

No. _____

In the Supreme Court of the United States

JAMES PAINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the court analyze whether a conviction is similar to the offenses listed in U.S.S.G. §4A1.2(c) as a group or solely for perceived seriousness when determining whether a conviction warrants a criminal history point?

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OPINIONS BELOW

On February 7, 2019, the Eighth Circuit Court of Appeals affirmed the judgment of the District Court for the Southern District of Iowa. App. 1. On March 14, 2019, the Eighth Circuit denied the petition for rehearing. App. 40.

JURISDICTION

On October 27, 2017, the “JUDGMENT IN A CRIMINAL CASE” was entered by the Honorable Judge Stephanie Rose, in the United States District Court for the Southern District of Iowa. App. 7. On February 7, 2019, the Eighth Circuit affirmed the judgment of the District Court for the Southern District of Iowa. App. 1. Jurisdiction for the Eighth Circuit was pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Jurisdiction for the Supreme Court is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C. § 3553(f)(1)

the defendant does not have—

(A)

more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B)

a prior 3-point offense, as determined under the sentencing guidelines; and

(C)

a prior 2-point violent offense, as determined under the sentencing guidelines;

18 U.S.C. § 3742(a)

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

21 U.S.C. § 841(b)(1)(a)

In the case of a violation of subsection (a) of this section involving—

(i)

1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I)

coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II)

cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III)

ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV)

any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii)

280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv)

100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v)

10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi)

400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidiny l] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny l] propanamide;

(vii)

1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii)

50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the

greater of twice that authorized in accordance with the provisions of title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the

following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

United States Sentencing Guidelines § 4A1.2(c)

(c) SENTENCES COUNTED AND EXCLUDED

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

- Careless or reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace

Driving without a license or with a revoked or suspended license
 False information to a police officer
 Gambling
 Hindering or failure to obey a police officer
 Insufficient funds check
 Leaving the scene of an accident
 Non-support
 Prostitution
 Resisting arrest
 Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
 Hitchhiking
 Juvenile status offenses and truancy
 Local ordinance violations (except those violations that are also violations under state criminal law)
 Loitering
 Minor traffic infractions (*e.g.*, speeding)
 Public intoxication
 Vagrancy.

United States Sentencing Guidelines § 4A1.2 cmt. n.12.

In General.—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

Iowa Code § 124.407

It is unlawful for any person to sponsor, promote, or aid, or assist in the sponsoring or promoting of a meeting, gathering, or assemblage with the knowledge or intent that a controlled substance be there distributed, used, or possessed, in violation of this chapter.

Any person who violates this section and where the controlled substance is any one other than marijuana is guilty of a class “D” felony.

Any person who violates this section, and where the controlled substance is marijuana only, is guilty of a serious misdemeanor.

Iowa Code § 321.277

Any person who drives any vehicle in such manner as to indicate either a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving.

Every person convicted of reckless driving shall be guilty of a simple misdemeanor.

Iowa Code § 723.4

A person commits a simple misdemeanor when the person does any of the following:

1. Engages in fighting or violent behavior in any public place or in or near any lawful assembly of persons, provided, that participants in athletic contests may engage in such conduct which is reasonably related to that sport.
2. Makes loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof.

3. Directs abusive epithets or makes any threatening gesture which the person knows or reasonably should know is likely to provoke a violent reaction by another.

4. Without lawful authority or color of authority, the person disturbs any lawful assembly or meeting of persons by conduct intended to disrupt the meeting or assembly.

5. By words or action, initiates or circulates a report or warning of fire, epidemic, or other catastrophe, knowing such report to be false or such warning to be baseless.

6.

a. Knowingly and publicly uses the flag of the United States in such a manner as to show disrespect for the flag as a symbol of the United States, with the intent or reasonable expectation that such use will provoke or encourage another to commit trespass or assault.

b. As used in this subsection:

(1) “Deface” means to intentionally mar the external appearance.

(2) “Defile” means to intentionally make physically unclean.

(3) “Flag” means a piece of woven cloth or other material designed to be flown from a pole or mast.

(4) “Mutilate” means to intentionally cut up or alter so as to make imperfect.

(5) “Show disrespect” means to deface, defile, mutilate, or trample.

(6) “Trample” means to intentionally tread upon or intentionally

cause a machine, vehicle, or animal to tread upon.

c. This subsection does not apply to a flag retirement ceremony conducted pursuant to federal law.

7. Without authority or justification, the person obstructs any street, sidewalk, highway, or other public way, with the intent to prevent or hinder its lawful use by others

Iowa Code § 725.1(1)(a)

Except as provided in paragraph “b”, a person who sells or offers for sale the person’s services as a partner in a sex act commits an aggravated misdemeanor

Iowa Code § 725.1 (2)(b)

A person who purchases or offers to purchase services as a partner in a sex act from a person who is under the age of eighteen commits a class “D” felony

Iowa Code § 726.5

A person, who being able to do so, fails or refuses to provide support for the person’s child or ward under the age of eighteen years for a period longer than one year or in an amount greater than five thousand dollars commits nonsupport; provided that no person shall be held to have violated this section who fails to support any child or ward under the age of eighteen who has left the home of the parent or other person having legal custody of the child or ward without the consent of that parent or person having legal custody of the child or ward. “Support”, for the purposes of this section, means any support which has been fixed by court order, or, in the absence of any such

order or decree, the minimal requirements of food, clothing or shelter. Nonsupport is a class “D” felony

Iowa Code § 902.9(1)(e)

A class “D” felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars

City of Council Bluffs Code of Ordinances § 8.20.020(2)(B)

After entering within or upon the premises and discovering that illegal activities are occurring, remaining within or upon the premises of a disorderly house as defined in Section 8.20.040;

City of Council Bluffs Code of Ordinances § 8.20.040(a)(1)–(2)

When any building, structure, enclosure, booth or other place is kept, used, or maintained for any illegal purpose, which the owner, tenant, agent, or employee of another having control of any such place . . . permits such a place to be used for the purpose of illegally keeping, selling, possessing, consuming or giving away any intoxicating liquor, beer, wine, or unlawful drugs, such place shall be deemed to be a disorderly house, and any person who, by himself as owner, or other as tenant, agent or employee, keeps or uses such disorderly house, or permits or allows the same to exist, is guilty of a misdemeanor.

City of Council Bluffs Code of Ordinances § 8.48.010

It is unlawful for persons to collect, assemble or group together, and, after being so collected, assembled or grouped together, to stand or loiter on any sidewalk or at any street corner in front of any bank, business house, or at any other place in the city, to the annoyance, hindrance or obstruction to the free passage of any person or persons passing on or along any sidewalk or street in the city.

STATEMENT OF THE CASE

In June 2017, Mr. Paine pleaded guilty to conspiracy to distribute a controlled substance, in violation of 21 USC §§ 846 & 841(b)(1)(A) and admitted that he was responsible for at least 50 grams or more of actual methamphetamine and at least 500 grams or more of a mixture or substance containing methamphetamine. App. 1. The initial presentence investigation report (“PSR”) prepared in this case indicated that Mr. Paine had a criminal history score of two. App 18. One point was from a June 2015 conviction for “Gathering” in Pottawattamie County, Iowa. App. 24. Mr. Paine’s Gathering conviction is a serious misdemeanor and his sentence was seven days’ imprisonment. App. 22.

The significance of the Gathering conviction was a threshold disputed issue at the sentencing hearing. App. 17-18. The parties agreed that the base offense level was 34, and that a 3-point reduction was appropriate for acceptance of responsibility. App. 18. If the Gathering conviction *did not* give a point to Mr. Paine’s criminal history

score, Mr. Paine would have a criminal history category of I (not II) and would also be eligible for a further two-point reduction for the safety valve and no mandatory minimum sentence would apply. App. 18. See 18 U.S.C. § 3553(f)(1) (requiring, for relief from statutory mandatory minimums, that “the defendant does not have more than 1 criminal history point”)

Following argument by counsel, the district court concluded that the Gathering conviction should count in calculating Mr. Paine’s criminal history. App. 27. The court sentenced Mr. Paine to 89 months’ imprisonment. App. 1.

This petition follows.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. GATHERING IS SIMILAR TO DISORDERLY CONDUCT OR LOITERING.

The Eighth Circuit erred in finding that the Council Bluffs, Iowa, Code of Ordinances for sections 8.20.020 and 8.48.010 (disorderly conduct and loitering) were not comparable to Mr. Paine’s conviction for Gathering. as examples of the offenses of disorderly conduct and loitering. The Eighth Circuit found that these offenses were punishable by up to 30 days’ imprisonment. Council Bluffs, Iowa, Code of Ordinances § 8.02.020, as opposed to Mr. Paine’s statute of conviction, which is a serious misdemeanor.

The Eighth Circuit analyzed solely one specific factor of the offense (total

possible punishment) as opposed to the relevant factors test, which is as follows.

[T]he court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

U.S.S.G. § 4A1.2 cmt. n.12.

Total possible punishment for an offense is not even listed as a relevant factor for the “common sense approach” that the court should use. Rather, the court is to consider the “perceived seriousness of the offense as indicated by the level of punishment.” Mr. Paine’s Gathering conviction only resulted in a sentence of seven days’ imprisonment. This is a similar sentence to what Mr. Paine would receive under disorderly conduct or loitering. Council Bluffs, Iowa, Code of Ordinances § 8.02.020. There is little perceived seriousness of the offense, as demonstrated by Mr. Paine’s light sentence.

The other factors also inhere in his benefit, and this one factor alone cannot and should not be determinative. Next, a comparison of the elements of disorderly conduct and Gathering also favors Mr. Paine. Disorderly conduct is proscribed by state statute, see Iowa Code § 723.4, as well as local ordinance, here the City of Council Bluffs. See City of Council Bluffs Code of Ordinances, tit. 8, ch. 8.20 (“Disorderly Conduct”).

The elements of serious-misdemeanor Gathering are that a person (1) sponsors, promotes, or aids (2) a meeting, gathering, or assemblage, (3) with the knowledge or

intent that [marijuana] be there distributed, used, or possessed. See Iowa Code § 124.407. Similarly, under local ordinance, disorderly conduct is defined in part as:

After entering within or upon the premises and discovering that illegal activities are occurring, remaining within or upon the premises of a disorderly house as defined in Section 8.20.040[.]

City of Council Bluffs Code of Ordinances, tit. 8, ch. 8.20, § 8.20.020(2)(B). The disorderly house ordinance, in turn, states:

When any building, structure, enclosure, booth or other place is kept, used, or maintained for any illegal purpose, which the owner, tenant, agent, or employee of another having control of any such place . . . permits such a place to be used for the purpose of illegally keeping, selling, possessing, consuming or giving away any intoxicating liquor, beer, wine, or unlawful drugs, such place shall be deemed to be a disorderly house[.]

Id. § 8.20.040(a)(1)–(2).

There is almost zero difference in culpability between these statutes and Mr. Paine’s statute of conviction, as “discovering” that illegal activities are occurring is just as “knowing” that marijuana is going to be distributed in the house. The Eighth Circuit cited United States v. Ruacho, 746 F.3d 850 (8th Cir. 2014) (per curiam) and United States v. Foote, 705 F.3d 305 (8th Cir. 2013) for the proposition that Mr. Paine’s conviction indicated that there was a higher level of culpability and a greater chance of recidivism in his conviction. Specifically, that “[d]rug possession ‘suggests a more calculating, a more resourceful, and a more dangerous criminal’ than someone who commits a minor traffic infraction.” United States v. Foote, 705 F.3d 305, 308 (8th Cir. 2013) (citation omitted). While this may be true the question is whether it is similar to

disorderly conduct, and disorderly conduct requires almost the same elements. In addition, while it is related to drugs, there is no requirement of drug possession, use, or trafficking. A person convicted of Gathering is less culpable than the person convicted of Possession of Drug Paraphernalia, because there is at least a reasonable inference that the person possessing drug paraphernalia is possessing it in order to use drugs. The person convicted of Gathering only knows that rugs are being used at a party.

**II. GATHERING SHOULD BE EXCLUDED BECAUSE IT IS
SIMILAR TO THE OFFENSES LISTED IN U.S.S.G. §4A1.2(c)(1)
AS A GROUP**

In addition to his arguments that Gathering is excluded because it is similar to disorderly conduct, loitering and/or vagrancy, Mr. Paine alternatively argued that Gathering bears important similarities to the characteristics of the offenses listed in §4A1.2(c)(1) *as a group*, and therefore, that Gathering is excluded under that section of the Guidelines.

The Honorable Judge Mark W. Bennett adopted this standard in United States v. Weller after engaging in a well-reasoned statutory interpretation of the text of U.S.S.G. §4A1.2(c). See 102 F. Supp. 3d 1065 (N.D. Iowa 2015). This Court should adopt the same standard:

[T]he guideline states that it applies to “the following prior offenses and offenses similar to them.” Because this language refers to “offenses similar to *them*,” *i.e.*, similar to listed *offenses*, not merely similar to *a listed offense*, this language is, at best, ambiguous as to whether it requires a comparison of a prior offense to *a single specific listed offense*, or to the *listed offenses as a group*. Because I conclude that either reading is plausible, I must apply the rule of lenity and resolve the

resulting ambiguity in the defendant's favor. Such lenity, here, would place more emphasis on the comparison of the *character* of the prior

offense and the *character* of the listed offenses *as a group*, and less emphasis on any comparison of the prior offense with a *specific* listed offense. Indeed, this conclusion is consistent with the multi-factor test in Amendment 709 and Application Note 12, which plainly de-emphasized an offense-to-offense comparison and similarity of elements of the prior offense with the elements of a single listed offense by making “the elements of the [prior] offense” only *one* of several factors that must be balanced. It is also consistent with the statement of the factors in the multi-factor test. The first factor invites “comparison of *punishments* imposed for the listed and unlisted *offenses*,” which, again, suggests consideration of the listed offenses *as a group*. The second, fourth, and fifth factors, read in context, plausibly suggest—and certainly do not unambiguously exclude—comparison of the prior offense to the listed offenses *as a group*. Even to the extent that the guideline and the test can be read to require a comparison of the prior offense to a *specific* listed offense, the multi-factor test does not establish any priority or hierarchy among the listed factors, such that any one of them might be determinative, but requires a balancing of all of the relevant factors.

Id. at 1076–77 (citations omitted). Accordingly, using this rationale, Mr. Paine's Gathering conviction should be compared with the §4A1.2(c)(1) offenses *as a group* to determine if its character is similar to those listed in the Guidelines.

The first two factors—the punishment imposed the perceived seriousness of Gathering—favor Mr. Paine. As noted, Mr. Paine's Gathering conviction is a serious misdemeanor and he was given a sentence of seven days' imprisonment with no fine imposed. This punishment fits comfortably within the spectrum of punishments for the offenses delineated in §4A1.2(c). For instance, on the low end, two listed offenses—reckless driving or disorderly conduct—are punishable in Iowa only as simple misdemeanors. See Iowa Code § 321.277; Iowa Code § 723.4. However, another listed

offense, prostitution, is punishable as either an aggravated misdemeanor or class “D” felony, Iowa Code § 725.1(1)(a), (2)(b), and nonsupport is punishable as a class “D” felony. Iowa Code § 726.5. Class “D” felonies are punishable by up to five years’ imprisonment and a minimum \$750 fine imposed. Iowa Code § 902.9(1)(e).

The punishments for the remaining listed offenses in §4A1.2(c)(1) range from misdemeanors to felonies, depending on the severity of the conduct involved. Again, because Gathering in Iowa is a serious misdemeanor and Mr. Paine was sentenced to seven days’ imprisonment, it cannot be said that this punishment is so dissimilar from the listed offenses that it should be counted toward his criminal history score. In fact, the punishment imposed on Mr. Paine is far less severe than what the Iowa legislature has authorized for many of the listed offenses.

Finally, the culpability and recidivism factors favor Mr. Paine as well. This is not a “narcotics case,” as in Ruacho and Foote, and the district court erroneously likened it to one. App. 27. There is almost zero difference in culpability between these statutes and Mr. Paine’s statute of conviction, as “discovering” that illegal activities are occurring is just as “knowing” that marijuana is going to be distributed in the house. The Eighth Circuit cited United States v. Ruacho, 746 F.3d 850 (8th Cir. 2014) (per curiam) and United States v. Foote, 705 F.3d 305 (8th Cir. 2013) for the proposition that Mr. Paine’s conviction indicated that there was a higher level of culpability and a greater chance of recidivism in his conviction. Specifically, that “[d]rug possession ‘suggests a more calculating, a more resourceful, and a more dangerous criminal’ than someone who commits a minor traffic infraction.” United

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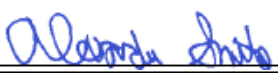
CONCLUSION

Paine respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

**PARRISH KRUIDENIER DUNN BOLES GRIBBLE
GENTRY BROWN & BERGMANN L.L.P.**

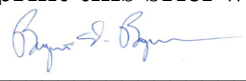
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ATTORNEY'S COST CERTIFICATE

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APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 17-3390

United States of America

Plaintiff - Appellee

v.

James Lewis Paine, also known as James L. Paine

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Council Bluffs

Submitted: September 25, 2018

Filed: February 7, 2019

[Unpublished]

Before SMITH, Chief Judge, MELLOY and STRAS, Circuit Judges.

PER CURIAM.

In 2017, James Paine pled guilty to conspiring to distribute methamphetamine. Over Paine's objection, the district court¹ assigned Paine a criminal history point for

¹ The Honorable Stephanie M. Rose, United States District Judge for the Southern District of Iowa.

a 2015 serious misdemeanor conviction for “[g]athering[] where controlled substances [are] unlawfully used.” Iowa Code § 124.407 (2015). Paine appeals, arguing that gathering is similar to the offenses of disorderly conduct and loitering and therefore should not be counted towards his criminal history pursuant to United States Sentencing Guidelines (“U.S.S.G.”) § 4A1.2(c). We affirm.

I. Background

In 2017, Paine pled guilty to conspiring to distribute at least 50 grams or more of methamphetamine and at least 500 grams or more of a mixture or substance containing methamphetamine. The presentence report assessed Paine two criminal history points—one for a 2005 conviction for possession of drug paraphernalia and one for his 2015 serious misdemeanor gathering conviction. The district court rejected Paine’s argument that the gathering conviction was similar to disorderly conduct or loitering, offenses that, pursuant to U.S.S.G. § 4A1.2(c), are excluded for the purposes of calculating criminal history. The district court stated:

In reviewing the statute here and the elements that apply to that statute and in reviewing the case law that was cited to me[,] . . . I find by a preponderance of the evidence that the conviction under Iowa Code Section 124.407 for gathering is not similar to those outlined in USSG 4A1.2(c)(1) or (c)(2).

I find gathering, as described in its elements and as discussed in the limited case law . . . to be more similar to possession of a controlled substance or possession of drug paraphernalia than any of the offenses enumerated by 4A1.2(c)(1) or (c)(2). As such, I find that the defendant is properly found to be a criminal history category of II.

Had the district court accepted Paine’s argument, Paine would have had a criminal history category I and would have been eligible for “safety-valve” relief under 18 U.S.C. § 3553(f), which “allows the district court to disregard an applicable statutory

minimum if certain requirements are met.” United States v. Barrera, 562 F.3d 899, 902 (8th Cir. 2009).

II. Standard of Review

“When reviewing the district court’s imposition of a sentence, we review ‘de novo the district court’s interpretation and application of the sentencing guidelines and statutes’” United States v. Barrientos, 670 F.3d 870, 873 (8th Cir. 2012) (citation omitted). We first look to see whether the district court committed a “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.” Gall v. United States, 552 U.S. 38, 51 (2007). Miscalculation of a defendant’s criminal history may constitute a significant procedural error. Barrientos, 670 F.3d at 873.

III. Discussion

In general, the Guidelines provide that misdemeanors are counted for the purposes of calculating a defendant’s criminal history score. See U.S.S.G. §§ 4A1.1, 4A1.2. The Guidelines, however, also provide a limited exception to this rule. Certain listed offenses, and “offenses similar” to them, are only counted if specific conditions are met. U.S.S.G. § 4A1.2(c)(1). In addition, certain other listed offenses, and “offenses similar” to them, are never counted. U.S.S.G. § 4A1.2(c)(2). The sole issue in this case is whether gathering, which is an unlisted offense, is similar to the listed offenses of disorderly conduct or loitering and thus should not be counted.

Iowa’s gathering statute states:

It is unlawful for any person to sponsor, promote, or aid, or assist in the sponsoring or promoting of a meeting, gathering, or assemblage with the knowledge or intent that a controlled substance be there distributed, used, or possessed, in violation of this chapter.

Any person who violates this section and where the controlled substance is any one other than marijuana is guilty of a class “D” felony.

Any person who violates this section, and where the controlled substance is marijuana only, is guilty of a serious misdemeanor.

Iowa Code § 124.407 (2015).

To determine whether gathering is similar to disorderly conduct or loitering, the Guidelines direct us to apply the following test:

[T]he court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

U.S.S.G. § 4A1.2 cmt. n.12.

Serious misdemeanor gathering is not similar to disorderly conduct or loitering. In terms of punishment and perceived seriousness, gathering is punishable as either a felony or a serious misdemeanor. Iowa Code § 124.407 (2015). A serious misdemeanor, which is what Paine was convicted of, is punishable by up to one year’s imprisonment. Iowa Code § 903.1(1)(b). Paine cites no authority that suggests disorderly conduct and loitering are punishable by anything more than 30

days' imprisonment.² The significant difference in punishment indicates that gathering is perceived as a more serious offense.

The elements of the offense, the level of culpability involved, and the likelihood of recidivism also indicate that serious misdemeanor gathering is not similar to disorderly conduct or loitering. To be convicted of serious misdemeanor gathering, a defendant must, at a minimum, assist in promoting an assemblage with knowledge that marijuana will be possessed. Iowa Code § 124.407 (2015). Thus, serious misdemeanor gathering has two elements that disorderly conduct and loitering do not: a drug element and a drug-related scienter element. See United States v. Millard, 139 F.3d 1200, 1209 (8th Cir. 1998) (“[T]he Iowa [gathering] statute contains an element of mental culpability directly related to a drug crime”); Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Sloan, 692 N.W.2d 831, 832 (Iowa 2005) (referring to serious misdemeanor gathering as a “drug offense[]”). The drug element is significant because it indicates that serious misdemeanor gathering involves a higher level of culpability and a greater chance of recidivism than disorderly conduct and loitering. See United States v. Ruacho, 746 F.3d 850, 855 (8th Cir. 2014) (per curiam) (noting that “convictions involving illegal narcotics correlate strongly to recidivism”); cf. United States v. Foote, 705 F.3d 305, 308 (8th Cir. 2013) (“Drug possession ‘suggests a more calculating, a more resourceful, and a more dangerous criminal’ than someone who commits a minor traffic infraction.” (citation omitted)).

² Paine cites Council Bluffs, Iowa, Code of Ordinances sections 8.20.020 and 8.48.010 as examples of the offenses of disorderly conduct and loitering. The government does not object to Paine’s citation of these ordinances. Under these ordinances, both offenses are punishable by up to 30 days’ imprisonment. Council Bluffs, Iowa, Code of Ordinances § 8.02.020.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

James Lewis Paine

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:16-cr-00056-018

USM Number: 17773-030

Benjamin David Bergmann

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One of the Superseding Indictment filed on December 20, 2016.

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

☐ 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 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846	Conspiracy to Distribute at Least 50 Grams of Actual Methamphetamine and at Least 500 Grams of a Mixture or Substance Containing Methamphetamine	11/2016	1s

☐ See additional count(s) on page 2

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.

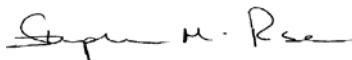
☐ The defendant has been found not guilty on count(s)

☐ 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.

October 27, 2017

Date of Imposition of Judgment



Signature of Judge

Stephanie M. Rose, U.S. District Judge

Name of Judge

Title of Judge

October 27, 2017

Date
A7

DEFENDANT: James Lewis Paine
CASE NUMBER: 1:16-cr-00056-018

IMPRISONMENT

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

89 months as to Count One of the Superseding Indictment filed on December 20, 2016.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant be placed at FPC Yankton if commensurate with his security and classification needs. The Court further recommends that the defendant be made eligible to participate in the 500 hour residential drug abuse treatment program (RDAP).

☒ 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 _____ 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 _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: James Lewis Paine
CASE NUMBER: 1:16-cr-00056-018

Judgment Page: 3 of 8

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
Five years as to Count One of the Superseding Indictment filed on December 20, 2016.

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 (42 U.S.C. § 16901, *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: James Lewis Paine
CASE NUMBER: 1:16-cr-00056-018

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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.
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. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: James Lewis Paine
CASE NUMBER: 1:16-cr-00056-018

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SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle 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 you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: James Lewis Paine
 CASE NUMBER: 1:16-cr-00056-018

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment *</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS		\$0.00	\$0.00

☐ 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 Sheet 6 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:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* 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: James Lewis Paine
CASE NUMBER: 1:16-cr-00056-018

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 payment of \$ 100.00 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 _____ (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:
- All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
- While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ 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:
- See next page.

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 A assessment, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: James Lewis Paine
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ADDITIONAL FORFEITED PROPERTY

Approximately \$3,250.00 of United States currency, seized from the residence of ALBERTO HERNANDEZ JR., also known as, "Fat Albert," located at 4626 N. 15th Street, Omaha, Nebraska;

A 2006 BMW 530XI, VIN: WBANF73546CG68847, registered to Jillian Benedict, seized near 4626 N. 15th Street, Omaha, Nebraska;

A 2008 Ford Edge SEL, VIN: 2FMDK38C48BA06952, bearing paper license plates, last registered to Shawn and Steven Zimmerman, seized near 4626 N. 15th Street, Omaha, Nebraska;

A 2008 Chevrolet Impala, VIN: 2G1WT58N589133488, bearing no license plates, last registered owner is Courtney Waugh, seized near 4626 N. 15th Street, Omaha, Nebraska;

A 9mm Beretta 9000S handgun bearing serial number: SZ019483 with magazine and ammunition, seized at 4626 N. 15th Street, Omaha, Nebraska;

A 9mm SCCY CPX-2 handgun bearing serial number: 144182 with two magazines and ammunition, seized at 4626 N. 15th Street, Omaha, Nebraska;

Approximately \$5,200.00 of United States currency, seized from the residence of FELIX ALVARO MARTINEZ, also known as, Juan Martinez Felix and Isaias Reyes Mendoza, located at 1302 S. 31st Street, Omaha, Nebraska;

Approximately \$1,160.00 United States currency, seized from the residence of CELESTINO MENDOZA, also known as, "Bombo," located at 2527 Rees Street, Omaha, Nebraska;

A .45 caliber COLT handgun bearing serial number: 59780 with magazine and ammunition, seized at 2527 Rees Street, Omaha, Nebraska;

Approximately \$27,028.00 United States currency, seized from the residence of TRAVIS JAMES McWILLIAMS, located at 4417 N. 93rd Street, Omaha, Nebraska;

A 2011 Dodge Ram Quad 1500 pickup, VIN: 1D7RV1GT0BS566798, registered to Travis McWilliams, seized near 4417 N. 93rd Street, Omaha, Nebraska;

A .25 caliber Titan handgun bearing serial number: D911260 with magazine and ammunition, seized at 4417 N. 93rd Street, Omaha, Nebraska;

Approximately \$611.00 United States currency, seized from the residence of JOHN PATRICK HIGGINS, located at 7847 Whitmore Plaza, Omaha, Nebraska;

Approximately \$5,870.00 United States currency, seized from the residence of PETER ACOSTA, located at 2618 B Ave, Council Bluffs, Iowa;

Approximately \$262,465.00 United States currency, seized from the residence of MIGUEL ANGEL AGUIRRE ESPARZA, located at 604 S. 22nd Street, #217, Omaha, NE;

A 2001 Ford F350, VIN: 1FTSW30F91ED71806, registered to James Lewis Paine, seized near 1500 McPhearson Street, Council Bluffs, Iowa;

A .12 gauge HNR shotgun bearing serial #BA522378, seized at 419 N. 8th Street, Council Bluffs, Iowa;

A 1999 Kenworth T600 tractor truck, VIN 1XKAD89X9XR8257611, registered to Vicente Briseno Martinez, seized near 5808 Mile 13 North, Mercedes, Texas; and

A 2015 Nissan Sedan SV, VIN: 3N1AB7AP1FY254658, registered to Vicente Briseno Martinez, seized near 5808 Mile 13 North, Mercedes, Texas,

As outlined in the Motion for Preliminary Order of Forfeiture filed on September 8, 2017.

- - - - - X
 UNITED STATES OF AMERICA, :
 Plaintiff, :
 : :
 vs. :
 : :
 JAMES LEWIS PAINE, :
 Defendant. :
 - - - - - X

Courtroom, First Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Friday, October 27, 2017
11:00 a.m.

For the Defendant: BENJAMIN D. BERGMANN, ESQ.
AL SMITH, ESQ.
Parrish Kruidenier Law Firm
2910 Grand Avenue
Des Moines, Iowa 50312

A15

1 P R O C E E D I N G S

2 (In open court with the defendant present.)

3 THE COURT: We are here in the matter of United States
4 vs. James Lewis Paine. It's Case No. 1:16-cr-56. The defendant
5 is present and represented by his attorney, Ben Bergmann. He's
6 also joined by Alexander, is it --

7 MR. SMITH: Smith, Your Honor.

8 THE COURT: Say it again. Oh, Smith. It really is
9 Friday. I apologize.

10 The Government is represented by Special Assistant
11 United States Attorney Corey Becker, and the probation office is
12 represented by Karen Dassinger.

13 Mr. Paine, do you recall being in court on June 5th
14 and pleading guilty to Count 1 of the ten-count superseding
15 indictment that was filed against you in December of 2016?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And that charge was conspiracy to
18 distribute at least 500 grams of methamphetamine mixture and 50
19 grams of actual methamphetamine; is that right?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: And do you recall that that drug offense
22 is punishable by at least ten years in prison and up to life in
23 prison, a fine of up to \$10 million, at least five years and up
24 to life on supervised release, and a \$100 special assessment?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: And you understand you're here today for
2 purposes of being sentenced?

3 THE DEFENDANT: Yes.

4 THE COURT: Okay. I have received and read the
5 Presentence Investigation Report. The most recent report is
6 dated October 2nd, and it's filed at Docket 732. I have also
7 reviewed the sentencing memorandum filed by the defendant at
8 Docket 756 and letters of support for the defendant filed at
9 Dockets 770 and 800.

10 Mr. Becker, have you had an opportunity to review the
11 presentence report on behalf of the United States?

12 MR. BECKER: I have, Your Honor.

13 THE COURT: And it's my understanding the parties have
14 agreed that the appropriate drug quantity here is a base offense
15 level of 34. I will adopt that agreement.

16 Also, based upon the defendant's sentencing
17 memorandum, it looks like I'll need to resolve the question of
18 whether the defendant is a criminal history category of I, which
19 would qualify him for safety valve.

20 Other than that issue, is there anything from the
21 Government's perspective, aside from the sealed filing and a
22 determination of the ultimate sentence here, that would need to
23 be resolved?

24 MR. BECKER: No, Your Honor.

25 THE COURT: Okay. Thank you, Mr. Becker.

1 Mr. Bergmann, did you have an opportunity to review
2 the presentence report with your client?

3 MR. BERGMANN: Yes, Your Honor.

4 THE COURT: And can you briefly outline the process
5 you used to do that?

6 MR. BERGMANN: I went to Council Bluffs and sat in the
7 Pottawattamie County Jail and I read it to him, which I
8 discovered became part of my process. Dealing with Mr. Paine,
9 who speaks English -- almost all my clients speak Spanish, and
10 maybe I don't need to read it to my clients that speak English,
11 but I did it anyway, so that's how we went over it.

12 THE COURT: And aside from the matters I have
13 described, any other factual issues, guideline issues that I'd
14 need to resolve today?

15 MR. BERGMANN: No, Your Honor. The way you listed it
16 out is exactly right. We've agreed to a base offense level of
17 34 with minus 3 for acceptance of responsibility if Your Honor
18 so chooses. We are arguing for a Criminal History Category I.
19 He would then also be eligible for a further two-point reduction
20 for the safety valve. And so we will be advocating for a no
21 mandatory minimum with the suggested guideline sentence of 87 to
22 108 months.

23 THE COURT: Thank you, Mr. Bergmann.

24 Mr. Paine, did you have enough time to review your
25 presentence report with your attorney?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: And was he able to answer any questions
3 you may have had?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Have you been happy with him as your
6 lawyer?

7 THE DEFENDANT: Yes.

8 THE COURT: Okay. Good.

9 Then let's go ahead and take up that criminal history
10 scoring issue. This issue relates to whether any criminal
11 history points should be assessed for Mr. Paine's 2015 Iowa
12 gathering conviction as outlined in presentence report paragraph
13 194.

14 Mr. Becker, the Government bears the burden of
15 establishing the applicability of criminal history points by a
16 preponderance of the evidence. Does the Government wish to
17 present any evidence or argument on this issue?

18 MR. BECKER: Just argument, Your Honor.

19 THE COURT: Go ahead.

20 MR. BECKER: Your Honor, Iowa Code Section 124.407,
21 prohibited gatherings, the criminal aspect of that Code section
22 can be charged in one of two ways. The least severe would be a
23 serious misdemeanor, which would involve aiding or promoting or
24 sponsoring a gathering in which the defendant knows or believes
25 a controlled substance, that being marijuana, would be there

1 distributed, used, or possessed. That's a serious misdemeanor
2 punishable by up to one year in prison.

3 The other way to charge 124.407 is for any other drug
4 other than marijuana, and that's a Class D felony. Same
5 elements, just not marijuana, any other drug. The Class D
6 felony is punishable by up to five years in prison.

7 I believe the case law here that really controls this
8 is the Ruacho decision. Now, the Ruacho decision says to use a
9 common sense approach when considering whether or not this is an
10 excludable conviction under the sentencing guidelines, and
11 there's a number of factors that do flow through here.

12 The first is a comparison of the punishments imposed
13 for the listed excludable offenses and the unlisted one that the
14 defendant is asking the Court to assume this is.

15 Looking at the sentencing guidelines, specifically
16 Section 4A1.2, sub (c)(1) and (2), all of these listed offenses
17 in the state of Iowa are either traffic offenses that don't have
18 a punishment involving incarceration or, in their simplest form,
19 can be charged as a simple misdemeanor. A simple misdemeanor in
20 the state of Iowa is punishable by up to 30 days.

21 Now, the charge in which the defendant has pled guilty
22 is a serious misdemeanor. It's punishable by up to one year in
23 prison, which means the legislature and the courts of the state
24 of Iowa have viewed this charge as at least 12 times as serious
25 as some of these simple misdemeanors listed in the excludable

1 category.

2 Three, the elements of this offense. And the Iowa
3 Court of Appeals has recently reaffirmed what these elements
4 are, and this is a State vs. Antrim case, and that's 884 N.W.2d
5 223. It's a 2016 case. The Court of Appeals has said that
6 there's three key elements to the prohibited gatherings charge.

7 The first is that the defendant sponsored promoted or
8 aided; two, a meeting, gathering, or assemblage; three, with the
9 knowledge or intent that the controlled substance be there
10 distributed, used, or possessed.

11 This goes into one of the other factors in the Ruacho
12 case of the element of culpability. One of the elements of this
13 crime is a guilty mind. It's knowledge or intent. In this
14 crime, although you don't have to possess a controlled substance
15 to be guilty of it, you also don't have to possess a controlled
16 substance to be guilty of conspiracy to distribute in federal
17 court.

18 I think the best argument for why this offense should
19 count is the common sense approach. The defendant is not making
20 an argument that because this offense involved marijuana, it
21 shouldn't count. So that would mean that if someone were
22 convicted of the methamphetamine alternative, the same rationale
23 would apply.

24 So the Court could look at a situation in which
25 someone pled guilty to a D felony gathering and went to jail or

1 prison for five years, and defense counsel would be entertaining
2 an argument that it doesn't count and it's excludable.

3 I don't think that is supported by the case law of the
4 Eighth Circuit. I don't think the appellate courts of the state
5 of Iowa have viewed the prohibited gathering statute that way,
6 and I don't think that is the kind of conviction articulated
7 when the sentencing guidelines were created, so we believe that
8 the conviction was accurately scored in the PSR.

9 THE COURT: Thank you, Mr. Becker.

10 Mr. Bergmann.

11 MR. BERGMANN: We disagree. We have attached as
12 Exhibit A to the sentencing brief -- or as Exhibit A to our
13 sentencing brief the guilty plea and sentencing, and it shows
14 it's a serious misdemeanor. So to whatever extent it needs to
15 be the argument that it's a Class D or not, it is a serious
16 misdemeanor.

17 And I've talked to Jason Griess about this. I sent it
18 to him. He seemed to agree that it was a serious misdemeanor
19 offense.

20 He was sentenced to seven days in jail. As my
21 colleague astutely notes, a simple misdemeanor is punishable by
22 up to 30 days in jail. So whatever the Iowa legislature
23 thought, the judge here thought that it was commensurate to a
24 simple misdemeanor. He wasn't sentenced to probation. The fine
25 was suspended.

1 We ask Your Honor to take notice of Exhibit A, even
2 though we don't have the burden of production or persuasion on
3 this.

4 Your Honor, one of the important things that we didn't
5 lay out in our sentencing brief totally is that Your Honor
6 should engage in the categorical approach in determining what
7 conduct was -- took place here.

8 Now, you'll note in Exhibit A that the guilty plea in
9 that case doesn't exactly comport with Iowa law as it doesn't
10 list a factual basis, but we know how to handle that when we
11 don't have a factual basis to know exactly what the offense is.
12 We use the categorical approach, which comes from Shepard,
13 Moncrieffe -- what other ones -- Mellouli, Mathis, Descamps.
14 And I'll get these names to the court reporter later.

15 The categorical approach is appropriate here, and that
16 says that the minimal culpable conduct is what we're going to
17 look at. And Justice Kagan has been talking about this for
18 years now. She even got Justice Scalia on board toward the very
19 end of his life.

20 So what happened here was that the minimal culpable
21 conduct is that Mr. Paine assisted in promoting an assemblage
22 with knowledge that somebody else was going to have marijuana.
23 So to the extent the Government argues that there's this huge
24 scienter involved, well, it's scienter of someone else's
25 conduct, which is really not scienter at all, we would say.

1 In other words, Jim Paine told somebody where he could
2 get tickets to 80/35. He said, "Hey, if you go online, there's
3 going to be this concert over at the Gateway Park," if it took
4 place in Polk County, of course, "and I do have to tell you that
5 I've got pretty good knowledge that somebody's going to be
6 smoking marijuana there or at the very least is going to have it
7 in their pocket."

8 So with that in mind, with what the minimal conduct is
9 as required by the categorical approach, we say that all three
10 of the reasons that we list in our brief starting on page 9
11 exclude this as a criminal history point.

12 Firstly, this took place in Pottawattamie County. The
13 Council Bluffs city ordinance for disorderly conduct, which is
14 listed in 4A1.2, subsection (c), subsection (1) as one of the
15 offenses that never counts, actually is the exact same offense
16 as the minimal conduct required to violate the statute in
17 question.

18 So is this an offense regardless of whatever name it
19 is? Well, we know in that very same jurisdiction over in
20 Pottawattamie County that Jim could have been charged with
21 either one of these, and had he been charged, by whatever
22 authority, under the Council Bluffs City Code instead of under
23 the state code, this would be a no-brainer; it's a disorderly
24 conduct.

25 And that is exactly what the guidelines say. They

1 say, "Sentences for the following prior offenses and offenses
2 similar to them, by whatever name they are known, are counted
3 only" when the sentence is a term of probation of more than a
4 year or term of imprisonment of at least 30 days, and we don't
5 have either of those, which we know from Exhibit A.

6 So our number one argument why you should exclude
7 this, Your Honor, is that this is disorderly conduct known by
8 another name, and using the Ruacho, or whatever it's called -- I
9 don't know how to say that case, but I think we're both talking
10 about the same case -- under all the elements there, it leads to
11 a decision that this is essentially disorderly conduct by
12 another name.

13 And I have listed more reasons why Your Honor should
14 exclude it under our first argument, but I know you've read the
15 sentencing brief, and so I'll leave that to you.

16 Secondly, Judge Bennett persuasively, and certainly
17 not authoritatively, suggests that another way to look at this
18 is look at all these offenses and say are these offenses similar
19 to the group. Is assisting someone in promoting an event or,
20 rather, an assemblage where it is known that someone will
21 possess marijuana like disorderly conduct? Is it like
22 disturbing the peace? Is it like contempt of court? Is it kind
23 of like gambling? Is it like nonsupport, prostitution, or
24 resisting arrest, trespassing?

25 I would say it is like all those offenses. And

1 especially given the fact that he got a sentence of seven days
2 in jail, which would have been the same as if he would have been
3 sentenced under that Council Bluffs City Code because it's a
4 simple misdemeanor, and that's another reason why this point
5 should be excluded.

6 So we've got two reasons why, under section (c)(1),
7 that this point should not count and why the Government has
8 failed to prove or persuade the Court more likely than not that
9 it does count.

10 And finally, Your Honor, we think that it also should
11 not count because, under section (c)(2) -- so that would be in
12 total, it would be Section 4A1.2, subsection (c), subsection
13 (2), because it's similar to the offenses of loitering and
14 vagrancy.

15 If we look in the Council Bluffs City Code again,
16 loitering, again, is very similar to the minimal conduct under
17 the offense in question here. Again, that's a simple
18 misdemeanor. And it says loitering there, and I would think
19 that it would be axiomatic that an offense of loitering is
20 similar to loitering, so that's the third reason why. And it's
21 also similar to vagrancy, as we list in our brief.

22 So, Your Honor, we specifically request that on that
23 point, that the Government's failed to meet their burden of
24 production or persuasion as to any of the three arguments as to
25 why this point should not count toward his criminal history

1 scoring, and we ask that you specifically find that for all
2 three of those reasons, it does not count.

3 Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Bergmann.

5 In reviewing the statute here and the elements that
6 apply to that statute and in reviewing the case law that was
7 cited to me in Mr. Bergmann's brief, which I appreciated -- it
8 was a well-written brief and very thorough -- ultimately, I find
9 by a preponderance of the evidence that the conviction under
10 Iowa Code Section 124.407 for gathering is not similar to those
11 outlined in USSG 4A1.2(c)(1) or (c)(2).

12 I find gathering, as described in its elements and as
13 discussed in the limited case law, really, that's out there, to
14 be more similar to possession of a controlled substance or
15 possession of drug paraphernalia than any of the offenses
16 enumerated by 4A1.2(c)(1) or (c)(2). As such, I find that the
17 defendant is properly found to be a criminal history category of
18 II.

19 So let's go ahead and compute an advisory guideline
20 range. We have a starting base offense level of 34. There's a
21 two-level decrease for acceptance of responsibility.

22 Is the Government moving for that third level as well?

23 MR. BECKER: We are, Your Honor.

24 THE COURT: That leaves us at a total offense level of
25 31. Defendant is a criminal history category of II, so we have

1 an advisory guideline range of 121 to 151 months' imprisonment.
2 Probation is precluded by statute. Supervised release of five
3 years to life is recommended. The fine range is 30,000 to 10
4 million dollars, and there is a \$100 special assessment.

5 Let's turn, then, to the sealed filing at Docket 810.
6 I will seal this portion of the transcript. Would the parties
7 like me to seal the courtroom as well?

8 MR. BECKER: Your Honor, the Government will defer to
9 the defendant on that.

10 MR. BERGMANN: Yes, Your Honor, we would like to seal
11 this portion of the transcript.

12 THE COURT: Do you want me to seal the courtroom?

13 MR. BERGMANN: Yes, Your Honor.

14 THE COURT: Okay. Then I'll ask that anybody who is
15 here in our courtroom who is not courtroom staff or courthouse
16 staff step out for just a few minutes, and then we'll welcome
17 you back in when we're done with this situation.

18 (In a closed courtroom with the defendant present.)

19 (The portion of the transcript from page 14, line 19
20 to page 21, line 19 is contained in a separate transcript filed
21 under seal.)

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(In open court with the defendant present.)

THE COURT: Okay. Mr. Becker, any additional
recommendation you'd like to make with respect to the sentence
in this case?

MR. BECKER: No, Your Honor.

THE COURT: Mr. Bergmann.

1 MR. BERGMANN: Your Honor, being told that at this
2 point the best we can do is 89 months, I would reiterate all the
3 reasons why 89 months is the appropriate sentence.

4 Jim's never really done any serious time. He's a
5 long-time drug addict. He should have gotten treatment a long
6 time ago. While his conduct merited getting indicted and then
7 pleading guilty in federal court, in the pantheon of individuals
8 we see here, he is by no means a kingpin. He is a small cog in
9 this wheel. He needs to get clean. He's too old to be in this
10 game. I think he knows that.

11 All the factors for sentencing suggest an even lower
12 sentence, to be quite honest, Your Honor, based on his age. The
13 deterrence to him, the deterrence to others, the safety of the
14 community, all those factors, frankly, could be addressed by
15 treatment, significant inpatient treatment, which we request
16 that you include in your order, that you recommend that he
17 complete RDAP.

18 But understanding that at this point the best we can
19 do is 89 months, that's what we request.

20 THE COURT: Any placement requests?

21 THE DEFENDANT: Yankton.

22 THE COURT: Okay. Mr. Paine, this is the time in the
23 hearing when you get a chance to say what you might want to say.
24 You don't have to say anything, but is there anything you'd like
25 to say to me or the -- I think these are your sisters that have

1 come to support you?

2 THE DEFENDANT: Yes, Your Honor. Your Honor, I'd like
3 to start by saying that I am sorry for my involvement in this
4 case. I am sorry that I helped get drugs for people to fuel
5 their habits. If anyone should know better, it's me. I have
6 been using drugs for 20 years.

7 Before I became involved in this case, I had a feeling
8 of dread that something bad was going to happen. I knew that I
9 should stop. The problem is that I was helpless with my
10 addiction. An addict always convinces himself that he doesn't
11 have a problem or that he can quit at any time. After my forced
12 sobriety these many months in jail, I've come to realize that I
13 was powerless over my addiction. I have also come to realize
14 that I don't want to lead the life of an addict anymore.

15 I am a nearly 60-year-old man. I have never done any
16 serious time. I am very nervous about what is going to happen
17 to me. More than anything, I am worried sick that I am not
18 going to be able to see my mother again. I know that my sisters
19 wrote you letters supporting me. My mother did not write a
20 letter because we have not informed her of what's going on with
21 me. It would crush me if she would find out what is going on.
22 I just hope that she lives long enough so that I can see her
23 again.

24 Though they couldn't take time off today, I want to
25 apologize to my mother and my sisters in putting them through

1 this. I also want to thank my sisters for supporting me through
2 the entire case.

3 I am sure everyone tells you this, but I am not going
4 to be back in front of you. I am getting to be an old man. I
5 absolutely cannot afford to get involved in drugs again. I do
6 not -- I do need treatment, though. I have never been through
7 treatment. I request that you give me enough time for me to go
8 through treatment in prison.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Paine.

11 In your case, obviously, I considered all of the
12 3553(a) factors. In your case, that ten-year mandatory minimum
13 really truncated our ability to consider those, so I reduced
14 your sentence by one month, which was all I could really do,
15 from 121 down to 120.

16 I, obviously, considered the statutory penalties,
17 which was that mandatory minimum ten-year sentence that you were
18 facing, and I have considered the advisory guideline range and
19 how 3553(e) and 5K1.1 impacted your case.

20 This was a huge methamphetamine conspiracy. It
21 spanned multiple states. You were, as your own lawyer described
22 you, one of the smaller cogs in this particular wheel.

23 In looking at your history, frankly, it is shocking
24 that you're still alive, given the amount of drugs you've used
25 over the time of your life.

1 You'll be 60 in December. You were born in Fort Dodge
2 and raised on a family farm there in -- is it pronounced
3 Renwick, is that how it's pronounced, in Iowa?

4 THE DEFENDANT: Yes.

5 THE COURT: You had a loving and supportive childhood.
6 You're the youngest of four. You've got three sisters. You
7 moved around a lot as a teenager and adult. You lived lots of
8 places; Denison and Northwood in Iowa, Arizona, Nebraska, the
9 state of Washington, Wyoming, Montana before settling back in
10 Council Bluffs, Iowa around the age of 37, and you've stayed
11 there ever since.

12 You've never married. You don't have children.
13 You're physically healthy, which, again, is surprising given
14 your substance abuse. You've never been diagnosed with any
15 mental health problems.

16 Your substance abuse history is shockingly bad.
17 You've been abusing alcohol heavily since your teen years, and
18 you continue to do so into your forties. You abused cocaine
19 over that same 20-year period and then sort of switched over to
20 methamphetamine for the next 20-year period until your arrest in
21 this instant case. You had some experimentation in there with
22 crack cocaine and marijuana as well.

23 I agree with Mr. Bergmann that drug treatment at any
24 point in your life would have been helpful. You've had none.
25 But despite all of that, all that heavy substance abuse, you

1 graduated high school, you earned your electrician diploma.
2 You've worked your entire adult life as an electrician doing
3 construction.

4 You've picked up some criminal history. Most of it's
5 really old at this point. None of it's violent. You know,
6 larcenies and OWIs and public intoxications, exactly the kind of
7 stuff we see from drug addicts and people who have alcohol
8 issues. Open containers and drug paraphernalia and gathering, I
9 mean, these are all part and parcel with being a drug addict.
10 We see them with almost everybody who is.

11 So ultimately in this case, there's just nothing I can
12 do other than give you the reduction I have given you, having --
13 and that reduction is based on your substantial assistance, and
14 wish you luck.

15 I hope that I'll get a chance to check in with you in
16 another, you know, six months or a year or something on a Rule
17 35, but the reality is something like 95 to 97 percent of all
18 federal defendants plead guilty, and so that's probably a fairly
19 slim likelihood.

20 I will recommend the RDAP program for you. As you
21 know, you can earn up to a year off your sentence if you
22 complete that program. It's a good program. It will give you
23 some drug treatment you really need.

24 I'll recommend Yankton for you. It's a decent
25 facility. It's about as close to Council Bluffs as you're

1 probably going to find.

2 After you get done with your term of imprisonment,
3 you'll have to serve supervised release for five years. You'll
4 have all the standard conditions of supervision; you can't
5 commit new crimes, you can't have weapons, you can't have drugs.

6 You'll also have special conditions of supervision
7 relating to your particular needs. You'll participate in a
8 program of testing and treatment for substance abuse. You have
9 a ban on alcohol use, which means you can't use alcohol and you
10 can't be in places that sell alcohol as their main business, so
11 bars, taverns, pubs, liquor stores, places like that.

12 And you have what's called a search condition, which
13 means the probation office has my permission to search you or
14 your house, your car or your business, your computers, your
15 outbuildings, only if they have a good reason to believe you're
16 breaking the law or you're not complying with the terms and
17 conditions of supervision.

18 I find that you don't have the ability to pay a fine,
19 and no fine will be imposed. There is no restitution. I do
20 order forfeiture as previously set forth in the Preliminary
21 Order of Forfeiture filed September 8th of 2017. I order you to
22 pay the \$100 special assessment.

23 The last thing I want to talk to you about is your
24 right to appeal. Subject to any appeal waiver you've signed,
25 you have 14 days from today to appeal the sentence I just gave

1 you. If you decide you want to appeal, you just need to let
2 Mr. Bergmann know. He'll take care of filing the paperwork for
3 you. That paperwork won't cost you anything.

4 Mr. Bergmann, you were appointed in this case,
5 correct?

6 MR. BERGMANN: That's right, Your Honor.

7 THE COURT: And so he would handle the appeal as well,
8 and that wouldn't cost you anything either. What is really
9 important is Mr. Bergmann know for sure what you want to do. I
10 can only imagine all the stuff that's going through your head
11 right now, and so a lot of times defendants are sure they told
12 their lawyer one thing and the lawyer is sure he or she heard
13 something different. Two years down the road, we're having a
14 fight in this courtroom about what was said.

15 So the safest thing to do is to write it down. And it
16 really is as simple as, "I do," or, "I do not want to appeal,"
17 and you sign it and give it to your lawyer, and it protects both
18 of you. But if, for whatever reason, you don't want to write it
19 down or you don't get it written down, you just need to let him
20 know by telephone or in person, or whatever you have to do, in
21 the next two weeks so he has time to file the paperwork. If you
22 don't get that paperwork filed, you forever give up your right
23 to challenge the sentence.

24 Mr. Becker, do we have any counts to be dismissed?

25 MR. BECKER: Your Honor, pursuant to the plea

1 agreement, there are no charges to be dismissed with regard to
2 this defendant, and the Government would just ask for forfeiture
3 to be imposed.

4 THE COURT: Okay. And that was ordered.

5 I will, just for purposes of the record -- I know I
6 said it during our closed session, but I'll say it publicly
7 here. I do impose 89 months' imprisonment. It's a little bit
8 of odd math. What I did was give a 25 percent reduction from
9 121, which was the bottom of the advisory guideline range, and
10 then I essentially rounded up that one extra month that I would
11 have taken off on a variance.

12 So 90 months would technically be 25 percent of 120
13 months. 90 months plus a quarter of a month or something would
14 be 25 percent of 121 months. So I rounded it to 89 months,
15 essentially, is what I did -- or, I'm sorry, 89.75 I guess would
16 be what it would have been, and I rounded it down.

17 Anything else, Mr. Bergmann?

18 MR. BERGMANN: Nothing further, Your Honor.

19 THE COURT: Do you have any questions about your
20 sentence, Mr. Paine?

21 THE DEFENDANT: No, Your Honor.

22 THE COURT: Okay. Mr. Becker?

23 MR. BECKER: No, Your Honor.

24 THE COURT: Probation?

25 THE PROBATION OFFICER: No, Your Honor.

1 THE COURT: Good luck to you, Mr. Paine.
2 We are adjourned.
3 (Proceedings concluded at 11:47 a.m.)
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1 C E R T I F I C A T E

2 I, Kelli M. Mulcahy, a Certified Shorthand Reporter of
3 the State of Iowa and Federal Official Realtime Court Reporter
4 in and for the United States District Court for the Southern
5 District of Iowa, do hereby certify, pursuant to Title 28,
6 United States Code, Section 753, that the foregoing is a true
7 and correct transcript of the stenographically reported
8 proceedings held in the above-entitled matter and that the
9 transcript page format is in conformance with the regulations of
10 the Judicial Conference of the United States.

11 Dated at Des Moines, Iowa, this 20th day of November,
12 2017.

13

14

15 /s/ Kelli M. Mulcahy
16 Kelli M. Mulcahy, CSR, RMR, CRR
17 Federal Official Court Reporter

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

No: 17-3390

United States of America

Appellee

v.

James Lewis Paine, also known as James L. Paine

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Council Bluffs
(1:16-cr-00056-SMR-18)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

March 14, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans