

No. 21-

IN THE
Supreme Court of the United States

ANDREW USSERY,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

APPENDIX VOLUME

JAMES SCOTT SULLIVAN
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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 20-50585

United States Court of Appeals
Fifth Circuit

FILED

January 5, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDREW USSERY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:20-CR-35-1

Before SMITH, ELROD, and OLDHAM, *Circuit Judges.*

PER CURIAM:*

Andrew Ussery pleaded guilty to conspiring to possess with intent to distribute fifty grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A). Ussery was sentenced to 188 months' imprisonment. On appeal, Ussery challenges the factual basis of his sentence and the district court's refusal to grant safety-valve relief under the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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Guidelines or an equivalent variance. Because there was a sufficient factual basis for Ussery's sentence and no procedural or substantive error, we **AFFIRM**.

Ussery executed a factual basis for his plea. The factual basis establishes the following facts. An Odessa Police Department detective encountered Ussery in the parking lot of the MCM Grande Hotel and Fun Dome. Knowing that Ussery had outstanding arrest warrants, the detective contacted the Texas Department of Public Safety, which then initiated a traffic stop. Ussery fled the traffic stop, crashed, and threw a bag of about 326 grams of methamphetamine out of the car window and over a barbed wire fence. Ussery's car also contained Psilocybin mushrooms. Ussery was arrested and transported to the Odessa Police Department.

After reading Ussery his Miranda rights, law enforcement learned that Ussery had two hotel rooms at the MCM Fun Dome. Law enforcement returned to the hotel, where they found a woman in one room and more methamphetamine in both. Ussery was indicted on one count of conspiring to possess with intent to distribute fifty grams or more of actual methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A).

Ussery pleaded guilty. The district court accepted Ussery's plea, and the Probation Office prepared a presentence investigation report (PSR). The PSR first calculated the quantity of drugs attributable to Ussery. It relates that on the night in question, officers at the hotel located a woman—different from the one in Ussery's hotel room—under investigation by the DEA. After being read her Miranda rights, the woman stated that she was talking with Ussery on the phone when he was stopped by law enforcement, that she believed Ussery to be high on mushrooms at the time, and that she had distributed "approximately one pound (453.592 grams) of methamphetamine for Ussery beginning in approximately October 2019."

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Based on the woman's statement and the amount of methamphetamine in the hotel rooms and the bag Ussery threw over the fence, the PSR concluded that Ussery was responsible for a total of 758.292 grams of methamphetamine.

The PSR gave Ussery a Total Offense Level of 33 and a Criminal History Category of IV. Based on these scores, the PSR calculated an imprisonment range of 188–235 months. The district court adopted the PSR recommendation and sentenced Ussery to 188 months' imprisonment.

Ussery first argues that there was an insufficient factual basis for the woman's statement that he supplied her with a pound of methamphetamine. The district court may consider facts in a PSR as long as they "have an adequate evidentiary basis with sufficient indicia of reliability." *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (quoting *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)). If they do, the burden flips to the defendant to present rebuttal evidence "demonstrating that those facts are 'materially untrue, inaccurate or unreliable.'" *Id.* (quoting *United States v. Huerta*, 182 F.3d 361, 364–65 (5th Cir. 1999)).

The facts have an adequate evidentiary basis with sufficient indicia of reliability. The woman was at the MCM hotel; Ussery had two rooms at the MCM. The woman stated that she distributed methamphetamine for Ussery in the past; Ussery pleaded guilty to conspiring to distribute methamphetamine. The woman believed that Ussery was high on mushrooms in his car; and Ussery had mushrooms in his car. This is an adequate evidentiary basis with sufficient indicia of reliability. Because

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Ussery presented no rebuttal evidence, the district court did not err in relying on those facts.¹

Construed generously, Ussery's brief raises two further alleged errors. First, Ussery argues that the district court erred by applying the "criminal history" factor in § 5C1.2 of the Guidelines instead of the amended factor in 18 U.S.C. § 3553(f). Second, he argues that the district court wrongly declined to grant an equivalent downward variance.

Section 3553(f) provides safety-valve relief for defendants who meet five requirements. Where, among other requirements, a defendant has four or fewer criminal history points and sufficiently cooperates with law enforcement, the district court must "impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence." 18 U.S.C. § 3553(f). The Guidelines provide analogous relief in § 5C1.2, which generally reproduces the factors in § 3553(f). Furthermore, the Guidelines require a two-level Offense Level reduction for defendants who satisfy the

¹ "[O]ut-of-court declarations by an unidentified informant may be considered 'where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means.'" *United States v. Young*, 981 F.2d 180, 186 (5th Cir. 1992) (quoting commentary to U.S.S.G. § 6A1.3). Ussery has not argued that the government lacked good cause for nondisclosure and does not argue it here. *See id.* at 187. Even if he did raise the issue, "[w]e will not find plain error in the failure to adequately justify nondisclosure of [confidential informants] unless it is clear from the record that this rendered the sentencing process wholly unreliable." *Id.* The nondisclosure did not have this effect.

In his reply brief, Ussery also notes the government's admission of ambiguity in the sentencing transcript about whether the woman in Ussery's room and the unidentified informant were one and the same. Although the sentencing transcript was ambiguous, the PSR was not. Furthermore, we do not "entertain arguments raised for the first time in a reply brief." *United States v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009). Because the alleged ambiguity occurred at sentencing, Ussery should have objected at that time.

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requirements of § 5C1.2. U.S.S.G. § 2D1.1(b)(18). However, the Guidelines have not been amended to conform to the current § 3553(f), and § 5C1.2 still precludes from relief defendants—like Ussery—with more than 1 criminal history point. U.S.S.G. § 5C1.2(a)(1). Accordingly, Ussery asked the district court for a variance equivalent to the two-level Offense Level reduction from which he would not be precluded if the Guidelines reflected the current § 3553(f). The district court declined to grant the downward variance.

We review federal criminal sentences for reasonableness. *Harris*, 702 F.3d at 229. First, we ensure that the district court committed no significant procedural error, such as “improperly calculating the Guidelines range, treating the Guidelines as mandatory, or selecting a sentence based on erroneous factors.” *Id.* We review the interpretation and application of the Guidelines *de novo*, subject to the harmless error standard. *United States v. Torres-Perez*, 777 F.3d 764, 768 (5th Cir. 2015). Next, we review the substantive reasonableness of the sentence. *Harris*, 702 F.3d at 229. Substantive reasonableness is reviewed for abuse of discretion and includes claims that the district court erred in denying a downward variance. *United States v. Douglas*, 957 F.3d 602, 609 (5th Cir. 2020).

The district court did not procedurally err. The government contended at sentencing that Ussery did not sufficiently cooperate with law enforcement as required for relief under § 5C1.2. It is the defendant’s burden to show that he satisfies this element, and Ussery did not do so. *See United States v. Gonzalez-Loya*, 639 F. App’x 1023, 1026 (5th Cir. 2016). Ussery is therefore not entitled to safety-valve relief under § 5C1.2.

Even if he were, to the extent Ussery argues that the district court misapplied or misinterpreted § 5C1.2 by failing to apply the amended “criminal history” factor in § 3553(f), any such error would be harmless. Safety-valve relief under § 5C1.2 would have decreased Ussery’s

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recommended guideline range from 188–235 months to 151–188 months. As the district court explained at relative length, it would have imposed the 188-month sentence even under the lower range. Because the district court would have imposed the 188-month sentence either way, any error in failing to grant relief under § 5C1.2 would be harmless.²

Finally, Ussery’s sentence is substantively reasonable. A “sentence within a properly calculated Guideline range is presumptively reasonable.”³ *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006). There is nothing to suggest that Ussery’s sentence is unreasonable, and Ussery fails to rebut the presumption to the contrary.

* * *

For these reasons, the district court’s sentence is AFFIRMED.

² Few cases have addressed whether § 5C1.2 incorporates the amended § 3553(f) factors as opposed to the factors it expressly lists. *See United States v. Leri*, 849 F. App’x 898, 900 (11th Cir. 2021) (suggesting that § 5C1.2 does not incorporate the amended criteria in § 3553(f) and concluding that the district court’s decision to that effect was not plain error); *United States v. Shanklin*, 835 F. App’x 145, 146 (7th Cir. 2021) (concluding that an argument that § 5C1.2 incorporates the amended § 3553(f) factors would be frivolous). We need not weigh in either way. We note only that because Ussery did not argue below that the amended § 3553(f) factors apply instead of those in § 5C1.2, plain-error review applies to this claim. *United States v. Duke*, 788 F.3d 392, 396 (5th Cir. 2015). Under plain-error review, the “defendant must show a clear or obvious error that affects his substantial rights.” *United States v. Mudekunye*, 646 F.3d 281, 287 (5th Cir. 2011). Even assuming plain error, as explained above, the error would be harmless and therefore would not affect Ussery’s substantial rights.

³ We have held that even when a district court miscalculates the guideline range, its sentence is presumptively reasonable if it falls within the properly calculated guideline range. *United States v. Medina-Argueta*, 454 F.3d 479, 483 (5th Cir. 2006). Because the 188-month sentence falls within both the higher and lower guideline ranges, it would be presumptively reasonable no matter which range applies.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

v.

Case Number: 7:20-CR-00035(1) DC
USM Number: 44591-480

ANDREW USSERY

Alias(es):

AKA Cody Ussery,; **AKA** Andrew Cody Ussery,;
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, Andrew Ussery, was represented by Kevin D. Acker.

The defendant pled guilty to Count(s) 1, of the Indictment on March 11, 2020. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count(s)</u>
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute and Distribute 50 Grams or More of Actual Methamphetamine	December 27, 2019	1

As pronounced on July 8, 2020, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further 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.

Signed this 14th day of July, 2020.



David Counts
United States District Judge

DEFENDANT: ANDREW USSERY
CASE NUMBER: 7:20-CR-00035(1) DC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **One Hundred Eighty-Eight (188) months** with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

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

That the defendant participate in the Bureau of Prisons' Drug Treatment Program while incarcerated.

That the defendant serve this sentence at F.C.I. Sheridan.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ with a certified copy of the Judgment.

United States Marshal

DEFENDANT: ANDREW USSERY
CASE NUMBER: 7:20-CR-00035(1) DC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years**.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court and shall comply with the following additional conditions:

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(c)(1)), 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 may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.

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CONDITIONS OF SUPERVISED RELEASE

(As Amended November 28, 2016)

It is ORDERED that the Conditions of Probation and Supervised Release applicable to each defendant committed to probation or supervised release in any division of the Western District of Texas, are adopted as follows:

Mandatory Conditions:

- [1] The defendant shall not commit another federal, state, or local crime during the term of supervision.
- [2] The defendant shall not unlawfully possess a controlled substance.
- [3] 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 on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- [4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- [5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et. seq.) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- [6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- [7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
- [8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- [9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

- [1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- [2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- [3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- [4] The defendant shall answer truthfully the questions asked by the probation officer.

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CASE NUMBER: 7:20-CR-00035(1) DC

- [5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change
- [6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.
- [7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- [8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- [9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
- [10] The defendant shall 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] The defendant shall 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 the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- [13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- [14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
- [15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- [16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
- [17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

DEFENDANT: ANDREW USSERY
 CASE NUMBER: 7:20-CR-00035(1) DC

CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 200 E. Wall St. Room 222, Midland, TX 79701.

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTAL:	\$100.00	\$0.00	\$0.00	\$0.00	\$0.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of **\$100.00**.

Fine

The fine is waived because of the defendant's inability to pay.

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 above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** 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.