

No. \_\_\_\_\_

---

In the  
Supreme Court of the United States

---

CHELSEA SHANNON MCINTYRE,  
Petitioner

v.

UNITED STATES OF AMERICA,  
Respondent.

---

On Petition for a Writ of Certiorari  
To the United States Court of Appeals  
For the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

---

ANDREA RENEE ST. JULIAN  
*Counsel of Record*  
12636 High Bluff Dr., Ste. 400  
San Diego, California 92130  
(858) 792-6366  
astjulian@san.rr.com

*Counsel for Petitioner,*  
CHELSEA SHANNON MCINTYRE

## QUESTION PRESENTED

Did Ms. McIntyre receive due process of law where the district applied Career Offender Guidelines, lacking a sound basis in policy, and leading to a career offender designation that was based on insufficiently substantial predicate convictions?

## PARTIES TO THE PROCEEDINGS

The parties are petitioner, Chelsea Shannon McIntyre, and respondent, United States of America. All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI .....	1
OPINIONS BELOW .....	1
STATEMENT OF JURISDICTION .....	2
CONSTITUTIONAL PROVISION INVOLVED .....	2
STATEMENT OF THE CASE AND FACTS .....	3
A.    Ms. McIntyre's Personal History .....	3
B.    The Alleged Facts Giving Rise to the Instant Conviction .....	7
C.    Ms. McIntyre's Complaint, Indictment, Detention, and Arraignment .....	9
D.    Pre-Plea Report and Change of Plea .....	10
E.    The Sentencing and Appeal .....	11
1.    Ms. McIntyre's failure to appear at the initial sentencing hearing .....	11
2.    The presentence reports and sentencing memoranda .....	13
3.    The sentencing hearing .....	20
4.    The appeal .....	21

REASONS FOR GRANTING THE WRIT .....	22
I.    MS. MCINTYRE DID NOT RECEIVE DUE PROCESS OF LAW WHERE THE DISTRICT APPLIED CAREER OFFENDER GUIDELINES, LACKING A SOUND BASIS IN POLICY, AND LEADING TO A CAREER OFFENDER DESIGNATION THAT WAS BASED ON INSUFFICIENTLY SUBSTANTIAL PREDICATE CONVICTIONS.....	22
A.    The District Court Was Not Required to Adhere to the Career Offender Guidelines When Sentencing Ms. McIntyre.....	24
B.    The Career Offender Guidelines Lack a Sound Basis in Policy. ....	25
C.    The Predicate Convictions on Which Ms. McIntyre's Career Offender Designation Was Based Were Insufficiently Substantial to Justify Her Sentence. ....	31
CONCLUSION.....	35

## APPENDICES

Appendix A March 21, 2023, Memorandum of the Ninth Circuit Court of Appeals .....	2a
Appendix B February 8, 2022, Judgment of U.S. District Court, Central District of California .....	8a

## FEDERAL CASES

<i>Hawkins v U.S.</i> , 706 F.3d 820 (7 <sup>th</sup> Cir.2013).....	24
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	27
<i>Nelson v. United States</i> , 555 U.S. 350 (2009).....	24
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	26, 29
<i>Spears v. United States</i> , 555 U.S. 261 (2009).....	24
<i>U.S. v Booker</i> , 543 U.S. 220 (2005).....	24
<i>U.S. v Foote</i> , 784 F.3d 931 (4 <sup>th</sup> Cir.2015).....	24
<i>Gall v U.S.</i> , 552 U.S. 38 (2007).....	26

## FEDERAL STATUTES

18 U.S.C § 3553.....	24
21 U.S.C. § 841(a)(1).....	9

## OTHER

### U.S. Sentencing Comm'n, Report to the Congress:

<i>Career Offender Guidelines Working Group Memorandum</i> , (Mar. 1988) at <a href="https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-groupreports/miscellaneous/031988_Career_Offender.pdf">https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-groupreports/miscellaneous/031988_Career_Offender.pdf</a> (Last visited August 21, 2022) .....	28
---	----

Michael S. Gelacak, Ilene H. Nagel, & Barry L. Johnson, <i>Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis</i> , 81 Minn. L. Rev. 299, 356-57 (Dec. 1996) .....	27
--	----

### Sentencing Comm'n, Report to the Congress:

<i>Career Offender Sentencing Enhancements</i> , at 2 (Aug. 2016) at <a href="https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-andreports/criminal-history/201607_RtC-Career-Offenders.pdf">https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-andreports/criminal-history/201607_RtC-Career-Offenders.pdf</a> .....	29
--	----

### U.S.S.C.,

<i>Report to the Congress: Career Offender Sentencing Enhancements</i> , at 2 (Aug. 2016).....	28
--	----

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Chelsea Shannon McIntyre, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, entered in the instant proceeding on March 21, 2023, Ninth Circuit Court of Appeal No. 22-50019.

### OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued an unpublished memorandum decision in this matter. App. 2a. See *United States v. McIntyre*, No. 22-50019, 2023 WL 2584246 (9<sup>th</sup> Cir. March 21, 2023)(unpublished). The district court order from which Ms. McIntyre appealed is also unpublished. App. 5a. See *United States v. McIntyre*, U.S. District Court, Central District of California, No. 19-cr-00236.

## STATEMENT OF JURISDICTION

The date on which the Ninth Circuit Court of Appeals filed its Memorandum in the instant matter was March 21, 2023. 2b. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V: No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE AND FACTS

### A. Ms. McIntyre's Personal History

Ms. McIntyre was born in 1990 to troubled parents, Michele McIntyre and Orlando Rios. 1-PSRs-17. Michelle was a heroin addict at the time she gave birth to Ms. McIntyre. Mr. Rios was Michele's drug supplier.

Due to her parents' drug addiction and incarceration for the possession for sale of cocaine and heroin, Ms. McIntyre was sent to live with her grandparents when she was one year old. Ms. McIntyre has seen her father only once when she was 16. 1-PSRs-17

When McIntyre was between the ages of 10 and 12, she went to live with her mother and younger sisters. Ms. McIntyre had little to no structure living with her mother, who was in a methadone program and always sleeping. 1-PSRs-18. Michele's live-in boyfriend, Dimas Romero, drank heavily and used drugs throughout the time he lived with the family. 1-PSRs-18.

At the age of 12, Ms. McIntyre began smoking cannabis. That same year, her 15-year-old boyfriend, Mario Flores, introduced her to methamphetamines which quickly became her drug of choice. 1-PSRs-18. That same year, Ms. McIntyre was introduced to alcohol. 1-PSRs-18. By the time she was in high school, Ms. McIntyre smoked cannabis with her mother. 1-PSRs-18.

Ms. McIntyre's relationship with Mr. Flores lasted from the time she was 12 until she was 17 years old. The relationship was a violent one. When Ms. McIntyre was 17, Mr. Flores severely beat her, knocking her out and leaving bloodied a nose, lips, and a black eye. Ms. McIntyre's mother said nothing of the severe beating and made Ms. McIntyre go to school the next day. 1-PSRs-18.

At the age of 14, Ms. McIntyre became pregnant. 1-PSRs-18. She and the child's father decided to terminate the pregnancy. When Ms. McIntyre was 22 years old, the father of the child was murdered by his brother in a most gruesome manner. 1-PSRs-18-19; 3-ER 247. Ms.

McIntyre was required to testify at the murder trial. The murder and having to testify traumatized her. She mourned the death of the child's father and regretted having had an abortion. 1-PSRs-18-19.

At the age of 23, Ms. McIntyre entered a drug rehabilitation center for the first time. Two years later, however, Ms. McIntyre suffered yet another devastating loss. Her Aunt, Doris Miles, who had treated Ms. McIntyre like a daughter, died a sudden and untimely death. 1-PSRs-19. Ms. McIntyre increased her methamphetamine use to cope. 1-PSRs-19. Aunt Doris's death was on the heals of the sudden and untimely death of Ms. McIntyre's uncle, Bob. 3-ER 240-241, 247.

At 28 years of age, Ms. McIntyre attempted to enter a facility rehabilitation for a second time, after having resided in a sober living facility the year before. 1-PSRs-19-20. There was, however, no space for her. 3-ER-247.

In June 2020, Ms. McIntyre successfully entered residential treatment where she participated in weekly treatment groups in areas

such as Living in Balance, Matrix, Anger Management, Seeking Safety,

Clean and Sober Parenting, and Nurturing Parenting. McIntyre tested

negative for all substances, was

helpful to the other women, and participated in social support through

virtual support groups. The same month she entered the treatment

program, she gave birth to her first child, a daughter. 1-PSRs-19, 20.

Following her July 2020 discharge from treatment, Ms. McIntyre

went to live with her maternal grandparents. 1-PSRs-19. She spent time

with her grandparents, buying groceries for them and helping them

clean and landscape their rental properties. 1-PSRs-19. She did

everything to help take care of her elderly grandparents included buying

their clothes, cooking for them and helping them to stay organized. 3-

ER-248, 303.

While living with her grandparents, Ms. McIntyre also took care of

her daughter and worked to be the mother she never had. She was

motivated to be a good role model, stay clean, and live a law abiding life.

She did not want to miss any more years of her daughter's upbringing than she had to. 1-PSRs-19.

Ms. McIntyre took easily to caring for her grandparents because of her work history. She has a GED and also a food handler's license. Thus her employment history includes work in the hotel, restaurant and spa industries. 1-PSRs-21.

Ms. McIntyre has suffered from mental health issues since childhood, leading her to feel manic and restless at times. She did not, however, seek treatment for it until June 1, 2020 when she began attending weekly treatment groups in areas that address emotional health. 1-PSRs-20. Eventually, Ms. McIntyre was diagnosed as having a bipolar disorder that included mania and depression 3-ER-251, 253. She was prescribed mental health medication. 2-ER-65-66, 83.

Ms. McIntyre also suffers from high blood pressure, which was exacerbated by her pregnancy. 1-PSRs-19. The pregnancy also caused Ms. McIntyre to suffer postpartum depression. 3-ER-253.

## B. The Alleged Facts Giving Rise to the Instant Conviction

On January 30, 2019, local law enforcement from San Luis Obispo conducted a traffic stop of driver, Rudolfo Cerda. 1-PSRs-6; 2-ER 216 .At the time of the stop, an officer observed that Mr. Cerda gave something to Ms. McIntyre who was the passenger. 1-PSRs-6; 2-ER-217. Upon questioning Mr. Cerda, the officer learned that Mr. Cerda was on parole. 2-ER-217.

The officer who conducted the stop alleged that she viewed a hypodermic needle with no cap in the back passenger seat. The officer further alleged that brown liquid inside the needle was consistent with heroin. 1-PSRs-6; 2-ER-96.

During a pat-down search of Ms. McIntyre, the officer allegedly encountered a large bulge in her waistband. The bulge contained what the officer believed was a white rock-like substance consistent with methamphetamine. The officer also allegedly retrieved a glass pipe with white residue inside and a small baggie with a black tar substance the

officer believed was consistent with heroin from Ms. McIntyre's waistband. 1-PSRs-6; 2-ER-219-221. Law enforcement alleged that, in a *Mirandized* interview, Ms. McIntyre stated that the methamphetamine belonged to her. 2-ER-220-221.

The Drug Enforcement Administration (DEA) laboratory report of the substances collected from the stop reflected that the substance contained methamphetamine with a total net weight of 88.3 grams, with a purity of 100%, resulting in 88.3 grams of actual methamphetamine. 1-PSRs-6; 2-ER-128.

C. Ms. McIntyre's Complaint, Indictment, Detention, and Arraignment

On March 18, 2019, a Complaint was filed in the Central District of California charging Ms. McIntyre with Possession with Intent to Distribute a Controlled Substance under 21 U.S.C. § 841(a)(1). On April 18, 2019, the local U.S. attorney filed an Indictment, alleging Possession

with Intent to Distribute Methamphetamine under 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii). 2-ER-178.

Following her arrest, the government requested that Ms. McIntyre be detained. 2-ER-208. The district court denied that request and set bail at \$25,000. 2-ER-186-187, 200. At the detention hearing, Ms. McIntyre waived her right to a preliminary hearing. 2-ER-184-185, 205. At arraignment, Ms. McIntyre pleaded not guilty. 2-ER-171 175.

#### D. Pre-Plea Report and Change of Plea

On January 20, 2020, the district court ordered that probation prepare a Pre-Plea Presentence Report, which was completed on May 21, 2020. 1-PSRs-51; 2-ER-140. On February 14, 2020, the parties filed a joint statement regarding Ms. McIntyre's Rule 11 plea. 2-ER-125. The parties did not, however, enter into a plea agreement. 1-PSRs-6. Thus, Ms. McIntyre entered an open plea. 2-ER-109, 115.

On February 18, 2020, Ms. McIntyre pleaded guilty to the single

count of the Indictment. 2-ER-104, 117. The district court found that Ms. McIntyre knowingly and voluntarily waived her rights and thus it accepted Ms. McIntyre's guilty plea. 2-ER-117.

At the time of the change of plea hearing, Ms. McIntyre was pregnant. The district court set her sentencing date for October 2020 so that she could have her baby prior to sentencing while she was out on bail. 2-ER-117-118. The sentencing hearing was later continued to February 16, 2021. 2-ER-79.

#### E. The Sentencing and Appeal

##### 1. Ms. McIntyre's failure to appear at the initial sentencing hearing

On the day of her February 16, 2021 sentencing hearing, Ms. McIntyre failed to appear. On that same day, she absconded from pretrial supervision and location monitoring by removing her GPS

tracker. She remained a fugitive until she was arrested on a bench warrant on August 5, 2021. 2-ER-72-75 1-PSRs-8.

The psychiatrist who evaluated Ms. McIntyre following her release noted that Ms. McIntyre's behaviors in absconding were very much in keeping with her then untreated mental health issues:

Chelsea McIntyre's descriptions of her mood during her pregnancy and in the postpartum, which included symptoms of detachment, panic, crying, feelings of hopelessness, spontaneous crying, obsessive worry and intrusive images are consistent with a diagnosis of a perinatal mood disorder. At the time of the arrest, in a manic state, she acted impulsively by cutting off her ankle monitor without any reflection about the possible consequences of her actions.

3-ER-253.

The evaluating psychiatrist further found that Ms. McIntyre's bipolar illness had been exacerbated by her long-term use of methamphetamine. In this regard, methamphetamine use has been found to aggravate mood swings, increase irritability, and *inter alia*,

negatively impact a user's reasoning abilities. 3-ER-254.

While Ms. McIntyre was absent from custody, her mental health continued to deteriorate. She contemplated suicide. 3-ER-41, 249-250. In this regard she started consuming fentanyl for the first time, "hoping to die." 3-ER-241-249.

The evaluating psychiatrist ultimately concluded:

Chelsea McIntyre's mental disease is manageable and controllable with appropriate pharmacological and psychological intervention. Patients have the potential to live fully productive lives when bipolar disorder is effectively treated. With proper rehabilitation, her substance use disorder can also be addressed. She has shown that she can maintain sobriety.

3-ER-254.

2. The presentence reports and sentencing memoranda

a. The presentence reports

The Office of Probation prepared a pre-plea report, a presentence report, a revised presentence report, and three addenda. 1-PSRs-3, 27, 28, 29, 51. The final Presentence Report (PSR) calculated Ms. McIntyre's sentencing guideline range based on the following determinations.

Base Offense Level (Guideline §2d1.1) 30

Obstruction of Justice +2

Adjusted Offense Level 32

Career Offender 37

Total Offense Level 37

Criminal History Category VI

1-PSRs-5.

The addition of two points for obstruction of justice was based on Ms. McIntyre absconding while out on bail. 1-PSRs-8. The Career Offender designation was based on two previous convictions, one of

which was considered a crime of violence and the other of which was a controlled substance offense. 1-PSRs-8-9. The first conviction had taken place in 2008 shortly after Ms. McIntyre turned 18 years old. Ms. McIntyre was convicted of assault with a deadly weapon or instrument other than a firearm or by means of force likely to produce great bodily injury, California Penal Code § 245(a)(1). This conviction was based on a minor altercation with her mother while Ms. McIntyre was intoxicated from alcohol. 1-PSRs-10. The second conviction was for possession of a controlled substance (morphine) for sale (California Health & Safety Code, § 11378), which occurred in September 2012. 1-PSRs-11.

Because of the Career Offender designation, Ms. McIntyre's Criminal History Category became a level VI. This produced a guideline imprisonment range of 360 months to life with five years of supervised release. 1-PSRs-5, 22. The statutory minimum for Ms. McIntyre's offense was ten years incarceration with a maximum term of imprisonment being life. 1-PSRs-21.

Ms. McIntyre's criminal history included a June 2012 conviction for possession of a controlled substance, a 2012 conviction for shoplifting a makeup bag, and a conviction for receiving stolen property and for using another's ID (California Penal Code, §§ 496(a) and 530.5(a).) 1-PSRs-11-13. The PSR listed the probation violations that were associated with these convictions, and also additional arrests. 1-PSRs-12-19.

Probation opined that there were factors that may have warranted a downward departure. 1-PSR-23. Probation indicated that, besides the ten-year old incident with her mother when Ms. McIntyre was just 18, Ms. McIntyre had no violent offenses. 1-PSR-23. Additionally, Ms. McIntyre's lengthiest prior sentence imposed was for two years in 2010. Probation also noted that Ms. McIntyre "...has recently participated in treatment, gave birth, and assists her elderly grandparents." 1-PSR-23. Thus, Probation concluded that Ms McIntyre's "... criminal history category may be overstated." 1-PSR-24.

b. The government's sentencing position

The government submitted its sentencing position before Ms. McIntyre absconded and thus based its position on the original presentence report filed. 2-ER-93. In that position statement, the government recommended that the district court impose a 262-month term of imprisonment. 2-ER-99. At Ms. McIntyre's ultimate sentencing hearing, the government continued to recommend a sentence of 262 months. 1-ER-21.

c. Ms. McIntyre's sentencing position

Ms. McIntyre, in a supplemental position paper, explained that the district court should not apply the career offender guidelines and instead sentence her to 138 months – fifteen months more than the ten-year mandatory minimum sentence for a career offender. 1-ER-15; 3-ER-236.

Ms. McIntyre based her argument on the following reasons:

- # A ten-year sentence was a low-end guideline sentence and the mandatory

minimum.

- # Ms. McIntyre's background contained myriad mitigating circumstances.
- # Ms. McIntyre was a new mother that had made recent successful efforts to improve her life for the better.
- # Ms. McIntyre was a drug addict and the instant offense was a manifestation of that.
- # Ms. McIntyre was neither a kingpin nor a sophisticated drug dealer and at most, was a low-level street dealer.
- # Ms. McIntyre would be facing less time if she committed a violent offense, including voluntary manslaughter.
- # The longest period in custody Ms. McIntyre had ever served was two years (over 10

years prior to her conviction in this matter).

- # The facts of the predicate priors were mitigating and did not justify a career offender designation since one offense occurred a month after Ms. McIntyre turned 18 and the other involved small amounts of drugs.
- # The methamphetamine guidelines are overly harsh with the mandatory minimum and more than sufficient in this case.
- # Ms. McIntyre attempted to cooperate in good faith, evidencing that she is reformed and unlikely to reoffend.
- # A sentence of more than 10 years will derail any progress that Ms. McIntyre has made since a lengthy prison term makes it more

difficult for a defendant to assimilate back into society.

3-ER-271-272.

Ms. McIntyre further based her request on the facts that:

- # She did not flee the state or county when she absconded.
- # She suffers from a number of mental health issues and trauma that, prior to absconding, had not been properly treated.

3-ER-236-237.

In requesting that the district court not apply the career offender guideline, Ms. McIntyre explained that without that designation, her sentencing guideline range would have been 120 to 150 months. 3-ER-200, 237; 3-ER 273.

### 3. The sentencing hearing

On February 7, 2022, the district court sentenced Ms. McIntyre to a 210-month term of imprisonment. 1-ER-2, 8. In arriving at Ms. McIntyre's sentence, the district court found that Probation had correctly calculated Ms. McIntyre' sentencing guideline range which resulted in a suggested sentence of 262 to 273 months. 1-ER-22.

In explaining the sentence it would imposed on Ms. McIntyre, the district court stated that it would vary from the guideline range. In this regard, the district court stated that the sentence, which was 52 months below the lowest guideline range, was the equivalent of a two-level downward departure. 1-ER-27. The district court felt the variance was appropriate because:

- # Ms. McIntyre did attempt to cooperate with law enforcement;
- # Her longest sentence, which had been imposed ten years earlier, had only been two years; and,

# Her background was particularly troubled.

1-ER-22-23, 27-28.

#### 4. The appeal

Ms. McIntyre filed a timely notice of appeal of the judgment on February 9, 2022. 2-ER-223. The Court of Appeals filed an unpublished memorandum affirming Ms. McIntyre's conviction on March 21, 2023.

## REASONS FOR GRANTING THE WRIT

### I. MS. MCINTYRE DID NOT RECEIVE DUE PROCESS OF LAW WHERE THE DISTRICT APPLIED CAREER OFFENDER GUIDELINES, LACKING A SOUND BASIS IN POLICY, AND LEADING TO A CAREER OFFENDER DESIGNATION THAT WAS BASED ON INSUFFICIENTLY SUBSTANTIAL PREDICATE CONVICTIONS.

At her sentencing hearing, Ms. McIntyre requested that the district court consider but ultimately reject a custodial sentence based on her designation as career offender. Specifically, Ms. McIntyre requested that the district court exercise its discretion and not apply the career offender guidelines to her. 3-ER-238. In so requesting, Ms. McIntyre pointed out that the career offender guidelines are not sufficiently grounded in policy nor do the guidelines, as applied to her, accurately reflect the

predicate convictions on which her designation as a career offender were based. Consequently, application of the career offender guidelines gravely over-sentenced her.

Despite the circumstances of Ms. McIntyre's sentencing, the Ninth Circuit Court of Appeals affirmed her conviction and the corresponding sentence. The district court sentence and the Ninth Circuit's decision lacked sufficient legal authority and was thus a violation of Ms. McIntyre's due process rights.

A. The District Court Was Not Required to Adhere to the Career Offender Guidelines When Sentencing Ms. McIntyre.

The Federal Sentencing Guidelines are advisory, not mandatory, and though district courts must take them into account, they are not bound by them. *U.S. v Booker*, 543 U.S. 220 (2005). District courts may not presume that a within-Guidelines sentence is reasonable. *Nelson v. United States*, 555 U.S. 350, 352 (2009). Rather, district courts must make their own independent determination that a Guidelines sentence comports with the sentencing standards of 18 U.S.C. § 3553(a), even a sentence based on a career offender designation. See *U.S. v. Foote*, 784 F.3d 931, 943 (4<sup>th</sup> Cir.2015); See also *Hawkins v U.S.*, 706 F.3d 820, 832 (7<sup>th</sup> Cir.2013). District courts are thus empowered to vary below the low end of the career offender guideline. See *U.S. v Gillis*, 592 F.3d 696, 698 (6<sup>th</sup> Cir.2009); To similar effect see, *Spears v. United States*, 555 U.S. 261, 264

(2009).

B. The Career Offender Guidelines Lack a Sound Basis in Policy.

As discussed more fully in the immediately following subsection of this petition, the application of the career offender guidelines caused Ms. McIntyre's sentence to be wildly out of proportion to the realities of her criminal history and the crime of which she was convicted in the instant matter. The application of the career offender guidelines to Ms. McIntyre had a dramatic effect on her guidelines range. Without a career offender designation, Ms. McIntyre's suggested guidelines range would have been 120 to 150 months for a custodial sentence. The application of the career offender designation increased the guidelines range to 262 to 327 months of incarceration. This is a more than a doubling of the suggested guidelines sentencing. The unreasonable nature of this doubling can be found in the lack of reasoned policy underlying the career offender designation.

The career offender guidelines are based solely on congressional dictate rather than the Federal Sentencing Commission's normal process of studying empirical data. See U.S. Sentencing Comm'n, Report to the Congress: Career Offender Sentencing Enhancements (Aug. 2016) pp. 12-14 at [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-andreports/criminal-history/201607\\_RtC-Career-Offenders.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-andreports/criminal-history/201607_RtC-Career-Offenders.pdf). (Last visited August 21, 2022). In other words, the career offender guideline resulted from congressional directive rather than resulting from "careful study based on extensive empirical evidence derived from review of thousands of individual sentencing decisions." *Gall v U.S.*, 552 U.S. 38, 46 (2007). Because the Sentencing Commission created the career offender guideline in the absence of empirical support, the Commission deviated from its primary mission to promulgate "a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." *Rita v. United States*,

551 U.S. 338, 349 (2007).

The Commission not only failed to rely on empirical evidence of pre-guidelines practice, but it also failed to review and revise the career offender guideline in light of later judicial decisions, sentencing data, and comments from experts in the field. Indeed, almost ten years before *Booker*, a study of downward departures found “extensive use of [downward] departures from sentences generated by the career offender provisions,” and these were “quite substantial,” “typically” to the sentence that would have applied absent the career offender provision. See Michael S. Gelacak, Ilene H. Nagel, & Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-357 (Dec. 1996). One reason for such departures was that the predicates were “minor or too remote in time to warrant consideration.” *Id.* at 357. But the Commission has not

reexamined or revised the career offender guideline, other than to expand its reach in several ways after its initial creation and address the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), regarding crimes of violence.

The Commission's failure to remedy the problems many courts have identified with the career offender guideline is highlighted by the Commission itself having recognized that the guideline is flawed. A 1988 Commission study concluded that the career offender guideline "makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions . . . even if one defendant was a drug 'kingpin' with serious prior offenses, while the other defendant was a low-level street dealer [with] two prior convictions for distributing small amounts of drugs." U.S. Sentencing Comm'n, Report to the Congress: *Career Offender Guidelines Working Group Memorandum*, p. 13 (Mar. 1988) at

[https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988\\_Career\\_Offender.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf) (Last visited August 21, 2022).

In 2016, the Commission acknowledged “concerns that the career offender directive fails to meaningfully distinguish among career offenders with different types of criminal records and has resulted in overly severe penalties for some offenders.” U.S. Sentencing Comm'n, Report to the Congress: *Career Offender Sentencing Enhancements*, at 2 (Aug. 2016) at <https://www.ussc.gov/>

U.S. Sentencing Comm'n, Report to the Congress: [sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf). (Last visited August 21, 2022). Likely with those concerns in mind, district courts are more frequently sentencing career offenders well below the career offender guideline range. “[T]he proportion of career offenders sentenced within the

applicable guideline range. . . decreased from 43.3 percent in fiscal year 2005 to 27.5 percent in fiscal year 2014.” *Id.* at 22.

Despite the deep concerns regarding the career offender guidelines, the Commission did nothing to address them. Because of the Commission’s refusal to revise the career offender guidelines even though they were not based on empirical evidence or past practice, the career offender guidelines do not provide even a rough approximation of 18 U.S.C. § 3553(a)’s objectives. *United States v. Rita*, 551 U.S. 338, 350 (2007).

A number of courts have rejected the career offender guidelines on policy grounds. See, e.g., *U.S. v Mitchell*, 624 F.3d 1023, 1028-1030 (9<sup>th</sup> Cir. 2010); *U.S. v Newhouse*, 919 F. Supp.2d 955 (N.D. Iowa 2013) wherein the court systematically deconstructed the career offender guideline and concluded that it raises “a specter of aperiodic, irrational, and arbitrary sentencing guideline ranges”; *Id.* at 967-968 listing courts that have

varied from the career offender guideline on policy and individual-defendant grounds. As discussed more fully in the following subsection, the irrational and arbitrary nature of the application of the career offender guidelines to Ms. McIntyre was a due process violation that provides a compelling reason for the grant of the instant petition.

C. The Predicate Convictions on Which Ms. McIntyre's Career Offender Designation Was Based Were Insufficiently Substantial to Justify Her Sentence.

Ms. McIntyre's predicate convictions were both relatively minor and remote in time. For these reasons the more than two-fold increase in her sentencing guidelines range was wholly unwarranted and constituted a due process violation.

The first predicate conviction occurred in 2008. At that time, Ms. McIntyre was a high school student who lived with her mother. 1-PSRs-28; 3-ER-295. One month after turning 18, Ms. McIntyre came home intoxicated. 1-PSRs-18; 3-ER-238, 278, 284, 295. She went to bed, but her mother angrily woke Ms. McIntyre from a deep sleep. 3-ER-295. In her confused state, Ms. McIntyre struck her mother. 3-ER-295. Ms. McIntyre's mother admitted to law enforcement that she was the aggressor, not Ms. McIntyre. 1-PSRs-218; 3-ER-238, 295. Ms. McIntyre

was criminally charged, resulting in a 2008 conviction for assault. 1-PSRs 10, 18; 3-ER 238. She was given a sentence of three years of probation and 45 days in county jail. 1-PSRs-10.

Ms. McIntyre was so intoxicated at the time of the 2008 incident that she does not remember it. Afterward, Ms. McIntyre felt extremely remorseful, apologized to her mother, and never drank alcohol again. 1-PSRs-18; 3-ER-295. Thus, the altercation was a one-time, isolated incident never repeated that took place ten years prior to the incident giving rise to the instant proceeding. 3-ER-278, 295.

The second offense that counted as a predicate conviction for the career offender designation is a 2012 controlled substance for sale offense. The offense involved small amounts of heroin (3.13 grams) and methamphetamine (13 grams) and occurred more than eight years prior to sentencing in this matter. 1-PSRs-11 Ms. McIntyre received a sentence of three years of probation and 180 days in county jail. 1-PSRs-11.

Defendants, such as Ms. McIntyre, who only marginally fit within the career offender guideline should not bear the full weight its directives. As has been noted:

[D]istrict courts should not be overly shy about concluding that particular defendants . . . do not have the profile Congress and the Commission had in mind when they directed that sentences for career drug offenders be set at or near the top of the statutory range. *Booker* discretion is at its zenith when sentencing courts make the judgment that the particular conduct of the defendant falls only marginally within the scope of a guideline that even the Commission regards as overbroad and (in some applications) counter-productive.

*United States v. Pruitt*, 502 F.3d 1154, 1172 (10<sup>th</sup> Cir. 2007).

Because of two relatively minor convictions both of which were remote in time, the Sentencing Guidelines led to Ms. McIntyre being designated a career offender. In both cases, Ms. McIntyre received a sentence of probation and minimal county jail time. These factors, taken together, reflect that the two crimes were simply not serious enough to

warrant a designation of career offender. Thus, the district court's heavy reliance on the career offender designation prevented Ms. McIntyre from receiving fair and just treatment under the law. This violation of due process is a compelling reason to grant the instant petition.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: June 5, 2023

Respectfully submitted,

/s/ Andrea R. St. Julian

Andrea R. St. Julian

Attorney for Defendant-Appellant,  
CHELSEA SHANNON MCINTYRE

# APPENDICES

# APPENDIX A

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MAR 21 2023

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHELSEA SHANNON McINTYRE,

Defendant-Appellant.

No. 22-50019

D.C. No. 2:19-cr-00236-RGK-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
R. Gary Klausner, District Judge, Presiding

Submitted March 14, 2023\*\*

Before: SILVERMAN, SUNG, and SANCHEZ, Circuit Judges.

Chelsea Shannon McIntyre appeals from the district court's judgment and challenges the 210-month sentence imposed following her guilty-plea conviction for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). We have jurisdiction under 28 U.S.C. § 1291,

---

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

and we affirm.

McIntyre contends that her sentence is substantively unreasonable.

Although she does not dispute that she qualifies as a career offender, she argues that the district court should not have considered the resulting guideline range because the career offender guideline is not based on sound policy and her predicate offenses were relatively minor and remote in time. McIntyre further contends that her mitigating circumstances and the 18 U.S.C. § 3553(a) factors warranted a 138-month sentence. The district court did not abuse its discretion.

*See Gall v. United States*, 552 U.S. 38, 51 (2007). The below-Guidelines sentence is substantively reasonable in light of the § 3553(a) factors and the totality of the circumstances, including McIntyre's criminal history and decision to abscond prior to sentencing. *See Gall*, 552 U.S. at 51; *see also United States v. Gutierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009) ("The weight to be given the various factors in a particular case is for the discretion of the district court."). Moreover, the district court adequately considered her mitigating circumstances and the § 3553(a) factors in arriving at this sentence.

**AFFIRMED.**

# APPENDIX B

**United States District Court**  
**Central District of California**

**UNITED STATES OF AMERICA vs.**

**Defendant** CHELSEA SHANNON MCINTYRE

akas: \_\_\_\_\_

**Docket No.** 2:19-cr-00236-RGK

**Social Security No.** 1 2 8 9

(Last 4 digits)

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
FEB	7	2022

**COUNSEL**

**NEHA CHRISTERNA, DFPD**

(Name of Counsel)

**PLEA**

**GUILTY**, and the court being satisfied that there is a factual basis for the plea.  **NOLO**  
**CONTENDERE**  **NOT**  
**GUILTY**

**FINDING**

There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of:  
 Possession with Intent to Distribute Methamphetamine, in violation of 21 USC 841(a)(1)(b)(1)(A)(viii), as charged in Count One of the Indictment

**JUDGMENT  
AND PROB/  
COMM  
ORDER**

The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

**TWO HUNDRED TEN (210) MONTHS**

It is ordered that the defendant shall pay to the United States a special assessment of \$100, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline §5E1.2(a), all fines are waived as the Court finds that the defendant has established that she is unable to pay and is not likely to become able to pay any fine.

The Court recommends that the Bureau of Prisons conduct a mental health evaluation of the defendant and provide all necessary treatment.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Chelsea Shannon McIntyre, is hereby committed on Count 1 of the Indictment to the custody of the Bureau of Prisons for a term of **TWO HUNDRED TEN (210) MONTHS**.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office and Second Amended General Order 20-04.

2. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.
3. The defendant shall cooperate in the collection of a DNA sample from the defendant.
4. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.
5. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath and/or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.
6. During the course of supervision, the Probation Officer, with the agreement of the defendant and defense counsel, may place the defendant in a residential drug treatment program approved by the U.S. Probation and Pretrial Services Office for treatment of narcotic addiction or drug dependency, which may include counseling and testing, to determine if the defendant has reverted to the use of drugs. The defendant shall reside in the treatment program until discharged by the Program Director and Probation Officer.
7. The defendant shall participate in mental health treatment, which may include evaluation and counseling, until discharged from the program by the treatment provider, with the approval of the Probation Officer.
8. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.
9. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, computers (as defined in 18 USC 1030(e)(1)), cell phones other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of her supervision and that the areas to be searched contain evidence of this violation.
10. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name, other than the defendant's true legal name, nor shall the defendant use, any name other than the defendant's true legal name without the prior written approval of the Probation Officer.

The Court recommends that the Bureau of Prisons consider the defendant for placement in its Residential Drug Abuse Program (RDAP).

USA vs. CHELSEA SHANNON MCINTYRE

Docket No.: 2:19-cr-00236-RGK

The Court authorizes the Probation & Pretrial Services Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the sentencing judge.

The Court authorizes the Probation Officer to disclose the Presentence Report, and any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide information (excluding the Presentence report), to State or local social service agencies (such as the State of California, Department of Social Service), for the purpose of the client's rehabilitation.

The Court recommends that the defendant be designated to a Bureau of Prisons facility in Southern California and has no objection to Dublin.

The defendant is advised of her right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

February 8, 2022

Date

  
R. Gary Klausner, United States District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

February 8, 2022

Filed Date

By /s/ Sharon L. Williams

Deputy Clerk

---

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

**STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE**

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The defendant must also comply with the following special conditions (set forth below).

## STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California  
 Attn: Fiscal Department  
 255 East Temple Street, Room 1178  
 Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
  - Non-federal victims (individual and corporate),
  - Providers of compensation to non-federal victims,
  - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

## CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

**RETURN**

I have executed the within Judgment and Commitment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

Defendant noted on appeal on \_\_\_\_\_

Defendant released on \_\_\_\_\_

Mandate issued on \_\_\_\_\_

Defendant's appeal determined on \_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_  
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By \_\_\_\_\_

Date \_\_\_\_\_

Deputy Marshal

**CERTIFICATE**

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By \_\_\_\_\_

Filed Date \_\_\_\_\_

Deputy Clerk

**FOR U.S. PROBATION OFFICE USE ONLY**

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

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

(Signed) \_\_\_\_\_  
Defendant

\_\_\_\_\_  
Date

\_\_\_\_\_  
U. S. Probation Officer/Designated Witness

\_\_\_\_\_  
Date