**No. 23-2525**

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

WILLIAM GRANT
Defendant-Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
HON. LESLIE E. KOBAYASHI
DIST. CT. NO. 1:22-CR-00069-LEK-1

# OPENING BRIEF

Office of the Federal Public Defender for the District of Hawaii
Salina M. Kanai, Federal Public Defender
Craig W. Jerome, First Assistant Federal Defender

Sharron I. Rancourt, Assistant Federal Defender, Counsel of Record
300 Ala Moana Blvd., Suite 7104
Honolulu, Hawaii 96850
Telephone (808) 541-2521
Email sharron_rancourt@fd.org

**Table of Contents.**

## Table of Authorities.

**Cases.**



**Constitutional Provision.**



**Statutes.**



**Sentencing Guidelines.**

**Rules.**



**Other Authority.**

## Introduction.

The issues on appeal in this matter revolve around ten fentanyl patches—akin to nicotine patches often used to quit smoking—that were legally manufactured but illegally diverted. William Grant sold the ten patches to someone cooperating with federal agents. PSR-11–12 (citations to the PSR, unless otherwise indicated, are to its paragraph numbering). He distributed them in their original and unopened pharmaceutical packaging, which clearly labeled each patch as containing 10 milligrams of fentanyl; the ten doses of fentanyl that Grant distributed amounted to 0.1 gram of fentanyl. PSR-12. Government analysis of the patches, however, determined that the net weight of the mixture on the patches was 23.8 grams, much of which was alcohol and, in any event, 23.7 grams of which was not fentanyl. PSR-12.

The primary issue on appeal is whether the district court erred in ruling that the net weight of the mixture on the patches, rather than the dosage amount of fentanyl on the patches, set Grant's base offense level under USSG §2D1.1 (2021). The difference between the two weights correlates to starting with a base offense level of 12 (when dosage amount is used) or 18 (when the alcohol is included) and, downstream, to using a

guideline range of 27 to 33 months of imprisonment or a range of 51 to 63 months. USSG §5A (2021); PSR-24–33; PSR-82; 1-ER-24. Grant maintains that the district court erred by not using the legitimately labeled dosage amount on each patch's packaging and the lower range correlating to it as the starting point for the court's consideration of other sentencing factors. 1-ER-15–18.

Another issue on appeal arises from the district court's refusal to give Grant the benefit of an anticipated guideline amendment—reducing the impact that 'status points' have on a defendant's criminal history, USSG §4A1.1(d) (2021) and now USSG §4A1.1(e) (2023)—after denying a request to continue his sentencing by a bit over a month, a brief delay that would have rendered the amendment applicable to him. The district court admitted that the court had given other defendants, in unrelated cases, the benefit of the anticipated amendment. 1-ER-23. The court's refusal to do so in Grant's case is not adequately explained in the record. Refusing to give Grant the benefit of the anticipated amendment that would lower his sentencing range were he sentenced a month or so later, when the court gave other defendants the benefit of that anticipated amendment, is simply unreasonable. 1-ER-23; 1-ER-25–27. In this case, moreover, the difference

matters, because Grant's criminal history category, with the benefit of the amendment, drops from VI to V. This drop in criminal history category also lowers his advisory guidelines range.

The final issue on appeal concerns the district court's disconcerting remarks at sentencing suggesting that it was relying on anecdotes or personal knowledge about fentanyl. At their most problematic, those remarks reflect that the presiding judge believed that patches, still in their pharmaceutical packaging with a clearly labeled dosage amount, were more dangerous (for some unexplained and counter-intuitive reason), than fentanyl of unknown purity and amount that might be consumed accidentally because it is distributed in a disguised form. 1-ER-25–26; 1-ER-30–31; 1-ER-34. Grant submits that the district court's reliance at sentencing on the judge's own notions about fentanyl—unsupported by reliable information presented to it in this case—was not reasonable.

**Jurisdiction.**

The district court had jurisdiction under 18 U.S.C. §3231. This appeal arises from the judgment of conviction and sentence that the district court filed on September 27, 2023. 1-ER-3. Grant timely filed his notice of appeal

on October 3, 2023. 1-ER-59; FRAP 4(b)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742.

**Bail status.**

Grant is serving his sentence of imprisonment at Sheridan FCI. His projected release date is September 24, 2027.

**Issues.**

1. Did the district court wrongly determine the quantity of fentanyl involved in this case, by ignoring the dosage amount clearly stated on the ten pharmaceutical patches that Grant sold and by using a net weight that included the quantity of alcohol on the patches instead, an error that increased his base offense level from 12 to 18 under USSG §2D1.1?

2. Did the district court arbitrarily refuse to apply an anticipated guideline change that it had applied when sentencing other defendants or otherwise fail to adequately explain why it treated Grant differently than those other defendants?

3. Did the district court rely on unreliable anecdotes and personal opinions about fentanyl to increase Grant's sentence?

**Pertinent positive law.**

1. The district court used USSG §2D1.1 (2021) to set Grant's base offense level. Section 2D1.1(a)(5) required using "the offense level specified in the Drug Quantity Table set forth in subsection (c)," and subsection (c)(11), in turn, set a base offense level of 18 for "[a]t least 16 G[rams] but less than 24 G[rams] of Fentanyl," and subsection (c)(14) set a base offense level of 12 for "[l]ess than 4 G[rams] of Fentanyl."

Note A to the Drug Quantity Table set out in §2D1.1(c), generally 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." But this guideline's Application Note 9 did provide otherwise, when, as here, a mixture is a "dose." Application Note 9 provided: "If the number of doses … but not the weight of the controlled substance is known, multiply the number of doses … by the typical weight per dose" in the Typical Weight Per Unit (Dose, Pill, or Capsule) Table. Note 9 also provided that the estimates in that table should not be used "if any more reliable estimate of the total weight is available from case-specific information." Fentanyl was not listed in the table.

2. The district court used USSG §4A1.1 (2021) to calculate Grant's criminal history score. Section 4A1.1(d), a guideline targeting the defendant's status in the criminal justice system, provided: "Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status."

3. A bit over a month after the district court sentenced Grant, the Sentencing Commission amended §4A1.1. As amended, the current version of the status guideline provides: "Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." USSG §4A1.1(e) (2023).

**Case statement.**

On August 12, 2022, at the behest of someone cooperating with government agents, Grant sold ten fentanyl patches and a gun to the cooperator. PSR-10–11. The patches were still in their pharmaceutical packaging. PSR-12. And the packaging stated that each patch contained a 10mg dose of fentanyl. PSR-12. The ten patches that Grant sold thus

amounted to selling and distributing 100mg—0.1 gram—of fentanyl. PSR-12. Subsequent laboratory analysis of the patches, however, evinced that the mixture on the packages weighed more, much of which was simply alcohol, and that the total combined weight of the mixture on the patches came to 23.8 grams. PSR-12. The ten patches accordingly contained 0.1 gram of fentanyl and 23.7 grams of other substances. About two weeks after the sale, the government indicted Grant. 1-ER-54–58.

Count 1 of the indictment accused Grant of distributing "a mixture or substance containing a detectable amount of … fentanyl" on August 12, 2022, in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(C). 1-ER-55. Count 2 accused him, a felon, of possessing a gun and ammunition on August 12, 2022, in violation of 18 U.S.C. §922(g)(1) and 18 U.S.C. §924(a)(2). The drugs, gun, and ammunition predicating these two counts were those he sold to the government's cooperator. Count 3 added another §922 charge, based on ammunition that agents seized from his residence two days after the sale, on August 14, 2022. 1-ER-56. He pled guilty without a plea agreement on April 7, 2023. 1-ER-67–68.

While Grant's case was pending before the district court, media stories about fentanyl proliferated in Hawaii. There was, for example, a story about

a state law requiring bars and nightclubs to stock Narcan as part of "the battle against fentanyl." HNN Staff, *Honolulu mayor signs bill requiring bars, nightclubs to carry life-saving overdose treatment*, Hawaii News Now (July 24, 2023) (last visited January 24, 2024) (full url citations for this, and other similar articles that are cited in this brief and are readily found on the internet, are provided in the table of authorities). The mayor reportedly said: "The very fact that we had to introduce this bill in the battle against fentanyl is really unprecedented. Fentanyl represents a threat to people's lives unlike anything we've seen before in our war against drugs." *Id.* As noted below, at Grant's sentencing a few months later, the presiding judge referred to Narcan and echoed the mayor's remarks. 1-ER-25–26.

There were also stories and broadcasts about a couple who were accused of running a fentanyl distribution ring, which had allegedly supplied the fentanyl resulting in a "deadly Waikiki mass overdose." HNN Staff, *Couple accused of fentanyl supply in deadly mass overdose to remain in custody*, Hawaii News Now (July 1, 2023) (last visited January 24, 2024). That couple's case was lodged on the district court's docket on June 23, 2023, on, moreover, the docket of the judge who, some three months later, sentenced Grant. *United States v. Drageset*, No. 1:23-cr-00051-LEK (D.

Haw.). Another prominent story warned about large amounts of fentanyl, "a deadly drug … that's 50 times more potent than heroin, and 100 times more potent than morphine," being distributed as "rainbow-colored counterfeit pills" that looked "like candy." HNN Staff, *Dealers are distributing fentanyl in Hawaii made to look like rainbow-colored candies*, Hawaii News Now (Sept. 27, 2022) (last visited January 24, 2024). That story also emphasized: "According to the CDC, more than 70,000 Americans[,] including 41 here in Hawaii[,] died of drug overdoses related to synthetic opioids like fentanyl last year." *Id.* The notes these stories hit reverberated in the remarks the district court made about fentanyl when sentencing Grant. 1-ER-25–26; 1-ER-30–34.

Sentencing occurred on September 26, 2023. During the sentencing hearing the presiding judge repeatedly emphasized how frightening fentanyl was:

> Fentanyl has done tremendous harm to our community. We have decades of harm done by methamphetamine, and fentanyl is much more recent, but we don't have any direct deaths attributable to methamphetamine. Methamphetamine has certainly destroyed the fabric of society in Hawaii. Families have been torn apart, property crimes, other types of crimes, probably violent crimes too, could be related to methamphetamine. We have not seen the kind of death that is directly caused by the distribution of an illegal substance like we have with fentanyl. And, quite frankly, it's frightening. We are being recommend to

> carry Narcan in the courtrooms. The thing that is particularly concerning, and when the Court thinks about danger to the community, is that it doesn't matter if it's one dose, the first dose somebody does with fentanyl, or if it's the hundredth dose. The lethalness of fentanyl is unmatched and, quite frankly, we have never seen that before. So that's a harm to our community.

1-ER-25–26 (paragraphing altered; some capitalization omitted); *see also* 1-ER-34 (district court remarks about a letter it received from someone that "talk[ed] about the death of an individual from fentanyl" (capitalization omitted)).

The district court's off-the-cuff remarks when sentencing Grant, however, are far more categorical and definitive than the government's own statistics suggest may actually be the case. *See*, *e.g.*, National Institute on Drug Abuse, *Drug Overdose Death Rates* (last visited on January 11, 2024) (compiling tables showing overdose deaths attributable to other controlled substances); U.S. Dept. of Health & Human Services, *Overdoes Prevention Strategy* (last visited on January 11, 2024) (reproducing a *Trends in U.S. Drug Overdose Deaths (1999–2022)* table, showing, among other things, deaths attributable to "psychostimulants with abuse potential (primarily methamphetamine)"). Contrary to the notions that the district court voiced at sentencing, fentanyl overdoses are not uniquely different from those attributed to other substances. *See*, *e.g.*, Centers for Disease Control and

Prevention, *U.S. Overdose Deaths in 2021 Increased Half as Much as in 2020–But Are Still Up 15%* (May 11, 2022) (last visited on January 11, 2024); Brittany Lyte, *Drug Overdoses Are On The Rise On Kauai. Meth Is Still The Main Reason*, Honolulu Civil Beat (Jan. 2, 2023) (reproducing statistics compiled by the Hawaii Department of Health) (last visited on January 24, 2024). And alarming outlier anecdotes of unintentional and unexpected overdosing can be dug up as to any abused substance; such things are not unique to fentanyl. *See*, *e.g.*, Raheel Ashraf (BBC Sport reporter), *Len Bias: The NBA draft star and his overdose—a death that changed America*, British Broadcasting Corporation (June 22, 2023) (last visited January 24, 2024).

The presiding judge also remarked at sentencing that it believed Grant's distribution of clearly labeled and pharmaceutically packaged fentanyl patches "worrie[d]" her more than the distribution of fentanyl of unknown purity in unknown dosage amounts disguised as candy. 1-ER-30–31. In response to defense counsel's remarks arguing that the packaging and known dosage amount of each patch was a mitigating factor, the district court tangentially responded with an explanation about why it struggled with comparisons between fentanyl and methamphetamine:

> Let me tell you why I struggle with fentanyl versus methamphetamine, and it's for this simple reason. I may be

> correct or not correct. Methamphetamine has to be shipped to Hawaii, the poison has to be either brought in by an individual, mailed we often see, because it's not processed here. But fentanyl is brought in legally every day, because it's a prescription drug. So there is no chance of the kind of interdiction that we have law enforcement with dogs and going through the mail and finding out if there are airline people who have been persuaded to allow shipments or individuals carrying it in their handbags. There is an opportunity for interdiction at that point. We don't have that with fentanyl. Fentanyl can be brought in all the time. There is no way that law enforcement can stop people or stop the shipment because there are medical reasons why it can be. It's processed in the United States. So I understand what you're saying, well, there's these patches, and it wasn't masquerading as anything. But, frankly, that worries me more.

1-ER-31 (paragraphing altered; some capitalization omitted). But, once again, the district court's remarks pivot on a dubious point; methamphetamine, as well as many other controlled substances, have acceptable medical uses and, when prescribed, are perfectly legal to carry in a handbag or transport on a plane. *See*, *e.g.*, U.S. Drug Enforcement Administration, *Methamphetamine* (last visited January 11, 2024) (noting some of methamphetamine's legitimate medical uses and common prescription brand names).

In addition to making such remarks about fentanyl, the district court also overruled Grant's objection to the way the probation officer calculated the amount of fentanyl for purposes of setting his base offense level under

the guidelines. 1-ER-14–18. Grant's objection was a simple one: because the dosage amount is definitively stated on each patch's pharmaceutical packaging, we know exactly how much fentanyl he distributed and, thus, the total dosage amount of 0.1 grams should set his base offense level at 12 under USSG §2D1.1(c)(14). 1-ER-14–16; *see also* DC ECF 35; DC ECF 41. The district court overruled his objection, based on the probation officer's response to it in the final presentence report. 1-ER-17–18; PSR (Addendum), PageID.321–322.

The probation officer pointed to, and followed, the general rule under §2D1.1 that the net weight of the mixture should be used, unless the actual weight of the controlled substance is more. PSR (Addendum), PageID.321. As to Grant's reliance on Application Note 9 to §2D1.1, the probation officer retorted that dosage amount is used only when the weight of the controlled substance is not known, that the table set forth in Note 9 did not list an estimated fentanyl dosage amount, and that the table, in any event, should not be used when a more reliable estimate of total weight was available from case-specific information; and, ignoring the case-specific information as to dosage amount, the probation officer turned to the net mixture weight as the pertinent case-specific information in Grant's case. PSR (Addendum),

PageID.321. The probation officer further noted that the Sentencing Commission's helpline confirmed the probation officer had it right. PSR (Addendum), PageID.321. And the probation officer asserted that her reading of the guidelines made the most sense for four reasons: because it harmonized the guideline with the way §841(b)'s admixture language has been construed; because the fentanyl did not need to be extracted from the alcohol on the patch in order to be used, unlike the beeswax often mixed with cocaine; because Application Note 9 did not apply due to the fact that the patches were recovered and analyzed and there was no need to estimate weight in some alternative way; and because, citing *Chapman v. United States*, 500 U.S. 453 (1991) (the case construing §841's admixture language), using the mixture amount promoted uniformity in sentencing, a point that basically dovetailed back into the probation officer's initial reason for saying her reading made the most sense. PSR (Addendum), PageID.321–322.

The district court also denied Grant's request to give him the benefit of the anticipated changes to USSG §4A1.1 that would have gone (and did go) into effect on November 1, 2023, a bit over a month after he was sentenced. 1-ER-22–23. As the district court noted, it had also rejected

Grant's request to continue sentencing until after November 1, 2023, 1-ER-23; 1-ER-68 (DC ECF 38 (minute order)). This change in the guidelines lowered the criminal history points assigned to Grant because he committed the offenses in this matter while he was on probation in a Hawaii state case; under the 2021 Guidelines, he received 2 points; under the 2023 Guidelines, he would receive only 1 point. PSR-47; PSR-49; USSG §4A1.1(d) (2021); USSG §4A1.1(e) (2023). That 1-point difference would have lowered his criminal history category from VI to V under USSG §5A's sentencing table.

In accord with its rulings on the guidelines (including one not raised in this appeal), the district 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. 1-ER-24. The district court's beliefs about fentanyl, noted above, bundled with other aggravating factors, led the district court to vary upward and sentence Grant to 72 months of imprisonment. 1-ER-24–27; 1-ER-31; 1-ER-40. The district court filed its written judgment on September 27, 2023. 1-ER-3. And Grant thereafter timely lodged this appeal. 1-ER-59; 1-ER-69.

**Argument summary.**

1. The district court erred in setting Grant's base offense level at 18 under USSG §2D1.1(c). The district court calculated drug weight under §2D1.1(c) by using the combined net weight of the fentanyl and alcohol on the ten pharmaceutical patches that Grant sold, citing the need to be consistent with a case construing 18 U.S.C. §841 (*Chapman*), and dismissing the relevancy of the Sentencing Commission's views about using dosage amount when such is known from a legitimate manufacture's packaging. Section 2D1.1, however, rejects *Chapman*'s approach to calculating drug weight. And a sentencing court cannot reasonably ignore the Sentencing Commission's remarks about using a known dosage amount.

2. The district court erred in not treating Grant the same as other defendants, to whom it was applying an anticipated guideline amendment before that amendment went into effect. The district court's reasons for treating Grant differently did not speak to the amendment at issue. The district court's decision to treat him differently was thus arbitrary and unreasonable.

3. The district court erred by relying on mistaken assumptions and unreliable information about fentanyl when sentencing Grant. Many of the

generalized remarks the district court made at sentencing appear to be based on the judge's personal knowledge or on otherwise unverified information. And at least one of those remarks indicates that the judge treated a circumstance that reasonably carries only mitigating weight as an aggravating factor. The district court thus violated due process when sentencing Grant.

## Argument.

### I. Standards of review.

Whether the district court imposed a reasonable sentence is reviewed for an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). A district court's application of a guideline or statute is also reviewed for an abuse of discretion, but its interpretation of pertinent law is reviewed de novo. *United States v. House*, 31 F.4th 745, 752 (CA9 2022). "A district court abuses its discretion when it errs in its Guideline's calculation, imposes a sentence based on clearly erroneous facts, or imposes a substantively unreasonable sentence." *House*, 31 F.4th at 752–753 (citation and quotation marks omitted); *see also United States v. Rodriguez*, 49 F.4th 1205, 1211 (CA9 2022) (reaffirming that a district court abuses its discretion when it

does not apply the correct legal standard or relies on unreasonable factual findings).

Thus, as to the case at hand, the district court's ruling on the legal question of whether the express dosage amount of fentanyl patches or the net weight of the mixture of fentanyl and alcohol on the patches determines drug quantity under USSG §2D1.1 is reviewed de novo. *United States v. Robins*, 967 F.2d 1387, 1389 (CA9 1992) (reviewing de novo, and holding wrong, a district court's decision to use the combined weight of cocaine and cornmeal); *United States v. Perez*, 962 F.3d 420, 448 (CA9 2020) (reaffirming that "method of approximation must be reviewed de novo"). But the district court's upward variance is reviewed for an abuse of discretion, which will have occurred if the district court's remarks at sentencing reflect reliance on inaccurate or unreliable information or on unreasonable inferences.

## II. Dosage amount, not the combined weight of the fentanyl-alcohol mixture on the patches, should set Grant's base offense level.

As discussed above, Grant argued at sentencing that the 10mg dosage amount of fentanyl contained on each of the ten patches should set his base offense level at 12 under §2D1.1. The district court, adopting the probation

officer's view, rejected his argument largely on the idea that accepting it would create a conflict between the way drug amount is determined under *Chapman*'s construction of §841. On a hot take, *Chapman* might seem to dispose—as the probation officer and district court believed—of Grant's dosage argument. But the hot take, as so often so, is wrong.

*Chapman* construed §841's admixture language—referring to a "mixture or substance containing a detectable amount" of a controlled substance—in the context of LSD, which was then commonly sold in a diluted form on doses of "carrier" paper, the downstream tripper then consuming the whole:

> [T]he LSD in an average dose weighs 0.05 milligrams; there are therefore 20,000 pure doses in a gram. The pure dose is such an infinitesimal amount that it must be sold to retail customers in a "carrier." Pure LSD is dissolved in a solvent such as alcohol, and either the solution is sprayed on paper or gelatin, or paper is dipped in the solution. The solvent evaporates, leaving minute amounts of LSD trapped in the paper or gel. Then the paper or gel is cut into "one-dose" squares and sold by the dose. Users either swallow the squares, lick them until the drug is released, or drop them into a beverage, thereby releasing the drug. Although gelatin and paper are light, they weigh much more than the LSD. The ten sheets of blotter paper carrying the 1,000 doses sold by petitioners weighed 5.7 grams; the LSD by itself weighed only about 50 milligrams[.]

*Chapman*, 500 U.S. at 457. The Supreme Court rejected the argument that the weight of the paper should be excluded when calculating culpable drug

weight under §841: "[A] reading of the statute that makes the penalty turn on the net weight of the drug rather than the gross weight of the carrier and drug together … is not a plausible one. The statute refers to a 'mixture or substance containing a detectable amount.' So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence." *Chapman*, 500 U.S. at 459.

The Supreme Court found support for its reading of the statute's admixture language in the structure of §841. *Chapman*, 500 U.S. at 459–460. Other portions of the statute called for using either combined weight of drug and carrier or the pure weight of the drug itself when it came to methamphetamine and PCP. *Chapman*, 500 U.S. at 459. But as to drugs like LSD, cocaine, and heroin, the statute made no such distinction and provided no such choice of measures. *Chapman*, 500 U.S.C. at 459. "Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD." *Chapman*, 500 U.S. at 459. The Supreme Court further explained that the statute's structure demonstrated that "Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of [LSD, cocaine, and heroin] for sentencing purposes. Inactive ingredients are

combined with pure heroin or cocaine [or LSD], and the mixture is then sold to consumers as a heavily diluted form of the drug. In some cases, the concentration of the drug in the mixture is very low. …. But if the carrier is a 'mixture or substance containing a detectable amount of the drug,' then under the language of the statute the weight of the mixture or substance, and not the weight of the pure drug, is controlling.'" *Chapman*, 500 U.S. at 460.

The reason that *Chapman* does not dispose of Grant's fentanyl dosage argument is that the Sentencing Commission rejected *Chapman*'s approach to counting carrier weight. About two years after *Chapman*, the Commission adopted Amendment 488, clarifying that, for purposes of setting a defendant's base offense level, carrier weight should not be added in: "In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table." USSG §2D1.1(c) (Notes do Drug Quantity Table (G)). The Commission adopted the amendment because it recognized that, at least when it came to setting a defendant's base offense level, including carrier weight led to unwarranted sentencing disparity, because carrier

weight could, and often did, vary given the carrier—different kinds of paper, or using sugar cubes instead, and so on. Amendment 488 (1995) (Reason for Amendment). Which struck the Commission as too arbitrary a reason to increase a defendant's imprisonment sentence. *Id.*

In 1993 the Commission also amended the dosage application note, then set out in Application Note 11 to §2D1.1, but as Application Note 9 in the 2021 version of the Guidelines that the district court turned to in Grant's case. The dosage note turns off the normal admixture rule and, instead, calls for multiplying the number of doses, pills, or capsules by the typical weight per dose of the controlled substances listed in a table of various drugs that are often sold in dosage, pill, or capsule form. Fentanyl is not listed on the table. The dosage note also states that the average dosage amounts listed in its table should not be used "if any more reliable estimate of the total weight is available from case-specific information." USSG §2D1.1, comment. (n.9).

What is notable about the 1993 amendment to the dosage note is that the Commission explained the note's table was amended to delete estimated dosage amounts "for several controlled substances that are generally legitimately manufactured and then unlawfully diverted; in such cases,

more accurate weight estimates can be obtained from other sources (e.g., from the Drug Enforcement Administration or the manufacturer). Amendment 318 (1993) (Reason for Amendment). In rejecting Grant's argument, the district court and probation officer placed significant weight on the fact that fentanyl was not listed in the dosage note. But the Commission's remarks explaining Amendment 318 reflect that the reason fentanyl isn't in the dosage note's table is because it, as was so in Grant's case, is often legitimately manufactured but then unlawfully diverted, and we can accurately determine the amount of fentanyl Grant distributed from the manufacture's packaging of the ten diverted patches he sold.

Yes, the general rule is that we use admixture weight to set a base offense level. USSG §2D1.1(c) (Notes to Drug Quantity Table (A)) and comment. (n.1)). But the Guidelines make clear that it rejects *Chapman*'s approach, and turns off that general rule, when it comes LSD's carrier weight. And the Guidelines make clear that dosage amounts should be used of substances that are legitimately manufactured but then illegally diverted, rather than the general admixture rule, at least when dosage amount can be accurately determined from the legitimate manufacturer. In a case involving legitimately manufactured fentanyl patches, which were illegally diverted

and then sold in their original packaging, dosage amount, not the general admixture rule, should be used to determine the weight setting the defendant's base offense level under §2D1.1. To do otherwise ignores the spirit of the guideline and turns a blind eye on the Commission's rejection of *Chapman* and the Commission's preference for deferring to a legitimate manufacturer's stated dosage amounts for lawfully manufactured, but illegally diverted, controlled substances. The district court, accordingly, erred in using the general admixture rule to set Grant's base offense level.

## III. The district court's decision to treat Grant differently than other defendants with regard to an anticipated guideline amendment was not reasonable.

The 2021 Guidelines assigned two 'status' points to Grant's criminal history because he was on state probation when he sold the fentanyl patches and violated federal firearm laws. USSG §4A1.1(d) (2021). In the 2023 amendment cycle, the Sentencing Commission amended the status guideline so that, once the amendment went into effect on November 1, 2023, a probationer with Grant's criminal history would only receive one criminal history point for committing new crimes while on probation for an old one. USSG §4A1.1(e) (2023). Grant pled guilty in April of 2023 and his sentencing was then scheduled for September 26, 2023, about a month

before the new amendment was set to take effect. 1-ER-68. After the Commission promulgated the amendment and repeat players—prosecutors, probation officers, public defenders, and district court judges—anticipated Congress would not go to the trouble of countermanding the amendment, Grant moved to continue his sentencing hearing until after the amendment would take effect. 1-ER-68. The district court denied that motion.

Undeterred, Grant asked the district court to exercise its discretion under 18 U.S.C. §3553(a) to avoid unwarranted sentencing disparity by giving him the benefit of the anticipated amendment. 1-ER-22–23. The district court refused to do so, explicitly acknowledging that it *was* giving other defendants in other cases the benefit of the anticipated amendment. 1-ER-23. But it decided to treat Grant differently than those other defendants, because his case involved the "frightening" drug fentanyl, a gun, and a cache of ammunition, and because he was "an admitted drug addict." 1-ER-25; *see also* 1-ER-23–27.

The district court's reasons for not treating Grant the same as other defendants it was sentencing around the same time in 2023 is a non sequitur. The status guideline is about the weight that should be given to the fact that the defendant recidivates while still actively serving the

supervisory part of a sentence—while, that is, the defendant is on probation, parole, supervised release, and so on—for a prior offense. The perceived gravity of Grant's *current* federal offenses has nothing to do with whether his probationary *status* at the time he committed them should result in two or only one criminal history point. Perhaps there are circumstances about a prior offense that might speak to the weight that should be given to the fact that the defendant commits a new crime while still on probation for the prior. (Though Grant can't readily think of any such circumstances, because the enhancement simply hits status, not why that status exists. It hits, that is, the fact that the defendant is not simply a recidivist, but a *recent* recidivist, nothing more.) But the nature of the new crime says nothing at all about the gravity of the defendant's probationary status or what carry-over weight should be given to probationary status when sentencing the defendant for committing a new crime.

Because the district court's justification for treating Grant differently than other defendants it was contemporaneously sentencing was a non sequitur, its decision was arbitrary and unreasonable and, therefore, an abuse of its discretion under §3553(a)(4) (the guidelines factor) and §3553(a)(6) (the disparity factor).

## IV. The district court's upward variance was tainted by unreasonable notions about fentanyl.

A federal statute generally 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." 18 U.S.C. §3661. Due process, however, is less expansive. Due process requires that the judge rely only on information that is both accurate and reliable. *United States v. Messer*, 785 F.2d 832, 834 (CA9 1986) ("when a trial judge relies on materially false or unreliable information in sentencing, the defendant's due process rights are violated"); *United States v. Williams*, 668 F.2d 1064, 1072 (CA9 1981) (vacating a sentence because the district court assumed allegations against the defendant made in a pending state case were true, even though they remained disputed in the state courts); *Townsend v. Burke*, 334 U.S. 736, 740–741 (1948) (faulting a district court for relying "on misinformation" and erroneous "assumptions [that] … were materially untrue" and emphasizing that relying on such information, whether through "carelessness or design, is inconsistent with due process"). Nor may a district court predicate a ruling on the judge's personal knowledge or

experiences as an individual. *United States v. Lewis*, 833 F.2d 1380, 1385 (CA9 1987); *Leong Kim Wai v. Burnett*, 23 F.2d 789, 791 (CA9 1928) (judge erred in relying on "his personal knowledge and recollection of conditions existing in the vicinity of certain streets in Honolulu").

As discussed above, the remarks that the district court made when sentencing Grant appear to mimic sensationalized media accounts of illicitly manufactured fentanyl, distributed in unmarked quantity and purity and disguised as candy. Such media accounts, viewed and experienced in the judge's personal capacity outside of court, constituted information that the judge knew as an individual. The judge's remarks also suggest that she had in mind and took as true unproven allegations federal prosecutors made against a couple charged in connection with fentanyl overdoses. And nearly all of the judge's generalized assumptions about fentanyl are materially inaccurate and unreliable. Again, as discussed above, fatal overdosing is not unique to fentanyl, nor is fentanyl trafficking uniquely impervious to interdiction.

The judge's treatment of legitimate manufacture and packaging as an *aggravating* circumstance is particularly problematic and unreasonable. The media accounts, which appear to have colored the judge's views about

fentanyl, were about sudden deaths from unintentional overdosing, which occurred because the user consumed fentanyl in a form that did not provide the user any information about the amount or purity of fentanyl being consumed in each piece of candy or dose, in whatever form it was consumed. Perhaps, in those circumstances, fentanyl is frightening. But Grant's case did not involve illegally manufactured fentanyl, unknown amounts of fentanyl, fentanyl of unknown purity, or fentanyl ingested unintentionally because it was used as a cutting agent or sold as another drug or, to hook the unwary, as something that does not appear to be a controlled substance at all. This case, rather than any of that, involved ten legally made patches still sealed in packaging that clearly noted each patch contained a 10mg dose of fentanyl. This was not a case, then, that involved the frightening type of fentanyl that is illegally manufactured and packaged to look like something it is not—the kind that might be accidentally consumed, or that might accidentally cause an unintentional overdose because purity and dose are unknown, or that might be accidentally used in combination with, and rendered unexpectedly fatal by, another substance. The only reasonable weight that the method of manufacture, packaging,

and illegal distribution of the fentanyl patches has in Grant's case is *mitigating* weight.

Thus, in addition to unreasonably relying on generalized assumptions and personal knowledge, the judge that sentenced Grant further erred by placing aggravating weight on a mitigating circumstance. Due process accordingly requires vacating Grant's sentence and remanding, perhaps before a different district court judge, for resentencing. *United States v. Paul*, 561 F.3d 970, 975 (CA9 2009) (reassignment appropriate to preserve the appearance of justice or when "the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of … her mind previously expressed views or findings determined to be erroneous"); *United States v. Estabilio*, 849 Fed. Appx. 208 (CA9) (June 1, 2021) (unpublished) (reassigning on remand even though this Court had "no doubts as to the district judge's … ability to assess this case fairly").

## Conclusion.

This Court should vacate the district court's judgment of conviction and sentence in this matter and remand for resentencing.

Submitted from Honolulu, Hawaii.

Submitted on January 25, 2024.

Office of the Federal Public Defender for the District of Hawaii
Salina M. Kanai, Federal Public Defender
Craig W. Jerome, First Assistant Federal Defender

*/s/ Sharron I. Rancourt*
Sharron I. Rancourt
Assistant Federal Defender
Counsel of record for defendant-appellant William Grant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 23-2525.

I am the attorney or self-represented party.

This brief contains 6,282 words, including no words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface, 14pt Charter BT and Charter BD BT, comply with FRAP 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature *⁄ s ⁄ Sharron I. Rancourt* Date January 25, 2024 .

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number 23-2525.

The undersigned attorney or self-represented party is unaware of any related cases currently pending in this court.

Signature *⁄ s ⁄ Sharron I. Rancourt* Date January 25, 2024 .