

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1986

UNITED STATES OF AMERICA,
Appellant

v.

PETE MANNING

District Court No. 3-20-cr-00105-001

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, KRAUSE, RESTREPO,
BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES,
CHUNG, and SMITH, * Circuit Judges

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by panel and the Court en banc, is denied.

*The vote of the Honorable D. Brooks Smith, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing only.

BY THE COURT,

s/D. Brooks Smith
Circuit Judge

Dated: October 19, 2023
Amr/cc: All counsel of record

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DCO-096

No. 22-1986

UNITED STATES OF AMERICA,
Appellant

v.

PETE MANNING

(D.N.J. No. 3-20-cr-00105-001)

Present: JORDAN, MONTGOMERY-REEVES and SMITH, Circuit Judges

1. Motion filed by Appellant USA to lift stay, to summarily reverse, to stay briefing schedule;
2. Response filed by Appellee;
3. Reply by Appellant USA to Response

Respectfully,
Clerk/amr

ORDER

The foregoing Motion filed by Appellant USA to lift stay and to summarily vacate the judgment and remand for re-sentencing is GRANTED.

By the Court,

s/D. Brooks Smith
Circuit Judge

Dated: September 22, 2023

CJG/cc: Mark E. Coyne, Esq.
John F. Romano, Esq.
Jason F. Ullman, Esq.

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK



UNITED STATES COURT OF APPEALS

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September 22, 2023

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RE: USA v. Pete Manning
Case Number: 22-1986
District Court Case Number: 3-20-cr-00105-001

ENTRY OF JUDGMENT

Today, **September 22, 2023** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment.

45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:

3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).

15 pages if hand or type written.

Attachments:

A copy of the panel's opinion and judgment only.

Certificate of service.

Certificate of compliance if petition is produced by a computer.

No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszeit, Clerk

By: s/ Caitlyn
Case Manager
267-299-4956

Docket No. 22-1986

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant
v.
PETE MANNING

**MOTION TO LIFT THE STAY,
FOR SUMMARY REVERSAL,
AND TO STAY THE BRIEFING
SCHEDULE**

Patricia S. Dodszuweit, Clerk
United States Court of Appeals
for the Third Circuit

Jason F. Ullman, Esq.
jason_ullman@fd.org

Dear Ms. Dodszuweit:

Defendant, Pete Manning, pleaded guilty to distribution of heroin (21 U.S.C. § 841(a)(1), (b)(1)(C)), was at least 18 when he committed that offense, and had two prior heroin convictions. The District Court nonetheless determined that he was not a career offender. The reason: New Jersey’s controlled substance schedules were supposedly broader than the federal schedules. Ex. E at 7-11.¹ As a result, the Court imposed a sentence at the top of Manning’s non-career-offender Guidelines range. Ex. F; StR.

Following sentencing, this Court held in United States v. Lewis, 58 F.4th 764, 773 (3d Cir. 2023), that “[t]he meaning of ‘controlled substance’ as used in

¹ “Ex. ___” refers to an exhibit attached to this motion. “Dkt. #” refers to a docket entry in D.N.J. Crim. No. 20-105. “PSR” and “StR” refer to the Pre-Sentence Report and Statement of Reasons, respectively, which have been filed under seal.

Guidelines § 4B1.2(b)’s definition of ‘controlled substance offense’ includes drugs regulated by state law at the time of the predicate state conviction, even if they are not federally regulated.” Lewis compels the conclusion that the District Court erred in finding that Manning was not a career offender. Because that Guidelines-calculation error is not harmless, this Court should lift the extant stay, summarily vacate the sentence under 3d Cir. L.A.R. 27.4 (2011) and I.O.P. 10.6 (2023), and remand for re-sentencing. Pending decision on this motion, the Government also requests that this Court stay the issuance of the briefing schedule.

A. FACTUAL BACKGROUND

Between July and October 2018, Manning sold heroin to an undercover law enforcement officer on four occasions in exchange for \$8000 in cash. Those sales totaled 39 grams—approximately 2000 individual doses. PSR ¶¶ 8-15. Manning had been convicted of selling drugs in the past, for offenses that both occurred in 2009: a Pennsylvania conviction for possession with intent to distribute heroin, PSR ¶ 35; and a New Jersey conviction for distributing heroin near school property, PSR ¶ 36. In connection with that second drug-trafficking conviction, Manning also pleaded guilty to unlawfully possessing a semiautomatic handgun. PSR ¶ 36. In the ensuing years, Manning amassed a long series of additional convictions. PSR ¶¶ 37-43.

B. PROCEDURAL HISTORY

On January 31, 2020, Manning pleaded guilty before the Honorable Michael A. Shipp, U.S.D.J., to a one-count Information, charging him with distribution of heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). Dkt. ## 22, 24. In anticipation of sentencing, the Probation Office found that Manning qualified as a career offender and therefore had an advisory Guidelines range of 151-to-188 months' imprisonment. PSR ¶¶ 27, 35-36, 46, 85.

The Government agreed with that calculation but asked for a modest 4-level downward variance to a sentence of 110 months' imprisonment. See Ex. A. For his part, after initially conceding that he was a career offender and joining in the Government's request for a 110-month prison sentence, see Ex. A at 2 n.1, Manning changed course. He argued that he was not a career offender after all by claiming that his prior drug offenses weren't career offender predicates because of a mismatch between federal and state drug schedules. See Ex. B. In support, he relied in part on United States v. Scott, D.N.J. Crim. No. 18-547, 2021 U.S. Dist. LEXIS 253093 (D.N.J. 2021), where Judge Shipp previously held that "controlled substance" in the Guidelines referred solely to substances prohibited under federal law and therefore drug convictions under state law couldn't qualify if the controlled substance schedules did not exactly match. See Ex. B at 5; Ex. D; see

also Ex. C. Manning, therefore, asked for a sentence within his otherwise applicable Guidelines range: 24-to-30 months' imprisonment. See Ex. B.

Sentencing occurred on April 20, 2022. See Ex. E. Following argument on the Guidelines issue, Judge Shipp adhered to Scott, finding that Manning's prior New Jersey drug conviction wasn't a qualifying "controlled substance offense" because New Jersey's controlled substance schedules supposedly reached thousands of heroin isomers that were not listed in the federal controlled substance schedules. Ex. E at 7-11.² Judge Shipp therefore calculated an advisory Guidelines range of 24-to-30 months' imprisonment. Ex. E at 12; StR.

The Government objected to the determination that Manning wasn't a career offender. Ex. E at 12. After hearing from counsel and Manning, Ex. E at 13-26, Judge Shipp imposed a top-of-the-range sentence of 30 months' imprisonment, Ex. E at 26-32; Ex. F. Judge Shipp explained that this was a "gift" resulting from "conflict in the law" and that "many of the factors that militate in favor of a more substantial sentence here still" applied. Ex. E at 31. The Government again objected "to the sentence incorporating our earlier objection to the Court's determination of the overall Guidelines range." Ex. E at 33-34. Judge Shipp noted the objection. Ex. E at 34.

² Although Judge Shipp didn't expressly address Manning's prior Pennsylvania conviction at the sentencing hearing, Ex. E at 11, the Statement of Reasons said that neither conviction qualified "under § 4B1.1," StR.

The Government timely appealed the sentence, Dkt. # 38, and then moved to stay this appeal pending Lewis, App. No. 22-1986, # 5. This Court granted that motion and directed the Government to inform it of the issuance of the mandate in Lewis. App. No. 22-1986, # 6. Lewis was decided on January 26, 2023, and the petition for rehearing was denied on May 3, 2023. The mandate in that case has yet to issue because this Court granted a stay of the issuance of the mandate pending Lewis’s petition for a writ of certiorari. App. No. 21-2621, # 85.

C. THIS COURT SHOULD LIFT THE STAY IN THIS APPEAL BECAUSE *LEWIS* IS BINDING AUTHORITY IN THIS CIRCUIT.

Although the mandate in Lewis has yet to issue, this Court should nonetheless lift the stay in this appeal. That’s because Lewis remains controlling precedent in this Circuit unless and until it is vacated, see In re Zermeno-Gomez, 868 F.3d 1048, 1051-53 (9th Cir. 2017); see also Brown v. Sage, 941 F.3d 655, 665 (3d Cir. 2019) (en banc) (Smith, J., concurring), and the stay of the mandate “in no way affects the duty of this panel and the courts in this circuit to apply now the precedent established by [Lewis] as binding authority,” Martin v. Singletary, 965 F.2d 944, 945 n.1 (11th Cir. 1992). In fact, in seeking the stay, Lewis cited this very authority, arguing that the stay in that case needn’t further delay consideration of other appeals. App. No. 21-2621, # 84.

Indeed, this Court has lifted the stays in other appeals that were held pending the issuance of the mandate in Lewis. E.g., United States v. Brad Stokes, App. No.

22-1365, # 33; United States v. Jamir Foushee, App. No. 22-1699, # 21; United States v. Alfred Stewart, App. No. 22-1721, # 25. This Court should do the same here as Lewis is controlling precedent. There is no reason to further delay consideration of this appeal, which has been pending since May 2022.

D. THIS COURT SHOULD SUMMARILY VACATE THE SENTENCE AND REMAND FOR RE-SENTENCING.

Following Lewis, this Court should summarily vacate the sentence under 3d Cir. L.A.R. 27.4 (2011) and remand for re-sentencing. That rule provides for summary action where “subsequent precedent or a change in circumstances warrants such action.” That’s the case here. Indeed, this Court has granted that very relief in another Government appeal raising the same Lewis error at sentencing. See United States v. Timothy Wright, App. No. 22-3437, # 17 (Krause, Porter, and Ambro, JJ.).

At the first step of the sentencing process, district courts must “calculate a defendant’s Guidelines sentence as it would have before United States v. Booker.” United States v. Flores-Mejia, 759 F.3d 253, 255-56 (3d Cir. 2014) (en banc). This Court reviews “de novo the District Court’s interpretation of the Guidelines.” Lewis, 58 F.4th at 767.

Under § 4B1.1, “[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of

violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a) (2018). The Guidelines define “controlled substance offense” as:

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b).

In Lewis, this Court held that “[t]he meaning of ‘controlled substance’ as used in Guidelines § 4B1.2(b)’s definition of ‘controlled substance offense’ includes drugs regulated by state law at the time of the predicate state conviction, even if they are not federally regulated or are no longer regulated by the state at the time of the federal sentencing.” 58 F.4th at 773. Thus, “[i]t is therefore irrelevant that the [state] statute under which [a defendant] was convicted defined [a drug] more broadly than federal law,” id. at 771, or that the state changed its laws to deregulate a substance after conviction, id. at 772. In other words, for purposes of § 4B1.2(b), all that matters is that the substance was regulated by the state *or* federal government “at the time of the predicate conviction.” Id. at 772.

Given Lewis’s holding, the District Court reversibly erred by determining that Manning was not a career offender. *First*, under Lewis, Manning’s prior drug

convictions plainly qualify as “controlled substance offenses.” See PSR ¶¶ 35-36.

Both were offenses “under state law, punishable by imprisonment for a term exceeding one year, that prohibit[] the . . . distribution . . . of a controlled substance . . . or the possession of a controlled substance . . . with intent to . . . distribute.”

U.S.S.G. § 4B1.2(b); see N.J.S.A. 2C:35-7; 35 Pa. Cons. Stat. § 780-113(a)(30); see also United States v. Glass, 904 F.3d 319, 324 (3d Cir. 2018). Lewis fatally undermines the basis for the District Court’s conclusion that those convictions don’t qualify. See Ex. E at 9-11. That’s because it’s legally irrelevant after Lewis whether New Jersey or Pennsylvania defines heroin in a way that’s “broader than the federal definition.” See Ex. E at 10-11.

Second, Manning’s federal conviction for violating 21 U.S.C. § 841(b)(1)(C) qualifies as a “controlled substance offense” as well. U.S.S.G. § 4B1.1(a). *Finally*, Manning was “at least eighteen years old at the time [he] committed the instant offense of conviction.” Id.; see PSR ¶ 27. Thus, the District Court should have calculated Manning’s advisory Guidelines range as 151-to-188 months’ imprisonment, PSR ¶ 85, not 24-to-30 months’ imprisonment, StR.

That Guidelines-calculation error is not harmless. The difference between the bottom of the correct Guidelines range and the one applied by the District Court is large—*127 months*—and the Government’s objection was properly preserved, meaning that *Manning* must shoulder the burden of showing “that there

is a high probability that the sentencing judge would have imposed the same sentence under a correct Guidelines range, that is, that the sentencing Guidelines range did not affect the sentence actually imposed.” United States v. Raia, 993 F.3d 185, 195 (3d Cir. 2021) (quoting United States v. Zabielski, 711 F.3d 381, 387 (3d Cir. 2013)).³

That’s especially true here. The District Court imposed a sentence at the very top of the non-career-offender Guidelines range. See Zabielski, 711 F.3d at 387; United States v. Langford, 516 F.3d 205, 216 & n.3, 219 (3d Cir. 2008). And it suggested that Manning’s sentence would have been longer had his Guidelines range been higher. For example, the Court:

- Explained that this was “serious” offense, Ex. E at 27;
- Discussed Manning’s “extensive criminal history,” Ex. E at 29-30;
- Rejected Manning’s argument that his prior offenses “were the result of just juvenile misjudgment,” because he “was also convicted of seven other offenses from 2009 to 2018,” Ex. E at 30;
- Noted the need for deterrence and protection of the public, especially in light of the dangers of heroin, Ex. E at 30;
- Explained that the Guidelines calculation was “a gift” that resulted from “conflict in the law” and that Manning was otherwise looking at a “sentence to be somewhere in the area of 110 months’ imprisonment,” Ex. E at 31; and

³ Indeed, following the Supreme Court’s teachings, this Court has held that even a 2-level Guidelines error satisfies the stringent *plain error* standard. United States v. Capps, 977 F.3d 250, 258 (3d Cir. 2020); see Molina-Martinez v. United States, 578 U.S. 189, 200 (2016).

- Emphasized that “many of the factors that militate in favor of a more substantial sentence here still” applied and that “there is still a need for specific deterrence here,” Ex. E at 31.

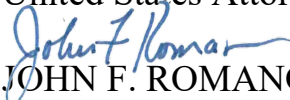
Therefore, because Manning will be unable to carry his “heavy” burden of showing harmlessness, remand for re-sentencing is required. United States v. Jackson, 862 F.3d 365, 389 n.13 (3d Cir. 2017).

CONCLUSION

Accordingly, the United States respectfully requests that this Court lift the stay in this appeal and summarily vacate the judgment and remand for re-sentencing. Pending decision on this motion, the United States respectfully requests that this Court stay the issuance of the briefing schedule.

Respectfully submitted,

PHILIP R. SELLINGER
United States Attorney

By:  JOHN F. ROMANO
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(973) 645-2866

Dated: June 21, 2023

CERTIFICATION OF COMPLIANCE

I hereby certify that this motion contains 2236 words, and therefore does not exceed the 5200-word limit set forth in Fed. R. App. P. 27(d)(2)(A).



John F. Romano
Assistant U.S. Attorney

Dated: June 21, 2023

CERTIFICATION OF SERVICE

I hereby certify that I caused a copy of the attached motion to be served on June 21, 2023, by the Notice of Docketing Activity generated by the Third Circuit's electronic filing system, on the following Filing User:

Jason F. Ullman, Esq.
jason_ullman@fd.org



John F. Romano
Assistant U.S. Attorney

Dated: June 21, 2023