**No. 22-_____**

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**JESSE RONDALE BAILEY,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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

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# APPENDIX

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mation" language do not mean literally that the state-court orders become federal orders. Rather, they use that language as a shorthand way to express the idea that the state-court orders have the same authority as any other interlocutory order in district court and that the district court is free to reconsider them. In *Nissho-Iwai*, for example, the Fifth Circuit held that, after removal, a district court may reconsider a state court's interlocutory sanctions order just as the court could later reconsider its own interlocutory sanctions order. 845 F.2d at 1303–05. If the state court followed state standards that were "inconsistent with federal standards," the Fifth Circuit added, that fact could provide a reason to modify the order. *Id.* at 1304; *see also Tompkins v. Crown Corr, Inc.*, 726 F.3d 830, 843 (6th Cir. 2013); *Diet Drugs*, 282 F.3d at 232 & n.7. This logic comports with our reasoning. As we have explained, a district court may, after removal, modify or dissolve a state court's injunction if the injunction conflicts with federal standards.

**[9]** One last point. Just because parties cannot immediately appeal state-court orders under § 1292(a)(1) does not mean that state-court orders are completely unreviewable. If, for example, a district court issues a final judgment under § 1291, that final judgment incorporates all interlocutory rulings entered along the way—whether by a federal court or a state court. *See Reilly v. Waukesha County*, 993 F.2d 1284, 1286–87 (7th Cir. 1993); *see also Chaz Constr., LLC v. Codell*, 137 F. App'x 735, 743 (6th Cir. 2005); *Munsey v. Testworth Lab'ys*, 227 F.2d 902, 903 (6th Cir. 1955) (per curiam). But again, no final judgment exists here.

We thus dismiss this appeal for lack of appellate jurisdiction.


**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**Jesse Rondale BAILEY, Defendant-Appellant.**

**No. 20-5384**

United States Court of Appeals, Sixth Circuit.

Argued: July 28, 2021

Decided and Filed: March 8, 2022

**Background:** Defendant moved pro se for reduced sentence under the First Step Act for convictions for possession and distribution of crack cocaine and powder cocaine. The United States District Court for the Eastern District of Tennessee, Thomas A. Varlan, J., denied motion. Defendant appealed.

**Holdings:** The Court of Appeals, Bush, Circuit Judge, held that:

(1) district court did not abuse its discretion in issuing brief order refusing to reduce defendant's sentence, and

(2) defendant's sentence of 360 months' imprisonment, a bottom of guidelines range sentence, as career offender was not substantively unreasonable, and, thus, district court did not abuse its discretion in refusing to reduce defendant's sentence.

Affirmed.

Gilman, Senior Circuit Judge, filed concurring opinion.

**1. Criminal Law ⚿1156.2**

Court of Appeals reviews a district court's denial of a motion for a sentence

reduction under statute allowing for modification of a sentence to the extent otherwise permitted by statute and the First Step Act for abuse of discretion. 18 U.S.C.A. § 3582(c)(1)(B); Pub. L. No. 115-391.

**2. Criminal Law ⚿1147**

An abuse of discretion occurs when a district court relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law.

**3. Criminal Law ⚿1134.84**

A district court's decision on a motion for a sentence reduction under the First Step Act will be vacated only if Court of Appeals is firmly convinced that a mistake has been made. 18 U.S.C.A. § 3582(c)(1)(B); Pub. L. No. 115-391.

**4. Criminal Law ⚿1134.84**

When reviewing a decision on a motion for sentence reduction under the First Step Act, Court of Appeals reviews sentences for procedural and substantive reasonableness. 18 U.S.C.A. § 3582(c)(1)(B); Pub. L. No. 115-391.

**5. Criminal Law ⚿1134.84**

In examining a resentencing decision under the First Step Act for procedural error, Court of Appeals looks to whether the district court has engaged in a thorough renewed consideration of the statutory sentencing factors. 18 U.S.C.A. §§ 3553(a), 3582(c)(1)(B); Pub. L. No. 115-391.

**6. Criminal Law ⚿1134.84**

In examining a resentencing decision under the First Step Act for procedural error, Court of Appeals reviews whether the district court adequately explained the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. 18 U.S.C.A. § 3582(c)(1)(B); Pub. L. No. 115-391.

**7. Sentencing and Punishment ⚿2313**

District court did not abuse its discretion in issuing brief order refusing to reduce under the First Step Act defendant's sentence of 360 months' imprisonment, a bottom of guidelines range sentence, as career offender for possession and distribution of cocaine, where order referred to multiple statutory sentencing factors and gave them renewed consideration. 18 U.S.C.A. §§ 3553(a), 3582(c)(1)(B); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 1B1.1 et seq.; Pub. L. No. 115-391.

**8. Sentencing and Punishment ⚿2313**

In examining the procedural reasonableness of a resentencing decision under the First Step Act, the appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon the circumstances at hand. 18 U.S.C.A. § 3582(c)(1)(B); Pub. L. No. 115-391.

**9. Sentencing and Punishment ⚿1408, 2262**

Defendant's sentence of 360 months' imprisonment, a bottom of guidelines range sentence, as career offender for possession and distribution of cocaine was not substantively unreasonable, and, thus, district court did not abuse its discretion in refusing to reduce defendant's sentence under the First Step Act; sentence was well within the guidelines for career offender, career offender classification was correctly applied to defendant as result of his previous convictions, and within-guidelines sentence did not create sentencing disparity. 18 U.S.C.A. § 3553(a); Compre-

hensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; Pub. L. No. 115-391.

**10. Sentencing and Punishment ⚿38, 40**

A sentence is substantively reasonable if it is proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes of statute setting forth sentencing factors to be considered when imposing a sentence. 18 U.S.C.A. § 3553(a).

**11. Criminal Law ⚿1144.17**

Court of Appeals may presume that sentences within the Sentencing Guidelines are substantively reasonable. U.S.S.G. § 1B1.1 et seq.

**12. Sentencing and Punishment ⚿30, 40**

Sentence may be substantively unreasonable if it is greater than necessary when juxtaposed against statutory sentencing factors. 18 U.S.C.A. § 3553(a).

**13. Sentencing and Punishment ⚿112**

A court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation; but this does not mean that a court cannot discuss rehabilitation at all in its sentencing order.

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Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 3:06-cr-00145-1—Thomas A. Varlan, District Judge.

ARGUED: Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Brian Samuelson, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. ON BRIEF: Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Brian Samuelson, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

Before: GILMAN, McKEAGUE, and BUSH, Circuit Judges.

BUSH, Circuit Judge, delivered the opinion of the court in which GILMAN and McKEAGUE, Circuit Judges, joined. GILMAN, Circuit Judge (pp. 1216–20), delivered a separate concurring opinion.

## OPINION

JOHN K. BUSH, Circuit Judge.

In 2008, Jesse Rondale Bailey received a sentence of 360 months' imprisonment as a career offender for the possession and distribution of crack cocaine and powder cocaine. After the passage of the First Step Act in 2018, he moved for a sentence reduction. The district court denied his motion, and Bailey appealed. Because the district court's denial of Bailey's motion was not an abuse of discretion, we affirm.

### I.

Bailey's status as a career offender dates back to convictions for cocaine possession and facilitating second-degree murder. Those offenses resulted in his incarceration until 2005. Shortly after he was released from prison, Bailey engaged in conduct resulting in five federal charges: (1) one count of conspiring to distribute and possess with intent to distribute at least 5 kilograms of powder cocaine and at least 50 grams of crack cocaine, in viola-

tion of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A); (2) two counts of distributing at least 50 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A); (3) one count of distributing at least 5 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B); and (4) one count of distributing an unspecified quantity of powder cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). In 2008, Bailey was convicted on all five counts.

Before his sentencing, the Government filed a notice informing the district court that Bailey had a prior felony drug conviction and was, therefore, subject to an enhanced mandatory minimum of twenty years' imprisonment for the (b)(1)(A) offenses. Bailey was also classified as a career offender because of his prior convictions. Those factors led to a Sentencing Guidelines range of 360 months to life imprisonment.

Bailey objected to his career-offender classification and asked for a sentence "ten years less than the actual guideline range would be if he was not a career offender." The district court overruled his objections after considering the relevant sentencing factors set out in 18 U.S.C. § 3553(a). It noted Bailey's "extensive criminal history[,]" his "lack of respect for the law[,]" and its hope that Bailey would "further his education and get his GED while he was with the Bureau of Prisons." The court then imposed a sentence of 360 months' imprisonment, the bottom of Bailey's Guidelines range.

In 2010, Congress enacted the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010), to correct the unequal treatment of base and powder cocaine in the Federal Code by increasing the quantity of cocaine base necessary to trigger certain statutory penalties. The Fair Sentencing Act, however, did not apply to persons already sentenced at the time of its enactment. That changed with the First Step Act of 2018, which "allows courts to apply § 2(a) of the Fair Sentencing Act retroactively." *United States v. Smith*, 958 F.3d 494, 497 (6th Cir. 2020) (quoting *United States v. Beamus*, 943 F.3d 789, 791 (6th Cir. 2019)); *see also* First Step Act of 2018, § 404(a), (b), Pub. L. No. 115-391, 132 Stat. 5194, 5222 (First Step Act). Under the First Step Act, a district court can reduce a defendant's sentence if that defendant was previously sentenced for an offense covered under the Fair Sentencing Act. First Step Act, § 404(b).

In January 2019, Bailey moved pro se for a reduced sentence under the First Step Act. He argued that his sentence was excessive, "unjust and counterproductive," and "fail[ed] to serve an incapacitative [sic] goal[.]" He pointed to his efforts to "rehabilitate himself through a variety of education, vocational, and selfhelp programs" and his continuous employment during his period of incarceration. Assisted by counsel, he filed another motion for a reduced sentence, arguing that he deserved a sentence reduction because of his incident-free record in custody and his completion of the programs mentioned above. In response, the Government noted that it "ha[d] no specific information to present in opposition to a sentence reduction," but that "nothing in [§ 404] shall be construed to require a court to reduce a sentence[.]" The Government also noted that Bailey's Guidelines range was unchanged.

The district court, this time a different judge, denied Bailey's request, finding that "the First Step Act's provisions did not affect [Bailey's] guideline range as a career offender[.]" The court "commend[ed]

[Bailey] for his incident/discipline-free history and completion of drug education classes," but it noted that his sentence was already at the bottom end of his Guidelines range. Bailey timely appealed, arguing that the district court abused its discretion by refusing to modify his sentence.

## II.

**[1–3]** We review a district court's denial of a motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(B) and the First Step Act for abuse of discretion. *United States v. Smith*, 959 F.3d 701, 702 (6th Cir. 2020); *United States v. Moore*, 582 F.3d 641, 644 (6th Cir. 2009). An abuse of discretion occurs when a district court "relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *United States v. Flowers*, 963 F.3d 492, 497 (6th Cir. 2020) (quoting *United States v. White*, 492 F.3d 380, 408 (6th Cir. 2007)). A district court's decision will be vacated "only if we are 'firmly convinced that a mistake has been made.'" *Smith*, 959 F.3d at 702 (quoting *Moore*, 582 F.3d at 644).

**[4–6]** We review sentences for procedural and substantive reasonableness. *United States v. Boulding*, 960 F.3d 774, 783 (6th Cir. 2020). In examining the resentencing decision for procedural error, we look to whether the court has engaged in a "thorough renewed consideration of the § 3553(a) factors." *Id.* at 784. And we review whether the district court "adequately explain[ed] the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *Chavez-Meza v. United States*, —— U.S. ——, 138 S. Ct. 1959, 201 L.Ed.2d 359 (2018).

Procedural Reasonableness

**[7, 8]** Bailey argues that the district court abused its discretion by failing to engage in an adequate review of his circumstances. We disagree. As the Supreme Court has held, "[t]he appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon [the] circumstances" at hand. *Chavez-Meza*, 138 S.Ct. at 1964 (quoting *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007)). As the concurrence explains, an interested reader could not be faulted for finding our precedent in First Step Act cases less than clear. But we have affirmed brief orders in First Step Act cases, such as this one, where the district court had retained a bottom-of-Guidelines sentence. *See Smith*, 958 F.3d at 501.

Bailey cites a pair of out-of-circuit cases to support his contention that the district court should have provided a more comprehensive explanation. However, those cases are not binding, nor do we find their reasoning persuasive. First, in the two cases Bailey cites, neither district court considered the respective defendant's admirable post-conviction conduct. *See United States v. Shaw*, 957 F.3d 734, 742 (7th Cir. 2020); *see also United States v. Martin*, 916 F.3d 389, 397–98 (4th Cir. 2019). The court here did just that, commending Bailey for "his incident/discipline-free history and completion of drug education classes[.]" Second, these cases conflict with this court's previous holdings that reconsiderations like the one the district court engaged in here were enough to satisfy the First Step Act. *See, e.g.*, *Smith*, 958 F.3d at 501; *see also United States v. Michael*, 836 F. App'x 408, 413 (6th Cir. 2020) (holding that the district court did not abuse its discretion in issuing a "fairly simple" ex-

planation consisting of two sentences when granting a reduced sentence).

Although the district court's order was brief, it referred to multiple § 3553(a) factors and gave them "renewed" consideration. And the district court was correct to conclude that Bailey's status as a career offender meant that the First Step Act did not ultimately affect his Guidelines range, thus keeping his sentence the same after the "renewed" consideration. In sum, the district court had discretion under the First Step Act to reduce Bailey's sentence, but its refusal to do so cannot be considered an abuse of its discretion.

Substantive Unreasonableness

**[9–11]** Bailey next argues that the district court abused its discretion by upholding a substantively unreasonable sentence. A sentence is substantively reasonable "if it is proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes of § 3553(a)." *United States v. Moon*, 808 F.3d 1085, 1090 (6th Cir. 2015) (citations omitted). "[W]e may presume that sentences within the Guidelines are reasonable[.]" *United States v. Ushery*, 785 F.3d 210, 223 (6th Cir. 2015).

**[12]** A sentence may be substantively unreasonable if it is "greater than necessary" when juxtaposed against the sentencing factors of 18 U.S.C. § 3553(a). *Holguin-Hernandez v. United States*, —— U.S. ——, 140 S. Ct. 762, 766–67, 206 L.Ed.2d 95 (2020); *see also Moon*, 808 F.3d at 1090 ("[A] sentence is substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." (cleaned up)).

Bailey claims that his "career offender sentence is substantively unreasonable because it rests on an impermissible reason, creates unwarranted disparity rather than avoids it, and is demonstrably greater than necessary." Essentially, he argues that his "sentence is too long." *Cf. United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). This is an "uphill climb" for Bailey, one he cannot make. *United States v. Faulkner*, 926 F.3d 266, 273 (6th Cir. 2019).

**[13]** First, Bailey has not shown that his sentence rests on an impermissible reason. He relies on *Tapia v. United States*, 564 U.S. 319, 131 S.Ct. 2382, 180 L.Ed.2d 357 (2011), to argue that the original district court's mentioning of rehabilitation in its written statement of reasons should be disqualifying. It is true that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 335, 131 S.Ct. 2382. But this does not mean that a court cannot discuss rehabilitation at all. And it certainly does not mean that reversal is required just because rehabilitation was mentioned. *See id.*; *see also United States v. Krul*, 774 F.3d 371, 375 (6th Cir. 2014) (noting that *Tapia* "cannot mean that reversal is required whenever it is merely possible that rehabilitation drove the length of imprisonment").

Nor does the district court's refusal to reduce Bailey's sentence create unwarranted sentencing disparities. Within-Guidelines sentences such as Bailey's help reduce disparities, not create them. Indeed, this is "[t]he point of the [G]uidelines[.]" *United States v. Swafford*, 639 F.3d 265, 270 (6th Cir. 2011). Although Bailey presumably wants a below-Guidelines sentence, such a claim is "an unconventional ground for challenging a *within-[G]uide-*

*lines* sentence." *Id.* (emphasis in original). And arbitrarily picking and choosing sentences to push below the recommendations of the Guidelines would create a different sort of disparity, one we choose to avoid.

Finally, Bailey's sentence is not "greater than necessary." *Cf. Holguin-Hernandez*, 140 S. Ct. at 766–67. As we have noted, his sentence remains well within the Guidelines for a career offender. And the career-offender classification was correctly applied to Bailey as a result of his previous convictions. To the extent that Bailey argues that the district court erred in considering these violent aspects of his criminal history, we have confirmed that "a district court may still consider . . . relevant information about the defendant's history and conduct" when exercising its discretion to reduce certain sentences under the First Step Act. *United States v. Foreman*, 958 F.3d 506, 511 (6th Cir. 2020) (quoting *United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020) (cleaned up)). The district court did not abuse its discretion in refusing to modify Bailey's presumptively reasonable, within-Guidelines sentence.

## III.

The district court plainly had the authority to reduce Bailey's sentence, but neither the First Step Act nor the Fair Sentencing Act required it to do so. Nor was its decision not to reduce his sentence an abuse of discretion. We **AFFIRM** the district court's order.

RONALD LEE GILMAN, Circuit Judge, concurring.

## CONCURRENCE

At the end of the day, I reluctantly concur in the lead opinion's analysis. But I write separately to explain why I find the procedural-reasonableness question to be such a close call.

The essential problem in this case is the very brevity of the district court's decision. In considering whether to reduce Bailey's sentence under the First Step Act, the court held no hearing and thus produced no transcript. Its entire reasoning is set forth in the following two sentences from the one-page form order that the court entered on March 27, 2020:

> [T]he First Step Act's provisions did not affect defendant's guideline range as a career offender, so even after a sentence reduction pursuant to the First Step Act, his guideline range would remain 360 months' to life imprisonment. . . . While the Court commends defendant for his incident/discipline-free history and completion of drug education classes, the Court does not find that defendant's conduct while incarcerated provides a sufficient basis for reducing defendant's sentence considering his categorization as a career offender and the fact that defendant's sentence already reflects a term of imprisonment at the low-end of the guideline range.

The key question is whether this explanation is procedurally reasonable.

### I. This court's caselaw on procedural reasonableness

A bit of background might prove helpful here. One could be forgiven for describing our precedents regarding the procedural requirements for deciding First Step Act motions as less than clear. We have told the district courts that "necessary review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the [18

U.S.C.] § 3553(a) factors." *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020). But we have also said that a district court's bare recitation that it "had taken into account the [§ 3553(a)] factors . . . is often enough." *United States v. Barber*, 966 F.3d 435, 439 (6th Cir. 2020) (citations and internal brackets omitted); *see also United States v. Michael*, 836 F. App'x 408, 413 (6th Cir. 2020) (concluding that a one-sentence form order was sufficiently thorough).

We have also cautioned that a "district court need not respond to every sentencing argument" so long as "the record as a whole [ ] indicate[s] the reasoning behind the court's sentencing." *Id.* at 412 (citing *Rita v. United States*, 551 U.S. 338, 356–59, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007)). But we have reversed a district court's "reasoned opinion" denying a sentence reduction, even though we agreed with its overall analysis, because the court did not mention the defendant's argument regarding his post-conviction conduct. *United States v. Williams*, 972 F.3d 815, 816, 817 (6th Cir. 2020).

Finally, we have explained that "[w]hen considering the adequacy of the district court's explanation for its decision regarding a sentencing modification, we consider the record both for the initial sentence and the modified one." *Id.* at 817 (citing *Chavez-Meza v. United States*, —— U.S. ——, 138 S. Ct. 1959, 1967–68, 201 L.Ed.2d 359 (2018)). But we have also held on multiple occasions that courts may not rely on the original balancing of the § 3553(a) factors without conducting a renewed consideration of those factors, as *Boulding* requires. *United States v. Ross*, 858 F. App'x 840, 842 (6th Cir. 2021); *United States v. Domenech*, 819 F. App'x 341, 344 (6th Cir. 2020).

Although much of this caselaw appears to be contradictory, I perceive two guiding principles that can be divined from these cases. The first is that a court's order will not be deemed insufficiently thorough based on length alone. *See, e.g.*, *Michael*, 836 F. App'x at 413 (rejecting the defendant's argument "that the district court abused its discretion because its explanation of his sentence reduction was too short"). But the record must show that the district court considered the defendant's properly raised mitigation arguments regarding the reconsideration of the § 3553(a) factors, which means that the court must address—either explicitly or implicitly—arguments that were not addressed at the initial sentencing. *Compare Williams*, 972 F.3d at 817 (concluding that the district court's failure to mention the defendant's argument regarding his post-conviction conduct warranted vacatur because "that conduct by definition occurred after his initial sentencing in 2005, which means that neither the record for his initial sentence nor for his First Step Act motion provides us any indication of the district court's reasoning as to that [argument]"), *with United States v. Smith*, 958 F.3d 494, 501 (6th Cir. 2020) (approving a one-sentence form order denying a reduction in sentence and noting that "[t]here was not anything more the district court needed to say to impose a sentence at the bottom of the Guidelines, with the benefit of the earlier sentencing transcript, and presented with no new mitigation arguments"). We therefore look to the record of the initial sentencing only insofar as it is necessary to determine what the district court considered in deciding whether to modify a sentence under the First Step Act.

The second guiding principle is based on the unique procedural characteristics of

First Step Act cases. As was the case here, "[t]he judges considering First Step Act motions will frequently not be the original sentencing judges because of the length of sentences in crack-cocaine and cocaine-base cases." *United States v. Allen*, 956 F.3d 355, 358 (6th Cir. 2020). And "because the original sentences in these cases were largely dictated by the high mandatory minimums, defense counsel may have prioritized or raised different arguments than he or she would have if the defendant had been subject to a lower mandatory minimum sentence or no mandatory minimum at all." *Id.* (citation omitted). This heightens the importance of ensuring that district courts address any new mitigation arguments when deciding First Step Act motions.

## II. Application of the law to the present case

Applying the aforementioned principles here, the district court's order denying Bailey's motion for a reduced sentence under the First Step Act was just barely reasonable from a procedural viewpoint. Bailey raised three new mitigation arguments relating to the reconsideration of the § 3553(a) factors: (1) the disparity between his sentence and the sentences currently being meted out for the same offense; (2) his diminishing likelihood of recidivism; and (3) his spotless prison record and pursuit of educational opportunities.

The district court addressed only the third argument in its brief order, but the other two specific arguments advanced by Bailey did not require a direct response because, for the reasons explained below, they were not required to be considered in the court's sentencing decision. *See United States v. Perez-Rodriguez*, 960 F.3d 748, 753 (6th Cir. 2020) (explaining that "procedural review of a sentence concerns the propriety of the factors that go into a sentence").

Bailey's first argument was that the district court erred in failing to consider data contained in a 2016 report by the United States Sentencing Commission, which showed that "mixed category" career offenders (i.e., career offenders like Bailey who have committed both drug-trafficking and violent crimes) regularly receive below-Guidelines sentences. He did not raise his sentencing-disparity argument before the district court, so we review that argument under the plain-error standard. *See United States v. Sherrill*, 972 F.3d 752, 769, 770 (6th Cir. 2020).

At oral argument, Bailey contended that even though he did not raise this argument to the district court, that court was required to consider the Sentencing Commission's data in its consideration of unwarranted sentencing disparities, which is a § 3553(a) factor. *See* 18 U.S.C. § 3553(a)(6). "But nowhere have we required a district court to consult the Sentencing Commission's collected data before issuing a sentence." *United States v. Hymes*, 19 F.4th 928, 935 (6th Cir. 2021). Although we have *permitted* courts to consider research compiled by the Sentencing Commission, *United States v. Blackman*, 678 F. App'x 400, 401 (6th Cir. 2017), "we have never adopted the view that district courts *must* consider national sentencing statistics, whether when entering a within-Guidelines sentence or one that falls outside the Guidelines range[,]" *Hymes*, 19 F.4th at 936 (emphasis in original).

We recently "expressly reject[ed] imposing such a requirement on district courts" because, to do so, "would elevate the Commission's statistical data over the text of

the Guidelines themselves." *Id.*; *see also United States v. Barcus*, 892 F.3d 228, 235 (6th Cir. 2018) ("[C]hanging the Guidelines to correspond to new empirical data is in the hands of the Commission, not this court."). The Guidelines themselves are meant to help maintain national uniformity in sentences, so "by initially and correctly determining what [Bailey]'s advisory Guidelines range would be, the [district] court necessarily ... took account of the national uniformity concern embodied in § 3553(a)(6)." *United States v. Houston*, 529 F.3d 743, 752 (6th Cir. 2008).

Bailey's recidivism argument is also based largely on data from the Sentencing Commission that, according to him, shows (1) that career offenders with mixed criminal histories of both drug and violent offenses do not reoffend at a rate greater than those sentenced under the ordinary drug Guidelines; and (2) that the average rate of rearrest for federal offenders drops sharply after age 45, including for those convicted of drug offenses. As with the sentencing-disparity data, the district court was not required to consider this data "because the Commission's writings do not have the force of law." *United States v. Michael*, 836 F. App'x 408, 413 (6th Cir. 2020) (collecting cases). "The district court was thus under no obligation to respond directly to the Commission's stud[ies]." *Id.*

On the other hand, Bailey's argument regarding his post-conviction conduct was directly addressed by the district court. But there is one significant problem: the district court makes no mention of 18 U.S.C. § 3553(a). This fact arguably distinguishes this case from the many others in which we have approved very brief orders denying relief under the First Step Act because the orders in those cases explicitly stated that the district court considered the § 3553(a) factors. *See, e.g.*, *United States v. Smith*, 958 F.3d 494, 501 (6th Cir. 2020).

The government argues that this fact is immaterial because the district court could consider the record from the initial sentencing, where the court analyzed the § 3553(a) factors in detail. I find that argument unpersuasive, however, because the resentencing judge was different from the initial sentencing judge and, as the government conceded at oral argument, there is nothing in the record suggesting that the resentencing judge actually considered anything from the initial sentencing. The circumstances here are therefore materially different from those in *Chavez-Meza v. United States*, —— U.S. ——, 138 S. Ct. 1959, 1967, 201 L.Ed.2d 359 (2018), where the Supreme Court held that the record from the defendant's initial sentencing could be considered in determining whether a district court adequately explained its sentence-modification decision.

In *Chavez-Meza*, the Supreme Court explained that the same judge had sentenced the defendant originally, so the record from the initial sentencing reflected the judge's beliefs at the time and "shed[ ] light" on why the court decided to modify the sentence. *Id.* Not so in this case because the resentencing judge differed from the initial sentencing judge. The record as a whole might contain evidence supporting a particular sentencing decision, but that is irrelevant to the procedural-reasonableness inquiry if there is no indication that the district court actually considered such evidence in making its decision. *See United States v. Gale*, 468 F.3d 929, 940 (6th Cir. 2006) (explaining that where "a defendant's argument and supporting evidence presents an arguably meritorious claim for

a lesser sentence, but there is little to suggest that the district court actually considered it, then remand may be appropriate").

Nevertheless, we have in at least one instance affirmed a district court's order that did not explicitly state that it had considered the § 3553(a) factors. *See United States v. Boyd*, 835 F. App'x 88, 93 (6th Cir. 2020). We, in fact, explicitly rejected the defendant's argument in *Boyd* that the district court procedurally erred "by not expressly stating that it had in fact considered the § 3553(a) factors." *Id.* That was because the district court's stated reasons for denying the sentence reduction showed that the court had considered and addressed many of the factors, just not explicitly. *Id.*

So too here. The district court's resentencing order addresses the Guidelines range and the only new mitigation argument that the court was required to respond to: Bailey's post-conviction conduct. "[E]vidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors." *Pepper v. United States*, 562 U.S. 476, 491, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011). Specifically, the evidence of Bailey's post-conviction conduct that was considered by the district court "provide[d] the most up-to-date picture of [Bailey]'s 'history and characteristics' " under § 3553(a)(1). *Id.* at 491, 131 S.Ct. 1229 (citation omitted).

The district court declined to reduce Bailey's sentence because of his status as a career offender and because he had already received a sentence at the low end of the applicable Guidelines range. These considerations show that the court considered "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." 18 U.S.C. § 3553(a)(4)(A). And "the district judge did consider national uniformity [under § 3553(a)(6)] because the judge determined what the Sentencing Guidelines range would be, a guidelines range that considers the criminal conduct at issue as well as the criminal history of the defendant." *United States v. Simmons*, 501 F.3d 620, 626 (6th Cir. 2007). I am therefore reasonably satisfied that the district judge here did indeed consider the § 3553(a) factors in denying Bailey's motion for a sentence reduction. *See United States v. Banks*, 722 F. App'x 505, 511 (6th Cir. 2018) ("[N]ot all § 3553(a) factors are important in every sentencing; often one or two prevail, while others pale." (quoting *United States v. Bridgewater*, 479 F.3d 439, 442 (6th Cir. 2007) (internal alterations omitted)).

The preferred practice is for district courts to state explicitly that they have considered the § 3553(a) factors. What is ultimately important, however, is not boilerplate language or "a list of the § 3553(a) factors," but a "reasoned explanation sufficiently thorough to permit meaningful appellate review." *United States v. Ware*, 964 F.3d 482, 487 (6th Cir. 2020) (citation, internal alterations, and internal quotation marks omitted). The district court's order—though not a model of clarity—explicitly addressed Bailey's new mitigation argument and provided just enough detail to confirm that the § 3553(a) factors were considered. I therefore reluctantly concur in the conclusion that the decision to deny Bailey a sentence reduction was procedurally reasonable.

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF TENNESSEE

United States of America )
v. )
Jesse Rondale Bailey ) Case No. 3:06-cr-145-1
) USM No. _____

Date of Previous Judgment: 11/24/2008 Defendant's Attorney: Jonathan A. Moffatt

**ORDER FOR SENTENCE REDUCTION PURSUANT TO SECTION 404 OF THE FIRST STEP ACT OF 2018**

Upon motion of ☒ the defendant ☐ the Director of the Bureau of Prisons ☐ the attorney for the Government ☐ the Court for a reduction in the term of imprisonment based on a statutory penalty range that has been subsequently lowered and made retroactive by Section 404 of First Step Act of 2018 (Public Law 115-391, 132 Stat. 5194, 5222), and having considered such motion,

**IT IS ORDERED** that the motion is:

☒ **DENIED.**

☐ GRANTED and the defendant's previously imposed sentence of imprisonment *(as reflected in the last judgment issued)* of _____ months **is reduced to**_____.

Defendant is eligible for a First Step Act sentence reduction because he was convicted of an offense whose statutory penalties were modified by the Fair Sentencing Act. First Step Act of 2018, Pub. L. No. 115-391, § 404(a)–(b), 132 Stat. 5194, 5222 (2018). However, the First Step Act's provisions did not affect defendant's guideline range as a career offender, so even after a sentence reduction pursuant to the First Step Act, his guideline range would remain 360 months' to life imprisonment. Defendant is not entitled to a plenary resentencing for the reasons discussed in *United States v. Latawyne Dewright Osborne*, No. 3:06-cr-110 (E.D. Tenn. Mar. 5, 2020) [Doc. 236]; rather, the Court's discretion to modify defendant's sentence is limited by the statutory direction to impose a reduced sentence "as if" the Fair Sentencing Act of 2010's penalty provisions were in effect at the time the covered offense was committed. § 404(b). While the Court commends defendant for his incident/discipline-free history and completion of drug education classes, the Court does not find that defendant's conduct while incarcerated provides a sufficient basis for reducing defendant's sentence considering his categorization as a career offender and the fact that defendant's sentence already reflects a term of imprisonment at the low-end of the guideline range.

The Clerk is DIRECTED to terminate pending motions [Docs. 139, 140].

Except as provided above, all provisions of the judgment dated November 24, 2008 shall remain in effect.

**IT IS SO ORDERED**.

Order Date: March 27, 2020

Thomas A. Varlan
*Judge's Signature*

Effective Date: _____
*(if different from order date)*

Thomas A. Varlan, U.S. District Judge
*Printed name and title*

## I. COURT DETERMINATION OF SENTENCING PURSUANT TO FIRST STEP ACT OF 2018:

Defendant convicted of offense involving ____ grams of cocaine base.

Previous sentencing range: _____ to _____ months.

Sentencing range under Fair Sentencing Act: _____ to _____ months.

## II. CONDITIONS OF SUPERVISED RELEASE:

☒ Conditions of supervised release set forth in judgment are to remain in effect.

☐ Conditions of supervised release set forth in judgment are to remain in effect, with the following modifications:

## III. FACTORS CONSIDERED:

The Court considered the following in exercising its discretion to modify the term of imprisonment:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION, AT KNOXVILLE, TENNESSEE

| | | |
|---|---|---|
| United States of America, | : | |
| | : | |
| Government, | : | |
| | : | |
| Vs. | : | CR |
| | : | 3-06-145 |
| Jesse Rondale Bailey, | : | |
| | : | |
| Defendant, | : | |

Sentencing hearing before the Honorable Thomas W. Phillips on November 24, 2008.

APPEARANCES:

ON BEHALF OF THE GOVERNMENT:

William Mackie
Jeffrey Theodore
Assistants U.S. Attorney

ON BEHALF OF THE DEFENDANT:

Robert Vogel
Attorney at Law

Jolene Owen, R.P.R.
800 Market Street, Suite 131
P.O. Box 2201
Knoxville, Tennessee, 37901
(865) 384-6585

COURTROOM DEPUTY: We are here on a sentencing hearing in case 3-06cr145, United States of America versus Jesse Rondale Bailey. Here on behalf of the government is Will Mackie and Jeff Theodore. Is the government ready to proceed?

MR. THEODORE: Yes, Your Honor.

MR. VOGEL: Your Honor, the defendant is present and ready to proceed.

THE COURT: Okay. Mr. Bailey, this is
00:00:24 your sentencing hearing being held pursuant to Rule 32 of the Federal Rules of Criminal Procedure. If you would, please, stand and raise your right hand for me.

JESSE R. BAILEY

was first duly sworn and testified as follows:

THE COURT: Mr. Bailey, would you please state and spell for the record your full name.

MR. BAILEY: Jesse Rondale Bailey, J-e-s-s-e R-o-n-d-a-l-e B-a-i-l-e-y.

THE COURT: How old are you, Mr. Bailey?

00:01:02 MR. BAILEY: 23 years old.

THE COURT: When is your birthday?

MR. BAILEY: 3-7-75.

THE COURT: How far did you go in school?

MR. BAILEY: The 11th grade.

THE COURT: Do you have any difficulty

reading or writing?

MR. BAILEY: No, sir.

THE COURT: Mr. Bailey, on August 15th, 2007, a jury found you guilty of Count 1 of the superseding indictment charging violation of 21 United States Code § 841 and 846, conspiracy to distribute and possess with intent to distribute cocaine and cocaine base.

Count 2 of the superseding indictment
00:01:42 charging a violation of 21 United States Code § 841(a)(1), distribution of cocaine hydrochloride and Counts 3 through 5 of the superseding indictment charging violations of 21 United States Code § 841(a)(1) distribution of cocaine base.

The punishment which may be imposed as a result of the conviction as to counts 1, 3, 4 of the superseding indictment is a mandatory minimum 20 years imprisonment to a maximum life imprisonment, a fine of up to eight million dollars or imprisonment and a fine.
00:02:20 The punishment which may be imposed as a result of your conviction as to Count 2 of the superseding indictment is a maximum 30 years imprisonment, a $2 million fine or imprisonment and a fine.

The punishment which may be imposed as a result of your conviction to Count 5 of the superseding

indictment is a mandatory minimum ten years up to a maximum term of life imprisonment, a $4 million fine or imprisonment and a fine.

There is also a special assessment fee of $100 which must be paid in this case as to each of Counts 1 through 5 for a total of $500.

Mr. Bailey, you have been represented in this case by your counsel Mr. Vogel, your current counsel that is. I assume you would like him to

00:03:08 represent you for purposes of your sentencing hearing here this afternoon. Is that correct?

MR. BAILEY: Yes, sir.

THE COURT: Mr. Vogel, are you willing to continue to represent Mr. Bailey for purposes of the sentencing hearing?

MR. VOGEL: Yes, Your Honor.

THE COURT: Okay. Now, Mr. Bailey, a Presentence Investigation Report has been prepared in this case. Have you received a copy of the Presentence

00:03:32 Investigation Report?

MR. BAILEY: I received a copy a while back.

THE COURT: Okay. Have you had enough time to go over that with Mr. Vogel?

MR. BAILEY: No, sir.

THE COURT: Do you need more time to go over it with Mr. Vogel?

MR. BAILEY: Well, there's a few things in there that is incorrect that I might want to go over it with him. I don't think he has it now.

MR. VOGEL: Your Honor, I didn't bring my copy of it with me today. We had met --

MR. BAILEY: I remember bringing it up to Mr. Reed, when he was my counsel then. Ever since I

00:04:18 done received new counsel, we never got around to rediscussing it. I did inform Mr. Reed there was a lot of things in there that was incorrect. I mean from the beginning to the end there was a lot of things. Through the process of obtaining new counsel, I never got around to discussing it again.

THE COURT: Mr. Vogel.

MR. VOGEL: Your Honor, we had gone through it. I am not sure what Mr. Bailey is referring to. We had gone through it in visits at the Blount

00:04:48 County Jail. I did prepare a sentencing memorandum in response to the Presentence Report. I am really at kind of a loss.

THE COURT: You did. You objected to three areas of the Presentence Investigation Report.

Let me give you about ten minutes. Why

don't you discuss with Mr. Bailey the objections that you have raised and see what other objections he might have. We need to make sure that he has had an opportunity to tell you what he wants you to object to before we proceed.

MR. VOGEL: Certainly, Your Honor.

THE COURT: We'll take a ten-minute recess and reconvene at 1:20.

(Off the record.)

00:17:06 (Back on the record.)

THE COURT: I understand, Mr. Bailey, you have now had an opportunity to go over the Presentence Report with your attorney, is that correct?

MR. BAILEY: Yes, sir.

THE COURT: Mr. Vogel, do you have any additional corrections, modifications or changes that need to be made to the Presentence Investigation Report other than those you have filed objections with the court?

00:17:24 MR. VOGEL: No further objections, but there is one date that maybe just for clarification purposes we need to deal with on page 8, Paragraph 32. It states in that paragraph that Mr. Bailey was placed on Knox County juvenile probation on June 2nd, 2003. Now, somewhere along the line that date is messed up.

He was 28 years old on June 2nd, 2003. He was incarcerated on that date. He was in the penitentiary. That does not seem accurate. I don't know -- that does need to be corrected.

THE COURT: Can we check on that, please, Ms. Brown?

PROBATION OFFICER: We'll check on it and correct it for the Bureau of Prisons purposes.

THE COURT: Thank you, Ms. Brown.

00:18:12 Okay. Mr. Theodore, have you received a copy of the Presentence Investigation Report?

MR. THEODORE: Yes, we have, Your Honor. We have no objections to the report.

THE COURT: Thank you, Mr. Theodore.

Mr. Vogel have filed three objections. First to the designation of the defendant as a career offender. Secondly, to the inclusion of his juvenile criminal record, pending charges, and other arrests in his criminal history. Last of all, your objection to

00:18:38 the inclusion of his indicted affiliation, with his indicated affiliation with a street gang, as described in Paragraph 68 of the Presentence Report.

Do you want to present evidence in support of your objections, Mr. Vogel?

MR. VOGEL: Your Honor, I have no evidence

to put on today in support of these. I do have some additional argument that I would like to make in response to the probation officer's.

THE COURT: You may proceed.

MR. VOGEL: Dealing with objection number one. Certainly we acknowledge that it is the law of the circuit at this time that this court is well within its rights and jurisdiction to make judicial fact finding, including obviously the facts of prior convictions. We are not contending that.

00:19:20

What the essence of this objection was was that since the *Booker* decision and its subsequent progeny and other decisions that have emanated from it, we think this court has a right to reject the career offender status. If the guidelines are guidelines and advisory, they are advisory. This court does not have to follow the mandate that says he has to be sentenced to 360 years to life. There have been decisions and there have been courts that have found that the underlying charges do not warrant a career offender status.

00:19:56

We understand that one of Mr. Bailey's prior charges is very serious. The other charge, however, is for a small amount of drugs and because of that we wanted to bring it to the court's attention and

ask the court to consider deviating from the career offender status, sentencing him to Category VI which would be the highest category anyway within his level which would then still provide an enhancement for his past crimes, but would not, would actually take ten years off the sentence and not pop it up another ten years, which doesn't really seem appropriate here.

This crime is not a crime of violence, neither was the other crime, the other drug crime.

00:20:46 There doesn't seem to be any indication or in the course of the events in this particular case that indicate he posed a danger to the community. He was involved with another individual who was also involved in drug dealing. That is the extent of the relationship that was proven here.

Those things being said, we would ask the court to consider deviating from the career offender status. We ask the court to sentence him to ten years less than the actual guideline range would be if he was

00:21:18 not a career offender. Your Honor, I don't think the probation office has actually said that is not permissible.

The last line of their second paragraph in the response says that it is believed the court can sentence the defendant in accordance with the career

offender guidelines, if it finds he has at least two prior felony convictions. I don't think that means the court has to. Certainly the court can. We don't object to the fact the court can. We ask the court to consider a lesser sentence.

For the second objection, the juvenile record should not be considered by this court. This should have been closed. It is not something that should affect this court's decision at all. The
00:22:02 arguments made by the probation department it says in reference to the juvenile record that they are allowed to do it because of some publication that gives them guidance. Well, that is fine. That is not an argument that says it has to be included. There is nothing mandated anywhere that says the juvenile record must be included. When you have a sealed record, it's not something that this court should consider.

The second part of that objection was also the pending charges. Once again, if you don't have a
00:22:32 conviction, if you don't have proof that the defendant committed a particular crime, it's not appropriate for this court to consider whether that should affect his sentencing. The reason I am saying that is because it's very possible he could be not guilty of that crime. The whole point in only enhancing for convictions, because

we have had a finding of guilt. For the court to even look at what a pending charge might be violates the whole tenant of saying to the defendant, we are only going to hold you responsible for what you have been found guilty, or what you have admitted to. I think that violates the principle of that.

There is a whole line of court decisions that says you can only hold him responsible for what he admits to or what has been proven.

00:23:18 THE COURT: Mr. Vogel, I am a little confused on your second point. According to my calculation, the defendant was 21 years of age when that offense was committed. You are saying he was less than 21 years of age?

MR. VOGEL: Which offense, Your Honor?

THE COURT: The offense that is listed, the offense that you are saying he was a minor at the time the crime was committed.

MR. VOGEL: No, Your Honor. I am saying

00:23:50 that included in the -- maybe I spoke too quickly. I apologize if I jumped topics too quickly. What I am saying is that there is included in the Presentence Report references to Mr. Bailey's juvenile record. I am objecting to its inclusion in the Presentence Report. I am objecting to whether it would influence or should

influence the decision of this court.

THE COURT: I am sorry. I misunderstood you.

MR. VOGEL: It's my fault. I probably went too quickly between the topics.

For objection number three, Your Honor, the inclusion of the information about the prior gang involvement, there has been absolutely no indication or testimony or proof in this case that Mr. Bailey had any
00:24:34 gang involvement or is involved in a gang presently or was involved in a gang during any of the events that led up to this conviction and today's sentencing.

If he was in the past, it has no relevance whatsoever to the sentencing here today. The only justification that probation can give to this is that the Bureau of Prisons needs to know about all considerations and then they go through a litany such as bail jumping, sexual misconduct, firearms, escapes, violence immigration status, threats against government
00:25:08 officials and prior institutional adjustment. They don't even mention gangs in the list.

It doesn't seem appropriate to include something in here which has an immediate negative connotation to anybody that reads it. It carries that negative weight with us and yet is not relevant at all

to this present case. That is why we objected to that. We would like these things stricken, Your Honor.

Once again I ask the court to consider sentencing Mr. Bailey to the Category VI level 32 as an enhanced sentence, but not as a career offender at 360 to life. Thank you.

THE COURT: Thank you, Mr. Vogel.

Mr. Theodore, do you wish to respond?

MR. THEODORE: Yes, Your Honor, briefly.

00:25:58 Your Honor, Mr. Vogel has indicated he objects to Mr. Bailey being sentenced as a career offender. Prior to this hearing he did indicate he wanted to see further evidence of the convictions that form the basis for the predicate for the career offender status. What I have provided so the court is aware and I would like to provide these to the court at this time, certified copies of the convictions in those cases. I have two other exhibits, Your Honor.

THE COURT: They'll be received and made

00:26:32 an exhibit to the proceedings in this case.

MR. VOGEL: No objection Your Honor.

MR. THEODORE: They are certified convictions. Just to show, so Mr. Vogel has sufficient evidence that the Jesse Rondale Bailey indicated in those convictions is the same Jesse Rondale Bailey that

is part of this case, I have also provided him with a TOMIS record. That is Tennessee Offender Management Information System record which come from the Department of Corrections database. On there there's a photograph of Mr. Bailey. It indicates the same Social Security number as certified convictions. There is also, if you look on the fourth page of that TOMIS Record, there is actually a picture of a tattoo of Yosemite Sam on the left chest of Mr. Bailey. If you see the Presentence
00:27:20 Report in this case, paragraph 69, it mentions the fact that Mr. Bailey in this case has a tattoo of Yosemite Sam on his left chest. Also I provided in Exhibit 4 the driver's license record. Again that cross-references the same Social Security as the TOMIS Record and the certified convictions and again there is a photograph which it's clear, when you look at the photograph, that Jesse Rondale Bailey and the convictions and this case, in this case, are one in the same. I don't think there is any doubt certainly that he has those convictions,
00:27:58 Your Honor.

As far as whether he should be sentenced within that, Mr. Vogel is asking the court for a variance. There is a very recent case, *United States v. Funk* out of this circuit that is 543 F.3d. 522, Your Honor, if I can provide a copy of that to the court and

to Mr. Vogel.

THE COURT: Very well.

MR. THEODORE: In that case, Your Honor, that was July, 2008, the defendant in that case had a guideline range as a career offender. His guideline range I think was 262 to 327. The District court in that case sentenced the defendant to 150 months believing that that would be a sufficient sentence. The Court of Appeals vacated that sentence and said that
00:28:50 that was substantively unreasonable under those circumstances. That Congress gave clear directive of how these type of defendants should be sentenced. Your Honor, so, in this particular case I think it's clear that Mr. Bailey should be sentenced as a career offender.

As far as some of the other conduct and the contents in the Presentence Report, Your Honor, there is a mention of an aggravated assault where there is pending charges against Mr. Bailey right now. I
00:29:24 would like to provide the court Exhibit Number 5, the actual affidavit of the complaint in that case.

MR. VOGEL: Your Honor, once again, I object to pending charges at all. For the court to consider them doesn't seem appropriate.

THE COURT: Thank you, Mr. Vogel.

MR. THEODORE: Your Honor, I think Mr. Vogel is incorrect. He seems to suggest in order to consider any other conduct at all whatsoever, any other negative conduct, that it has to be admitted by the defendant or proven to a, you know, to a jury beyond a reasonable doubt. That is not the standard for finding facts at sentencing. I think there is an indicia of reliability of that particular pending charge. That is a detailed affidavit of the complaint. It lists the
00:30:08 victims names, it gives a full account of what happened in there. Your Honor, I think that that is reliable information.

In that case it states on the second page the defendant committed the offense of aggravated assault. Obviously, he hasn't been, you know, there is not a conviction. It says a codefendant Casby handed defendant a big gun with a curved ammo clip. The defendant pointed it towards the victim, one of which was holding her six-month old son, and yelled "this is
00:30:42 my block", placing the victim in fear of death or serious injury. This was in August of 2006.

There is another page which goes into more details about that particular charge, Your Honor. Again, I think this is, the details there do provide some reliable information for the court. I think the

court can consider that, regardless of the fact there is not a conviction yet in that.

As far as the gang affiliation, Your Honor, we don't have any evidence to provide the court on that. Certainly I think it's relevant. I believe the presentence investigator relied upon a state presentence report for some of that information. Certainly it's relevant. It shows, if you are affiliated with gangs certainly it has some tendency to
00:31:30 show a propensity for criminal behavior, Your Honor. I think it's relevant. Again, we have no further evidence of that though.

Your Honor, I just want to just add, you know, as far as whether the court should do a variance, Mr. Bailey has led a life of habitual crime. When you look at his past history and you look at the fact that it doesn't appear he has shown any contrition whatsoever for his criminal behavior, I think the likelihood of recidivism is very high with Mr. Bailey. We think a
00:32:04 sentence in the guideline range of the career offender guideline range is appropriate. Thank you.

THE COURT: Okay. Mr. Vogel.

MR. VOGEL: Thank you, Your Honor. First of all concerning the *U.S. v. Funk* decision, Your Honor, that decision does not necessarily preclude this court,

in fact, it doesn't preclude this court from making a variance downward, if the court believes that a career offender sentence would overstate the facts and circumstances of the underlying crimes.

I think that the government will agree that decision does not state that.

Secondly, Your Honor, the case that you just received we object to the inclusion in the record. We object to it being considered. The facts are not
00:32:50 reliable, Your Honor. Even if the court is to consider them, the United States has a burden and the burden is at least a preponderance of the evidence that these are reliable.

THE COURT: Mr. Vogel, I am confused. It's my responsibility to make sure that I understand and follow the law as set by the Sixth Circuit Court of Appeals. I was very much familiar with this opinion before it was ever handed to me. Are you saying I need to not consider this opinion in my determination in this
00:33:20 case?

MR. VOGEL: No, absolutely not, Your Honor. I am saying that opinion does not preclude you from giving a variance on the career offender status. It doesn't say in there you can't do it. It provides some guidelines as to a specific circumstances when the

court found it to be unreasonable. That is all it does. It does not preclude a variation from the career offender status. That is all I am saying.

THE COURT: Thank you, Mr. Vogel.

MR. VOGEL: As far as the pending charges, the pending charges are not relevant in this case. First of all, they have not been proven. The government has not met its burden by providing an affidavit, a copy of an affidavit without the officer or any arresting
00:34:02 people here to provide testimony, any kind of evidence. They have not met their burden at all. That should not be considered.

Certainly they have already admitted they have absolutely no evidence of gang affiliation. Yet they want you to consider it. They have not met their burden. They have a burden to meet to demonstrate at least that there is a propensity, a preponderance of the evidence rather, that this should be included. They have already told you they can't do that. We ask that
00:34:32 that be stricken as well.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Vogel. Anything further, Mr. Theodore?

MR. THEODORE: No, Your Honor, thank you.

THE COURT: With regard to defendant's

objections to his career offender status, the court finds that defendant qualifies as a career offender under sentencing guideline 4B1.1.

First, defendant was over 18 years of age at the time that he committed the instant offenses.

Secondly, the instant offenses are felony controlled substance offenses.

Finally, the defendant has at least two prior felony convictions of either a crime of violence
00:35:06 or a controlled substance offense.

The court has received copies of the judgment in those cases, one signed by Judge Baumgartner and dated June 22nd, 1999, and the second signed by Judge Leibowitz and dated June 7th, 1999.

Accordingly, defendants objections to not finding the defendant a career criminal, career offender, are overruled by this court. The court does believe that such crimes constitute a crime of violence, as those terms are defined in sentencing guideline
00:35:50 4B1.2, and as explained in the commentary thereto.

Moreover, regardless of whether the defendant characterizes the quantity of the drugs as minor, in Tennessee possession of cocaine for sale of more than one half gram is a Class B felony offense.

In sum, the court finds that the career

offender status applies to defendant and will treat the application thereof as advisory in conjunction with the other factors set forth in 18 United States Code § 3553a).

Mr. Vogel, I am fully aware and understand the thrust of your argument that you have made. You have made it very forcefully, but that the court does have discretion under the dictates of the United States Supreme court in the recent decisions dealing with
00:36:40 sentencing of the defendants, sentencing of felony offenders. However, the court does believe that under the circumstances of this case, the defendant is correctly classified as a career offender.

Having found that career offender status would apply to the defendant, the base offense level does not apply. However, the court notes that the two level decrease for crack cocaine pursuant to the revision of the application note 10(d) to sentencing guideline 2D1.1 has been addressed by the probation
00:37:16 officer and has already been accounted for in the base offense level of 32.

With regard to the amount of cocaine attributed to defendant in Count 2, a jury found the defendant to be guilty beyond a reasonable doubt of distributing this amount.

Defendant's conclusory arguments do not serve as a basis for overturning the jury's guilty verdict.

In any event, under Rule 29 of the Criminal Rules of Procedure defendant has waived his objection at this time.

With regard to the defendant's objection to the inclusion of his juvenile criminal record, other arrests and pending charges, these matters are included
00:37:56 in the Presentence Report simply to advise the court of the defendant's situation. These considerations do help the court to tailor the sentence in light of other statutory concerns, as required by *United States v. Booker* and enable the court to consider the history and characteristics of the defendant, as required by 18 United States Code § 3553(a).

At the same time, the defendant's history and other considerations pending charges will not be considered by the court in formulating the defendant's
00:38:30 sentence in this case.

As discussed by the probation officer and as previously noted by the court, the information regarding defendant's past gang affiliation is included to assist the court in fashioning an appropriate sentence for defendant, treating the sentencing

guidelines as advisory only and considering the factors set forth in 18 United States Code § 3553(a).

Moreover, this information assists the United States probation officer in supervising the defendant subsequent to any imposed term of imprisonment.

For the foregoing reasons the court hereby overrules defendant's objections to the PSR, but the court will also not consider the allegation that the

00:39:12 defendant belonged to a gang in formulating an appropriate sentence in this case.

The sentence of the court in this cause shall be made pursuant to the factors set forth in 18 United States Code § 3553(a) treating the Sentencing Commission guidelines as advisory only.

Now, Mr. Bailey, the following prior convictions have been alleged for the purposes of enhancing your sentence under sentencing guideline 4B1.1, career offender.

00:39:44 That is, June 7th, 1999, in the criminal court for Knox County, Tennessee, possession of cocaine exceeding one half gram with intent to sell, case number 62093.

On June 22nd, 1999, in the criminal court for Knox County, Tennessee, facilitation of second

degree murder, case number 65697C.

Mr. Bailey, any challenge to these prior convictions which are not made before the sentence is imposed may not be raised thereafter to attack the sentence. Mr. Bailey, do you affirm the prior convictions, as previously stated by the court?

MR. BAILEY: Yes, sir.

THE COURT: Thank you, Mr. Bailey.

The court finds that defendant has been
00:40:36 convicted of violations of 21 United States Code § 841(a)(1). In addition defendant has affirmed his two prior convictions for a controlled substance offense and a crime of violence. Accordingly, pursuant to sentencing guideline 4B1.1 it's the finding of the court that the defendant should be sentenced as a career offender. Therefore, pursuant to sentencing guideline 4B1.1 defendant's base offense level is 32. The career offender base level is 37 which makes the total offense level as 37. Thus the court's conclusion as to the
00:41:42 appropriate offense level in this case is 37 and the defendant's criminal history category is VI.

Now, Mr. Vogel, would you like to make any comments on behalf of the defendant before I set his sentence in this case?

MR. VOGEL: No, Your Honor. Once again I

just would ask the court to consider something below the 360 to life.

THE COURT: Thank you, Mr. Vogel. Mr. Theodore, do you wish to make any comments on behalf of the government before I set the defendant's sentence in this case?

MR. THEODORE: Nothing further, Your Honor.

THE COURT: Okay, let's take a short recess. We'll reconvene at five minutes to two.

00:42:38

(Off the record.)

(Back on the record.)

MR. VOGEL: Your Honor, while you were out, Mr. Bailey's mother and fiancee are here. She informed me that she has checked with the clerk's office and that the pending charge that was given by the government, the witness actually recanted. Apparently on the back page there is a signature of the witness recanting or there is an indication that she recanted. The charges have not been dismissed, however. I know the court said it wasn't going to consider that for sentencing purposes. I felt like it needed to be on the record.

00:52:14

THE COURT: Mr. Theodore. Do you have any position as far as that information being contained in

in the Presentence Report and the fact that she has recanted?

MR. THEODORE: Your Honor, just looking at the affidavit, I believe there were several witnesses there. I am not sure exactly which witness she is talking about. The fact that case has not been dismissed tells me that there must be additional evidence. I really can't speak to that. I am not aware of whether that has been recanted. Even if one witness
00:52:52 did recant, it sounds like there are a number of witnesses there.

THE COURT: Anything further, Mr. Vogel?

MR. VOGEL: Your Honor, my understanding it the main witness that reported the threat recanted and I would think that would be --

THE COURT: I haven't considered that really for purposes of sentencing at all.

Now Mr. Bailey, do you want to say anything to me before I do set your sentence in this
00:53:16 case?

MR. BAILEY: No, sir. I am all right -- I prefer to just remain silent. I am all right.

THE COURT: Thank you, Mr. Bailey.

Anything further, Mr. Vogel, on behalf of the defendant before I set his sentence in this case?

MR. VOGEL: No, Your Honor.

THE COURT: Anything further, Mr. Theodore, on behalf of the government?

MR. THEODORE: Your Honor, the only thing I would say is I have talked it over with our First Assistant, Mike Winck. He is the person that actually indicted Mr. Bailey in this case, was involved in the early part of the investigation, talked it over with people in our office. We do believe that a guideline
00:53:56 sentence would be appropriate.

THE COURT: Thank you, Mr. Theodore.

Counsel, I will at this time state the sentence. I will give you an opportunity to file any objections you may have to the sentence before it's actually imposed in this case.

The court has considered the nature and circumstances of the offense, the history and characteristics of the defendant and advisory guideline range as well as the other factors set forth in Title 18
00:54:18 United States Code § 3553(a).

Pursuant to the Sentencing Reform Act of 1984 it is the judgment the court that the defendant is hereby committed to the custody of the Bureau of Prisons for a term of imprisonment of 360 months as to Counts 1 through 5 to be served concurrently.

This term reflects the lower area of the guideline range. It is felt this sentence will afford adequate deterrence and provide just punishment.

The court will recommend that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons Institution Residential Drug Abuse Treatment Program.

Upon release from imprisonment the defendant shall be placed on supervised release for a
00:55:04 term of ten years. This term consists of terms of ten years on each of the Counts 1, 3, 4, eight years on Count 5 and six years as to Count 2, all such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which he has been released.

While on supervised release the defendant shall not commit another federal, state or local crime,
00:55:36 shall comply with the standard conditions that have been adopted by this court and local Rule 83.10 and shall not illegally possess a controlled substance.

The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

The defendant shall cooperate in the

collection of DNA, as directed by this probation officer.

In addition, the defendant shall comply with the following special conditions. The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by his probation officer, until such time as he has been released from the program by the probation officer.

Title 18 United States Code § 3565(b) and
00:56:20 3583(g) require mandatory revocation of probation or supervised release for possession of a controlled substance or of a firearm or for refusal to comply with drug testing.

Pursuant to Title 18 United States Code § 3013 the defendant shall pay a special assessment fee in the amount of $500 which shall be due immediately.

The court finds that the defendant does not have the ability to pay a fine and the court will accordingly waive the fine in this case.

00:56:52 It is further ordered that the defendant be remanded to the custody of the Attorney General pending designation by the Bureau of Prisons and the court will recommend that the defendant be placed in the Bureau of Prisons facility located closest to Knoxville, Tennessee.

Mr. Vogel, do you have any objection to the sentence, as stated by the court, other than the objections that you have previously filed in this court?

MR. VOGEL: No, Your Honor. Other than reserving those, we do object to the sentence of 360 months. We believe that the application of the guidelines in this case violate Mr. Bailey's 6th Amendment rights and that the sentence is excessive. Other than that we just reserve or preserve all objections we have made heretofore.

00:57:40

THE COURT: Thank you, Mr. Vogel.

Mr. Theodore, do you have any objection to the sentence as previously read and stated by the court?

MR. THEODORE: No, Your Honor.

THE COURT: Very well, the sentence shall be imposed as previously read and stated by the court. The court does find that a sentence of 360 months in this case is sufficient but not greater than necessary to comply with the purposes of Section 3553(a).

00:58:04

In determining the sentence to be imposed the court has considered the nature and circumstances of the offense, as well as the history and characteristics of the defendant. The defendant does have an extensive criminal history demonstrating a life marked with violence and substance abuse. After his previous

release from prison, in May of 2005, the defendant immediately resumed his involvement in drug trafficking. This lengthy criminal history demonstrates defendant's lack of respect for the law.

Further, the defendant is subject to enhanced sentence due to his status as a career offender. This enhanced sentence will afford adequate deterrence and protect the public from future crimes.

In final analysis, the court finds that a
00:58:54 term of imprisonment in this case of 360 months is sufficient but not greater than necessary to comply with the purposes of 3553(a). The court has noticed that the defendant does appear to have a history of substance abuse and the court has recommended that the defendant receive 500 hours of substance abuse treatment while in custody with the bureau of prisons.

It's also hoped that the defendant will further his education and get his GED while he is with the Bureau of Prisons.

00:59:30 Now, Mr. Bailey, you have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law.

You also have the right to apply for leave to appeal in what is called in form of pauperis, that

is, without paying any court costs prior to filing your appeal.

In addition, Mr. Bailey, with very few exceptions, any notice of appeal must be filed within ten days of the entry of the judgment in this case. A judgment of the conviction shall be promptly prepared on the form prescribed for sentences under the Sentencing Reform Act. Copies of the charging documents, Presentence Report and judgment of conviction will be
01:00:10 sent to the United States Sentencing Commission as expeditiously as possible.

Anything further, Mr. Vogel, we need to take up on behalf defendant at this time?

MR. VOGEL: Your Honor, Mr. Bailey has indicated he would ask the court to file a notice of appeal as soon as appropriate.

THE COURT: Okay, if you will go downstairs after this proceeding and see the clerk of the court, she can prepare those documents for you.

01:00:32 Anything further, Mr. Theodore, on behalf of the government?

MR. THEODORE: No, sir, Your Honor. Thank you.

THE COURT: We'll stand adjourned.

(Court was recessed.)

I CERTIFY THAT THE FOREGOING IS AN ACCURATE TRANSCRIPT OF THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER, THIS THE 17th DAY OF February, 2009.

S/ J. Owen
JOLENE OWEN.
Registered Professional Reporter