*, 290 F.3d 881, 888 (7th Cir. 2002).

The Fifth Amendment is violated by a so-called constructive amendment, which can occur when the proof offered at trial, the jury instructions, or both

allow the jury to convict for an offense outside the scope of the indictment. See generally *Stirone*, 361 U.S. at 217-18; *United States v. Remsza*, 77 F.3d 1039, 1043 (7th Cir. 1996). When a constructive amendment occurs and the court overrules the defendant's objections to the impermissible broadening, the error is "reversible *per se*." *United States v. Leichtnam*, 948 F.2d 370, 377 (7th Cir. 1991), citing *Stirone*, 361 U.S. at 217.

Pierson argues that his indictment was constructively amended by the combination of the government's kitchen-gun evidence and the court's jury instructions that failed to specify the car gun as the gun charged. Pierson's indictment narrowed the bases of conviction by specifying the car gun—not any other firearm—in Counts II and III. But the government, by presenting evidence of the non-indicted kitchen gun, created an exit ramp that might have tempted the jury to veer outside the confines of his indictment. The court's jury instructions did not block that exit ramp. Together, the evidence and jury instructions created the possibility of conviction based on either the car gun or kitchen gun, though the indictment required, more narrowly, that guilt be based on Pierson's possession of only the car gun. Under this circuit's precedent, this combination of the evidence and untailored jury instructions added up to a constructive amendment.

To support his constructive amendment argument, Pierson points to *United States v. Leichtnam*, supra, where the facts were very similar to this case and we found that a constructive amendment occurred. In *Leichtnam*, the defendant

was indicted for using and carrying "a firearm, to wit: a Mossberg rifle" in relation to a drug trafficking crime. Though only a Mossberg rifle was mentioned in the indictment, the government entered two other firearms—two handguns—into evidence. The court then instructed the jury that the relevant count hinged on proof that the defendant "intentionally used or carried *a firearm*." 948 F.2d at 374-75 (emphasis added). Together, the evidence and instructions allowed the defendant to be convicted based on a finding that he carried *any* firearm, rather than the specific firearm charged. *Id.* at 380-81.

Specific language in an indictment that provides detail beyond the general elements of the crime makes the specified detail essential to the charged crime and must, therefore, be proven beyond a reasonable doubt. We made clear in *Leichtnam* that the specified firearm was, as a matter of law, "not merely surplusage." 948 F.2d at 379 ("By the way the government chose to frame Leichtnam's indictment, it made the Mossberg an essential part of the charge and limited the bases for possible conviction to the Mossberg.").[2]

---

[2] In *Leichtnam*, we cited examples where a specific detail alleged in an indictment became an essential element of the charged crime: "When included in the indictment, the words to 'to wit … the DeCavalcante Family' become an essential element of the charge." *Leichtnam*, 948 F.2d at 377-78, citing *United States v. Weissman*, 899 F.2d 1111, 1115-16 (11th Cir. 1990), and *Howard v. Daggett*, 526 F.2d 1388, 1390 (9th Cir. 1975) (indictment charged inducing two particular women into prostitution, so defendant could not be convicted of inducing prostitution generally).

Like the indictment in *Leichtnam*, Pierson's indictment specified the firearm with which he was charged—the car gun. Count II alleged:

> Pierson … did knowingly possess *a firearm, that is, a Taurus Model PT 145 .45 caliber handgun*, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, the drug offense charged in Count One; all in violation of Title 18, United States Code, Section 924(c)(1)(A).

Count III alleged in pertinent part:

> Pierson … having been convicted of a crime punishable by imprisonment for a term exceeding one year … did knowingly possess in and affecting interstate commerce, *a firearm, that is, a Taurus Model PT 145 .45 caliber handgun,* in violation of Title 18, United States Code, Section 922(g)(1).

The grand jury made the car gun an essential element of Counts II and III when, in the indictment, it specified the car gun by brand and model number. The government could have drafted the indictment to allege that Pierson possessed "a firearm," generally, but it chose not to. Therefore, conviction hinged on the car gun. Possession of the kitchen gun could not serve as a substitute basis for conviction.

Despite charging only the car gun, the government introduced evidence of both the car gun and the kitchen gun, just as the government in *Leichtnam* introduced evidence of firearms not mentioned in the indictment. In Pierson's case, the evidence highlighted similarities between the two

guns. Both guns were .45 caliber, Taurus-brand handguns manufactured in Brazil, and both were stolen. The guns were also similar in appearance. The indictment specified the gun charged by its brand and model number and not by the location where it was found. It may have been difficult for the jury to distinguish the kitchen gun from the car gun. But the evidence alone did not constructively amend Pierson's indictment.[3]

Following *Leichtnam*, we find that the combination of the evidence and jury instructions added up to a constructive amendment of Pierson's indictment. In explaining to the jury the elements for Counts II and III, the district court itself never clarified that guilt hinged on finding that Pierson possessed the car gun. Instead, like the trial court in *Leichtnam*, the court explained in general terms that possession of "*a firearm*" was necessary, which we held added up to a constructive amendment when combined with evidence regarding uncharged firearms. 948 F.2d at 379; see also *United States v. Murphy*, 406 F.3d 857, 860-61 (7th Cir. 2005) (finding constructive amendment where court instructed that defendant could be convicted for witness tampering if he knowingly intimidated *or* used physical force against witness, though indictment charged him with witness tampering only via physical force or threat of force, and not intimidation).

---

[3] We do not suggest that the government introduced the kitchen-gun evidence to confuse the jury. The government offered the plausible explanation at oral argument that it introduced the kitchen-gun evidence to block any suggestion that it was withholding information from the jury.

In Pierson's case, the jury instructions similarly failed to limit the jury's attention to the car gun, creating at least a theoretical possibility that the jury could convict Pierson on grounds outside of the indictment. The kitchen-gun evidence without the untailored jury instructions, or vice versa, would not amount to a constructive amendment. But, following the rationale of *Leichtnam*, together they expanded the bases for conviction to proof of either the car gun or the kitchen gun.

The constructive amendment could have been avoided easily in this case. Most obviously, Pierson could have objected to the evidence or the jury instructions. He did not. "Had he done so, the district judge might well have acted to avoid any error." *Leichtnam*, 948 F.2d at 375. Or the government could have drafted a broader indictment; it was not required to charge a specific firearm. Or the government could have simply withheld the kitchen-gun evidence. Or, even with the kitchen-gun evidence, more specific jury instructions would have cleared up any ambiguity.

The court risked constructive amendment by not tailoring the pattern jury instructions to the specifics of the case. When the indictment narrows the basis for conviction by adding specifics to an element of the crime, as it did here, the district court should adjust the pattern instructions to ensure the defendant stands to be convicted for precisely what was charged in the indictment. See *United States v. Miller*, 891 F.3d 1220, 1232 (10th Cir. 2018), citing *United States v. Ward*, 747 F.3d 1184, 1192 (9th Cir. 2014) ("[W]hen conduct necessary to satisfy an element of the offense is charged in the indictment and the government's

proof at trial includes uncharged conduct that would satisfy the same element, we need some way of assuring that the jury convicted the defendant based solely on the conduct actually charged.").

Pattern jury instructions are helpful, of course, but "Pattern instructions are not intended to be used mechanically and uncritically." *United States v. Edwards*, 869 F.3d 490, 497 (7th Cir. 2017). They should be used as a starting point rather than an ending point. Where the indictment makes a particular firearm an essential element of the offense as charged, the court's jury instructions should be adjusted to include that essential element. If jury instructions are tailored to the specific charges in the indictment, constructive amendments are less likely to occur. Certainly, in Pierson's case, if the court had specified the car gun in the instructions, there would have been no constructive amendment.

3. The Error Was Not "Plain"

Under *Leichtnam*, we thus find a constructive amendment error, but that error does not call for reversal of Pierson's firearm convictions. The error was not "plain." Our precedent is unclear as to whether and when factors such as closing arguments, verdict forms, and indictment copies in deliberations can contribute to or prevent constructive amendments. Additionally, there is not a general consensus among the circuits on the effects of those factors, and the Supreme Court has not addressed them.

An error cannot be "plain" if the law is unsettled. See *United States v. Hosseini*, 679 F.3d 544, 552 (7th Cir. 2012). An error also is not "plain" if it is "subtle,

arcane, debatable, or factually complicated." *United States v. Turner*, 651 F.3d 743, 748 (7th Cir. 2011). "For an error to be 'plain,' it must be of such an obvious nature that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *Id.*, quoting *United States v. Frady*, 456 U.S. 152, 163 (1982).

The *Leichtnam* error here was not plain. Constructive amendment doctrine seeks to prevent confusion and to ensure that a defendant stands trial for charges in the grand jury's indictment. Though the government introduced evidence of the kitchen gun and the jury instructions were not tailored, other events at trial should have made the charges against Pierson clear to the jury. The government, on six separate occasions during its closing argument and rebuttal, pointedly referred to the car gun. In two of those instances, the government made clear that the car gun was the only gun indicted. The government explained that the jury would have to determine "whether the Defendant possessed this stolen .45-caliber handgun from his car in furtherance of his drug trafficking and whether the Defendant possessed this .45-caliber handgun while a convicted felon." The government had also made clear during opening statements that the car gun was the "subject of Counts II and III." Beyond the government's clarifications, the verdict form directed the jury's attention to Pierson's indictment, and the jury had a copy of his indictment in deliberations. In our view, these facts minimized the risk of jury confusion and at least made debatable whether a constructive amendment occurred here.

Further, the law in this area is not as settled as Pierson suggests. He points out that in dissent in *Leichtnam*, Judge Coffey argued that no constructive amendment occurred because at trial, the judge "read the firearms indictment to the jury, including the specific reference only to the [charged] Mossberg rifle." 948 F.2d at 386 (Coffey, J., concurring in part and dissenting in part) (alteration in original). In addition, Judge Coffey noted that in closing arguments, the prosecutor "discussed only the 'specific firearm alleged' in the indictment" and did not mention the other handguns introduced into evidence. *Id.* Pierson argues that the *Leichtnam* majority found a constructive amendment despite the clarifications and suggests we should do the same in his case. However, in concluding that a constructive amendment occurred in *Leichtnam*, the majority never discussed those factors. See *id.* at 374-81. The majority opinion thus provides little direct guidance on the effects of such clarifications outside of evidence and jury instructions.

Nor has the law since *Leichtnam* provided clarification sufficient to call this error "plain." No Supreme Court decision provides direct guidance for this analysis. Cases from this circuit and others have, at times, given weight to such factors but do not provide a clear rule. See, e.g., *United States v. Cusimano*, 148 F.3d 824, 830-31 (7th Cir. 1998) (finding no constructive amendment, in part because district court instructed that defendants were on trial only for charges in indictment and provided copy of indictment to jury); *United States v. Lopez*, 6 F.3d 1281, 1288 (7th Cir. 1993) (holding that even if broadening of indictment constituted error, it was not

plain error, in part because court instructed that defendants were not on trial for any conduct not alleged in indictment); see also *United States v. Holley*, 23 F.3d 902, 912 (5th Cir. 1994) (holding that, though jury instructions and evidence may have broadened bases beyond indictment, no constructive amendment occurred because court instructed jury to consider only crime charged in indictment, the indictment was read to jury at beginning of trial, copy of indictment was given to jury for deliberation, and the government, in closing, mentioned only crime as indicted); *United States v. Kuehne*, 547 F.3d 667, 683-84 (6th Cir. 2008) ("To determine whether a constructive amendment has occurred, therefore, we review the language of the indictment, the evidence presented at trial, the jury instructions and the verdict forms utilized by the jury").

Whether a constructive amendment occurred is a fact-intensive question, and the facts of Pierson's case do not lend themselves to clear application of this circuit's precedent. Though the government introduced the kitchen-gun evidence, it also made clear to the jury that it was not the gun directly at issue. Because the *Leichtnam* majority did not address what effect, if any, clarifying statements like those made by the government here should have on the constructive amendment question, we cannot say that *Leichtnam* made this error obvious. Additionally, prior cases have given at least some weight to facts such as the verdict form and the indictment being given to the jury when deciding whether or not a constructive amendment occurred. Together, the facts in the case make the constructive amendment issue debatable. The error here was not "plain."

4. Substantial Rights Not Affected

Some of the same factors lead us to conclude that Pierson's argument also fails on the third prong of plain-error review, which requires that he show that the error affected his substantial rights. Ample evidence supported convictions on Counts II and III. Most pertinent to the plain-error question, the government's reminders to the jury and the phrasing of the verdict form make it unlikely that Pierson's substantial rights were affected.

Our circuit uses a fairly low threshold for constructive amendment, as *Leichtnam* shows, but when applying plain-error review, we balance that approach with a relatively demanding approach to prejudice. The Supreme Court has not clarified whether "affecting substantial rights" always requires a showing of prejudice, but "the law in this circuit is clear. In the context of plain error review, the amendment must constitute 'a mistake so serious that but for it the [defendant] probably would have been acquitted' in order for us to reverse. In other words, the constructive amendment must be prejudicial." *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996) (finding no plain error), quoting *United States v. Gunning*, 984 F.2d 1476, 1482 (7th Cir. 1993) (alteration in original).

Pierson urges us to reconsider the *Remsza* standard. First, he suggests that we should not require any showing of prejudice in cases of constructive amendment. He cites *United States v. Pedigo*, 12 F.3d 618 (7th Cir. 1993), where the indictment was written so that the jury could not properly have convicted the defendant on Count III

based on co-conspirator liability outlined in Count I. See *id.* at 631. Nonetheless, "the prosecutor argued, and the court instructed the trial jury, that the jury could do just that." *Id.* Finding a constructive amendment, we said that a broadening of the indictment was reversible *per se*. See *id.* at 631 ("Therefore, if an amendment occurred, the plain error standard of review will not save the conviction.").

Though *Pedigo* has not been overruled expressly, our cases applying the *Olano* plain-error standard since then have made clear that its *per se* approach does not apply in plain-error review, and we will not return to it here. See *United States v. Duran*, 407 F.3d 828, 843 (7th Cir. 2005) (expressly rejecting *Pedigo*: "*Pedigo* is not the current law of this circuit. This court has explained that when, as here, the indictment is broadened based on non-specific jury instructions and when there was no objection to those jury instructions at trial, plain error review is appropriate."). We take instruction from *Olano* and now require the defendant to show that the constructive amendment was prejudicial. See 507 U.S.at 742-43 (Kennedy, J., concurring) ("Rule 52(b) does not permit a party to withhold an objection … and then to demand automatic reversal").

Second, Pierson argues that the *Remsza* prejudice standard conflicts with cases from other circuits. There is not, however, a consensus among the circuits on the appropriate standard in constructive amendment cases. Some circuits presume that constructive amendments are prejudicial. See *United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001) ("A constructive amendment is a *per se* prejudicial

violation of the Grand Jury Clause of the Constitution."); *United States v. Floresca*, 38 F.3d 706, 713 (4th Cir. 1994) ("a constructive amendment always 'affects substantial rights'). The Third Circuit applies a rebuttable presumption that constructive amendments are prejudicial and places the burden of showing no prejudice on the government. See *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002). Other circuits require the defendant to show prejudice, but some demand less of a showing than we do under *Remsza*. See *United States v. Madden*, 733 F.3d 1314, 1323 (11th Cir. 2013) (finding that defendant was prejudiced by constructive amendment because court could not conclude "'with certainty' that with the constructive amendment, [defendant] was convicted solely on the charge made in the indictment"); *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018) (requiring defendant to show "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different[,]" and clarifying that "A reasonable probability is a probability sufficient to undermine confidence in the outcome," and not a requirement that defendant prove by preponderance of the evidence that, but for the error, the outcome would have been different). The Eighth Circuit applies a standard similar to ours in *Remsza*. *United States v. Gavin*, 583 F.3d 542, 547 (8th Cir. 2009) (holding constructive amendment did not affect defendant's substantial rights because there was "no reasonable probability Gavin would have been acquitted under the correct jury instruction"). Our standard for determining if substantial rights were affected by a constructive amendment without

objection sets a high bar for reversal on plain-error review.

We found only one case in which a constructive amendment (without objection) amounted to a plain error affecting a defendant's substantial rights. In *United States v. Ramirez*, 182 F.3d 544, 545-46 (7th Cir. 1999), as part of a reverse-sting operation, police saw the defendant load large quantities of marijuana into a vehicle and drive away. Officers stopped him and searched the vehicle. They found a loaded revolver and the marijuana. One count in the indictment charged Ramirez with carrying a firearm "in relation to the crime of knowing and intentional unlawful distribution of marijuana." At the end of the trial, however, the court instructed the jury that the defendant could be convicted if the government proved that he "knowingly carried a firearm during and in relation to a 'drug trafficking crime.'" *Id.* The court defined "drug trafficking crime" in a way that allowed the jury to convict for crimes outside of those specified in the indictment, including carrying a firearm in relation to *possession with intent to distribute*. The jury found Ramirez guilty.

Ramirez did not object, so we applied plain-error review. See 182 F.3d at 547-48. There was no evidence that Ramirez actually distributed the marijuana, which was essential to convict him, as charged, of carrying a firearm *in relation to the distribution of the drug*. *Id.* at 547. At most, the evidence showed that the defendant carried the firearm in relation to the crime of possession *with the intent to distribute*. *Id.* "Only through the constructive amendment of the indictment to include those other drug trafficking

crimes as potential predicate offenses was the jury supplied with a basis to convict Ramirez on [Count III]." *Id.* at 548. Applying the *Remsza* standard, we reversed the conviction on that charge: "but for the constructive amendment, a reasonable jury would have acquitted [defendant] on the firearms charge." *Id.*

In this case, by contrast, we are confident that if no constructive amendment had occurred, the verdict would have been the same. Strong evidence showed that Pierson possessed the car gun and that his possession of that gun was in furtherance of a drug trafficking crime. See *Remsza*, 77 F.3d at 1044 (finding defendant not prejudiced by constructive amendment because testimony provided compelling proof that defendant committed the indicted crime and there was no indication that, but for the constructive amendment, the jury would have reached a different result); see also *Duran*, 407 F.3d at 843-44 (finding no prejudice; an "abundance of evidence" proved that specified gun was possessed in furtherance of drug-trafficking conspiracy as alleged in indictment).

Pierson's ownership of the Malibu, where the charged gun was found, was uncontested. Additionally, the government presented strong evidence to prove Pierson possessed the car gun in furtherance of the drug trafficking charged in Count I. Officers recounted Pierson's activities before the search, which appeared to be a drug deal. The white bag that Pierson carried from the car to the apartment contained distribution quantities of several drugs. Officers testified that drug traffickers often keep

weapons in center console voids and larger stashes of drugs in the trunk, just as Pierson did.[4]

In addition to the ample evidence, as noted, the government's closing argument told the jury clearly to focus on the car gun, and the verdict form framed the questions for each offense "as described in the Indictment," and the jury had a copy of the indictment during deliberations. With all of these factors working to counter the possibility of a conviction outside the terms of the indictment, we see no prejudice that would authorize an appellate court to find a reversible plain error in the absence of a timely objection in the district court. See *Olano*, 507 U.S. at 741 (where conceded error did not affect substantial rights, court of appeals had no authority to correct it).[5]

---

[4] All of this testimony aligns with the often-applied theory that firearms can further drug trafficking by providing protection to the dealer, his stash, or his territory. See *Duran*, 407 F.3d at 840. The government's evidence satisfied many of the factors relevant to whether a gun is used in furtherance of drug trafficking: (1) the type of drug activity conducted; (2) accessibility of the weapon; (3) the type of weapon; (4) whether the weapon was stolen; (5) whether possession of that weapon is legal or illegal; (6) whether the firearm was loaded; (7) the proximity of the weapon to the drugs; and (8) the time and circumstances in which the weapon was found. See *id.*, citing *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000), *modified on denial of rehearing*, 226 F.3d 651 (5th Cir. 2000).

[5] Because the error was neither "plain" nor affected Pierson's substantial rights, we do not need to address the fourth and final prong of plain-error review which grants appellate courts discretion to dismiss if the plain error also affected the fairness, integrity, and public reputation of the proceedings. Cf. *Remsza*, 77 F.3d at 1044 (stating that if the court could exercise the discretion granted by the fourth prong, it would choose not to because the evidence was so compelling); see *United States v.*

B. *Apprendi* Issue

Pierson also asserts that his mandatory life sentence should be vacated and remanded for resentencing because it was based on two prior felony drug convictions that were not submitted to the jury for finding. He cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), to support his argument. Together, those two cases require that any fact that increases the maximum or minimum statutory penalty must, if the defendant does not admit it, be submitted to the jury for a finding beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 103. Both cases, however, continued to recognize an exception to that rule for evidence of prior convictions. See *Almendarez-Torres v. United States*, 523 U.S. 224, 234-35; 243-46 (1998) (noting danger of prejudice to defendant from submitting such evidence to jury). The defendants in *Apprendi*, 530 U.S. at 490, and *Alleyne*, 570 U.S. at 111 n.1, did not challenge the *Almendarez-Torres* exception. Also, we must note that in our experience as judges in criminal cases, we have rarely seen an accused defendant eager to inform a jury about his prior convictions. Pierson's argument is clearly foreclosed by Supreme Court precedent. The issue is preserved for possible Supreme Court review.

Hall, 610 F.3d 727, 744 (D.C. Cir. 2010) (constructive amendment did not affect fairness, integrity, or public reputation of court proceedings; defendant never suggested he would have defended himself differently if he had known about additional theory).

C. The First Step Act

The First Step Act was enacted on December 21, 2018, while this case was pending on appeal. Section 401 of that Act, titled "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies," changed the mandatory term of life imprisonment without release previously required under 21 U.S.C. § 841(b)(1)(A)(viii) to a mandatory minimum of twenty-five years. See First Step Act, Pub. L. No. 115-391, § 401(a)(2)(A)(ii).

On appeal, Pierson argues that § 401 of the First Step Act applies to him, so that his life sentence should be vacated. We disagree. Subsection § 401(c) states that the amendments in that section "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence has not been imposed as of such date of enactment." Pub. L. 115-391, § 401(c). In common usage in federal sentencing law, a sentence is "imposed" in the district court, regardless of later appeals. See 18 U.S.C. § 3553(a) ("factors to be considered in imposing a sentence" addressed to district court); Fed. R. Crim. P. 32(b) ("The court must impose sentence without unnecessary delay."); Fed. R. Crim. P. 32 advisory committee's note to 1994 amendment (regarding duty to advise defendant of right to appeal: "the duty to advise the defendant in such cases extends only to advice on the right to appeal any sentence imposed"); 21 U.S.C. § 851(b) ("If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence … inform [defendant] that any challenge to a prior conviction which is not made before sentence is

imposed may not thereafter be raised to attack the sentence."); Fed. R. Crim P. 32(a)(2) (1986) ("After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal …. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere.").

Any reduction in criminal penalties or in a Sentencing Guideline can pose difficult line-drawing in applying the reduction to pending cases. See generally *Dorsey v. United States*, 567 U.S. 260 (2012) (addressing application of Fair Sentencing Act of 2010 to pending cases where Act did not address problem expressly). In *Dorsey*, the Court applied the new, more lenient terms of the Fair Sentencing Act to the "post-Act sentencing of pre-Act offenders." *Id.* at 281. In the First Step Act, Congress chose language that points clearly toward that same result: the date of sentencing in the district court controls application of the new, more lenient terms.

To avoid this result, Pierson relies on a Sixth Circuit case, arguing that a sentence is not "imposed" until the case reaches final disposition in the highest reviewing court. See *United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997), *superseded by regulation on other grounds*, U.S.S.G. §1B1.10(b)(2)(A). The Sixth Circuit was asked in *Clark* "whether § 3553(f) of the safety valve statute should be applied to cases pending on appeal when it was enacted." The legislation stated that the new safety-valve applied "to all sentences imposed on or after the date of enactment." 110 F.3d at 17, quoting Pub. L. No. 103-322, § 8001(a), 108 Stat.

1796, 1985-86 (1994). Focusing primarily on the remedial purpose of the 1994 safety-valve provision, the court held that although the statute was enacted a month after the defendant's sentence was imposed by the district court, the statute applied because "A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' within the meaning of the safety valve statute[.]"*Id.*

It appears that no other circuits have applied *Clark*'s definition of "imposed" while interpreting the safety-valve statute, let alone applied it while interpreting any other statute. In view of the more common meaning of "imposed" and *Dorsey*, we respectfully decline to extend *Clark*'s reasoning to § 401(c) of the First Step Act.

Sentence was "imposed" here within the meaning of § 401(c) when the district court sentenced the defendant, regardless of whether he appealed a sentence that was consistent with applicable law at that time it was imposed. Pierson's case falls outside of § 401. His convictions and sentence are AFFIRMED.

Appendix D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 1:16CR00206-001

UNITED STATES OF AMERICA,
Plaintiff,
v.
DEVAN PIERSON,
Defendant.

Filed: Jan. 12, 2018

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☒ was found guilty on count(s) 1 through 3 after a plea of not guilty

The defendant is adjudicated guilty of these offense(s):

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21§841(a)(1) and 851	Possession with Intent to Distribute Controlled Substances (50 Grams or More of Methamphetamine, Heroin, and Cocaine)	08/18/2016	1
18§924(c)(1)(A)	Possession of a Firearm in Furtherance of Drug Trafficking Activity	08/18/2016	2
18§922(g)(1)	Felon in Possession of a Firearm	08/18/2016	3

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

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

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

IT IS ORDERED that the defendant shall 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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

January 10, 2018
Date of Imposition of Sentence

s/ James E. Shadid
Hon. James E. Shadid, Judge
United States District Court
Southern District of Indiana

1/11/2018
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life without release, plus 5 years. Count 1: Life without release; Count 3: 10 years, concurrent; Count 2: 5 years, consecutive.**

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

That the defendant be designated to a facility as close to his family as possible, and provided access to vocational and treatment programming.

☒ 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
- ☐ 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 Service Office.

RETURN

I have executed this judgment as follows:

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

_____

UNITED STATES MARSHAL

BY: _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years. Count 1: 10 years, Count 2: 5 years, Count 3: 3 years, all concurrent.**

MANDATORY CONDITIONS

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 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 (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in 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 conditions listed below.

CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the judicial district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.
2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.
4. You shall not knowingly leave the judicial district without the permission of the court or probation officer.
5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.
6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to

be convicted felons to your probation officer within 72 hours of the contact.

7. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in who lives there, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.
8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.
9. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.
10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.
11. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and/or shall permit the probation officer to make such notifications and/or confirm your compliance with this requirement.
12. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.
13. You shall participate in a substance abuse or alcohol treatment program approved by the

probation officer and abide by the rules and regulations of that program. The probation officer shall supervise your participation in the program (provider, location, modality, duration, intensity, etc.). The court authorizes the release of the presentence report and available evaluations to the treatment provider, as approved by the probation officer.

14. You shall not use or possess any controlled substances prohibited by applicable state or federal law, unless authorized to do so by a valid prescription from a licensed medical practitioner. You shall follow the prescription instructions regarding frequency and dosage.
15. You shall submit to substance abuse testing to determine if you have used a prohibited substance or to determine compliance with substance abuse treatment. Testing may include no more than 8 drug tests per month. You shall not attempt to obstruct or tamper with the testing methods.
16. You shall not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, Spice, glue, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption.
17. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a

condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.

18. You shall pay the costs associated with the following imposed conditions of supervised release, to the extent you are financially able to pay: substance abuse treatment and testing. The probation officer shall determine your ability to pay and any schedule of payment.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

_____	_____
Defendant	Date
_____	_____

U.S. Probation Officer/Designated Witness Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total monetary penalties in accordance with the schedule of payments set forth in this judgment.

	Assessment	JVTA Assessment[1]	Fine	Restitution
TOTALS	$300.00			

* * *

SCHEDULE OF PAYMENTS

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

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

☐ not later than __, or

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

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

* * *

[1] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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

Two firearms and all ammunition seized during the search of his vehicle and 3825 N. Whittier Place on August 17, 2016.

Appendix E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 1:16CR00206-001

UNITED STATES OF AMERICA,
Plaintiff,
v.
DEVAN PIERSON,
Defendant.

Jan. 10, 2018

TRANSCRIPT OF SENTENCING HEARING

(Open court.)

[2] THE COURT: Good morning, everybody. This is the United States of America versus Devan Pierson, 16-cr-00206. Mr. Pierson is present in open court with his attorney, Mr. Riggins. Ms. Brady present for the Government.

This matter is set today pursuant to a jury finding of guilty on November 8, 2017, to Count 1, possession with intent to distribute controlled substances; Count 2, possession of a firearm in furtherance of a drug-trafficking crime; and Count 3, felon in possession of a firearm.

A presentence report was ordered and prepared. It appears the parties have received that report.

Mr. Riggins, have you had an opportunity to receive the presentence report?

MR. RIGGINS: Yes, I've received both the original presentence investigative report along with the final report. I noted the changes that were made in the final report, and me and Mr. Pierson went over those as well.

THE COURT: All right. And Ms. Brady as well?

MS. BRADY: I did receive both, yes, Your Honor.

THE COURT: Okay. And it appears that if there were any objections they have been addressed and resolved; is that correct, Mr. Riggins?

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

THE COURT: Ms. Brady?

[3] MS. BRADY: Yes, Your Honor.

THE COURT: Then are the parties ready to proceed to sentencing in this cause?

MR. RIGGINS: Yes.

MS. BRADY: Yes, Your Honor.

THE COURT: All right. For the record, there are no post-trial motions filed; correct?

MR. RIGGINS: That is correct, Your Honor.

THE COURT: Then given no objections, I'll adopt a presentence report today. It appears then that we would start, or have a total offense level. The guideline calculations will be a total offense level 37, criminal history category of 6. The guideline range on Count 1 would be life. Count 1 and 3, actually—no, Count 1

would be life. Count 2 would be 60 months consecutive to Count 1, and Count 3 would be up to ten years. Correct?

MS. BRADY: Yes, Your Honor.

MR. RIGGINS: Yes, Your Honor.

THE COURT: And Count 2 would be consecutive to Counts 1 and 3. Supervised release period on Count 1 would be ten years. Count 2 would be two to five years. Count 3 would be one to three years.

He's not eligible for probation. A fine of 40,000 to 20,500,000. Restitution is not an issue. A special assessment of $300. Do the parties agree that those are the [4] guideline calculations, Mr. Riggins?

MR. RIGGINS: Yes, Your Honor.

THE COURT: Ms. Brady?

MS. BRADY: Yes, Your Honor.

THE COURT: Okay. With that in mind, are there any further additions or corrections to be offered to the presentence report from either party?

MR. RIGGINS: Nothing from us, Your Honor.

MS. BRADY: No, Your Honor.

THE COURT: Formal evidence from the Government?

MS. BRADY: Your Honor, as there are no objections to the PSR, we do not have evidence. I do have certified copies of the two prior 851 convictions should the Court request those to be added to the record. I don't know that it's necessary given the fact that there is no objection to the PSR which already includes that information, Your Honor.

THE COURT: You're free to make them part of the record if you wish, but I think without objection, that it appears that that is not being contested.

MS. BRADY: Yes, Your Honor.

THE COURT: Mr. Riggins, any formal evidence on behalf of Mr. Pierson?

MR. RIGGINS: Your Honor, Mr. Pierson would like to address the Court. I don't think that he has any additional evidence for the Court to consider, and then after [5] Mr. Pierson, I would have some brief remarks.

THE COURT: Mr. Pierson, you will be given an opportunity to address the Court as it pertains to allocution if there is something—and I normally do that after your attorney has argued for a sentencing alternative. But maybe under the circumstances, if you have something different to say that you'd like to be heard on?

THE DEFENDANT: Yes, sir.

THE COURT: All right, go ahead.

THE DEFENDANT: I just want to speak on my—the career offender thing they said they put on me here. I understand I had two 851s filed against me, but in my PSI, it said, "The defendant was at least 18 years old at the time of the instant offense of his conviction. The instant offense of conviction is a felony that is either a crime of violence or controlled substance offense, and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance; therefore, the defendant is a career offender. Because the defendant is a career offender for both Counts 1 and 2, the otherwise applicable guideline range for Count 1 is 360 months

to life based on the offense level of 37 and criminal history category of 6. However, because the defendant's also a career offender under Count 2, the otherwise applicable guideline range is increased by 60 months pursuant to Rule 4B1.(c)(2)(A)—1.1(c)(2)(A) resulting in a [6] guideline range. Therefore 420 months to life."

I have never heard anything about getting a career offender put on me. I heard about—I know I had two 851s, but I never knew anything about a career offender. I didn't know I qualified for a career offender.

THE COURT: Okay. And are you saying that because you believe that Mr. Riggins should have advised you of that if he had known?

THE DEFENDANT: Yes, sir.

THE COURT: So you're saying you weren't aware of the possible penalties when you went to trial?

THE DEFENDANT: I was aware of the possible penalties, but I didn't know I was—could get the career offender.

THE COURT: Were you aware that this could be, if you were found guilty, this could be or would be a life sentence?

THE DEFENDANT: No, I didn't.

THE COURT: Seems to me, Mr. Riggins, you can respond to that if you wish. First of all, there is no objection to the designation of career offender; is that correct, Mr. Riggins?

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

THE COURT: And probation is here as well if anybody has any questions. It's based upon paragraphs 42 and 45, [7] would that be correct? "The prior's conspiracy to possess with intent to distribute," paragraph 45, for which you received 151 months in prison. And is the other based upon the paragraph 42 dealing in cocaine or narcotic felony?

Probation, would you identify yourself, please?

PROBATION OFFICER: Matt Renshaw for Probation. That is correct. Those convictions form the basis of the career offender finding.

THE COURT: And maybe for Mr. Pierson's sake, since he believes that he wasn't 18 at the time that was committed, explain that, how that still applies.

PROBATION OFFICER: It's applied based on his age at the time of the instant offense, not the prior convictions. And it appears to me—I'd have to do the math, but he would have been somewhere around 33, more or less, somewhere in that area at the time of the instant offense.

THE COURT: At the time of his second offense?

PROBATION OFFICER: The instant offense.

THE COURT: The instant, correct. All right.

With that in mind, is there anything else, Mr. Riggins, that you believe needs to be addressed based on what Mr. Pierson has said?

MR. RIGGINS: Yes, Your Honor. If I could, I would like—Mr. Pierson has an opportunity to review the first letter that he received from me after the very first meeting [8] that we had. And after showing that

to him, maybe he could address the issue of whether he knew whether he was facing a life sentence or not.

THE COURT: All right. Well, take a moment to do that.

MR. RIGGINS: I did already, Your Honor. I think he can answer the question.

THE COURT: Mr. Pierson, does it appear you were advised that you could receive a life sentence?

THE DEFENDANT: That's what it says in this letter right here.

THE COURT: The letter was clearly received by you before you went to trial?

THE DEFENDANT: Uh-huh. On March 29th, he sent it out.

THE COURT: All right. Okay then, with that in mind, I think that will—no need to address that issue any further.

Is there anything else you want to say on that type of an issue, Mr. Pierson? Otherwise you will have an opportunity to speak again.

THE DEFENDANT: I will not have an opportunity?

THE COURT: You will.

THE DEFENDANT: I'll wait.

THE COURT: All right, very good. Okay.

[9] Then argument as sentencing alternatives from the Government?

MS. BRADY: Your Honor, we would simply request that Mr. Pierson be sentenced in accordance with the guidelines, that is a mandatory life sentence

as to Count 1. And the guidelines as to Counts 2 and 3, particularly with Count 2 to run consecutive. I think, Your Honor, that the law is quite clear on this. And I think more importantly, even in looking at the 3553 factors, Your Honor, I think it's clear that this is the appropriate sentence regardless.

Your Honor, when you look at Mr. Pierson's criminal history, I believe, with the first arrest at the age of 13, with ongoing convictions and additional arrests for firearms and drug-related offenses, until the dates of his most recent arrest, Your Honor, I think it's clear.

Most importantly, I would note that Mr. Pierson dates back in this courthouse back to 2007 when AUSA Conour and I first encountered Mr. Pierson for a cocaine conspiracy offense. He was sentenced. He received the very fair plea agreement and plea offer from the Government, and rather than take that opportunity to kind of reboot and say "Hey, you know what, I deal drugs, this is probably going to eat up a huge chunk of my life," what he did barely out of the halfway house is go right back into it.

And I think what makes this particularly offensive [10] is the fact that Mr. Pierson, it is my understanding, was in the REACH program in our district, which means Probation took a very intensive effort to help Mr. Pierson. "You need a job? We'll get you a job. You need someplace to live? We'll work with you."

They did everything they could to assist Mr. Pierson in coming back to where he should be in life. And he made a very clear and very conscious decision he wasn't going to do that.

So looking both at the law, looking at the 3553 factors, I think they go to and direct us to the same sentence. That is a respectful recommendation for the Court for a life sentence in this matter, Your Honor.

THE COURT: All right. Thank you.

Mr. Riggins?

MR. RIGGINS: Your Honor, what I would ask the Court to take into consideration under the 3553 factors, in addition to those, I would ask the Court to make a separate analysis from the 851s that were filed and make a determination if, without those being filed, would the Court have made a determination that Mr. Pierson would be given a life sentence.

THE COURT: Ms. Brady, do you wish to be heard on that point?

MS. BRADY: Your Honor, I'm not sure that the law would require some separate analysis. The fact is the law is [11] what it is. The 851s were filed. The law is clear. A life sentence is appropriate, in addition to it being appropriate under the 3553 factors.

THE COURT: All right. Thank you.

Mr. Pierson, at this time, you have an opportunity to make a statement if you wish.

THE DEFENDANT: Yeah. First and foremost, Your Honor, I'd like to address the Court on a few issues so that it will be on record. I know I was found guilty of these charges. There was a few issues I had with Mr. Riggins that I wasn't allowed to speak about during my trial.

The first being the fact that Mr. Matthew Whitt, the—the drug examiner, didn't come to testify because

he was relieved of his duties prior to trial. After trial, I asked Mr. Riggins—during trial I asked Mr. Riggins why he's not testifying, and he simply wrote down on this piece of paper right there, that sheet of paper right there, that he quit during my trial.

And after that, I called him, and during the recorded phone call, asked Mr. Riggins about the situation, and he stated that Ms. Brady told him that Matthew Wiggins—that Matthew Whitt had quit. So I asked him, I said, "So you just going to go with what the prosecutors say, and not try to investigate the situation on why the person who was testing the drugs that was found in the house can't testify because [12] all of a sudden he just got relieved of his duties?" And I feel it's my right to know who's testifying against me if their name was in my trial brief because Mr. Matthew Whitt's name was in my trial briefs.

And then when the other person came and got on the stand and testified about the drugs, I never knew who he was. That was the first time I ever seen or heard of his name or anything.

Then I also asked Mr. Riggins on several occasions that I need copies of the letter that I wrote—every letter that I wrote him, and every letter he wrote me to show that I asked for several motions to get filed prior to trial that he never attempted to file. These motions could have possibly saved me from going to trial or proved my innocence in this case.

Also, I'd like to thank you for taking time out of your day to come from Illinois to hear this difficult case. And I also like to apologize to my daughter, Ki-Ayjah, for not being able to be the dad that she needs in her life. I also want her to know that I love her with

all my heart and I'll be home soon so that I can be there with her for the remainder of my life. And to the rest of my family and friends, I thank you all for everything. I love you, y'all. And to my mama, Diane, if you can do it, I can do it. It's time for me to leave it in God's hands. That's what she would always say. [13] That's what I'm going to do. I love you, Mom, and I'll be home soon.

And for the Court recommendations, I'd like to be placed back close to home where I was at before I was released from federal prison the first time.

THE COURT: All right. Thank you.

MR. RIGGINS: Your Honor, may I have a moment with Mr. Pierson?

THE COURT: You may. And while you're doing that, with regard to the point Mr. Riggins made about what the sentence might be without the 851, as I understand, that would be Level 30, category 6 still. What would that sentencing range be?

MS. BRADY: He would still be a career offender, correct, Your Honor?

THE COURT: Correct, but I'm just looking at what it was before it got bumped to career offender.

MS. BRADY: Yes, Your Honor.

THE COURT: He would still be a career offender.

PROBATION OFFICER: Are you looking for the guideline range at level 30, category 6, Your Honor?

THE COURT: Yes, just to make a point.

PROBATION OFFICER: Yes, 168 to 210 months.

THE COURT: All right. Mr. Riggins, do you need any more time with Mr. Pierson?

[14] MR. RIGGINS: Your Honor, I didn't hear what Mr. Renshaw said.

THE COURT: 168 to 210 if it was a Level 30.

MR. RIGGINS: I'm ready. He's ready.

THE COURT: Mr. Pierson, anything else you want to say based upon your visit with Mr. Riggins?

THE DEFENDANT: I would like to have, like, copies of this paper right here.

THE COURT: What paper is that?

THE DEFENDANT: It's the paper where he wrote on there during my trial. I had asked him questions and he had simply stated that the drug chemist dude had quit, and he didn't do a thorough investigation on what happened to the drug chemicals. So I'd like to have copies of that paper made.

THE COURT: Well, I'm going to leave that in Mr. Riggins' hands. It seems to me that's a work product of his. Whether he provides a copy to you or not will be up to him. It seems like you're making a record on what it says. So I'll leave that at this point alone unless Mr. Riggins wishes to be heard.

MR. RIGGINS: Your Honor, just for the record, Mr. Pierson asked me to gather all of his prior letters. I have given all of his prior letters to him today, and that paper that he's describing is a part of that packet that's [15] listed in there.

THE DEFENDANT: No, it's not.

THE COURT: All right. Well, then that's that. Anything else you want to say, Mr. Pierson?

THE DEFENDANT: I don't have that. Flip it over. That's what I had asked you during trial and you wrote right there.

THE COURT: Anything else, Mr. Pierson, anything else you want to say?

THE DEFENDANT: No, I just like to appeal my case if possible.

THE COURT: All right. You will hear your appeal rights here momentarily.

You made it clear throughout the proceedings and throughout the trial, Mr. Pierson, that you have had some issues with Mr. Riggins. I found that given the circumstances, and from my observation and viewing of the evidence, that Mr. Riggins did all he could do in representing you in this matter.

But having said that, and considering all the information before me, which includes the presentence report, which includes the sentencing guideline calculations, the career offender designation, the arguments of counsel, the statement that you've made throughout the trial, and yet today, the factors in 3553, which I'll articulate a few in a [16] moment, I believe the sentence that's to be imposed is sufficient, but not greater than necessary to comply with the purpose of the act.

The presentence report catches my attention right at paragraph 10 on page 4. We don't have to look very far. Shortly, within a few weeks of the trial, you apparently had an incident at the Knox County jail where you punched somebody in the face. You admitted it. You said you had felt disrespected. You said something about receiving a mandatory life

sentence, which also confirms that you knew what the sentence would be before you went to trial.

THE DEFENDANT: This was after my trial?

THE COURT: I understand that, but before sentencing, before a presentence report was even prepared and released. It appears that you were aware of the mandatory life sentence.

The point I'm making isn't necessarily that you were aware of the mandatory life sentence, but the punching of somebody because you felt disrespected. And you don't have to look too far, and I'm not a lecturer, and by no means is this a lecture, and frankly you are very clear where this sentence may be headed, so I'm not going to spend much time visiting or talking about it. But the conduct on paragraphs 11 through 14 as set forth in the presentence report, or 11 through 16 and 17, comes in August of 2016 within four months of your release [17] from a prior drug felony of which you received 151 months.

Then when you returned to this way of life, you basically said, "I refuse to live by the rules that society wishes me to comply with. So please put me back in prison, and since I refused to comply, you might as well put me back in prison for as long as you can."

I don't take any pleasure in imposing a sentence like this, but it just seems to me you were determined to make yourself come to this point; possessing handguns at age 16, dealing cocaine at 17, conspiring to possess with intent to deliver crack at age 25. I pointed out you were released in April of 2016. This conduct occurred in August of 2016.

I'm not sure if this is your way of proving or earning respect for yourself. Then if it is, perhaps it's just as well that you get a life sentence today because you're sure to return. And to Mr. Riggins point about the 851s, they were properly applied. You are properly a career offender. I believe this sentence is properly imposed and appropriate, but your guideline range would be 168 to 210 if you were that level 30, criminal history category 6. You received 151 months previously, and that did not deter you in any way, shape or form to return to this lifestyle. So the sentence today is appropriate.

I'll say as well, when I reference paragraph 62 to 65 about your childhood, and I don't presume by any means to [18] know how your childhood affected you, clearly it set you on this path. Maybe it set you on to not understand the norms of society. Maybe it set you on a course to not understand simple rights and wrongs. Your dad was never in your life. He was in and out of prison. Your mother, who is working now and so I assume she's recovered in some fashion, was a crack addict during your childhood, leaving you alone for periods of time. Legal guardianship of you was placed with someone else at age 14.

So in some regards, some would say maybe you never had a chance. And I don't presume to know whether those are obstacles that simply you're unable to overcome. But I do know this. In the federal system, and when you were released in April of 2016, as Miss Brady points out, the probation office and the supervised release officers do take their role seriously, and they did set up conditions for you to try to help

yourself. And obviously you never gave that a chance to do so.

So even though I take no pleasure in imposing a sentence like this, it's one you pretty much chose for yourself, and I do believe it is appropriate. So given all the factors that are properly considered here, I do believe that it will be my judgment and sentence that you'll be imprisoned for a concurrent term of life on Count 1, and ten years on Count 3. Again, those would be concurrent with each [19] other. A term of 60 months on Count 2 to be served consecutively. It produces a total term of life plus five years. I find no ability to pay a fine, so no fine is imposed.

I find forfeiture of all the firearms and ammunition seized from your vehicle at 3825 North Whittier Place on August 18, 2016. The supervised release period will be, as to Count 1, a term of ten years. Five years on Count 2. Three years on Count 3. Those will be served concurrent with each other.

Based on the nature of the offense, as well as your personal history and characteristics and to protect the public, I also am adopting the supervised release conditions that are set forth in paragraphs 106 and 107 of the presentence report with the reasoning, and I will state those.

Mr. Riggins, have you gone over those with Mr. Pierson?

MR. RIGGINS: Yes, Your Honor.

THE COURT: All right. While on supervised release, you will not commit another federal, state or local crime, cooperate in the collection of DNA.

Refrain from any unlawful use of a controlled substance, and submit to one drug test within 15 days of placement on supervised release, and at least two periodic tests thereafter as directed by the probation office.

[20] Report to the probation office in the judicial district to which you are released within 72 hours of your release from custody of the Bureau of Prisons. Report to the probation officer in a manner and frequency as directed by the court or the probation officer.

Permit a probation officer to visit you in a reasonable time at home or another place where the officer may legitimately enter by right or consent, and permit confiscation of any contraband observed in plain view of the probation officer.

The first two conditions are administrative requirements of supervision. This is a condition to assist the probation officer in monitoring you for the protection of the community. Not knowingly leave the judicial district without the permission of the court or the probation officer. This is again to assist probation in monitoring you for protection of the community.

Answer truthfully to inquiries by the probation officer subject to your 5th Amendment privilege. This is an administrative requirement of supervision.

Not meet, communicate or otherwise interact with a person you know to be engaged or planning to be engaged in criminal activity. Report any contact with persons you know to be convicted felons to your probation officer within 72 hours of contact. This condition is designed to reduce the [21] risk of recidivism and provide for public safety.

Reside at a location approved by the probation officer and notify probation at least 72 hours prior to any planned change in place or circumstances of residence or employment, including but not limited to changes in who lives there, job positions, job responsibilities.

When prior notification is not possible, notify probation within 72 hours of the change. This condition is imposed to assist probation in monitoring you and for protection of the community.

Not own, possess or have access to firearm, ammunition, destructive device or dangerous weapon. This condition is imposed to assist probation in monitoring you and for the protection of the community, and simply because as a convicted felon, you're not allowed to possess.

Notify probation within 72 hours of being arrested, charged or questioned by law enforcement. This condition is imposed to assist probation in monitoring you and for protection of the community.

Maintain lawful full-time employment unless excused by probation for schooling, vocational training, or other reasons that prevent lawful employment. This is to ensure gainful employment to reduce the risk of recidivism.

Notify third parties who may be impacted by the nature of the conduct underlying your current or prior [22] offenses of conviction, and permit Probation to make such notifications and confirm your compliance. Ordering this condition to reduce the risk to the community posed by the offense of conviction as well as your personal history and characteristics.

Make a good faith effort to follow instructions of probation necessary to ensure compliance. This is an administrative requirement.

Participate in a substance abuse or alcohol treatment program approved by probation, and abide by the rules and regulations of that program. Probation shall supervise your participation in the program. The Court authorizes the release of the presentence report and available evaluations to the treatment providor as approved by probation. This addresses your history of substance abuse.

Not use or possess any controlled substances prohibited by applicable state or federal law unless authorized to do so by a valid prescription from a licensed medical practitioner. Follow the prescription instructions regarding frequency and dosage. This is to monitor your sobriety.

Not knowingly purchase, possess, distribute, administer or otherwise use any psychoactive substances that impair a person's physical or mental functioning, whether or not intended for human consumption. This is to address your [23] history of substance abuse.

Submit to substance abuse testing to determine if you've used a prohibited substance or to determine compliance with the substance abuse treatment. Testing may include no more than eight drug tests per month. Shall not attempt to obstruct or tamper with the testing methods. This allows probation to monitor your sobriety.

Provide probation access to any requested financial information. Is this necessary given that no fine is being imposed?

MS. BRADY: Other than the $300 special assessment, that I believe Your Honor is assessing, I don't know that it is. No, Your Honor, it's not.

THE COURT: I don't think I'll impose that.

Submit to a search by probation of your person, vehicle, office, business, residence and property, including any computer systems and hardware or software systems, electronic devices, telephones, Internet-enabled devices, including data contained in such whenever probation has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you, and that area to be searched may contain evidence of such a violation or conduct. Other law enforcement may assist as necessary.

Submit to the seizure of contraband found by the [24] probation officer. Warn other occupants these locations may be subject to searches. This is due to the nature of the instant offense and your history of substance abuse. I'm imposing this condition to assist probation in monitoring you and for the protection of the community.

Pay the costs associated with the following imposed conditions to the extent you're able to do so: Substance abuse treatment and testing. Probation will determine your ability to pay and any schedule of payments subject to my review upon request. This requires you to invest, if you can, in your own rehabilitation.

The special assessment of $300 is imposed. I will recommend that you serve your sentence in a facility that gives you access to vocational and drug treatment possibilities as well as close to your family as possible.

Is there anything else the parties believe needs to be addressed before appeal rights?

MS. BRADY: No, Your Honor.

MR. RIGGINS: No, Your Honor.

THE COURT: All right. I'll say one last thing here, Mr. Pierson. Sentences like this shouldn't be necessary. In spite of the history you made for yourself, there was an opportunity for you to avoid this. Your visits with me during the trial and after and today indicate to me a person that can articulate how he thinks. It just seems to me [25] that you could have made or clearly should have made different choices.

With that in mind, you do have appeal rights. You have 14 days to do so, or ask Mr. Riggins to do so on your behalf. Mr. Riggins was court-appointed counsel. So it's probably appropriate that court-appointed counsel would be available for you for your appeal.

Anything else the parties believe needs to be addressed today?

MS. BRADY: No, Your Honor.

MR. RIGGINS: Your Honor, I think he wants to ask the clerk to issue the notice just to make sure that it's done. Is that what you want?

THE DEFENDANT: Yes.

THE COURT: All right.

MR. RIGGINS: And then I'll file the necessary documents in the Court of Appeals.

THE COURT: Very good.

THE DEFENDANT: How long do I have for that?

THE COURT: Well, the appeal process starts now. How long it takes, you'll be advised by the Court of Appeals on the process. Okay?

THE DEFENDANT: All right.

THE COURT: All right. Very good. Thank you. We'll be in recess.

Appendix F

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 1:16CR00206-001

UNITED STATES OF AMERICA,
Plaintiff,
v.
DEVAN PIERSON,
Defendant.

Filed: September 21, 2016

INDICTMENT

The Grand Jury charges that:

Count One

(*21 U.S.C. 841(a)(1) Possession with Intent to Distribute Controlled Substances*)

On or about August 18, 2016, in the Southern District of Indiana, DEVAN PIERSON, defendant herein, knowingly and intentionally possessed with the intent to distribute controlled substances, including 50 grams or more of methamphetamine, a Schedule II controlled substance; a mixture or substance containing a detectable amount of heroin, a Schedule I controlled substance; and/or a mixture or substance containing a detectable amount of cocaine,

a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Count Two

(*18 U.S.C. 924(c)-Possession of a Firearm in Furtherance of Drug Trafficking Activity*)

On or about August 18, 2016, in the Southern District of Indiana, DEVAN PIERSON, defendant herein, did knowingly possess a firearm, that is, a Taurus Model PT 145 .45 caliber handgun, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, the drug offense charged in Count One; all in violation of Title 18, United States Code, Section 924(c)(1)(A).

Count Three

(*18 U.S.C. 922(g)-Possession of a Firearm as A Previously Convicted Felon*)

On or about August 18, 2016, in the Southern District of Indiana, DEVAN PIERSON, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, to wit: felony Dealing in Cocaine or Narcotic in 2000 in Marion County Superior Court, and felony Conspiracy to Possess Controlled Substances with Intent to Distribute in 2009 in the Southern District of Indiana; did knowingly possess in and affecting interstate commerce, a firearm, that is, a Taurus Model PT 145 .45 caliber handgun, in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE

1. Pursuant to Federal Rule of Criminal Procedure 32.2, the United States hereby gives the

defendant notice that the United States will seek forfeiture of property, criminally and/or civilly, pursuant to Title 18, United States Code, Sections 924(d), Title 21, United States Code, Sections 853 and 881, and Title 28, United States Code, Section 2461 (c), as part of any sentence imposed.

2. Pursuant to Title 18, United States Code, Section 924(d), if convicted of the offenses set forth in Counts Two or Three of this Indictment, the defendant shall forfeit to the United States "any firearm or ammunition involved in" the offense.

3. Pursuant to Title 21, United States Code, Section 853, if convicted of the offense set forth in Count One of the Indictment, the defendant shall forfeit to the United States any and all property constituting or derived from any proceeds the defendant obtained directly or indirectly as a result of the offense, and any and all property used or intended to be used in any manner or part to commit and facilitate the commission of the offense.

4. The United States shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), and as incorporated by Title 28, United States Code, Section 2461(c), if any of the property described above in paragraph 3, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty.

A TRUE BILL

[Redacted]
Foreperson

JOSH J. MINKLER
United States Attorney

By: [handwritten: signature]
Michelle P. Brady
Assistant United States Attorney