

No. 25-

IN THE
Supreme Court of the United States

MICHAEL HENDERSON,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner pleaded guilty to a drug offense and a Presentence Investigation Report (“PSR”) was prepared, which included an enhancement for possession of a firearm. Petitioner objected and, with no opposition from the Government, the enhancement was removed. The Government never argued for the application of the enhancement and in fact adopted the resulting Guideline range in its sentencing memorandum. After the filing of the sentencing memoranda but before sentencing, the district court, in light of new Circuit Court authority, ordered additional briefing regarding whether Petitioner was eligible for “safety valve” relief under 18 U.S.C. § 3553(f). In its brief, the Government argued that several Guideline enhancements should apply (including, for the first time, the firearm enhancement), although it made no argument that it had good cause for doing so in such delinquent fashion. The district court, without making a finding of good cause, entertained the Government’s arguments and, in an order entered prior to the sentencing hearing, applied the firearm enhancement and enhanced Petitioner’s Guideline range accordingly.

This Petition presents two issues:

I. Whether, under Rule of Criminal Procedure 32(i)(1)(D), a district court’s order for additional briefing on safety valve eligibility – which notes that the defendant was not assessed certain Guideline enhancements in the PSR to which the Government failed to object – constitutes “good cause” so as to allow the Government to make untimely objections to the PSR.

II. Whether a district court has an independent responsibility to correctly calculate the advisory Guideline range in which it is not “limited by the parties’ arguments or the recommendations in the presentence report.”

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Henderson*, No. 2:22-cr-00065, U.S. District Court for the Southern District of West Virginia. Judgment entered April 21, 2023.
- *United States v. Henderson*, Appeal No. 23-4313, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on November 17, 2025.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *United States v. Henderson*, 159 F.4th 213 (4th Cir. 2025), is published and attached to this Petition as Appendix A. The written order addressing the Government's belated objections is attached to this Petition as Appendix B. The judgment order is unpublished and is attached to this Petition as Exhibit C.

JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on November 17, 2025. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of that denial. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of Rule 32 of the Rules of Criminal Procedure, which provides, in pertinent part:

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the

objections. The probation officer may then investigate further and revise the presentence report as appropriate.

* * *

(i) Sentencing.

(1) In General. At sentencing, the court

* * *

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

STATEMENT OF THE CASE

On March 29, 2022, an indictment was filed in the Southern District of West Virginia charging Michael Henderson with possession with intent to distribute 500 grams or more of a mixture containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1). JA009.¹ On November 17, 2020, a superseding indictment was returned charging Henderson with the same offense. JA010. Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Henderson pleaded guilty to the charge in the superseding indictment. JA-11-014. A judgment order was entered on April 21, 2023. JA106-113. Henderson timely filed a notice of appeal on May 3, 2023. JA114. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

¹ “JA” refers to the Joint Appendix that was prepared in this case for the appeal to the Fourth Circuit.

A. Facts Pertinent to the Issue Presented

This case arose from the stop of a taxi in which Henderson was a passenger and the discovery of a large amount of methamphetamine following a search of the taxi. At issue is whether the district court should have entertained untimely Government objections to the calculation of the advisory Guideline range and, ultimately, imposed enhancements requested by the Government.

1. Henderson is intercepted while carrying a large amount of methamphetamine and pleads guilty to possessing it with intent to distribute.

On March 3, 2022, Henderson arrived in Charleston, West Virginia, by bus and got into a waiting taxi. Police stopped the taxi and, after discussions with the driver and Henderson, searched the taxi. The items searched included a duffle bag Henderson had brought with him from the bus, in which police found five bags containing a total of approximately five pounds of methamphetamine. JA118. Testing confirmed that the bags contained 2.3 kilograms of crystal methamphetamine or “ice.” JA119.

While Henderson was detained in the regional jail (but prior to federal charges being brought), investigators obtained recordings of phone calls Henderson made to various people. JA120-121. Some calls included terms, such as “sockets” and “tools,” which investigators interpreted as being code for drugs. In one call, Henderson told Bonnie Cagle to give “five socket sets to someone that was working in the sand.” JA120. In another, Henderson instructed Cagle to tell someone else that “the train is going to be back on track” and instructed her on how to cut methamphetamine for

sale. JA121. Finally, in another call, Henderson asked Cagle about “his black and silver ‘puppies,’” and told her to give his brother the “silver puppy” and “leave the black one inside.” *Ibid.* Investigators believed that “puppies” was code for firearms. *Ibid.* An interview with Cagle confirmed the meaning of the code words used during the phone calls and resulted in Cagle giving investigators two guns, neither of which were the “puppies” referenced by Henderson. JA122.

As a result of the investigation, Henderson was charged with possessing 500 grams or more of a mixture containing methamphetamine with the intent to distribute it. JA009-010.² Henderson pleaded guilty to that offense without a plea agreement. JA011-014; JA117. In its order memorializing Henderson’s guilty plea, the district court set December 1, 2022, as the deadline for the draft Presentence Investigation Report (“PSR”) to be prepared, with objections due on December 15, 2022. The order clearly stated – in all caps and bold type – that those deadlines could only be altered by the court and would only change “upon good cause shown.” JA013

2. The Government belatedly argues for Guideline enhancements after the PSR process is completed.

Following Henderson’s guilty plea a PSR was prepared to assist the district court at sentencing. JA115-139. As originally calculated, the probation officer recommended Henderson’s base offense level be 32, treating the methamphetamine

² The only difference between the original indictment and the superseding indictment is that the initial one did not specify the statute allegedly violated in the body of the indictment itself. JA009-010.

seized as mixture, rather than ice, as no lab reports had yet been returned as to its purity. The probation officer also recommended a two-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm during the offense. JA061. In a letter to the probation officer dated December 29, 2022,³ Henderson objected to the two-level enhancement. JA071-073. He argued that it relied on Cagle being a credible witness and she was not, therefore “the Government has not demonstrated by a preponderance of the evidence that Henderson possessed any guns” and, even if it had, “it has not demonstrated that the possession was in connection with drug trafficking activity.” JA072.

Two orders extended the deadlines in the district court’s original scheduling order, both based on motions filed by the Government.⁴ The first, entered on December 12, 2022, directed the Government to file any objections by March 2, 2023, while also extending the deadline for sentencing memoranda to be filed to March 23, 2023. JA015-016. The second, entered on January 12, 2023, granted the Government’s motion as to the sentencing hearing, but denied it with regard to other deadlines, leaving those in place. JA017-018.

A revised PSR was provided to the parties on March 14, 2023, which sustained Henderson’s objection and did not recommend the two-level enhancement. JA062. The parties filed sentencing memoranda based on the revised PSR on March 23, 2023.

³ This is the customary manner by which objections to the PSR are presented in the Southern District of West Virginia, with unresolved objections being preserved in an Addendum to the final PSR.

⁴ The motions were based on medical needs of Government counsel and were not objected to by Henderson.

Henderson argued for a sentence of 120 months in prison, the mandatory minimum and a slight variance from the then-calculated advisory Guideline of 121 to 151 months in prison. JA019; JA020. The Government did not present any objection to that Guideline range and argued for a sentence “at the top end of the advisory guideline range.” JA028.

On March 24, 2023, the district court entered an order to allow the parties to address whether Henderson qualified for relief under the “safety valve” provision of 18 U.S.C. § 3553(f) in the wake of *United States v. Jones*, 60 F.4th 230 (4th Cir. 2023). JA030-031. The district court stated that “[a]lthough the PSR did not recommend enhancements related to firearms or a leadership or managerial role, and did recommend an acceptance of responsibility reduction, based on the facts in the PSR surrounding those issues, the Court finds it is appropriate to give the parties the opportunity to address (a) the implications of *Jones* and (b) whether Mr. Henderson meets the remaining safety valve criteria.” JA030.

The parties filed supplemental memoranda on April 7, 2023. In its memorandum, the Government, for the first time, argued not only that Henderson was not eligible for relief under the safety valve, but that his advisory Guideline range should be enhanced two levels for possession of a firearm and two levels for being a manager or leader of criminal activity, as well as arguing Henderson should be denied any reduction for acceptance of responsibility. JA033-037. As a result, the Government argued that Henderson’s advisory Guideline range should be 262 to 327 months in prison, although it did not suggest what the appropriate sentence for

Henderson would be. JA037. Henderson argued that he qualified for the safety valve and should be sentenced to 100 months in prison. JA047. As to the Guideline calculations, Henderson argued that the Government had waived its right to assert any objections to the Guideline calculations at that point because it had failed to make timely objections pursuant to the district court's scheduling orders. JA042.

On April 17, three days before the sentencing hearing, the district court entered an order resolving the issues raised by the supplemental briefing. JA049-059. The district court held that it could consider the Government's Guideline arguments, as a "party's failure to advance an argument does not prevent the Court from calculating a Guideline range that may differ from that proposed by Probation by the PSR or by either party." JA053. In a footnote, the district court noted that Henderson had taken the opportunity to argue that the safety valve applied, after not objecting to its absence in the PSR, and "[a]ccepting the 'waiver' argument and treating the parties equally would, therefore, result in no consideration of [Henderson]'s eligibility for the safety valve." *Ibid.*

On the merits, the district court concluded that the two-level firearm enhancement should apply. Henderson had "not disputed the facts in the PSR," which the district court construed to show that "he instructed someone to give his brother a black gun to leave in the house and silver gun to carry with him." JA053-054. That person was "also managing his drug business," thus supporting the enhancement. JA054. The district court also concluded that "the facts in the PSR support the conclusion that Mr. Henderson managed or supervised others in his drug distribution

activity related to his offense,” supporting a two-level enhancement. JA056. Because such an enhancement applied, Henderson was excluded from safety valve relief under 18 U.S.C. § 3553(f)(4) “because this provision explicitly ties eligibility to the Guidelines determination of whether a person was an organizer, leader, manager, or supervisor of others.” *Ibid.* Finally, the district court overruled the Government’s objection to Henderson receiving a reduction for acceptance of responsibility. JA057.⁵

On the eve of sentencing, Henderson filed a motion for leave to file a second supplemental sentencing memorandum. In the motion itself, Henderson set forth the procedural background of the preparation of the PSR and various objections to it. JA060-064. Attached to the motion was a supplemental sentencing memorandum that restated Henderson’s request for a 120-month sentence, with additional argument as to why the district court should reject the advisory Guideline range due to inherent flaws in the Guideline treatment of methamphetamine. JA065-069. Also attached to the motion was a copy of Henderson’s letter to the probation officer containing his objections to the initial PSR, including an argument that the two-level gun enhancement should not apply. JA070-074.⁶

⁵ The final revised PSR, prepared before the district court’s ruling, recalculated the base offense level after testing revealed the purity of the methamphetamine, producing a base offense level of 36. JA124.

⁶ Although the district court did not enter an order granting Henderson’s motion for leave, at sentencing it confirmed that “I have also reviewed the defendant’s second supplemental memorandum which was filed on yesterday evening.” JA083.

3. Henderson is sentenced to 188 months in prison.

Sentencing for Henderson was held on April 20, 2023. JA075-105. Based on its rulings and the final revised PSR, the district court concluded that Henderson's final offense level was 37 and his Criminal History Category IV, producing an advisory Guideline range of 292 to 365 months in prison. The district court also noted that "for purposes of meth which is not considered to be ice, the applicable advisory guideline range is 188 to 235 months." JA082.

The Government argued that a sentence "within the guidelines is appropriate." JA084. It emphasized Henderson's "lengthy criminal history and the continued nature of his criminal conduct," noting that Henderson had "served significant terms of incarceration" and was "on parole at the time he committed to this offense" and "none of that has deterred him from continuing to engage in criminal conduct." *Ibid.* Henderson noted the district court's "prior history of disagreeing with the ice/meth disparity and varying downward" as well as the fact that the Guideline enhancements imposed would not only increase Henderson's Guideline range but would impact "his ability to get time off his sentence while in BOP custody." JA085. In conclusion, Henderson argued that while the Guideline calculations had changed since the initial PSR was prepared, "the facts and circumstances of the case have not changed" and a 120-month sentence was still appropriate. *Ibid.*

The district court imposed a sentence of 188 months in prison, followed by a five-year term of supervised release. JA094.

4. The Fourth Circuit affirms Henderson's sentence.

The Fourth Circuit affirmed Henderson's sentence. *United States v. Henderson*, 159 F.4th 213 (4th Cir. 2025). As relevant to this Petition, Henderson argued "that the district court erred when it allowed the government to make late arguments in support of two sentencing enhancements." *Id.* at 216. The court noted that the district court had "extended the fourteen-day cutoff" for filing objections, but "that new deadline came and went without any objections from the government." *Id.* at 219. Nonetheless, it concluded that "the district court's request for supplemental briefing constituted 'good cause' for the government to then pursue sentencing enhancements." *Ibid.* That was because "[s]entencing enhancements are naturally a part of" the discussion of the safety valve, as "whether Henderson qualified for certain enhancements informed whether the safety valve applied." *Ibid.* Therefore, "because the court's request for supplemental briefing fairly implicated the relevant enhancements, the request constituted an implicit finding of good cause for the government's new arguments." *Ibid.*

The Fourth Circuit went further. It noted, citing this Court's decision in *Gall v. United States*, 552 U.S. 38 (2007), that "[r]egardless, district courts have an independent obligation to properly calculate the applicable guideline range." *Henderson*, 159 F.4th at 219. "In doing so," the court continued, district courts "aren't limited to the parties' arguments or the recommendations in the presentence report." *Ibid.* "So," the court concluded, "the government's failure to timely object to the presentence report didn't relieve the district court of its independent duty to calculate

Henderson’s proper guideline range, which includes consideration of applicable enhancements.” *Ibid.* Reviewing the record, the court concluded that it had “no reason to think that the court would have viewed the facts differently or failed to apply the enhancements in the absence of the government’s arguments,” rendering any error harmless. *Ibid.*

REASONS FOR GRANTING THE WRIT

- I. **The writ should be granted to determine whether, under Rule of Criminal Procedure 32(i)(1)(D), a district court’s order for additional briefing on safety valve eligibility – which notes that the defendant was not assessed certain Guideline enhancements in the PSR to which the Government failed to object – constitutes “good cause” so as to allow the Government to make untimely objections to the PSR.**

Rule 32 of the Rules of Criminal Procedure sets forth a procedure for challenging recommendations made by the probation officer in the PSR including setting deadlines for such objections. It also provides relief if those deadlines are missed – a court may grant permission for untimely objections upon a showing of “good cause.” In this case, the Government failed to comply with the deadline for objections in Rule 32. It did not seek permission to file untimely objections, much less provide good cause for missing the deadline. The district court, regardless, entertained the Government’s untimely objections without, itself, making a finding that good cause was shown. The Fourth Circuit concluded that the district court’s order seeking additional briefing on safety valve eligibility under § 3533(f) “implicitly” constituted good cause for the Government’s untimely objections. *Henderson*, 159 F.4th at 219. Whether a district court order that seeks briefing on statutory

sentencing factors but does not seek additional argument on Guideline enhancements constitutes “good cause” under Rule 32(i)(1)(D) is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

Rule 32 of the Rules of Criminal Procedure sets forth the procedure for production of the PSR and how the parties can object to its contents. Specifically, Rule 32(f)(1) provides that “[w]ithin 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to . . . sentencing guideline ranges . . . contained in or omitted from the report.” Those objections must be disclosed to the opposing party, as well as the probation officer. R. Crim. P. 32(f)(2). Once objections are received, the probation officer “may . . . revise the presentence report as appropriate.” R. Crim. P. 32(f)(3). An exception to those timing rules is found in Rule 32(i)(1)(D), which allows that a district court “may, *for good cause shown*, allow a party to make a new objection at any time before sentence is imposed.” (emphasis added).

Sentencing in this case initially proceeded in accordance with the provisions of Rule 32. On October 6, 2022, the same day Henderson entered his guilty plea to the charge in the superseding indictment, the district court entered an order memorializing the plea and setting a schedule for production and finalization of the PSR. JA011-014. That order directed a draft PSR to be prepared by December 1, 2022, objections to be submitted by December 15, and a final PSR prepared by December 29, 2022. JA013. The draft PSR, which included a two-level enhancement for possession of a firearm, was prepared by November 29, 2022. JA061.

On December 12, 2022, in response to an unobjected-to motion by the Government and because of good cause shown, the district court extended the deadlines for filing objections to March 2, 2023. JA015-016. By letter to the probation officer, on which the Government was copied, Henderson filed his objections on December 29, 2022. JA070-074. Among Henderson's objections was an objection to the two-level enhancement for possession of a firearm. JA071-073.

On January 12, 2023, the district court entered a second order in relation to sentencing deadlines based on a second unopposed motion of the Government. In that order the district court granted the motion with regards to the date of the sentencing hearing, but denied the motion with regard to other deadlines, including for objections to the PSR, as "the parties received the draft PSR in December 2022." JA017-018. The Government did not file any objections, either to the draft PSR or in response to Henderson's objections, prior to the deadline set by the district court. Sentencing memoranda were filed, in accordance with the district court's deadlines, on March 23, 2023. JA019-029. In its memorandum, the Government did not take issue with the advisory Guideline range of 121 to 151 months set forth in the revised PSR, which did not include any enhancements for possession of a firearm or leadership role, and recommended a reduction for acceptance of responsibility. JA028.

The next day, the district court entered an order in response to *United States v. Jones*, 60 F.4th 230 (4th Cir. 2023). JA030-031. In *Jones*, the Fourth Circuit concluded that the statutory "safety valve" was available to a defendant, like

Henderson, who does not have more than 4 criminal history points, a prior 3-point offense, and a prior 2-point violent offense. *Id.* at 231-232.⁷ The district court’s order noted that under *Jones* Henderson was not excluded on that basis and recognized that “the parties have not addressed the applicability of the safety valve.” JA030. It found “it is appropriate to give the parties the opportunity to address (a) the implications of *Jones* and (b) whether Mr. Henderson meets the remaining safety valve criteria.” *Ibid.* In doing so, the district court noted that “the PSR did not recommend enhancements related to firearms or a leadership or managerial role, and did recommend an acceptance of responsibility reduction.” *Ibid.* The district court’s order did not invite briefing on those issues, however, only on the impact of *Jones* and whether Henderson met the **remaining** safety valve criteria.

The Government’s memorandum in response to the district court’s order, filed on April 7, 2023, went well beyond the scope of the district court’s order, arguing not only that Henderson did not qualify for safety valve relief, but that his sentence should be enhanced for possession of a firearm and a leadership role and that he should be denied credit for acceptance of responsibility. JA033-037. In conclusion, the Government argued that Henderson’s advisory Guideline range was 262 to 327 months in prison, more than doubling the sentence it argued the district court should impose in its initial sentencing memorandum. JA037. Nowhere in its memorandum did the Government recognize that its objections to the PSR’s advisory Guideline

⁷ *Jones* was vacated and remanded by this Court in light of *Pulsifer v. United States*, 601 U.S. ___, 144 S. Ct. 718 (2024). *United States v. Jones*, 144 S. Ct. 1091 (Mem) (2024).

calculations came more than a month after the district court’s deadline for such objections, much less months after Henderson’s objections put the Government on notice regarding the firearm enhancement. Nowhere did the Government argue good cause excused its late assertion of its objections. In short, the Government failed completely to abide by the requirements of Rule 32 and the orders entered by the district court pursuant to it.

Henderson objected to the district court considering the Government’s tardy objections, pointing out that it had three prior occasions to raise them and did not. JA042. The district court’s response to that objection was tangential and not rooted in the requirements of Rule 32. The district court dismissed Henderson’s objection, finding, without any analysis, that the Government did not waive its arguments “where the Court invited further briefing on these issues.” JA053. Except the district court did not “invite further briefing” on Guideline calculation issues – it invited further briefing on the implication of *Jones* and the issue of whether Henderson was eligible for safety valve relief. JA30.⁸

The district court in this case made no specific finding that the Government had good cause to excuse its delinquent objections. This is unsurprising, as the Government never argued there was good cause to excuse them. In light of that

⁸ Even if the district court’s safety valve order made the leadership role enhancement issue relevant, it could not do the same for the firearm enhancement, as the safety valve may apply even if the defendant receives such an enhancement. *See United States v. Hodgkiss*, 960 F.3d 1110 (8th Cir. 2020). Nor could it for the issue of acceptance of responsibility, as the district court held. JA057 (§ 3553(f)(5) “requires more than acceptance of responsibility”).

absence, it is unclear how the district court could make any ruling on the issue of good cause, whether an implicit or explicit one. Something is implicit if it is “implied through not plainly expressed,” as well as “naturally or necessarily involved in, or capable of being inferred from, something else.” *Implicit*, Oxford English Dictionary (https://www.oed.com/dictionary/implicit_adj)(last visited February 11, 2026). In this case there is no “something else.” An implicit ruling “must, like an explicit one, be clear.” *District of Columbia v. Trump*, 959 F.3d 126, 130 (4th Cir. 2020). This not a case where a party made an argument and the district court was silent about it. *See, e.g., Wall v. Rasnick*, 42 F.4th 214, 220 (4th Cir. 2022)(entry of judgment against plaintiff on all claims treated “as an implicit denial of his spoliation objections”). This is a case where the party who benefitted from the district court’s largesse never sought it or explained why it was entitled to it.

The Government never argued it had good cause to file delinquent objections to the PSR, which objections triggered district court actions that greatly increased Henderson’s advisory Guideline range. This Court should grant review to determine whether the district court’s actions constituted an “implicit” ruling that good cause existed to entertain the Government’s delinquent objections.

II. The writ should be granted to determine whether a district court has an independent responsibility to correctly calculate the advisory Guideline range in which it is not “limited by the parties’ arguments or the recommendations in the presentence report.”

As an alternative holding, the Fourth Circuit concluded that any error on the district court’s part in this case was harmless due to its “independent obligation to

properly calculate the applicable guideline range” which is not “limited to the parties’ arguments.” *Henderson*, 159 F.4th at 219. While the district court’s obligation to correctly calculate the advisory Guideline range is settled law, *Gall v. United States*, 552 U.S. 38, 51 (2007), the Fourth Circuit goes a step further – imposing on district courts an obligation to closely examine Guideline calculations regardless of whether the parties have any dispute to resolve. Such an obligation turns traditional notions of party presentment on their head and makes the procedures set forth in Rule 32 for objecting to PSR provisions meaningless. It also calls into question whether plain error review can ever apply in an appeal involving a disputed Guideline calculation. Whether such a free-floating obligation exists is an important question of federal law – one that impacts every federal criminal case – that this Court should resolve. *See* Rules of the Supreme Court 10(c).

In *United States v. Booker*, 543 U.S. 220, 237 (2005), this Court held that the United States Sentencing Guidelines, as then constituted, violated the Sixth Amendment because they were mandatory. As a remedy, this Court struck certain statutory language to render them “effectively advisory.” *Id.* at 245. In *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court reemphasized the advisory nature of the Guidelines, holding that district courts could reject their advice based on policy-based disagreements. In the ensuing twenty years, this Court has emphasized the central role that the Guidelines continue to play, in spite of their advisory nature. *See, e.g., Molina-Martinez v. United States*, 578 U.S. 189, 204-205 (2016)(in the usual case, being “sentenced under an incorrect Guidelines range” is prejudicial for plain-error

review purposes); *Rosales-Mireles v. United States*, 585 U.S. 129, 132 (2018)(prejudicial plain error in Guideline calculations “in the ordinary case . . . seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief”); *Peugh v. United States*, 569 U.S. 530, 544 (2013)(because the “federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing,” *Ex Post Facto* Clause applies); *Freeman v. United States*, 564 U.S. 522, 529 (2011)(the “Guidelines provide a framework or starting point” for sentencing). Thus, “failing to calculate (or improperly calculating) the Guidelines range” constitutes a “significant procedural error” that renders a sentence unreasonable. *Gall*, 552 at 51.

The Fourth Circuit in this case did more than recognize the district court’s duty to correctly calculate and apply the Guidelines. It went further by stating that district courts “have an ***independent*** obligation” to correctly calculate the Guideline range. *Henderson*, 159 F.4th at 219 (emphasis added).⁹ In meeting that obligation, the Fourth Circuit continued, district courts “aren’t limited to the parties’ arguments or the recommendation of the presentence report” and the Government’s “failure to timely object” could not relieve that burden. *Ibid.* Such a free-floating obligation, that exists without any reference to the arguments of the parties before it, flies in the face of well-established procedural frameworks. It also leads to situations, like the one in

⁹ In doing so, the Four Circuit cited *Gall*, 552 U.S. at 50, but nothing in *Gall* (much less at that citation in the case) mentions an “independent” obligation.

this case, in which the district court decides an issue without giving both parties a full opportunity to argue it before the court.

As set forth above, Rule 32 of the Rules of Criminal Procedure sets forth procedures relating to the production of the PSR, including how (and when) the parties can object to it and the district court's obligation to resolve those objections – in certain instances. *See United States v. Vazquez-Garcia*, 130 F.4th 891, 898 (10th Cir. 2025) (“due process is provided by Federal Rule of Criminal Procedure 32”). It is frequently used to cut off inquiry into Guideline issues when late objections are made. *See, e.g., United States v. Lindsey*, 827 F.3d 733, 736-738 (8th Cir. 2016) (refusing to consider untimely raised objections to Armed Career Criminal Act predicate offenses where defendant did not attempt to make any showing of good cause); *Aguilar-Ibarra*, 740 F.3d at 590-591 (applying plain error review where defendant did not show good cause below for untimely objection to Guideline calculation); *United States v. Eastteam*, 426 F.3d 1301, 1303 (10th Cir. 2005) (defendant did not demonstrate good cause for objection made first time at sentencing when the “Government made known to Defendant through the PSR that it did not intend to seek the third-level reduction” for acceptance of responsibility); *United States v. Wheeler*, 322 F.3d 823, 827 (5th Cir. 2003) (applying plain error review where defendant “offered no explanation whatsoever for his failure to raise his objections until the day before his sentencing hearing, which was well beyond the prescribed 14-day period”); *United States v. Chung*, 261 F.3d 536, 539 (5th Cir. 2001) (where good cause is not shown district court is “free to disregard” untimely objections). Indeed, Rule 32 refutes the idea that the

district court must, regardless of the parties' arguments, independently analyze the Guidelines. First, under Rule 32(i)(3)(A), the district court "may accept any undisputed portion of the presentence report as a finding of fact." *See also United States v. Oaks*, 606 F.3d 530, 542 (8th Cir. 2010)("a defendant's failure to object to the PSR's factual characterization of his conduct is dispositive")(cleaned up); *United States v. Baker*, 559 F.3d 443, 449-450 (6th Cir. 2009)(when defendant did not object to factual finding in PSR "the district court properly accepted it as true"); *United States v. Revels*, 455 F.3d 448, 451 n.2 (4th Cir. 2006)(if a defendant "fails to properly object to the relevant findings in his PSR, the government meets its burden of proving those facts by a preponderance of the evidence, and the district court is free to adopt the findings of the presentence report without more specific inquiry or explanation")(cleaned up); *United States v. Conrad*, 74 F.4th 957, 959 (8th Cir. 2023)("the district court was not required to resolve every disputed issue and to amend the presentence report accordingly"). Second, Rule 32(i)(3)(B) allows the district court to decline to resolve an issue presented by the parties if it "determine[s] that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." No independent duty of district courts to calculate the Guideline range can be found in Rule 32.

Similarly, Rule of Criminal Procedure 51 undercuts the Fourth Circuit's creation of an independent duty to calculate the Guideline range regardless of the arguments of the parties. Rule 51(b) provides that a party may "preserve a claim of error by informing the court – when the court ruling or order is made or sought – of

the action the party wishes the court to take, or the party’s objection to the court’s action and the grounds for that objection.” It encodes in criminal proceedings the party presentation principle, where the “parties frame the issues for decision, while the court serves as neutral arbiter of matters the parties present.” *Clark v. Sweeney*, 607 U.S. ___, 146 S. Ct. 410, 412 (2025)(cleaned up). “To put it plainly,” this Court recently said, “courts ‘call balls and strikes’; they don’t get a turn at bat.” *Ibid.* Preserving a claim allows for more favorable standards of review on appeal, while failure to preserve a claim relegates the claim for review by plain error. *See United States v. Olano*, 507 U.S. 725 (1993). If there is a free-floating obligation on the district court to correctly calculate the Guidelines regardless of what the parties do, Rule 51(b) would be a dead letter. There would be no need for parties to “inform the court . . . of the action the party wishes the court to take” because the district court is already under an obligation to take that action.

In this case, the Fourth Circuit has altered long-held procedural rules related to sentencing. There is no basis for this in the law. This Court should grant review to address the issue, given that it applies to every criminal case in federal court – 61,678 of them in fiscal year 2024.¹⁰

CONCLUSION

Ultimately, this is a case where the Government dropped the ball and the district court handed it back to them and allowed them to run with it. Rule 32 of the

¹⁰ U.S. Sent’g Comm’n, *Sourcebook of Federal Sentencing Statistics* (2024), Table 1 (available online at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Table01.pdf>).

Rules of Criminal Procedure does not allow that without a showing of good cause, which the Government never tried to demonstrate. Nor does it support a free-floating obligation for the district court to impose Guideline enhancements neither sought nor addressed the parties. For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

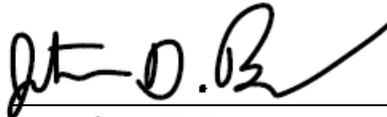
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APPENDIX

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159 F.4th 213

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Michael HENDERSON, Defendant - Appellant.

No. 23-4313

|

Argued: September 12, 2025

|

Decided: November 17, 2025

Synopsis

Background: After defendant pled guilty to possessing 500 grams or more of methamphetamine with intent to distribute, the United States District Court for the Southern District of West Virginia, [Irene C. Berger](#), J., [2023 WL 2967420](#), sentenced defendant, and defendant appealed.

Holdings: The Court of Appeals, [Diaz](#), Chief Judge, held that:

[1] district court's request for supplemental briefing constituted good cause for government to then pursue sentencing enhancements more than 14 days after receipt of presentence report;

[2] any error in district court's consideration of government's untimely objections was harmless;

[3] district court did not commit clear error in finding that defendant constructively possessed firearm; and

[4] district court did not commit plain error when it determined that facts supported application of two-level firearms enhancement.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (14)

[1] [Criminal Law](#)  [Sentencing](#)

Court of Appeals reviews sentencing decisions, including decision to consider untimely objections to presentence report, for abuse of discretion.

[2] [Criminal Law](#)  [Sentencing](#)

Court of Appeals will not reverse district court's sentencing decision simply because it may have come to different result in first instance; instead, it looks for significant procedural errors that tainted sentence, as when district court failed to properly calculate guideline range, relied on clearly erroneous facts, or otherwise acted in arbitrary or irrational manner.

[3] [Sentencing and Punishment](#)  [Objections and disposition thereof](#)

District court's request for supplemental briefing constituted good cause for government to then pursue sentencing enhancements more than 14 days after receipt of presentence report, even though district court did not explicitly ask parties to discuss sentencing enhancements in their supplemental briefs; district court asked for briefing on whether defendant qualified for safety valve relief, and sentencing enhancements were naturally part of that discussion, because whether defendant qualified for certain enhancements informed whether safety valve applied. [18 U.S.C.A. § 3553\(f\)](#); [Fed. R. Crim. P. 32\(i\)\(1\)\(D\)](#).

[4] [Sentencing and Punishment](#)  [Use and effect of report](#)

[Sentencing and Punishment](#)  [Operation and effect of guidelines in general](#)

District courts have independent obligation to properly calculate applicable guideline range at sentencing, and in doing so, are not limited to parties' arguments or recommendations in presentence report. [U.S.S.G. § 1B1.1 et seq.](#)

[5] [Criminal Law](#)  [Sentencing proceedings in general](#)

Any error in district court's consideration of government's untimely objections to presentence report was harmless in sentencing defendant for possessing 500 grams or more of methamphetamine with intent to distribute; district court independently assessed

relevant facts—once in its order on safety valve relief, and again at defendant's sentencing—before deciding that enhancements should apply, and there was no reason to think that court would have viewed facts differently or failed to apply enhancements in absence of government's arguments.

[6] [Criminal Law](#) ↪ [Questions of Fact and Findings](#)
[Criminal Law](#) ↪ [Sentencing](#)

Court of Appeals reviews district court's factual findings, including whether particular sentencing enhancement applies, for clear error.

[7] [Criminal Law](#) ↪ [Sentencing](#)

When reviewing district court's factual findings at sentencing, Court of Appeals cannot reverse simply because it would have decided case differently; rather, clear error exists only if, on entire evidence, it is left with definite and firm conviction that mistake has been committed.

[8] [Sentencing and Punishment](#) ↪ [Possession and carrying](#)

To satisfy its burden to prove that weapon sentencing enhancement is warranted in drug case, government need not prove precisely concurrent acts, such as gun in hand while in act of storing drugs; evidence—including circumstantial evidence—of constructive possession is enough. [U.S.S.G. § 2D1.1\(b\)\(1\)](#).

[9] [Sentencing and Punishment](#) ↪ [Possession and carrying](#)

Government meets its burden to prove that weapon sentencing enhancement is warranted in drug case by showing that defendant exercised, or had power to exercise, dominion and control over item. [U.S.S.G. § 2D1.1\(b\)\(1\)](#).

[10] [Sentencing and Punishment](#) ↪ [Possession and carrying](#)

District court did not commit clear error in finding that defendant constructively possessed firearm, for purposes of determining applicability of two-level firearm enhancement in sentencing defendant for possessing 500 grams or more of methamphetamine with intent to distribute, in light of evidence that defendant continued running his drug trafficking operation from jail over phone, that he had instructed associate to make sure his “brother”

received two firearms when he arrived in town, and that his brother was coming to town to assist with operation. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, [21 U.S.C.A. § 841\(a\)\(1\)](#); [U.S.S.G. § 2D1.1\(b\)\(1\)](#).

[11] **Criminal Law** ➔ [Sentencing proceedings in general](#)

Defendant forfeited argument that district court incorrectly relied on disputed facts when it applied two-level firearm enhancement in sentencing him for possessing 500 grams or more of methamphetamine with intent to distribute, even though presentence report contained no recommendations for enhancements and no objections from government; district court's request for supplemental briefing on safety valve criteria put parties on notice that they needed to address facts relevant to firearm and leadership enhancements, but defendant did not raise any factual disputes in his supplemental brief. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, [21 U.S.C.A. § 841\(a\)\(1\)](#); [U.S.S.G. § 2D1.1\(b\)\(1\)](#).

[12] **Criminal Law** ➔ [Necessity of Objections in General](#)

To prevail on plain error review, defendant must show that error (1) was made, (2) is plain—i.e., clear or obvious, and (3) affects substantial rights.

[13] **Criminal Law** ➔ [Sentencing and Punishment](#)

Sentencing error affects defendant's substantial rights, for purposes of plain error review, only if, absent error, different sentence might have been imposed.

[14] **Criminal Law** ➔ [Sentencing proceedings in general](#)

District court did not commit plain error when it determined that facts supported application of two-level firearm enhancement in sentencing defendant for possessing 500 grams or more of methamphetamine with intent to distribute, despite defendant's contention that it incorrectly relied on disputed facts, absent non-speculative argument that the district court would have issued lesser sentence if it had reviewed his factual objections before ruling on enhancement. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, [21 U.S.C.A. § 841\(a\)\(1\)](#); [U.S.S.G. § 2D1.1\(b\)\(1\)](#).

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. [Irene C. Berger](#), District Judge. (2:22-cr-00065-1)

Attorneys and Law Firms

ARGUED: Jonathan D. Byrne, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Erik S. Goes, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. ON BRIEF: [Wesley P. Page](#), Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, South Carolina, for Appellant. [William S. Thompson](#), United States Attorney, Monica D. Coleman, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Before [DIAZ](#), Chief Judge, and [WILKINSON](#) and [WYNN](#), Circuit Judges.

Opinion

Affirmed by published opinion. Chief Judge [Diaz](#) wrote the opinion, in which Judge [Wilkinson](#) and Judge [Wynn](#) joined.

[DIAZ](#), Chief Judge:

***216** A district court sentenced Michael Henderson to 188 months in prison for possessing 500 grams or more of methamphetamine with the intent to distribute. Henderson presses two sentencing challenges on appeal. First, he claims that the district court erred when it allowed the government to make late arguments in support of two sentencing enhancements. Second, he asserts that the district court erred by applying the enhancement for possession of a firearm because the record didn't support it.

We hold that it was within the district court's discretion to consider the late arguments and that there was sufficient record evidence to support the firearm enhancement. So we affirm.

I.

A.

Law enforcement stopped a car in which Henderson was a passenger. As police searched the vehicle, a K-9 alerted to drugs in Henderson's bag. The bag contained five bags of

methamphetamine, which testing later confirmed contained approximately 1,921.2 grams of pure crystal meth, also known as “ice.” The officers then arrested Henderson.

While in jail awaiting trial, Henderson called various associates. On several calls, Henderson instructed the associates on how to count and distribute “sockets,” “soft tools,” and “hard tools,” which investigators believed were code for drugs.

Henderson placed most of these calls to Bonnie Cagle. On one call, Cagle mentioned that Henderson's “brother” was coming into town. Henderson directed Cagle to give his “black puppy” and “silver puppy” to his brother when he arrived. He also instructed that the black puppy should be kept at home, but his brother could carry the silver puppy.

Cagle told police that the “puppies” were guns and that “sockets,” “hard tools,” and “soft tools” all referred to drugs. She also told police that she had one of Henderson's guns at her home and another at her mother's house. The police later recovered a black firearm from Cagle and a silver firearm from her mother's home.

B.

1.

Henderson pleaded guilty to possessing 500 grams or more of a mixture containing methamphetamine with the intent to distribute, in violation of [21 U.S.C. § 841\(a\)\(1\)](#). Before sentencing, the district court entered a scheduling order, which it later amended to extend the deadline by which the parties could submit objections to Henderson's presentence investigation report.

The presentence report recommended a two-level enhancement for possessing a firearm in connection with drug trafficking. [U.S.S.G. § 2D1.1\(b\)\(1\)](#). Henderson timely objected to that enhancement and to the report's “recitation of the facts and circumstances” supporting it. J.A. 71–73. The government didn't object to the report or respond to Henderson's objections.

The probation officer chose to remove the firearm enhancement recommendation. The revised report also recommended a three-point reduction for acceptance of responsibility.

2.

The parties then submitted sentencing memoranda to the court—Henderson argued for a below-guideline sentence of 120 months in prison, while the government requested a sentence “at the top” of the *217 guideline range. J.A. 19–23, 24–28. After receiving the sentencing memoranda, the district court ordered supplemental briefing on whether Henderson qualified for “safety valve” relief under [18 U.S.C. § 3553\(f\)](#).

The safety valve statute allows a district court to impose a sentence without regard to the mandatory minimum if:

- (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;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan

[18 U.S.C. § 3553\(f\)](#).¹

But the government argued that Henderson didn't qualify for safety valve relief because he didn't satisfy prongs (f)(2), (f)(4), and (f)(5): he possessed firearms in connection with his offense, led or supervised others, and failed to truthfully provide the government with all information he had about the offense. And for the first time, the government objected to the presentence report's lack of sentencing enhancements.

The government said the district court should apply enhancements for Henderson's possession of a firearm under [U.S.S.G. § 2D1.1\(b\)\(1\)](#) and leadership role under [U.S.S.G. § 3B1.1\(c\)](#).

The government also argued that the district court shouldn't reduce Henderson's sentence for acceptance of responsibility under [U.S.S.G. § 3E1.1\(a\)](#).

Henderson responded that the government forfeited these arguments because it hadn't timely objected to the report's recommendations.

3.

The district court found that the government hadn't forfeited its enhancement arguments because they related to the court's request for more briefing. In any event, the court added, it had an independent obligation to correctly calculate the guideline range.

***218** The court then reviewed the facts in the presentence report and found that both the firearm and leadership enhancements applied. It concluded that Henderson constructively possessed firearms in connection with his drug trafficking operation, and that he managed or supervised others involved in drug distribution.

The court also concluded that Henderson wasn't entitled to safety valve relief. [18 U.S.C. § 3553\(f\)\(4\)](#) bars relief if the defendant was “an organizer, leader, manager, or supervisor of others in the offense.” Because Henderson qualified for the leadership role enhancement, that meant he couldn't receive safety valve relief.

The district court also found that Henderson didn't “truthfully provide[]” all the information he had about the offense to the government, as required by [§ 3553\(f\)\(5\)](#). Henderson's guilty plea alone wasn't enough to satisfy this prong, and the court concluded that he hadn't provided the government with important information regarding the source of his drugs, his accomplices, his customers, and details about how he transported and sold the drugs.²

C.

At sentencing, Henderson didn't object to the facts contained in the presentence report. So the district court adopted those facts.

The district court then calculated Henderson's guideline range. Henderson started with a base offense level of 36 for possessing at least 1.5 kilograms of pure methamphetamine, or “ice.” The court then added two points each for the firearm and leadership enhancements and subtracted three points for acceptance of responsibility, for a final offense level of 37. Combining that with

Henderson's criminal history category, the district court found an advisory guideline range of 292 to 365 months in prison.

But the court noted that if the seized methamphetamine had been a mixture instead of “ice,” the guideline range would instead be 188 to 235 months. So it applied the lower range and sentenced Henderson to 188 months’ imprisonment and five years of supervised release.

This appeal followed.

II.

We start with Henderson's claim that the government made untimely arguments for sentencing enhancements.

A.

[1] [2] We review sentencing decisions, including a decision to consider untimely objections to a presentence report, for abuse of discretion. See [United States v. Pauley](#), 511 F.3d 468, 473 (4th Cir. 2007); [United States v. McCollum](#), 80 F. App'x 825, 827 (4th Cir. 2003) (per curiam). We won't reverse the district court simply because we may have come to a different result in the first instance. [United States ex rel. Nicholson v. MedCom Carolinas, Inc.](#), 42 F.4th 185, 197 (4th Cir. 2022). Instead, we look for “significant procedural errors” that tainted the sentence. [Pauley](#), 511 F.3d at 473. Such errors include whether the district court failed to properly calculate the guideline range, relied on clearly erroneous facts, or otherwise acted ***219** in an arbitrary or irrational manner. See [id.](#); [Nicholson](#), 42 F.4th at 197.

B.

Parties must submit objections to the presentence report within fourteen days of receipt. [Fed. R. Crim. P. 32\(f\)\(1\)](#). Even so, a district court “may, for good cause, allow a party to make a new objection at any time before sentence is imposed.” [Fed. R. Crim. P. 32\(i\)\(1\)\(D\)](#).

[3] Here, the district court extended the fourteen-day cutoff. But that new deadline came and went without any objections from the government. So we must consider whether the district court's request for supplemental briefing constituted “good cause” for the government to then pursue sentencing enhancements. We conclude that it did.

Henderson argues otherwise because the court didn't explicitly ask the parties to discuss sentencing enhancements in their supplemental briefs. But district courts have wide latitude to decide what constitutes good cause, and their findings can be made implicitly. See [United States v. Aidoo, 670 F.3d 600, 612 \(4th Cir. 2012\)](#).

The district court asked for briefing on “(a) the implication of [Jones](#), and (b) whether Mr. Henderson me[t] the remaining safety valve criteria.” J.A. 30. Sentencing enhancements are naturally part of that discussion, because whether Henderson qualified for certain enhancements informed whether the safety valve applied.

The district court found Henderson ineligible for safety valve relief because he qualified for the leadership role enhancement. And while the court found otherwise when considering the firearm enhancement, it had to review the facts supporting the enhancement to make that decision. In short, because the court's request for supplemental briefing fairly implicated the relevant enhancements, the request constituted an implicit finding of good cause for the government's new arguments.

[4] Regardless, district courts have an independent obligation to properly calculate the applicable guideline range. See [Gall v. United States, 552 U.S. 38, 50, 128 S.Ct. 586, 169 L.Ed.2d 445 \(2007\)](#). In doing so, they aren't limited to the parties' arguments or the recommendations in the presentence report. See [United States v. White, 875 F.2d 427, 431 \(4th Cir. 1989\)](#). So the government's failure to timely object to the presentence report didn't relieve the district court of its independent duty to calculate Henderson's proper guideline range, which includes consideration of applicable enhancements. See [Aidoo, 670 F.3d at 612](#).

[5] The district court independently assessed the relevant facts—once in its order on safety valve relief, and again at Henderson's sentencing—before deciding the two enhancements should apply. We have no reason to think that the court would have viewed the facts differently or failed to apply the enhancements in the absence of the government's arguments. So any error in considering the objections was harmless.

III.

We turn next to Henderson's objection to the firearm enhancement.

A.

[6] [7] We review a district court's factual findings, including whether a particular sentencing enhancement applies, for clear error. See [United States v. Banks](#), 10 F.3d 1044, 1057 (4th Cir. 1993). Here again, we can't reverse “simply because we would have decided the case differently.” *220 [United States v. Manigan](#), 592 F.3d 621, 631 (4th Cir. 2010) (citation modified). Rather, clear error exists only if, “on the entire evidence, we are left with the definite and firm conviction that a mistake has been committed.” [Id.](#) (citation modified).

B.

[U.S.S.G. § 2D1.1\(b\)\(1\)](#) provides for a two-level enhancement if the defendant possessed “a dangerous weapon (including a firearm).” The enhancement applies when the defendant possessed the weapon “in connection with drug activity that was part of the same course of conduct or common scheme as the offense of conviction.” [United States v. McAllister](#), 272 F.3d 228, 233–34 (4th Cir. 2001) (citation modified).

[8] But the government needn't prove “precisely concurrent acts, such as a gun in hand while in the act of storing drugs.” [Manigan](#), 592 F.3d at 629 (citation modified). Evidence (including circumstantial evidence) of constructive possession is enough. [Id.](#)

[9] The government meets its burden by showing “the defendant exercised, or had the power to exercise, dominion and control over the item.” [United States v. Moye](#), 454 F.3d 390, 395 (4th Cir. 2006) (citation modified). In deciding this issue, a district court may “take reasonable account of the settled connection between firearms and drug activities.” [Manigan](#), 592 F.3d at 629.

[10] The facts in the presentence report show that Henderson constructively possessed firearms. Henderson continued running his drug trafficking operation from jail over the phone. On one call, he instructed Cagle to make sure his “brother” received two firearms when he arrived in town—a black gun to keep in his house and a silver one to carry. That evidence sufficed for the district court to find that Henderson exercised control over the weapons.

The district court also reasonably found that Henderson possessed the weapons in connection with his drug trafficking business. Henderson directed Cagle (who herself was involved in the drug scheme) to give his guns to his brother, who was coming into town to assist with the operation. And law enforcement recovered one of the firearms Henderson described from Cagle's home, showing that the weapons were connected to drug activity. See [Manigan](#), 592 F.3d at 631 (a district court may infer that “a handgun seized from the residence of a drug trafficker was possessed in connection with his drug activities”).

We discern no clear error in the court's decision to apply the firearm enhancement.

C.

Finally, Henderson claims that the district court incorrectly relied on disputed facts when it applied the firearm enhancement. Recall that Henderson lodged several objections to the presentence report, including to the “recitation of the facts and circumstances regarding the guns” and the application of the firearm enhancement. J.A. 71. While the probation officer removed the proposed enhancement, she didn't change the facts in the report.

Henderson now argues that he didn't need to alert the district court to his objections, but at the same time, he says the court erred by treating the facts as undisputed. He claims that if the court had seen his objections to the report before ruling on the enhancement, it “may have reached a different conclusion.” Appellant's Br. at 23.

[11] But we can't fault the district court for not addressing objections it didn't know about. Henderson didn't raise any factual disputes to the court in his *221 supplemental brief. And at sentencing, he told the court that he didn't object to the facts in the report.

Henderson asserts that he didn't need to raise objections in his supplemental brief because, at that time, the presentence report contained no recommendations for enhancements and no objections from the government. But the district court's request for supplemental briefing on the safety valve criteria put the parties on notice that they needed to address facts relevant to the firearm and leadership enhancements. If Henderson had concerns about how the report described the facts, he should have said so then.

Because he didn't, Henderson forfeited any objections to the facts supporting the firearm enhancement. See [United States v. Brack](#), 651 F.3d 388, 392 (4th Cir. 2011).

[12] Our review then is limited to plain error. [United States v. Hamilton](#), 701 F.3d 404, 410 (4th Cir. 2012). To prevail, Henderson must show that “an error (1) was made, (2) is plain (i.e., clear or obvious), and (3) affects substantial rights.” *Id.* (citation modified).

[13] **[14]** A sentencing error affects a defendant's substantial rights only if, “absent the error, a different sentence might have been imposed.” [United States v. Hernandez](#), 603 F.3d 267, 273 (4th Cir. 2010). Henderson can't satisfy this prong, because he hasn't made any non-speculative argument that the district court would have issued a lesser sentence if it had reviewed his factual objections before ruling on the enhancement.

* * *

For these reasons, we affirm the district court's judgment.

AFFIRMED

All Citations

159 F.4th 213

Footnotes

- ¹ The district court's order came on the heels of our decision in [United States v. Jones, 60 F.4th 230 \(4th Cir. 2023\)](#), which held, for the first time, that [§ 3553\(f\)\(1\)](#) only barred a defendant from safety valve relief if he satisfied *all* the listed criminal history characteristics. [Id. at 239](#). Henderson's criminal history didn't disqualify him from safety valve relief under the [Jones](#) framework, so the district court's order assessed whether he could satisfy the remaining statutory criteria.
- ² At the same time, the district court found that the firearm enhancement didn't affect Henderson's eligibility for safety valve relief under [§ 3553\(f\)\(2\)](#), because he only possessed the firearm in connection with “relevant conduct,” not the underlying “offense of conviction.” J.A. 54–55.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRIMINAL ACTION NO. 2:22-cr-00065

MICHAEL HENDERSON,

Defendant.

MEMORANDUM OPINION AND ORDER

The Defendant, Michael Henderson, entered a guilty plea on October 6, 2022, without a plea agreement, to the single count of the superseding indictment, possession with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine. On March 24, 2023, the Court entered an order in this matter, inviting the parties to submit additional memoranda addressing the implications of *United States v. Jones*, 60 F.4th 230, 239 (4th Cir. 2023), wherein the Fourth Circuit found that “the plain text of [18 U.S.C.] § 3553(f)(1) requires a sentencing court to find that a defendant has all three of the listed criminal history characteristics before excluding a defendant from safety valve eligibility.” The Court noted that the Presentence Investigation Report did not recommend enhancements related to firearms or a leadership or managerial role, and did recommend an acceptance of responsibility reduction, but contained

concerning facts surrounding those issues, and invited the parties to address whether the Defendant met the remaining safety valve criteria.

The Court has reviewed the *United States' Supplemental Sentencing Memorandum* (Document 93) and the *Defendant's Supplemental Sentencing Memorandum* (Document 94). The Court makes the following findings regarding the applicability of sentencing enhancements and the safety valve.

FACTS¹

Mr. Henderson, a passenger in a taxi, was found in possession of approximately five pounds of methamphetamine during a traffic stop on March 3, 2022, near the Greyhound Bus Station in Charleston, West Virginia. Officers reached out to the Michigan State Police and learned that he was being investigated in connection with a recent arrest near the Greyhound Bus Station in Detroit, Michigan, in which officers seized approximately seven pounds of methamphetamine from a man who appeared to be working with Mr. Henderson. Officers also learned that the taxi driver, based in Williamson, West Virginia, had previously been stopped in Ceredo, West Virginia, and officers had seized a large amount of cash from the passenger. Text messages on Mr. Henderson's cell phone included communications with others related to drug trafficking. The taxi driver was later interviewed and indicated that he gave Mr. Henderson and "his people" rides to or from Charleston, West Virginia, or Huntington, West Virginia, once or twice per week, or about 20 to 30 times over the past three months.

Beginning on the date of his arrest, Mr. Henderson made numerous calls from jail to multiple associates, using poorly coded language to instruct them in the preparation, storage,

¹ These facts are drawn from the Presentence Investigation Report. Neither party filed factual objections.

transportation, and sale of drugs to specified customers. He also instructed a woman who appeared to be his primary contact in Williamson, West Virginia, to provide someone he referred to as his brother, who was coming to Williamson to help with the drug business, with his two firearms. Investigators went to her residence, and she turned over the guns discussed in the call. She also confirmed the meaning of the coded terms.

Mr. Henderson pled guilty and admitted to possessing with intent to distribute the drugs seized from him. He has also submitted a written statement of acceptance of responsibility. He has two prior three-point offenses and one prior one-point offense.

The PSR did not include enhancements for possession of a firearm under Section 2D1.1(b)(1) of the Sentencing Guidelines or a role enhancement under Section 3B1.1. It also did not address the applicability of either the statutory safety valve in 18 U.S.C. § 3553(f) or the Guidelines safety valve in Section 2D1.1(b)(18) and Section 5C1.2. Neither party initially objected.

DISCUSSION

The safety valve, contained in 18 U.S.C. § 3553(f), provides that courts may impose a sentence without regard to a statutory minimum sentence if the Defendant meets the following criteria

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;

2. the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
3. the offense did not result in death or serious bodily injury to any person;
4. the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
5. not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553(f). It is the defendant’s burden to prove that “the prerequisites for application of the safety valve provision...have been met.” *United States v. Aidoo*, 670 F.3d 600, 605 (4th Cir. 2012). In *United States v. Jones*, 60 F.4th 230, 239 (4th Cir. 2023), the Fourth Circuit held that the first criteria, addressing criminal history, would operate to exclude defendants only if they have “all three of the listed criminal history characteristics.” Mr. Henderson does not have a prior two-point violent offense, and the parties do not dispute that he is not excluded under Section 3553(f)(1).

A. Firearms

In the United States’ supplemental sentencing memorandum, it argues that the firearm enhancement pursuant to Guidelines Section 2D1.1(b)(1) applies, based on Mr. Henderson’s post-arrest recorded jail calls directing someone to provide guns to another individual who would be

arriving to distribute controlled substances. The United States also argues that Mr. Henderson's possession of a firearm excludes him from eligibility for the statutory safety valve pursuant to 18 U.S.C. § 3553(f)(2).

The Defendant argues that the United States waived these arguments because it presented them only in response to the Court's query, not in objections to the PSR or in the original sentencing memorandum. He also argues that even if the firearm enhancement applies for purposes of Section 2D1.1(b)(1) of the Guidelines, the safety valve excludes only defendants who possess a firearm or induced another participant to do so in connection with the offense of conviction. He argues that the firearms discussed during the jail call were not possessed in connection with the offense of conviction—the possession with intent to distribute the methamphetamine on March 3, 2022.

The Court finds that the 2-level enhancement pursuant to Guidelines Section 2D1.1(b)(1) is applicable based on the undisputed facts contained in the PSR. The Court does not find that the United States waived its arguments under these circumstances, where the Court invited further briefing on these issues. Even if it had waived the argument, the Court calculates the Guideline range based on the facts presented and the law. A party's failure to advance an argument does not prevent the Court from calculating a Guideline range that may differ from that proposed by Probation in the PSR or by either party.² Mr. Henderson has not disputed the facts in the PSR. In a recorded call, he instructed someone to give his brother a black gun to leave in the house and

² Indeed, the Defendant's waiver argument is a bit disingenuous under the circumstances, given that he used the opportunity of the Court's invitation for additional briefing to argue that the safety valve applies, and that he should receive a two-level safety valve reduction, arguments that were not presented as objections or in his sentencing memorandum. Accepting the "waiver" argument and treating the parties equally would, therefore, result in no consideration of the Defendant's eligibility for the safety valve.

a silver gun to carry with him. That person was also managing his drug business, and his brother was coming to Williamson to assist with the drug trafficking operation. Therefore, the Court finds that firearms were possessed in connection with relevant conduct, and the 2-level firearm enhancement under the Guidelines is applicable.

However, the Fourth Circuit has recognized that “at least five of our sister circuits have held that a weapon enhancement pursuant to § 2D1.1(b)(1) does not foreclose a safety valve reduction despite §5C1.2(a)(2)’s requirement that a defendant seeking the reduction did not possess a firearm in connection with the offense” based on the “different standards of proof applicable” to the two provisions. *United States v. Bolton*, 858 F.3d 905, 914 (4th Cir. 2017). The Eighth Circuit has further held that the requirement that a defendant demonstrate, by a preponderance of the evidence, that he did possess a firearm in connection with the “offense” refers only to the offense of conviction, reasoning that the language in 18 U.S.C. §3553(f)(5) requiring a defendant to provide all information he has “concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan” would be superfluous if “offense” could be read to include relevant conduct. *United States v. Hodgkiss*, 960 F.3d 1110, 1111–12 (8th Cir. 2020) (further noting that “where the Commission’s commentary conflicts with the plain meaning of a statute, the statute governs”). In this District, Judge Volk recently reached the same conclusion, finding that a defendant had cast sufficient doubt on whether a firearm possessed in connection with relevant conduct was possessed “in connection with the offense of conviction” where there was no evidence that it was present during the controlled buy that constituted the

offense of conviction. *United States v. Ward*, No. 5:21-CR-00229, 2022 WL 16543356, at *3 (S.D.W. Va. Oct. 28, 2022) (Volk, J.)³

The Court is persuaded by the Eighth Circuit’s reasoning. The facts herein indicate that Mr. Henderson possessed, or induced others to possess, firearms in relation to an ongoing drug trafficking scheme that constitutes relevant conduct. There is no evidence, however, that he possessed firearms in connection with his offense of conviction: the possession with intent to distribute methamphetamine on March 3, 2022. Therefore, the Court finds that Mr. Henderson’s possession of firearms, and his acts in inducing others to possess the firearms, do not preclude eligibility for the safety valve.⁴

B. Leadership Role

The United States next argues that a 2-level increase for a leadership role pursuant to Guidelines Section 3B1.1(c) applies, and that Mr. Henderson is therefore ineligible for the statutory safety valve pursuant to 18 U.S.C. § 3553(f)(4) as an organizer, leader, manager, or supervisor of others in the offense. It cites his jail calls directing multiple people to take specified action to continue his drug trafficking business, as well as an interview with a taxi driver who was paid by Mr. Henderson to transport himself and others who were involved in drug trafficking.

³ Judge Volk’s opinion indicates that the United States conceded that the statutory safety valve requires possession of a firearm in connection with the offense of conviction. Given that this case is prosecuted by the same U.S. Attorney’s office, several months later, the Court finds the apparent inconsistency in positions somewhat surprising.

⁴ As briefly referenced, Application Note 3 to Section 5C1.2, the safety valve provision contained in the Guidelines, states that “offense” means the offense of conviction and all relevant conduct. The Fourth Circuit has held that commentary to the Guidelines cannot operate to add to or change the Guidelines. *United States v. Campbell*, 22 F.4th 438, 440 (4th Cir. 2022). However, in the context of the Guidelines, “offense” generally refers to both the offense of conviction and relevant conduct; Application Note 1(i) to Section 1B1.1 defines offense to mean offense and relevant conduct. The Guidelines have not been updated to reflect changes to 18 U.S.C. § 3553(f), but the Court understands the intent of the safety valve reduction in Guidelines Section 2D1.1(b)(18) and Section 5C1.2 is to essentially incorporate the statutory requirements as contained in 18 U.S.C. § 3553(f). Therefore, the Court assumes that if Mr. Henderson is eligible for the statutory safety valve, he is also eligible for a 2-level Guidelines reduction.

Mr. Henderson argues that the PSR did not apply a role enhancement, and none should apply.

The Court finds that the facts in the PSR support the conclusion that Mr. Henderson managed or supervised others in his drug distribution activity related to his offense. Beginning on the day he was arrested, he made calls to multiple people to instruct them to take particular actions to continue his drug business. He set prices, he determined which drugs should be sold to which customers in specified quantities, he directed the travel of various associates, and he directed the disposition of his firearms. The facts are not sufficiently developed to determine whether Mr. Henderson was an organizer or leader as opposed to a manager or supervisor, or to determine exactly how many people were involved in the criminal activity, and so the Court will apply the 2-level increase pursuant to Guidelines Section 3B1.1(c).

18 U.S.C. § 3553(f)(4), like § 3553(f)(2) refers to the “offense” without expressly including relevant conduct. A defendant must show that he “was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines...” 18 U.S.C. § 3553(f)(4). However, because this provision explicitly ties eligibility to the Guidelines determination of whether the defendant was an organizer, leader, manager, or supervisor of others, the Court finds that any defendant who is subject to a role enhancement under Guidelines Section 3B1.1(c) is ineligible for safety valve relief, even if the leadership role related to relevant conduct.⁵

⁵ If the leadership role for purposes of the safety valve were required to relate to the offense of conviction, it is not clear Mr. Henderson would be able to meet his burden of showing that he fits the criteria. The evidence indicates that others assisted in arranging transportation and in storing and distributing drugs. There is no evidence to indicate that Mr. Henderson did not receive such assistance with respect to the seized drugs prior to his arrest, or that it was his intent to personally distribute the drugs he possessed on March 3, 2022.

C. Acceptance of Responsibility

Finally, the United States argues that Mr. Henderson should not receive a reduction for acceptance of responsibility under the Guidelines and has not truthfully provided the Government with “all information and evidence [he] has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” (U.S. Supp. Mem. at 6.) It argues that he did not withdraw from criminal activity, as evidenced by the jail calls, and has not provided information regarding his source of supply, his distributors, or his customers.

The Defendant submitted an affidavit admitting to his conduct and describing some of his own drug trafficking activity. He also submitted a written acceptance of responsibility statement to Probation after the PSR was initially completed. Probation updated the PSR on April 13, 2023, to incorporate lab results and the acceptance statement.

The Court finds that the Defendant has demonstrated acceptance of responsibility for purposes of Section 3E1.1 of the Sentencing Guidelines. There is no evidence that he continued to engage in criminal activity after his guilty plea. He did continue his criminal activity rather extensively after his arrest. That is something the Court considers in determining the appropriate sentence but does not view as incompatible with acceptance of responsibility where a defendant does ultimately withdraw from the criminal activity and admit his conduct. Mr. Henderson has admitted to the conduct comprising the offense of conviction and has not falsely denied relevant conduct.

However, 18 U.S.C. § 3553(f)(5) requires more than acceptance of responsibility. A defendant must show that “not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning

the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” 18 U.S.C. § 3553(f)(5). “To carry his burden, the defendant must persuade the district court that he has made full, truthful disclosure of information required by the safety valve.” *United States v. Aidoo*, 670 F.3d 600, 607 (4th Cir. 2012). For a defendant involved in a drug-smuggling conspiracy, the Fourth Circuit has recognized that the disclosure requirement includes providing information about the chain of distribution and others involved in the crime. *Id.* at 611.

Mr. Henderson’s one-page affidavit describing some of the terms he used, his travel arrangements, his alias, and his efforts to evade detection does not satisfy the requirements of 18 U.S.C. § 3553(f)(5). The facts in the PSR make clear that Mr. Henderson was involved in a large-scale drug operation, moving substantial quantities of drugs, with multiple participants. His statement provides no information regarding the source of his drugs, how often he obtained drugs and in what quantities, when and how he transported and sold them, the identities of others involved in the offense, or who purchased the drugs from him. Therefore, the Court cannot find, on the information presented, that he has shared all information he has concerning the offense and relevant conduct.⁶

CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the United States’ objections as to the failure of the PSR to apply a firearms enhancement pursuant to

⁶ Because the Court has also found that Mr. Henderson’s leadership role precludes application of the safety valve, the Court finds it unnecessary to withhold ruling on this issue until after the sentencing hearing. The other issues resolved herein are legal determinations based on undisputed facts that the Court finds it appropriate to resolve on the briefing prior to the sentencing hearing, allowing the parties to prepare for the hearing with these rulings in mind. The statute provides defendants with the opportunity to truthfully admit their conduct until sentencing for purposes of 18 U.S.C. § 3553(f)(5). Thus, the Court’s finding herein is simply that the evidence submitted with the supplemental sentencing memorandum and in the PSR is insufficient to establish that Mr. Henderson has shared all information concerning the offense and relevant conduct, recognizing that he remains free to do so.

U.S.S.G. § 2D1.1(b)(1) and a role enhancement pursuant to 3B1.1(c) be **SUSTAINED**, that the United States' objections as to the application of the acceptance of responsibility reduction pursuant to U.S.S.G. § 3E1.1 be **OVERRULED**, and that the Defendant's objection as to the failure to apply relief from the mandatory minimum pursuant to 18 U.S.C. § 3553(f) and an accompanying reduction pursuant to U.S.S.G. § 2D1.1(b)(18) and § 5C2.1 be **OVERRULED** as set forth herein.

The Court **DIRECTS** the Clerk to send a copy of this Order to the Defendant and counsel, to the United States Attorney, to the United States Probation Office, and to the Office of the United States Marshal.

ENTER: April 17, 2023



IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES DISTRICT COURT

Southern District of West Virginia

UNITED STATES OF AMERICA

v.

MICHAEL HENDERSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:22-cr-00065-01

USM Number: 96563-509

Wesley P. Page

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One of the single-count Superseding Indictment

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:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1)	possession with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomer, a Schedule II controlled substance	3/3/2022	One

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.

4/20/2023

Date of Imposition of Judgment



IRENE C. BERGER

UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

Name and Title of Judge

4/21/2023

Date

DEFENDANT: MICHAEL HENDERSON
CASE NUMBER: 2:22-cr-00065-01

IMPRISONMENT

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

ONE HUNDRED EIGHTY-EIGHT (188) MONTHS. The defendant shall be given credit for all time served to which he is legally entitled.

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

The Court recommends that the defendant: 1) be evaluated for any mental health needs and be provided with appropriate treatment; 2) be permitted to take part in any substance abuse treatment programs for which he is eligible; 3) be permitted to participate in UNICOR if eligible; and 4) be placed in a facility as near as possible to Mobile, Alabama.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL HENDERSON
CASE NUMBER: 2:22-cr-00065-01

SUPERVISED RELEASE

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

FIVE (5) YEARS.

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 the location where 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: MICHAEL HENDERSON
CASE NUMBER: 2:22-cr-00065-01

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: MICHAEL HENDERSON
CASE NUMBER: 2:22-cr-00065-01

ADDITIONAL SUPERVISED RELEASE TERMS

While on supervised release, the defendant must not commit another federal, state, or local crime, must not possess a firearm or other dangerous device, and must not unlawfully possess a controlled substance. The defendant must also comply with the standard terms and conditions of supervised release as recommended by the United States Sentencing Commission and as adopted by the United States District Court for the Southern District of West Virginia, including the condition that the defendant shall participate in a program of testing, counseling, and treatment for drug and alcohol abuse as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. In addition, the defendant shall comply with the following Standard Conditions of Supervision adopted by the Southern District of West Virginia in Local Rule of Criminal Procedure 32.3:

- 1) If the defendant is unemployed, the probation office may direct the defendant to register and remain active with Workforce West Virginia or the local equivalent in the state in which he is serving his term of supervised release;
- 2) The defendant shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program as directed by the probation officer. The defendant shall not use any method or device to evade a drug screen;
- 3) As directed by the probation officer, the defendant will make co-payments for drug testing and drug treatment services at rates determined by the probation officer in accordance with a court-approved schedule based on ability to pay and availability of third-party payments;
- 4) A term of community service is imposed on every defendant on supervised release or probation. Fifty hours of community service is imposed on every defendant for each year the defendant is on supervised release or probation. The obligation for community service is waived if the defendant remains fully employed or actively seeks such employment throughout the year;
- 5) The defendant shall not possess a firearm, ammunition, destructive device, or any other 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), and shall reside in a residence free from such items; and
- 6) The defendant shall not purchase, possess, or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids, or other designer stimulants.

DEFENDANT: MICHAEL HENDERSON
CASE NUMBER: 2:22-cr-00065-01

SPECIAL CONDITIONS OF SUPERVISION

In addition, the defendant shall comply with the following Special Conditions of supervision:

- 1) The defendant must participate in a mental health treatment program and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will supervise the defendant's participation in the program.
- 2) The defendant must not use or possess alcohol.
- 3) The defendant is not a resident of this district; therefore, the period of supervised release is to be administered by the district where the defendant is a legal resident and/or the district where a suitable release plan is developed.

DEFENDANT: MICHAEL HENDERSON
CASE NUMBER: 2:22-cr-00065-01

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 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>
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TOTALS	\$ _____	0.00	\$ _____	0.00
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- 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.

DEFENDANT: MICHAEL HENDERSON
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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 with 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:
If not paid immediately, the defendant shall pay the \$100 special assessment while incarcerated through participation in the Inmate Financial Responsibility Program by paying quarterly installments of \$25 each.

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 (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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- 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) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.