

A P P E N D I X

" A "

Court of Appeals Order of 4-24-2020
in 18-6260 affirming the District Court

NOT RECOMMENDED FOR PUBLICATION

No. 18-6260

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

<p>FILED Apr 24, 2020 DEBORAH S. HUNT, Clerk</p>

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONALD R. CONWAY,

Defendant-Appellant.

)	
)	
)	
)	
)	ON APPEAL FROM THE UNITED
)	STATES DISTRICT COURT FOR
)	THE EASTERN DISTRICT OF
)	KENTUCKY
)	
)	
)	

ORDER

Before: COLE, Chief Judge; GUY and BUSH, Circuit Judges.

Donald R. Conway, a federal prisoner who has been appointed counsel pursuant to the Criminal Justice Act, appeals the sentence imposed after he was found guilty at a bench trial of possession with intent to distribute heroin, 21 U.S.C. § 841(a), and possession with intent to distribute cocaine, *id.* He has also filed a *pro se* motion for reconsideration of this court's prior order that denied his motion to strike the brief filed by his appointed counsel, to withdraw his appointed counsel, and to be appointed new counsel. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

After the district court found Conway guilty of his § 841(a) charges, a presentence report was prepared, in which Conway was assigned a total offense level of 34 and a criminal history category of VI. The presentence report classified Conway as a career offender under USSG § 4B1.1, based on his having two prior convictions for a "crime of violence" or a "controlled substance offense"—namely, Ohio convictions for felonious assault and trafficking in cocaine.

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The resulting Guidelines range was 262 to 327 months. The district court imposed a below-Guidelines sentence of 192 months.

Conway appealed and was appointed new counsel, Andrew P. Avellano. Shortly before Avellano filed Conway's appellant brief, Conway filed a *pro se* motion for Avellano to withdraw as counsel and for the appointment of new counsel, which this court denied. Conway then filed a *pro se* motion in which he reiterated his request for a substitution of counsel and requested that the court strike the appellant brief filed by Avellano. This court denied the motion in an order dated January 9, 2020. Conway then filed a motion for this court to reconsider its January 9, 2020, order.

In Conway's appellant brief, filed by Avellano on Conway's behalf, Conway argues that his sentence is procedurally unreasonable, and that he does not qualify as a career offender because his Ohio trafficking-in-cocaine conviction does not qualify as a "controlled substance offense" under the Guidelines.

Sentencing Challenge

We generally review a district court's sentencing decision for procedural reasonableness under an abuse-of-discretion standard. *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012). However, "[w]hether a prior conviction counts as a predicate offense under the Guidelines is a question of law subject to de novo review." *United States v. Havis*, 927 F.3d 382, 384 (6th Cir. 2019) (en banc) (per curiam). Under the Guidelines, a defendant qualifies as a career offender if, among other things, the current offense is a "controlled substance offense" and he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

USSG § 4B1.1(a). A controlled substance offense is defined as:

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

USSG § 4B1.2(b).

Conway argues that his 2011 conviction for violation of Ohio Revised Code § 2925.03(A)(2), is not a controlled substance offense because that statute criminalizes conduct

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not covered by § 4B1.2(b)'s definition of a "controlled substance offense." Under section 2925.03(A)(2), no person shall knowingly

[p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

Ohio Rev. Code § 2925.03(A)(2).

"We have repeatedly held that [section] 2925.03(A)(2) 'falls within the ambit of USSG § 4B1.2(b),' and, thus, that it is a controlled substance offense. *Harris v. Joseph*, No. 19-5308, 2019 U.S. App. LEXIS 25768, at *6 (6th Cir. Aug. 26, 2019) (quoting *United States v. Robinson*, 333 F. App'x 33, 36 (6th Cir. 2009)); see also *United States v. Wright*, 43 F. App'x 848, 852-53 (6th Cir. 2002) (concluding that section 2925.03(A)(2) is a "controlled substance offense" under USSG § 4B1.1); see also *Nesbitt v. United States*, Nos. 4:15CR18, 4:16CV2604, 2017 U.S. Dist. LEXIS 165394, at *4 (N.D. Ohio Oct. 5, 2017) ("Sixth Circuit precedent leaves no doubt that . . . a [section 2925.03(A)(2)] conviction is a predicate offense."). Other circuits agree. See *United States v. Miles*, 266 F. App'x 534, 536 (9th Cir. 2008); *United States v. Karam*, 496 F.3d 1157, 1167-68 (10th Cir. 2007). On this authority, Conway cannot show that the district court erred in classifying him as a career offender.

Motion for Reconsideration

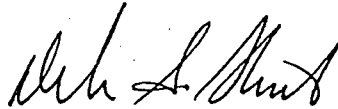
Conway also seeks reconsideration of this court's January 9, 2020, order, which denied his motion for substitution of counsel and to strike the appellant brief filed by Avellano. These arguments lack merit: as this court previously explained, Conway's "right to court-appointed counsel on appeal . . . does not include a right to counsel of choice." Order dated Jan. 9, 2020; see also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). And, to the extent that Conway argues that his appellant brief should be stricken on the ground that Avellano failed to raise certain issues, the argument fails because appointed counsel has no obligation to raise issues that he or she deems lack merit. See, e.g., *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001). His motion for reconsideration therefore must be denied.

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Accordingly, we **AFFIRM** the district court's judgment and **DENY** the motion for reconsideration.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Deborah S. Hunt", written in black ink.

Deborah S. Hunt, Clerk

A P P E N D I X

" B "

Court of Appeals Order of 7-29-20
in 18-6260 denying Petition for Rehearing/
Petition for Rehearing En Banc

A P P E N D I X

" C "

District Court Conviction and Sentencing
on 11-30-2018 in 2:17-cr-0043

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Northern Division at Covington

Eastern District of Kentucky

FILED

NOV 30 2018

UNITED STATES OF AMERICA

v.

Donald R. Conway

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-CR-43-DLB-01

USM Number: 21792-032

Edward L. Metzger, III
Defendant's Attorney

AT LEXINGTON
ROBERT R. CARR
CLERK, U.S. DISTRICT COURT

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 & 2
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	Possession with Intent to Distribute Heroin	12/28/2016	1
21:841(a)(1)	Possession with Intent to Distribute Cocaine	12/28/2016	2

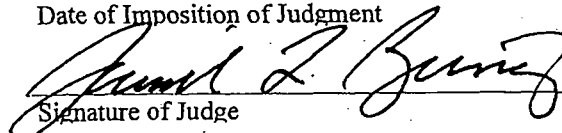
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☒ Count(s) 3 ☒ is ☐ are dismissed on the motion of the United States.

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

November 29, 2018

Date of Imposition of Judgment



Signature of Judge

Honorable David L. Bunning, U.S. District Judge

Name and Title of Judge

11/30/18

Date

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01

IMPRISONMENT

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

**Cts. 1&2: 192 Months on each Count to run concurrent with each other, for a total term of
ONE HUNDRED NINETY-TWO (192) MONTHS**

☒ The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant participate in the 500-Hour RDAP Program and any additional substance abuse treatment programs for which he would qualify.
It is recommended that the defendant be given credit for time served from December 28, 2016 – present.
It is recommended that the defendant be designated to FCI Manchester.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____
☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01

SUPERVISED RELEASE

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

Cts. 1&2: 6 Years on each Count to run concurrent with each other, for a total term of SIX (6) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

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

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1), but including other devices excluded from this definition), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search will be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.
2. You must participate in a substance abuse treatment program and must submit to periodic drug and alcohol testing at the direction and discretion of the probation officer during the term of supervision. You must pay for the cost of treatment services to the extent you are able as determined by the probation officer.
3. You must refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing which is required as a condition of release.

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00 (\$100/Ct.)	\$ N/A	\$ Waived	\$ Community Waived

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS \$ _____ \$ _____

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01

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 \$ 200.00 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, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
35 West 5th Street, Room 289, Covington, KY 41011-1401

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

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

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

- ☐ Joint and Several

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

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01
DISTRICT: Eastern District of Kentucky – Northern Division at Covington

STATEMENT OF REASONS

(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

- A. ☒ The court adopts the presentence investigation report without change.
- B. ☐ The court adopts the presentence investigation report with the following changes: (Use Section VIII if necessary)
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report)
1. ☐ Chapter Two of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to base offense level, or specific offense characteristics)
 2. ☐ Chapter Three of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)
 3. ☐ Chapter Four of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)
 4. ☐ Additional Comments or Findings: (include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)
- C. ☐ The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.
Applicable Sentencing Guideline: (if more than one guideline applies, list the guideline producing the highest offense level) _____

II. COURT FINDINGS ON MANDATORY MINIMUM SENTENCE (Check all that apply)

- A. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.
- B. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below the mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:
- ☐ findings of fact in this case: (Specify) _____
 - ☐ substantial assistance (18 U.S.C. § 3553(e))
 - ☐ the statutory safety valve (18 U.S.C. § 3553(f))
- C. ☒ No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: (BEFORE DEPARTURES OR VARIANCES)

Total Offense Level: 34
Criminal History Category: VI
Guideline Range: (after application of §5G1.1 and §5G1.2) 262 to 327 months
Supervised Release Range: _____ to 6 years
Fine Range: \$ 35,000 to \$ 2,000,000

- ☒ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01
DISTRICT: Eastern District of Kentucky – Northern Division at Covington

STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION (Check all that apply)

- A. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.
- B. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: (Use Section VIII if necessary)
- C. ☐ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual.
(Also complete Section V)
- D. ☒ The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). (Also complete Section VI)

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL (If applicable)

- A. The sentence imposed departs: (Check only one)
- ☐ above the guideline range
- ☐ below the guideline range

- B. Motion for departure before the court pursuant to: (Check all that apply and specify reason(s) in sections C and D)

1. Plea Agreement

- ☐ binding plea agreement for departure accepted by the court
- ☐ plea agreement for departure, which the court finds to be reasonable
- ☐ plea agreement that states that the government will not oppose a defense departure motion

2. Motion Not Addressed in a Plea Agreement

- ☐ government motion for departure
- ☐ defense motion for departure to which the government did not object
- ☐ defense motion for departure to which the government objected
- ☐ joint motion by both parties

3. Other

- ☐ Other than a plea agreement or motion by the parties for departure

C. Reasons for departure: (Check all that apply)

- | | | |
|---|--|--|
| <input type="checkbox"/> 4A1.3 Criminal History Inadequacy | <input type="checkbox"/> 5K2.1 Death | <input type="checkbox"/> 5K2.12 Coercion and Duress |
| <input type="checkbox"/> 5H1.1 Age | <input type="checkbox"/> 5K2.2 Physical Injury | <input type="checkbox"/> 5K2.13 Diminished Capacity |
| <input type="checkbox"/> 5H1.2 Education and Vocational Skills | <input type="checkbox"/> 5K2.3 Extreme Psychological Injury | <input type="checkbox"/> 5K2.14 Public Welfare |
| <input type="checkbox"/> 5H1.3 Mental and Emotional Condition | <input type="checkbox"/> 5K2.4 Restraint Abduction or Unlawful | <input type="checkbox"/> 5K2.16 Voluntary Disclosure of Offense |
| <input type="checkbox"/> 5H1.4 Physical Condition | <input type="checkbox"/> 5K2.5 Property Damage or Loss | <input type="checkbox"/> 5K2.17 High-Capacity Semiautomatic Weapon |
| <input type="checkbox"/> 5H1.5 Employment Record | <input type="checkbox"/> 5K2.6 Weapon | <input type="checkbox"/> 5K2.18 Violent Street Gang |
| <input type="checkbox"/> 5H1.6 Family Ties and Responsibilities | <input type="checkbox"/> 5K2.7 Disruption of Government Function | <input type="checkbox"/> 5K2.20 Aberrant Behavior |
| <input type="checkbox"/> 5H1.11 Military Service | <input type="checkbox"/> 5K2.8 Extreme Conduct | <input type="checkbox"/> 5K2.21 Dismissed and Uncharged Conduct |
| <input type="checkbox"/> 5H1.11 Charitable Service/Good Works | <input type="checkbox"/> 5K2.9 Criminal Purpose | <input type="checkbox"/> 5K2.22 Sex Offender Characteristics |
| <input type="checkbox"/> 5K1.1 Substantial Assistance | <input type="checkbox"/> 5K2.10 Victim's Conduct | <input type="checkbox"/> 5K2.23 Discharged Terms of Imprisonment |
| <input type="checkbox"/> 5K2.0 Aggravating/Mitigating Circumstances | <input type="checkbox"/> 5K2.11 Lesser Harm | <input type="checkbox"/> 5K2.24 Unauthorized Insignia |
| | | <input type="checkbox"/> 5K3.1 Early Disposition Program (EDP) |

- ☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: (see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)

- D. State the basis for the departure. (Use Section VIII if necessary)

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01
DISTRICT: Eastern District of Kentucky - Northern Division at Covington

STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE (If applicable)

A. The sentence imposed is: (Check only one)

- ☐ above the guideline range
☒ below the guideline range

B. Motion for a variance before the court pursuant to: (Check all that apply and specify reason(s) in sections C and D)

1. Plea Agreement

- ☐ binding plea agreement for a variance accepted by the court
☐ plea agreement for a variance, which the court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense motion for a variance

2. Motion Not Addressed in a Plea Agreement

- ☐ government motion for a variance
☐ defense motion for a variance to which the government did not object
☒ defense motion for a variance to which the government objected
☐ joint motion by both parties

3. Other

- ☐ Other than a plea agreement or motion by the parties for a variance

C. 18 U.S.C. § 3553(a) and other reason(s) for a variance (Check all that apply)

- ☐ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1):
☐ Mens Rea ☐ Extreme Conduct ☐ Dismissed/Uncharged Conduct
☐ Role in the Offense ☐ Victim Impact
☐ General Aggravating or Mitigating Factors: (Specify)

☐ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1):

- | | |
|---|---|
| <input type="checkbox"/> Aberrant Behavior | <input type="checkbox"/> Lack of Youthful Guidance |
| <input type="checkbox"/> Age | <input type="checkbox"/> Mental and Emotional Condition |
| <input type="checkbox"/> Charitable Service/Good Works | <input type="checkbox"/> Military Service |
| <input type="checkbox"/> Community Ties | <input type="checkbox"/> Non-Violent Offender |
| <input type="checkbox"/> Diminished Capacity | <input type="checkbox"/> Physical Condition |
| <input type="checkbox"/> Drug or Alcohol Dependence | <input type="checkbox"/> Pre-sentence Rehabilitation |
| <input type="checkbox"/> Employment Record | <input type="checkbox"/> Remorse/Lack of Remorse |
| <input type="checkbox"/> Family Ties and Responsibilities | <input type="checkbox"/> Other: (Specify) |

☐ Issues with Criminal History: (Specify)

- ☐ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
- ☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
- ☐ Acceptance of Responsibility ☐ Conduct Pre-trial/On Bond ☐ Cooperation Without Government Motion for
- ☐ Early Plea Agreement ☐ Global Plea Agreement
- ☐ Time Served (not counted in sentence) ☐ Waiver of Indictment ☐ Waiver of Appeal
- ☐ Policy Disagreement with the Guidelines (Kimbrough v. U.S., 552 U.S. 85 (2007): (Specify)

☐ Other: (Specify)

D. State the basis for a variance. (Use Section VIII if necessary)

The age of the felonious assault case (B9808065) is over 20 years old. The criminal history score would be III without career offender. The defendant only received 6 months on the drug trafficking offense (B1000821). Due to the nature and circumstances of the predicate offense.

DEFENDANT: Donald R. Conway
CASE NUMBER: 2:17-CR-43-DLB-01
DISTRICT: Eastern District of Kentucky – Northern Division at Covington

STATEMENT OF REASONS

VII. COURT DETERMINATIONS OF RESTITUTION

A. ☐ Restitution not applicable.

B. Total amount of restitution: \$ _____

C. Restitution not ordered: (Check only one)

1. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
2. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
3. ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
4. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s)' losses were not ascertainable (18 U.S.C. § 3664(d)(5)).
5. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s) elected to not participate in any phase of determining the restitution order (18 U.S.C. § 3664(g)(1)).
6. ☒ Restitution is not ordered for other reasons: (Explain)
Due to the defendant's inability to pay.

D. ☐ Partial restitution is ordered for these reasons: (18 U.S.C. § 3553(c)) _____

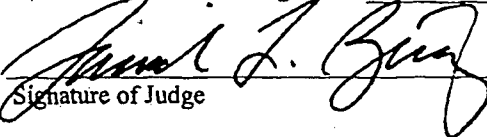
VIII. ADDITIONAL BASIS FOR THE SENTENCE IN THIS CASE (If applicable)

Pursuant to 18:3553(a), such sentence would take into account the nature and circumstances of the offense and the history and characteristics of the defendant; reflect the seriousness of the offense; promote respect for the law; provide just punishment for the offense; afford adequate deterrence to criminal conduct; and protect the public from further crimes of the defendant.

Defendant's Soc. Sec. No.: 437-29-6348

Date of Imposition of Judgment: November 29, 2018

Defendant's Date of Birth: 10/19/1976


Signature of Judge

Defendant's Residence Address: 35 Russell Street
Florence, Kentucky 41042

David L. Bunning, U.S. District Judge
Name and Title of Judge

Date: 11/30/18

Defendant's Mailing Address: Same

A P P E N D I X

" D "

Order from Magistrate Judge Candance J. Smith
admonishing Petitioner to refrain from
submitting filings while represented by Counsel
(Dist. Ct. Dkt. 52, 8-08-2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
at COVINGTON

CRIMINAL CASE NO. 17-43-DLB-CJS

UNITED STATES OF AMERICA

PLAINTIFF

vs.

ORDER

DONALD CONWAY

DEFENDANT

* * * * *

The undersigned has received handwritten correspondence from Defendant Donald Conway, which correspondence will be ordered filed of record.

Defendant is hereby informed that it is not appropriate to communicate directly to any judge assigned this case. Documents are to be sent to the Clerk of Court for filing and must contain a certificate of service that a copy of the document has been served upon the opposing party or its counsel, if represented by counsel. Future communications Defendant sends directly to a judge assigned this case will not be filed and will instead be returned.

More importantly, Defendant is represented by counsel in this case. Any future matters Defendant wishes to bring to the attention of the Court in this case must be presented by his counsel, not Defendant directly.

Accordingly, **IT IS ORDERED** that the Clerk of Court shall file Mr. Conway's letter in the record for this case, with electronic service of a copy to be provided to counsel of record and with a paper copy of this Order to be mailed to Defendant Conway at the Campbell County Detention Center, 601 Central Avenue, Newport, KY 41071.

Dated this 8th day of August, 2018.



Signed By:

Candace J. Smith

A handwritten signature in black ink, appearing to be "CJS", written over the printed name.

United States Magistrate Judge

J:\DATA\Orders\criminal cov\2017\17-43-DLB-CJS ltr filing from dcf.wpd

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