

APPENDIX

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APPENDIX A

**United States Court of Appeals
for the Eighth Circuit**

No. 21-1609

United States of America,

Plaintiff – Appellee,

v.

Mark E. Pulsifer,

Defendant – Appellant.

Appeal from United States District Court
for the Southern District of Iowa – Western

Submitted: January 11, 2022

Filed: July 11, 2022

Before COLLOTON, KELLY, AND KOBES, Circuit
Judges.

COLLOTON, Circuit Judge.

Mark Pulsifer pleaded guilty to one count of distributing at least fifty grams of methamphetamine. *See* 21 U.S.C. § 841. At sentencing, the district court¹ denied Pulsifer's request to be sentenced according to the sentencing guidelines without regard to the statutory minimum penalty of 21 U.S.C. § 841(b). Pulsifer relied on 18 U.S.C. § 3553(f), which allows a court to sentence offenders who meet certain criteria below the otherwise applicable statutory minimum term of imprisonment. Pulsifer disputes the district court's ruling, but we conclude that he does not qualify for sentencing under § 3553(f), and therefore affirm the judgment of the district court.

Pulsifer pleaded guilty to distributing fifty grams or more of methamphetamine. *See* 21 U.S.C. § 841(a)(1), (b)(1)(A). Because Pulsifer committed the offense after he had sustained a final conviction for a prior serious drug felony, the statutory minimum penalty was fifteen years' imprisonment. *Id.* § 841(b)(1)(A)(viii). At sentencing, Pulsifer argued that he was eligible for a guideline sentence without regard to the statutory minimum based on § 3553(f).

The district court ruled that Pulsifer was ineligible for sentencing under § 3553(f) and did not apply the guideline range that would have governed if there were no statutory minimum. Instead, starting with the fifteen-year minimum, the court made an unrelated reduction under different authority and sentenced Pulsifer to 162 months' imprisonment. Pulsifer appeals, arguing that the district court erred in concluding that § 3553(f) was inapplicable. We review

¹ The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

the district court's interpretation of the statute *de novo*.

To qualify for a sentence under the guidelines without regard to the statutory minimum, a defendant must satisfy each of the five subsections in § 3553(f). This appeal concerns only § 3553(f)(1), which requires the court to find that—

- (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. § 3553(f)(1).

The statute calls for an inquiry into whether a defendant has certain prior “offenses” under the sentencing guidelines—a “1-point offense,” a “prior 3-point offense,” and a “prior 2-point violent offense.” The guidelines, however, do not assign criminal history points based on a prior “offense,” but tally them according to the length of “each prior sentence of imprisonment.” *See* USSG § 4A1.1. A “prior sentence” means any sentence imposed for conduct that is not part of the instant offense of conviction. *Id.* § 4A1.2(a).

We have considered whether Congress meant to introduce a new concept of a “prior offense” that accrues criminal history points, but we think not. The statute requires an evaluation of whether a defendant has a particular prior offense “as determined under the sentencing guidelines.” The only relevant

determination available “under the sentencing guidelines” is whether to add a certain number of criminal history points based on a defendant’s prior sentence. There is no separate determination under the guidelines that would assign criminal history points to a defendant’s prior offense. If, for example, a defendant commits a felony offense for which a two-year sentence was imposed twenty years before the commencement of the instant offense, the number of criminal history points assigned is zero, because the sentence is outside the applicable time period. USSG § 4A1.2(e). There is no separate determination under the guidelines that would assign points to the old felony “offense.” We therefore understand Congress to have used a form of common-sense shorthand in § 3553(f)(1) that incorporated the determinations of criminal history points under USSG § 4A1.1.

On this understanding, a defendant has a “prior 3-point offense” if the sentencing court is required to add three points under the guidelines for a prior sentence of imprisonment exceeding one year and one month. USSG § 4A1.1(a). A defendant has a “prior 2-point violent offense” if the court is required to add two points under the guidelines for a prior sentence of imprisonment of at least sixty days resulting from a conviction for a crime of violence that was not counted in § 4A1.1(a). *See id.* § 4A1.1(b); 18 U.S.C. §§ 16, 3553(g). In determining whether a defendant has at least four criminal history points, the court must exclude a prior “1-point offense”—that is, a prior sentence not counted in § 4A1.1(a) or (b). *See* USSG § 4A1.1(c).

The dispute on appeal is whether a defendant is eligible for a sentence below the statutory minimum if

he does not have all three of the elements of criminal history enumerated in § 3553(f)(1), or whether a finding that the defendant has at least one of those three elements renders him ineligible. Pulsifer conceded that he had both (a) more than four criminal history points and (b) a prior three-point offense, as described in § 3553(f)(1)(A) and (B). But because he did not have a prior two-point violent offense as described in § 3553(f)(1)(C), Pulsifer maintained that he was eligible for a guideline sentence without regard to the statutory minimum. This is a new issue arising from amendments to § 3553(f) in the First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.

A defendant qualifies under § 3553(f)(1) if he “does not have—” the criminal history points specified in (A), the prior offense listed in (B), *and* the prior offense listed in (C). The parties discuss whether “and” should be read conjunctively or disjunctively, but we do not believe that is the important question. The most natural reading of “and” is conjunctive—“along with or together with.” *Webster’s Third New International Dictionary* 80 (2002). Although the word is sometimes “ill chosen” and means “or” when considered in context, *see United States v. Fisk*, 70 U.S. 445, 447 (1865), we typically would not construe a statute to carry that nonliteral meaning unless there were clear indications in the statute that dictate the result. *See* 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 21:14 (7th ed. 2021) (“[T]he words are not interchangeable, and their strict meaning should be followed when their accurate reading does not render the sense of the statute confusing and there is no clear legislative intent to have the words not mean what they strictly should.”).

The important question here is in what sense the statute uses the word “and” in the conjunctive. When used as a conjunctive, the word “and” has “a distributive (or several) sense as well as a joint sense.” *Garner’s Dictionary of Legal Usage* 639 (3d ed. 2011). That is, the phrase “A and B” could mean “A and B, jointly or severally.” *Id.*; see Scott J. Burnham, *The Contract Drafting Guidebook* 163 (1992). As applied to § 3553(f)(1), a “joint” sense of “and” would mean that a defendant is eligible for relief unless the court finds that he does not jointly have all three elements listed in (A), (B), and (C). The “distributive” sense of the word would mean that the requirement that a defendant “does not have” certain elements of criminal history is distributed across the three subsections, and a defendant is ineligible if he fails any one of the three conditions.

There is a strong textual basis to prefer a distributive reading of “and” in § 3553(f). If “and” is read jointly, then subsection (A) is rendered superfluous. A defendant who has a prior three-point offense under subsection (B) and a prior two-point violent offense under subsection (C) would *always* meet the criterion in subsection (A), because he would always have more than four criminal history points. Thus, reading “and” in its joint sense would leave subsection (A) without any independent operation.

It is “a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation omitted). Only the distributive interpretation avoids surplusage. Subsection (A) has an independent operation only if “and” is read severally: a defendant who has more than four

criminal history points, but does not meet the conditions in subsection (B) or subsection (C), is ineligible for a sentence below the statutory minimum. The distributive reading therefore gives meaning to each subsection in § 3553(f)(1), and we conclude that it is the better reading of the statute.²

Rather than address the presumption against surplusage, Pulsifer contends that a different canon of interpretation—the presumption of consistent usage—favors reading “and” in the joint sense. Under that canon, we presume that identical words used in different parts of the same statute have the same meaning unless the text or context suggests otherwise. *See IPB, Inc. v. Alvarez*, 546 U.S. 21, 33-34 (2005). Pulsifer points out that the “and” connecting the five statutory requirements in § 3553(f) means that a defendant must satisfy all five criteria to qualify for the limitation of statutory minimums. *See United States v. Maupin*, 3 F.4th 1009, 1016 (8th Cir. 2021). He argues that the consistent-usage canon calls for a presumption that the “and” connecting the three subsections in § 3553(f)(1) likewise means that a defendant is ineligible for relief only if he meets each condition in § 3553(f)(1).

² The Ninth Circuit in *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), *petition for reh’g filed*, believed that § 3553(f)(1) employs a “conjunctive negative proof” in which the defendant is ineligible only if he meets all three conditions “cumulatively.” *Id.* at 436. As we see it, however, that conclusion mistakenly assumes that the word “and” is used in a joint sense, and the decision was reached only after revising the meaning of § 3553(f)(1)(C) to avoid surplusage. *See id.* at 444-46 (M. Smith, J., concurring in part, dissenting in part, and concurring in the judgment).

Any presumption of consistent usage is overcome in this case by the contextual differences between the lists in § 3553(f) and § 3553(f)(1). The presumption of consistent usage “readily yields to context,” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014) (internal quotation omitted), and context here indicates that the “and” in each list serves a different function. The list in § 3553(f) states that the limitation on statutory minimums applies “if the court finds at sentencing ... that” the defendant satisfies subsections (1), (2), (3), (4), and (5). 18 U.S.C. § 3553(f). Section 3553(f) thus contains a list of affirmative requirements that naturally employs “and” in the joint sense. The list in § 3553(f)(1) works differently. Section 3553(f)(1) introduces a negative list in which “and” must be employed in the several or distributive sense to avoid surplusage.

The practical effect of reading “and” in its distributive sense is that § 3553(f)(1) serves as an eligibility checklist for offenders who seek to avail themselves of the limitation on statutory minimums. The text distributes the introductory phrase “does not have” across each statutory condition. A court will find that § 3553(f)(1) is satisfied only when the defendant (A) does not have more than four criminal history points, (B) does not have a prior three-point offense, and (C) does not have a prior two-point violent offense. If a defendant does not meet all three conditions, then the defendant is not eligible to be sentenced under the sentencing guidelines without regard to the statutory minimum.

Here, it is undisputed that Pulsifer has a criminal history that meets the criteria in subsections (A) and (B). He has more than four criminal history points and

a prior three-point offense. Those circumstances make him ineligible for sentencing under § 3553(f). That Pulsifer does not also have a prior two-point violent offense that would meet the condition in subsection (C) is immaterial.

Pulsifer also suggests that the rule of lenity counsels in favor of his interpretation of § 3553(f)(1). That rule applies, however, only when there remains a “grievous ambiguity or uncertainty in the statute,” *Muscarello v. United States*, 524 U.S. 125, 139 (1998) (internal quotation omitted), after the court has “seized every thing from which aid can be derived.” *Chapman v. United States*, 500 U.S. 453, 463 (1991) (internal quotation omitted). Here, the traditional tools of interpretation reveal the meaning of the provision, and there is no grievous ambiguity.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	JUDGMENT IN A
	)	CRIMINAL CASE
)	
v.	)	Case Number: 1:20-cr-
	)	00028-001
)	
MARK EDWARD PULSIFER	)	USM Number: 15108-
	)	047
)	
	)	<u>Jerrold Robert Black</u>
	)	Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s) One of the Indictment filed on July 28, 2020
- 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),	Distribution of 50 grams or More of	04/09/2020	One

Metham-
phetamine

841(b)(1)(A),
851

See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

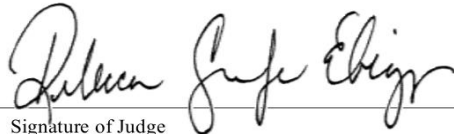
The defendant has been found not guilty on count(s) _____

Count(s) Two 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 2, 2021

Date of Imposition of Judgment



Signature of Judge

Rebecca Goodgame Ebinger, U.S. District Judge

Name of Judge

Title of Judge

March 2, 2021Date**IMPRISONMENT**

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

162 months as to Count One of the Indictment filed on July 28, 2020.

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

The Court recommends the defendant be designated to FMC Rochester for treatment of acute medical needs related to recent shooting reflected in PSR paragraph 102. The Court further recommends the defendant be afforded the opportunity 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 is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

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

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Ten years as to Count one of the Indictment filed on July 28, 2020.

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 any other conditions on the attached page.

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 plant 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 _____

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a cognitive behavioral treatment program, which may include journaling and other curriculum requirements, as directed by the U.S. Probation Officer.

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.

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.

CRIMINAL MONETARY PENALTIES

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

- Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage



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.

* 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.

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 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 8344, Des Moines, IA. 50306-9344.

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

Case Number

Defendant and Co-Defendant Names

<i>(including defendant number)</i>	Total Amount
-------------------------------------	--------------

Joint and Several Amount	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:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTAs assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION**

United States of America,	)	Case No. 1:20-cr-28
Plaintiff,)	
	)	Transcript of Sentenc-
vs.	)	ing Proceedings
)	
Mark Edward Pulsifer,)	
Defendant.)	
)	
)	

COURTROOM,
THIRD FLOOR
U.S. COURTHOUSE
8 South Sixth Street
Council Bluffs, Iowa
51501
Tuesday, March 2,
2021
10:59 a.m.

BEFORE: THE HONORABLE REBECCA GOOD-
GAME EBINGER, DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: RICHARD ROTHROCK
United States Attorney's Office
8 South Sixth Street, Suite 348
Council Bluffs, IA 51501

For the Defendant: J. ROBERT BLACK
Attorney at Law
1904 Farnham Street,
Suite 425
Omaha, NE 68102

Chelsea Wheeler, CSP, RPR, FCRR
United States Courthouse
123 East Walnut Street
Des Moines, IA 50309

EXHIBITS

<u>DEFENDANT'S EX-</u>	<u>OFFERED</u>	<u>RECEIVED</u>
<u>HIBITS</u>		
A Sealed Exhibit	7	7
B Sealed Exhibit	7	7
C Sealed Exhibit	7	7

PROCEEDINGS

(In open court with the defendant present.)

THE COURT: Thank you. Please be seated.

We are here in the matter of the United States of America versus Mark Pulsifer. This is Case No. 1:20-cr-28. This is the time and date set for sentencing in this matter. My name, as you know, is Rebecca Goodgame Ebinger. I'm the district judge presiding.

If counsel would please remain seated with your masks on and introduce yourselves for purposes of the record.

MR. ROTHROCK: Your Honor, Richard Rothrock, Assistant United States Attorney, representing the Government. With me at counsel table is Special Agent Jake Burger of the Division of Narcotics Enforcement for the State of Iowa.

MR. BLACK: And good morning, Your Honor. I'm Robert Black. I'm representing Mark Pulsifer, who is present at counsel table.

THE COURT: Thank you.

I don't know where my microphone is. Can you all hear me okay?

MR. ROTHROCK: Yes, Your Honor.

THE COURT: Okay.

COURTROOM DEPUTY: I think it's this right here.

THE COURT: There it is.

Mr. Pulsifer?

THE DEFENDANT: Yes. Yes, ma'am.

THE COURT: Do you recall being charged by way of a two-count indictment filed on July

28 of last year with two different drug trafficking offenses?

THE DEFENDANT: Yes, ma'am.

THE COURT: Originally, on October 16 of 2020, you pleaded guilty to the first count of the two-count indictment, and then on November 4 of 2020, I accepted that plea and adjudicated you guilty.

At the time of your plea, the United States Magistrate Judge who presided informed you that the violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 851 that you pleaded guilty to carried a mandatory minimum term of imprisonment of 15 years and up to life imprisonment based upon your prior conviction under 21 U.S.C. 851.

Do you recall that, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And the Government noticed that prior conviction. You acknowledge that you were previously convicted of that serious drug felony as listed in the 851 notice?

THE DEFENDANT: Yes, ma'am.

THE COURT: The magistrate judge recommended to me that I accept your plea of guilty and adjudicate you guilty, and I did so on November 4, as I stated.

Do you understand, sir, that you're here today for the purpose of being sentenced on your plea of guilty?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you continue to acknowledge that you are, indeed, guilty of the crime charged in Count 1, distribution of 50 grams or more

of methamphetamine after having been convicted of a serious drug felony?

THE DEFENDANT: Yes, ma'am.

THE COURT: Before I proceed further with the hearing, I need to make sure that you're fully able to participate here today.

Are you currently under the influence of alcohol?

THE DEFENDANT: No, ma'am.

THE COURT: Are you under the influence of any illegal substances?

THE DEFENDANT: No, ma'am.

THE COURT: Are you taking any prescription medications?

THE DEFENDANT: No, I'm not.

THE COURT: Are you suffering from any mental health or physical illness or ailment that would make it difficult for you to understand and participate in today's hearing?

THE DEFENDANT: No, I'm not.

THE COURT: Thank you.

If at any time during this hearing, Mr. Pulsifer, you do not understand something I say or you have a question, would you please stop me and let me know?

THE DEFENDANT: Yes, ma'am.

THE COURT: The most important thing is that you understand the proceedings.

In anticipation of this hearing, the United States Probation Office prepared a presentence investigation report. I should note that Senior

U.S. Probation Officer Daniel Prather is here with us today, and he is the author of the presentence investigation report.

I have reviewed that report. I have also reviewed the sentencing memoranda and motions filed by the parties. I have reviewed the Government's response to the defendant's memorandum. I received the defense's proposed Exhibits A, B, and C. I have reviewed those items. I have also reviewed the materials related to the plea and the docket as a whole.

Are there any other materials that need to be brought to my attention, Mr. Rothrock?

MR. ROTHROCK: Your Honor, just so I'm clear, there was a filing this morning by the Government, No. 54. I assume the Court is referring to that also.

THE COURT: The motion I mentioned was that motion.

MR. ROTHROCK: Thank you, Your Honor. Nothing else for the Government, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: Nothing further at this time, Your Honor.

THE COURT: These microphones work better than our microphones in Des Moines. I have been asking attorneys to stay seated just so that it's easier to hear with the masks. I appreciate you rising to address the Court, but you may remain seated throughout the proceeding.

Mr. Rothrock, any objections to A, B, or C?

MR. ROTHROCK: No objections.

THE COURT: Those are admitted at this time.

So let's turn our attention to the presentence investigation report, then.

Mr. Rothrock, have you had the opportunity to review that report?

MR. ROTHROCK: Your Honor, I have.

THE COURT: And does the Government have any outstanding factual objections, corrections, or omissions to bring to the Court's attention?

MR. ROTHROCK: None, Your Honor.

THE COURT: Mr. Black, have you and your client had the opportunity to review that report?

MR. BLACK: We have, Your Honor.

THE COURT: Could you make a record as to how you went about reviewing the document with your client?

MR. BLACK: We reviewed the document in person while my client was in custody at Pottawattamie County Jail, Your Honor. I was present and brought a hard copy of the document, and we went over it together.

THE COURT: After that review, do you have any outstanding factual objections or corrections to bring to the Court's attention?

MR. BLACK: No, Your Honor.

THE COURT: Thank you.

Mr. Pulsifer, we've been talking about the presentence investigation report in this case. Mr. Black explained to me how he went about reviewing this report with you.

Do you recall going over the report with Mr. Black as he explained?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you had a full and fair opportunity to review the information contained in the presentence investigation report?

THE DEFENDANT: Yes, we have.

THE COURT: Mr. Black has informed me that after that review, there are no outstanding factual objections, corrections, or things that are wrong with the facts contained in the report that he needs to bring to my attention.

Do you understand that, sir?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you agree that the report is factually accurate or correct?

THE DEFENDANT: I do, Your Honor.

THE COURT: Thank you.

Based upon that record, the Court will rely upon the unobjected to factual information contained in the presentence investigation report for purposes of determining the appropriate sentence to impose in this case.

That brings us to a discussion of the advisory guideline calculation. As we know, the guidelines are advisory, and the Court treats them as such, but the Court must consider them in determining the appropriate sentence to impose in this case.

In this case the mandatory minimum drives the calculation, but we'll go through that as it's referenced in the report.

Starting on page 19—excuse me—page 4, paragraph 19, based upon the offense involving at least 50 grams but less than 150 grams of actual methamphetamine, there's a base offense level of 30. There are no adjustments to the offense level. There are two levels off for acceptance of responsibility.

Does the government move for the third level?

MR. ROTHROCK: Yes, Your Honor.

THE COURT: That results in a total offense level of 27. The defendant is a criminal history category V. The resulting range would otherwise be lower than the advisory guideline range, but because there is a 15-year mandatory minimum under the statute, the guideline range is 150 months.

Supervised release is ten years. Probation is not an option under either the guidelines or the statute, and the fine is recommended between 25,000 and \$20 million.

Does the Government have any objections to those calculations?

MR. ROTHROCK: I may have misheard. I believe the Court said 150 months. I believe it's 180 months for the 15 years, but I'm not a mathematician.

THE COURT: No. It is 180 months. I said 150. You're right. Fifteen-year mandatory minimum is 180 months. I apologize for misspeaking. Thank you.

MR. ROTHROCK: The Government has no arguments with the Court's recitation.

THE COURT: Mr. Black?

MR. BLACK: Separate and apart from our motion for—or our objection concerning safety valve, Your Honor, we have no objection to the Court's calculation.

THE COURT: You agree that the calculation is correct under the law as it's set forth, but you believe the law has been improperly applied as to 3553(f)?

MR. BLACK: That is correct, Your Honor.

THE COURT: Okay. I have read your written materials, and I have reviewed the case out of California that you have cited.

Would you like to be heard in support of your argument in favor of the Court finding that the defendant is eligible under 3553(f)?

MR. BLACK: Only very briefly, Your Honor.

3553(f) is read in the conjunctive. I think the Government typically would want to look at its subparts to be read in the conjunctive. We believe that the statutory interpretation, then, should be that the layout of the entire statute, that Section 3553(f) should be read in the conjunctive, including those portions that concern points calculations. So—

THE COURT: But if it's read in the conjunctive, isn't that against your argument? He would have to have all three of those things not be the case. You're reading it in the disjunctive meaning that if he didn't have any one of those things, he would be able to be released from the burden of safety valve.

MR. BLACK: That's correct, Your Honor. Perhaps my definition of that is incorrect. Our

position is that all three of those criteria must be satisfied in order for him not to be eligible for safety valve.

THE COURT: So when it says that he has to have all three when it says “and”—and I had—my notes are now back in chambers.

When 3553(f) states (A), (B), and (C) it says “the defendant does not have”—the language of 3553(f)(1) states that the eligibility can be set aside if the defendant does not have more than four criminal history points, a prior three-point offense, a prior two-point violent offense, and those are listed in the conjunctive with an “and.”

Your position is that he must not have all of those?

MR. BLACK: That is correct, Your Honor, in order for 3553(f) to not apply to him. He is precluded from having each of those. In other words, he would need to—his criminal history would need to fulfill each of those criteria in order for 3553(f) to not apply to him.

THE COURT: Thank you.

Mr. Rothrock, I read your written materials.

MR. ROTHROCK: Thank you, Your Honor.

Again, it’s the Government’s position that that makes the statute simply useless. I mean, there’s no reason—it’s Congress’s purpose that the Court needs to consider. As the Government has pointed out, if you have a two and a three, there’s no reason for the four.

I did find yet another case, Your Honor. It's *Westerfeld, W-e-s-t-e-r-f-e-l-d, v. Independent Processing, LLC*. It's at 621 F.3d 819, and specifically at page 824, it states that while the starting point for interpreting the statute is the language of the statute itself, the Court must interpret the words of the statute in light of the purposes Congress sought to serve. The Court's task is to avoid interpreting the statute in a manner that renders any section of the statute superfluous or fails to give effect to all of the words used by Congress.

I guess that sums up the Government's argument, Your Honor. If we are to follow the California District Court's lead, it makes 3553(f) untenable because, again, there's an "and" for organizer, leader and—I drew a blank. But organizer, leader, and continued criminal enterprise, and none of that would make sense, Your Honor.

We believe that any one of those criteria in (f)(A) should qualify the defendant for his—or disqualify him from safety valve, Your Honor.

And we would submit the matter on the written matters and those comments.

THE COURT: So the Court has read the *Lopez* decision out of the Southern District of California, and I do not find it persuasive. The language here is that safety valve applies unless the defendant—the defendant is eligible for safety valve under all of the other criteria—if he meets all of the other criteria and the defendant does not have these three things.

This defendant does have one of those three things, and so he is, therefore, ineligible for safety valve. The converse is not true. The fact that he—the argument that is being made is that if the

defendant—the defendant must have all three things in order to be given the ability to have the safety valve relief simply is not consistent with statutory interpretation.

Here the defendant has more than four criminal history points, excluding any criminal history points resulting from a one-point offense, as determined under the sentencing guidelines, and for that reason, because he has that, he is not eligible for safety valve.

The analysis under *Lopez* simply is not persuasive. The Court notes that there are—the issue in that case was somewhat distinguishable in terms of the defendant’s history and the qualifications there, but both based upon the Government’s argument as to the purpose of the statute and the plain reading of the requirement that he has to not have those things and this defendant does have more than four criminal history points, he is not eligible for safety valve.

Any additional record in that regard from the defense?

MR. BLACK: No, Your Honor. I think our objection has been made thoroughly.

THE COURT: Mr. Rothrock, any additional record?

MR. ROTHROCK: No, Your Honor. Thank you.

THE COURT: So that objection is overruled.

Mr. Black, my law clerk should have given you some headsets.

Do you have a headset in front of you?

MR. BLACK: I do, Your Honor.

THE COURT: Would you prefer for the next matter to be heard utilizing headsets and white noise, or would you prefer to proceed under seal in open court?

MR. BLACK: We would prefer to proceed under seal with the courtroom cleared of any spectators, Your Honor.

THE COURT: Okay. Anyone who is not an employee of the Court or involved directly in the proceeding will be removed from the courtroom at this time. Thank you.

(Per order of the Court, pages 16 through 24 are filed under seal.)

* * *

(In open court with the defendant present.)

THE COURT: This brings us to the ultimate question in the case, which is the appropriate disposition.

Does the Government wish to present any evidence as to disposition?

MR. ROTHROCK: No, Your Honor.

THE COURT: Does the defense wish to present any additional evidence as to disposition?

MR. BLACK: No, Your Honor, not beyond Mr. Pulsifer's statement to the Court.

THE COURT: And I have read the materials that were submitted on his behalf.

The gallery member who was previously in the courtroom, has she been notified that the courtroom is open?

COURT SECURITY OFFICER: She has, Your Honor.

THE COURT: Thank you.

So at this time, Mr. Black, would you like to be heard in support of the sentence to be imposed?

MR. BLACK: Yes, Your Honor. Thank you.

Mr. Pulsifer is nearly 60 years old, Your Honor, and he obviously can't run from his record. He understands the Court has to give that some weight, as pointed to by the Government in their sentencing memorandum.

We would ask the Court to impose the minimum here, the mandatory minimum, as required after our motion for safety valve relief was denied. A 180-month sentence is well above and beyond what a sentencing calculation would be at 120 to 150 months under the sentencing guidelines.

So under these particular circumstances, even considering Mr. Pulsifer's lengthy criminal history, the fact that his age and physical health are what they are operate as something of a mitigating factor against that, Your Honor, certainly to the degree that, the defense would argue, a mandatory minimum sentence here is appropriate for his sentence and for what he has been convicted of, Your Honor.

With that, I have nothing further.

THE COURT: And you agree that the mandatory minimum at this time is 162 based on the Court's ruling?

MR. BLACK: Yes, Your Honor.

THE COURT: Thank you.

Mr. Pulsifer, now is the time during the hearing that you have the opportunity to speak. You do not have to say anything, but if you would like to, the Court will consider it.

Is there anything you would like to say, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Thank you.

THE DEFENDANT: I would just like to take this opportunity to apologize to the people and their families that I have caused harm to for my illegal activities, and I just—that's all I have to say. And I apologize to my family and my loved ones also.

THE COURT: Thank you, sir.

MR. BLACK: If I may, Your Honor, simply to clarify on that last point. The mandatory minimum is 180, and then after application of the Court's reduction here, so we are requesting that the Court would impose what originally would have been a 180-month sentence and then reduce that to 162 months, just so my position is clear, Your Honor.

THE COURT: Yes.

Mr. Rothrock, on behalf of the Government.

MR. ROTHROCK: Your Honor, the Court has articulated the reasons for the 162-month sentence. We are in agreement with that. We would

ask the Court not to impose a fine. Supervised release, as indicated by the presentence report, should be imposed.

And we would submit the matter with those comments unless the Court has questions for the Government, Your Honor.

THE COURT: Thank you.

The Court is required to consider a number of factors before deciding on an appropriate sentence in this and every case, and those factors are set forth in Title 18, United States Code, Section 3553(a). They include the defendant's history and characteristics, and the nature and circumstances of this offense.

The Court must also consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, and to adequately deter future criminal conduct, both for this defendant and for others who might contemplate committing such an offense in the future.

The Court has to consider the need to protect the public and to provide the defendant with educational training or other needs in the most effective manner.

The Court has to consider the sentencing guidelines and the advice they provide as well as the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.

I may not speak about each one of the statutory considerations specifically in articulating the reasoning for my sentence, but in determining the

appropriate sentence to impose, I have considered each and every one of them.

Ultimately, the sentence the Court imposes must be sufficient but not greater than necessary to serve the purposes of sentencing.

Here the mandatory minimum largely drives the sentence, and the Court's ruling—the sentence—based upon the defendant's criminal history, the statutes require a mandatory minimum term of imprisonment with credit for the motion previously granted, and the Court finds that that is the sentence to be imposed in this case.

Counsel, do you know of any legal reason why the Court should not impose sentence at this time?

MR. ROTHROCK: The Government knows of none, Your Honor.

MR. BLACK: No, Your Honor.

THE COURT: Then based upon the Court's review of the criteria set forth in Title 18, United States Code, Section 3553(a), and the circumstances of this case and for the reasons I have explained, it is the judgment of the Court that the defendant, Mark Edward Pulsifer, is sentenced to 162 months of imprisonment.

That sentence is within the advisory guideline range and is imposed for the reasons I have previously stated.

The Court does not impose a fine, finding that the defendant does not have the reasonable ability to pay a fine. Restitution is not at issue and is not ordered.

The Court does impose a \$100 special assessment due and payable immediately without interest to the United States Clerk of Court for the Southern District of Iowa.

The Court imposes a ten-year term of supervised release to commence immediately following the term of imprisonment.

Within 72 hours of release from the custody of the Bureau of Prisons, Mr. Pulsifer, you'll be required to report in person to the probation office in the district to which you are released.

While on supervised release, you shall not commit another state, federal, or local crime; you shall not unlawfully use a controlled substance; and you shall not unlawfully possess a controlled substance.

You'll be subject to at least one drug test within 15 days of your release and at least two more thereafter, and you must cooperate in the collection of DNA.

You are a felon. As you know, you cannot possess a firearm, destructive device, or ammunition either during your term of supervised release or at any time thereafter.

You'll be required to abide by the standard conditions of supervised release as set forth by the United States Sentencing Commission in addition to the special conditions of supervised release that were proposed in the presentence investigation report and were unobjected to by the defense.

I'll briefly summarize those for you now. They're in part G beginning at paragraph 146. You'll

note that they'll be enforced in full as written, but I'll just summarize them at this time.

Paragraph 146, you'll be required to participate in a program of cognitive behavioral treatment.

You'll be subject to a search condition, and that search condition can be effectuated with or without the assistance of law enforcement, including the United States Marshals Service.

You'll be required to participate in a program of testing and treatment for substance abuse. In furtherance of that treatment, you'll be restricted from the use of alcohol or any other intoxicants while you're on supervision as well.

You will be restricted from patronizing businesses where more than 50 percent of their revenue is derived from the sale of alcoholic beverages, so bars, taverns, and the like.

Both the length of the term of supervision and the conditions imposed are based upon an individualized assessment of this defendant's supervision needs after reviewing and considering each of the relevant factors under Title 18, United States Code, Sections 3553(a) and 3563(b).

Mr. Black, any requests as to designation or programming?

MR. BLACK: Your Honor, there's a little bit of difficulty because Mr. Pulsifer is going to need to go to a medical facility first. So in the short term, he's just requesting Rochester, and I don't think we have any additional long-term requests beyond that, Your Honor. His care may take some time there.

THE COURT: Would you like for me to recommend him to have the opportunity to participate in the 500-hour residential drug abuse treatment program? I note that he was unsuccessful in his attempt at that program previously, so perhaps this time will be a better outcome for him.

MR. BLACK: We would appreciate that recommendation, Your Honor.

THE COURT: So because of the—although the information about his recent shooting is included in the presentence investigation report, I suggest that we put in the judgment in the recommendation language that suggests that the defendant be designated to FMC Rochester for treatment of acute medical needs related to his recent shooting as reflected in paragraph 102.

I just think without that—it has been very difficult of late to have people go to a medical facility, and I think that that specificity might assist in having Mr. Pulsifer receive that care.

Any objection to that?

MR. BLACK: No, Your Honor. We would agree with that.

THE COURT: Okay. So I'll include more specific language than typical in that recommendation because of the fact that this isn't an ongoing problem but something that needs acute care at this time.

MR. BLACK: Thank you, Your Honor.

THE COURT: And I will include the recommendation that the defendant be afforded the opportunity to participate in the 500-hour residential drug abuse treatment program.

Any other recommendations you would like me to make, sir?

MR. BLACK: No, Your Honor.

THE COURT: Any forfeiture?

MR. ROTHROCK: No, Your Honor.

THE COURT: Counts to be dismissed?

MR. ROTHROCK: Count 2, Your Honor. The Government would move for that dismissal.

THE COURT: And the Court grants that motion.

Mr. Pulsifer, you do have the right to appeal the sentence that I have just imposed. If you wish to pursue an appeal, you must file a written notice of appeal within 14 days of the entry of judgment.

Do you understand the time limit for filing a notice of appeal, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In addition, if you wish to pursue an appeal and you cannot afford an attorney, one can be appointed to represent you. You can also have transcripts of this or any other relevant proceedings made at no cost to you in furtherance of your appeal if you qualify financially.

Do you understand your appeal rights, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Thank you.

Counsel, any matters I failed to address?

MR. ROTHROCK: The Government knows of none, Your Honor.

MR. BLACK: No, Your Honor.

THE COURT: Anything further on behalf of the Government?

MR. ROTHROCK: No, Your Honor.

THE COURT: On behalf of the defense?

MR. BLACK: Nothing further, Your Honor.

THE COURT: The defendant is committed to the custody of the United States Marshals Service for transportation to the designated Bureau of Prisons facility.

Mr. Pulsifer, I wish you the best moving forward, sir.

THE DEFENDANT: Thank you for your consideration and your time.

THE COURT: Thank you, sir.

That will conclude the hearing.

(The sentencing concluded at 11:41 a.m.)

CERTIFICATE

I, Chelsey Wheeler, a Certified Shorthand Reporter of the State of Iowa and Federal Official Realtime Court Reporter in and for the United States District Court for the Southern District of Iowa, do hereby certify, pursuant to Title 28, United States Code, Section 753, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-titled matter and that the transcript page format is in conformance with the regulation of the Judicial Conference of the United States.

DATED this 1st day of April, 2021.

47a

/s/ *Chelsey Wheeler*

Chelsey Wheeler

Certified Shorthand Reporter