

22

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

---

No: 22-2136

---

United States of America

Plaintiff - Appellee

v.

April Paw

Defendant - Appellant

---

Appeal from U.S. District Court for the District of South Dakota - Northern  
(1:20-cr-10040-CBK-1)

---

**JUDGMENT**

Before COLLOTON, MELLOY and GRUENDER, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 13, 2023

Order Entered in Accordance with Opinion:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

United States Court of Appeals  
For the Eighth Circuit

---

No. 22-2136

---

United States of America

*Plaintiff - Appellee*

v.

April Paw

*Defendant - Appellant*

---

Appeal from United States District Court  
for the District of South Dakota – Northern

---

Submitted: March 16, 2023

Filed: June 13, 2023

[Unpublished]

---

Before COLLOTON, MELLOY, and GRUENDER, Circuit Judges.

---

PER CURIAM.

April Paw pled guilty to conspiracy to distribute a controlled substance (methamphetamine) in violation of 21 U.S.C. § § 841(a)(1) and 846. The presentence investigation report (PSR) recommended a guideline range of 87 to 108 months. However, a 10-year statutory mandatory minimum moved the guideline “range” to

↑ ineffective counsel - Matt never explained any of this to April

120 months. The district court<sup>1</sup> found Paw's criminal history was underrepresented and departed upward. The resulting guideline range was 121 to 151 months of imprisonment. The district court sentenced Paw to 151 months of imprisonment. Paw appeals, arguing the district court committed a procedural error by not explaining the departure and abused its discretion in ordering a substantively unreasonable sentence. We affirm.

I.

Paw spent most of her childhood at a refugee camp in Thailand before moving to the United States when she was 22. Paw was the victim of domestic violence both at the refugee camp in Thailand and in the United States. After living for a few years in Minnesota, she moved to South Dakota and began working at a manufacturing plant. After having a child, Paw stopped working at the manufacturing plant and began selling methamphetamine.

what  
proof

On May 12, 2020, Paw was arrested for distribution of methamphetamine. Paw was housed in the Brown County Jail in Aberdeen. While Paw was in the county jail, law enforcement received multiple tips that Paw was actively trying to recruit cell mates to sell methamphetamine and Paw was continuing to "call[] the shots" from inside the jail. Paw posted bail on October 24, 2020. After Paw was released, a confidential informant told law enforcement that Paw was planning to receive methamphetamine from a Minnesota supplier. Law enforcement arrested the supposed supplier who identified Paw as the "boss lady." Paw was arrested again on November 6, 2020, and subsequently released on a personal recognizance bond. On October 4, 2021, she pled guilty to a single count of conspiracy to distribute a controlled substance. She was sentenced in May 2022. Paw complied with all rules of release during the fifteen months she was out on a personal recognizance bond.

---

<sup>1</sup>The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

Paw makes two arguments on appeal. First, she argues the district court committed a procedural error by not explaining how it arrived at criminal history category IV. Second, she argues the sentence is substantively unreasonable because it did not account for mitigating circumstances.

## II.

“Pursuant to USSG § 4A1.3, a court may impose an upward departure if ‘reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.’” United States v. Sullivan, 853 F.3d 475, 479 (8th Cir. 2017) (citation omitted). We review a departure under § 4A1.3 for abuse of discretion. United States v. Azure, 536 F.3d 922, 930 (8th Cir. 2008). The district court did not abuse its discretion by departing upward after noting Paw’s uncharged criminal conduct from the jail. See id. at 931.

If a district court chooses to depart it must adequately explain any departure—failure to do so may be a significant procedural error. Azure, 536 F.3d at 932. There is no set amount of explanation required. “While we do not require a ‘ritualistic exercise in which the sentencing court mechanically discusses each criminal history category it rejects en route to the category that it selects,’ the sentencing court ‘must adequately explain why it concludes the intermediary categories fail to meet the purposes of § 4A1.3.’” Sullivan, 853 F.3d at 479 (citation omitted). Because failure to explain a departure is a procedural error, “we review the district court’s factual findings for clear error and its application of the guidelines de novo.” Sullivan, 853 F.3d at 479.

The district court did not commit a procedural error by failing to explain the departure in more detail. In this case, the district court noted an upward departure was necessary because: “I guess I’ve never had a case in the 27 years I’ve been on the bench where someone is stupid enough to be trying to recruit other prisoners and to obtain further drugs to be sold illegally when they’re in jail.” The district court’s

explanation is sufficient given how the mandatory minimum changed the calculus and how the district court discussed Paw's conduct in the jail. See e.g., United States v. Cooke, 853 F.3d 464, 473 (8th Cir. 2017) (“[W]e have previously upheld nonextensive explanations of upward departures so long as the district court ‘adequately explained [its] rationale for the sentence imposed.’” (citation omitted)).

Finally, the sentence is not substantively unreasonable. “A district court abuses its discretion and imposes an unreasonable sentence when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors.” United States v. White, 816 F.3d 976, 987 (8th Cir. 2016) (citation omitted). All relevant factors were presented to the district court and the district court did not consider any improper factors. It was within the district court's discretion to not give more weight to Paw's history of abuse or other mitigating evidence.

### III.

Accordingly, we affirm the judgment of the district court.

---

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,  Plaintiff - Appellee,  vs.  APRIL PAW,  Defendant - Appellant.	No. 22-2136  MOTION TO WITHDRAW AS COUNSEL FOR APPELLANT
---	---

Jason J. Tupman, Federal Public Defender for the Districts of South Dakota and North Dakota and counsel of record for Appellant April Paw, pursuant to Fed. R. App. P. 27(a), Eighth Circuit Rule 27B, and Part V of the Plan to Implement the Criminal Justice Act of 1964, as amended August 1, 2015, respectfully moves this court, for its order permitting him to withdraw as counsel for the Appellant. *See Austin v. United States*, 513 U.S. 5 (1994).

The undersigned counsel has made a diligent and conscientious review of the entire record of the case and has concluded that there is no reasonable likelihood that a petition for writ of certiorari to the United States Supreme Court would be granted by that Court applying the standards set forth in Rule 10 of the Rules of the Supreme Court. Counsel has advised Appellant of this determination. Counsel has further advised Appellant of the procedures for filing a pro se petition for writ of certiorari to the United States Supreme Court.

The undersigned further certifies that he has advised Appellant of the procedures for filing a pro se petition for rehearing by the panel and rehearing en banc. The undersigned has declined to file a petition for rehearing by the panel or the court en banc because the undersigned believes that there are not reasonable grounds for such a petition. Pursuant to Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964, the undersigned therefore requests a 28-day extension of time within which Appellant may file a pro se petition for rehearing.

WHEREFORE, the undersigned counsel of record for the Appellant respectfully requests that this court issue its order allowing him to withdraw as counsel for the Appellant and grant a 28-day extension of time in which Appellant may file a pro se petition for rehearing.

Dated this 26th day of June, 2023.

Respectfully submitted,

/s/ Jason J. Tupman  
Jason J. Tupman, Federal Public Defender  
Attorney for Appellant April Paw  
Office of the Federal Public Defender  
Districts of South Dakota and North Dakota  
101 South Main Avenue, Suite 400  
Sioux Falls, SD 57104  
Phone: (605) 330-4489; Fax: (605) 330-4499  
Ecf8\_sf@fd.org

## CERTIFICATE OF SERVICE

I certify that on June 26, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

I further certify that on June 26, 2023, I mailed a copy of the Motion to Withdraw as Counsel for Appellant to April Paw, Reg. No. 16483-509; FCI Aliceville; PO Box 4000; Aliceville, AL 35442.

/s/ Jason J. Tupman  
Jason J. Tupman, Federal Public Defender  
Attorney for Appellant April Paw

## CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 309 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Garamond font.

Dated this 26th day of June, 2023.

/s/ Jason J. Tupman  
Jason J. Tupman, Federal Public Defender  
Attorney for Appellant April Paw