

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Defendant-Appellant.

ORDER

It is **ORDERED** that the petition be and hereby is denied.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0020p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NASHAUN DRAKE,

Defendant-Appellant.

No. 23-3304

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:21-cr-00519-1—Donald C. Nugent, District Judge.

Decided and Filed: January 28, 2025

Before: SUTTON, Chief Judge; KETHLEDGE and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: Catherine Adinaro Shusky, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant. Daniel R. Ranke, UNITED STATES ATTORNEY’S OFFICE, Cleveland, Ohio, for Appellee.

OPINION

MURPHY, Circuit Judge. Nashaun Drake pleaded guilty to several drug offenses. At Drake’s sentencing, the district court treated him as a “career offender” based, in part, on a prior marijuana conviction. The court sentenced Drake to a within-guidelines sentence of 200 months’ imprisonment. Drake now argues that his prior marijuana conviction did not qualify as the type of drug offense that can trigger the career-offender sentencing enhancement. And he argues that his 200-month sentence was unreasonable. But our binding precedent requires us to reject his

first claim, and our deferential standard of review requires us to reject his second one. We affirm.

In the spring of 2021, the police department in Euclid, Ohio, began to suspect Drake of drug trafficking. On June 11, 2021, Euclid officers executed a search warrant at his apartment. They discovered 322.33 grams of fentanyl, 16.22 grams of cocaine, .6 grams of methamphetamine, and a variety of tools commonly used in the drug-trafficking trade.

The government charged Drake with five counts of possessing illegal drugs with the intent to distribute them, in violation of 21 U.S.C. § 841(a)(1). Drake pleaded guilty to all five counts.

At sentencing, the district court concluded that Drake qualified as a “career offender” under § 4B1.1 of the Sentencing Guidelines. This conclusion produced a guidelines range of 188 to 235 months’ imprisonment. The court sentenced Drake to a 200-month prison term.

On appeal, Drake argues that the district court should not have applied the career-offender enhancement and that it imposed a substantively unreasonable sentence. He is twice mistaken.

Career-Offender Enhancement. Section 4B1.1 directs district courts to treat a defendant as a “career offender” if (among other requirements) “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). Section 4B1.2 then defines “controlled substance offense” to include any federal or state crime that is punishable by more than a year in prison and that bars (among other activities) the “distribution” of “a controlled substance[.]” *Id.* § 4B1.2(b). Although § 4B1.2 does not identify the drugs that qualify as controlled substances or otherwise define the phrase “controlled substance,” the parties agree for purposes of this appeal that the phrase looks to the drug schedules in federal and state law. *Cf. United States v. Clark*, 46 F.4th 404, 408 (6th Cir. 2022).

The district court treated Drake as a career offender in part because it found that his Ohio conviction for marijuana trafficking in 2016 qualified as a “controlled substance offense” under § 4B1.2. We review its decision de novo. *See id.* at 407.

To decide whether a state drug crime qualifies as a “controlled substance offense” under § 4B1.2(b)’s definition, we apply the “categorical approach.” *See id.* at 407–08. This approach requires us to consider only the generic elements of a state drug crime and to ignore the specific conduct of the defendant who committed the crime. *See id.* If a hypothetical defendant could have committed the crime through *any* conduct that would not satisfy § 4B1.2’s federal definition of “controlled substance offense,” the state crime categorically falls outside that federal definition. *See id.* at 408. In other words, the categorical approach requires us to identify the “least culpable conduct” that the state drug crime covers and to ask whether this conduct meets § 4B1.2’s definition of “controlled substance offense.” *Id.* (citation omitted).

In this appeal, the parties agree on the least culpable conduct for Drake’s 2016 marijuana conviction: a hypothetical defendant could have committed this offense by distributing hemp because Ohio’s definition of “marijuana” included that substance back in 2016. So we must ask whether this hemp crime falls within § 4B1.2’s definition of “controlled substance offense.”

The answer to this question depends on the time that matters for § 4B1.2’s definition. According to Drake, § 4B1.2’s definition takes a *time-of-sentencing* approach that asks whether all the substances that could have supported his 2016 marijuana offense would fall within the federal and state drug schedules as they existed in 2023 when the district court sentenced him. By then, Congress and the Ohio legislature had amended their drug schedules to exclude hemp. *See* 21 U.S.C. § 802(16)(B); Ohio Rev. Code § 3719.01(M). Drake thus asserts that the 2016 version of his offense included conduct (distributing hemp) that does not meet § 4B1.2’s definition of “controlled substance offense.” According to the government, § 4B1.2 takes a *time-of-conviction* approach that asks whether all the substances that could have supported Drake’s state-law offense would have fallen within the federal and state drug schedules as they existed in 2016 at the time of his prior crime. Because those schedules listed hemp, the government asserts that the hypothetical distribution of hemp also meets § 4B1.2’s definition of “controlled substance offense.”

Our precedent has already resolved this timing debate. In *Clark*, we rejected a defendant’s (nearly identical) argument that a Tennessee drug crime did not qualify as a controlled substance offense because it covered hemp when the defendant committed it.

See 46 F.4th at 407–08. We held that § 4B1.2 adopted a time-of-conviction rule. See *id.* at 408. That rule foreclosed the defendant’s claim because the federal and Tennessee drug schedules included hemp when he committed his prior crime. See *id.* at 408, 415. And as many of our cases have recognized since *Clark*, we must follow that precedent. See *United States v. Johnson*, 2024 WL 4648088, at *4 (6th Cir. Nov. 1, 2024) (citing cases); see also *United States v. Tornes*, 2023 WL 5973174, at *1 (6th Cir. Sept. 14, 2023); *United States v. Baker*, 2022 WL 17581659, at *2 (6th Cir. Dec. 12, 2022).

This time-of-conviction rule dooms Drake’s claim. It means that § 4B1.2’s definition of “controlled substance offense” incorporates the drug schedules from 2016. Because those drug schedules included hemp, Drake’s state-law trafficking offense falls within § 4B1.2’s federal definition under the categorical approach. See *Clark*, 46 F.4th at 408.

To his credit, Drake concedes that *Clark* forecloses his claim. But he says we need not follow that precedent because of an intervening Supreme Court decision: *Brown v. United States*, 602 U.S. 101 (2024). *Brown* held that the definition of “serious drug offense” in the Armed Career Criminal Act (a similar recidivism statute) incorporated the time-of-conviction approach that *Clark* had adopted for the definition of “controlled substance offense” in § 4B1.2. See *id.* at 108–23. At first blush, then, *Brown* would seem to hurt (not help) Drake. In a footnote, though, the Supreme Court distinguished the Armed Career Criminal Act from the Sentencing Guidelines. See *id.* at 120 n.7. The defendant in *Brown* had suggested that district courts typically apply the most up-to-date version of the guidelines manual when they sentence defendants. See *id.* But the Court doubted the “relevan[ce]” of this sentencing practice. *Id.* Congress had instructed district courts to use the guidelines “in effect on the date the defendant is sentenced,” but it had provided no similar instruction for the Armed Career Criminal Act. *Id.* (quoting 18 U.S.C. § 3553(a)(4)(A)(ii)).

Yet *Brown*’s footnote does not permit us to depart from *Clark*. To be sure, at least one circuit court has distinguished § 4B1.2 from the Armed Career Criminal Act based on the footnote’s logic: that courts must use the guidelines manual in effect at the time of sentencing. See *United States v. Minor*, 121 F.4th 1085, 1091–93 (5th Cir. 2024). *Minor* also became the first post-*Brown* decision to disagree with *Clark* by adopting a time-of-sentencing approach for

§ 4B1.2. *See id.* at 1089–90. But *Clark* has already held that the requirement to apply the guidelines manual in effect at the time of sentencing does not justify *Minor*’s time-of-sentencing approach. *See* 46 F.4th at 411–12. As *Clark* explained, the requirement that district courts use the current manual “leaves unanswered” the critical question: what does “the term ‘controlled substance’” in § 4B1.2 of that current manual mean? *Id.* at 411. And *Clark* relied on the text and purpose of § 4B1.2 to adopt a time-of-conviction approach. *See id.* at 408–15. Nothing in *Brown*’s footnote undermines this reasoning. *See Johnson*, 2024 WL 4648088, at *4. And the rest of *Brown* “lends support to our holding in *Clark*” because it invoked the same reasoning. *Id.*; *see also United States v. Gordon*, 111 F.4th 899, 901 n.4 (8th Cir. 2024); *United States v. Waiters*, 2024 WL 2797919, at *5 (11th Cir. May 31, 2024) (per curiam). In short, *Clark* continues to bind us after *Brown*. And *Clark* shows that the district court correctly treated Drake as a career offender when calculating his guidelines range.

Substantive Reasonableness. Even if the district court correctly treated Drake as a career offender, he next argues that the court still imposed a substantively unreasonable sentence. This type of claim does not challenge the way the district court calculated Drake’s guidelines range or the process it used to impose the sentence. *See United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). The claim instead challenges the court’s “bottom-line number” as unreasonable when measured against the sentencing factors in 18 U.S.C. § 3553(a). *United States v. Lynde*, 926 F.3d 275, 279 (6th Cir. 2019). Yet we defer to a district court’s conclusions about the § 3553(a) factors that matter the most in each case, so a defendant raising such a claim must show that the court abused its significant sentencing discretion. *See Gall v. United States*, 552 U.S. 38, 51 (2007). And Drake’s burden is even more demanding because the court imposed a 200-month sentence in the bottom half of his guidelines range. His sentence thus triggers an appellate presumption of reasonableness. *See United States v. Vonner*, 516 F.3d 382, 389–90 (6th Cir. 2008) (en banc).

Drake has not overcome this presumption. To start, the district court’s decision to impose a within-guidelines sentence accounted for “the need to avoid unwarranted sentence disparities among” similarly situated defendants. 18 U.S.C. § 3553(a)(4)(A), (6). Next, the court chose its specific sentence within this range because of Drake’s extensive record. *See id.*

§ 3553(a)(1). That record comfortably fell within the highest criminal history category even though 12 of Drake’s convictions did not factor into his criminal history score. Drake’s record also included dozens of prison infractions. And it included repeated threats of violence against women. Even Drake conceded that an objective observer looking at his background would fear that he “pose[d] a danger to the community” when out of prison (or even within it). Sent. Tr., R.73, PageID 350. So the need to deter Drake and protect the public from his conduct sat at the forefront of the district court’s sentence. 18 U.S.C. § 3553(a)(2)(B)–(C).

In response, Drake argues that the court’s sentence did not adequately account for several mitigating factors, including the horrific abuse he suffered as a child, his “mental illness,” and his “borderline intellectual functioning[.]” Appellant’s Br. 18–19. These factors, Drake says, reduced his moral blameworthiness and the need for a long sentence “to provide just punishment[.]” 18 U.S.C. § 3553(a)(2)(A). Perhaps so. But the district court had the discretion to focus on some penological goals (deterrence and incapacitation) over others (retribution) when choosing the sentence. *See Gall*, 552 U.S. at 51; *United States v. Gates*, 48 F.4th 463, 478 (6th Cir. 2022); *see also* 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.5(a)(1)–(a)(7), Westlaw (database updated Oct. 2024). And Drake’s claim that the court should have weighed these various penological goals differently merely asks us to “rebalance the § 3553(a) factors”—something that falls outside our reviewing role. *United States v. Holt*, 116 F.4th 599, 617 (6th Cir. 2024) (citation omitted).

Drake next argues that the court should have given him a lower sentence because his 200-month prison term is “more than six-and-a-half times longer” than the longest term that he has ever served. Appellant’s Br. 19. We fail to see why this fact supports a lower sentence. To the contrary, the district court could have reasonably concluded that Drake’s continued criminality called for a longer sentence because shorter sentences have not adequately deterred him.

We affirm.

No. 23-3304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 28, 2025
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
NASHAUN DRAKE,)
)
Defendant-Appellant.)
)
)
)
)

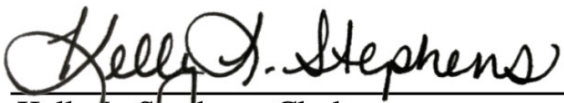
ORDER

BEFORE: SUTTON, Chief Judge; KETHLEDGE and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

v.

NASHAUN DRAKE

§ **JUDGMENT IN A CRIMINAL CASE**
 §
 §
 § Case Number: **1:21-CR-00519-DCN(1)**
 § USM Number: **50468-509**
 § **Edward G. Bryan**
 § Defendant's Attorney

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	One, Two, Three, Four and Five of the Indictment
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense**Offense Ended****Count**

21:841(a)(1) and (b)(1)(C) Possession With Intent To Distribute Controlled Substances
 21:841(a)(1) and (b)(1)(C) Possession With Intent To Distribute Controlled Substances
 21:841(a)(1) and (b)(1)(C) Possession With Intent To Distribute Controlled Substances
 21:841(a)(1) and (b)(1)(B) Possession With Intent To Distribute Controlled Substances
 21:841(a)(1) and (b)(1)(B) Possession With Intent To Distribute Controlled Substances

06/11/2021
 06/11/2021
 06/11/2021
 06/11/2021
 06/11/2021

1
 2
 3
 4
 5

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 28, 2023

Date of Imposition of Judgment

Donald C. Nugent
 Signature of Judge

DONALD C. NUGENT, United States District Judge

Name and Title of Judge

March 28, 2023
 Date

DEFENDANT: NASHAUN DRAKE
CASE NUMBER: 1:21-CR-00519-DCN(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

200 months as to count 1; 200 months as to count 2; 200 months as to count 3; 200 months as to count 4; 200 months as to count 5.
Terms to run concurrent and include credit for time served in federal custody.

- ☒ The court makes the following recommendations to the Bureau of Prisons:
1. **500-hour residential drug abuse program, or RDAP.**
 2. **Bureau of Prisons placement at Federal Correctional Institution Jesup, Georgia.**

- ☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on
 - ☐ as notified by the United States Marshal.
 - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: NASHAUN DRAKE
CASE NUMBER: 1:21-CR-00519-DCN(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : five (5) years with standard/special conditions as directed.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution (*check if applicable*)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: NASHAUN DRAKE
CASE NUMBER: 1:21-CR-00519-DCN(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change. If not in compliance with the condition of supervision requiring full-time occupation, you may be directed to perform up to 20 hours of community service per week until employed, as approved or directed by the pretrial services and probation officer.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and/or shall permit the probation officer to make such notifications, and/or confirm your compliance with this requirement.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: NASHAUN DRAKE
CASE NUMBER: 1:21-CR-00519-DCN(1)

SPECIAL CONDITIONS OF SUPERVISION

Mandatory Drug Testing

You must refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release from imprisonment and to at least two periodic drug tests thereafter, as determined by the Court.

Substance Abuse Treatment and Testing

The defendant shall participate in an approved program of substance abuse testing and/or outpatient or inpatient substance abuse treatment as directed by their supervising officer; and abide by the rules of the treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). The defendant shall not obstruct or attempt to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing.

Mental Health Treatment

You must undergo a mental health evaluation and/or participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

Mental Health Medications

You must take all mental health medications that are prescribed by your treating physician.

Gambling Addiction Treatment

You must participate in a gambling addiction treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

Gambling Restriction

You must not engage in any form of gambling (including, but not limited to, lotteries, online wagering, sports betting) and you must not enter any casino or other establishment where gambling is the primary purpose (e.g., horse race tracks, off-track betting establishments).

General Educational Development (GED)

You must enter an adult program and work toward obtaining a General Educational Development (GED) diploma at the discretion of the U.S. Pretrial Services & Probation Officer.

Driver License and Insurance

You must possess a valid driver license and insurance to operate a motor vehicle.

Gang

You must not communicate, or otherwise interact, with any known member of the Heartless Felons gang, without first obtaining the permission of the probation officer.

DEFENDANT: NASHAUN DRAKE
CASE NUMBER: 1:21-CR-00519-DCN(1)

Search / Seizure

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

Support Dependents

You must meet any legal obligation to support or make payment toward the support of any person, including any dependent child, the co-parent or caretaker of a dependent child, or a spouse or former spouse.

DNA

You must cooperate in the collection of DNA as directed by the probation officer.

DEFENDANT: NASHAUN DRAKE
CASE NUMBER: 1:21-CR-00519-DCN(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$500.00	\$.00	\$.00	\$.00	.

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

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

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: NASHAUN DRAKE
CASE NUMBER: 1:21-CR-00519-DCN(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payments of \$ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$500.00 for Counts 1, 2, 3, 4 and 5, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

- ☐ Joint and Several
 See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 UNITED STATES OF AMERICA, Case No. 21-cr-519

5 Plaintiff,

6 vs.

March 28, 2023
9:05 a.m.

7 NASHAUN DRAKE,

8 Defendant.

9
10 TRANSCRIPT OF SENTENCING PROCEEDINGS
11 BEFORE THE HONORABLE DONALD C. NUGENT
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

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25 Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

1 TUESDAY, MARCH 28, 2023, 9:05 A.M.

2 THE COURT: Be seated, folks.

3 Okay. Good morning, folks.

4 We are here in Case Number 21-cr-519, it's
09:06:00 5 titled the United States versus Nashaun Drake.

6 Good morning, Mr. Drake.

7 THE DEFENDANT: Good morning, Your Honor.

8 THE COURT: Now, Mr. Drake, you're here for
9 sentencing, as you know.

09:06:08 10 The case was referred to the Probation
11 Department for the preparation of a presentence report.

12 I have a copy of the report. I'm prepared
13 to go forward this morning with sentencing.

14 And there's no reason why we shouldn't go
09:06:20 15 forward with the sentencing today, is there?

16 THE DEFENDANT: No.

17 THE COURT: All right. Now, I have, as I
18 say, I have a copy of the report, including your lawyer's
19 very coherent sentencing memorandum.

09:06:39 20 So as we begin the process I have to say a
21 couple things to you.

22 The first is if you don't understand
23 something, or if you have any question about what we're
24 doing, I want you to let me know.

09:06:50 25 All right?

1 THE DEFENDANT: Yes.

2 THE COURT: The second thing is you may
3 have a right to appeal any sentencing decision that I
4 make here today that's not limited by your plea agreement
09:06:59 5 or otherwise.

6 And in the event you did decide to perfect
7 an appeal and you didn't have the money to hire a lawyer,
8 I'd appoint one to represent you without cost.

9 You understand that?

09:07:09 10 THE DEFENDANT: Yes.

11 THE COURT: Now, as I say, I've reviewed
12 the presentence report as well as Mr. Bryan's sentencing
13 memorandum.

14 And let me ask, are you satisfied that the
09:07:21 15 presentence report contains all the information that you
16 want in there?

17 THE DEFENDANT: Yes.

18 THE COURT: Thank you.

19 And, Mr. Bryan, are you satisfied?

09:07:28 20 MR. BRYAN: Yes, Your Honor.

21 THE COURT: And, Ms. Sweeney, are you
22 satisfied?

23 MS. SWEENEY: Yes, Judge.

24 THE COURT: Thank you.

09:07:32 25 As we go through the process then,

1 Mr. Drake, I'm going to explain to you a little bit about
2 what we're doing.

3 The first is whenever a Judge in Federal
4 Court has to impose sentence, the Court has to look at
09:07:46 5 the maximum sentence for each count of conviction.

6 In this case Counts 1 through 3, the
7 maximum sentence is up to 20 years in prison on each
8 count.

9 Do you understand that?

09:07:58 10 THE DEFENDANT: Yes.

11 THE COURT: And Counts 4 and 5, the maximum
12 sentence on each count is up to 40 years in prison.

13 Do you understand that?

14 THE DEFENDANT: Yes.

09:08:05 15 THE COURT: All right. Then what I have to
16 do is look at the United States Sentencing Guidelines.

17 The Guidelines require that I make a
18 finding as to what your total offense level is and your
19 criminal history category.

09:08:17 20 And then once I do that, the Guidelines
21 give me a recommended sentencing range.

22 And in this case I'm going to make an
23 initial finding that your total offense level is 31, and
24 your criminal history category is six. Gives me a range
09:08:29 25 of 188 to 235 months.

1 Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: All right. Then I look at a
4 statute that's 18, United States Code, Section 3553.

09:08:40 5 Now, that statute enumerates several
6 individual factors.

7 I take those individual factors and compare
8 them with your background, your character, and your
9 history, combine all that with all the facts and
09:08:53 10 circumstances in the case to, hopefully, fashion and
11 determine a sentence that's sufficient but not greater
12 than necessary to meet the Ends of Justice.

13 Do you understand that?

14 THE DEFENDANT: Yes.

09:09:02 15 THE COURT: All right. And, Mr. Bryan, is
16 there anything in addition that you'd like to say, sir?

17 MR. BRYAN: Yes, Your Honor.

18 As the Court is aware just for purposes of
19 preserving the record, Your Honor has already referred to
09:09:14 20 the sentencing memorandum that was filed in this case,
21 and Your Honor has, in essence, I think just adopted the
22 findings of the presentence investigation report.

23 One of those findings being that Mr. Drake
24 qualifies for treatment as a Career Offender based upon
09:09:31 25 the two predicate offenses, one being the 16-year-old

1 conviction for felonious assault where he sprayed bug
2 spray on a girlfriend, and then --

3 THE COURT: "Off," right?

4 MR. BRYAN: It was "Off," actually. Just
09:09:50 5 not --

6 THE COURT: I should put as a little aside
7 when I read that and it reminded me of my time at Parris
8 Island, South Carolina where we had a bunch of people
9 lined up, and girls like to spray "Off" in their mouths,
09:10:08 10 too.

11 They survived.

12 MR. BRYAN: They did survive.

13 THE COURT: Yeah.

14 MR. BRYAN: And so did she, although I'm
09:10:16 15 not trying to minimize it.

16 THE COURT: No, I know.

17 MR. BRYAN: I think more than anything
18 else, it happened when Mr. Drake was 19 years old and
19 he's now -- how old are you now?

09:10:25 20 THE DEFENDANT: Thirty-six.

21 MR. BRYAN: He's now 36 years old, and it
22 happened quite awhile ago.

23 The other predicate offense that qualifies
24 him for enhanced treatment is a 2016 marijuana
09:10:36 25 trafficking offense.

1 And there the legal arguments are that in
2 2016, marijuana trafficking included -- it didn't include
3 a purity amount or a THC level amount per se where Ohio's
4 statute was amended in 2018 to include a higher THC level
09:10:53 5 amount, which means that in some jurisdictions in the
6 Ninth Circuit and other circuits and in at least one case
7 in the Sixth Circuit ruled that Ohio's old marijuana
8 trafficking statute wasn't a proper predicate offense to
9 be used for Career Offender purposes.

09:11:08 10 But admittedly, the most recent Ohio -- or
11 Sixth Circuit case has found that the past marijuana
12 conviction would be an okay predicate or does satisfy the
13 requisite parameters to qualify as a Career Offender
14 predicate.

09:11:26 15 The point I'm trying to make is that, first
16 of all, I need to preserve that issue because it hasn't
17 been decided by the Supreme Court.

18 THE COURT: That sounds fair.

19 MR. BRYAN: There's a circuit split.

09:11:39 20 So I'm objecting to that enhancement as a
21 Career Offender predicate just to preserve that issue.

22 But then my arguments I think will
23 transition into why I believe that a reasonably
24 sufficient sentence, one that's sufficient but not
09:11:55 25 greater than necessary to accomplish the purposes and

1 goals of sentencing, would arrive in the original range
2 that Mr. Drake basically agreed to in the plea agreement;
3 that the difference between the Probation Department and
4 the plea agreement -- and again it becomes academic after
09:12:16 5 an application of the Career Offender predicate or Career
6 Offender Guideline -- is that the parties agreed that the
7 base offense level for the amount and type of drugs was
8 offense level 28.

9 The Probation Department has disagreed.
09:12:33 10 They believe that a chemical known as 4- -- or I forget
11 the -- ANPP, 4-ANPP is a Fentanyl analog.

12 We're arguing that it's not a Fentanyl
13 analog because it doesn't meet the definition of a
14 Fentanyl analog, and also it doesn't have the effect of
09:12:58 15 increasing the potency of Fentanyl, but it actually has
16 the pharmacological effect of decreasing the potency of
17 Fentanyl.

18 So I need to preserve that objection as
19 well for the record.

09:13:11 20 And so based upon -- although Your Honor
21 hasn't really ruled on that issue because you found that
22 the Career Offender predicate applied, so just to
23 preserve the record, I'm preserving the argument that his
24 proper base offense level without the Career Offender
09:13:27 25 Guideline range would be offense level 28, and with

1 acceptance of responsibility he would be 25.

2 And regardless of the fact that he
3 has -- whether he's a Career Offender or not, he comes by
4 his criminal history score the old-fashioned way. He has
09:13:44 5 enough criminal history points to qualify as a criminal
6 history category six.

7 And there is some mention by the Probation
8 Department that are there grounds for upward variance,
9 are there grounds for downward variance. And in
09:13:57 10 Paragraph 153 the Probation Officer noted that a
11 potential ground for an upward variance would be
12 Mr. Drake's history of violence.

13 And there has been some history throughout
14 his life and throughout his criminal history where there
09:14:12 15 have been some disturbing incidences, including the
16 incident where he sprayed "Off" into the mouth of a
17 girlfriend, and also where he made verbal threats against
18 people, you know, involved in the criminal justice
19 system.

09:14:26 20 But throughout all of that, throughout all
21 of Mr. Drake's criminal history, the lengthiest period of
22 incarceration that he ever received -- and I'm not
23 suggesting that he was undersentenced, because most of
24 the offenses for which he was eventually convicted were
09:14:43 25 either pled down to something much less serious than what

1 he was originally charged with -- but the greatest period
2 of incarceration, and he did this a number of different
3 times, is a period of two years.

4 So he's never been incarcerated in his life
09:14:54 5 for any duration greater than two years.

6 And so even within the range that we're
7 asking the Court to sentence Mr. Drake, that 110 to
8 137-month range, the lower end of that range would be
9 five times greater than the amount of time that Mr. Drake
09:15:10 10 has ever served for any sentence in his life.

11 Also, obviously Your Honor has to consider
12 the nature and circumstances of the offense.

13 It's pretty straightforward. Mr. Drake was
14 targeted by law enforcement, the Euclid Police Department
09:15:28 15 and DEA. They received a search warrant to search an
16 apartment that he was known to be using.

17 They executed the search warrant.
18 Mr. Drake was there during the execution of the search
19 warrant. He -- there's no evidence that he was resistant
09:15:41 20 or noncompliant during the execution of the search
21 warrant.

22 They seized multiple types of drugs from
23 the home. They did not seize any firearms or anything
24 like that, but just multiple various types of drugs
09:15:53 25 which, without the Career Offender enhancement and

1 without the Probation Department's argument that one of
2 those drugs contained a Fentanyl analog, which we object
3 to, he'd be facing a Sentencing Guideline range of 110 to
4 137 months, including his criminal history category of
09:16:09 5 six.

6 So it is what it is, except it wasn't
7 common.

8 And Mr. Drake's probably -- his only other
9 prior trafficking offense, although he has a lot of low
09:16:22 10 level F-5s -- I'll get to that -- a lot of low level F-5s
11 and things of that nature and a lot of drug possession
12 offenses, F-5, F-4 possession offenses, the only other
13 trafficking offense was a marijuana conviction that was
14 conveyed.

09:16:42 15 Mr. Drake, in his acceptance of
16 responsibility statement -- if I can find it -- says, "I
17 was at my apartment and they found drugs, heroin, crack
18 cocaine, and methamphetamine. The drugs were mine. I
19 had to support myself. No one cared for me. I tried to
09:16:59 20 get a job and no one would hire me.

21 "I'm sorry for selling drugs. I accept
22 full responsibility for my actions. I want to change. I
23 have a daughter and I want to be in her life.

24 "I am sorry to the Court."

09:17:12 25 And then when you further consider beyond

1 his criminal history Mr. Drake's history and
2 characteristics, you find what I consider to be one of
3 the more mitigating social history backgrounds of many of
4 the clients that have appeared.

09:17:30 5 Many of our clients come from disadvantaged
6 backgrounds, but for Mr. Drake -- and all of this was
7 confirmed by his sister, his sister Dorothy -- grew up in
8 basically horrendous conditions.

9 He was born, both of his parents were drug
09:17:50 10 addicts and alcohol abusers. Mr. Drake himself
11 characterized himself as a "crack baby."

12 He was raised by his grandmother into his
13 teen years, and but she wasn't -- not through any fault
14 of her own -- was not in a position to be able to raise
09:18:07 15 the number of children and the problems with the
16 children.

17 Mr. Drake was beaten by his grandmother and
18 his older brothers. He didn't have adequate food,
19 clothing, or a place to sleep. He was forced to sleep on
09:18:23 20 basement floors without blankets or coverings of any
21 type.

22 And then he, fortunately, at one point in
23 his life he was able to go to live with his aunt and
24 uncle, whom he described as very loving and caring, and
09:18:40 25 it was only, unfortunately, for a very short period of

1 time because his aunt passed away in 2001 and his uncle
2 passed away in 2007.

3 Mr. Drake, as a juvenile, was part of the
4 Ohio Department of Youth Services. And as the Court is
09:18:54 5 aware, he's been in and out of prison throughout most of
6 his young adult life and into his 30s.

7 So there is significant mitigation
8 warranting a variance from the Career Offender Guideline.

9 The Career Offender Guideline, as the Court
09:19:08 10 has indicated, is 188 to 235 months.

11 We submit that considering not just the
12 nature and circumstances of the offense but especially
13 Mr. Drake's history and characteristics, that a sentence
14 within that range would be far greater than necessary to
09:19:22 15 accomplish the purposes and goals of sentencing.

16 And I'd also want to point out that the
17 Probation Department, as one of the purposes and goals of
18 sentencing in addition to holding the offender
19 accountable, which I believe any sentence within 110 to
09:19:38 20 137 months, you know, holds Mr. Drake certainly
21 accountable for his offense conduct in this case and also
22 his background and history because that's arrived at
23 because of his high criminal history score, but the -- a
24 major thing that the Court has to consider is also to
09:19:57 25 impose a sentence to avoid unwarranted sentencing

1 disparities.

2 And in the probation report, it reflects
3 that people similarly situated to Mr. Drake with offense
4 level calculation and criminal history score, the average
09:20:12 5 sentence is 147 months, much below the 188 months or the
6 low end of the Career Offender Guideline, and the median
7 sentence is 151 months.

8 So both of those sentences are
9 significantly below the 188-month minimum sentence that
09:20:32 10 Mr. Drake faces at this time.

11 So for all these reasons -- and I don't
12 want to belabor what I wrote in the sentencing memorandum
13 because it speaks for itself -- we would ask the Court to
14 consider a downward variance from the current Sentencing
09:20:47 15 Guideline to the original Sentencing Guideline which is
16 110 to 137 months, and to impose a sentence within that
17 range.

18 Mr. Drake has desperately been pointing at
19 my paper to tell me that he wants me to ask the Court to
09:21:03 20 recommend to the Bureau of Prisons that he serve his
21 sentence at FCI Jessup which is in Georgia, which is near
22 where his sister lives, his sister Dorothy.

23 THE DEFENDANT: My mother, too.

24 MR. BRYAN: Your mother lives there now
09:21:19 25 with your sister?

1 And so his family lives in Georgia now, and
2 so he's asking the Court to consider recommending to the
3 Bureau of Prisons that he serve his time there.

4 Thank you.

09:21:28 5 THE COURT: Thank you very much.

6 Before I listen to Ms. Sweeney, Ms. Newman,
7 I have a couple questions for you.

8 I notice several of these felony offenses
9 were given zero points.

09:21:43 10 Just was wondering about that.

11 THE PROBATION OFFICER: They didn't score
12 based on the time frame.

13 So certain felonies, it has to be within
14 either 10 years or 15 years from the date that the
09:22:00 15 instant offense occurred.

16 So some of them are too old. That's why
17 they didn't score.

18 THE COURT: Okay. Let me -- maybe I
19 misread these, but, okay, I can see the breaking and
09:22:16 20 entering, that's in 2009. No points for that.

21 2007, having weapon while under disability,
22 no points for that.

23 Trafficking in drugs in 2016.

24 THE PROBATION OFFICER: What Paragraph
09:22:45 25 Number?

1 THE COURT: That's on Page 19.

2 And also in 2016, trafficking in heroin,
3 it's got zero points.

4 THE PROBATION OFFICER: With Paragraph 51
09:22:54 5 that was trafficking in drugs was a felony five so that,
6 if it would have scored, he would have only been eligible
7 for two points, but that has to be within 10 years of the
8 instant offense.

9 And the instant offense occurred in 2022
09:23:10 10 and he was sentenced in 20 -- oh, wait a minute, you're
11 right.

12 THE COURT: Write that down. Anna said I
13 was right.

14 THE PROBATION OFFICER: Well, let me see,
09:23:24 15 4A1.2, because he was sentenced on the same -- so 51 and
16 52, he was sentenced on the same day so he didn't receive
17 points because he was sentenced on the same day for
18 Paragraph 52.

19 So you don't get --

09:23:39 20 THE COURT: And he got zero points on
21 Paragraph 52 as well.

22 THE PROBATION OFFICER: Paragraph 52 --
23 wait a minute.

24 So Paragraph 40 -- no, Paragraph 49. So
09:23:53 25 Paragraph 49, 51, 52, they didn't score because -- so

1 4A1.2(a) (2), and I'll read to you what the Guideline says
2 because you have to consider whether they're separate
3 offenses or the same.

4 So 4A1.2(a) (2), so it says, "If the
09:24:18 5 defendant has multiple prior sentences, determine whether
6 those sentences are counted separately or treated as a
7 single sentence. Prior sentences are always counted
8 separately if the sentences were imposed for offenses
9 that were separated by an intervening arrest. If there
09:24:33 10 is no intervening arrest, prior sentences are counted
11 separately unless the sentences resulted from offenses
12 contained in the same charging instrument or the offenses
13 were imposed on the same day."

14 So he had those three offenses, they were
09:24:46 15 imposed on the same day, so he doesn't get -- he doesn't
16 get points for those additional offenses.

17 THE COURT: Does that make any sense?

18 THE PROBATION OFFICER: According to the
19 Guideline, yes.

09:24:59 20 THE COURT: These are three separate
21 offenses.

22 THE PROBATION OFFICER: They are.

23 However, you have to look at also the dates
24 of the arrest.

09:25:07 25 So in Paragraph 49, it's showing that he

1 was arrested on June 30th, but the date -- okay, so that
2 was the date of the offense.

3 And then in Paragraph 51, he was
4 arrested -- the date of the offense was February of 2026
09:25:28 5 which was before the arrest in Paragraph 49.

6 So we have to consider -- he didn't get
7 extra points because they were not considered, according
8 to the Guidelines, separate offenses. Even though he was
9 arrested on different days, you have to look at the date
09:25:45 10 of when the offense occurred and when he was arrested.

11 So based on all of that, our office
12 determined that he did not get criminal history points.

13 THE COURT: The offenses were on three
14 separate days, three separate offenses, and he was
09:25:58 15 arrested at three separate times, too.

16 THE PROBATION OFFICER: He was, but you
17 also have to look at the dates of when the offense
18 occurred.

19 So Paragraph 51, the date of that offense
09:26:11 20 occurred prior to his arrest in Paragraph 49.

21 Your Honor, even if these did score, he
22 would still be in a criminal history category six, but
23 our office determined that those did not receive criminal
24 history points because he was sentenced on the same day
09:26:34 25 on all three of those cases.

1 THE COURT: Right. I mean, I gathered
2 that, it was because he was sentenced on the same day.

3 But it then flies in the face of what the
4 Guidelines say, if there's three separate offenses
09:26:48 5 separated by -- each arrest separated by a different
6 time.

7 THE PROBATION OFFICER: Well, it has to be
8 separated by intervening arrest.

9 An intervening arrest means that he's
09:26:57 10 arrested for the first offense prior to committing the
11 second offense.

12 So --

13 THE COURT: Exactly.

14 THE PROBATION OFFICER: But he wasn't.

09:27:04 15 So the first offense happened in
16 Paragraph 51, but he wasn't arrested until after
17 Paragraph 49.

18 So I mean, you have to take those dates
19 into account as well.

09:27:19 20 I'm sorry if I'm not being clear.

21 THE COURT: No, you're being clear, but I
22 mean, he was arrested in Paragraph 49, and then
23 subsequent to that he was arrested on Paragraph 51, even
24 though the crime occurred beforehand.

09:27:34 25 Maybe it's just an academic argument. I'm

1 not --

2 THE PROBATION OFFICER: And you could be
3 right and I could be wrong and I could have made a
4 mistake, but I know that, you know, we discussed this, I
09:27:43 5 discussed this with my supervisor, and this is what we
6 came up with.

7 So if I'm wrong, I apologize. He would
8 still, even if you applied those points --

9 THE COURT: No, I get that, but I was just
09:27:53 10 kind of curious about that.

11 Okay. Thank you.

12 THE PROBATION OFFICER: You're welcome.

13 THE COURT: You answered the question
14 though.

09:27:59 15 THE PROBATION OFFICER: You're welcome.

16 THE COURT: I'm sorry, Ms. Sweeney.

17 MS. SWEENEY: Oh. Thank you, Judge.

18 First, as to the defendant's objections
19 regarding the Career Offender Guideline, the Sixth
09:28:10 20 Circuit has been clear in the *Clark* case, which I know
21 this Court has previously relied on; in another case, I
22 believe it's *Fenderson, United States versus Fenderson*,
23 the Court rejected the same argument relying on *United*
24 *States versus Clark*, the Sixth Circuit opinion that
09:28:25 25 defense counsel referenced, which supports that the

1 marijuana conviction is a predicate offense for Career
2 Offender Guidelines.

3 So it's the Government's position that the
4 Court has correctly found that the defendant qualifies as
09:28:36 5 a Career Offender.

6 For that reason, Judge, based on the
7 defendant's lengthy criminal history, including the fact
8 that he has several violations while incarcerated in
9 detention on this case, the Government would seek a
09:28:51 10 Guideline sentence within the Career Offender Guideline.

11 If the Court were to vary downward to the
12 Guideline range that is calculated in the plea agreement,
13 the Government would ask for a sentence at the high end
14 of that range, which would be 137 months, but the
09:29:04 15 Government seeks a Guideline sentence within the Career
16 Offender range.

17 THE COURT: Thank you.

18 Okay. I should, just to follow up,
19 Ms. Newman correctly did state in the presentence report
09:29:20 20 in the determination of a Career Offender that at the
21 time of the conviction, the offender has to be at least
22 18 years of age at the time of the offense, and that the
23 conviction is a felony, that it's either a crime of
24 violence or controlled substance offense, and the
09:29:40 25 defendant has at least two prior felony convictions of

1 either a crime of violence or a controlled substance
2 offense; and in this case felonious assault, Ohio Revised
3 Code Section 2903.11 in Cuyahoga County Common Pleas
4 Court in Case Number 06-486427; and trafficking in
09:29:59 5 marijuana, Revised Code Section 2925.03A(2), also in
6 Cuyahoga County Common Pleas Court, Case Number
7 16-608708.

8 And the conviction for felonious assault,
9 as noted in Paragraphs 28 and 41, qualifies as a crime of
09:30:18 10 violence for Career Offender purposes as the conviction
11 received criminal history points.

12 And the wording in the indictment indicates
13 that the defendant caused or attempted to cause physical
14 harm by means of a deadly weapon. That's Revised Code
09:30:33 15 Section 2903.11(a) (2) .

16 And then the conviction for trafficking in
17 marijuana, as noted in Paragraphs 28 and 49, also
18 qualifies as a controlled substance offense for Career
19 Offender purposes for the following reasons:

09:30:48 20 First, the maximum penalty for a felony of
21 the third degree in Ohio is more than 12 months'
22 imprisonment.

23 Secondly, the conviction was assigned
24 criminal history points under the United States
09:30:59 25 Sentencing Guidelines.

1 And finally, the wording in the indictment
2 indicates that the defendant prepared for shipment,
3 shipped, transported, delivered, prepared for
4 distribution or distributed a controlled substance or
09:31:12 5 controlled substance analogue when he knew or had
6 reasonable cause to believe that the controlled substance
7 or analog was intended for sale or resale by the
8 defendant or another person, and the drug involved was
9 marijuana in an amount less than 200 grams. And that's
09:31:28 10 Revised Code Section 2925.03A(2).

11 In addition to that, looking at the
12 defendant's criminal history category, it would be six
13 nonetheless. So he would qualify as a total offense
14 level of 31, criminal history category six, with the
09:31:46 15 range of 188 to 235 months.

16 And so with that in mind, then, is there
17 anything that you'd like to say, Mr. Drake?

18 THE DEFENDANT: Yes.

19 THE COURT: Now, you've got to speak up so
09:32:02 20 we can hear you.

21 MR. BRYAN: Stand up.

22 THE DEFENDANT: Yes.

23 I want to say that I'm sorry to the Court
24 and I'm sorry to my family, and I wish -- I wish I could
09:32:14 25 just stop being in the streets and stuff.

1 I want to change my life.

2 THE COURT: Well, you got a young daughter
3 now, don't you?

4 THE DEFENDANT: Yeah.

09:32:22 5 THE COURT: How old is she?

6 THE DEFENDANT: She one.

7 THE COURT: Have you seen her?

8 THE DEFENDANT: I ain't seen her yet.

9 THE COURT: That's got to be pretty tough.

09:32:33 10 You know, I look at your background and I
11 have to take that into consideration, and I looked at,
12 you know, you have three juvenile offenses that you got,
13 you went to the Ohio Youth Commission, but you were not
14 amenable to any kind of supervision because of your
15 conduct.

16 THE DEFENDANT: Yes.

17 THE COURT: And then I look at your adult
18 record, and you've got 12 adult convictions that you got
19 no points on that -- and you're only 36 years old?

09:33:06 20 THE DEFENDANT: Yeah.

21 THE COURT: And then you got 17 other
22 arrests for misdemeanors and felonies that charges were
23 dismissed. That means you had that contact with the
24 justice system where the charges were dismissed. Not
09:33:21 25 only that, but then, of course, we have the criminal

1 history category six.

2 Then we've got active warrants on you in
3 Cleveland and Shaker Heights and in Cleveland Heights as
4 well. They're still pending.

09:33:31 5 So you've been a busy man. And I'm not
6 beating you over the head with this, but, you know, the
7 law requires I kind of take this into consideration.

8 You've been a lot of trouble while you've
9 been locked up, if I look at this.

09:33:49 10 You know, at the age of 16 you had two drug
11 delinquencies, and while you were incarcerated for that
12 you received six behavioral infractions which included
13 fighting and so judicial release was denied.

14 And then after you got out, you violated
09:34:15 15 the terms of supervision. So that was kind of tough as a
16 juvenile.

17 But I guess what I'm looking at is whether
18 you kind of learned your lesson. Like you said, you had
19 made a very nice acceptance of responsibility here. I
09:34:28 20 took that to heart, believe me.

21 And then but when you got out, you have
22 trouble with women, don't you?

23 THE DEFENDANT: I got a little anger
24 problem but I don't be trying to hurt nobody. They be
09:34:47 25 trying to put their hands on me and stuff.

1 I ain't never really, like, trying to hurt
2 the females or nothing. They just -- they hit me and I
3 just -- I ain't, like, punching them or nothing like
4 that.

09:34:58 5 I don't do no stuff like that.

6 THE COURT: Well, in 2006 way back when you
7 were 19 you went to Cassandra Paine's house and told her,
8 "You think I'm playing, bitch? I'm going to shoot you in
9 the face."

09:35:12 10 And then you said "I'll kill you" because
11 this was your block, I guess.

12 I don't know what that meant, but that
13 sounds like a threat of violence to me.

14 THE DEFENDANT: Me and the girl got into it
09:35:23 15 about a cell phone bill.

16 THE COURT: About what?

17 THE DEFENDANT: About a cell phone bill.

18 She got mad, and I told her let me get the
19 rest of my stuff out her house so she spit on me.

09:35:35 20 So I tried to force myself in the house,
21 and then that's when I sprayed the "Off" and she called
22 the police though, but she didn't go to the ambulance or
23 nothing, though.

24 THE COURT: You had another problem with
09:35:52 25 Cassandra as well later, too.

1 THE DEFENDANT: Judge.

2 THE COURT: Except this time Cassandra said
3 that you forced your way into her residence, pushed her
4 on the couch, and you choked her several times, you held
09:36:16 5 her for over an hour, and every time she attempted to get
6 up you pushed her back down.

7 And then that's when you put the bug spray
8 in her mouth.

9 THE DEFENDANT: That was the same incident.

09:36:35 10 THE COURT: Then you went to jail, you
11 didn't get any points for this because it's too old, but
12 this is having a weapon while under disability, way down
13 in Belmont County.

14 And then this is interesting to me, I
09:36:50 15 haven't seen one quite like this before, that you had 53
16 incident reports while you were at the ODRC, including
17 possession of contraband, fighting, being out of place,
18 throwing liquids or materials at another, disrespecting
19 staff, threatening bodily injury, destruction of
09:37:12 20 property, disobedience of a direct order, masturbation,
21 engaging in unauthorized group activities, attempting to
22 establish a relationship, stealing, smoking, and
23 possession of a weapon.

24 Sounds like you were busy while you were
09:37:26 25 locked up.

1 When you got out in 2009, you had a problem
2 with Desire Riddle, and then she says when you didn't let
3 her in, you became angry or irate and you threatened to
4 kill her if she did not get back together with you.

09:37:46 5 You picked up a brick, walked into her
6 garage, and used the brick to break several windows on
7 her vehicle, and you also took a glass car window that
8 she was going to use to replace the one that you broke a
9 few days before.

09:38:01 10 Sounds like a little bit of violence.

11 And then when you were at ODRC at that time
12 you had 32 incident reports. I'm not going through all
13 the things that you were doing, but it sounds like you
14 have a hard time adjusting. I mean, and like you said,
09:38:17 15 you had some anger problems.

16 And then you, afterwards, you threatened
17 Desire by saying, "Bitch, you going to turn your back on
18 me? You better go to Court with me and say I didn't
19 break into your garage."

09:38:34 20 And you said you were going to mess her up
21 or have your boys mess her up, burn her house down.

22 I mean that's scary. I mean, Ms. Riddle
23 was probably petrified with something like that.

24 And then again then you had the 32 incident
09:38:49 25 reports when you got locked up for that.

1 I guess I'm -- then you got another thing a
2 couple years later with -- is it Marcia Cole?

3 THE DEFENDANT: Maria Cole.

4 THE COURT: Maria?

09:39:07 5 THE DEFENDANT: Yeah.

6 THE COURT: That time you repeatedly kept
7 going back to her house and broke her car windows, house
8 windows, pointed a .40 caliber handgun at her and her
9 son.

09:39:18 10 And when the policemen were there you kept
11 calling her, and even the cops could hear you making
12 threats.

13 You sound like a pretty dangerous fellow to
14 me, Nashaun.

09:39:37 15 So what do you think; when you get out,
16 what do you plan on doing?

17 THE DEFENDANT: Getting some jobs and
18 better my foundation.

19 I want to change, though, I ain't going to
09:39:47 20 lie to you. Like, I, like, all my life I really ain't
21 really had nothing to live for.

22 Now I got a baby. I just want to be there
23 for that baby, that's all.

24 THE COURT: Now, who is the baby's mom?

09:40:01 25 THE DEFENDANT: Her name Raven, Raven

1 Hunter.

2 THE COURT: Where does she live?

3 THE DEFENDANT: She about to move to

4 Georgia, too.

09:40:08 5 THE COURT: Is she?

6 Does she have any other kids?

7 THE DEFENDANT: Yes. She got one.

8 THE COURT: One?

9 THE DEFENDANT: A son, another son. She

09:40:16 10 got a son.

11 THE COURT: Are you still in contact with

12 her?

13 THE DEFENDANT: Yes.

14 THE COURT: Well, I don't know.

09:40:25 15 I mean, you really set yourself up for

16 quite a problem.

17 You know, what's the most time you've ever

18 done?

19 THE DEFENDANT: Two-and-a-half years.

09:40:39 20 THE COURT: Do you think a person looking

21 at your background, looking at what you've done, even you

22 would have to agree that you pose a danger to the

23 community and to yourself, I mean, because of your

24 conduct.

09:40:51 25 THE DEFENDANT: Yes.

1 THE COURT: I mean, and you're 36 years
2 old. You're almost at the age now where you think you're
3 wasting your time, and but, you know, you're stuck here
4 with the Guidelines.

09:41:06 5 And the Guidelines give me a range of 188
6 to 235 months, which is an enormous amount of time, but
7 you're going to have to take whatever effort that you
8 think is appropriate to turn your life around.

9 You've got an opportunity. I'm going to
09:41:21 10 give you whatever break I can.

11 I think I'm going to recommend drug
12 treatment, too, because you were involved with drugs.
13 That will help.

14 If you successfully complete the program,
09:41:32 15 it will give you a good mindset about the use and abuse
16 of drugs and alcohol. It will also lessen the amount of
17 time that you serve, so that will be -- but that's up to
18 you. I mean, I'll make that recommendation.

19 I'm also going to recommend Jessup, and
09:41:48 20 that's just my recommendation. The Bureau of Prisons
21 ultimately has to make that determination, but my
22 recommendation helps.

23 And then I'm going to also give you credit
24 for all the time that you've served up to now, but I'm
09:42:03 25 going to place you in the custody of the Bureau of

1 Prisons to be imprisoned for a term of 200 months with a
2 \$100 special assessment on each count. That's a \$500
3 special assessment that's due and payable today.

4 And then that's to be followed by five
09:42:17 5 years of supervised release on Counts 4 and 5; three
6 years on Counts 1 through 3, to run concurrent with each
7 other.

8 While you're on supervised release, you
9 have to follow all the terms and conditions everyone
09:42:29 10 follows on supervised release, which would include any
11 specific condition that your supervising officer thinks
12 is appropriate.

13 And in addition to that, you can't drive a
14 motor vehicle without a valid driver's license and proof
09:42:45 15 of insurance.

16 So any objections other than what you've
17 raised?

18 MR. BRYAN: Your Honor, the objections that
19 I've already raised, and I would object to the sentence
09:42:55 20 as well.

21 THE COURT: Okay. Thank you.

22 And Ms. Sweeney?

23 MS. SWEENEY: No objections from the
24 Government, Judge.

09:42:59 25 THE COURT: All right. Nashaun, good luck.

1 THE DEFENDANT: He gave me 200 months?

2 MR. BRYAN: Yes.

3 THE CLERK: All rise.

4 (Proceedings concluded at 9:43 a.m.)

09:43:07

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6 C E R T I F I C A T E

7 I certify that the foregoing is a correct
8 transcript from the record of proceedings in the
9 above-entitled matter.

10

11

12

13 /s/Susan Trischan

14 /S/ Susan Trischan, Official Court Reporter
Certified Realtime Reporter

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