DISTRICT JUDICIAL NOMINATION COMMISSION AND OFFICE OF THE GOVERNOR JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. **State your full name.**

   Justin Aaron Lightfoot

2. **State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

   Criminal Division Chief, Assistant United States Attorney
   United States Attorney's Office
   Northern District of Iowa

3. **State your date of birth (to determine statutory eligibility).**

   February 5, 1981

4. **State your current city and county of residence.**

   Cedar Rapids, Linn County

PROFESSIONAL AND EDUCATIONAL HISTORY

5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.

University of Iowa College of Law — Aug. 2003 to May 2006
Juris Doctor, with high distinction

Iowa State University — Aug. 1999 to May 2003
Bachelor of Arts, with distinction
Major: Political Science
Minor: Criminal Justice Studies

6. Describe in reverse chronological order all of your work experience since graduating from college, including:

a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

- **Criminal Division Chief** — Nov. 2018 to present
  Assistant United States Attorney — May 2012 to present
  United States Attorney's Office
  Northern District of Iowa
  111 7th Avenue, SE, Box # 1, Cedar Rapids, Iowa
  Supervisor: Sean Berry, First Assistant U.S. Attorney

- **Assistant Linn County Attorney, *cross-designated as a***
  Special Assistant United States Attorney — Aug. 2010 to May 2012
  51 3rd Avenue Bridge, Cedar Rapids, Iowa*
  Supervisor: Patrick Reinert, Assistant United States Attorney
  **Although employed by Linn County, my physical work space was located in the United States Attorney's Office in Cedar Rapids.*

- **Judicial Law Clerk** — Aug. 2006 to Aug. 2010
  United States District Court
  Eastern District of Missouri
  Hon. Carol E. Jackson, District Judge
  111 South 10th Street, St. Louis, Missouri
  Supervisor: Judge Carol E. Jackson

- **Clinic Intern** Aug. 2005 to May 2006
  University of Iowa College of Law, Legal Clinic
  280 Boyd Law Building, Iowa City, Iowa
  Supervisor: Professor Reta Noblett-Feld

- **Summer Associate** May 2005 to Aug. 2005
  Faegre & Benson, LLP
  (now Faegre Drinker, LLP)
  801 Grand Avenue, 33rd Floor, Des Moines, Iowa
  Supervisor: Terri Combs

- **Legal Intern** May 2004 to May 2005
  United States Attorney's Office
  Northern District of Iowa
  111 7th Avenue, SE, Box # 1, Cedar Rapids, Iowa
  Supervisor: Judge Stephanie Rose (then an Assistant U.S. Attorney)

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

State of Iowa, 2006

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

I have worked in public service as an attorney for the government my entire career. In almost fifteen years as a lawyer, I have worked on criminal cases for approximately 11 years (or about 73%) and on civil cases for approximately four years (or about 27%).

I have appeared exclusively in the United States District Court and the United States Court of Appeals for the Eighth Circuit, not including a handful of pro bono appearances in the Iowa District Court for Linn County. As a law student, I appeared in two cases in the Iowa District Court for Johnson County.

Experience with Criminal Law – 2010 to Present

I have served as a prosecutor since 2010, when I began prosecuting drug and gun crimes. My caseload quickly expanded in scope and complexity, and I have prosecuted cases involving drugs, guns, bank robberies, disability benefits fraud, wire and bank fraud, counterfeiting, civil rights investigations, and more. In this position:

a. My only client is the United States government.
b. All of our office's cases are litigated in the United States District Court for the Northern District of Iowa and the Eighth Circuit Court of Appeals.
c. My work is entirely litigation-focused.
d. Although certain matters I work on, such as postconviction relief petitions, are classified as civil cases, nearly 100 percent of my work as a prosecutor is in the area of criminal law and procedure.

Courtroom Experience - I was appearing in court very early in my career on an almost-daily basis. I have represented the government in felony jury trials, as well as numerous contested suppression, detention, sentencing, revocation, and preliminary hearings. I have also handled hundreds of "routine" proceedings, such as initial appearances, arraignments, status hearings, and plea hearings.

Legal Writing - While I have enjoyed frequent court appearances over my career as a prosecutor, my position has also required a substantial amount of legal writing. In addition to drafting appellate briefs and responses to habeas petitions, I have frequently submitted substantive briefs for federal sentencings and suppression hearings. In recent years, our office has responded to dozens of petitions for relief based on the First Step Act of 2018, which made the Fair Sentencing Act of 2010 retroactive. I have either drafted or reviewed every single First Step Act brief filed in the district court by our office. I also have significant experience preparing search warrants, criminal complaints, and wiretap affidavits, and presenting them to judges.

Criminal Chief Duties – In 2018, I was selected to serve as the chief of the criminal division. In that capacity, I oversee the entire criminal division, which consists of over 40 staff members (including 26 prosecutors) spread out among the district's offices in Cedar Rapids and Sioux City. I supervise the prosecution of cases involving every type of federal crime and exercise approval authority over many important decisions made in those cases. I am also involved in researching and determining the government's position on complex legal questions touching on every area of criminal law and procedure. In 2019, I was selected by the Department of Justice to serve as a member of the Criminal Chief Working Group, a small group of about 15 criminal chiefs from around the country that advise the Attorney General's Advisory Committee on criminal matters. As a member of the working group, I am involved in identifying and researching new legal issues that arise around the country. On more than one occasion, the specific input I provided in the working group was later included in nationwide Department of Justice guidance issued to all federal prosecutors.

Experience with Civil Litigation – 2006 to 2010

My work as a prosecutor and criminal division chief differs substantially from my prior work as a judicial law clerk from 2006 through 2010. My clerkship, with the now-retired United States District Judge Carol E. Jackson, was initially a two-year term clerkship but was extended, at Judge Jackson's request, for an additional two-year term. In this position:

a. I had no clients; I worked only for the court.
b. I did not appear in court as an attorney, but routinely participated in court proceedings, assisting Judge Jackson.
c. The entirety of my work involved litigation pending in the district court.
d. At least 95 percent of my work was on civil cases.

As a law clerk, I handled a caseload of at least 40 to 60 civil cases at any given time, and all of my work involved trial court litigation. These cases covered the entire array of civil litigation, including complex business litigation, employment litigation, actions under the Labor Management Relations Act and ERISA, patent litigation, prisoner litigation, habeas corpus petitions, social security benefit appeals, and more. In each of these cases, I attended scheduling conferences, drafted scheduling orders, and monitored the cases as they proceeded towards disposition. I drafted orders on all motions filed in these cases, including but not limited to extension requests, discovery disputes, motions to dismiss, motions for summary judgment, and motions in limine. In almost all cases, I was expected to draft these proposed orders without first receiving input from Judge Jackson. Instead, it was incumbent upon me to read the briefs, do the research, come to a conclusion, and prepare a draft order that I believed to be appropriate. Only at that point would I send my draft to Judge Jackson for her review of the matter. I also prepared final jury instructions for jury trials and assisted in drafting findings of fact and conclusions of law for bench trials.

I have copied citations to some published opinions below. These opinions belong to Judge Jackson and should not be credited to me. I provide them because I was the law clerk assigned to these cases, and I worked on them in the manner set forth above. They provide a brief glimpse of the type of cases I worked on for four years as a judicial law clerk.

Dubinsky v. Mermart, 2009 WL 1011503 (E.D. Mo. 2009) (granting motion to dismiss upon finding that plaintiffs were subordinate bondholders bound by the requirement in the Subordination Agreement that they obtain consent of the Senior Mortgagee prior to filing suit). This ruling was affirmed on appeal in *Dubinsky v. Mermart*, 595 F.3d 812 (8th Cir. 2010) (Jarvey, J., sitting by designation).

Matthews v. Purkett, 2009 WL 2982912 (E.D. Mo. 2009) (overruling a report and recommendation by a United States Magistrate Judge and denying section 2254 relief). This ruling was affirmed on appeal in *Matthew v. Purkett*, 383 F. App'x 583, 2010 WL 2680322 (8th Cir. 2010).

Bazzi v. Tyco Healthcare Group, 2010 WL 1260141 (E.D. Mo. 2010) (granting summary judgment in wrongful termination suit, but denying defendant's request for Rule 11

sanctions). This ruling was affirmed on appeal in *Bazzi v. Tyco Healthcare Group*, 652 F.3d 943 (8th Cir. 2011).

e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.

I have tried nine cases to verdict over the past ten years. I was co-counsel for two trials, lead counsel for two trials, and sole counsel for the remaining cases. I have tried four cases directly to a judge, with the remaining cases tried to a jury. I have tried one additional case outside of the ten-year period. All of my trials as a prosecutor involved felony charges. As a judicial law clerk, I was heavily involved in approximately 15 to 20 jury trials.

Outside of trials, the most common "contested matters" in federal court are petitions to revoke supervised release. These matters are initiated by the filing of a petition alleging that a defendant failed to comply with a condition of release. Commonly, these petitions allege violations of Iowa criminal law. In an evidentiary hearing that closely resembles a bench trial, the prosecution has the burden to prove that the defendant committed the alleged violations. It is difficult to determine the number of contested revocation matters that I have handled. After reviewing my case files and court records, I conservatively estimate that I have handled over 75 contested revocation matters in the past ten years. I have also handled numerous contested sentencing hearings, during which both evidence and arguments are presented. With the possible exception of a small handful of these revocation and sentencing hearings (when I was first starting as a prosecutor or when I was training a new prosecutor), I was sole counsel for all of these contested matters.

f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.

In the past ten years, I have drafted and submitted briefs in approximately 32 appeals, all before the Eighth Circuit Court of Appeals. In that same time period, I have presented oral argument before the Eighth Circuit Court of Appeals on six occasions. I was sole counsel for each case.

9. Describe your pro bono work over at least the past 10 years, including:

a. Approximate number of pro bono cases you've handled.
b. Average number of hours of pro bono service per year.
c. Types of pro bono cases.

My entire post-law school career has been spent in public service. As both a judicial law clerk and a federal prosecutor, I have been prohibited from engaging in the outside practice of law. This includes pro bono work.

In 2015, however, our office received approval to do limited work with Iowa Legal Aid to represent victims of domestic abuse in state court as they seek protective orders. I am one of two attorneys in our office that facilited this pro bono project, and I volunteered to handle several of the cases. From 2015 to early 2018, I met with seven clients through this project, and assisted another attorney as he met with his first client. Five of my cases proceeded to court. On average, I estimate that I worked approximately 10 hours per year on these cases, during the time that I was involved in this project. I was unable to continue participation in this project in 2018 when I became the criminal division chief.

Because my ability to perform pro bono services has always been limited, I have made a conscious effort to donate considerable amounts of my time volunteering in events designed to increase interest in the law. As set forth in my answer to Question 23, I regularly speak with students about the criminal justice system. I have helped with moot court and mock trial every year since 2006, and have volunteered to grade briefs for the Appellate Advocacy Program at the University of Iowa College of Law.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

I have not held judicial office or served in any quasi-judicial position.

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

Not Applicable

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days.

Not Applicable

ii. 180 days.

Not Applicable

iii. 240 days.

Not Applicable

iv. One year.

Not Applicable

12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:

a. Title of the case and venue,
b. A brief summary of the substance of each matter,
c. A succinct statement of what you believe to be the significance of it,
d. The name of the party you represented, if applicable,
e. The nature of your participation in the case,
f. Dates of your involvement,
g. The outcome of the case,
h. Name(s) and address(es) [city, state] of co-counsel (if any),
i. Name(s) of counsel for opposing parties in the case, and
j. Name of the judge before whom you tried the case, if applicable.

First Significant Legal Matter

United States v. Kevin Reddout (March 2011 to Nov. 2011)
United States District Court for the Northern District of Iowa
Case Number 1:11-CR-00057
Judge Linda R. Reade
Opposing Counsel: Raphael Scheetz

Kevin Reddout was charged with a methamphetamine-related drug crime in a March 2011 indictment. I was the prosecutor who indicted and prosecuted the case, representing the United States. Mr. Reddout pled guilty on the eve of trial. The Court ordered a presentence report and sentencing was scheduled for October 13, 2011. Shortly before sentencing, I became aware of additional mitigating information that, while not negating Mr. Reddout's guilt, made me question whether federal prosecution was the appropriate disposition. Despite the fact that the defendant had already pled guilty, had no right to withdraw his guilty plea, and the parties had already filed their sentencing memoranda, I filed a motion to dismiss the indictment on October 5, 2011, and, instead, placed Mr. Reddout in a diversionary program. The Court granted the motion, and the case was dismissed.

I list this case as a significant one not because it involved the most complex legal question, or because it involved the most serious crime of those that I've prosecuted. I list this case because it was not easy for me, as a young prosecutor, to approach my supervisors and suggest that we should dismiss a case against someone we had already secured a conviction against. But it was the right thing to do, and I am proud of the decision to dismiss the case. Now, as the criminal chief for our district, I often think back to this case when faced with difficult decisions regarding the appropriate disposition of our criminal cases.

Second Significant Legal Matter

United States v. Delvonn Battle (Feb. 2013 to Dec. 2014)
United States District Court for the Northern District of Iowa
Case Number 1:13-CR-2005
Judge Linda R. Reade
Opposing Counsel: David Mullin
United States Court of Appeals for the Eighth Circuit
Case Number 13-3134
Judge Benton, Judge Melloy, and Judge Shepherd
Opposing Counsel: Anne Laverty (deceased)

Delvonn Battle was charged by indictment with possession of a firearm by a felon. Mr. Battle was one of three passengers riding in a vehicle that was pulled over by police in January 2012. A drug dog alerted on the vehicle and, upon a search of the vehicle, a loaded handgun was found under Mr. Battle's seat. Ballistics evidence showed that the firearm found during the traffic stop was the same firearm involved in an unsolved Des Moines shooting in December 2011.

Mr. Battle was convicted after a four-day jury trial. I was sole counsel representing the government for the trial. During and preceding trial, Mr. Battle raised several evidentiary arguments in an effort to preclude the government from presenting evidence regarding the Des Moines shooting, and to offer "reverse 404(b)" evidence. As noted in the Eighth Circuit's subsequent decision in this matter, the Eighth Circuit had not yet ruled on the admissibility of such "reverse 404(b) evidence." Defendant also made several other evidentiary arguments, and contended that the court should grant judicial immunity to one of his witnesses. The district court ruled that the government's evidence relating to the Des Moines shooting was admissible as substantive evidence. The court also ruled that defendant's "reverse 404(b)" evidence was inadmissible, and that it would not grant judicial immunity.

I handled this case on appeal. The Eighth Circuit Court of Appeals affirmed each evidentiary decision. *See United States v. Battle*, 774 F.3d 504 (8th Cir. 2014).

While the case involved a single gun charge, I list it here because the trial was a fairly complicated one given the number of witnesses and the numerous evidentiary issues (many of which had not been previously ruled on by the Eighth Circuit). Because of the evidentiary issues raised in this case, the Eighth Circuit's decision has been heavily cited by other courts and attorneys in over 170 different cases.

Third Significant Legal Matter

United States v. Jamie Goad (Feb. 2014 to June 2015)
United States District Court for the Northern District of Iowa
Case Number 1:14-CR-28
Judge Linda R. Reade
Opposing Counsel: Jill Johnston
United States Court of Appeals for the Eighth Circuit
Case Number 14-3070
Chief Judge Riley (retired), Judge Loken, and Judge Shepherd
Opposing Counsel: Brad Hansen

Jamie Goad was ordered to reside at a halfway house pursuant to a condition of his supervised release. Mr. Goad left the halfway house, without authorization, and his whereabouts were unknown until he was arrested several weeks later. In February 2014, I obtained an indictment against Mr. Goad, charging him with the crime of escape. I was the sole prosecutor representing the United States. Mr. Goad filed a motion to dismiss, arguing that he was not in "custody" as that term is used in the federal escape statute. Specifically, he argued that the term "custody" did not include court-ordered residency at a halfway house while a person is on supervised release. I filed a written response to the motion to dismiss, and the district court denied Mr. Goad's motion.

Mr. Goad appealed to the Eighth Circuit Court of Appeals. Although there was dicta in an Eighth Circuit case which seemingly supported Mr. Goad's argument, this was a new legal issue that had not yet been decided by the circuit. I represented the United States on appeal. The Eighth Circuit Court of Appeals issued an opinion on June 11, 2015, agreeing with the arguments made in my brief, and affirming the district court's denial of the motion to dismiss. *See United States v. Goad*, 788 F.3d 873 (8th Cir. 2015).

I chose to include this case because it involved an issue of first impression and has been frequently relied upon in subsequent prosecutions of individuals who violate the federal escape statute in this manner.

Fourth Significant Legal Matter

Jennifer Saylor v. Carrie Kowalczk (Aug. 2005 to Nov. 2005)
Iowa District Court for Johnson County
Case number EQCV064613
Judge Potterfield
Opposing Counsel: Jacob Koller
Supervising Professor: Professor Reta Noblett-Feld

I was a third-year law student in 2005, practicing in the College of Law's legal clinic, when I was assigned to this case as the lead student attorney. We represented the plaintiff in a breach of contract case concerning her family pet, an English Mastiff named Pumpkin. Pumpkin was originally owned by the defendant, Carrie Kowalczk. Ms. Kowalczk was a breeder who raised dogs and presented them in dog shows. Our client and Ms. Kowalczk had an agreement where Ms. Kowalczk would transfer registration and ownership of

Pumpkin to our client once Pumpkin earned her American Kennel Club Champion Certificate. In exchange, our client raised Pumpkin and presented Pumpkin at dog shows for Ms. Kowalczk. Due to Pumpkin's success at the dog shows, however, Ms. Kowalczk had an apparent change of heart and attempted to keep ownership of Pumpkin.

After a two and a half day bench trial, the Court took the case under advisement and subsequently issued a verdict in our client's favor. I first-chaired this trial under the supervision of Professor Noblett-Feld, of Iowa City, Iowa. Another student second-chaired the trial. (I do not recall this student's name, and the court's order is silent as to his name).

Many looking at this case from the outside would perhaps consider this to be a "dog of a case." But this case was significant to me because (1) it was my first trial; (2) the stakes were high for our client, who dearly loved Pumpkin, and who was afraid that her pet would be taken away from her family; and (3) it helped me, at a very early stage in my career, recognize the critical truth that each case is important to someone.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

While my courtroom and clerkship experiences have prepared me well for a district judgeship, my ability to serve as a district court judge is also greatly enhanced by other portions of my legal background.

First, my experience as chief of the criminal division has prepared me for a district court judgeship. The criminal chief position is a demanding one. The criminal chief duties require sound judgment, common sense, and a strong and efficient work ethic. They also require the ability to make tough, and sometimes unpopular, decisions. These same traits would serve me well in the demanding job of a district court judge, where tough decisions must be made in a timely manner.

Second, for several years I have served as the Criminal Civil Rights Coordinator for our district. In that capacity, I review all criminal civil rights complaints that are brought to our office's attention, including hate crimes and alleged color of law violations. I have been involved in thorough investigations into such allegations. In the past four years, I have attended over 30 hours of training related to civil rights investigations and prosecutions. Through that training, I was exposed to cases around the country where law enforcement officers exceeded their authority, or where someone was victimized solely due to the color of their skin or their sexual orientation. My work and training in this area has underscored my commitment to equal justice under the law, and will serve me well as a district court judge.

Finally, I have served as the Crime Prevention and Offender Reentry Coordinator for our district. Some of my accomplishments in this role include:

- Leading the revitalization of the WARN ("Welcome and Resource Notification") meetings with the Sixth Judicial District Department of Corrections. At these WARN meetings, held every other month, I joined law enforcement and

community resource groups to speak with state parolees and high risk probationers about the requirements of their supervision, available resources in the community, and the fact that they face significant federal penalties if they possess a firearm as a felon.

- Initiating a recurring WARN-style presentation at the Eldora State Training School.
- Orchestrating a student-driven initiative designed to promote a healthy discussion among teenagers about gun violence.
- Creating a seminar entitled "Iowa's Untapped Workforce." This half-day seminar was held in Cedar Rapids, Fort Dodge, and Sioux City, and was designed to increase employer awareness of the opportunity to find reliable employees from the "untapped" workforce of ex-offenders. During the seminar, I facilitated a "Reentry Simulation" activity, which placed participants in the shoes of someone being released from prison, enabling the participants to experience some of the issues faced when reintegrating into society. Hundreds of employers attended these seminars. Several employers, including a large company that had previously been resistant to hiring ex-offenders, informed our office that they hired individuals with criminal records as a result of these programs. A brief video explaining the purpose of these seminars can be found by searching YouTube for "Iowa's Untapped Workforce" or at this link: Iowa's Untapped Workforce - YouTube (https://www.youtube.com/watch?app=desktop&v=7x8A6PEog7Q)
- Conducting additional "reentry simulations" around the community.
- Presenting to school groups, community organizations, and law enforcement partners. Since beginning reentry-related duties in 2015, I've made dozens of reentry-related presentations (as set forth in my answer to Question 23 of the application) to a large variety of audiences.

My reentry-related work has rewarded me with a background that is fairly unique among prosecutors. I have developed a much better appreciation of the hurdles that individuals face when reentering communities after a prison sentence, and how difficult it can be to overcome the label "felon." But I also have an appreciation for the need to keep our communities safe and to hold individuals responsible for criminal acts. This unique background would enhance my ability to serve the district as a district judge.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

I have not held public office and have not been a candidate for any public office.

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.
b. Your title.
c. Your duties.
d. Dates of involvement.

- **Board of Governors** 2018 to present
  Linn County Bar Association

  I was elected in 2018 to serve a three-year term as a member of the Linn County Bar Association's Board of Governors. The Board of Governors manages the affairs of the bar association including, among other things, organizing monthly meetings, planning bar events, and monitoring the financial status of the organization.

- **Board of Trustees** 2016 to present
  Future Problem Solving International

  I was elected in 2016 to serve a three-year term as a Trustee on the volunteer Board of Trustees for the nonprofit Future Problem Solving Program International. In 2019, I was re-elected to a second three-year term. This is an educational nonprofit focused on teaching critical thinking skills and creative problem solving. Over 250,000 students from 14 different countries have participated. As a Trustee, my duties include general oversight of the organization and of the Executive Director and other staff. I have served on both the personnel and policy committees, and chaired the personnel committee from 2016 through 2018, and chaired the policy committee from 2019 to present day. Since 2010, I have also been a member of the Board of Advisors for Future Problem Solving's Iowa affiliate, serving an indeterminate term.

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

- **Federal Practice Committee** Nov. 2019 to present
  United States District Court
  Northern District of Iowa

- **Criminal Chief Working Group** July 2019 to present
  Attorney General's Advisory Committee
  Eighth Circuit Representative
  Liaison to Cyber & Intellectual Property Crime Subcommittee

- **Selection Committee** March 2020
  Attorney General's Awards For Exceptional
  and Distinguished Service

- **Selection Committee** Oct. 2019 to March 2020
  Executive Office of United States Attorneys (EOUSA)
  Director's Awards for Superior Performance by
  an Assistant United States Attorney

- **Dean Mason Ladd Inn of Court** 2014 to present

- **Linn County Bar Association** 2010 to present
  Board of Governors (2018 to present)

- **Iowa State Bar Association** 2006 to present
  Member
  Mock Trial Volunteer

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

- **Marion Christian Church** Aug. 2010 to present
  Pastoral Search Committee Member (2020 to present)
  Chair, Church Council (2019)
  Vice Chair, Church Council (2018)

- **Westfield Elementary School** Aug. 2015 to present
  Volunteer
  Member, Parent Teacher Organization

- **Linn-Mar Community School District** Jan. 2017 to June 2017
  Member, Facilities Leadership Team

- **Reentry Committee** 2016 to 2017
  Cedar Rapids Civil Rights Commission
  Committee Member

- **Law Enforcement Subcommittee** 2016 to 2017
  (A subcommittee of the Safe, Equitable, and
  Thriving Communities (SET) Task Force)

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

Not Applicable

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

I have included five writing samples, all of which were drafted during my time as an Assistant United States Attorney.

OTHER INFORMATION

20. If any member of the District Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

I am not related to any member of the Nominating Commission.

21. If any member of the District Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

I am not a law or business partner with any member of the Nominating Commission.

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

None

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

For clarity purposes, I have listed my commonly recurring presentations first, with all presentation dates identified together.

Date(s)	Title or Subject Matter Description	Audience
2/18/20 1/13/20 11/19/19 11/12/19 5/28/19 5/16/19 3/27/19 12/20/18 10/10/18 2/28/18 1/4/18 11/9/17 10/19/17 5/22/17 5/19/17 3/29/17 3/28/17 12/6/16 11/6/16 10/13/16	I led a discussion regarding the criminal justice system and the role of prosecutors.	High School students (Middle School students on a few occasions)
12/19/18 3/29/18 2/22/18 6/29/17 4/20/17 2/9/17	Offender Reentry Simulation I organized and facilitated a reentry simulation event that places participants in the shoes of someone being released from prison. I also gave opening and closing remarks regarding recidivism at each of these events.	Participants included: -Kirkwood Community College staff -IowaWorks staff -Iowa Department of Corrections staff -Employers in the Cedar Rapids, Dubuque, and Waterloo areas
11/7/18 9/12/18 7/11/18 3/7/18 1/10/18 11/1/17 9/6/17 5/3/17 3/1/17 1/4/17 11/2/16 9/7/16	"WARN" (Welcome and Resource Notification) presentation regarding federal gun laws, penalties, and reentry resources.	State of Iowa parolees and probationers

Date(s)	Title or Subject Matter Description	Audience
7/6/16 5/4/16 3/2/16 11/4/15 9/2/15	(continued from previous page)	

In addition to the commonly recurring presentations listed above, I have also made the following speeches, talks, or presentations in the past ten years:

Date(s)	Title or Subject Matter Description	Audience
10/29/20	Prosecution and the Fourth Amendment	Coe College Criminal Justice students
10/22/20	Law and Ethical Rules re: Difficult Clients/Counsel – Civil and Criminal (Panel Discussion)	CLE Event that was open to all attorneys
10/22/19	Protecting Houses of Worship (Panel Discussion)	Law Enforcement, Clergy, Community Members
6/12/19	Federal Prosecution Update	Iowa Association of County Attorneys
4/25/19	Protecting Houses of Worship – "Criminal Civil Rights Violations"	Law Enforcement, Clergy, Community Members
11/14/18	Federal Prosecution Update	Iowa Association of County Attorneys
3/8/18	Presentation to State Training School students in Eldora regarding gun crimes and penalties, and the availability of rehabilitative services	State Training School students in Eldora
2/21/18	Discussion regarding the criminal justice system and the role of prosecutors	Students in Wartburg College's Criminal Justice Club
10/25/16	Presentation at Vernon Middle School in Marion regarding guns, bullying, and violence, as part of a Pledge Against Violence Initiative	Middle School students
10/24/16	Presentation at Assunta Pallota Middle School in Waterloo regarding guns, bullying, and violence, as part of a Pledge Against Violence Initiative	Middle School students
10/19/16	Presentation at Marion High School regarding guns, bullying, and violence, as part of a Pledge Against Violence Initiative	High School students

Date(s)	Title or Subject Matter Description	Audience
9/23/16	Second Chance Hiring Career Fair – I organized a career fair aimed at matching area employers with individuals who have been released from prison. I made remarks to the employers at the beginning of the career fair.	Employers and Human Resource Specialists
7/30/16	I was invited to present at the American Cheese Society's national convention regarding the importance of employment on successful offender reentry.	Employers in the cheese industry
7/28/16	"Iowa's Untapped Workforce" – I organized this half day-long seminar aimed at increasing awareness of the impact of employment on recidivism. I spoke during the event, introduced speakers, and facilitated a reentry simulation.	Employers and community leaders in the Sioux City area
7/27/16	"Iowa's Untapped Workforce" – I organized this half day-long seminar aimed at increasing awareness of the impact of employment on recidivism. I spoke during the event, introduced speakers, and facilitated a reentry simulation.	Employers and community leaders in the Fort Dodge and Central Iowa area
7/26/16	"Iowa's Untapped Workforce" – I organized this half day-long seminar aimed at increasing awareness of the impact of employment on recidivism. I spoke during the event, introduced speakers, and facilitated a reentry simulation.	Employers and community leaders in the Cedar Rapids area
7/22/16	I spoke on the "On the Record" podcast for KCRG and the Gazette regarding recidivism and offender reentry efforts.	Public podcast available to anyone
7/21/16	I spoke with the Gazette Editorial Board regarding recidivism and offender reentry efforts.	The Gazette editorial board
6/22/16	Presentation regarding federal gun and drug laws, as well as offender reentry efforts.	Cedar Rapids West Rotary
5/10/16	Interview with KCRG reporter Dave Franzman regarding gun violence in the Cedar Rapids area	Public television, available to anyone (aired May 19, 2016)
4/26/16	Presentation at an employer round table event regarding hiring ex-offenders	Cedar Rapids area employers
2/16/16	I participated in a panel discussion for the television program "Ethical Perspectives on the News" regarding mandatory minimums and sentencing reform. Available at: https://www.youtube.com/watch?v=o4m4Idb9FKg	Public television, available to anyone. (aired on Feb. 21, 2016)

Date(s)	Title or Subject Matter Description	Audience
12/17/15	"Case Law Update" – presentation regarding recent cases involving the Fourth Amendment	Law Enforcement Officers – Cedar Rapids area
12/10/15	"Case Law Update" – presentation regarding recent cases involving the Fourth Amendment	Law Enforcement Officers – Decorah area
10/21/15	I spoke on the "On the Record" podcast for KCRG and the Gazette regarding an initiative to reduce violence among youth and young adults	Public podcast, available to anyone
10/19/15 to 10/21/15	I presented five different times at four different schools over these dates, regarding an initiative to reduce violence among youth and young adults	High School and Middle School students
10/15/15	Discussion with Gazette Editorial Board regarding the Department of Justice's "Smart on Crime" initiative	The Gazette editorial board
9/28/15	"Case Law Update," focusing on the Fourth Amendment, and "National Security Update" presentations to law enforcement	Law Enforcement Officers – Mason City area
9/10/15	Roundtable Discussion regarding the role of prosecutors in the criminal justice system, and how to become a prosecutor	Law students – University of Iowa College of Law

I have also participated in other career-day type events, many of which I did not document. I have participated in mock trials and moot court competitions, where I made oral comments regarding the students' performance. Finally, over the past ten years, I have presented internal office training on numerous topics, including the Fourth Amendment, discovery obligations, and other aspects of criminal law.

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Facebook: Justin Lightfoot
LinkedIn: Justin Lightfoot

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

- **Order of the Coif** 2006
  The Order of the Coif is an honorary scholastic society "recognizing those who as law students attained a high grade of scholarship."

- **Michelle R. Bennett Client Representation Award** 2006
  I was a co-recipient of the Michelle R. Bennett Client Representation Award, presented annually to a third-year law student at the University of Iowa College of Law.

- **Law School Graduation with High Distinction** 2006
  I graduated in the top ten percent of my law school class, earning "high distinction" honors. (Class rank: 18th out of 220 students).

- **University of Iowa Student Employee of the Year** 2005
  I was nominated for my work during my internship with the U.S. Attorney's Office in Cedar Rapids. I was selected as the "Student Employee of the Year' among all student employees at the University of Iowa. My nomination was submitted by Judge Stephanie Rose and Teresa Baumann, both of whom were federal prosecutors at that time.

- **State of Iowa Student Employee of the Year** 2005
  After being selected as the University of Iowa Student Employee of the Year, my nomination was subsequently selected among all nominations in the State of Iowa as the "State of Iowa Student Employee of the Year."

- **Undergraduate Graduation *magna cum laude*** 2003
  I was named to the "Dean's List" every semester.

- **Pi Sigma Alpha** 2003
  Pi Sigma Alpha is a national political science honor society.

In addition to the recognitions listed above, I have received various internal office awards and recognition over the past ten years.

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

Hon. Carol E. Jackson
United States District Judge (retired)
(For privacy purposes, Judge Jackson's personal cell phone number will be separately provided. Because she is retired, she no longer has an office telephone number.)
I worked as a judicial law clerk for Judge Jackson from 2006 though 2010.

Hon. Stephanie M. Rose
United States District Judge
(515) 284-6453
Judge Rose was the law clerk coordinator for the United States Attorney's Office when I was hired as a law student clerk. Judge Rose was also the United States Attorney who hired me as a federal prosecutor.

Hon. Rebecca Goodgame Ebinger
United States District Judge
(515) 323-2855
I worked with Judge Ebinger when she was an Assistant United States Attorney in our office. Before her appointment to the federal bench, Judge Ebinger served as a state district court judge. She has generously shared with me her experience transitioning from being a federal prosecutor to a state district judge.

Hon. Leonard T. Strand
Chief United States District Judge
(712) 233-3921
Judge Strand is the chief judge of the district court where I practice. Judge Strand sits in Sioux City, and I do not regularly practice in front of Judge Strand. However, I have worked with Judge Strand on several matters as criminal chief, and he presided over one trial of mine. In 2019, Judge Strand appointed me to the Federal Practice Committee for the Northern District of Iowa.

Hon. C.J. Williams
United States District Judge
(319) 286-2340
Judge Williams was a colleague of mine in the United States Attorney's Office, prior to his selection as a judge. I have also appeared in court before Judge Williams.

Peter Deegan, Jr.
United States Attorney
(319) 363-6333
Pete Deegan is the United States Attorney for my office. Prior to being appointed United States Attorney, Pete served as an Assistant United States Attorney and the Criminal Division Chief, and was my direct supervisor.

Sean Berry
First Assistant United States Attorney
(319) 504-6559
Sean Berry is my direct supervisor, and has been an informal mentor of mine throughout my time at the United States Attorney's Office.

John Lane
(319) 651-7666
John Lane was a long-time criminal defense attorney in the Cedar Rapids area prior to his retirement. He represented defendants in many cases that I prosecuted, and we had a jury trial together.

JoAnne Lilledahl
(319) 573-5633
JoAnne Lilledahl was an Assistant Federal Public Defender for many years, and she served as opposing counsel in numerous cases that I prosecuted.

Lisa Burns
(319) 361-5371
Lisa Burns is a former legal assistant that worked with me for several years in the United States Attorney's Office. She is now a judicial assistant.

John Whiston
(319) 541-7152
Professor John Whiston was a clinical professor of law at the University of Iowa College of Law, prior to his retirement. I did not work with him much as a clinical law student. However, I grew to know Professor Whiston well through my offender re-entry work, as well as through the Inn of Court, mock trials, and other bar association events.

27. Explain why you are seeking this judicial position.

"Take all the robes of all the good judges that have ever lived on the face of the earth, and they would not be large enough to cover the iniquity of one corrupt judge."
- Henry Ward Beecher

I first saw this quote many years ago on a day-by-day calendar I had on my desk. I hesitated to include it in my response to this question because I do not want the give the impression that I believe we suffer from corrupt judges. To the contrary, we are fortunate to live in a country, and in a state, where we have a judiciary filled with hardworking, fair, and independent judges. But this quote reminds me of how much the integrity of the legal process depends upon good judges. I like to think of judges as the "quality control" of our legal system, ensuring that its results are as dictated by the law and the facts, and not by factors such as race, gender, or socioeconomic status. To that end, our system is dependent upon highly skilled judges who have a passion for equal justice under the law. In turn, that requires the willingness of well-qualified candidates to step forward to serve in such a role.

I believe my traits and skills align well to those necessary to be a good district court judge, and I desire to utilize them to serve the public and our legal system in this "quality control" role.

I am particularly drawn to the district court bench for several reasons. First, the Sixth Judicial District is a busy one, and the judges each handle a high volume of cases. I thrive and enjoy working in a fast-paced environment where a strong work ethic and efficiency are keys to success. Second, as a court of general jurisdiction, the district court offers the ability to work on cases of every type, promoting continued intellectual curiousity and development. Third, I would find the work personally satisfying. The legal system is about people, and nowhere is this more clear than in the halls of the district court. People from all walks of life come to the court with disputes and concerns that are very important to them. The judges of the district court are commonly the first (and many times, the only) judicial official that these individuals personally encounter as they begin their trek though our legal system. This is a time when litigants, defendants, victims, and family members form their impressions about the legal system, and the district judges have a unique chance to help shape these views through their interactions with these individuals. The opportunity

to directly interact with the people who are at the center of the work of the court is one more reason that I would find a career as a district judge personally and professionally fulfilling.

28. Explain how your appointment would enhance the court.

My appointment would contribute to the work of the district court in several ways:

Criminal Law and Procedure

Criminal cases make up a significant portion of the district judge's docket, and my expertise in this area will greatly assist me in quickly contributing to the court's work. I have been a full-time prosecutor for over a decade. While I have practiced in federal court, the federal rules of criminal procedure are very similar in substance to the Iowa rules of criminal procedure. Likewise, I am constantly referring to Iowa criminal law in my work as a federal prosecutor, and I have frequent conversations with county attorneys and assistant county attorneys regarding whether a defendant should be prosecuted in federal court or in state court. These conversations include a detailed analysis of the potential state criminal charges and penalties. My deep background and expertise in criminal law would enhance the work of the court.

Judicial Clerkship – Civil Procedure

Likewise, in my time as a judicial law clerk I handled hundreds of civil cases and approached them from the same viewpoint as a judge. I was required to draft opinions without initial guidance from Judge Jackson, and learned an incredible amount about the rules of civil procedure and various causes of action. I routinely applied state law in resolving these cases. This four-year experience helped hone my legal skills, and provided me with a comfortable familiarity with the rules of civil procedure.

Legal Writing and Courtroom Experience

My legal writing skills were greatly refined during my work as a judicial law clerk and as a prosecutor. Both positions required a substantial amount of legal writing, and I have consistently been told that legal writing is one of my strengths. I enjoy writing, and I always strive to produce an organized, well-written product that is easy to read and understand. I am an efficient writer—a skill that will be of critical importance given the high volume of cases in the Sixth Judicial District.

I also have significant courtroom experience. As a prosecutor, I have handled all types of hearings that accompany criminal cases. As a law clerk, I gained substantial experience with hearings that relate to civil cases. I am completely comfortable inside the courtroom and have a solid understanding of the rules of evidence. This background will assist me in presiding over hearings as a district judge.

Significant Decision-Making Experience

A district court judge must be decisive and able to make tough decisions. As an Assistant United States Attorney, and especially as the chief of the criminal division, I have considerable experience with making high-impact decisions. Most everyone who is

prosecuted in federal court ends up in federal prison. For that reason, the initial charging decision alone carries significant consequences in the life of another person, and in most cases, the lives of many other people. Beyond the initial charging decision, other impactful decisions that I routinely make as the criminal division chief include deciding whether to offer certain plea agreements, whether to apply mandatory minimums and other sentencing enhancements, and whether to dismiss charges. My experience running the criminal division of the United States Attorney's Office will be invaluable to me as a district judge.

Offender Re-entry Experience

My work relating to offender reentry and recidivism is unique among prosecutors. As discussed elsewhere in this application, I have devoted significant time to learning about what happens when an individual transitions back into the community from prison. I credit my experience working with ex-offenders for my increased empathic concern for the difficulties that these individuals face. It is true that some people who come out of prison have no intention of living a law-abiding lifestyle, and are eager to return to a criminal lifestyle. There is little that can be done for those individuals. But there are many that truly want to do well, but face obstacles that they simply do not know how to overcome. I have no doubt that this experience, together with my work as a prosecutor, will help me serve the Sixth Judicial District well as a judge.

Temperament and Work Ethic

Finally, I've been told my personality, temperament, and work ethic are excellent fits for this position. I believe that, if asked, criminal defense attorneys would describe me as personable, easy to work with, and most importantly, fair. I possess a strong work ethic and have always been willing to pitch in and cover a hearing or draft a brief for a sick or vacationing colleague. Because of my exhibition of these qualities, many judges and attorneys (including criminal defense attorneys) have encouraged me to seek this position. I believe that these innate traits will enhance my work as a district judge, and further the work of the court.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

I have learned much from the attorneys and judges I have worked alongside over the past fifteen years. One valuable lesson I learned during my judicial clerkship was the importance of timely issuing rulings so that cases could proceed swiftly towards disposition. Judge Jackson believed in the maxim, "Justice delayed is justice denied," and as her law clerks we strived to complete our draft orders expeditiously once a matter was fully briefed.

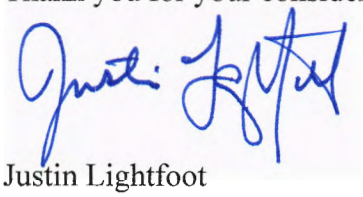
Judge Jackson was right that judicial delays can have significant consequences. As a young child, I saw first-hand the emotional toll that a custody battle has on a family. There were few things more important or stressful in my family's life at that time than the legal proceedings involving custody of my older half-brother. Delays in these sort of family law cases only increase this stress and, in some instances, can place individuals at risk of harm. In civil cases, delayed trial dates or rulings can cost a party significant sums of money. In

criminal cases, such delays can result in extended loss of liberty or a prolonged danger to the community.

Unfortunately, the COVID-19 pandemic has made heavy court dockets even heavier. If selected, I pledge to do all that I can to be of immediate assistance to the court. I am willing to work on whatever the court needs as it continues to resolve cases that have been delayed by the pandemic. In that regard, I will be aided by my work ethic, my common sense, my legal experience, and my willingness to learn. Most importantly, I will be guided by my commitment to equal justice under the law.

I am ready and hope to roll up my sleeves and get to work serving the people of Iowa and, specifically, the Sixth Judicial District.

Thank you for your consideration,



Justin Lightfoot

Writing Sample # 1 – Justin Lightfoot

Case: **United States v. Ronald Weaver**

I recently filed this brief in opposition to a defendant's request for a reduced sentence based on the First Step Act of 2018. As mentioned elsewhere in my application, dozens of petitions for relief under the First Step Act have been filed in the past year. In some cases, we have agreed to relief. In others, like this case, we have opposed relief. I have drafted most of our office's First Step Act responses and have reviewed all of them.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 06-CR-4014-LTS
	)	
vs.	)	
	)	
RONALD WEAVER,	)	
	)	
Defendant.	)	

RESPONSE TO DEFENDANT'S MOTION FOR REDUCED SENTENCE PURSUANT TO THE FIRST STEP ACT

The United States files its response to defendant's motion for reduced sentence pursuant to Section 404 of the First Step Act, Public Law 115-391, 132 Stat. 5194 (2018) ("First Step Act"). Defendant requests a reduction in his prison sentence to time-served, and a reduction in his term of supervised release. In support of this request, defendant asks the Court to reconsider several guidelines determinations made by the sentencing court.

The government agrees that defendant is eligible for relief, but defendant's violent history weighs strongly against any reduction as a matter of discretion. If the Court finds a reduction is warranted, the Court should impose a reduced sentence of no less than 262 months' imprisonment, which is a sentence at the bottom of the career offender guidelines range that would have applied had the Fair Sentencing Act of 2010 been in effect at the time of original sentencing. Finally, the Court should reject defendant's request for a new determination of other guidelines

issues unrelated to the Fair Sentencing Act, such as defendant's career offender status, his role enhancement, and his criminal history category.

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I. THE FIRST STEP ACT

The First Step Act, enacted on December 21, 2018, authorizes retroactive application of part of the Fair Sentencing Act of 2010 ("FSA 2010") to certain defendants. Specifically, Section 404 of the First Step Act provides that "[a] court that imposed a sentence for a covered offense may . . . impose a reduced sentence as

if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed." Section 404, Public Law 115-391, 132 Stat. 5194 (2018) (hereinafter cited as "First Step Act").

Section 3 of the FSA 2010 is not relevant to the motion currently before the Court.[1] Section 2 of the FSA 2010 increased the quantity of cocaine base, commonly called crack cocaine, necessary to trigger mandatory minimum sentences under 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B), as follows:

	Statutory Penalties[2]	Crack cocaine quantity pre-FSA 2010	Crack cocaine quantity post-FSA 2010
841(b)(1)(A)	10 years – life 20 years – life [one prior] Mandatory life [2+ priors]	50 grams	280 grams
841(b)(1)(B)	5 years – 40 years 10 years – life [one prior] 10 years – life [2+ priors]	5 grams	28 grams

Finally, the First Step Act makes a reduced sentence entirely discretionary, noting that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." Section 404(c), First Step Act. In determining whether the Court should grant a sentence reduction to an eligible

[1] Section 3 of the FSA 2010 eliminated the provision in 21 U.S.C. § 844(a) which had imposed a five-year mandatory minimum sentence for simple possession of five grams or more of crack cocaine.

[2] The FSA 2010 did not change any of the statutory penalties found under 21 U.S.C. § 841. Instead, it only changed the amount of crack cocaine necessary to trigger those penalties.

defendant, the Court may consider the presentence report and should assess the ordinary considerations pertinent to sentencing as set forth in 18 U.S.C. § 3553(a). Additionally, under *Pepper v. United States*, 562 U.S. 476 (2011), the Court may consider post-offense conduct, either positive or negative, in assessing whether to adjust a previously imposed sentence.

II. DEFENDANT'S ELIGIBILITY FOR A REDUCED SENTENCE

In considering a motion under Section 404 of the First Step Act, the Court must first "decide whether the defendant is eligible for relief[.] *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019). Not all defendants who were convicted of a crack cocaine offense are eligible for a reduction under the First Step Act. Section 404 of the First Step Act permits a court to reduce a sentence only when the sentence was for a "covered offense." A "covered offense" is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010." Section 404(a), First Step Act of 2018.

In this case, defendant was one of five defendants charged in a five-count Second Superseding Indictment filed in October 2006. (Docket 91). In Count 1, defendant was charged with conspiracy to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. (*Id.*). Count 2 alleged possession with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). (*Id.*). Defendant was convicted

of both counts after a jury trial. (Docket 202).[3] Defendant was sentenced in June 2008 to concurrent terms of 300 months' imprisonment, to be followed by a five-year term of supervised release. (Docket 354). His expected release date from BOP custody is December 10, 2028. (Docket 521-1 at 1).

Section 2 of the FSA 2010 changed the statutory penalties associated with the federal crimes set forth in Counts 1 and 2, and defendant committed the offenses prior to August 3, 2010. Specifically, the applicable statutory penalties for both counts at the time of sentencing were a mandatory minimum 10 years' imprisonment and a maximum possible sentence of life imprisonment, to be followed by a term of supervised release of at least 5 years, pursuant to 21 U.S.C. §§ 841(b)(1)(A). Had the FSA 2010 been in effect, the mandatory minimum would have been reduced for each count to 5 years' imprisonment, and the statutory maximum would be reduced to 40 years' imprisonment. *See* 21 U.S.C. § 841(b)(1)(B). Further, the minimum term of supervised release would have been reduced to 4 years. *Id.* Therefore, because the statutory penalties for Counts 1 and 2 were altered by Section 2 of the FSA 2010, defendant was convicted of a "covered offense." *See United States v. Banks*, 960 F.3d 982 (8th Cir. 2020).

[3] Defendant's conviction was vacated in August 2013 when the district court granted, in part, defendant's § 2255 motion. *See* 5:10-CV-4091, Docket 56 (Aug. 19, 2013). This decision was reversed on appeal, and defendant's conviction was reinstated. *See* 5:10-CV-4091, Docket 78 (July 16, 2015).

III. A REDUCTION IS NOT WARRANTED AS A MATTER OF DISCRETION

Because defendant is eligible for relief, the Court must "decide, in its discretion, whether to grant a reduction." *McDonald*, 944 F.3d at 772. For the reasons set forth below, relief is not warranted in this case.

Defendant's Sentence is Within the Amended Career Offender Guidelines Range

Based on the 879.95 grams of crack cocaine found in the presentence report and defendant's career offender status, the following statutory penalties and guideline calculations would have applied before and after FSA 2010:

Statutory Range (original)	Statutory Range under FSA 2010	Guideline Calculation (original)	Guideline Calculation (post-FSA 2010)
10 years to life At least 5 years of supervised release § 841(b)(1)(A)	5 years to 40 years At least 4 years of supervised release § 841(b)(1)(B)	360 months to life §4B1.1 TOL: 37 CHC: VI	262 to 327 months §4B1.1 TOL: 34 CHC: VI

Because the applicable career offender offense level under §4B1.1 varies based on the statutory maximum sentence, the reduction in the statutory maximum results in a lowered guidelines range. Thus, had the FSA 2010 been in effect at the time of defendant's sentencing, his offense level would have been 34, and his guidelines range would have been lowered to 262 to 327 months' imprisonment.[4] *See* USSG §4B1.1.

[4] Of course, given the high drug quantity in this case, had the Fair Sentencing Act been enacted prior to defendant's sentencing, the government could

The sentencing court varied down at the initial sentencing to a sentence of 300 months' imprisonment. Defendant's current sentence of 300 months is still within the amended range. The sentencing court explained the downward variance as follows:

> The court wishes to state that it has considered 3553(a) factors, sentencing factors, and the court is going to downward vary to 300 months. And the court is persuaded that this reflects the seriousness of the offense. It gives him something over and above the 260 that he got in the Southern District to show that we didn't ignore this particular conviction, and the court believes that still promotes respect for the law and provides just punishment for the offense, and we feel that it affords adequate deterrence to criminal conduct. It also protects the public from further crimes from the defendant.

(Sent. Tr. 143).

The sentencing court's reference to the "Southern District" refers to defendant's prosecution in the United States District Court for the Southern District of Iowa in case number 4:07-CR-05. (PSR ¶ 54). In that case, defendant was convicted of being a felon in possession of firearm and ammunition. (*Id.*). Defendant fired a gun in the parking lot of a strip club, and then handed the gun to

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have alleged "280 grams or more" in the indictment, and the penalties set forth in 21 U.S.C. § (b)(1)(A) would have still applied. Under that scenario, there would have been no impact on defendant's sentence. However, in terms of determining eligibility for a reduced sentence, the actual drug quantity involved in the offense is not relevant. *See United States v. Haynes*, 968 F.3d 869, 870 (8th Cir. 2020) ("Therefore, a court must consider the penalties for the offense defined by the quantity of drugs with which the defendant was charged in the indictment, not by the quantity of drugs that was found at sentencing based on all of the defendant's relevant conduct."). The Court can still consider the quantity of drugs involved in the offense, among other factors, in determining whether to grant relief as a matter of discretion and, if so, the extent of any reduction. *Id.* (affirming denial where district court discussed drug quantity and found that existing sentence was appropriate).

another individual who also fired it. (*Id.*). An individual was shot in the leg during the altercation. (*Id.*). Defendant then led police on a high-speed pursuit, reaching 110 miles per hour. (*Id.*). "During the pursuit, [defendant's associate] pointed a handgun out the window of the vehicle and fired it at the pursuing officers." (*Id.*). Defendant was initially sentenced to 262 months' imprisonment. (*Id.*). That sentence was later vacated in a § 2255 proceeding, and an amended sentence of 120 months' imprisonment was imposed. *See* S. Dist. IA 4:07-CR-00005, Docket 130.

Aggravating Factors Outweigh the Mitigating Factors

The incident in the Southern District is one of several aggravating factors in this case that suggest that a sentencing reduction is not warranted. Defendant committed the crime in the Southern District of Iowa "while being a fugitive on the indictment in regards to the acts of drug trafficking in Sioux City." (Sent. Tr. 146). Despite the fact that there was no connection between the strip club shooting and the drug charges in the instant offense, the sentence in the instant case was set to run *concurrent* to the sentence in the Southern District of Iowa. (Sent. Tr. 150). While the government does not suggest that the Court can now order the sentence to run consecutive to the sentence in the Southern District of Iowa, the Court can consider defendant's total past conduct in determining the extent of any reduction to his drug sentence. Because defendant received a concurrent sentence, he essentially received no additional punishment for his actions in the Southern District case. Yet his conduct in the Southern District of Iowa case is extremely

aggravating and violent in nature. Defendant fired a gun, provided that gun to another person who also fired it, and led police on a high speed chase—during which the gun was again fired, this time at the police. He committed this violent crime while the indictment in the instant case was pending.

Defendant has a serious criminal history involving violence and firearms, even beyond the incident that led to the charges in the Southern District of Iowa. In 1998, he was convicted of three counts of aggravated assault. (PSR ¶ 49). He assaulted three individuals with a handgun. (*Id.*). The three victims were entering their school when defendant shot at them. (*Id.*).

In 2000, defendant was convicted of Criminal Possession of a Firearm. (PSR ¶ 52). In that case, defendant was associated with a group that actively sought out members of a family with the intent to harm them. (*Id.*). Members of this group killed multiple people. (*Id.*). Defendant was present during at least one of the deadly shootings. (*Id.*). Finally, as mentioned above, defendant was convicted of the Southern District of Iowa offense in 2006, which also involved the illegal possession of firearms and the discharge of firearms. (PSR ¶ 54). Defendant also committed violent offenses as a juvenile. (PSR ¶¶ 44-48).

In addition to his history of violence and involvement with firearms, defendant has performed poorly while on court supervision. He was placed on probation in 1999 for the aggravated assault convictions, and had his probation revoked in April 2000. (PSR ¶ 49). He was paroled in June 2004, and his parole was revoked in March 2005. (*Id.*). He was again paroled in June 2005, and had a

parole violation in August 2005. (*Id.*). He was paroled again in January 2006, and violated his parole in September 2006. (*Id.*). Both of defendant's federal crimes took place while he was on parole from his state court convictions. (PSR ¶¶ 15-27, 49, 54).

Defendant has a history of fleeing from, and lying to, law enforcement and absconding from parole. He absconded from parole on at least two occasions after his aggravated assault convictions. (PSR ¶ 49). When police encountered defendant in 1999, when he was selling cocaine, he provided a false name to police. (PSR ¶ 51). As discussed above, he led police on a high speed chase in the Southern District of Iowa case, during which his passenger fired a gun at the pursuing officers. (PSR ¶¶ 53-54).

At the time of original sentencing, when defendant was just 26 years old, his criminal history already qualified as a criminal history category VI, with 17 criminal history points, even prior to application of the career offender guidelines provisions. (PSR ¶ 58).

Defendant has performed well while imprisoned within the Bureau of Prisons, and this is a mitigating factor. He has only one disciplinary report, for a fairly minor violation (being unsanitary or untidy), in 2012. (Docket 521-1 at 5).[5] However, in terms of whether a discretionary reduction is appropriate, that single mitigating factor is significantly outweighed by the aggravating factors discussed

[5] Defendant did not accept responsibility for this disciplinary violation, claiming that the items did not belong to him. (Docket 521-1 at 5).

above—particularly defendant's history of violence, his poor performance on supervision, and repeated involvement with firearms, including multiple situations involving the discharge of those firearms.

Defendant contends that he is "unlikely to reoffend[.]" (Docket 521 at 21). The record does not support this contention. The only evidence in support of the contention that defendant is a low risk to recidivate is his conduct within BOP. All other factors show that defendant is at high risk to recidivate. When discounting the time periods that defendant was in prison, he has been consistently involved in criminal activity since he was a teenager. (PSR ¶¶ 44 – 54). Defendant's first adult criminal conviction resulted from a February 1998 arrest. (PSR ¶ 49). Defendant was on probation from his last juvenile adjudication at the time. (PSR ¶ 48). Defendant consistently violated his parole within a fairly short period of being placed on parole. (PSR ¶¶ 49, 51, 52). He committed the instant offense while on parole. (PSR ¶¶ 15, 49, 51, 52). Defendant is a Criminal History Category VI, and all of defendant's criminal history points were accumulated during a fairly short time period; from February 1998 until September 2006. (PSR ¶¶ 49 – 54). This is even more remarkable when considering that he spent a fair amount of time in prison during that same time period. (*Id.*).

Defendant's criminal history is not filled with drug possession or low-level drug trafficking offenses. It is replete with violent offenses involving firearms and assaults. Regardless of defendant's good conduct while in prison, the record demonstrates that he is at a very high risk to commit future crimes when he is

released from prison. *See* United States Sentencing Commission Report on Recidivism Among Federal Violent Offenders at p. 33, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf (last visited December 1, 2020) (noting that "[m]easured by rearrest, violent prior offenders recidivated at a higher rate than non-violent offenders by a margin of more than 25 percentage points" and also noting that recidivism among violent prior offenders, on average, occurs faster than non-violent offenders). Moreover, his total current sentence does not meaningfully reflect the seriousness of his conduct in the Southern District of Iowa, as the sentence for the instant offense was longer than, and ran concurrent to (therefore subsuming), the sentence for the very serious gun crime he committed.

For all these reasons, the Court should deny defendant's motion as a matter of discretion, finding that the sentencing factors support the current sentence of 300 months' imprisonment, which remains a sentence within the amended career offender guidelines range.[6]

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[6] If the Court is persuaded that a reduction is necessary, it should limit any reduction to a new sentence within the amended career offender guidelines—the bottom of which is 262 months' imprisonment. The government notes that, at the original sentencing, defendant received a downward variance of approximately 16.6 percent, reducing the sentence from 360 months (the bottom of the original range) to 300 months' imprisonment. The sentencing court stated its variance was necessary based on the court's analysis of the severity of the offense. In other words, the court believed the guidelines range was too high based on the nature of the offense. But an equivalent variance below the amended range would not be appropriate here. First, even if the Court is not convinced that the aggravating factors outlined above demand a denial of the motion as a whole, the same aggravating factors counsel against a reduction below the amended range. Further, the stated concern about the pre-FSA 2010 guidelines range being too high for the

IV. THE COURT SHOULD REJECT DEFENDANT'S REQUEST TO RECONSIDER OTHER GUIDELINES ISSUES

Defendant argues that (1) he would no longer be a career offender under current law; (2) his drug quantity should be lower than what was found by the sentencing court; (3) the aggravated role enhancement, found by the court at sentencing, should not apply; and (4) his criminal history category should be lowered. These guidelines issues are unrelated to the changes set forth in the FSA 2010, and the Court should not entertain these arguments.

A. The First Step Act Does Not Require Re-Examination of Guidelines Issues Unrelated to the Fair Sentencing Act

The First Step Act does not authorize a plenary resentencing. Section 404 of the First Step Act made the FSA 2010 retroactive. It did not make other changes in the law, such as changes in what constitutes a "crime of violence" for career offender purposes, retroactive. Further, it did not provide a "redo" for factual or legal issues previously litigated and already decided by the sentencing court. A reconsideration of these other guidelines issues—none of which involve the FSA 2010—is not required under the First Step Act.

In *United States v. Harris*, the Eighth Circuit affirmed the district court's denial of his First Step Act motion despite the defendant's argument that the district court "failed to give sufficient weight to the fact that he would not be a

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nature of the offense is mitigated by the reduction of that guidelines range through application of the FSA 2010. The amended range of 262 months to 327 months is an appropriate sentencing range when considering all of the factors in this case, and defendant's current sentence of 300 months falls within this range. An amended sentence below this range would be inappropriate in light of all of the sentencing factors.

career offender if resentenced under the current advisory guidelines." 960 F.3d 1103, 1106 (8th Cir. 2020). The *Harris* court noted that any argument that the Court was required to apply the current advisory guidelines range would be "inconsistent" with the court's prior rulings and those of its sister circuits. *Id.*

It is true that the Court may consider "the defendant's advisory range under the current guidelines." *Id.* But this does not mean that the Court can review all findings of the original sentencing court and impose its own judgment on those already-litigated issues. *Harris* merely says that the Court can (but is not required to) consider the current range. It says nothing about re-litigating issues, especially when there has been no change in the law or facts.[7]

It is clear under *Harris* that the Court is not required to recalculate defendant's guidelines range. Further, as set forth below, the weight of the authority suggests that the Court should not do so.

B. Reconsideration of Unrelated Guidelines Issues Would Lead to Unwarranted Sentencing Disparity

Several circuit courts and district courts have rejected attempts by defendants to reconsider guidelines issues in a Section 404 motion, other than the recalculation necessary to incorporate the impact of the FSA 2010. Some of these decisions have been cited by the Eighth Circuit, and their reasoning is persuasive.

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[7] There is a distinction between defendant's argument that the Court should reconsider his career offender status, and his other guidelines arguments. Defendant's career offender argument relies on case law, albeit outside of the Eighth Circuit, that developed after defendant's sentencing. Defendant's other arguments do not rely on any change in law or facts—they simply want the Court to reconsider the issues that were already decided at sentencing.

The facts of this case are similar to those in *United States v. Kelley*, 962 F.3d 470 (9th Cir. 2020). In *Kelley*, the Ninth Circuit rejected defendant's argument that the district court should have considered defendant's argument that he would no longer be a career offender under current law. *Id.* at 478-79. Like in *Harris*, the court rejected Kelley's argument that the district court must determine how subsequent changes in the law impacted defendant and "recalculate the applicable Guidelines range and reconsider the §3553(a) factors under the current law." *Id.* at 477.

The Ninth Circuit, in *Kelley*, recognized that the reconsideration of whether defendant is a career offender, or other similar changes in the law, would create unwarranted sentencing disparity and "put defendants convicted of crack cocaine offenses in a far better position that defendants convicted of other drug offenses." *Kelley*, 962 F.3d at 478. "The crack cocaine defendants could have their career offender statuses reevaluated, and be eligible for other positive changes in their Guidelines calculations, while other criminal defendants would be deprived of such a benefit." *Id.* "There is no indication in the statute that Congress intended this limited class of crack cocaine offenders to enjoy such a windfall." *Id.*

Several other circuit courts have agreed. The Fifth Circuit has found that it is inappropriate to consider such changes, noting that "defendants seeking relief under section 404(b) of the [First Step Act] cannot take advantage of changes in the law that have nothing to do with [the FSA 2010]." *United States v. Stewart*, 964 F.3d 433, 438 (5th Cir. 2020) (interpreting *United States v. Hegwood*, 934 F.3d 414

(5th Cir. 2019) as prohibiting the court from considering other post-sentencing changes in the law). Likewise, the Second Circuit has found that Section 404 "issues no directive to allow re-litigation of other Guidelines issues—whether factual or legal—which are unrelated to the retroactive application of the Fair Sentencing Act. *United States v. Moore*, 975 F.3d 84, 90 (2d. Cir. 2020). As noted in *Moore*, reconsideration of these issues would "effectively turn every First Step Act motion into a *de facto* plenary resentencing." *Id.* at 92. "[T]he court would have to consider not only intervening case law but also novel legal arguments about why a previous Guidelines calculation was incorrect, or even novel factual arguments to that effect[.]" *Id.* The *Moore* court agreed with *Kelley* that such an approach would create unwarranted sentencing disparity. *Moore*, 975 F.3d at 92, n.35.

The Eleventh Circuit has also rejected the "argument that the First Step Act grants federal courts the broad authority to resentence a defendant based on subsequent changes in the law beyond those mandated by sections 2 and 3 of the Fair Sentencing Act." *United States v. Carter*, 792 F. App'x. 660, 663 (11th Cir. 2019). Similarly, in *United States v. Foreman*, 958 F.3d 506, 515 (6th Cir. 2020), the Sixth Circuit rejected defendant's argument that the district court erred, nothing that it "presupposes a plenary resentencing and career-offender determination to which he was never entitled."

The Fourth Circuit disagrees, and has held that the district court must recalculate the guidelines range, without a career offender enhancement, if post-sentencing circuit precedent indicates defendant is no longer a career offender.

See United States v. Chambers, 956 F.3d 667 (4th Cir. 2020). *Chambers* was a split decision, with a lengthy dissent. *Id.* at 675-80 (Rushing, J., dissenting). Likewise, the Tenth Circuit's decision in *United States v. Brown*, finding that a district court could recalculate the guidelines range if the court erred[8] in the original calculation, also drew a lengthy dissent. 974 F.3d 1136, 1146-51 (Phillips, J., dissenting).

The decisions in *Chambers* and *Brown* both drew vigorous dissents, and are inconsistent with the Eighth Circuit's opinion in *Harris*, 960 F.3d at 1106, insofar as *Harris* expressly indicates the district court is not required to undertake the inquiry that *Chambers* and *Brown* seemingly demand. Further, there is reason to believe that, if the Eighth Circuit were to examine this issue in more detail, it would align more closely with the decisions in *Kelley*, *Hegwood*, *Moore*, *Foreman*, and *Carter*. Indeed, in *Harris*, the Eighth Circuit cited *Hegwood*, *Foreman*, and *Carter*, with apparent approval. *Harris*, 960 F.3d 1103, 1106 ("Therefore, we need not consider this contention, which would be inconsistent with our decision in *Williams*[9] and has been rejected by other circuits.").

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[8] The *Brown* case involved a redetermination of whether a defendant was a career offender. Pursuant to binding circuit case law issued after the defendant's sentencing, his prior convictions would no longer qualify as career offender predicates. The *Brown* court stated that this subsequent case law should be applied to defendant's case when recalculating the guidelines range on a First Step Act motion, because it was not based on "an amendment to the law between Mr. Brown's original sentencing and his First Step Act sentencing; it was a clarification of what the law always was." *Brown*, 974 F.3d at 1145. The Sixth Circuit reached a similar finding in *United States v. Boulding*, 960 F.3d 774 (6th Cir. 2020).

[9] *United States v. Williams*, 943 F.3d 841 (8th Cir. 2019).

As laid out in the cases above, consideration of post-sentencing changes in the law that are unrelated to the FSA 2010 would create sentencing disparity and place defendant in a better position than defendant would have been if he had been sentenced shortly after the FSA 2010 was in effect. Likewise, defendant would be put in a better position than if he had sold any other type of drug, such as powder cocaine. In either of the other scenarios, defendant would have no mechanism to ask the Court to review his career offender status, his aggravated role enhancement, or his drug quantity.

C. Defendant Has Not Shown that the Career Offender Guidelines Would No Longer Apply

This case is distinguishable from *Chambers* and *Brown* – the two cases cited above that authorized a redetermination of a defendant's career offender status. In both *Chambers* and *Brown*, there was binding circuit precedent that showed that the prior career offender determination was in error. Indeed, the *Chambers* court distinguished *Hegwood*, noting that "unlike the error in . . . this case, the intervening Fifth Circuit case law that would have removed Hegwood's career-offender enhancement has not been declared retroactive." *Chambers*, 956 F.3d at 673. Unlike the defendants in *Chambers* and *Brown,* defendant fails to cite any binding circuit precedent that shows his career offender status was erroneous.

This distinction is important. At the heart of the *Chambers* and *Brown* cases is the proposition that the district court should not be forced to ignore binding circuit precedent when calculating the amended guidelines range. Here, however,

there is no Eighth Circuit case law indicating that defendant's guidelines range was reached in error.

Defendant has two prior career offender predicates, both of which were convictions in the State of Kansas: (1) aggravated assault; and (2) possession of cocaine with intent to sell. (PSR ¶ 42). Defendant does not contest that his aggravated assault conviction would still qualify as a crime of violence. Instead, defendant's argument is that his "possession of cocaine with intent to sell" conviction would no longer qualify as a "controlled substance offense." (Docket 521 at 12-13). Defendant argues that "[t]he Kansas statute's definition of 'sell' is broader than the definition of a controlled substance offense under USSSG §4B1.2(b)." (Docket 521 at 12). As indicated above, the Court need not, and should not, engage in this analysis. A challenge to a finding that defendant is a career offender was appropriate on direct appeal; it is not the sort of review Congress had in mind when enacting the First Step Act. And, unlike in *Chambers* or *Brown*, there is no established circuit case law that shows that a Kansas conviction for possession of cocaine with intent to sell is not a controlled substances offense for career offender purposes.

Defendant relies on the Tenth Circuit's decision in *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017). In *Madkins*, the Tenth Circuit held that similar language within the Kansas drug statute was overbroad, because it includes an "offer to sell." But the court noted that "at first glance, it seems as though an offer for sale would fit squarely within the definition in the Guidelines[.]" *Id.* at 1147.

Thus, it is not clear that all courts would agree with *Madkins*. The Eighth Circuit acknowledged *Madkins*, along with several other cases, in finding that the violation of a Missouri drug statute, that penalized "a barter, exchange, or gift, or offer," qualified as a controlled substance offense for career offender purposes. *United States v. Thomas*, 886 F.3d 1274 (8th Cir. 2018). In so doing, the Eighth Circuit noted that, "to meet the Guidelines definition, a state law must require something more than a mere offer to sell." *Id.* at 1276. That "something more," however, need only be "an attempt, [a] bona fide offer showing intent, or over acts furthering that intent." *Id.* In *Thomas*, although the Missouri statute did not define "offer," the Eighth Circuit found that the statute required "something more" than just the "utterance of words." *Id.*

It is not an obvious conclusion that the Eighth Circuit would agree with *Madkins* that the Kansas statute criminalizes an offer, without "something more." Because there is not clear circuit precedent, defendant would be unlikely to succeed on this claim even on direct appeal, as it would not even rise to clear error. *See United States v. Faulkner*, 950 F.3d 670, 680 (10th Cir. 2019). In *Faulkner*, a defendant was not able to succeed in his claim that he was incorrectly labeled a career offender *even on direct appeal*, because the law was not clear. This lack of clarity in the law should also be fatal to his claim in this motion.

For all of these reasons, the Court should reject defendant's career offender arguments. If the Court is inclined to grant a reduction, the appropriate reduction

should be based on the amended guidelines range that applies today under USSG §4B1.1.[10]

D. There is No Basis to Reconsider the Court's Prior Findings Regarding Drug Quantity or Role

If the Court determines that it should not re-evaluate defendant's career offender status, then it need not address these arguments. Defendant's drug quantity and role enhancement are irrelevant under the career offender guidelines.

Even if the Court does re-evaluate defendant's career offender status, there is no basis to reconsider the prior findings regarding drug quantity and aggravated role. Unlike his career-offender argument, defendant does not rely on any post-sentencing changes in the law in arguing that the Court should re-determine his drug quantity or the applicability of a role enhancement. Defendant's argument that the parties may now re-litigate these issues is not supported by *Chambers* or *Brown*. As briefly referenced above, the Tenth Circuit, in *Brown*, permitted reexamination of the defendant's career offender status because subsequent case law showed that the earlier determination had been in error. *See Brown*, 974 F.3d at 1145 (noting that the subsequent circuit case law did not change the law, but

[10] The career offender guidelines range, under current guidelines, is 262 to 327 months' imprisonment. *See* USSG §4B1.1. If defendant were not a career offender, his offense level under §2D1.1 would be level 30, based on the sentencing court's finding that defendant was involved with at least 500 grams of crack cocaine. (Sent. Tr. 111). A two-level role enhancement applies. (Sent. Tr. 120-21). Defendant did not accept responsibility, so his total offense level would remain at 32. As noted, defendant qualified as a criminal history category VI, even without application of the career offender guidelines. Accordingly, the resulting non-career offender guidelines range would be 210 to 262 months' imprisonment.

merely clarified what the law always was, in terms of whether the defendant's prior convictions qualified as career offender predicates). Likewise, the decision in *Chambers* is predicated on intervening case law, and not merely the re-litigation of issues already decided. *Chambers*, 956 F.3d at 672.

The sentencing court found that defendant was involved in "at least 500 and not over 1500" grams of crack cocaine. (Sent. Tr. 111). This would result in an offense level of 30 under the current version of USSG § 2D1.1. Defendant does not want the Court to consider this drug quantity. Instead, defendant wants the Court to consider additional statements made by the sentencing judge during defendant's § 2255 proceeding, casting doubt on the credibility of certain government witnesses.

The Court should reject this request. First, because the Court should still consider defendant to be a career offender, the non-career offender offense level is irrelevant. However, if the Court looks at drug quantity in determining the extent of any reduction, it should rely on the judicially found drug quantity at the original sentencing. There is no legal authority suggesting the Court should recalculate this drug quantity. While the sentencing judge made statements during the § 2255 proceeding regarding the credibility of witnesses, that same sentencing judge was the judge that made the drug quantity findings at sentencing, following trial. The Court should rely on that drug quantity, determined shortly after trial, rather than looking at statements made by the judge during a much later § 2255 proceeding that resulted in a reversal by the Eighth Circuit. The Court should not now be

making its own credibility determinations of witnesses who testified at a sentencing before a different judge over a decade ago.

Likewise, the parties already litigated whether the aggravated role enhancement applied, and the Court found that it did. (Sent. Tr. 120-21).[11] Defendant cites no change in the law or guidelines pertaining to the role enhancement since his sentencing. Instead, defendant merely wants this Court to review the issue and, in defendant's hope, make a different finding than that made by the judge that handled the trial and sentencing. If a defendant is unhappy with a role enhancement, that must be challenged on direct appeal. While defendant unsuccessfully challenged his conviction and sentence on appeal, *United States v. Weaver*, 554 F.3d 718 (8th Cir. 2009), he did not appeal the issues of drug quantity or role in the offense. Defendant cannot raise these issues for the first time in this First Step Act proceeding. Doing so would turn this proceeding into a de facto plenary resentencing.

[11] Defendant cites language used by the sentencing judge, that the judge "d[idn't] like this role in the offense situation." (Docket 521 at 16). However, the transcript reveals that the sentencing judge was referring to the law regarding the role enhancement in general. (Sent. Tr. 120-121). The sentencing judge discussed Eighth Circuit precedent, which the judge apparently did not agree with, but then noted that under that precedent, the sentencing judge did not "see how, in good conscience, [it] can say that there shouldn't be anything for role in the offense." (Sent. Tr. 121). The sentencing judge imposed a two-level enhancement for aggravated role. (*Id.*).

E. Defendant's Criminal History is Properly Scored as Category VI

Defendant also argues that his criminal history category should be Category V, instead of Category VI. Defendant claims that "[t]he adult charging of [defendant's] earlier crimes [in Kansas] was a discretionary decision by the state court" and that it "should not drive up his criminal history." (Docket 521 at 19). Defendant also notes that he was convicted of eluding, and convicted of the federal felon in possession charge, for the same conduct. (*Id.*).

The Court should reject these arguments. First, the Court should refuse to reconsider defendant's criminal history score, for the reasons outlined above. Defendant's criminal history category was already found by the sentencing court to be category VI, and there has been no change in the law or facts that would alter that conclusion.

Second, defendant's criminal history is properly scored as Category VI—both because he is a career offender, and because he had enough criminal history points to qualify as a Category VI even without the application of the career offender guideline. While defendant was charged in state court with eluding, and in federal court with felon in possession of a firearm, those were properly scored as separate convictions under the guidelines. Indeed, defendant does not claim that they were scored incorrectly; defendant's argument instead appears to be that the criminal history category overstates his actual criminal history.

Defendant's criminal history, as detailed above, contains numerous convictions, numerous violations of supervision, and several convictions relating to

firearms and involving violence. This is not a case where the "criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes[.]" USSG §4A1.3(b). If anything, defendant was incredibly fortunate that his federal sentences were run concurrent to one another, given that the underlying crimes were completely unrelated.

V. SUPERVISED RELEASE

In addition to seeking a reduction in his prison sentence to time-served, defendant requests a reduction in his term of supervised release from a five-year term to a four-year term. The government agrees that defendant is eligible for such a reduction in his term of supervised release. A four-year term of supervised release would be the minimum term of supervision that could have been imposed had defendant been sentenced after the Fair Sentencing Act was in effect. However, for the same reasons described above that indicate that a reduced prison sentence is inappropriate, the Court should decline to reduce defendant's term of supervised release. Congress made First Step Act relief discretionary, and this is a case where the exercise of that discretion to deny relief altogether is necessary. With defendant's past conduct and likelihood to recidivate, a shorter term of supervised release would be inappropriate. When defendant is on supervised release, he can petition the Court to terminate such supervision early if he is performing well. But with defendant's history of poor performance and violent

conduct, the Court should decline to reduce the term of supervised release at this point in time.

VI. FURTHER PROCEEDINGS

Defendant is not entitled to a hearing. *See Williams*, 943 F.3d at 843-44. Further, a hearing is not necessary in this case.

If this Court grants a reduction of sentence that makes the defendant's release from custody immediate or imminent, the government requests that the Court delay defendant's release for a period of at least 10 calendar days from the date of the Court's order. This period of delay will enable the BOP (1) to review the defendant for possible civil commitment as a sexually dangerous person, as required by 18 U.S.C. § 4248; (2) to notify victims and witnesses of the release of an offender as required by 18 U.S.C. § 3771; (3) to notify law enforcement officials and sex registration officials of the release of a violent offender or sex offender pursuant to 18 U.S.C. §§ 4042(b) and (c); and (4) to permit adequate time to collect DNA samples pursuant to 42 U.S.C. § 14135a.

VII. CONCLUSION

Defendant is eligible for a reduction. Based on all of the above, the government respectfully requests that the Court, in the exercise of its discretion, deny defendant's motion for a reduced sentence. If the Court disagrees and finds that a reduction is warranted, it should limit any reduction to a new sentence of no less than 262 months' imprisonment. Finally, the Court should deny defendant's request to reconsider issues already decided at his original sentencing.

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to the parties or attorneys of record.

UNITED STATES ATTORNEY

BY: */s/ RAL*

Respectfully Submitted,

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Writing Sample # 2 – Justin Lightfoot

Case: **United States v. Rajih Donley**

The *Donley* case is being prosecuted by another attorney in our office. The defendant was serving a state prison sentence when he demanded that he receive a speedy trial on his federal charges. Due to an administrative error, the demand did not get noticed by the attorney who was handling the case. The defendant later filed a motion to dismiss based on a violation of his right to speedy trial under the Interstate Agreement on Detainers Act.

As criminal division chief, I decided that I would handle the response given that the motion alleged that an attorney in the criminal division had missed a deadline.

I am including only the "argument" portion of this brief and have omitted the procedural and factual background sections. The attorney assigned to the case had prepared a rough draft response, and I borrowed from such response in completing the background sections. I drafted the "argument" section anew.

and a subsequent search of that vehicle resulted in the discovery of a firearm that appeared to be the same firearm from the social media video. (*Id.*). The gun had a green laser, just as in the social media video. (*Id.*). Some marijuana "shake," which is the seeds and stems from marijuana plants, was also found inside the female's vehicle. (*Id.*). Defendant had at least one prior felony conviction for manufacturing/delivery of cannabis from the Circuit Court for Cook County, Illinois. (Docket 2).

III. Argument

Under the terms of the Interstate Agreement on Detainers Act (IADA):

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint.

18 U.S.C. App. 2 § 2, Art. III(a).

The government does not dispute that there was a violation of 18 U.S.C. App. 2 § 2. Art. III(a) in this case. Defendant executed a speedy trial demand on October 8, 2019, and the government received it on the same date. The government concedes that defendant was not brought to trial within one hundred and eighty days of the government's receipt of defendant's notice.[3]

[3] Given the government's receipt of defendant's notice on October 8, 2019, defendant's trial would have needed to commence on, or before, April 5, 2020, in

When a violation of the 180-day rule occurs, and the United States is the "receiving state," the Court "may dismiss the indictment with or without prejudice." *United States v. McKinney*, 395 F.3d 837, 841 (8th Cir. 2005). When deciding whether to dismiss with or without prejudice, the Court should consider: (1) the seriousness of the offense; (2) the facts and circumstances leading to the dismissal; and (3) the impact of re-prosecution on the administration of the Act and on the administration of justice. *Id.*; 18 U.S.C.A App 2 § 9.

All three of these factors weigh in favor of dismissing this matter without prejudice. First, defendant is charged with a serious offense. "The IADA does not specify the criteria for analyzing the seriousness of the offense, but other courts have examined the nature of the conduct charged and the potential sentence. *McKinney*, 395 F.3d at 841 (citing *United States v. Kurt*, 945 F.2d 248, 253 (9th Cir. 1991)).

In *McKinney*, the defendant was similarly charged with being a felon in possession, but due to a clerical error, he was never brought to federal court to face charges. *Id*. at 841. The district court found that the seriousness of the offense weighed in favor of dismissal without prejudice, and the Eighth Circuit agreed,

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order to comply with the 180-day rule set forth in 18 U.S.C. App. 2 § 2. Art. III(a). Of course, all jury trials in this district were suspended and continued by Administrative Order, beginning on March 16, 2020, due to the COVID-19 pandemic. Thus, even if the government would have secured defendant's appearance, it is possible that defendant's trial would have still not have taken place – depending on when defendant would have first appeared and when the trial would have been set. Nevertheless, the Administrative Order does not appear to toll the time period relevant to this matter, and therefore the government concedes that a violation of the 180-day rule occurred.

noting that "the nature of McKinney's conduct and the potential sentence for McKinney's charged offense demonstrates the seriousness of his offense." *Id.* McKinney was charged with two counts of being a felon in possession, and each count was punishable by the same potential penalty that applies to the single count in this case: up to ten years' imprisonment and a fine of up to $250,000. Even though McKinney was charged with two counts, and therefore had a possible maximum penalty of 20 years' imprisonment, the Eighth Circuit "has found that a single count with the same statutory penalty [of up to 10 years' imprisonment] is a 'serious offense.'" *Id.* (quoting *United States v. Duranseau*, 26 F.3d 804, 808 (8th Cir. 1994)). Given the potential penalty in this case, the Court should find this is a serious offense.

In addition to the potential penalty, the specific conduct in this case reinforces the notion that defendant's offense was a serious one. This offense involves a dangerous weapon from someone who has a criminal history that involves firearms. *See United States v. Polk*, No. 05-CR-22-JLH, 2007 WL 809820, *6 (E.D. Ark., Mar. 15, 2007) (unpublished) ("Given the potential danger to society stemming from offenses involving dangerous weapons, the Court cannot say that the offenses were not sufficiently serious in nature[.]"). Defendant possessed a firearm while on bond for a state case that involved shooting a firearm. While defendant notes he is not charged with shooting a firearm or making threats to anyone in this federal case (Docket 12-1 at 3), his possession of a firearm while bragging about doing "illegal shit" while on bond for another gun-related crime is

extremely serious and concerning. Even the mere possession of ammunition by a felon in sufficient to rise to the level of being a "serious offense." *See United States v. Ward*, 135 F. App'x. 885, *2 (8th Cir. 2005) (unpublished) (citing *McKinney*). This is a serious offense.

The second factor—the facts and circumstances leading to the dismissal—also supports a dismissal without prejudice. "Circumstances do not favor dismissal with prejudice . . . where there is no showing that the claimed negligence was in reality an attempt to obtain a tactical advantage for the government or that the government regularly or frequently failed to meet the time limits[.]" *Duranseau*, 26 F.3d 804, 808 (8th Cir. 1994).[4] The district court in *McKinney* found that there was no evidence of bad faith or pattern of negligence and that McKinney was the victim of "unfortunate administrative oversight." *McKinney*, 395 F.3d at 841. The Eighth Circuit found that the court did not abuse its discretion in concluding that this factor supported a dismissal without prejudice, finding that "McKinney did not present evidence of bad faith or a pattern of negligence." *Id.*

Here, "[defendant] has not alleged bad faith by the government or a 'pattern of negligence' as discussed in *McKinney*." *United States v. Macomber*, 717 F.3d 607, 611 (8th Cir. 2013). Defendant notes only that the facts show "negligence on

[4] Although *Duranseau* involved a violation of the Speedy Trial Act, instead of the Interstate Agreement on Detainers Act ("IADA"), the analysis is very similar and, as mentioned above, the *McKinney* court cited *Duranseau* with approval in analyzing whether dismissal under the IADA should be with, or without, prejudice.

the part of the government." (Docket 12-1 at 4). This is far below the bar set forth in *McKinney* and *Duranseau*. This case involved only an unintentional oversight. Defendant does not argue that the government gained any tactical advantage from this delay, or that the government has "frequently failed to meet the time limits." *Duranseau*, 26 F.3d at 808. "Dismissal without prejudice is proper when the government's IADA violation is caused by mere error[.]" *Polk*, 2007 WL 809820 at *6 ("[T]he violation here was the result of an oversight, not an intent to violate Polk's rights under the IADA."); *see also United States v. Ward*, 135 F. App'x. 885, *2 (8th Cir. 2005) ("The circumstances resulting in the dismissal of Ward's indictment also support the district court's decision to dismiss without prejudice since, like the defendant in *McKinney*, Ward has not shown evidence of bad faith or a pattern of negligence."). The second factor also weighs in favor of dismissal without prejudice.

Finally, the third factor also favors dismissal without prejudice. In *McKinney*, the Eighth Circuit seemingly agreed with the district court that, when examining the impact of re-prosecution, "the focus . . . should be on whether the prosecution had an improper motive, and whether the violation prejudiced the defendant." *McKinney*, 395 F.3d at 841-42. In *McKinney*, the only potential prejudice found by the court was the possibility that the defendant would need to restart a rehabilitation program. *Id.* The Eighth Circuit found that "McKinney will not be prejudiced if he is re-prosecuted." *Id.* Likewise, in *Ward*, the Eighth Circuit found that "Ward has not demonstrated any substantial impact from re-

prosecution" despite Ward's arguments that re-prosecution denied him an opportunity to argue for concurrent sentences and that the delay made it difficult for him to contact an unidentified potential witness. *Ward*, 135 F. App'x. 885, at *2.

Defendant claims that re-prosecution will prejudice defendant by interfering with his rehabilitative programming—either while he is in prison, or once he is on parole. (Docket 12-1 at 4). As in *McKinney*, this is insufficient to justify a dismissal with prejudice. While defendant may suffer some interference with his prison-related programming when he appears in federal court, it will be the same or similar sort of interference that his appearance in federal court would have caused had there been no IADA violation. Additionally, at this time there has been no interruption to defendant's state prison programming because defendant has not yet been removed from state custody. In other words, defendant's only claim of prejudice is that federal prosecution—whenever it would occur—will interfere with his state prison programming. This is not a harm specific to "re-prosecution" or any IADA violation, but just federal prosecution in general.

Further, the government attempted to mitigate any prejudice to defendant by working with defendant through his counsel to reach a resolution, and offered to seek a writ immediately after learning of the error. Not only does defendant fail to allege or show that the government had an improper motive, but the government's actions show that it attempted in good faith to minimize any potential prejudice from the moment it learned of the speedy trial demand.

Finally, as noted above, it is questionable whether defendant's trial would have now been completed even if the government had sought his appearance immediately after receipt of defendant's speedy trial demand.

As shown above, all three of the relevant factors weigh in favor of dismissal without prejudice. The instant offense is a serious one, there was no bad motive or pattern of negligence or misconduct. Defendant will not be prejudiced by re-prosecution to any degree greater than he would have been prejudiced by the initial prosecution. "Dismissal without prejudice therefore would not be detrimental to the administration of justice." *Polk*, 2007 WL 809820 at *7. "To the contrary, allowing a defendant to escape punishment for violating federal law, if he is guilty, is prejudicial to the interests of justice." *Id.* For these reasons, the Court should grant defendant's motion to dismiss, but deny defendant's request for a dismissal with prejudice.

IV. Conclusion

The Court should dismiss this matter without prejudice.

Respectfully submitted,

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United States Attorney

By: ***/s/ Justin Lightfoot***

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2021, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to the parties or attorneys of record.

UNITED STATES ATTORNEY

BY: */s/ RAL*

Writing Sample # 3 – Justin Lightfoot

Case: **United States v. Terry Samuels**

This brief was filed in December 2020, and is one of my most recent appellate briefs. This case involves the defendant's eligibility to receive the benefit of a retroactive change in the law.

Mr. Samuels was prosecuted by our office in May 2006, prior to when I started as a federal prosecutor. He was sentenced to life imprisonment based on selling crack cocaine near a school, after multiple prior felony convictions. He filed a motion under the First Step Act of 2018, seeking a reduced sentence. Although I was not involved in his initial prosecution, I drafted the government's response to Mr. Samuels's motion due to my deep familiarity with matters related to the First Step Act.

The Eighth Circuit Court of Appeals has not yet ruled in this case.

No. 20-2403

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

TERRY SAMUELS,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Iowa
Honorable Linda R. Reade, Judge

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Defendant Terry Samuels appeals the denial of his motion to reduce sentence pursuant to Section 404 of the First Step Act. Defendant contends the district court erred by finding defendant was ineligible for relief and by not considering the § 3553(a) factors. Defendant also contends the district court's decision was the result of a "clearly erroneous interpretation of the indictment."

The district court correctly concluded at sentencing, and again in ruling on the instant motion, that defendant was subject to a mandatory life sentence. Defendant was convicted of two counts of distribution of crack cocaine within 1,000 feet of a protected location after two or more prior felony drug convictions. The statutory penalty for this violation of 21 U.S.C. § 860 is contained in 21 U.S.C. § 841(b)(1)(A) and, at the time of defendant's offense, mandated a life sentence. This portion of § 841(b)(1)(A) was not modified by the Fair Sentencing Act. Therefore, even after the Fair Sentencing Act was enacted, § 841(b)(1)(A) mandated a life sentence for defendant's violation. The district court did not err in denying relief.

Oral argument is unnecessary.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. On June 25, 2020, the court entered its order denying defendant's motion to reduce sentence, and on July 8, 2020, defendant filed a timely notice of appeal. This Court has jurisdiction over this criminal appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the District Court Erred in Denying Defendant's Motion to Reduce Sentence Pursuant to Section 404 of the First Step Act, Where the Fair Sentencing Act Did Not Modify the Statutory Penalties Applicable to the Offense of Conviction and Defendant Remained Subject to a Statutorily-Mandated Life Sentence?

United States v. Ford, 642 F. App'x 637 (8th Cir. 2016)
United States v. Jones, 962 F.3d 1290, 1303 (11th Cir. 2020)
Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010)
First Step Act of 2018, Pub. L. No. 115-91, 132 Stat. 5194 (2018)

STATEMENT OF THE CASE

Relevant Procedural History

Defendant Terry Samuels was indicted in May 2006 with two counts of distribution of cocaine base (hereinafter "crack cocaine") within 1,000 feet of a protected location, in violation of 21 U.S.C. § 860(a). (DCD 1).[1] Shortly thereafter, the government filed an information pursuant to 21 U.S.C. § 851, providing notice of an intent to seek enhanced penalties. (DCD 18). An amended notice pursuant to § 851 was filed in June 2007. (DCD 32).[2] The notices provided that, because defendant had two or more convictions for felony drug offenses,

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[1] "DCD" refers to the district court docket in case number CR-06-1020-LRR, and each reference is followed by the docket entry number. "PSR" refers to the second revised presentence report (at DCD 69) and, unless otherwise noted, each reference is to a paragraph number in the report. Each of the following references is followed by the applicable page number:

- "Def. Add." refers to defendant's addendum and each citation refers to the ECF-stamped page number;
- "Def. Brief" refers to defendant's opening brief; and
- "Sent. TR" refers to the November 14, 2007, sentencing hearing transcript.

[2] The amended notice corrected an erroneous date of conviction for two of the predicate convictions listed in the original § 851 notice. The listed statutory penalties did not change from those identified in the original notice of enhanced penalties. (DCD 18, 32).

his offense was subject upon conviction to a statutory penalty of mandatory life imprisonment pursuant to 21 U.S.C. §§ 841(b)(1)(A), 860(a), and 851. (*Id.*).

Defendant was convicted on both counts after a June 2007 jury trial. (DCD 51). In the verdict, the jury found beyond a reasonable doubt that both distributions took place within 1,000 feet of a protected location. (*Id.*).

A sentencing hearing was held on November 14, 2007. (DCD 71, 77). Defendant was sentenced to the statutorily-required sentence of life imprisonment. (DCD 72). Defendant appealed his conviction and sentence (DCD 73), and this Court affirmed. *See United States v. Samuels*, 543 F.3d 1013 (8th Cir. 2008).

On January 11, 2019, defendant filed a *pro se* motion to reduce sentence under Section 404 of the First Step Act of 2018, Public Law 115-391, 132 Stat. 5194 (2018) ("First Step Act"). (DCD 116). A supplemental motion was filed by counsel on January 16, 2020. (DCD 128). The government filed a response on January 27, 2020. (DCD 131). The district court denied the motion, without a hearing, on June 25, 2020. (DCD 134). Defendant filed a notice of appeal. (DCD 136).

Ruling Presented for Review

Defendant appeals the district court's June 25, 2020, denial of his motion to reduce sentence pursuant to Section 404 of the First Step Act. (DCD 134, Def. Brief 3).

Statement of the Facts

Defendant sold crack cocaine to an informant within 1,000 feet of an elementary school.[3] The indictment alleged that each distribution involved approximately 20 grams of crack cocaine. (DCD 1). Defendant was convicted of both counts, and the jury found that each distribution involved at least 5 grams of crack cocaine. (DCD 51).

During sentencing, the court noted that defendant qualified as a career offender under the sentencing guidelines. (Sent. TR 17). The court also found that, had the career offender enhancement not applied, defendant would be responsible for 257.39 grams of crack cocaine. (*Id.*).

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[3] Because the conduct underlying defendant's convictions has little relevance on the legal issue of whether defendant is eligible for relief under Section 404 of the First Step Act, the government will not address the underlying facts in great detail. *See United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019) ("The First Step Act applies to offenses, not conduct[.]"). The facts underlying the convictions in this case are set forth in the Court's opinion in *Samuels*, 543 F.3d at 1014-1015.

In addition, the court found that a two-level enhancement for aggravated role would apply. (*Id.*). The court noted defendant's "long and serious criminal history" and pointed out that several additional convictions did not receive criminal history points. (Sent. TR 21). The court noted that "he's really more than a criminal history category VI in terms of his history," but that defendant was properly scored as a category VI. (*Id.*).

The court stated that defendant faced a mandatory life sentence. (Sent. TR 18). This was because, at the time of defendant's sentencing, 21 U.S.C. § 841(b)(1)(A) provided that any person convicted of violating § 860(a) after two or more prior felony drug offenses was subject to a mandatory minimum sentence of life imprisonment, irrespective of drug quantity. (PSR ¶ 94). On November 14, 2007, the district court imposed the mandatory life sentence. (DCD 72, 77).

The Fair Sentencing Act was enacted in August 2010. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (Aug. 3, 2010) ("Fair Sentencing Act"). Sections 2 and 3 of the Fair Sentencing Act amended the drug quantities necessary to trigger the statutory penalties set forth in 21 U.S.C. §§ 841(b)(1)(A)(iii) and 841(b)(1)(B)(iii),

but did not change the statutory penalties themselves. Specifically, under the Fair Sentencing Act, the 10 years-to-life statutory range set forth in § 841(b)(1)(A) is triggered by a violation involving at least 280 grams of crack cocaine. Likewise, the statutory range of 5 to 40 years' imprisonment under § 841(b)(1)(B) requires at least 28 grams of crack cocaine.

The First Step Act was enacted in 2018. Among other things, the First Step Act made sections 2 and 3 of the Fair Sentencing Act retroactive for "covered offenses," although the Act provided that such relief was discretionary. Specifically, Section 404 of the First Step Act provides that, for "covered offenses," the district court may, but is not required to, impose a reduced sentence "as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act § 404(b).

Defendant sought relief in the district court under this provision. In the supplemental motion to reduce sentence, defendant argued that his original sentence was in error, claiming that "[defendant] was never charged or convicted of violating 21 U.S.C. § 841(b)(1)(A); therefore, he should not have been subject to a three-strikes enhancement under

Section 851." (DCD 128 at 2). Defendant claimed that the court and parties were wrong at the original sentencing and that his "correct statutory range was most probably 10 years to life on each count[.]" (DCD 128 at 5). Defendant also claimed he was convicted of a "covered offense" because his statutory range changed post-Fair Sentencing Act. (DCD 128 at 5-6). Finally, defendant argued that the 18 U.S.C. § 3553(a) factors favored a reduced sentence. (DCD 128 at 7-9).

The district court denied defendant's motion. (DCD 134). The district court found that defendant was not convicted of a "covered offense" because "the portion of the statute defendant was convicted was not 'modified by section 2 or 3' of the Fair Sentencing Act." (DCD 134 at 3) (quoting Section 404, First Step Act). The court noted that "[t]he Fair Sentencing Act did not change the penalties applicable to defendant because defendant's § 851 enhancement and the § 860 protected location conviction resulted in a mandatory life sentence . . . both before and after the Fair Sentencing Act[.]" (DCD 134 at 4). The court found defendant's argument that his conviction did not originally require a mandatory life sentence was frivolous and had been explicitly rejected by this Court. (DCD 134 at 5).

SUMMARY OF THE ARGUMENT

The district court correctly denied defendant's motion for relief under the First Step Act. Defendant is not eligible for relief for two related reasons. First, defendant was not convicted of a "covered offense" because the Fair Sentencing Act did not modify the statutory penalties for the offense of distribution of crack cocaine within a protected location after two or more prior felony drug offenses.

Second, the scope of relief permitted by the First Step Act is limited by the statutory penalties that would have applied for the same offense post-Fair Sentencing Act; it authorizes a reduced sentence only "as if" the Fair Sentencing Act were enacted. In this case, the mandatory life sentence under §§ 860(a) and 841(b)(1)(A) would have still applied after the Fair Sentencing Act was enacted, so there can be no reduction "as if" the Fair Sentencing Act applied.

Defendant is not eligible for relief under Section 404 of the First Step Act. The district court's denial of the motion to reduce sentence should be affirmed.

ARGUMENT

The District Court Did Not Err in Denying Defendant's Motion to Reduce Sentence Pursuant to Section 404 of the First Step Act, Where the Fair Sentencing Act Did Not Modify the Statutory Penalties Applicable to the Offense of Conviction and Defendant Remained Subject to a Statutorily-Mandated Life Sentence

A. Standard of Review

This Court "review[s] de novo the applicability of the First Step Act to a defendant's case, including whether a defendant is eligible for a sentence reduction." *McDonald*, 944 F.3d at 771.

B. Defendant Was Not Convicted of a "Covered Offense"

The First Step Act defines a covered offense as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act" and which was committed before the enactment of the Fair Sentencing Act. Section 404(a), First Step Act. As this Court has stated, a defendant is convicted of a "covered offense" if: "(1) it is a violation of a federal statute; (2) the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act; and (3) it was committed before August 3, 2010." *McDonald*, 944 F.3d at 772. Defendant's offenses of conviction (two counts of distribution of crack cocaine within 1,000 feet

of a protected location, after two or more convictions for felony drug offenses) fail the second prong of this test; the statutory penalties were not modified by section 2 or 3 of the Fair Sentencing Act.

1. The district court did not apply a "clearly erroneous interpretation of the indictment" and instead properly found that the offense of conviction required a mandatory life sentence

In order to determine if the statutory penalties have been modified, as required for an offense to be a "covered offense," it is important to determine accurately the original statutory penalties that applied for the offense of conviction at defendant's sentencing. The parties disagree on this point. In support of his argument that he was convicted of a "covered offense" and is eligible for relief, defendant claims that the district court did not understand the interplay between 21 U.S.C. §§ 841(b)(1)(A) and 860" and misinterpreted the charges in the indictment. (Def. Brief at 17-19). Essentially, defendant claims that a mandatory minimum sentence of life imprisonment should have never applied to his offenses of conviction. This misunderstanding impacts all of defendant's arguments regarding eligibility under the First Step Act.

The district court found defendant's claim in this regard to be frivolous. Indeed, it is defendant, and not the district court, who has an "erroneous interpretation of the indictment" and of "the interplay between 21 U.S.C. §§ 841(b)(1)(A) and 860." (Def. Brief 17, 19). At the time of sentencing, the statutory penalty for a violation of § 860 after two or more convictions for prior drug felony offenses was set forth in 21 U.S.C. § 841(b)(1)(A), which clearly mandated life imprisonment. At that time, the relevant portion of § 841(b)(1)(A) provided:

> If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release[.]

21 U.S.C. § 841(b)(1)(A) (2007).

Under the plain language of this statute, section 841(b)(1)(A)'s mandatory life provision applied to anyone who had two or more convictions for prior drug felony offenses and: (1) was convicted of distributing 50 grams or more of crack cocaine ("this subparagraph") *or* (2) was convicted of section 849, 859, 860, or 861 of Title 21. *Id.* "This language clearly provides that a person who violates § 860 after having been convicted of two prior drug felonies . . . [is] subject to the

[mandatory life] penalty provisions of § 841(b)(1)(A)." *United States v. Jenkins*, 4 F.3d 1338, 1342 (6th Cir. 1993).

This Court has already found that this portion of § 841(b)(1)(A) requires a mandatory life sentence for violations of § 860 after two or more prior felony drug convictions, without regard to drug quantity. In *United States v. Ford*, 642 F. App'x 637 (8th Cir. April 28, 2016) (unpublished), this Court stated that, under § 841(b)(1)(A), "[a] mandatory life sentence applies to any person who distributes certain quantities of controlled substances *or* to any person who violates § 860 'after two or more prior convictions for a felony drug offense.'" *Id.* at 639-40 (emphasis in original).

Although defendant does not cite any legal authority that contradicts *Ford* or *Jenkins*, defendant argues that this interpretation is wrong, claiming that there would be "far-reaching consequences" if the "recidivist penalty provisions of §§ 841(b)(1)(A) and 851 apply irrespective of the drug quantity thresholds of that subsection, so long as the offense occurred within 1,000 feet of a protected location and the defendant had at least two qualifying prior drug convictions." (Def. Brief 17). As did the defendant in *Ford*, defendant "overlooks the

disjunctive 'or'" in the statute. *Id.* at 639. The statute clearly provided for two different avenues for the imposition of a mandatory life sentence for a crack cocaine defendant with two or more prior convictions: (1) a charged drug quantity of 50 grams or more, pursuant to § 841(b)(1)(A)(iii); or (2) a violation of § 860, regardless of the quantity of crack cocaine. Here, defendant was convicted of the latter.

In an attempt to distinguish *Ford*, defendant notes that "the *Ford* decision predates the passage of the [First Step Act]." (Def. Brief 18). But the timing of *Ford* in relation to the enactment of the First Step Act is irrelevant on the point for which the government was citing *Ford*: that defendant was properly subject, at the time of his original sentencing, to a life sentence under §§ 841(b)(1)(A) and 860.

Finally, defendant argues that the mandatory life provision in section 841(b)(1)(A) should not have applied to him because he "was not convicted of violating 21 U.S.C. § 841(b)(1)(A)." (Def. Brief 21). This argument is also in direct contradiction to the holding in *Ford*. As noted by the Court in *Ford,* "[t]hat Ford was not charged under § 841(b)(1)(A) specifically does not make his sentence illegal." *Ford*, 642 F. App'x at 640 (internal citation omitted). As was done in *Ford*, the

government in this case, pursuant to 21 U.S.C. § 851, "properly notified [defendant] that it would be seeking an increased punishment based on [defendant's] prior felony convictions." *Id.*

For all these reasons, the district court did not apply a "clearly erroneous interpretation of the indictment." (Def. Brief 19-21). The district court properly found that, at the time of sentencing, a mandatory life sentence applied to a violation of § 860 after two or more convictions for prior felony drug offenses. Therefore, unless the Fair Sentencing Act modified the statutory penalty for this offense, such that defendant would have no longer been subject to a mandatory life sentence, defendant was not convicted of a "covered offense."

2. The Fair Sentencing Act did not modify the statutory penalty of mandatory life imprisonment

As set forth above, a defendant is convicted of a "covered offense" if, among other things not at issue here, the statutory penalties for the offense were modified by section 2 or 3 of the Fair Sentencing Act.

"The First Step Act applies to offenses, not conduct, *see* First Step Act, §404(a), and it is [the defendant's] statute of conviction that determines his eligibility for relief." *McDonald*, 944 F.3d at 772. In this case, the district court's judgment reflects that defendant was

convicted of two counts of distribution of crack cocaine within 1,000 feet of a protected location, after two or more felony drug convictions. (Def. Add. 1). The Fair Sentencing Act did not change the penalties for this offense. The penalty for this offense was mandatory life imprisonment before the Fair Sentencing Act, and it was mandatory life imprisonment after the Fair Sentencing Act.

Had defendant not been convicted of violating § 860, he would be eligible for relief, because his mandatory life sentence would have been imposed based on his prior convictions and his drug quantity, as opposed to his prior convictions and his § 860 violation. In *United States v. Birdine*, 962 F.3d 1032, 1033-34 (8th Cir. 2020), this Court explained that, because the Fair Sentencing Act increased the drug quantity thresholds set forth in §§ 841(b)(1)(A)(iii) and 841(b)(1)(B)(iii), a defendant whose statutory penalties were determined by the pre-Fair Sentencing Act version of those sections will be eligible for relief. *Id.* In *Birdine*, where there was no § 860 violation, the mandatory life sentence only applied if the defendant's drug quantity exceeded the threshold set forth in § 841(b)(1)(A)(iii). Before Section 2 of the Fair Sentencing Act was in effect, the defendant's charged drug quantity

exceeded that amount; after Section 2 was enacted, it did not. Therefore, in Birdine's situation, Section 2 of the Fair Sentencing Act modified the statutory penalties applicable to his offense of conviction.

Similarly, in *McDonald*, the defendant was "convicted [of] distributing two ounces—approximately 57 grams—of cocaine base." *McDonald*, 944 F.3d at 771. The Court found that defendant was eligible for relief because the "statutory penalty for distributing 57 grams of cocaine base" was ten years to life prior to the Fair Sentencing Act, but "became 5 to 40 years" after the First Step Act made section 2 of the Fair Sentencing Act retroactive. *Id.* Once again, the change in McDonald's statutory penalties was because Section 2 of the Fair Sentencing Act amended § 841(b)(1)(A)(iii) to require 280 grams of crack cocaine instead of 50 grams. After these changes were made retroactive, "the statutory penalty for distributing 57 grams of cocaine base" was set forth in § 841(b)(1)(B) instead of § 841(b)(1)(A), and therefore the penalties applicable to the offense of conviction were modified and defendant was eligible for relief. *Id.* at 771-72.

This case is different. Because defendant was convicted of violating § 860 after two or more prior felony drug convictions, neither

§ 841(b)(1)(A)(iii) nor § 841(b)(1)(B)(iii)—the provisions amended by Section 2 of the Fair Sentencing Act—was relevant in determining defendant's statutory penalties.[4] As set forth above, the penalty for a violation of § 860 after two or more prior convictions for felony drug offenses is found in a different portion of § 841(b)(1)(A). Unlike in *McDonald*, the statutory penalties for this offense did not change after the Fair Sentencing Act was enacted; the mandatory life sentence for any violation of § 860 with two or more prior felony drug convictions survived the Fair Sentencing Act.[5]

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[4] Likewise, Section 3 of the Fair Sentencing Act is inapplicable to this case. Section 3 eliminated the provision in §844(a) which had imposed a five-year mandatory minimum sentence for simple possession of five grams or more of crack cocaine.

[5] In fact, the provision in § 841(b)(1)(A) mandating a life sentence for § 860 violations was not modified until 2018, in the First Step Act itself. Section 401 of the First Step Act reduced the mandatory minimum sentence for this offense from life imprisonment to 25 years' imprisonment. *See* Section 401, First Step Act. "But section 404 of the First Step Act 'makes retroactive only certain statutory changes pertaining to threshold crack cocaine weights triggering mandatory minimum sentences,' and it does not make the section 401 amendments retroactive." *United States v. Grant*, 813 F. App'x 246, 249 (8th Cir. May 15, 2020) (unpublished) (quoting *United States v. Wiseman*, 932 F.3d 411, 416-17 (6th Cir. 2019)). Section 401 expressly states that it applies only to defendants who had not yet been sentenced at the time the First Step Act was enacted. *See* Section 401(c), First Step Act.

In support of his argument that he is eligible for relief, defendant cites several cases where the defendants were sentenced to mandatory life sentences under § 841(b)(1)(A) and were still found to be eligible for First Step Act relief. (Def. Brief 12-15). None of these cases offer support for defendant's arguments, because they do not involve a violation of § 860 after two or more prior drug felony convictions.

To be clear, not every defendant who received a life sentence under the recidivist portion of § 841(b)(1)(A) is ineligible for relief. As the Court explained in *Ford*, section 841(b)(1)(A) provides two separate categories of offenses subject to a mandatory life sentence: (1) the distribution "of certain quantities of controlled substances" after two or more prior felony drug offenses; *or* (2) a violation of "§ 860 after two or more prior convictions for a felony drug offense." *Ford*, 642 F. App'x at 639-40. The defendant in *Birdine* fit into the first category—people who distributed a "certain quantit[y]" of crack cocaine after two or more prior felony drug convictions. This "certain quantit[y]" can be found in § 841(b)(1)(A)(iii): it was 50 grams prior to the Fair Sentencing Act, but it was 280 grams after the Fair Sentencing Act.

All of the mandatory-life cases cited by defendant are identical to *Birdine* in that the drug quantity provision in § 841(b)(1)(A)(iii) applied. For example, in *United States v. Jackson,* No. CR 06-1795, 2020 WL 553963 (D.N.M. Feb. 4, 2020) (unpublished), the defendant was eligible for First Step Act relief after he was convicted of possession with intent to distribute 50 grams or more of crack cocaine. The defendant originally received a life sentence under 21 U.S.C. § 841(b)(1)(A) because he had two prior felony drug convictions and was involved in over 50 grams of crack cocaine. *Id.* at *1. Because Jackson was not convicted of violating § 860, defendant's reliance on his case is misplaced. Jackson fit within the first category of defendants outlined in *Ford*, where a life sentence was imposed because he violated § 841(b)(1)(A)(iii) through (1) his involvement with 50 grams or more of crack cocaine (2) after two or more prior felony drug convictions. This is the exact scenario that occurred in *Birdine* and does not support defendant's argument.

Similarly, the other cases cited by defendant all have fact patterns identical to *Jackson* and *Birdine*. They do not involve a violation of § 860 after two or more prior drug felony convictions. *See United States*

v. Curry, 429 F. Supp. 3d 279 (W.D. La. 2019) (defendant was convicted of distributing 50 grams or more of crack cocaine after two prior convictions; no § 860 violation occurred); *United States v. Jackson*, No. 00-CR-346, 2019 WL 4222686 (MD. Fla. Sept. 5, 2019) (unpublished) (same); *United States v. Hadley*, 389 F. Supp. 3d 1043 (M.D. Fla. 2019) (same). In all of these cases, the defendants were subject to the modified provision of § 841(b)(1)(A)(iii) based on the drug quantity, and they fit within the first category of offenses described in *Ford*. These cases do not offer support for defendant's position.

Defendant also cites other cases where the drug quantity was higher than the drug quantity in this case. (Def. Brief 13-15). These cases have no relevance for the same reason: they all rely on the drug-quantity portion of § 841(b)(1)(A) (specifically, § 841(b)(1)(A)(iii)) and do not involve a recidivist § 860 violation.

In sum, a defendant who violated § 860 after two or more convictions for prior felony drug offenses faced the same statutory penalties before and after the Fair Sentencing Act was enacted and was not convicted of a "covered offense." Defendant has not cited any case where a defendant convicted of violating § 860 after two or more prior

felony drug convictions obtained relief under Section 404 of the First Step Act.

Because defendant was not convicted of a "covered offense," he is not eligible for relief, and the district court's denial of defendant's motion should be affirmed.

C. The First Step Act's Scope of Relief is Limited by the Statutory Penalties in Effect After the Fair Sentencing Act was Enacted

Even for a "covered offense," Section 404 of the First Step Act does not give courts carte blanche to impose any reduced sentences they desire. Instead, "section 404(b) of the First Step Act allows a district court to 'impose a reduced sentence *as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed*.'" *McDonald*, 944 F.3d at 771 (emphasis added).

Even under the broadest possible interpretation of Section 404, there is still at least "one limitation that arises from the 'as if' clause [italicized above]—that is, a court cannot reduce the sentence below the statutory mandatory minimum that would have applied if the Fair Sentencing Act had been in effect when the defendant committed the offense." *United States v. Hill*, 466 F. Supp. 3d 319, 325 (N.D.N.Y. June

10, 2020). The "as if" clause "does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *United States v. Jones*, 962 F.3d 1290, 1303 (11th Cir. 2020).

As set forth above, defendant would have still been subject to a statutorily-mandated life sentence even after the Fair Sentencing Act was in effect. Because defendant's "sentence would have necessarily remained the same had the Fair Sentencing Act been in effect, [the] district court lacks the authority to reduce the movant's sentence." *Id.* "Any reduction the district court would grant would not be 'as if' the Fair Sentencing Act had been in effect." *Id.*

Put another way, the "statutory mandatory minimum that would have applied if the Fair Sentencing Act had been in effect" when defendant committed his offense was mandatory life imprisonment pursuant to 21 U.S.C. §§ 841(b)(1)(A), 851, and 860. For this reason, the "as if" clause of Section 404 prohibits any reduction in this case, because defendant is already sentenced to the "lowest statutory penalty" that would have been available after the Fair Sentencing Act was enacted. *Jones*, 962 F.3d at 1303. Therefore, even if the Court

finds that defendant's offense of conviction is a "covered offense," the district court's order should be affirmed because the "as if" clause prohibits relief.[6]

Defense counsel has not cited, and the undersigned cannot find, any case where a First Step Act motion has led to a reduced sentence below the post-Fair Sentencing Act statutory minimum, other than in situations that do not apply here, such as in cases involving government motions under Federal Rule of Criminal Procedure 35 or 18 U.S.C. § 3553(e). The language of Section 404 in this regard is clear and unambiguous, without "clear legislative intent to the contrary." *United States v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002) ("Where the language of a statute is unambiguous, the statute should be enforced as written unless there is clear legislative intent to the contrary.").[7]

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[6] The district court found that this offense was not a "covered offense" and did not discuss the "as if" clause. (DCD 134). But it is well-established that this Court "may affirm on any ground supported by the record." *United States v. Garrido*, 995 F.2d 808, 813 (8th Cir. 1993).

[7] Defendant makes a policy argument that Congress could not have possibly wanted to provide a remedy for large scale drug traffickers with prior convictions, but no remedy for someone like defendant who sold smaller quantities within a protected location, after prior drug convictions. (Def. Brief 10-15). Yet Congress certainly knew

Because the "as if" clause of Section 404 prohibits any relief, the Court should affirm the district court's denial of defendant's motion.

D. Defendant's Argument that the District Court Abused its Discretion in Failing to Consider Relevant Factors is Not Ripe for Review Because the District Court Ruled Only on Eligibility

The district court found that defendant was not eligible for relief because he was not convicted of a "covered offense." (DCD 134). The court did not make any alternative findings regarding whether, had defendant been eligible, the court would have exercised its discretion to grant relief. Because the district court believed it did not have any discretion to exercise, there can be no finding in this appeal that the

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about the mandatory life sentence applicable to recidivist § 860 violators; it changed the penalty for that offense in the First Step Act itself, and it specifically refused to give that change retroactive effect. *See* Section 401(c), First Step Act. Further, Congress has consistently treated § 860 violations by recidivist drug dealers more harshly than other drug offenses. Even under the current statutory penalties, the sale of even just one gram of crack cocaine within 1,000 feet of a protected location, after two or more predicate serious drug felonies, would result in a 25-year mandatory minimum sentence. *See* 21 U.S.C. §§ 841(b)(1)(A), 851, 860. Yet the same defendant, with the same prior convictions, who sold 279 grams or less of crack cocaine (but did not do so near a protected location) is currently subject to only a ten-year mandatory minimum sentence. *See* 21 U.S.C. §§ 841(b)(1)(B) and 851. Defendant's policy arguments are not persuasive, especially in light of the clear statutory language.

district court abused its discretion in denying relief. Instead, if this Court found that defendant is eligible for relief, then a remand would be appropriate so that the district court could review the facts of the case and determine whether relief was appropriate as a matter of discretion. If this Court agrees that defendant is not eligible for relief, then the district court's order should be affirmed because the district court need not engage in the discretionary analysis for a defendant who is not eligible for relief.

CONCLUSION

For the above reasons, the district court's order denying defendant's motion to reduce sentence should be affirmed.

Respectfully submitted,

PETER E. DEEGAN, JR.
United States Attorney

By: */s/ Justin Lightfoot*

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Writing Sample # 4 – Justin Lightfoot

Case: **Dorian Ragland v. United States**

Some background information will help provide context for this short writing sample.

Dorian Ragland sold heroin to another person on January 9, 2001. The heroin user died of an overdose. Five years later, to the day, the government filed an Information charging Mr. Ragland with distributing heroin resulting in death. The next day, on January 10, 2006, a grand jury indicted Mr. Ragland on the same charge.

There is a 5-year statute of limitations for the crime of distributing heroin resulting in death. In the federal system, felony charges can only proceed by Indictment, and not by Information, absent consent of the defendant. The question in this case was whether the Information (filed without consent of the defendant) tolled the Statute of Limitations, such that the Indictment filed on January 10, 2006, was timely.

I was not involved in this case until I handled the oral argument before the Eighth Circuit Court of Appeals, when the assigned attorney was unavailable. When reviewing the case file and appellate brief (which the other attorney had submitted), I thought of an additional argument that showed that the government should prevail: because one element of the crime was that the heroin caused a death, and because the victim did not pass away until after midnight, the crime was not completed until January 10, 2001. Therefore, the January 10, 2006, Indictment was timely filed within the 5-year Statute of Limitations, regardless of whether the Information tolled the statute or not.

Because the briefs were already filed, I had to raise this issue to the Court in a Rule 28(j) letter. Rule 28(j) letters may not exceed 350 words in length, so I had to raise this issue in a very succinct manner.

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By Electronic Filing
The Honorable Michael E. Gans, Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Dorian Ragland v. United States*, No. 13-1379
(to be argued before the Honorable Chief Judge Riley and Judges Melloy and Benton on April 14, 2014)

Dear Mr. Gans:

The government submits this letter pursuant to Federal Rule of Appellate Procedure 28(j) to qualify a statement made in its brief and inform the Court of newly-discovered, relevant authority: *United States v. Gonzalez*, 495 F.3d 577 (8th Cir. 2007).

Yesterday, the undersigned began preparing for the upcoming oral argument by reviewing the brief written by the AUSA who tried this case. Upon reviewing the brief and record, the undersigned discovered an additional reason this Court may affirm the district court's denial of the movant's § 2255 motion. *See United States v. Lindsey*, 702 F.3d 1092, 1101 (8th Cir. 2013) ("[T]his court may affirm a district court's judgment on any basis supported by the record.") (quotation omitted).

This appeal pertains to the statute of limitations. Movant distributed heroin resulting in the death of another. This Court ruled on direct appeal that movant distributed heroin on January 9, 2001, and the user died on January 10, 2001. (Gov't Brief 5-6); *United States v. Ragland*, 555 F.3d 706, 715 (8th Cir. 2009). The government filed an information on January 9, 2006, and the grand jury returned an indictment on January 10, 2006. (Gov't Brief 3).

In its brief, the government conceded the indictment was untimely (Gov't Brief 11), but such a concession was based on the premise that the entire crime was completed on January 9, 2001. In *Gonzalez*, the Court stated: "Typically, '[a]n offense is committed when it is completed, that is, when each element of that offense has occurred.'" 495 F.3d at 580 (quoting *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999)). To convict movant, the government had to prove (1) he intentionally transferred heroin, (2) the movant knew it was heroin, and (3) the heroin contributed to the victim's death. *Ragland*, 555 F.3d at 715. Although the first two elements of the enhanced offense were satisfied on January 9, 2001, the third element was not satisfied until January 10, 2001, when the victim died. Therefore, the crime was not completed until January 10, 2001, and the January 10, 2006 indictment was timely.

Thank you.

Sincerely,

KEVIN W. TECHAU
United States Attorney

By:

JUSTIN LIGHTFOOT
Assistant United States Attorney

Writing Sample # 5 – Justin Lightfoot

Case: **United States v. Jamie Goad**

In this brief, I responded to a statutory interpretation argument defendant raised concerning the definition of "custody" in the federal escape statute. This was an issue of first impression in the Eighth Circuit. The Eighth Circuit Court of Appeals ruled in favor of the arguments made in this brief. This case is one of the cases I listed in response to question number 12 on the judicial application.

No. 14-3070

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMIE GOAD,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Iowa
Honorable Linda R. Reade, Chief Judge

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Following a conditional guilty plea, defendant Jamie Goad appeals the denial of his motion to dismiss the Indictment. The Indictment charged one count of escape in violation of 18 U.S.C. § 751(a). Defendant claims his escape from a Residential Reentry Center ("RRC") did not violate § 751(a) because he was required to reside at the RRC as a condition of supervised release, which defendant claims does not constitute "custody" as that term is used in the statute.

The issue raised in this appeal has not been decided by this Court. Defendant's claim is supported by a split 2-1 decision of the Ninth Circuit Court of Appeals, but was rejected by the Second and Tenth Circuits. This Court should agree with the majority of courts to reach this issue, rejecting defendant's proposed reading of the statute and finding that defendant was in "custody" for purposes of § 751(a) when he was residing at the RRC as a condition of supervised release.

If oral argument is granted, the government believes that ten minutes per side would be sufficient.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. On August 25, 2014, the court entered final judgment, and on August 28, 2014, defendant filed a timely notice of appeal. This Court has jurisdiction over this criminal appeal of the denial of a motion to dismiss pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the District Court Correctly Denied Defendant's Motion to Dismiss Because Required Residency at a Residential Reentry Center as a Condition of Supervised Release Constitutes "Custody" For Purposes of the Felony Escape Statute?

United States v. Foster, 754 F.3d 1186 (10th Cir. 2014)
United States v. Edelman, 726 F.3d 305 (2d Cir. 2013)
United States v. Burke, 694 F.3d 1062 (9th Cir. 2012)
United States v. Sack, 379 F.3d 1177 (10th Cir. 2004)

18 U.S.C. § 751(a)

STATEMENT OF THE CASE

Relevant Procedural History

Defendant was indicted on February 25, 2014, with one count of escape in violation of 18 U.S.C. § 751(a). (DCD 2).[1] Defendant filed a motion to dismiss the indictment on March 27, 2014. (DCD 9). The United States resisted the motion. (DCD 10). While the motion was pending, defendant agreed to a conditional plea agreement with the United States (DCD 18), and entered a conditional plea of guilty on April 14, 2014. (DCD 16). In the conditional plea agreement, the parties agreed that the "only issues reserved for appeal are the issues raised in defendant's Motion to Dismiss filed March 27, 2014 at Docket #9." (DCD 18 at ¶ 1).

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[1] "DCD" refers to the district court docket in district court case number 14-CR-00028-LRR, and each reference is followed by the docket entry number. "PSR" refers to the presentence report (at DCD 25) and, unless otherwise noted, each reference is to a paragraph number in the report. Each of the following references is followed by the applicable page number:

- "Def. Add. A" refers to defendant's addendum A and each citation refers to the ECF-stamped page number. "Def. Add. B" refers to defendant's addendum B and refers to the ECF-stamped page number;
- "Def. Brief" refers to defendant's opening brief; and
- "Sent. TR" refers to the August 25, 2014 sentencing hearing transcript.

On April 28, 2014, the defendant's motion to dismiss was denied by the Honorable Linda R. Reade, Chief United States District Court Judge. (DCD 20). On August 25, 2014, defendant was sentenced to 27 months' imprisonment to be followed by a three-year term of supervised release. (DCD 30). The 27-month prison sentence was ordered to run consecutive to the undischarged term of imprisonment imposed in case number 10-CR-44. (DCD 30).

Ruling Presented for Review

Defendant appeals the denial of his motion to dismiss. (DCD 20).

Statement of the Facts

A. Defendant's History of Supervised Release

On December 23, 2010, defendant was convicted, in case number 10-CR-44, of possession of a firearm after having sustained a conviction for a misdemeanor crime of domestic violence, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). (PSR ¶ 4, 31). Defendant was sentenced to 24 months' imprisonment, followed by a three-year term of supervised release. (PSR ¶ 4, 31). As defendant notes, he "struggled to comply with the terms of his supervised release." (Def. Brief 3). Defendant's supervised release was first revoked on June 14, 2012, when defendant was ordered to serve an 11-month revocation sentence. (PSR ¶ 31).

Supervised release was re-imposed to the original discharge date, which was March 8, 2015. (PSR ¶ 31). Defendant served his revocation sentence and was back on supervised release on April 23, 2013. (PSR ¶ 31).

Defendant's supervised release was revoked again on June 4, 2013. (PSR ¶ 31). The district court sentenced defendant to five months' imprisonment, and again re-imposed supervised release until March 8, 2015. (PSR ¶ 31). The district court added a special condition that would apply following defendant's release from the Bureau of Prisons, which stated:

> Immediately following release from imprisonment, you must reside in a Residential Reentry Center for a period of up to 120 days. This placement must be in the community corrections component with work release privileges. While a resident at the Residential Reentry Center, you must abide by all rules and regulations of the facility. You must report to the Residential Reentry Center at a time and date to be determined by the Bureau of Prisons, the Residential Reentry Center, and the U.S. Probation Office.

(Def. Add. A 4).

Pursuant to this special condition, defendant was required to reside at the Gerald R. Hinzman Residential Reentry Center ("Hinzman

Center") in Cedar Rapids, Iowa. (PSR ¶ 4). Defendant was not free to leave the Hinzman Center without authorization. (PSR ¶ 4).

B. The Escape

On December 11, 2013, defendant left the Hinzman Center without authorization and intentionally failed to return. (PSR ¶ 5). Defendant was placed on escape status. (PSR ¶ 5). While on escape status, defendant told a Deputy U.S. Marshal during a phone call that they would have a "standoff" when defendant was caught. (PSR ¶ 5). Defendant also threatened to assault another individual. (PSR ¶ 5).

Defendant was arrested on December 17, 2013, after law enforcement responded to a report of a male who appeared to be on drugs disturbing guests at a motel. (PSR ¶ 6). Defendant was transported to a hospital. (PSR ¶ 6). Defendant left the hospital without authorization and was observed by law enforcement jumping off the second floor of a parking ramp, before being apprehended by authorities. (PSR ¶ 6).

On January 13, 2014, based on the escape and other violations,[2] the district court revoked defendant's supervised release and imposed a 24-month revocation sentence, with no supervised release to follow. (PSR ¶ 31). This was the undischarged sentence of imprisonment that was referred to in the judgment in the instant case. (DCD 30).

SUMMARY OF THE ARGUMENT

This Court should join the Second and Tenth Circuits in holding that court-ordered residency at a RRC as a condition of supervised release constitutes "custody" under 18 U.S.C. § 751(a). The result reached by these circuits is supported by the unambiguous plain language of the statute itself, which encompasses "any custody" that is "under or by virtue of" a court order issued "under the laws of the United States." 18 U.S.C. § 751(a). Here, the district court ordered defendant to reside at the RRC. This was an order issued "under the laws of the United States." Thus, the Court should reject defendant's argument that the identity of the custodian is relevant, because under the plain language of the statute, it does not matter whether the

[2] The other violations were: (1) failure to participate in substance abuse testing; (2) failure to report to the probation officer as directed; (3) use of a controlled substance; (4) possession of drug paraphernalia; and (5) possession of a controlled substance. (PSR ¶ 31).

defendant was in BOP or Attorney General custody at the time he resided at the RRC.

Further, several courts, including this Court, have recognized that "custody" under § 751(a) has a broad meaning that includes minimal or even constructive custody. The required residency at the RRC was sufficiently restrictive on defendant's freedom to constitute "custody." This Court has already held that required residence at a RRC, where one cannot leave on his own free will, is sufficiently restrictive on an individual's freedom to constitute "custody." The only difference in this case is that the RRC residency requirement was a condition of supervised release, which defendant argues is non-penological in nature and therefore should not count as "custody." As noted by the Second and Tenth Circuits, and the dissent in the Ninth Circuit, there is nothing in the plain language of the relevant portion of § 751 that would indicate that the purpose of the custody is relevant. Instead, the use of the phrase "any custody" should be interpreted broadly and includes all court orders pursuant to federal law that place a defendant in a sufficiently restrictive environment.

Finally, because there is no grievous ambiguity in the statute, the rule of lenity does not apply. The Court should affirm the district court's denial of the motion to dismiss.

ARGUMENT

The District Court Correctly Denied Defendant's Motion to Dismiss Because Required Residency at a Residential Reentry Center as a Condition of Supervised Release Constitutes "Custody" For Purposes of the Felony Escape Statute

A. Standard of Review

"The standard of review on a ruling regarding a motion to dismiss an indictment varies based on the grounds for dismissal." *United States v. Williams*, 720 F.3d 674, 700 (8th Cir. 2013). Defendant's motion to dismiss was made pursuant to Fed. R. Crim. P. 12(b)(3)(B), and alleged that the indictment failed to state an offense. (DCD 9). The Court "review[s] a challenge to the sufficiency of an indictment de novo[.]" *United States v. White*, 241 F.3d 1015, 1020 (8th Cir. 2001). Likewise, "questions of statutory interpretation [are reviewed] de novo." *United States v. Zaic*, 744 F.3d 1040, 1042 (8th Cir. 2014). "The first question in interpreting a statute is 'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *United States v. Kowal*, 527 F.3d 741, 746 (8th Cir. 2008)

(quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The Court looks beyond the plain language only if the text is ambiguous. *Kowal*, 527 F.3d at 746.

B. Defendant Was in "Custody" at the RRC

The sole issue in this case is whether defendant was in "custody" for purposes of 18 U.S.C. § 751(a) when he was ordered by the district court to reside at the Hinzman Center as a condition of his supervised release. Defendant claims that "custody," as that term is used in Section 751(a), is ambiguous and requires the application of the rule of lenity. Defendant maintains that the most sensible reading of the statute is that a person is not in "custody" when he: "(1) has completed a term of imprisonment and no longer is in the custody of the Attorney General and/or the BOP, and instead is subject only to the supervision of the United States Probation Office, and (2) is subject to conditions of supervised release that are less restrictive than those in a prison or jail setting." (Def. Brief 13).

There is no basis for defendant's proposed two-factor test in the text of the statute. The statute does not require that the identity of the custodian be the Bureau of Prisons ("BOP") or the Attorney General.

Further, as the Second and Tenth Circuit Courts of Appeals have found, Congress's use of the phrase "any custody" warrants a broad interpretation and includes situations where an individual is residing at a RRC by court order while on supervised release.

1. The Plain Language of the Statute Does Not Require BOP or Attorney General Custody

Title 18, United States Code, Section 751(a) provides, in relevant part:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both[.]

18 U.S.C. § 751(a).

There are three elements to this felony escape crime, s*ee United States v. Bailey*, 444 U.S. 394, 406 (1980), with the second element having four separate alternatives. First, a defendant must escape or attempt to escape. Second, the escape must be from:

(1) "the custody of the Attorney General or his authorized representative;"

(2) "any institution or facility in which [the defendant] is confined by direction of the Attorney General;"

(3) "any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge;" or

(4) "the custody of an officer or employee of the United States pursuant to a lawful arrest[.]"

18 U.S.C. § 751(a). Third, the "custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense[.]"[3] *Id.*

As set forth above, the statute contemplates four separate types of custody. At issue in this appeal is the third listed type of custody—escape from "any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge[.]" 18 U.S.C. § 751(a). This portion of the statute simply does not require that the defendant be in the custody of the Attorney General or the Bureau of Prisons. If so, the above language would be rendered

[3] Defendant does not challenge this third element. Indeed, if defendant was in "custody," this Court's precedent clearly holds that the custody would be "by virtue of" defendant's original felony conviction in case number CR 10-44. *See United States v. Pynes*, 5 F.3d 1139, 1140 (8th Cir. 1993) ("We conclude Pynes was on supervised release by virtue of his original felony conviction, and hence upon revocation of his supervised release was in custody for '"conviction of any offense."'). Defendant also does not dispute that he escaped as that term is used in § 751(a).

meaningless. Any attempt by defendant to impose such a requirement should be rejected.

The plain language of the statute clearly does not impose any requirement that a defendant be in the custody of the Attorney General or the Bureau of Prisons. Therefore, the first prong of defendant's proposed two-part test—that a defendant is not in "custody" under the statute when he "has completed a term of imprisonment and no longer is in the custody of the Attorney General and/or the BOP, and instead is subject only to the supervision of the United States Probation Office" (Def. Brief 13), has no basis in the text of the statute. The relevant language in the statute does not concern itself with the identity of the custodian. It merely requires that the custody be "under or by virtue of any process . . . by any court[.]" 18 U.S.C. § 751(a). The court ordered placement in this case satisfies the statute in this regard. *See e.g., United States v. Foster*, 754 F.3d 1186, 1193 (10th Cir. 2014) (noting that a court order to reside at a RRC was custody "under or by virtue of any process . . . by any court[.]").

2. The Phrase "Any Custody" is Unambiguous, Should be Interpreted Broadly, and Does Not Exclude Residency at a RRC as a Condition of Supervised Release

The question remains of whether residency at the Hinzman Center during supervised release qualifies as "custody" at all. This is a related, but separate question from the one discussed above.[4]

Putting aside the fact that the required residency at the RRC was a condition of supervised release, it is clear that the nature of a RRC, standing alone, is sufficiently restrictive to constitute "custody" under Section 751. In *McCullough v. United States*, 369 F.2d 548, 550 (8th Cir. 1966), the Court "had no difficulty in applying the general escape

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[4] For instance, if a district court, as a penalty for violating supervised release, ordered that a defendant serve a weekend in a local jail, that defendant would be in "custody under or by virtue of any process . . . by any court[.]" 18 U.S.C. § 751(a). This would qualify as "custody" under the statute even though the defendant is not in BOP or Attorney General custody. The difference, of course, is that the defendant in the hypothetical scenario was ordered jailed—versus the situation here where defendant was ordered to reside at a RRC. The question really comes down to whether a RRC is sufficiently restrictive to constitute "custody," or whether there is something about the nature of supervised release that transforms the RRC into a noncustodial setting. Either way, resolution of the issue presented in this appeal does not focus on the identity of the custodian. The Court should reject any argument that it should consider as a factor whether defendant was in BOP custody. This is irrelevant under the portion of the statute at issue in this appeal.

portions of § 751" to a defendant who walked away from a halfway house. In both this case and in *McCullough*, the individual was not free to leave the RRC or halfway house without authorization or without following specific procedures. In other words, they had similar restrictions on their freedom. Individuals "suffer significant restraints on their liberty" when they are not free to leave a facility without permission. *United States v. Morgan*, 390 F.3d 1072, 1074 (8th Cir. 2004). While the defendant in *McCullough* was in BOP custody at the time he resided at the halfway house, the identity of the custodian is irrelevant. The only other difference between this case and *McCullough* is that the defendant in *McCullough* was serving the remainder of his sentence, and was not on supervised release. Yet there is nothing in the plain language of the statute which indicates that this distinction matters.

Instead, the relevant portion of § 751(a) uses the phrase "any custody." This Court and other courts have interpreted the word "custody" in § 751 rather broadly. *See United States v. Cluck*, 542 F.2d 728, 731 (8th Cir. 1976); *United States v. Ko*, 739 F.3d 558, 561 (10th Cir. 2014) (finding that home confinement constitutes "custody" under

§ 751). In *Cluck*, the Court found that "custody" under § 751(a) "may be minimal and, indeed, may be constructive." *Id.* The defendant in *Cluck* escaped from a hospital while in BOP custody. *Id.* at 735. The defendant was not handcuffed. *Id.* at 733. The doors were not locked. *Id.* Yet the Court found that the defendant was in "custody" as that term is used in 18 U.S.C. § 751(a). *Id.*

A broad reading of "custody" is supported by the fact that it is immediately preceded by the word "any." "It is significant that the statute applies to 'any custody,' suggesting that the term 'custody' should have a broad interpretation." *United States v. Edelman*, 726 F.3d 305, 309 (2d Cir. 2013).

The *Edelman* court addressed the issue that is squarely before this Court, and held that "residence in a halfway house as a condition of post-incarceration supervised release is 'custody' for purposes of Section 751(a)." *Id.* The *Edelman* court found persuasive the Sixth Circuit's opinion in *United States v. Rudinsky*, 439 F.2d 1074, 1076 (6th Cir. 1971) and the Tenth Circuit's opinion in *United States v. Sack*, 379 F.3d 1177, 1179 (10th Cir. 2004).

In *Rudinsky*, the Sixth Circuit Court of Appeals found that the defendant was in "custody" at a treatment center because there was "some restraint upon his complete freedom." *Rudinsky*, 439 F.2d at 1076. *Rudinsky* relied in part upon this Court's decision in *McCullough*, addressed above. *Id.* at 1077. In *Sack*, the Tenth Circuit Court of Appeals recognized the "broad language of the statute" and found that Sack was in "custody" under Section 751 when he was required to reside pretrial at a halfway house "as a result of an order of the district court[.]" *Sack*, 379 F.3d at 1179.

While *Sack* involved pretrial residency at a halfway house, the Tenth Circuit subsequently addressed the very issue before this Court. In *Foster*, the court held that required residency at a RRC as a condition of supervised release constitutes "custody" under 18 U.S.C. § 751(a). *Foster*, 754 F.3d at 1194. *Foster* also recognized the importance of the phrase "any custody" and held that the phrase "encapsulates all court orders that place the defendant under sufficient restrictions to constitute custody . . . regardless of the district court's underlying purpose in ordering the placement." *Id.* The *Foster* court found "no ambiguity in the statute." *Id.*

Thus, the Second and Tenth Circuits have rejected defendant's exact argument, and the Sixth Circuit appears likely to do the same if presented with a case directly on point. The circuit split is created solely by the Ninth Circuit's opinion in *United States v. Burke*, 694 F.3d 1062 (9th Cir. 2012), which was itself a split 2-1 decision.

In *Burke*, the court applied the rule of lenity in holding that a defendant was not in custody for purposes of Section 751 when he was residing in a RRC as a condition of supervised release because "the conditions of his release 'were much more analogous to probation than they were to imprisonment.'" *Burke*, 694 F.3d at 1065 (quoting *United States v. Baxley*, 982 F.2d 1265, 1269 (9th Cir. 1992)). The *Burke* majority distinguished prior Ninth Circuit precedent, such as *United States v. Keller*, 912 F.2d 1058 (9th Cir. 1990)—which held that escape from a halfway house constituted felony escape under Section 751—on the basis that the defendant in *Keller* was "committed to BOP custody when [he] absconded." *Burke*, 694 F.3d at 1065. Thus, *Burke*'s analysis turns largely on the identity of the custodian, despite the lack of any such requirement in the plain language of the statute.

The *Burke* dissent criticized the majority's reasoning in this regard, correctly noting that the fact that the defendant in *Keller* was in BOP custody has "little legal significance." *Burke*, 694 F.3d at 1067 (Callahan, J., dissenting). The dissent noted that Section 751 "defines 'custody' as including 'custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge.'" *Id.* (quoting 18 U.S.C. § 751(a)). Therefore, identity of the custodian is not relevant. The dissent also lamented the majority's application of the rule of lenity, noting that "[n]o court [other than *Burke*] has concluded that the word "custody" is too ambiguous to construe in this context." *Id.*

The reasoning in *Edelman* and *Foster*, together with the *Burke* dissent, represents the more persuasive reading of 18 U.S.C. § 751(a). The Court should adopt this reasoning and hold that defendant was in "custody" under Section 751 when he escaped.

Defendant notes that this Court has, in dictum, suggested that a person would not be in custody under Section 751 when ordered to reside at a halfway house. In *Hayes v. United States*, 281 F.3d 724 (8th Cir. 2002), the Court found that an obstruction of justice enhancement

under USSG §3C1.1 applied where a defendant absconded from a halfway house where she was ordered to reside pretrial. The *Hayes* Court noted that "the requirement that one reside in a halfway house is a substantial restraint on one's liberty." *Hayes*, 281 F.3d at 725. After reaching this conclusion, the Court, in dicta, stated, "Defendant points out, and rightly so, that required residence in a halfway house is not considered "custody" for certain other purposes, for example, the felony of escape from custody under 18 U.S.C. § 751." *Id.*

The *Hayes* dictum should not be persuasive to the Court. *Hayes* was concerned with a separate issue than the one currently before the Court. The offhand remark in *Hayes* (which was originally a statement of the defendant) was made without the benefit of the analysis of the Second and Tenth Circuits in *Edelman* and *Foster*, and without the benefit of argument on that precise issue. Further, in support of the dictum, *Hayes* cited the Tenth Circuit's decision in *United States v. Swanson*, 253 F.3d 1220 (10th Cir. 2001) and the Supreme Court's decision in *Reno v. Koray*, 515 U.S. 50 (1995). *Hayes*, 281 F.3d at 725. The Tenth Circuit has since clarified that "*Swanson* was not concerned with the identity of the custodian, but whether the nature of residence

at a halfway house was sufficiently restrictive to constitute custody."[5] *Sack*, 379 F.3d at 1179, n.1. The *Sack* court also distinguished *Koray*, noting that it was concerned with whether someone was in "official detention" under 18 U.S.C. § 3585, and not "in custody" under 18 U.S.C. § 751. *Id.* In sum, neither *Swanson* nor *Koray* support the conclusion drawn by defendant from the *Hayes* dictum. *See United States v. Hollingshed*, 2008 WL 170420, *2 (S.D. Iowa 2008) (finding that court-ordered placement at a RRC was "custody" under § 751, and noting that *Swanson* addressed a separate issue from that discussed in *Hayes*).

Defendant argues that *Koray*, while not on point, remains instructive. (Def. Brief 10-11). *Koray* dealt with whether a person is in "official detention" under 18 U.S.C. § 3585, during court-ordered pretrial placement at a treatment center. *Koray*, 515 U.S. at 52-53. The ultimate question was whether the defendant was entitled to credit for the time spent in the treatment center. *Id.* The Court held that a

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[5] This question—whether a halfway house is sufficiently restrictive to constitute custody under § 751—has already been answered affirmatively by this Court. *McCullough*, 369 F.2d at 550. Indeed, the statement in *Hayes* that custody under §751 is not established by "required residence in a halfway house" is contradicted by *McCullough*, at least so far as the defendant is required to reside in the halfway house to complete his BOP sentence.

defendant was not entitled to credit. *Id.* at 54. Defendant notes that, in support of its decision, *Koray* acknowledged that § 3585's predecessor used the phrase "in custody" rather than "official detention." (Def. Brief 10). The Court found that "Congress presumably made the change to conform the credit statute to the nomenclature used in related sentencing provisions . . . and in the Bail Reform Act of 1984." *Koray*, 515 U.S. at 60. Defendant argues that this supports the conclusion that "custody" is essentially equivalent to the phrase "official detention." (Def. Brief 11). Defendant claims that this shows that the word "custody" is ambiguous, because its meaning differs depending on the "statutory scheme in which it arises." (Def. Brief 11).

Koray is simply inapplicable to this case. In interpreting the phrase "official detention" in § 3585, the Court found it must be read in connection with the Bail Reform Act, since that "is the body of law that authorizes federal courts to place presentence restraints on a defendant's liberty." *Id.* at 56-57. "Under the Bail Reform Act of 1984, a defendant suffers "detention" only when committed to the custody of the Attorney General [whereas] a defendant admitted to bail on restrictive conditions, as [the defendant] was, is "released." *Id.* at 57.

Likewise, the Court concluded that the phrase "'official detention facility' in § 3585(a) . . . must refer to a correctional facility designated by the Bureau for the service of federal sentences[.]" *Id.* at 57. Thus, unlike the escape statute at issue here, the Bail Reform Act and § 3585 concern themselves with the identity of the custodian. In fact, *Koray* noted that, in the context of § 3585, "the identity of the custodian has both legal and practical significance." *Id.* at 62. This distinction makes *Koray* inapplicable to this case. As the Tenth Circuit has noted, "[n]othing in *Koray* says that [restrictive conditions of release] cannot constitute custody in the context of other statutes even if the defendant is not in official detention for the purposes of § 3585." *Sack*, 379 F.3d at 1180.

Further, while *Hayes* acknowledged that "custody" may not mean the same thing in every context, *Hayes*, 281 F.3d at 725-26, the relevant portion of the escape statute encompasses "any custody." 18 U.S.C. § 751(a). The plain meaning of "any custody" is that it includes "all court orders that place the defendant under sufficient restrictions to constitute custody" regardless of the identity of the custodian. *Foster*, 754 F.3d at 1194.

Likewise, contrary to defendant's argument, Section 751 does not concern itself with the "district court's underlying purpose in ordering the placement." *Id.* Defendant claims that stretching the "definition of 'custody' to encompass required residency at a halfway house would contravene the non-penological, transitional purposes of supervised release." (Def. Brief at 16). Defendant's argument that custody under § 751 is limited to those in custody for penological purposes contradicts the plain meaning of the phrase "any custody" and imposes an exception into the statute which simply does not exist. *See Foster*, 754 F.3d at 1191, n.3 ("Limiting court-ordered custody to exclude defendants on supervised release does not support [the] legislative intent, nor does that limitation have any basis in the text of § 751(a).").[6]

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[6] In addition, while the purpose of the custody is irrelevant under § 751, a court-ordered requirement to reside at a RRC during supervised release actually shares some of the same purposes as a prison sentence. Conditions of supervised release "are reasonably calculated to deter [a defendant] from repeating his illegal activity, protect the public from similar conduct, and serve his correctional needs." *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009). Some of the same concerns that factor into a district court's decision to send someone to prison, such as deterrence and public protection, are equally present when the district court orders someone to reside at a RRC as a condition of supervised release.

3. The Rule of Lenity Does Not Apply

This Court should not apply the rule of lenity because there is no "grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States v. Smith*, 756 F.3d 1070, 1075 (8th Cir. 2014). This requires "more than the simple existence of some statutory ambiguity because most statutes are ambiguous to some degree." *Id.* (internal citations omitted). As the dissent in *Burke* stated, "[n]o [other] court has concluded that the word "custody" is too ambiguous to construe[.]" *Burke*, 694 F.3d at 1066, n.2 (Callahan, J., dissenting). "Even though the definition of "custody" is analyzed on a case-by-case basis, the meaning of the word is not ambiguous such that the rule of lenity should apply." *Id.* "[T]he statute makes clear that [the escape from court-ordered residence at a halfway house while on supervised release] is proscribed." *Edelman*, 726 F.3d at 309-10. Under the statute, a defendant has "fair notice [that] absconding from the reentry center would constitute escape under § 751(a)." *Foster*, 754 F.3d at 1193. Further, with regard to defendant's argument that the statute excludes non-penological custody, there is "no ambiguity in the statute that would cause [a court] to limit its scope

by looking . . . to the court's intended purpose for the custodial placement." *Id.* at 1194.

For all of these reasons, this Court should join the Second and Tenth Circuits in holding that court-ordered residency at a RRC as a condition of supervised release constitutes "custody" for purposes of 18 U.S.C. § 751(a).

CONCLUSION

For the above reasons, the denial of defendant's motion to dismiss should be affirmed.

Respectfully submitted,

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