No. 23-2525

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM GRANT,

Defendant-Appellant.

On Appeal From the United States District Court
for the District of Hawaii
Crim. No. 22-00069 LEK-01

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases — Page(s)

Statutes and Rules

INTRODUCTION

Defendant-Appellant William Grant appeals his sentence of 72 months imprisonment imposed following his guilty pleas to (1) distributing fentanyl that was contained in ten transdermal fentanyl patches, (2) being a felon in possession of a firearm, and (3) being a felon in possession of ammunition.

He contends that the district court improperly considered the weight of the fentanyl patches that he sold rather than just the 10 milligrams of fentanyl that each patch was marked as containing. He also argues that the district court abused its discretion in failing to sentence him under a proposed guideline amendment that had not yet taken effect but would have lowered his criminal history and thus his guideline sentence range.

He argues that the district court violated due process when it imposed a 9 month upward variance at sentencing.

None of these arguments have merit. The district court properly found that the drug quantity that Grant distributed included the entire weight of the transdermal patches that contained fentanyl.

Nor did the district court abuse its discretion in declining to sentence Grant utilizing a proposed guideline amendment that had not yet taken effect. The court found that Grant's case was separate from other defendants that it had sentenced under the proposed guideline amendment.

The district court's upward variance of 9 months in Grant's sentence was reasonable, considering the aggravating factors, Grant's personal characteristics and the sentencing factors of 18 U.S.C. 3553(a). This was not clear error.

The sentence of the district court should be affirmed.

JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231 and in this Court under 28 U.S.C. § 1291.

Grant is presently serving his 72 month sentence at Sheridan Federal Correctional Institution ("Sheridan FCI"). His projected release date is September 24, 2027.

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined the amount of fentanyl Grant distributed by including the total weight of fentanyl patches that Grant sold.

2. Whether the district court abused its discretion when it declined to apply a proposed amendment to the sentencing guidelines.

3. Whether the district court's 9 months upward variance was an abuse of discretion.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. The Investigation

The Drug Enforcement Administration ("DEA") initiated an investigation of William Grant on August 11, 2022 after a cooperating source ("CS") informed agents that Grant distributed quantities of methamphetamine, fentanyl, and firearms from his residence in

Kaneohe, Hawaii. PSR 10[1]. The CS agreed to participate in a controlled purchase of drugs from Grant.

On August 12, 2022, the CS texted Grant and arranged to purchase fentanyl from Grant at his residence later that day. PSR 11. The meeting was monitored by agents and the video and audio of the transaction were recorded on a device worn by the CS. During the meeting, Grant advised that he could sell the CS five transdermal fentanyl patches for a total of $500. The CS left Grant's residence and returned to his vehicle to obtain the money for the fentanyl. PSR 11. Upon his return, the CS handed Grant $500 and Grant asked if the CS wanted to purchase five additional patches and a loaded double-barrel shotgun for an additional $1000. PSR 12. The CS agreed and gave Grant an additional $1000 in exchange for the 20 gauge shotgun and five more fentanyl patches. Grant sold the patches in their original packaging, which reflected that each patch contained 10 mg of fentanyl, or a total of 100 mg (0.1 gram) of fentanyl for ten patches. The DEA laboratory analysis established that the ten patches contained a total of

[1] PSR refers to the Presentence Investigation Report and its numbered paragraphs.

23.8 grams (net weight) of N—phenyl—N—[1-(2-phenylethyl)-4—piperidinyl] propanamide (fentanyl). PSR 12.

The agents determined that the shotgun was a Darne shotgun, model R15, 20 gauge caliber which was loaded with two 20 gauge shotgun shells. The shotgun was test fired and found to be in operable condition. Further, the agents determined by checking criminal database records that Grant was a convicted felon who was not allowed to possess firearms or ammunition. PSR 13. On August 14, 2022, agents arrested Grant without incident after he left his residence. Grant waived his constitutional rights and agreed to speak with the agents. PSR 15. During the interview, Grant admitted he was an addict and a user of methamphetamine, heroin, cocaine, fentanyl, and marijuana. Grant stated that he cut fentanyl patches into small pieces and placed them on his tongue to be absorbed into his system. He denied ever selling any drugs or firearms to anyone. PSR 15. Later on August 14, 2022, agents searched Grant's residence and recovered 1546 rounds of rifle, handgun, and shotgun ammunition of various calibers and manufacture. PSR 16, 17.

II. Procedural History

On August 25, 2022, the grand jury returned a three count Indictment charging Grant with distributing a mixture or substance containing a detectable amount of fentanyl, a schedule II controlled substance in violation of 21 U.S.C. § § 841(a)(1) and 841(b)(1)(C) (Count 1); with being a felon in possession of a firearm on August 12, 2022, in violation of 18 U.S.C. § § 922(g)(1) and 924(a)(2) (Count 2); and with being a felon in possession of ammunition on August 14, 2022, in violation of 18 U.S.C. § § 922(g)(1) and 924(a)(2) (Count 3). PSR 1-4.

On April 17, 2023, Grant pled guilty to all three Counts of the Indictment without a plea agreement. PSR 7. Grant was referred to the United States Probation and Pretrial Services Office for preparation of a Presentence Investigation Report. PSR 7. Sentencing was set for September 26, 2023 at 1:30 p.m. On August 21, 2023, Grant moved the court to continue his sentencing hearing until after November 1, 2023 in order to determine whether proposed amended sentencing guidelines would be adopted. The proposed amended guidelines if adopted by November 1, 2023 would have given Grant only one criminal history status point under U.S.S.G. § 4A1.1(e) whereas under the 2021

Guidelines, § 4A1.1(d) assigned Grant two status points because he was on state probation when he distributed fentanyl and violated federal firearm laws. The United States opposed the motion to continue sentencing and the district court denied the motion.

On September 21, 2023 Grant filed a Sentencing Memorandum and Request for Downward Variance. PSR page 29.

At the sentencing, the final PSR used U.S.S.G § 2D1.1 to calculate Grant's base offense level. Section 2D1.1(a)(5) required using the offense level specified in the Drug Quantity Table set forth in section (c). Note A to the Drug Quantity Table under U.S.S.G. § 2D1.1(c) provided: "Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."

The PSR utilized the DEA laboratory reports which reflected 23.8 grams (net weight) of a mixture or substance containing fentanyl. Under subsection (c)(11) of the § 2D1.1(c)—the Drug Quantity Table, a base offense level of 18 is set for at least 16 grams but less than 24 grams of fentanyl. Grant objected to the PSR calculation of base offense

level 18 in his Sentencing Memorandum and at sentencing and argued that the amount of fentanyl in each patch should be used when calculating the drug quantity for guideline computation purposes. Grant argued that each patch contained 10mg of fentanyl and since he distributed 10 transdermal patches, he only distributed a total of .1 gram of fentanyl. Grant argued that his base offense level should be 12 under subsection (c)(14) of the Drug Quantity Table for less than 4 grams of fentanyl. PSR page 29.

The district adopted the position in the final PSR rejecting the defense argument. PSR Addendum pages 29-30. ER 15-18[2].

At the sentencing hearing the district court denied Grant's request for a one point downward variance based on the proposed amendments to § 4A1.1—Criminal History Category of the Sentencing Guidelines.

The court determined that Grant's total offense level was 17, his criminal history category was VI and that his guideline range was 51 to 63 months. ER 24. The court noted numerous aggravating factors, varied upwards and sentenced Grant to 72 months custody as to each

[2] ER refers to Appellant's Excerpt of Record.

count with the terms to run concurrently. ER 40. Grant filed his notice of appeal on October 3, 2023.

This appeal followed.

SUMMARY OF ARGUMENT

The district court properly calculated the amount of fentanyl for which Grant was responsible by including the weight of the transdermal patches he distributed.

Note A to the Drug Quantity Table under United States Sentencing Guideline § 2D1.1(c), which the district court followed, states that "Unless otherwise specified the weight of a controlled substance set forth in the table refers to the entire weight of any mixture containing a detectable amount of the controlled substance." The district court correctly adopted the Presentence Report's rejection of Grant's argument that only the fentanyl in each transdermal patch should be counted when calculating the drug quantity for guideline computation purposes. The district court did not abuse its discretion in declining to sentence Grant under a proposed sentencing guideline amendment that had not yet taken effect. The district court correctly

held that Grant's case was separate from other defendants that it had sentenced under the proposed guideline amendment.

Because Grant did not object at sentencing to the district court's remarks concerning fentanyl's lethality and its effect on Hawaii's communities, his claim that the district court's upward variance was tainted by mistaken assumptions and unreliable information about fentanyl, raised for the first time on appeal, is reviewed for plain error.

Grant's fails to show that the court erred in its remarks at sentencing and even assuming that the district court did err, Grant has fallen short of establishing that his substantial rights were effected by any such error. The record provides ample support for the district court's 9-month upward variance. Grant has not shown that there is a reasonable probability that he would have received a more lenient sentence absent the asserted error.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CALCULATED THE AMOUNT OF FENTANYL FOR WHICH APPELLANT WAS RESPONSIBLE BY INCLUDING THE WEIGHT OF THE TRANSDERMAL PATCHES HE DISTRIBUTED

A. Standard of Review

The district court's interpretation of the Sentencing Guideline is reviewed de novo. *United States v. Campbell*, 937 F.3d 1254, 1256 (9th Cir. 2019).

B. Discussion

Grant argued that Application Note 9 to the Drug Quantity Table should be used to calculate his drug quantity for guideline computation purposes. Grant argued that the specific dosage amount on each patch—10 milligrams of fentanyl—should be used to calculate his drug quantity.

Over Grant's objection the district court ruled that the PSR's calculation of the amount of fentanyl was properly determined utilizing the entire weight of any mixture or substance containing a detectable amount of fentanyl—the default method of Note A to the Drug Quantity Table under U.S.S.G. § 2D1.1(c).

Note A to the Drug Quantity Table provides in part:

> "Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."

The district court was persuaded by the PSR's analysis as set forth in the Addendum to the final PSR. ER 14-17.

The PSR noted that the entire mixture approach of Note A makes sense for several reasons. First, the Sentencing Guidelines parallel the statutory scheme under 21 U.S.C. § 841(b) which provides for a mandatory minimum sentence for crimes involving certain weights of a "mixture or substance containing a detectable amount of drugs," including fentanyl. Other drugs, such as methamphetamine, however, have mandatory minimum sentences based either on the weight of the mixture or substance, or on lower weights of the pure drug. Compare 21 U.S.C. § 841(b)(1)(A)(vi) (400 grams or more of a mixture or substance containing fentanyl) with 21 U.S.C. § 841(b)(1)(A)(viii) (50 grams or more of actual methamphetamine).

Application Note 1 under commentary to the Drug Quantity Table explains that "mixture or substance" as used in this guideline does not include materials that must be separated from the controlled substance before the controlled substance can be used, such as beeswax in a cocaine/beeswax statue. Here, the fentanyl and the fentanyl patches need not be separated before the fentanyl can be ingested. As Grant

admitted, he cut the fentanyl patches into small pieces and placed them on his tongue to be absorbed into his system, he did not attempt to separate the fentanyl from the patch. PSR 15. The PSR further noted that due to the strong potency of fentanyl, using the patch as a carrier medium actually facilitates the distribution and administration of the drug.

The PSR and the district court rejected Grant's argument that the 10 mg of fentanyl that was listed on each patch should be used as a specific dosage amount because U.S.S.G. § 2D1.1 Application Note 9 described how to determine quantity based on doses, pills or capsules. The PSR found that Application Note 9 should not apply as Application Note 9 states that the Application Note is to be used only when the number of doses, pills or capsules, but not the weight of the controlled substance is known. The PSR also noted that the Typical Weight Per Unit Table of Application Note 9 which displayed typical weight per unit (dose, pill or capsule) did not list fentanyl. Additionally, the PSR noted that Application Note 9 instructed readers not to use the table if any more reliable estimate of the total weight is available from case-specific information. The PSR found that here the government had

recovered the actual fentanyl patches Grant distributed and that laboratory reports were available. Grant claims that in rejecting his argument that Application Note 9 should be used the district court and probation officer placed significant weight on the fact that fentanyl was not listed in the Typical Weight Per Unit Table. Grant further argues that fentanyl is not listed in Application Note 9 Typical Weight Per Unit Table because under Amendment 318 to the Sentencing Guidelines, fentanyl is recognized as a legitimately manufactured, but then unlawfully diverted drug. Amendment 318 however lists the legitimately manufactured/unlawfully diverted drugs that are deleted from Typical Weight Per Unit Table and fentanyl is not one of those specifically listed drugs. Nor has fentanyl ever previously been listed on the Table of Typical Weight Per Unit (dose, pill or capsule). There simply is no note or entry anywhere in the Sentencing Guidelines that designates fentanyl as a legitimately manufactured and unlawfully diverted drug that would cause it to be excluded from Application Note 9's Typical Weight Per Unit Table.

Grant also argues that the district court erred in the application of *Chapman v. United States*, 500 U.S. 453 (1991) in dismissing his dosage

argument because the Sentencing Commission rejected *Chapman*'s approach to counting carrier weight in Amendment 488 (1993). Indeed the Sentencing Commission in Amendment 488 clarified that in the case of LSD, in a carrier medium (e.g., a sheet of blotter paper) the weight of the carrier medium was not to be used for the purposes of the Drug Quantity Table. U.S.S.G. § 2D1.1(c) Note G. Amendment 488 notes that the Sentencing Commission recognized the "the weights of LSD carrier media vary widely" and that "basing the offense level on the entire weight of the LSD and the carrier medium provides unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights." But the Sentencing Commission has made no such finding in the case of fentanyl.

Nor have the Sentencing Guidelines provided any specific method for determining drug quantity in the case of fentanyl. Thus, pursuant to Note (A) to the Drug Quantity Table under USSG § 2D1.1(c), the default method for determining drug quantity applies and the entire weight of any mixture or substance containing a detectable amount of the controlled substance is used. The district court properly calculated

the amount of fentanyl Grant was responsible for utilizing the entire weight of the transdermal patches he distributed.

II. DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO APPLY A PROPOSED AMENDMENT TO SENTENCING GUIDELINES § 4A1.1

A. Standard of Review

As a general rule, a district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017)(en banc).

A. Discussion

The 2021 Sentencing Guidelines assigned two status points to Grant's criminal history because he was under a criminal justice sentence (5 years probation) for burglary and transport of controlled substance in Nevada when he committed the federal crimes in Hawaii. USSG § 4A1.1(d). PSR 49. In 2023 the Sentencing Commission proposed an amendment to the status guidelines so that if the amendment went into effect on November 1, 2023, an individual with Grant's criminal history would receive one criminal history point for committing new crimes while on probation for an old crime. USSG §

4A1.1 (2023). Grant's sentencing was scheduled for September 26, 2023. Grant moved to continue the sentencing until after November 1, 2023 in order to possibly receive under the proposed new guideline a criminal history status adjustment of only + 1 rather than + 2 based on his status at the time of his federal crimes. The United States opposed the motion and the district court declined to continue the September 26, 2023 sentencing.

Grant in his sentencing memorandum asked the district court to take into account the proposed guideline amendment and give him a one point downward variance.

At Grant's sentencing on September 26, 2023, the district court recognized that the proposed sentencing guidelines were anticipated to go into effect on November 1, 2023 and that the court had the discretion to apply the proposed guideline and grant a one point variance. The court found that specific facts made Grant's case separate from other defendants in which the court had exercised its discretion and applied the proposed guidelines. The court declined to sentence Grant under the proposed sentencing guidelines which were not yet in effect and declined to give him a one point variance.

The district court in exercising its discretion explained that in Grant's case there were several aggravating factors. First, the court was very concerned that Grant was distributing fentanyl which it found to be a very lethal drug and to pose a particular harm to the community. ER 25-26. The court also noted that Grant's distribution of fentanyl was aggravated by his possession and sale of a dangerous weapon, an operable shotgun. The district court further found that Grant was in possession of a large amount of ammunition upon his arrest. The court in deciding to treat Grant separately from other defendants in other cases in which it had sentenced defendants under the proposed guideline amendment listed a number of additional aggravating factors.

The court noted that Grant was an admitted drug addict and had a lengthy substance abuse history. The court noted Grant's long criminal history including a felony drug conviction in 2015 and a violent criminal burglary in 2016. Additionally the court noted that Grant had an outstanding bench warrant in Nevada and that the court had received a disturbing letter from a community member. The court adopted the findings of the Presentence Report which stated that

Grant's probationary status at the time he distributed fentanyl and sold the firearm in Hawaii was the result of his conviction in Nevada in 2018 for transport of a controlled substance.

That Grant was selling fentanyl in 2022 while on a sentence of probation imposed for a drug conviction in 2018 was certainly something the court considered in evaluating the gravity of his current crimes. The gravity of his current crimes, distributing fentanyl/while being a felon in possession of a firearm and ammunition, was also specifically noted by the court.

The court obviously believed it was not appropriate to give a repeat drug offender who was selling fentanyl and a firearm while on probation the benefit of a reduced criminal history category and a resulting lesser sentence, by utilizing proposed advisory sentencing guidelines that had not yet been adopted. The record fully supports the court's finding that Grant's case was separate from that of other cases in which the court had sentenced utilizing the proposed sentencing guidelines. The district court's decision is not illogical, implausible, or without support in the record.

III. THE DISTRICT COURT'S UPWARD VARIANCE OF NINE MONTHS WAS NEITHER AN ABUSE OF DISCRETION OR A VIOLATION OF DUE PROCESS

A. Standard of Review

(1) A district court's factual findings are reviewed for clear error. *United States v. Harris*, 999 F.3d 1233, 1235 (9th Cir. 2021).

(2) A district court's upward variance is reviewed for an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007).

(3) Procedural sentencing errors raised for the first time on appeal are generally reviewed for plain error. *United States v. Burgum*, 633 F.3d 810, 812 (9th Cir. 2011).

(4) Under the plain error standard, relief is not warranted unless there has been: (1) error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

B. Discussion

I. The Sentence Imposed Was Not An Abuse of Discretion

The court determined that Grant's total offense level was 17 and with a criminal history category VI, his sentencing guideline imprisonment range was 51 to 63 months. ER 40. Based on the

aggravating factors and after consideration of the 18 U.S.C. § 3553(a) factors the court exercised its discretion and varied upward to 72 months imprisonment. ER 40. Judges are given very broad discretion to consider a wide range of information in arriving at the sentencing decision. *United States v. Tucker*, 404 U.S. 443, 446 (1972). Title 18 United States Code § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Where, however, the trial judge relies on materially false or unreliable information there is a violation of defendant's due process rights. *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948).

The district court noted numerous aggravating factors in sentencing Grant. The court found that Grant had made a direct sale of fentanyl, and that as a lethal drug, it posed a particular harm to the community. ER 25-26. The court also found that the amount of fentanyl sold was not insignificant, that Grant had profited from the sale, and that the sale of fentanyl was done while he was in possession of and selling a dangerous weapon, a shotgun. Additionally, the court

found that Grant's possession of a large quantity of ammunition was an aggravating factor. ER 26. The court further found that several of Grant's personal characteristics were aggravating factors. ER 27. The court noted that Grant was an admitted drug addict with a substance abuse history since age 12. The court also considered Grant's prior felony convictions for a drug offense in 2015 and his violent crime burglary in 2016 to be aggravating factors. The court also noted that Grant had a long history of criminal convictions and arrests since age 13. ER 27. The court further noted that Grant had an outstanding bench warrant from Nevada and that the court had received a disturbing letter from a community member. ER 27. The court explained that in determining the sentence to be imposed it had considered advisory guideline computations, the sentencing factors of 18 U.S.C. § 3553 (a), as well as the particular seriousness and gravity of those offenses and Grant's history and characteristics. ER 44. The district court need not tick off each of the § 3553(a) factors to show that it has considered them. *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (*en banc*). The weight to be given the various factors in a particular case is for the discretion of the district court. *Id.* at 993.

Given its "superior position to find facts and judge their import under § 3553(a)," *Gall v. United States*, 552 U.S. 38, 51 (2007), the district court did not abuse its broad sentencing discretion in imposing an upward variance.

II. Appellant Fails To Establish That The Court Committed Either Clear Or Plain Error In Its Remarks At Sentencing

Grant claims that the district court committed procedural error by improperly relying on "mistaken assumptions and unreliable information." AOB 21[3].

Because Grant failed to raise these alleged procedural errors before the district court, this Court reviews for plain error. *U.S. v. Burgum*, 633 F.3d 810, 812 (9th Cir. 2011).

Under the plain error standard Grant must show that: (1) there was error; (2) that is clear or obvious; (3) that affects Grant's substantial rights; and that the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Jaimez*, 45 F.4th 1118, 1129 (9th Cir. 2022) (quoting *United States v. Macias*, 789 F.3d 1011, 1017 (9th Cir. 2015).

[3] Appellant's Opening Brief

A sentencing error prejudices the substantial rights of a defendant when there is a reasonable probability that he would have a different sentence had the district court not erred. *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013).

Grant bears the burden of showing that the district court relied on clearly erroneous facts affecting his substantial rights, when either (1) calculating the Guidelines range or (2) determining his sentence, *United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008).

For the reasons set forth in III.B.1. above Grant has not shown that the district court relied on clearly erroneous facts when calculating the Guidelines range. Thus the only question is whether the district court relied on any clearly erroneous facts in determining the sentence. Grant makes no showing that the district court relied on any clearly erroneous facts.

In fact the court, when it referenced fentanyl and its lethality in Hawaii, was explaining its sentencing decision and how it had fashioned Grant's sentence considering the sentencing factors of 18 U.S.C. § 3553(a). This was a proper consideration for the district court. See *United States v. Roy*, 88 F.4th 525, 532 (4th Cir. 2023).

> "While the particular fact of fentanyl's lethality to the touch may have been a matter of dispute, the district court's larger point was ever so true. Far from constituting significant procedural error, it was eminently reasonable for the district court to consider fentanyl's lethality and the devastating impact it has wrought upon communities across America."

Appellant cites a host of "Other Authority" that range from government studies to media publications in disputing some of the court's comments. AOB 4, 13-17. This Court should not consider any of this information since it was not presented to the district court and is not part of the record on appeal.

Even assuming that the district court did err, Grant has fallen short of establishing that his substantial rights were effected by any such error. The record provides ample support for the district court's 9 month upward variance that includes Grant's sale of a firearm in conjunction with the sale of fentanyl, Grant's substantial criminal history and history of drug abuse along with the fact that Grant was on probation when he committed the federal offenses. The record, however, provides no basis for concluding that there is a reasonable probability Grant would have received a more lenient sentence absent the asserted error. "Such a high degree of uncertainty precludes a finding that any alleged error affected his substantial rights. See *James v. United*

States, 527 U.S. 373, 394-95 (1999) ("Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights."); see also *United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1189 (9th Cir. 2013) (explaining that a defendant cannot meet the third prong of the plain error test by demonstrating a mere "possibility" that he could have obtained a lesser sentence absent the alleged error.); *United States v. Lorenzo*, 995 F.2d 1448, 1457 n.4 (9th Cir. 1993) (noting that "if plain error analysis applies, it appears that the appellants . . . pay the price for the inadequacy of the record."). Thus, even assuming error, it did not affect Grant's substantial rights.

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CONCLUSION

For the reasons stated above and based on the entire record, the judgment of the district court should be affirmed.

APRIL 10, 2024, Honolulu, Hawaii.

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

U.S.S.G. § 2D1.1(c) NOTE (A)

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

U.S.S.G. § 2D1.1(c) APPLICATION NOTE 9

9. **Determining Quantity Based on Doses, Pills, or Capsules.**—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (*e.g.*, 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

HALLUCINOGENS	
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm

Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamohetamine (STP, SOM)*	3 mg
MARIHUANA	
1 marihuana cigarette	0.5 gm
STIMULANTS	
Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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