

Appendix

APPENDIX

Decision of the Eleventh Circuit Court of Appeals,
United States v. Gregory Leri (April 27, 2021)

No. 20-12380 A-1

Eleventh Circuit Court of Appeals Order Denying Petition for Rehearing
En Banc, *United States v. Gregory Leri*, (July 13, 2021)

No. 20-12380 A-4

Judgment in a Criminal Case

United States v. Gregory Leri, (S.D. Fla. April 28, 2020)

No. 19-CR-60265-WPD A-5

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849 Fed.Appx. 898

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Gregory LERI, Defendant-Appellant.

No. 20-12380
|
Non-Argument Calendar
|
(April 27, 2021)

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 0:19-cr-60265-WPD-1, William P. Dimitrouleas, J., of conspiracy to possess with intent to distribute fentanyl and conspiracy to possess with intent to distribute oxycodone and sentenced to concurrent 78-month sentences. Defendant appealed.

Holdings: The Court of Appeals held that:

defendant failed to satisfy the relevant criteria and thus was not entitled to safety-valve relief at sentencing, and

defendant's sentences were substantively reasonable.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

*899 Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:19-cr-60265-WPD-1

Attorneys and Law Firms

Phillip Drew DiRosa, U.S. Attorney's Office, Fort Lauderdale, FL, Brandy Brentari Galler, U.S. Attorney's

Office, West Palm Beach, FL, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, for Plaintiff-Appellee

Bernardo Lopez, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Fort Lauderdale, FL, for Defendant-Appellant

Before JORDAN, GRANT, and BLACK, Circuit Judges.

Opinion

PER CURIAM:

Gregory Leri appeals his 78-month concurrent sentences of imprisonment for conspiracy to possess with intent to distribute fentanyl and conspiracy to possess with intent to distribute oxycodone. He asserts the district court plainly erred in not applying a two-level reduction under U.S.S.G. § 2D1.1(b)(18) because he met the amended safety-valve criteria in 18 U.S.C. § 3553(f). Additionally, he contends the district court abused its discretion in sentencing him to 78 months' imprisonment instead of probation because it failed to properly weigh all the 18 U.S.C. § 3553(a) factors when sentencing him, including the role of his addiction in the offenses. After review, we affirm.

I. DISCUSSION

A. Safety Valve

Leri concedes that he did not object to the district court's conclusion he was ineligible for safety-valve relief due to a single three-point prior conviction. Thus, review of this issue is for plain error. See *United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014) (reviewing for plain error a sentencing argument that was not raised before the district court). For an error to be plain, it must be one that is obvious and clear under current law. *United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir. 2013). An error is not obvious or clear under current law when there is a lack of controlling authority or there is room for doubt about the outcome of an issue. *United States v. Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999).

Under the safety-valve statute, 18 U.S.C. § 3553(f), a district court must impose a sentence pursuant to the Sentencing Guidelines without regard to any statutory minimum if the defendant meets all of the enumerated factors. 18 U.S.C. §

3553(f). Section 402 of the First Step Act¹ amended § 3553(f) to apply to more criminal offenses. *United States v. Tigua*, 963 F.3d 1138, 1142 (11th Cir. 2020). The first of the five criteria in § 3553(f), as amended by the First Step Act, is that:

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines.

18 U.S.C. § 3553(f)(1).

The Sentencing Guidelines, in § 5C1.2, also state the district court shall impose a sentence in accordance with the Guidelines without regard to the statutory minimum sentence if the court finds the defendant meets the criteria in § 3553(f)(1)-(5), which it lists. U.S.S.G. § 5C1.2. Section 5C1.2 has not been amended to incorporate the First Step Act's changes to § 3553(f). Compare 18 U.S.C. § 3553(f), with U.S.S.G. § 5C1.2. Section 5C1.2 still lists the first criterion for safety-valve eligibility as "the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category)." U.S.S.G. § 5C1.2(a)(1). Section 2D1.1, the Guideline for drug offenses, instructs the court should apply a two-level reduction if a defendant meets the safety-valve criteria in U.S.S.G. § 5C1.2. U.S.S.G. § 2D1.1(b)(18).

The district court did not plainly err in finding that **Leri** did not satisfy the safety-valve criteria. Section 3553(f) is not applicable to **Leri** because it allows the district court to sentence a defendant without regard to a mandatory minimum sentence and no mandatory minimum sentences applied to **Leri's** convictions. Thus, because § 3553(f) does not apply, the only question is whether **Leri** satisfied the criteria in § 5C1.2 such that he should have received a two-level reduction under § 2D1.1(b)(18). The § 5C1.2 criteria, which have not been amended after the First Step Act, state that a defendant must not have more than one criminal history point. U.S.S.G. § 5C1.2(a)(1). **Leri** does not satisfy this criteria because he has four criminal history points.

The only way **Leri** could qualify for the two-level reduction is if § 5C1.2's reference to "the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below" is read to incorporate the amended criteria in § 3553(f), including the broadened criteria for criminal history in § 3553(f)(1). But that reading is not plain from the language of § 5C1.2, which sets out the former criteria explicitly, and **Leri** has not pointed to any binding precedent stating that § 5C1.2 must be read to incorporate the amended criteria in § 3553(f), even though § 5C1.2 itself has not been amended.

Thus, as **Leri** does not satisfy the criteria in § 5C1.2 and it is not plain that the amended criteria in § 3553(f) are incorporated into § 5C1.2, the district court did not plainly err by not concluding that **Leri** satisfied the safety-valve criteria. See *Madden*, 733 F.3d at 1322.

B. Substantive Reasonableness

When reviewing for substantive reasonableness, we consider the totality of the circumstances under a deferential abuse-of-discretion standard. *901 *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The party challenging the sentence bears the burden of establishing it is unreasonable based on the facts of the case and the 18 U.S.C. § 3553(a) factors. *United States v. Shabazz*, 887 F.3d 1204, 1224 (11th Cir. 2018).

As to substantive reasonableness, a district court abuses its discretion when it (1) fails to consider relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment by balancing the proper factors unreasonably. *United States v. Irely*, 612 F.3d 1160, 1189 (11th Cir. 2010) (*en banc*). The proper factors are set out in § 3553(a) and include the nature and circumstances of the offense, the criminal history of the defendant, the seriousness of the crime, the promotion of respect for the law, just punishment, adequate deterrence, and protection of the public. 18 U.S.C. § 3553(a).

We have emphasized that we must give due deference to the district court to consider and weigh the proper sentencing factors. *Shabazz*, 887 F.3d at 1224. The district court also does not have to give all the factors equal weight and is given discretion to attach great weight to one factor over another. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015). Along with the § 3553(a) factors, the district court should also consider the particularized facts of the case and the guideline range. *Id.* at 1259–60. However, it maintains

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discretion to give heavier weight to any of the § 3553(a) factors or combination of factors than to the guideline range. *Id.* at 1259. The district court also has wide discretion to decide whether the § 3553(a) factors justify a variance. *United States v. Rodriguez*, 628 F.3d 1258, 1264 (11th Cir. 2010).

Leri has failed to show his sentence is substantively unreasonable because the district court made a clear error in judgment in balancing the § 3553(a) factors. *See Irey*, 612 F.3d at 1189. The district court's pronouncement of the sentence showed that it considered several of the § 3553(a) factors. Specifically, the district court's express consideration of **Leri's** "terrible" criminal history, as well as the fact that most of his past convictions were misdemeanors, showed it considered **Leri's** history and characteristics. 18 U.S.C. § 3553(a). Additionally, the district court considered the nature and circumstances of the offense in its finding of certain mitigating circumstances—the amount of drugs involved, the fact they came in lozenges, that they were prescribed to **Leri**, that he sold them, and that the behavior was common with addicts. *Id.* The district court granted a 43-month downward variance based on the mitigating factors noted, which showed it accounted for **Leri's** addiction and any mitigating effects it had. Further, its consideration of the downward variance it gave **Leri's** co-conspirator, even though she had ten prior felony convictions, showed the district court considered the need to avoid unwarranted sentence disparities.

Additionally, the district court did not abuse its discretion by not giving **Leri** a probationary sentence because, while it noted mitigating factors in granting him a downward variance, it also weighed factors tending to show the seriousness of the offense. It expressly noted that **Leri** had a "terrible" criminal history and that fentanyl was having "disastrous effects on society," which showed it weighed

Leri's particular circumstances and the nature of the offense in determining whether to reduce his sentence and, if so, how much to reduce it by. *See Rosales-Bruno*, 789 F.3d at 1259-60. Although **Leri** argues the district court placed insufficient weight on the role his addiction played in the offense, the district court expressly considered it and had *902 broad leeway in assigning its weight. The court was within its discretion to weigh **Leri's** addiction with the nature and circumstances of the offense, his extensive criminal history, the sentences given to his co-conspirators, and the need to promote respect for the law. Additionally, that the sentence was below the guideline range and well below the statutory maximum were further indicia of reasonableness. *United States v. Foster*, 878 F.3d 1297, 1309 (11th Cir. 2018) (stating we ordinarily expect a sentence within the guideline range to be reasonable); *United States v. Stanley*, 739 F.3d 633, 656 (11th Cir. 2014) (explaining a sentence imposed well below the statutory maximum is an indicator of a reasonable sentence). Therefore, because the district court did not abuse its discretion by ignoring relevant factors or improperly weighing the factors, the sentence was substantively reasonable and further reduction was not warranted.

II. CONCLUSION

Accordingly, we affirm **Leri's** sentences.

AFFIRMED.

All Citations

849 Fed.Appx. 898

Footnotes

¹ First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12380-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GREGORY LERI,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, GRANT, and BLACK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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UNITED STATES DISTRICT COURT
Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA
v.
GREGORY LERI

JUDGMENT IN A CRIMINAL CASE

Case Number: **19-60265-CR-DIMITROULES**
USM Number: **20443-104**

Counsel For Defendant: **H. Scott Hecker, Esq.**
Counsel For The United States: **Donald Chase, II, AUSA**
Court Reporter: **Ellen Rassie**

The defendant pleaded guilty to count(s) One and Two.

The defendant is adjudicated guilty of these offenses:

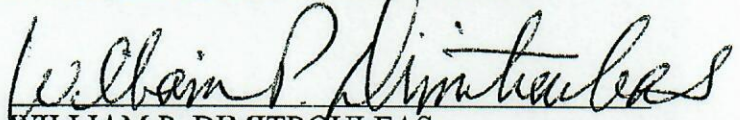
<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
21 USC 846	Conspiracy to possess with intent to distribute a detectable amount of fentanyl	08/22/2019	One
21 USC 846	Conspiracy to possess with intent to distribute a detectable amount of oxycodone	08/22/2019	Two

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

All remaining counts are dismissed on the motion of the government.

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.

Date of Imposition of Sentence: **4/28/2020**


WILLIAM P. DIMITROULEAS
United States District Judge

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Date: 4/28/20_____

DEFENDANT: **GREGORY LERI**

CASE NUMBER: **19-60265-CR-DIMITROULES**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **78 months as to each of Counts One and Two to run concurrent.**

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **GREGORY LERI**

CASE NUMBER: **19-60265-CR-DIMITROULES**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years as to each of Counts One and Two to run concurrent.**

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

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

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 standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **GREGORY LERI**

CASE NUMBER: **19-60265-CR-DIMITROULES**

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction - The defendant is prohibited from associating with Maria DeLuise while on probation/supervised release.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **GREGORY LERI**CASE NUMBER: **19-60265-CR-DIMITROULES****CRIMINAL MONETARY PENALTIES**

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00	\$0.00	\$0.00

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>
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* 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.

** Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **GREGORY LERI**CASE NUMBER: **19-60265-CR-DIMITROULES****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.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE**ATTN: FINANCIAL SECTION****400 NORTH MIAMI AVENUE, ROOM 08N09****MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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

<u>CASE NUMBER</u>	<u>TOTAL AMOUNT</u>	<u>JOINT AND SEVERAL AMOUNT</u>
<u>DEFENDANT AND CO-DEFENDANT NAMES</u>		
<u>(INCLUDING DEFENDANT NUMBER)</u>		

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) penalties, and (8) costs, including cost of prosecution and court costs.