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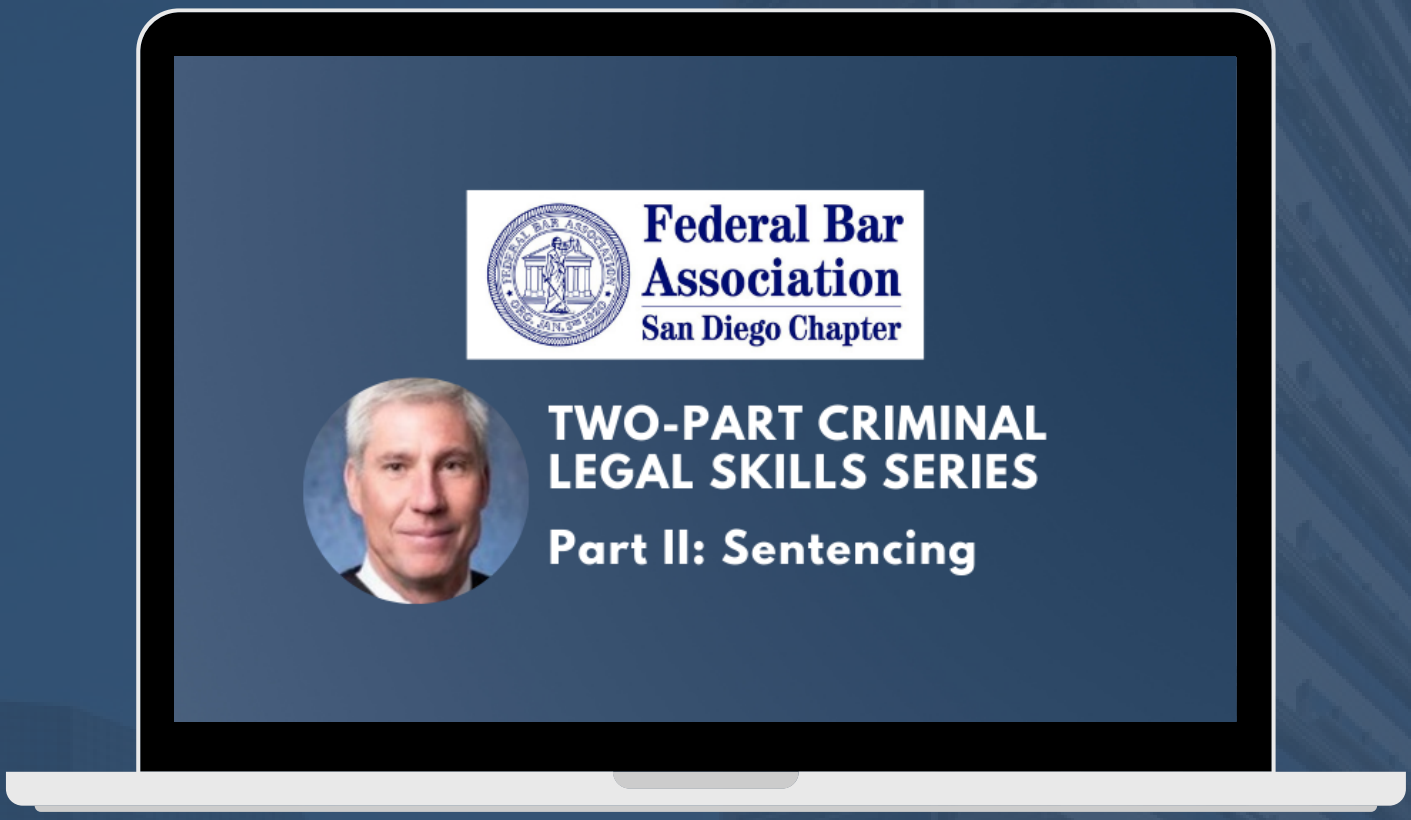

Part Two of the Series will cover various aspects of sentencing, and the panel hopes to touch on judges' preferences, pre-sentence objections, sentencing briefs, minor role, and safety valve.

Panelists:

- Honorable Todd W. Robinson
- Assistant United States Attorney J'me Forrest
- Federal Defender Leila Morgan

Time: 12 pm - 1 pm PST
Location: Zoom

MCLE: 1.0 hour of General MCLE
Cost: FREE

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SPEAKER BIOS

Judge Todd W. Robinson currently serves as a United States District Court Judge for the Southern District of California and is responsible for handling both civil and criminal matters. Before being appointed and confirmed to the federal bench, Judge Robinson was a Senior Litigation Counsel with the United States Attorney's Office. Prior to joining the U.S. Attorney's Office in San Diego, Judge Robinson was a Trial Attorney with the Narcotic and Dangerous Drug Section of the U.S. Department of Justice in Washington, D.C.

Leila Morgan has been a Trial Attorney with the Federal Defenders of San Diego, Inc., since 2004, spending her career defending the indigent accused. She has tried more than 20 felony jury trials, and has represented clients charged with a wide array of federal offenses, including immigration offenses, drug offenses, firearms, sex trafficking, child exploitation, witness tampering and wire fraud. She received her B.A. in Ethics and Criminal Justice from Central Methodist University and her J.D. from Fordham University School of Law.

J'me Forrest joined the United States Attorney's Office in October 2019. Before joining the USAO, AUSA Forrest was an associate at Munger, Tolles & Olson LLP for four years. In private practice, she represented large corporations and individuals at every stage of civil litigation and in criminal investigations.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the

order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

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

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

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

(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.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216; Pub.L. 115-391, Title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). >

Notes of Decisions (3029)

Footnotes

1 So in original. The period probably should be a semicolon.
2 So in original. No subpar. (B) has been enacted.
3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

U.S.S.G. § 3B1.2 (11/1/07)

United States Sentencing Commission

Guidelines Manual
***1**

Effective November 1, 1987, Including Amendments Effective January 1, 1988 through November 1, 2007 [a]

Chapter Three - Adjustments

Part B - Role in the Offense

§3B1.2. MITIGATING ROLE

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

Commentary

Application Notes:

1. Definition.--For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

2. Requirement of Multiple Participants.--This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.--

(A) Substantially Less Culpable than Average Participant.--This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

(B) Conviction of Significantly Less Serious Offense.--If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under

§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

***2** *(C) Fact-Based Determination.--The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.*

4. Minimal Participant.--Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently.

5. Minor Participant.-- Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.

6. Application of Role Adjustment in Certain Drug Cases.--In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(3), the court also shall apply the appropriate adjustment under this guideline.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (see Appendix C, amendment 456); November 1, 2001 (see Appendix C, amendment 635); November 1, 2002 (see Appendix C, amendment 640).

Footnotes

a Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; and November 1, 2007

End of Document

884 F.3d 911
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Alejandro Aguilar DIAZ, Defendant–Appellant.

No. 16-50102
|
Argued and Submitted October 3, 2017 Pasadena, California
|
Filed March 9, 2018

Synopsis
Background: Defendant entered a negotiated guilty plea, in the United States District Court for the Southern District of California, No. 3:15–cr–02484–BEN–1, Roger T. Benitez, J., to importation of cocaine and heroin, and his motion for minor-role reduction of offense level under Sentencing Guidelines was denied. Defendant appealed.

[Holding:] The Court of Appeals, Christen, Circuit Judge, held that district court's denial of minor-role reduction rested on incorrect interpretations of the relevant Guideline and an amendment to the Guideline.

Vacated and remanded.

West Headnotes (7)

[1] **Criminal Law** Review De Novo
Criminal Law Sentencing

With respect to application of the Sentencing Guidelines, the Court of Appeals reviews the District Court's identification of the correct legal standard de novo and the District Court's factual findings for clear error. U.S.S.G. § 1B1.1 et seq.

6 Cases that cite this headnote

[2] **Criminal Law** Application of guidelines

A district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion. U.S.S.G. § 1B1.1 et seq.

9 Cases that cite this headnote

[3] **Sentencing and Punishment** Burden of proof

A defendant seeking a minor-role reduction of the offense level under the Sentencing Guidelines bears the burden of proving that he or she is entitled to a downward adjustment based on his or her role in the offense. U.S.S.G. § 3B1.2(b).

4 Cases that cite this headnote

[4] **Criminal Law** In general; complaint, warrant, and preliminary examination
Sentencing and Punishment Sufficiency

The District Court need not tick off sentencing factors to show that it considered them, because the Court of Appeals assumes that the District Court knows and applies the law correctly.

8 Cases that cite this headnote

[5] **Criminal Law** Judgment, sentence, and punishment
Sentencing and Punishment Sufficiency

If the denial of a minor-role adjustment of the offense level under the Sentencing Guidelines is challenged and the defendant's sentencing occurred after the effective date of Amendment 794, which clarified the existing Guideline and provided a non-exhaustive list of sentencing factors, the Court of Appeals must assume the

district judge knew the law and understood his or her obligation to consider all of the sentencing factors, and the district judge need not recite each sentencing factor to show he or she had considered them. U.S.S.G. § 3B1.2(b) & cmt. n.3(C).

11 Cases that cite this headnote

[6] **Sentencing and Punishment** Minor or minimal participation
Sentencing and Punishment Burden of proof

While Amendment 794 to the Sentencing Guideline concerning minor-role reduction of offense level, which Amendment clarified the existing Guideline and provided a non-exhaustive list of sentencing factors, does not alter a defendant's burden to show that the nature of his participation rendered him substantially less culpable than other participants, the Amendment recognizes that a true minor-role participant need not be privy to every detail about the roles played by others in the scheme, and recognizes the likelihood that a true minor participant may be unable to identify other participants with specificity. U.S.S.G. § 3B1.2(b) & cmt. n.3(C).

12 Cases that cite this headnote

[7] **Criminal Law** Sentence
Sentencing and Punishment Minor or minimal participation

District court's denial of minor-role reduction of offense level under Sentencing Guidelines, at sentencing for importation of cocaine and heroin, rested on incorrect interpretations of the relevant Guideline and Amendment 794, which clarified the existing Guideline and provided a non-exhaustive list of sentencing factors, and thus, the Court of Appeals would vacate the sentence and remand for resentencing; district court relied on defendant's agreement to accept money in exchange for transporting drugs but ignored that his compensation was relatively modest and fixed, there was no evidence that defendant had a proprietary interest in the outcome of the trafficking operation or otherwise stood to benefit more than minimally, and while district court correctly identified a recruiter and another drug courier as the comparison group, it did not account for defendant's limited understanding of the overall scope and structure of the criminal operation. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 1002, 1010, 21 U.S.C.A. §§ 952, 960; U.S.S.G. § 3B1.2(b) & cmt. n.3(C).

5 Cases that cite this headnote

Attorneys and Law Firms

***912** Samuel L. Eilers (argued), Federal Defenders of San Diego, Inc., San Diego, California, for Defendant–Appellant.

Emily J. Keifer (argued), Assistant United States Attorney; Laura E. Duffy, United States Attorney; Helen H. Hong, Assistant United States Attorney, Chief, Appellate Section, Criminal Division; United States Attorney's Office, San Diego, California; for Plaintiff–Appellee.

Appeal from the United States District Court for the Southern District of California, Roger T. Benitez, District Judge, Presiding, D.C. No. 3:15–cr–02484–BEN–1

Before: Susan P. Graber, Mary H. Murguia, and Morgan Christen, Circuit Judges.

OPINION

CHRISTEN, Circuit Judge:

I. INTRODUCTION

Defendant Alejandro Aguilar Diaz pleaded guilty to importation of cocaine and heroin, in violation of 21 U.S.C. §§ 952 and 960. He appeals the district court's denial of a minor-role reduction for his sentence pursuant to United States Sentencing Guideline ("U.S.S.G.") § 3B1.2(b), arguing that the district court erred by refusing to consider all likely participants in the subject drug trafficking organization, erred by not sufficiently considering the factors articulated by Amendment 794 to the Sentencing Guideline, and abused its discretion when balancing the factors. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand for re-sentencing.

*913 II. BACKGROUND

Alejandro Aguilar Diaz, a 28-year-old legal resident of Tijuana, Mexico, was arrested on August 27, 2015, when crossing into the United States and charged with the importation of 10.68 kilograms of cocaine and 3.6 kilograms of heroin. On October 22, 2015, Aguilar Diaz agreed to plead guilty to two counts of drug importation in exchange for a favorable sentencing recommendation from the government.

After his arrest, Aguilar Diaz told authorities that he had agreed to transport drugs, which he believed to be marijuana, to an unknown location in the United States. He explained that he was at a party with a friend, Hector Rodriguez, when they were approached by an individual named Peter and asked if they would be willing to smuggle drugs across the border because they both had border-crossing cards. They agreed, and Aguilar Diaz accompanied Rodriguez on two crossings. The first was a practice run; Aguilar Diaz and Rodriguez drove separate cars and neither car carried drugs. The purpose of the first trip was for Aguilar Diaz to show Rodriguez how to cross the border in a vehicle. Only Rodriguez attempted to smuggle drugs into the United States on the second crossing but, because Rodriguez was nervous, Aguilar Diaz agreed to go along in a separate car in exchange for $200. Rodriguez was arrested on the second crossing. When Aguilar Diaz reported Rodriguez's arrest to Peter, Peter told him that he owed a debt for the confiscated drugs and that he would be paid only $1,000 for making an additional smuggling trip, instead of the $2,000 originally promised. Aguilar Diaz then allowed Peter to hide drugs in his car, tried to cross the border a third time, and he, too, was arrested. Eventually, Aguilar Diaz pleaded guilty to two counts of drug importation in exchange for the government's favorable sentencing recommendation. The pre-sentence report acknowledged that Aguilar Diaz cooperated after his arrest and during the subsequent investigation, and did not challenge his statement that he had only been involved in two prior crossings. It was undisputed that Aguilar Diaz has no prior criminal history.

In preparation for sentencing, Aguilar Diaz submitted a memorandum to the district court detailing his arguments in support of a minor-role adjustment pursuant to the § 3B1.2(b) Guideline. The memorandum argued that drug couriers play minor roles in drug trafficking organizations and addressed five factors the Sentencing Commission articulated when it clarified § 3B1.2 with Amendment 794.[1] Aguilar Diaz argued that all five of the recently enumerated factors weighed in favor of granting a minor-role adjustment in his case. The government disagreed and filed a sentencing summary chart that did not include a recommendation for a minor-role adjustment.

At Aguilar Diaz's sentencing hearing, the district court heard extensive argument from both parties about whether to grant the minor-role adjustment. The government cited Aguilar Diaz's involvement in multiple border crossings (the two crossings with Rodriguez and the crossing leading to Aguilar Diaz's arrest) to support its position that he should be considered a trusted courier, and urged the court to conclude that Aguilar Diaz was not eligible for the adjustment because he had not met his burden of demonstrating that he was substantially less culpable than the average participant. The defense argued the court should consider other "unknown" individuals who "have to exist in order for a drug trafficking organization to function," ***914** when deciding whether Aguilar Diaz had a minor role in the criminal enterprise. The district court responded that Ninth Circuit precedent precluded consideration of "hypothetical or unknown participants," and ruled that Rodriguez and Peter were the only other participants for comparison purposes.

In support of his contention that the Amendment 794 factors weighed in his favor, Aguilar Diaz argued: (1) the $1,000 he stood to receive for transporting the drugs was very little in comparison to the street value of the drugs ($270,000); (2) this was the first time he actually tried to smuggle drugs; (3) he had limited knowledge of other participants in the criminal enterprise; and (4) his mistaken understanding about the type and quantity of the drugs he was carrying demonstrated that he knew very little about the scope and structure of the smuggling operation. For its part, the government argued that

because Aguilar Diaz had experience crossing the border and Rodriguez did not, his presence and familiarity with the process encouraged and facilitated Rodriguez's smuggling trip. The government further argued that Aguilar Diaz was not substantially less culpable than the average participant because he assumed multiple roles by acting as a scout for Rodriguez's unsuccessful attempt and as a courier himself. The government pointed out that Aguilar Diaz was the driver and registered owner of the vehicle he used, that he attempted to traffic a large and valuable quantity of drugs, and that he agreed to accept money in exchange for the crossing. The district court adopted the government's argument with little elaboration and denied the minor-role adjustment. Aguilar Diaz was sentenced to serve 46 months in prison.

III. STANDARDS OF REVIEW

[1] [2]"[W]e review the district court's identification of the correct legal standard *de novo* and the district court's factual findings for clear error." *United States v. Gasca–Ruiz*, 852 F.3d 1167, 1170 (9th Cir.) (en banc), *cert. denied*, 1385 S. Ct. 229 (2017). "[A] district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion." *Id.*

IV. ANALYSIS

[3] [4]Section 3B1.2(b) of the United States Sentencing Guidelines provides for a two-level reduction in a defendant's sentence "[i]f the defendant was a minor participant in any criminal activity."[2] " 'The defendant bears the burden of proving that he [or she] is entitled to a downward adjustment based on his [or her] role in the offense.' " *United States v. Cantrell*, 433 F.3d 1269, 1282 (9th Cir. 2006) (alteration in original) (quoting *United States v. Awad*, 371 F.3d 583, 591 (9th Cir. 2004)). We have long held that in determining whether to grant a minor-role reduction, the correct inquiry is whether the defendant was " '*substantially less culpable* than the average participant' " in the charged criminal activity. *United States v. Rodriguez–Castro*, 641 F.3d 1189, 1193 (9th Cir. 2011) (quoting U.S.S.G. § 3B1.2 cmt. n.3(A)). It is also well established that a district court need not tick off sentencing factors to show that it considered them, *see* ***915** *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc), because "[w]e assume that the district court knows and applies the law correctly," *United States v. Cervantes–Valenzuela*, 931 F.2d 27, 29 (9th Cir. 1991) (per curiam). *See also United States v. Diaz–Argueta*, 564 F.3d 1047, 1052 (9th Cir. 2009).

Prior to Amendment 794, a circuit split developed concerning the proper interpretation of "the average participant" in the context of the minor-role sentencing Guideline. U.S.S.G. App. C. Amend. 794.[3] The First and Second Circuits allowed defendants to compare their culpability to that of their co-participants and to other persons participating in similar crimes—hypothetical typical offenders. *See id.* In our circuit and in the Seventh Circuit, the appropriate comparison was between the defendant and other participants in the same criminal scheme. *See id.* Amendment 794 resolved the circuit split in favor of the latter approach when it became effective on November 1, 2015. U.S.S.G. App. C. Amend. 794.

Amendment 794 also enumerated a list of factors for courts to consider when deciding whether to grant a minor-role adjustment:

> In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors: (i) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; (v) the degree to which the defendant stood to benefit from the criminal activity.

U.S.S.G. § 3B1.2 cmt. n.3(C). In stating its purpose for the Amendment, the Sentencing Commission explained that minor-role adjustments had been "applied inconsistently and more sparingly than the Commission intended," and that it intended to address caselaw that might discourage courts from applying minor-role adjustments.[4] U.S.S.G. App. C. Amend. 794. We have since observed that, as clarified, § 3B1.2 provides " 'a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered' for the reduction, and 'the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative' " of whether a minor-role adjustment should be granted. *United States v. Quintero–Leyva*, 823 F.3d 519, 523 (9th Cir. 2016) (brackets omitted) (quoting U.S.S.G. § 3B1.2 cmt. n.3(C)).

Quintero–Leyva reviewed a challenge to a sentence imposed before Amendment 794's effective date and addressed whether the factors identified in Amendment 794 should be given retroactive effect. There, the defendant pleaded guilty to importation of methamphetamine and sought a minor-role adjustment because he allegedly ***916** had limited knowledge of what he was transporting and no prior history of trafficking drugs across the border. *Id.* at 521. We held that because Amendment 794 was meant to clarify an existing Guideline, it applied retroactively to cases on direct appeal. *Id.* at 523. Further, we recognized that Amendment 794 settled the circuit split regarding which participants could be considered for comparison purposes and established that a defendant's conduct should be assessed against that of other participants in his or her own criminal scheme, rather than being compared to that of the hypothetical average participant in similar criminal activity. *Id.* We remanded Quintero–Leyva's case to the district court for re-sentencing because it was unclear whether the sentencing court had considered the factors identified by Amendment 794. *See id.* at 523–24.

[5]In the wake of Amendment 794 and *Quintero–Leyva*, if the denial of a minor-role adjustment is challenged and the defendant's sentencing occurred after the Amendment's effective date—as is the case here—our caselaw requires that we assume the district judge knew the law and understood his or her obligation to consider all of the sentencing factors, and we invoke the well-established presumption that the district court need not recite each sentencing factor to show it has considered them. *See Carty*, 520 F.3d at 992. But in deciding these post-Amendment appeals, we also recognize the Sentencing Commission's statement that minor-role adjustments were being applied more sparingly than the Commission intended and its admonition that, in Amendment 794, the Commission did more than merely adopt the Ninth Circuit's side of the previous circuit split concerning consideration of hypothetical average participants. Going forward, the assessment of a defendant's eligibility for a minor-role adjustment must include consideration of the factors identified by the Amendment, not merely the benchmarks established by our caselaw that pre-dates Amendment 794's effective date.

Turning to this appeal, Aguilar Diaz argues that the district court erred because it did not consider or mention the five factors listed in § 3B1.2 cmt. n.3(C), and failed to mention other factors it did consider when it concluded that Aguilar Diaz did not qualify for a minor-role adjustment. But the district court was not obligated to tick off the factors on the record to show that it considered them, *see Carty*, 520 F.3d at 992, and we have no trouble determining from the sentencing memoranda and the transcript of the sentencing hearing that the district court was well aware of the factors added by Amendment 794. The factors were thoroughly enumerated in the defendant's sentencing memorandum, and defense counsel pressed its points in argument to the court.

[6]Next, Aguilar Diaz argues that the district court erred by refusing to consider all likely participants in the drug smuggling operation in which he was involved because the court considered only Rodriguez and Peter. In *United States v. Rojas–Millan* we held that, when measuring a defendant's culpability relative to that of other participants, district courts must compare the defendant's involvement to that of all likely participants in the criminal scheme for whom there is sufficient evidence of their existence and participation. 234 F.3d 464, 473 (9th Cir. 2000). The question implied by Aguilar Diaz's appeal is whether this pre-existing caselaw is inconsistent with the guidance provided by Amendment 794. We conclude that it is not. Although Amendment 794 does not alter defendant's burden to show that the nature of his participation rendered him substantially less culpable than other participants, ***917** the Amendment recognizes that a true minor-role participant need not be privy to every detail about the roles played by others in the scheme. This is evident from one of the factors added by Amendment 794: "the degree to which the defendant understood the scope and structure of the criminal activity." U.S.S.G. § 3B1.2 cmt. n.3(C). The

Amendment recognizes the likelihood that a true minor participant may be unable to identify other participants with specificity. This is consistent with our pre-existing caselaw.

Prior to Amendment 794, *Rojas–Millan* acknowledged that a defendant seeking a minor-role reduction need not identify other participants precisely. *Rojas–Millan* held the district court should have considered other actors who were identified only by location and role—the Los Angeles supplier and Reno distributor. 234 F.3d at 473–74. Our caselaw has never required a defendant to identify other participants by name; doing so is only one way a defendant can establish the existence of other participants in a criminal scheme. *See id.* Identifying the locations of other individuals and the roles they actually served may be sufficient for the defendant to meet his burden. We conclude that Amendment 794 did not change the size of the appropriate comparison group—it remains impermissible to compare a defendant's conduct to that of the hypothetical average participant—but Amendment 794 makes clear that when a defendant knows little about the scope and structure of the criminal enterprise in which he was involved, that fact weighs in favor of granting a minor-role adjustment.

Separately, Aguilar Diaz argues that he *did* demonstrate the likely existence and participation of others, because of the value of the drugs, the likelihood that someone supplied the drugs to Peter and helped him load and conceal the drugs in Aguilar Diaz's car, and because someone must have existed in the United States to accept delivery. The district court considered this evidence, but it was not persuaded that Aguilar Diaz had done more than speculate that other participants must have existed. The district court went on to conclude that even in comparison to the people who "create the drugs, who cut the drugs, who load the drugs, who then unload the drugs, who sell the drugs on the streets, who ... generate the money and send the money back to Mexico," Aguilar Diaz's role of scouting and acting as a courier to smuggle a large amount of drugs across the border was not minor. To the extent the district court's reasoning reflects reliance on courier conduct as dispositive of Aguilar Diaz's eligibility for a minor-role reduction, it was error. Amendment 794 clarified that the performance of an essential role—here, the role of smuggling drugs across the border—is not dispositive. *See* *Quintero–Leyva*, 823 F.3d at 523.

Finally, Aguilar Diaz argues that the district court abused its discretion because, collectively, the factors weigh in his favor. We agree that several of the Amendment 794 factors do weigh in Aguilar Diaz's favor. *See* U.S.S.G. § 3B1.2 cmt. n. 3(C). For example, it is not contested that he did not know the type or quantity of the drugs hidden in his vehicle, suggesting he did not play a significant role in planning or organizing. That Aguilar Diaz only knew two other participants limits the size of the comparison group, but it also cuts in his favor because it tends to show that he had minimal knowledge regarding the scope and structure of the criminal operation. It is also undisputed that Aguilar Diaz was to receive a set fee of $1,000 and had no ownership interest or other stake in the outcome of the trafficking operation. Accordingly, he is among the offenders the Sentencing Commission described as not having a "*proprietary* interest in the criminal ***918** activity and who is simply being paid to perform certain tasks." *Quintero–Leyva*, 823 F.3d at 523 (emphasis added). This factor also weighs in favor of granting the adjustment.

[7]Although the district court has considerable latitude in ruling on minor-role adjustments, *see* *id.*, on this record we must remand for re-sentencing because the decision to deny the adjustment rested on incorrect interpretations of the § 3B1.2 Guideline and Amendment 794. The difficulty is that the district court adopted the government's argument with little elaboration, and the government's argument included an incorrect interpretation of § 3B1.2 and Amendment 794. First, the government relied on the fact that Aguilar Diaz agreed to accept money in exchange for transporting drugs, but ignored that his compensation was relatively modest and fixed. There was no evidence that Aguilar Diaz had a proprietary interest in the outcome of the operation or otherwise stood to benefit more than minimally. Second, though the government correctly identified Peter and Rodriguez as the comparison group, it did not account for Aguilar Diaz's limited understanding of the overall "scope and structure of the criminal operation."

Because we cannot determine whether the district court would have granted a minor-role adjustment had these factors been properly applied, we vacate Aguilar Diaz's sentence and remand for re-sentencing.

VACATED AND REMANDED.

All Citations

884 F.3d 911, 18 Cal. Daily Op. Serv. 2392, 2018 Daily Journal D.A.R. 2235

Footnotes

[1] Amendment 794 to § 3B1.2 became effective on November 1, 2015.

[2] The Guideline provides: "[b]ased on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels." U.S.S.G. § 3B1.2.

[3] *Compare* *United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004), *and* *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999) (per curiam), *with* *Cantrell*, 433 F.3d at 1283 (9th Cir. 2006), *and* *United States v. DePriest*, 6 F.3d 1201, 1214 (7th Cir. 1993).

[4] "This amendment ... addresses a circuit conflict and other caselaw that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances." U.S.S.G. App. C. Amend. 794.

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Five. Determining the Sentence (Refs & Annos)
Part C. Imprisonment

USSG, § 5C1.2, 18 U.S.C.A.

§ 5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

Currentness

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);

(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 21 U.S.C. § 848; 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.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

CREDIT(S)

(Effective September 23, 1994; amended effective November 1, 1995; November 1, 1996; November 1, 1997; November 1, 2001; October 27, 2003; November 1, 2004; November 1, 2009.)

COMMENTARY

<***Application Notes:***>

<**1.** "More than 1 criminal history point, as determined under the sentencing guidelines," as used in subsection (a)(1), means more than one criminal history point as determined under § 4A1.1 (Criminal History Category) before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).>

<**2.** "Dangerous weapon" and "firearm," as used in subsection (a)(2), and "serious bodily injury," as used in subsection (a)(3), are defined in the Commentary to § 1B1.1 (Application Instructions).>

<**3.** "Offense," as used in subsection (a)(2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.>

<**4.** Consistent with § 1B1.3 (Relevant Conduct), the term "defendant," as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.>

<**5.** "Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under § 3B1.1 (Aggravating Role).>

<**6.** "Engaged in a continuing criminal enterprise," as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise," but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor of others in the offense.">

<**7.** Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of § 1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.>

<**8.** Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Fed.R.Crim.P. 32(f), (i).>

<**9.** A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.>

<***Background:*** *This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). See also H.Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).>

Notes of Decisions (149)

Federal Sentencing Guidelines, § 5C1.2, 18 U.S.C.A., FSG § 5C1.2
As amended to 3-15-22.

998 F.3d 431
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Eric LOPEZ, Defendant-Appellee.

No. 19-50305
|
Argued and Submitted February 9, 2021
Pasadena, California
|
Filed May 21, 2021

Synopsis

Background: After defendant pled guilty to importing at least fifty grams or more of a substance containing methamphetamine, defendant filed motion for safety valve sentence reduction under First Step Act. The United States District Court for the Southern District of California, M. James Lorenz, Senior District Judge, 2019 WL 3974124, granted motion, and government appealed.

Holdings: The Court of Appeals, Murguia, Circuit Judge, held that:

[1] in matter of first impression, defendant must have more than four criminal-history points, prior three-point offense, and prior two-point violent offense, cumulatively, before he or she is barred from safety-valve relief, and

[2] defendant's prior vandalism conviction did not render him ineligible for safety-valve relief.

Affirmed.

Milan D. Smith, Circuit Judge, concurred in part, dissented in part, concurred in judgment, and filed opinion.

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

West Headnotes (14)

[1] Controlled Substances Proceedings

Defendant bears burden of proving safety valve eligibility by preponderance of evidence. 18 U.S.C.A. § 3553(f).

6 Cases that cite this headnote

[2] Controlled Substances Criminal history

Criminal defendant must have more than four criminal-history points, prior three-point offense, and prior two-point violent offense, cumulatively, before he or she is barred from safety-valve relief. 18 U.S.C.A. § 3553(f)(1).

9 Cases that cite this headnote

[3] Criminal Law Liberal or strict construction; rule of lenity

Rule of lenity requires grievous ambiguity in criminal statutes to be resolved in criminal defendant's favor.

[4] Controlled Substances Criminal history

Defendant's prior vandalism conviction did not render him ineligible for safety-valve relief following his conviction for importing methamphetamine, even though vandalism conviction was three-point offense; defendant did not have more than four criminal points or two-point violent offense. 18 U.S.C.A. § 3553(f)(1).

6 Cases that cite this headnote

[5] **Criminal Law** Review De Novo

Court of Appeals reviews de novo district court's interpretation of statute.

1 Cases that cite this headnote

[6] **Statutes** Language
Statutes Plain language; plain, ordinary, common, or literal meaning

In construing statute, court must begin with statutory text and end there if statute's language is plain.

[7] **Statutes** Undefined terms

Unless defined in statute, statutory term receives its ordinary, contemporary, common meaning.

[8] **Statutes** Similarity or difference

Canon of consistent usage requires court to presume that given term is used to mean same thing throughout statute and is at its most vigorous when term is repeated within given sentence.

1 Cases that cite this headnote

[9] **Statutes** Unintended or unreasonable results; absurdity

To avoid absurdity, plain text of Congress's statute need only produce rational results, not wise results.

[10] **Constitutional Law** Making, Interpretation, and Application of Statutes

Remedy for any dissatisfaction with results in particular statutory-construction cases lies with Congress and not with courts.

[11] **Statutes** Superfluousness

Canon against surplusage requires court, if possible, to give effect to each word and clause in statute.

1 Cases that cite this headnote

[12] **Statutes** Superfluousness

Canon against surplusage does not supersede statute's plain meaning and structure, while, at same time, requiring court to inconsistently interpret same word in same sentence.

1 Cases that cite this headnote

[13] **Criminal Law** Liberal or strict construction; rule of lenity

Rule of lenity prevents court from giving criminal statute's text meaning that is different from its ordinary, accepted meaning, and that disfavors criminal defendant.

[14] **Constitutional Law**Certainty and definiteness in general
Criminal Law Liberal or strict construction; rule of lenity

Rule of lenity is not just convenient canon of statutory construction; it is rooted in fundamental principles of due process mandating that no individual be forced to speculate whether his or her conduct is covered by criminal statute. U.S. Const. Amends. 5, 14.

***432** Appeal from the United States District Court for the Southern District of California, M. James Lorenz, District Judge, Presiding, D.C. No. 3:19-cr-00261-L-1

Attorneys and Law Firms

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Michael Marks (argued), Federal Defenders of San Diego, Inc., San Diego, California, for Defendant-Appellee.

Before: Danny J. Boggs,* Milan D. Smith, Jr., and Mary H. Murguia, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge Milan D. Smith Jr.

OPINION

MURGUIA, Circuit Judge:

[1] Title 18 U.S.C. § 3553(f), commonly called the "safety valve," allows a district court to sentence a criminal defendant below the mandatory-minimum sentence for certain drug offenses if the defendant meets the criteria in § 3553(f)(1) through (f)(5). In 2018, Congress amended one of the safety valve's provisions: § 3553(f)(1). *See* First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221. Section 3553(f)(1) focuses only on a criminal defendant's prior criminal history as determined under the United States Sentencing Guidelines. *See generally* 18 U.S.C. § 3553(f)(1). As amended, § 3553(f)(1) requires a defendant to prove that he or she "does not have" the following: "(A) more than 4 criminal history points ... (B) a ***433** prior 3-point offense ... *and* (C) a prior 2-point violent offense." *Id.* § 3553(f)(1)(A)–(C) (emphasis added).[1]

[2]As a matter of first impression, we must interpret the "and" joining subsections (A), (B), and (C) under § 3553(f)(1). If § 3553(f)(1)'s "and" carries its ordinary conjunctive meaning, a criminal defendant must have (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense, cumulatively, before he or she is barred from safety-valve relief under § 3553(f)(1). But if we rewrite § 3553(f)(1)'s "and" into an "or," as the government urges, a defendant must meet the criteria in only subsection (A), (B), *or* (C) before he or she is barred from safety-valve relief under § 3553(f)(1). Applying the tools of statutory construction, we hold that § 3553(f)(1)'s "and" is unambiguously conjunctive. Put another way, we hold that "and" means "and."

I.

This case involves criminal defendant Eric Lopez, a thirty-five-year-old man from South Gate, California. In December 2018, Lopez attempted to drive across the United States-Mexico border in Otay Mesa, California. A Customs and Border Protection Officer noticed a "soapy-odor" emanating from Lopez's vehicle and referred Lopez to secondary inspection. The inspection of Lopez's vehicle revealed packages containing methamphetamine. The government arrested Lopez and charged him with importing at least fifty grams or more of a substance containing methamphetamine in violation of 21 U.S.C. § 952 and 21 U.S.C. § 960. Lopez pleaded guilty.

Lopez's conviction triggered a mandatory-minimum sentence of five years' imprisonment. *See* 21 U.S.C. § 960(b)(2)(H). At sentencing, Lopez requested a sentence below the five-year mandatory minimum pursuant to the safety valve, 18 U.S.C. § 3553(f). The safety valve allows a district court to sentence a criminal defendant below a mandatory-minimum sentence for particular drug offenses if a defendant meets the criteria outlined in § 3553(f)(1) through (f)(5). *See generally* 18 U.S.C. § 3553(f). Because the government conceded that Lopez met the criteria outlined in § 3553(f)(2) through (f)(5),[2] whether the district court could sentence Lopez below the mandatory minimum turned on whether Lopez met the criteria in recently amended § 3553(f)(1). As amended, a defendant meets the criteria in § 3553(f)(1) 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[.]

***434** *Id.* § 3553(f)(1) (emphasis added). In other words, § 3553(f)(1) bars a defendant from safety-valve relief only if that defendant has each of (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense.

The district court explained that Lopez's Presentence Investigation Report revealed only one relevant conviction under the Sentencing Guidelines. In December 2007, when Lopez was twenty-two years old, he spray-painted a sign onto a building. Police officers witnessed Lopez spray-paint the sign and arrested him for vandalism. Lopez was convicted of vandalism in 2008. Because Lopez ultimately served more than thirteen months of imprisonment for the vandalism conviction,[3] that conviction constituted a "3-point offense" under the Sentencing Guidelines. *See* U.S. Sent'g Guidelines Manual § 4A1.1(a) (U.S. Sent'g Comm'n 2018) (explaining that, when calculating a defendant's criminal-history category, the district court must "[a]dd 3 points" for each prior sentence exceeding thirteen months of imprisonment).

In the district court, Lopez and the government agreed that Lopez's relevant criminal history—the single vandalism conviction—met the criteria in only subsection (B) ("prior 3-point offense") under § 3553(f)(1). Lopez had neither (A) "more than 4 criminal history points" nor (C) a "prior 2-point violent offense" under § 3553(f)(1). At sentencing, Lopez argued that § 3553(f)(1)'s "and" is plainly conjunctive, which meant that Lopez was eligible for safety-valve relief unless he had (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense.[4] The government argued, to the contrary, that Lopez was excluded from safety-valve relief if he met any of the criteria in subsection (A), (B), *or* (C) under § 3553(f)(1).

[3] [4]The district court recognized that whether Lopez's vandalism conviction precluded him from safety-valve relief turned on whether § 3553(f)(1)'s "and" is conjunctive or disjunctive. The district court concluded that § 3553(f)(1)'s "and" is ambiguous and invoked the rule of lenity to reach a conjunctive interpretation.[5] Lopez was eligible for safety-valve relief under the district court's conjunctive interpretation because, although his criminal history met subsection (B), his criminal history did not meet the criteria in subsections (A), (B), *and* (C) under § 3553(f)(1). The district court sentenced Lopez to four years of imprisonment, one year less than the five-year mandatory minimum. The government timely appealed Lopez's sentence.

II.

[5]We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a district court's interpretation of a statute. *United States v. Mejia-Pimental*, 477 F.3d 1100, 1103 (9th Cir. 2007) (reviewing de novo a district court's statutory interpretation of the safety-valve statute).

*435 III.

A.

The safety-valve provision allows a district court to sentence a criminal defendant below the

mandatory-minimum sentence for particular drug offenses if a defendant meets the following five subsections in § 3553(f):

> (1) the defendant does not have—
>
> (A) more than 4 criminal history points ...;
>
> (B) a prior 3-point offense ...; and
>
> (C) a prior 2-point violent offense ...;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon ... in connection with the [instant drug] offense;
>
> (3) the [instant drug] 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 [instant drug] offense ... and was not engaged in a continuing criminal enterprise ...; and
>
> (5) [before] the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the [instant drug] offense ....

18 U.S.C. § 3553(f)(1)–(5).

This case requires us to interpret one of those five provisions, § 3553(f)(1), which focuses on the defendant's prior criminal history as determined under the Sentencing Guidelines. *See generally id.* § 3553(f)(1). Before 2018, § 3553(f)(1) barred any defendant with more than one criminal-history point under the Sentencing Guidelines from safety-valve relief. *See Mejia-Pimental*, 477 F.3d at 1104. The low threshold of more than one criminal-history point resulted in many drug offenders receiving mandatory-minimum sentences in instances that some in Congress believed were unnecessary and harsh. Congress recognized the problem and sought to give district courts more flexibility.[6]

In December 2018, Congress passed the First Step Act, which amended § 3553(f)(1) and relaxed its criminal-history disqualifications. First Step Act of 2018, 132 Stat. at 5221. As amended, § 3553(f)(1) requires a defendant to prove that he or she "does not have" the following: "(A) more than 4 criminal history points ... (B) a prior 3-point offense ... *and* (C) a prior 2-point violent offense." *Id.* § 3553(f)(1)(A)–(C) (emphasis added). The issue before us is whether § 3553(f)(1)'s "and" is conjunctive or disjunctive.

B.

[6] [7]Well-established rules of statutory construction guide our review in construing § 3553(f)(1). We begin with the statutory text and end there if the statute's language is plain. *See Bostock v. Clayton Cnty.*, —— U.S. ——, 140 S. Ct. 1731, 1749, 207 L.Ed.2d 218 (2020). Unless defined in the statute, a statutory term receives its "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). The "limits of the drafters' imagination supply no reason to ignore the law's demands." *Bostock*, 140 S. Ct. at 1737 (holding that the clear statutory text in the Civil Rights Act of 1964 prohibited discrimination based on sexual orientation ***436** and gender identity even though members of Congress in 1964 "might not have anticipated their work would lead to th[at] particular result").

Here, the government concedes that the plain and ordinary meaning of § 3553(f)(1)'s "and" is conjunctive. The government's concession is well taken. For the past fifty years, dictionaries and statutory-construction treatises have instructed that when the term "and" joins a list of conditions, it requires not one or the other, but *all* of the conditions. *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* 46 (11th ed. 2020) (defining "and" to "indicate connection or addition"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116–20 (2012) (stating that "and" combines a list of conditions in a statute); *New Oxford American Dictionary* 57 (3rd ed. 2010) (stating that "and" is "used to connect words of the same part of speech, clauses, or sentences that are to be taken *jointly*") (emphasis added); *Oxford English Dictionary* 449 (2d ed. 1989) (stating that "and" introduces "a word, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it") (italics omitted); *Webster's Third New International Dictionary* 80 (1967) (defining "and" to mean "along with or together with" or "as well as").

Even if we had any doubt that Congress intended "and" in § 3553(f)(1) to receive its plain meaning, one glance at the Senate's legislative drafting manual would resolve it. Indeed, the Senate's drafting manual instructs that the term "and" should be used to join a list of

conditions—such as subsections (A), (B), and (C) in § 3553(f)(1)—when a conjunctive interpretation is intended:

> In a list of criteria that specifies a class of things—(1) use "or" between the next-to-last criterion and the last criterion to indicate that a thing is included in the class if it meets 1 or more of the criteria; and (2) use "and" to indicate that a thing is included in the class only if it meets all of the criteria.

Office of the Legislative Counsel, *Senate Legislative Drafting Manual* 64 (1997). Therefore, not only is the plain meaning of "and" conjunctive, but the Senate's own legislative drafting manual tells us that "and" is used as a conjunctive in statutes structured like § 3553(f)(1). This, too, the government concedes.

In addition to conceding that both the plain meaning of "and" and the Senate's legislative drafting manual support a conjunctive interpretation of § 3553(f)(1)'s "and," the government also concedes that § 3553(f)(1)'s structure as a conjunctive negative proof supports a conjunctive interpretation. A conjunctive negative proof includes a list of prohibitions stating, for example, "not A, B, and C." Scalia & Garner, *supra*, at 120. In *Reading Law*, Justice Scalia and Bryan Garner provide the following example of a conjunctive negative proof: "To be eligible, you must prove that you have not A, B, and C." *Id.* A conjunctive negative proof requires a person to prove that he or she does not meet A, B, and C, *cumulatively*. *See id.* at 119–20 (explaining that when the term "and" joins a list of prohibitions, "the listed things are individually permitted but cumulatively prohibited").

Section 3553(f)(1) is a conjunctive negative proof. To be eligible for the safety valve, a defendant must prove that he or she "does not have" the following: (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense. 18 U.S.C. § 3553(f)(1)(A)–(C). This structure requires a defendant to prove that he or she does meet the criteria in subsections (A), (B), and (C), *cumulatively*. *See id.*; Scalia & ***437** Garner, *supra*, at 119–20. A conjunctive negative proof may not be very common, but it involves specific rules of usage that eliminate any potential ambiguity regarding "and" in statutes structured like § 3553(f)(1). *See* Scalia & Garner, *supra*, at 119–20. The use of "and" in a conjunctive negative proof is determinative. *See id.* Rewriting § 3553(f)(1)'s "and" into an "or," as the government urges, would mean that we, as judges, have the power to change § 3553(f)(1)'s entire structure into a *disjunctive* negative proof. *See id.* at 120.[7]

[8]Last, the government concedes that the canon of consistent usage requires us to "presume" that § 3553(f)(1)'s "and" is a conjunctive. The canon of consistent usage requires a court to presume that "a given term is used to mean the same thing throughout a statute" and is "at its most vigorous when a term is repeated within a given sentence." *See* *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). This canon seeks consistent interpretations of a statutory term. *See* *id.* at 118–20, 115 S.Ct. 552.

The canon of consistent usage is relevant here because we previously interpreted a different "and" within § 3553(f) in the conjunctive—the "and" located at the end of § 3553(f)(4). *See* *Mejia-Pimental*, 477 F.3d at 1101, 1104. Section 3553(f)(4)'s final "and" joins § 3553(f)(1) (the provision at issue here), § 3553(f)(2) (prohibiting violence or possession of a dangerous weapon) § 3553(f)(3) (prohibiting death or serious bodily injury), § 3553(f)(4) (prohibiting a leader or organizer role), *and* § 3553(f)(5) (requiring certain information to be timely provided to the government). *See id.* That is why a criminal defendant must demonstrate that he or she meets all of these subsections under § 3553(f) before receiving safety-valve relief. *See id.* Because we have already interpreted § 3553(f)(4)'s final "and" in the conjunctive, the canon of consistent usage requires us to presume that § 3553(f)(1)'s "and" is also conjunctive. *See* *Brown*, 513 U.S. at 118, 115 S.Ct. 552. And because § 3553(f)(4)'s final "and"—as well as § 3553(f)(1)'s "and"—joins a list of conditions in the same lengthy sentence within § 3553(f), the presumption of consistent usage is "at its most vigorous." *See id.*

In sum, § 3553(f)(1)'s plain meaning, the Senate's own legislative drafting manual, § 3553(f)(1)'s structure as a conjunctive negative proof, and the canon of consistent usage lead to only one plausible reading of "and" here. Section 3553(f)(1)'s "and" is conjunctive.

Thus, a defendant must meet the criteria in subsections (A) (more than four criminal-history points), (B) (a prior three-point offense), *and* (C) (a prior two-point violent offense) to be barred from safety-valve relief by § 3553(f)(1). This means one of (A), (B), or (C) is not enough. A defendant must have all three before § 3553(f)(1) bars him or her from safety-valve relief.

C.

The government argues that we should disregard § 3553(f)(1)'s plain meaning, disregard § 3553(f)(1)'s structure as a conjunctive negative proof, disregard the Senate's legislative drafting manual, and inconsistently interpret "and" within ***438** § 3553(f). The government contends that § 3553(f)(1)'s "and" remains "ambiguous" and urges us to resolve that ambiguity by rewriting § 3553(f)(1)'s "and" into an "or."

In support, the government cites a handful of cases in which we construed the statutory term "and" to mean "or" because not doing so would have (1) rendered other statutory language superfluous or (2) produced absurd results. *See* *Confederated Tribes and Bands of Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 990–91 (9th Cir. 2020) (construing the term "and" disjunctively because not doing so would render other statutory language superfluous); *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (same); *Alaska v. Lyng*, 797 F.2d 1479, 1482 n.4 (9th Cir. 1986) (construing the term "and" disjunctively when interpreting the phrase "prospective community centers and recreational areas" because not doing so would defy common sense); *see also* *United States v. Fisk*, 70 U.S. (3 Wall.) 445, 447–48, 18 L.Ed. 243 (1865) (construing "and" to mean "or" when not doing so would produce results that defy common sense). These cases are distinguishable because they construed "and" to mean "or" neither in a conjunctive negative proof like § 3553(f)(1) nor when the canon of consistent usage required the court to vigorously presume that "and" is a conjunctive.

But, more to the point, the cases the government cites do not apply here because giving § 3553(f)(1)'s "and" its plain meaning neither produces absurd results nor renders other statutory terms superfluous.

1.

The government first argues that construing § 3553(f)(1)'s "and" in the conjunctive produces absurd results. We may avoid giving a statutory term its plain meaning if doing so would produce absurd results. *See* *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). But we recently explained that the absurdity canon is "confined to situations where it is *quite impossible* that Congress could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone." *In re Hokulani Square, Inc.*, 776 F.3d 1083, 1088 (9th Cir. 2015) (internal citation and quotation marks omitted) (emphasis added); *see also* *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930) ("[T]o justify a departure from the letter of the law upon [the absurdity] ground, the absurdity must be so gross as to shock the general moral or common sense" and there "must be something to make plain the intent of Congress that the letter of the statute is not to prevail.").

[9] [10]To avoid absurdity, the plain text of Congress's statute need only produce "rational" results, not "wise" results. *See In re Hokulani Square*, 776 F.3d at 1088. The bar for "rational" is quite low. *See* *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575–76, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) (refusing to rewrite a federal maritime statute when the statute's clear text provided a seaman with more than $300,000 in damages for only $412 in unpaid wages). This is because the "remedy for any dissatisfaction with the results in particular [statutory-construction] cases lies with Congress and not with [the courts]." *Id.* Although "Congress may amend the statute[,] we may not." *Id.* at 576, 102 S.Ct. 3245.

In this case, the government contends that construing § 3553(f)(1)'s "and" in the conjunctive produces "absurd" hypothetical results. For instance, the government points out that a career offender with several drug convictions—but who never committed a violent act—could possibly become ***439** eligible for safety-valve relief under a conjunctive interpretation. The government's hypothetical career offender presumably would have (A) more than four criminal-history points and (B) a prior three-point offense, but not (C) a prior two-point violent offense, under § 3553(f)(1).[8]

The government's career-offender hypothetical does not produce "absurd" results for multiple reasons. First, that hypothetical does not grapple with the purpose of each subsection under § 3553(f)(1). Subsection (A) targets recidivism (more than four criminal-history points), subsection (B) targets serious offenses (a prior three-point offense) and subsection (C) targets violence (a prior two-point violent offense). Congress could have required all three elements before subjecting a defendant to mandatory-minimum sentences for drug offenses. Indeed, a conjunctive interpretation results in § 3553(f)(1) not barring *non-violent*, repeat drug offenders from safety-valve relief. But *violent*, repeat drug offenders will almost always be barred under a conjunctive interpretation. When enacting the First Step Act, Congress could have made a policy decision to target violent drug offenders. This is, at minimum, a "rational" policy result.

Second, the government's career-offender hypothetical focuses only on § 3553(f)(1) and disregards the remainder of the safety-valve requirements, which the defendant must also satisfy before becoming eligible for safety-valve relief. Unlike § 3553(f)(1)'s focus on the defendant's *prior* criminal history, the remainder of the safety-valve statute focuses on the defendant's *instant* offense. *See* 18 U.S.C. § 3553(f)(2)–(5) (prohibiting the defendant from doing the following in the instant offense—act with or threatening violence, possessing deadly weapons, inflicting serious bodily injury, acting as a leader or organizer, and keeping certain information from the government). When enacting the First Step Act, Congress could have made a policy decision that the safety valve should focus more on the defendant's instant offense rather than the defendant's prior criminal history. This, too, is a "rational" policy result.

Third, if we accepted the government's absurdity argument and rewrote § 3553(f)(1)'s "and" into an "or," we would create results—not otherwise present under a conjunctive interpretation—that are arguably more confounding than the government's career-offender hypothetical. For instance, Lopez would lose the possibility of safety-valve relief only because he spray-painted a sign onto a building almost fourteen years ago. *See id.* § 3553(f)(1)(B). And a criminal defendant convicted of selling a small amount of marijuana (such as a marijuana cigarette), who received a sentence that exceeded thirteen months of imprisonment, could not receive safety-valve relief.[9] *See id.* (referring to a "3-point ***440** offense"); U.S. Sent'g Guidelines Manual § 4A1.1(a) (explaining that the district court must "[a]dd three points" to a defendant's criminal-history category for each sentence exceeding thirteen months of imprisonment). The government's request that we rewrite § 3553(f)(1)'s "and" into an "or" based on the absurdity canon is simply a request for a swap of policy preferences. But dissatisfaction with a statute's policy results is an insufficient ground to rewrite Congress's clear and unambiguous text. *See In re Hokulani Square*, 776 F.3d at 1088 ("The absurdity canon isn't a license for us to disregard statutory text where it conflicts with our policy preferences."); *see also Griffin*, 458 U.S. at 575–76, 102 S.Ct. 3245.

In the end, Congress amended the safety-valve provision in 2018 to give district courts discretion to avoid situations in which drug offenders must receive a sentence that is unduly harsh because of a mandatory minimum. Because a conjunctive interpretation of § 3553(f)(1)'s "and" remains "in harmony with what is thought to be the spirit and purpose of the act," this case lacks the "rare and exceptional circumstances" that allow a court to disregard Congress's clear and unambiguous statute via the absurdity canon. *See Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (citation and quotation marks omitted); *see also In re Hokulani Square*, 776 F.3d at 1088.

2.

[11]The government's next argument involves the canon against surplusage. This canon of construction requires a court, if possible, to give effect to each word and clause in a statute. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001); *see also Lamie v. United States Tr.*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *United States v. Barraza-Lopez*, 659 F.3d 1216, 1220 (9th Cir. 2011) (explaining that a court should avoid interpreting statutes to render any word or clause superfluous). The government argues that interpreting § 3553(f)(1)'s "and" as a conjunctive renders subsection (A) of § 3553(f)(1) superfluous because any defendant who has (B) a "prior 3-point offense" and (C) a "prior 2-point violent offense" will always have five criminal history points and therefore meet (A) "more than 4 criminal history points."

But the government's argument fails to consider a

defendant who has only one three-point violent offense under the Sentencing Guidelines; that defendant would have (B) a "prior 3-point offense" and (C) a "prior 2-point violent offense" but would have only three criminal-history points, *not* (A) "more than 4 criminal history points." *See* 18 U.S.C. § 3553(f)(1)(A)–(C). Put another way, a three-point violent offense can simultaneously satisfy two subsections, (B) and (C), while not satisfying subsection (A). *See id.* Subsection (A) is not superfluous under a conjunctive interpretation; it clarifies that a single three-point violent offense does not bar a defendant from safety-valve relief.[10]

***441** [12]Finally, even if we agreed that subsection (A) is superfluous under a conjunctive interpretation, our holding would not change. The canon against surplusage is just a rule of thumb. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (stating that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation"); *Chickasaw Nation*, 534 U.S. at 94, 122 S.Ct. 528 (explaining that "canons are not mandatory rules"); *see also* *Facebook, Inc. v. Duguid*, —— U.S. ——, 141 S. Ct. 1163, 1173–74, 209 L.Ed.2d 272 (2021) (Alito, J., concurring) ("[T]he Scalia-Garner treatise makes it clear that interpretive canons are not rules of interpretation in any strict sense but presumptions about what an intelligently produced text conveys.") (internal quotation marks and citation omitted). The canon against surplusage does not supersede a statute's plain meaning and structure, while, at the same time, requiring us to inconsistently interpret the same word in the same sentence. *See, e.g.*, *Lamie*, 540 U.S. at 536, 124 S.Ct. 1023 (choosing to follow the plain meaning despite that plain meaning rendering certain words in the statute surplusage); *Conn. Nat'l Bank*, 503 U.S. at 253–54, 112 S.Ct. 1146 ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others," plain meaning, because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). This is especially true for criminal statutes, such as § 3553(f)(1), because substantial "overlap between ... clauses" is "not uncommon in criminal statutes." *See* *Loughrin v. United States*, 573 U.S. 351, 358 n.4, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014); *see also* *Hubbard v. United States*, 514 U.S. 695, 714 n.14, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995). Accordingly, even if we were to accept the government's surplusage argument, too many reasons—plain meaning, structure, the Senate's own legislative drafting manual, and consistent interpretations—show that the canon against surplusage would yield in this specific context.[11]

***442 D.**

The government also argues that a conjunctive interpretation of § 3553(f)(1)'s "and" conflicts with legislative history. Because § 3553(f)(1)'s "and" is not ambiguous, we need not consult legislative history. *See* *Food Mktg. Inst. v. Argus Leader Media*, —— U.S. ——, 139 S. Ct. 2356, 2364, 204 L.Ed.2d 742 (2019) ("Even [courts] who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.' ") (citation omitted); *see also* *Bostock*, 140 S. Ct. at 1750 ("[L]egislative history can never defeat unambiguous statutory text."). But even if we considered legislative history, our holding would not change because the legislative history does not show that a conjunctive interpretation of § 3553(f)(1)'s "and" is inconsistent with Congress's intent.

Each party manages to point out a few floor statements or committee documents to support its interpretation of § 3553(f)(1)'s "and." On one hand, Lopez states that the First Step Act modified the safety valve to give back discretion to district courts to avoid unduly harsh mandatory-minimum sentences when unnecessary. This contention finds support in floor statements by United States Senators. *See, e.g.*, 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Bill Nelson) (opining that the First Step Act "will allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime"); *id.* at S7764 (statement of Sen. Cory Booker) (explaining that the First Step Act "will reduce mandatory minimums and give judges discretion back—not legislators but judges who sit and see the totality of the facts"); *id.* at S7774 (statement of Sen. Dianne Feinstein) (stating that the First Step Act will give "more discretion to judges to sentence below mandatory minimums" under the safety valve).[12] But we recognize that Lopez's conjunctive interpretation and the government's disjunctive interpretation both give at least some judicial discretion back to district court judges. That is because each interpretation expands safety-valve eligibility beyond those with only one criminal-history point.

On the other hand, the government points out that Senator Patrick Leahy described the First Step Act as a "*modest* expansion of the safety valve." *See id.* at S7749 (statement of Sen. Patrick Leahy) (emphasis added). But

Senator Leahy, in the same breath, stated that he hoped the First Step Act was "a turning point" and remarked: "I truly believe the error of mandatory minimum sentencing is coming to an end." *Id.* Moreover, because the First Step Act changed only one of five subsections for safety-valve eligibility, it ***443** can be characterized as "modest" even assuming a conjunctive interpretation.

The government also cites a bullet-point summary of the First Step Act prepared by the Senate Judiciary Committee. The summary states: "[O]ffenders with prior '3 point' felony convictions (sentences exceeding one year and one month) or prior '2 point' violent offenses (violent offenses with sentences of at least 60 days) will *not* be eligible for the safety valve absent a judicial finding that those prior offenses substantially overstate the defendant's criminal history and danger of recidivism." *See* Committee on the Judiciary, *The Revised First Step Act of 2018 (S.3649)*. But that bullet-point summary discussed a different version of § 3553(f)(1)—a version that, notably, provided a district court with judicial discretion to altogether disregard a defendant's prior criminal history under § 3553(f)(1). *See id.*

In sum, neither party cites anything in the First Step Act's thin legislative history to tip the scales either way. But even if one party could do so here, "legislative history can never defeat unambiguous statutory text." *Bostock*, 140 S. Ct. at 1750.

E.

[13] [14]Finally, we address the rule of lenity, a canon of statutory construction that requires "grievous ambiguity" in criminal statutes to be resolved in favor of a criminal defendant. *See* *Maracich v. Spears*, 570 U.S. 48, 76, 133 S.Ct. 2191, 186 L.Ed.2d 275 (2013) (citation omitted); *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006). The rule of lenity prevents a court from giving the text of a criminal statute "a meaning that is different from its ordinary, accepted meaning, and that disfavors the [criminal] defendant." *Burrage v. United States*, 571 U.S. 204, 216, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). The rule of lenity is not just a "convenient" canon of statutory construction; it is rooted in "fundamental principles of due process [mandating] that no individual be forced to speculate ... whether his [or her] conduct" is covered by a criminal statute. *See* *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979); *see also* *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Chief Justice John Marshall stating that the "rule that penal laws are to be construed strictly, is perhaps not much less old than [statutory] construction itself").

Because § 3553(f)(1)'s "and" is not ambiguous, we do not invoke the rule of lenity here. But assuming we accepted the government's contention that the term "and" here is ambiguous, we would invoke the rule of lenity to end with a conjunctive interpretation. We would not require a criminal defendant to read § 3553(f)(1)'s text, ignore the plain meaning of "and," ignore the Senate's legislative drafting manual, ignore § 3553(f)(1)'s structure, ignore our prior case law interpreting "and" in § 3553(f)(4), and then, somehow, predict that a federal court would rewrite § 3553(f)(1)'s "and" into an "or." *See* *Burrage*, 571 U.S. at 216, 134 S.Ct. 881; *Dunn*, 442 U.S. at 112, 99 S.Ct. 2190; *cf.* *Bostock*, 140 S. Ct. at 1738 (stating that judges cannot "remodel" statutory terms and "deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations").

IV.

For the reasons above, we affirm the district court's sentence and hold that § 3553(f)(1)'s "and" is unambiguously conjunctive. *See* *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1050 (9th Cir. 2000) (stating that we may "affirm the district court on a ground not selected by ***444** the district judge so long as the record fairly supports such an alternative disposition") (citation and quotation marks omitted).[13]

We recognize that § 3553(f)(1)'s plain and unambiguous language might be viewed as a considerable departure from the prior version of § 3553(f)(1), which barred any defendant from safety-valve relief if he or she had more than one criminal-history point under the Sentencing Guidelines. *See* *Mejia-Pimental*, 477 F.3d at 1104. As a result, § 3553(f)(1)'s plain and unambiguous language could possibly result in more defendants receiving safety-valve relief than some in Congress anticipated.

But sometimes Congress uses words that reach further

than some members of Congress may have expected. *See* *Bostock*, 140 S. Ct. at 1749 (noting that Congress's plain language sometimes reaches "beyond the principal evil [that] legislators may have intended or expected to address," but courts remain obligated to give Congress's language its plain meaning) (citation and quotation marks omitted). We cannot ignore Congress's plain and unambiguous language just because a statute might reach further than some in Congress expected. *See* *id.* ("[I]t is ultimately the *provisions* of [Congress's] legislative commands rather than the principal *concerns* of our legislators by which we are governed.") (emphasis added) (citation and quotation marks omitted).

Section 3553(f)(1)'s plain and unambiguous language, the Senate's own legislative drafting manual, § 3553(f)(1)'s structure as a conjunctive negative proof, and the canon of consistent usage result in only one plausible reading of § 3553(f)(1)'s "and" here: "And" is conjunctive. If Congress meant § 3553(f)(1)'s "and" to mean "or," it has the authority to amend the statute accordingly. We do not.

AFFIRMED.

M. SMITH, Circuit Judge, concurring in part, dissenting in part, and concurring in the judgment:

I join the majority opinion except for its contention that 18 U.S.C. § 3553(f)(1) does not contain superfluous language. *See* Majority Opinion at 437–38, 440–41 . The majority posits that "a three-point violent offense can simultaneously satisfy two subsections, (B) and (C)." *Id.* at 440. Subsection (B) provides for application of the safety valve for an individual who does not have "a prior 3-point offense, as determined under the sentencing guidelines," and subsection (C) gives relief for a defendant who does not have "a prior 2-point violent offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1)(B)–(C). Thus, under the majority's interpretation, when a defendant has a prior three-point violent offense, that offense counts as both "a prior 3-point offense," *id.* § 3553(f)(1)(B), *and* "a prior 2-point violent offense," *id.* § 3553(f)(1)(C). In effect, the majority interprets "a prior 2-point violent offense" to mean "a prior violent offense of at least 2 points." This reasoning allows the majority to avoid any surplusage in the statute.

If, instead, a prior three-point violent offense does *not* count as "a prior 2-point violent offense," *id.*, subsection (A) becomes redundant. Subsection (A) allows application of the safety valve for a defendant who does not have "more than 4 criminal history points." *Id.* § 3553(f)(1)(A). If a single offense cannot fulfill the requirements ***445** of subsections (B) and (C), a defendant who has "a prior 3-point offense" and "a prior 2-point violent offense," will always have "more than 4 criminal history points," *id.* § 3553(f)(1), rendering subsection (A) surplusage.

The majority's attempt to avoid surplusage in § 3553(f)(1) conforms to general principles of statutory interpretation. *See* *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citation and internal quotation marks omitted)). However, "our preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).

In interpreting "a prior 2-point violent offense" to mean "a prior violent offense of at least 2 points," the majority rewrites the plain language of the statute. Congress meant what it said. Two points is two points. Two points is not three points. An interpretive canon, such as the rule against surplusage, "is not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985). I agree with the majority that we should refuse to rewrite "and" to mean "or" in the context of § 3553(f)(1). The majority should apply that same principle of plain text analysis to interpretation of "a prior 2-point violent offense" in § 3553(f)(1)(C).

As further evidence that subsection (C) cannot be read as "a prior violent offense of at least 2 points," we need look only to the sentencing guidelines. The guidelines provide that in determining a defendant's criminal history category, the district court should "[a]dd 3 points for each prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a). Next, the guidelines state that the court should "[a]dd 2 points for each prior sentence of imprisonment of at least sixty days *not counted in (a)*." *Id.* § 4A1.1(b) (emphasis added). The guidelines' approach to three- and two-point offenses is mutually exclusive, as indicated by the final phrase of

§ 4A1.1(b). If a prior sentence is more than one year and one month, the district court assigns three points, and if the prior sentence is at least sixty days, but does not exceed one year and one month (*i.e.*, is "not counted in (a)"), the court assigns two points. Thus, a prior sentence is either a three-point offense *or* a two-point offense. A prior sentence cannot simultaneously be both a three-point offense *and* a two-point offense.

Not only does it make sense that Congress would mirror the guidelines when writing § 3553(f)(1), but the legislators themselves told us they did just that. Subsection (C) states that the disqualifying criminal history is "a prior 2-point violent offense, *as determined under the sentencing guidelines*." 18 U.S.C. § 3553(f)(1)(C) (emphasis added). Subsection (B) provides the same. *See id.* § 3553(f)(1)(B). When a district court determines, pursuant to the sentencing guidelines, that a prior offense is three points, that court cannot determine that the same prior offense is also two points because only an offense "of at least sixty days not counted" as a three-point offense can qualify as a two-point offense. U.S.S.G. § 4A1.1(b). The same is true in § 3553(f)(1). "[A] prior 3-point [violent] offense" is not also "a prior 2-point violent offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1)(B)–(C). Thus, I agree with the Government that a single prior three-point violent offense cannot fulfill subsections ***446** (B) and (C). *See* Majority Opinion at 440–41 n.10.

The majority attempts to distinguish § 3553(f)(1) from the sentencing guidelines by stating that "in the safety-valve context, we are not 'adding' criminal-history points to form a Guidelines calculation. We are determining the meaning of an offense under § 3553(f)(1)(C)." *Id.* at 441 n.10. For support, the majority references a summary released by the Senate Judiciary Committee, which states:

> [O]ffenders with prior "3 point" felony convictions (sentences exceeding one year and one month) *or* prior "2 point" violent offenses (*violent offenses with sentences of at least 60 days*) will *not* be eligible for the safety valve absent a judicial finding that those prior offenses substantially overstate the defendant's criminal history and danger of recidivism.

Committee on the Judiciary, 115th Congress, *The Revised First Step Act of 2018 (S.3649)* (some emphases added).

I put little stock in this summary for two reasons. First, "legislative history can never defeat unambiguous statutory text." *Bostock v. Clayton Cnty., Ga.*, —— U.S. ——, 140 S. Ct. 1731, 1750, 207 L.Ed.2d 218 (2020); *see also* Majority Opinion at 442–43. The "unambiguous statutory text" says "a prior 2-point violent offense" not "a prior violent offense of at least 2 points." Second, that same summary uses "or" to connect subsections (B) and (C). I agree with the majority that "the plain and ordinary meaning of § 3553(f)(1)'s 'and' is conjunctive." Majority Opinion at 436. The Senate Judiciary Committee's "summary" fails to accurately summarize the plain language of the law and its use of "and." This gives me pause in accepting the summary's decision to use "violent offenses of at least 60 days" in a parenthetical as a way to break with the unambiguous language of § 3553(f)(1)(C) and the sentencing guidelines.[1]

The textual evidence, both in the statute itself and the sentencing guidelines to which the statute references, points to only one conclusion: Congress intended to provide mutually exclusive categories for two- and three-point offenses. The majority's decision to interpret "prior 2-point violent offense" as "a violent offense of at least 2 points" "would have us read an absent word," or, in this case, words, "into the statute." *Lamie*, 540 U.S. at 538, 124 S.Ct. 1023. This we cannot do.

While I agree with the Government that a conjunctive interpretation of "and" renders subsection (A) surplusage, I also agree with the majority that this superfluity does not change the outcome. Majority Opinion at 440–41 . As the majority highlights, "[t]he canon against surplusage is just a rule of thumb." *Id.* at 441. While we must strive to interpret a statute to avoid surplusage, "our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 137, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007). In this case, the cost of applying the plain text of § 3553(f)(1)—"and" means "and"—is that subsection (A) is surplusage. As the majority writes, "[a]lthough 'Congress may amend the statute[,] we may not.' " Majority Opinion at 438–39 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)

(second alteration in original)). If Congress ***447** wishes to avoid surplusage in § 3553(f)(1), it has power pursuant to Article I of the Constitution to enact legislation to that effect. We can only carry out its will in applying the plain language of the statute as enacted.

I offer a final note regarding the Government's absurdity argument. I agree with the majority that reading "and" conjunctively does not produce absurd results. *See* Majority Opinion at 438–40 . However, applying the plain text of subsection (C)—where "a prior 2-point violent offense" means just that—admittedly makes the absurdity issue a closer question. That is because a defendant could have an unlimited number of prior three-point offenses (including three-point offenses of a violent nature), satisfying subsection (B), but still qualify for the safety valve because that defendant did not also have "a prior 2-point violent offense" pursuant to subsection (C). 18 U.S.C. § 3553(f)(1)(C). While this appears to be an odd result, I do not believe it is absurd.

As the majority notes, there is a high bar for showing absurdity, especially in the face of unambiguous statutory language. *See* Majority Opinion at 438–39. The absurdity doctrine "is confined to situations 'where it is quite impossible that Congress could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone.' " *In re Hokulani Square, Inc.*, 776 F.3d 1083, 1088 (9th Cir. 2015) (quoting *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 471, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring)). Allowing an individual who has multiple prior three-point offenses, but no prior two-point violent offenses, to be eligible for the safety valve is odd. And perhaps it "is not wise." *Id.* But it is the policy Congress plainly set forth by enacting § 3553(f)(1). It might be the case that Congress intended that the safety valve exclude only a very specific subset of individuals, as delineated by § 3553(f)(1). Alternatively, Congress might have believed that there was something particularly disqualifying about having both a prior two-point violent offense and a prior three-point offense. "It is, however, not our job to find reasons for what Congress has plainly done." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). Congress has clearly mandated that only individuals who have a prior three-point offense *and* a prior two-point violent offense (and, consequently, more than four criminal history points) are *potentially eligible*[2] for safety valve relief. *See* 18 U.S.C. § 3553(f)(1).[3]

***448** The First Step Act "is far from a *chef d'oeuvre* of legislative draftsmanship." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 320, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014). Congress certainly could have used more exacting language when modifying the safety valve in § 3553(f)(1). In this case, however, "[t]o decide" the meaning of "and" in § 3553(f)(1), "we start with the text of the statute, and as it turns out, it is not necessary to go any further." *Babb v. Wilkie*, —— U.S. ——, 140 S. Ct. 1168, 1172, 206 L.Ed.2d 432 (2020) (internal citation omitted). "And" means "and." *See* Majority Opinion at 435–36. "[O]ur 'sole function' is to apply the law as we find it." *Niz-Chavez v. Garland*, —— U.S. ——, 141 S. Ct. 1474, 1480, —— L.Ed.2d —— (2021) (quoting *Lamie*, 540 U.S. at 534, 124 S.Ct. 1023). I join the majority in holding that a defendant's criminal history must satisfy all three subsections of § 3553(f)(1) for that individual to be ineligible for safety valve relief. However, I respectfully disagree with the majority's interpretation of § 3553(f)(1)(C). Reading "a prior 2-point violent offense" as "a prior violent offense of at least 2 points" is not faithful to the plain text of that provision.

All Citations

998 F.3d 431, 21 Cal. Daily Op. Serv. 4974

Footnotes

* The Honorable Danny J. Boggs, Senior United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

1 "The defendant bears the burden of proving safety valve eligibility by a preponderance of the evidence." *United States v. Mejia-Pimental*, 477 F.3d 1100, 1104 (9th Cir. 2007).

2 Section 3553(f)(2) prevents application of the safety valve if the defendant used violence or possessed a deadly

weapon in the instant offense. Section 3553(f)(3) prevents application of the safety valve if the defendant's instant offense resulted in serious bodily injury or death. Section 3553(f)(4) prevents application of the safety valve if the defendant acted as a leader or organizer in the instant offense. Section 3553(f)(5) prevents application of the safety valve if the defendant does not provide certain information to the government.

[3] Lopez initially served three months of imprisonment and then served thirteen additional months of imprisonment for violating probation associated with the vandalism conviction.

[4] As previously noted, the government and Lopez agreed that he met the criteria outlined in the remainder of the safety valve, § 3553(f)(2) through (f)(5).

[5] The rule of lenity requires "grievous ambiguity" in criminal statutes to be resolved in favor of a criminal defendant. *See* *Maracich v. Spears*, 570 U.S. 48, 76, 133 S.Ct. 2191, 186 L.Ed.2d 275 (2013) (citation omitted); *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006).

[6] *See, e.g.*, 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Bill Nelson) (asserting that the First Step Act "will allow judges to ... use their discretion to craft an appropriate sentence to fit the crime" and noting one example of a person inexcusably receiving decades in prison for selling marijuana worth $350).

[7] Consider Justice Scalia and Bryan Garner's example of a disjunctive negative proof: "To be eligible for citizenship, you must prove that you have not (1) been convicted of murder; (2) been convicted of manslaughter; *or* (3) been convicted of embezzlement." *See* Scalia & Garner, *supra*, at 120 (emphasis added). The person applying for citizenship must "have done none" of the three conditions. *Id.* If a person is convicted only of murder, for example, that person is automatically ineligible for citizenship under this example of a disjunctive negative proof. *See id.*

[8] Notably, the career offender in the government's hypothetical would also need to satisfy the remainder of the safety-valve requirements to be eligible for relief. *See* 18 U.S.C. § 3553(f)(2)–(5). And if the career drug offender did so, a district court would still retain discretion to sentence the career drug offender *above* the mandatory-minimum sentence. *See* *id.* § 3553(f).

[9] Multiple states allow for such a conviction to result in more than thirteen months of imprisonment. *See, e.g.*, Ala. Code §§ 13A-12-211, 13A-5-6(a)(2) (requiring a mandatory-minimum sentence of at least two years imprisonment for selling *any* amount of marijuana); Miss. Code. Ann. § 41-29-139(b)(2)(A) (allowing a sentence of imprisonment of not more than three years for possessing "thirty ... grams *or less*" of marijuana with intent to distribute) (emphasis added); Mo. Ann. Stat. §§ 558.011, 579.020 (allowing a sentence of imprisonment of not more than four years for selling thirty-five grams *or less* of marijuana). Also, a defendant convicted twice of possessing marijuana for personal use might be excluded from safety-valve relief. *See* Ala. Code §§ 13A-12-213(c), 13A-5-6(a)(4) (allowing a sentence of not more than five years imprisonment for any person who is convicted twice of possessing marijuana for personal use).

[10] The government argues that 2-point violent offenses and 3-point violent offenses are mutually exclusive under United States Sentencing Guidelines § 4A1.1. The government contends that a "2-point violent offense" covers violent convictions with an imprisonment sentence *between* sixty days and thirteen months. *See* U.S. Sent'g Guidelines Manual § 4A1.1(b) ("Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a)."). The government then contends that any violent conviction resulting in more than thirteen months of imprisonment is a "3-point violent offense." *See* *id.* § 4A1.1(a) ("Add 3 points for each prior sentence of imprisonment exceeding [thirteen months]."). But § 4A1.1 was created to "add" criminal history points for a

Sentencing Guidelines calculation. In that context, it makes sense to "add points" for each sentence only once under § 4A1.1 because not doing so would overstate a defendant's criminal history and cause an inflated Guidelines range.

Here, in the safety-valve context, we are not "adding" criminal-history points to form a Guidelines calculation. We are determining the meaning of an offense under § 3553(f)(1)(C). Because Congress presumably targeted violent offenses with subsection (C)'s "2-point violent offense," it of course targeted more serious violent offenses (three-point violent offenses). But under the government's interpretation, a ninety-day sentence—but not a fifteen-year sentence—involving violence satisfies subsection (C). We reject that nonsensical interpretation and construe a "2-point violent offense" to cover "violent offenses with sentences of at least 60 days," as the only source to interpret that phrase has done. *See* Committee on the Judiciary, 115th Congress, *The Revised First Step Act of 2018 (S.3649)* (2-point violent offenses are "violent offenses with sentences of at least 60 days").

11 We also reject the government's "alternative interpretation" of § 3553(f)(1). This "alternative interpretation" allows the em-dash in § 3553(f)(1)'s introductory phrase ("does not have—") to inject "does not have" twice more into § 3553(f)(1) and, for all practical purposes, turn § 3553(f)(1) into a disjunctive statute. At the same time, the government contends that the first em-dash in § 3553(f) should not apply to (f)(1) through (f)(5) in the same way. No Ninth Circuit precedent has ever employed this far-fetched and quixotic em-dash theory or, worse, employed that theory inconsistently in the same subsection of the same statute, as the government requests that we do here. The government concedes that if we applied this em-dash theory consistently in § 3553(f), we would destroy the entire safety-valve structure and allow a defendant to receive safety-valve relief if he or she met the criteria in § 3553(f)(1), § 3553(f)(2), § 3553(f)(3), § 3553(f)(4), *or* § 3553(f)(5).

12 A few senators noted that the First Step Act would help "low-level, non-violent offenders." *See, e.g.*, 164 Cong. Rec. S7739 (statement of Sen. Chuck Schumer) (explaining that the First Step Act will "give judges more judicial discretion in sentencing for low-level, nonviolent drug offenders who cooperate with the government"). This does not help the government because Senator Schumer did not say the First Step Act will give more judicial discretion *only* in cases involving low-level, nonviolent drug offenders. *Id.* But even if he did, Lopez is a quintessential low-level, non-violent defendant who would be excluded from safety-valve relief under the government's disjunctive interpretation.

13 The district court deemed § 3553(f)(1)'s "and" ambiguous and invoked the rule of lenity to reach a conjunctive interpretation.

1 In the legislative history section of the majority opinion, the majority correctly notes that this "summary discussed a different version of § 3553(f)(1)." Majority Opinion at 443. But the majority then relies upon this same summary to analyze § 3553(f)(1)(C). *See id.* at 440–41 n.10.

2 I say "potentially eligible" because, as the majority states, "the career offender in the government's hypothetical would also need to satisfy the remainder of the safety-valve requirements to be eligible for relief." Majority Opinion at 439 n.8 (citing 18 U.S.C. § 3553(f)(2)–(5)). And even if an individual with multiple prior three-point offenses, but no prior two-point violent offense, satisfied the entirety of § 3553(f), "a district court would still retain discretion to sentence the career drug offender *above* the mandatory-minimum sentence." *Id.* (citing 18 U.S.C. § 3553(f)); *see also* *United States v. Real-Hernandez*, 90 F.3d 356, 361–62 (9th Cir. 1996) (noting that when a defendant meets all five requirements the safety valve, "[t]his, of course, does not require the court to sentence a defendant to a term less than the mandatory minimum; but it does require the court to sentence the defendant 'without regard to any statutory minimum' " (quoting 18 U.S.C. § 3553(f))). The district court would presumably be unlikely to exercise its discretion to sentence a person with multiple three-point offenses below the mandatory minimum.

[3] Even if the surplusage of § 3553(f)(1)(A) and the odd (though not absurd) results from applying the plain text of § 3553(f)(1)(C) rendered "and" ambiguous, I would nonetheless still hold that "and" must be given a conjunctive interpretation by applying the rule of lenity. *See* Majority Opinion at 442–43.

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Five. Determining the Sentence (Refs & Annos)
Part K. Departures
1. Substantial Assistance to Authorities

USSG, § 5K1.1, 18 U.S.C.A.

§ 5K1.1. Substantial Assistance to Authorities (Policy Statement)

Currentness

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989.)

COMMENTARY

<***Application Notes:***>

<***1.*** *Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.*>

*<**2.** The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.>*

*<**3.** Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.>*

*<**Background:** A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.>*

Notes of Decisions (411)

Federal Sentencing Guidelines, § 5K1.1, 18 U.S.C.A., FSG § 5K1.1
As amended to 3-15-22.

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321 F.3d 861
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Vince A. AULD, Defendant-Appellant.

No. 01-10669.
|
Submitted Dec. 2, 2002. *
|
Filed March 3, 2003.

Synopsis
Defendant was convicted in the United States District Court for the District of Hawai'i, Helen Gillmor, J., of drug trafficking offenses, and he appealed. The Court of Appeals, W. Fletcher, Circuit Judge, held that: (1) appropriate departure point for downward departure for substantial assistance was the statutory mandatory minimum sentence rather than the otherwise applicable guideline sentence; (2) district court properly disregarded defendant's actual offense conduct and criminal history category, as factors unrelated to defendant's assistance, in determining extent of downward departure for substantial assistance; and (3) *Apprendi* did not render the drug trafficking statute facially unconstitutional.

Affirmed.

West Headnotes (6)

[1] **Sentencing and Punishment** Remorse, Cooperation, Assistance

The appropriate departure point for downward departure for substantial assistance for defendant convicted of drug trafficking was the statutory mandatory minimum sentence rather than the otherwise applicable guideline sentence, where defendant had a prior drug felony conviction that triggered the mandatory minimum that exceeded the otherwise applicable guideline sentence. 18 U.S.C.A. § 3553(e); U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

20 Cases that cite this headnote

[2] **Sentencing and Punishment** Remorse, Cooperation, Assistance

Acceptance of government's recommendation to depart downward five years from 20-year mandatory minimum in view of defendant's substantial assistance was within district court's discretion in drug trafficking case in which the mandatory minimum was triggered by defendant's prior felony drug conviction, absent any indication in the record that the district judge felt, as a matter of law, powerless to depart below the otherwise applicable guideline range of 121 to 151 months. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1), 411, 21 U.S.C.A. §§ 841(b)(1), 851; U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

11 Cases that cite this headnote

[3] **Sentencing and Punishment** Remorse, Cooperation, Assistance

A district court's failure to take into account defendant's actual offense conduct and criminal history category when considering a motion by the government for a sentence below the statutory minimum so as to reflect defendant's substantial assistance neither results in a complete disregard of the sentencing guidelines nor offends the requirements of the statute authorizing imposition of such a sentence, though such factors are relevant to determination of a guidelines sentence. 18 U.S.C.A. § 3553(e); U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

11 Cases that cite this headnote

[4] **Sentencing and Punishment** Remorse, Cooperation, Assistance

Statute authorizing motion by the government for a sentence below the statutory minimum so as to reflect defendant's substantial assistance requires court to consider list of factors, unrelated to offense conduct and

criminal history, set forth in substantial assistance guideline in fixing a substantial assistance departure. 18 U.S.C.A. § 3553(e); U.S.S.G. § 5K1.1(a)(1-5), p.s., 18 U.S.C.A.

24 Cases that cite this headnote

[5] Sentencing and Punishment Remorse, Cooperation, Assistance

List of factors set forth in substantial assistance guideline for court to consider in fixing a substantial assistance departure is non-exhaustive, and a district court may consider other factors bearing on the quality of the assistance provided but may not consider factors unrelated to defendant's assistance. 18 U.S.C.A. § 3553(e); U.S.S.G. § 5K1.1(a)(1-5), p.s., 18 U.S.C.A.

8 Cases that cite this headnote

[6] Controlled Substances Validity

Apprendi does not render the drug trafficking statute facially unconstitutional. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. § 841.

Attorneys and Law Firms

***862** Donna M. Gray, Office of the Federal Public Defender, Honolulu, Hawaii, for the appellant.

Tracy A. Hino, Office of the United States Attorney, Honolulu, Hawaii, for the appellee.

Appeal from the United States District Court for the District of Hawaii; Helen Gillmor, District Judge, Presiding. D.C. No. CR-00-00422-HG.

Before BRIGHT,** HAWKINS and W. FLETCHER, Circuit Judges.

OPINION

WILLIAM A. FLETCHER, Circuit Judge:

The defendant-appellant in this case is subject to a statutorily required minimum sentence that exceeds the otherwise applicable guideline sentence. The question presented, one of first impression in this circuit, is whether a downward departure pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 should begin from the higher statutorily required minimum sentence, or from the lower otherwise applicable guideline sentence. We hold that the appropriate departure point is the statutorily required minimum sentence.

I. Background

In September 2000, officers of the Honolulu Police Department, working in conjunction with agents from the FBI, began an undercover investigation into the drug distribution activities of defendant-appellant Vince A. Auld. Their efforts led to Auld's arrest and indictment a little over a month later. The indictment ***863** charged Auld with three separate violations of 21 U.S.C. § 841. Count I charged Auld with knowingly and intentionally possessing with intent to distribute and distributing methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); Count II charged Auld with knowingly and intentionally possessing with intent to distribute and distributing five grams or more of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and Count III charged Auld with knowingly and intentionally possessing with intent to distribute fifty grams or more of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A).

This was not Auld's first encounter with the law. He had previously been convicted in Hawaii state court in 1986 for "Promoting a Dangerous Drug in the Second Degree." Based on this prior conviction, the government filed a Special Information pursuant to 21 U.S.C. §§ 841(b)(1) and 851 shortly after the indictment, advising Auld and the district court that, because Auld had a prior felony drug conviction, enhanced statutory penalties would apply at his sentencing. The Special Information had the effect of doubling the mandatory minimum sentences in Counts II and III from five and ten years, respectively, to ten years and twenty years,

respectively. Auld pled guilty to all counts in the indictment without the benefit of a plea agreement. He also continued his ongoing efforts to cooperate with authorities.

Auld's cooperation paid off for the government. It led to the arrest and indictment of approximately a half-dozen people and the seizure of a substantial quantity of methamphetamine, over 30 firearms, and $50,000. The government rewarded Auld by filing a motion in the district court, pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, requesting a downward departure from his sentence. The motion was made before Auld was sentenced, but after Auld's presentence investigation report had been adopted by the district court without objection. That report placed Auld at an adjusted offense level of 29 and in criminal history category IV, with a resulting guideline sentence range of 121 to 151 months. The report indicated, however, that in accordance with the Special Information, Auld was subject to a statutorily required minimum term of imprisonment of 20 years (240 months). *See* 21 U.S.C. § 841(b)(1)(A).

In its departure motion, the government asked that the court depart five years from the twenty-year mandatory minimum, leading to a total sentence of fifteen years (180 months). Auld, however, contended that the guideline sentencing range established by his offense level and criminal history score (121 to 151 months) should be used as the starting point for the departure, rather than the statutorily required minimum term of twenty years. The district court adopted the government's position over Auld's objection and sentenced him to fifteen years imprisonment. Auld timely appealed.

We review a district court's interpretation of a statute de novo. *See United States v. Hunter,* 101 F.3d 82, 84(9th Cir.1996). We also review a district court's interpretation of the Sentencing Guidelines de novo. *See United States v. Hughes,* 282 F.3d 1228, 1230 (9th Cir.2002).

II. Discussion

A. Point of Departure

Auld argues that we should read 18 U.S.C. § 3553(e) as instructing the district court to disregard the statutorily required minimum sentence and to look instead to the otherwise applicable guideline sentence ***864** when imposing a reduced sentence for substantial assistance.[1] Auld contends that by imposing a sentence of 180 months-29 months longer than the maximum guideline sentence-the district court improperly ignored the guideline applicable to his actual offense conduct and criminal history category and, in effect, departed *upward* rather than *downward.* He relies on the last sentence of § 3553(e), which provides that the departure sentence "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code."[2] Auld contends that this language instructs the district court to begin its § 3553(e) departure from the otherwise applicable guideline sentence rather than from the statutorily required minimum; or, he argues, it at least instructs the court to impose a sentence that falls within the guideline range.

Auld's position is foreclosed by the reasoning, if not the direct holding, of *Melendez v. United States,* 518 U.S. 120, 116 S.Ct. 2057, 135 L.Ed.2d 427 (1996). The Supreme Court explained in *Melendez* that the last sentence of § 3553(e) merely "charge[s] the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum." *Id.* at 129, 116 S.Ct. 2057. The Commission satisfied this statutory charge by promulgating U.S.S.G. § 5K1.1(a),[3] which provides factors that "guide the district court when it selects a sentence below the statutory minimum, as well as when it selects a sentence below the Guidelines range." *Id.* Contrary to Auld's contention, § 3553(e) does not mandate any particular departure point or require that the ultimate sentence imposed fall within the otherwise applicable guideline range. *See, e.g., United States v. Pillow,* 191 F.3d 403, 407 (4th Cir.1999) ("That the resulting 'sentence' [after a § 3553(e) departure] must be imposed in ***865** accordance with the Sentencing Guidelines and policy statements ... simply means that the district court's discretion in choosing a sentence after the Government moves to depart below the statutorily required minimum sentence is constrained by the Sentencing Guidelines and policy statements. Specifically, the district court should use the factors listed in § 5K1.1(a)(1)-(5) as its guide when it selects a sentence below the statutorily required minimum sentence.").

[1] While § 3553(e) does not explicitly state where the departure should begin, its clear implication is that the court should depart from the sentence that would have been imposed had the departure motion not been made. *See United States v. Li,* 206 F.3d 78, 89 (1st Cir.2000) ("[T]he proper starting point from which a departure is to be subtracted or to which it must be added is the greater of the guideline range or the mandatory minimum."). Each of our sister circuits to consider this question has arrived at the same answer we reach today. *See United States v. Stewart,* 306 F.3d 295, 331-32 (6th Cir.2002) (holding that where the statutory minimum exceeds the guideline sentence, a § 3553(e) departure begins at the statutory minimum); *United States v. Cordero,* 313 F.3d 161, 166 (3d Cir.2002) (same); *United States v. Head,* 178 F.3d 1205, 1206 (11th Cir.1999) (same); *United States v. Pillow,* 191 F.3d 403, 407 (4th Cir.1999) (same); *United States v. Hayes,* 5 F.3d 292, 295 (7th Cir.1993) (same).

Had Congress envisioned, as Auld contends, that a § 3553(e) motion would render the statutory minimum inoperative as a departure point, to be replaced by the otherwise applicable guideline sentence, we would expect that the text of § 3553(e) would incorporate language like that found in 18 U.S.C. § 3553(f), the so-called "safety valve" provision. Section 3553(f) provides that if its criteria are met, "the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission ... *without regard to any statutory minimum sentence.*" 18 U.S.C. § 3553(f) (emphasis added). By contrast, subsection (e) grants courts "[l]imited authority to impose a sentence *below a statutory minimum.*" 18 U.S.C. § 3553(e) (emphasis added). It nowhere states that this sentence shall be imposed "without regard to any statutory minimum sentence." *See also United States v. Ahlers,* 305 F.3d 54, 59 (1st Cir.2002) ("Unlike section 3553(f)-under which the mandatory minimum is to be *disregarded* once certain conditions are met-section 3553(e) retains the mandatory minimum as a reference point for a specific, carefully circumscribed type of departure. The sharp divergence between these regimes leads inexorably to the conclusion that Congress had different plans in mind for the operation and effect of the two provisions.") (footnote and citation omitted) (emphasis in original).

Auld relies on the term "waived" in Application Note 7 to U.S.S.G. § 2D1.1 in support of his reading of § 3553(e).[4] Note ***866** 7 explains that where a mandatory minimum sentence applies, "this mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.' " Auld contends that once a mandatory minimum sentence is "waived," the mandatory minimum disappears entirely, leaving only the otherwise applicable guideline range. In the context of the Note as a whole, however, "waived" means only that the mandatory nature of the statutory minimum is dispensed with, thus permitting the imposition of a sentence below that minimum. It does not mean that the statutory minimum is not to be used as the point from which a downward departure begins. In the very next sentence, the Note states that "[i]n addition, 18 U.S.C. § 3553(f) provides *an exception to the applicability of mandatory minimum sentences* in certain cases." (Emphasis added.) The difference in phraseology clearly reflects the Commission's understanding of the different functions of § 3553(e) and § 3553(f). While subsection (f) "provides an exception" to the applicability of a mandatory minimum, subsection (e) merely allows a departure that results in a "lower sentence" than the mandatory minimum. *See Ahlers,* 305 F.3d at 59; *see also United States v. Rabins,* 63 F.3d 721, 727 (8th Cir.1995) (holding that a § 3553(e) departure does not render the mandatory minimum inapplicable to the defendant so that other guideline departures become available).

Common sense also supports this reading of the statute. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152, 1157 (9th Cir.2001) ("If alternative readings [of a statute] are possible, we determine whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress.") (internal quotation marks omitted). Consider two defendants, both convicted of the same crime. Both defendants fall within the same guideline range; the second defendant, however, has a prior felony that triggers a mandatory minimum sentence

that exceeds the otherwise applicable guideline sentence. Both defendants provide equal assistance to the government. Based on this assistance, the government moves on behalf of both defendants for a two-year downward departure. The first defendant's downward departure obviously begins at his guideline sentence. Where does the second defendant's downward departure begin? It would be anomalous for it also to begin at the otherwise applicable guideline sentence, rather than the higher mandatory minimum. That would mean that both defendants might very well end up with the same sentence, although both defendants are not similarly situated. The second defendant has a prior felony warranting imposition of a mandatory minimum sentence; the first defendant does not.

In *Melendez,* the defendant was in the reverse position of the defendant in this case, for he was subject to a guideline sentence that exceeded his mandatory minimum sentence. The Court held that a motion under § 5K1.1 permitted departure from the guideline sentence, but that the departure could not extend below the mandatory minimum absent an additional motion by the government under § 3553(e). By analogy, one could argue that when a defendant is subject to a mandatory minimum sentence that exceeds the guideline sentence, a motion under § 3553(e) permits departure from the mandatory minimum, but not below the guideline sentence unless there is an additional motion by the ***867** government under § 5K1.1. We need not decide that question here, however. In this case, the government invoked both § 3553(e) and § 5K1.1. The district court therefore clearly had the authority to depart below the guideline sentence, and could have done so if it had deemed such a departure warranted. The initial point of the departure was, however, the mandatory minimum, just as the initial point of departure would have been the guideline sentence if Auld, like Melendez, had been subject to a guideline sentence that exceeded his mandatory minimum. *See Li,* 206 F.3d at 89. In both situations, the district court would depart from the sentence that would otherwise have been imposed. *See* 28 U.S.C. § 994(n) (the Commission "shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence *than would otherwise be imposed* ... to take into account a defendant's substantial assistance" (emphasis added)).

[2] There is no indication in the record of this case that the district judge felt, as a matter of law, powerless to depart below the minimum guideline range. Indeed, the attorney for the government specifically stated at Auld's sentencing hearing that "even though I am moving to depart just five years, as soon as the government moves to depart, it's certainly within the court's discretion to go anywhere at that point." Rather, it is apparent that the district judge simply agreed with the government's recommendation of a five-year departure. *See* U.S.S.G. § 5K1.1(a)(1)(directing sentencing court to take "into consideration the government's evaluation of the assistance rendered" by the defendant). The acceptance of the government's recommendation fell within the district court's discretion. *See United States v. Vizcarra-Angulo,* 904 F.2d 22, 23 (9th Cir.1990) ("[W]e may not review a defendant's appeal from the district court's discretion in fixing the extent of a downward departure.").

B. Extent of Departure

[3] Auld also argues that in determining the extent of the departure, § 3553(e) requires the sentencing court to take into account his actual offense conduct and criminal history category. Ignoring these two factors, Auld contends, "results in a complete disregard of the guidelines themselves and is contrary to the requirements of 18 U.S.C. § 3553(e)." While it is true that the two factors are relevant to the determination of a guideline sentence, a district court's failure to take them into account when considering a § 3553(e) motion neither results in a "complete disregard of the guidelines" nor offends the requirements of § 3553(e).

[4] **[5]** The guidelines themselves provide a list of factors, unrelated to offense conduct and criminal history, that a district court should consider in fixing a substantial assistance departure. *See* U.S.S.G. § 5K1.1(a)(1)-(5). It is the consideration of these factors that § 3553(e) requires. *See Melendez,* 518 U.S. at 129, 116 S.Ct. 2057. The § 5K1.1(a) list is non-exhaustive, and a district court may consider other factors bearing on the quality of the assistance provided. The district court may not, however, consider factors unrelated to the defendant's assistance. *See United States v. Valente,* 961 F.2d 133, 135 (9th Cir.1992); *Ahlers,* 305 F.3d at 60; *Rabins,* 63 F.3d at 727; *United States v. Campbell,* 995 F.2d 173, 175 (10th Cir.1993); *United*

States v. Thomas, 11 F.3d 732, 737 (7th Cir.1993); *United States v. Snelling,* 961 F.2d 93, 97 (6th Cir.1991).

C. *Apprendi v. New Jersey*

[6] Finally, we reject Auld's alternative argument that ***868** *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), renders 21 U.S.C. § 841 facially unconstitutional. *See United States v. Buckland,* 277 F.3d 1173 (9th Cir.2002) (en banc), *as amended by* 289 F.3d 558 (9th Cir.2002). *See also United States v. Hernandez,* 314 F.3d 430, 437-38 (9th Cir.2002) (reaffirming *Buckland*).

For the foregoing reasons, we AFFIRM the district court's decision in its entirety.

All Citations

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Footnotes

* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

** The Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

1 Section 3553(e) grants the district court authority, upon government motion, to depart below a statutory minimum in order to reward a defendant's substantial assistance:
Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

2 Section 994(n) charges the Sentencing Commission with "assur [ing] that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

3 U.S.S.G. § 5K1.1 provides:
Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance.

4 Note 7 to U.S.S.G. § 2D1.1 states:
Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as

provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* § 5K1.1. (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. *See* § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).