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

REPLY BRIEF

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Table of Contents.

Table of Authorities.

Cases.

Constitutional Provision.

Statute.

Sentencing Guidelines.

Rule.

Other Authority.

Argument.

I. Increasing Grant's guideline range for distributing 23.7 grams of alcohol to someone cooperating with federal agents is not reasonable.

Grant's primary argument on appeal is that the district court erred in determining his guideline range, by ignoring the dosage amount on the sealed packaging of the legitimately manufactured, but illegally diverted, fentanyl patches Grant sold to someone cooperating with federal agents. As reflected by the labeled dosage amount, he distributed 0.1 gram of fentanyl. That amount of fentanyl results in a base offense level of 12 and, all else remaining the same, a guideline range of 27 to 33 months of imprisonment. *See* USSG §2D1.1(c)(14) (2021); USSG §5A (2021); PSR-24–33.

Instead of starting with that guideline range, the district court used the combined weight of the fentanyl and the 23.7 grams of alcohol that was also on the patches. Using 23.8 grams of the mixture on the patches set Grant's base offense level at 18 and, all else remaining the same, produced a guideline range of 51 to 63 months of imprisonment. *See* 1-ER-24; USSG §2D1.1(c)(11); USSG §5A; PSR-24–33. The district court started with that higher guideline range and, from it, imposed a 9-month upward variance.

See 1-ER-24-31; 1-ER-40. The district court thus increased Grant's imprisonment by at least 30 months for distributing 23.7 grams of alcohol.

Thirty months' imprisonment for distributing alcohol is not reasonable.

The government maintains, however, that it is. Its argument on this point consists of nothing more than regurgitating the probation officer's rationale for using the guideline's default admixture rule. For the reasons set forth in Grant's opening brief, those reasons are not persuasive. One reason the government's (and probation officer's) reasoning is not persuasive is because it almost entirely rests on *Chapman v. United States*, 500 U.S. 453 (1991). In *Chapman*, the Supreme Court embraced an admixture rule in the context of LSD and held that for statutory purposes, weight calculations could include the delivery mechanism (paper, sugar cubes, what have you) used to ingest the LSD. *See Chapman*, 500 U.S. at 457–460. As explained in Grant's opening brief, the Sentencing Commission rejected *Chapman*'s statutory rule for purposes of calculating LSD weight under the guidelines. *See* OB-25–27. It did so because the weight of delivery mechanisms varied so much that including such weight arbitrarily skewed

culpability and resulted in unreasonable sentencing disparities. *See* USSG Amendment 488 (1995).

A hard application of *Chapman*'s admixture rule in this case would include not only the alcohol but also the weight of the patch. *No one*—not the government, not the probation officer, not the district court, and certainly not Grant—advocates for such a hard application of *Chapman*'s admixture rule. Said in terms of Amendment 488, everyone involved in Grant's case tacitly agrees that including patch weight would be unreasonable and arbitrarily skew Grant's culpability.

By the same token, though, there is nothing reasonable in the soft application of *Chapman*'s admixture rule that the government, parroting the probation officer and district court, advocates for in its answering brief. Holding Grant accountable for the amount of alcohol a legitimate manufacturer opts to use on its patches is just as unreasonable and arbitrarily skews Grant's culpability, holding him criminally liable for a manufacturing decision he had no control over.

This Court thus has a choice to make in this case. It can point to the guideline's admixture rule and hold that it supports counting the alcohol. Or it can recognize that the default admixture rule produces an unreasonable

and arbitrary result in cases involving legitimately manufactured, but illegally diverted, fentanyl patches still in their original packaging, untampered with by the defendant. The guidelines support this latter conclusion at least as much as (if not more readily than) they support an unthinking, reflexive turn to the default admixture rule. As explained in Grant's opening brief, the guidelines reject *Chapman* and, at the same time, reflect a preference for turning to case-specific information when dosage amount is known and the controlled substance at issue was legitimately manufactured by a reputable company, but then, downstream, illegally diverted by the defendant. *See* OB-23–29.

This Court should make the reasonable choice Grant suggests, not the unreasonable one the government offers.

II. The government's advocacy for plain error review is misguided.

In addition to his arguments about dosage weight, Grant argues that the district court's upward variance is unreasonable, because the district court's remarks at sentencing indicate that it relied on unreliable notions about fentanyl. *See* 1-ER-25–26; 1-ER-31–34. Those remarks strongly suggest that the district court judge culled her personal views about fentanyl from media stories and allegations made in another case on the court's

docket at the time. *See* OB-12–17. As explained in his opening brief, the judge's reliance on information that was not made a part of the record at sentencing and personal notions about fentanyl is reversible error, in no small part because such mistaken notions led the court to unreasonably and inexplicably treat a mitigating factor—the way the patches were still sealed and clearly labeled—as an aggravating one. *See* OB-32–35.

The government does not devote much of its answering brief to defending the district court's notions about fentanyl. Instead, it claims that Grant failed to preserve his claim, that this Court should review the upward variance for plain error, and that it should affirm because the record provides *other* reasons that could support the upward variance. *See* AB-20–26. The government missteps at the outset, because Grant did not forfeit his objection to the upward variance and, thus, plain error review is not in play here.

The government's pitch for plain error review also overlooks *Holguin-Hernandez v. United States*, 140 S.Ct. 762 (2020). The district court in that case sentenced the defendant to 12 months of imprisonment, after the defendant had argued for something less. *See Holguin-Hernandez*, 140 S.Ct. at 764–765. On appeal, the defendant argued the 12-month sentence was

unreasonable. *See id.* at 765. At the government's behest, the Fifth Circuit held the defendant had forfeited his claim that the 12-month sentence was unreasonable and that he had not shown any plain error under a plain error standard of review. *See id.* at 765; *see also United States v. Holguin-Hernandez*, 746 Fed. App'x 403 (CA5) (Dec. 27, 2018) (unpublished); *United States v. Holguin-Hernandez*, No. 18-50386 (CA5), Appellee's Brief for the United States of America, 2018 WL 5730104 at *4 (Aug. 8, 2018).

In the Supreme Court, the government changed its position on the plain-error issue, and the Supreme Court held that the defendant adequately preserved his unreasonable sentence claim by simply informing the district court of the different action he wanted the court to take:

> By "informing the court" of the "action" he "wishes the court to take," Fed. Rule Crim. Proc. 51(b), a party ordinarily brings to the court's attention his objection to a contrary decision. And that is certainly true in cases such as this one, where a criminal defendant advocates for a sentence shorter than the one ultimately imposed. Judges, having in mind their overarching duty under [18 U.S.C.] § 3553(a), would ordinarily understand that a defendant in that circumstance was making the argument (to put it in statutory terms) that the shorter sentence would be sufficient and a longer sentence greater than necessary to achieve the purposes of sentencing. Nothing more is needed to preserve the claim that a longer sentence is unreasonable.
>
> We do not agree with the Court of Appeals' suggestion that defendants are required to refer to the "reasonableness" of a sentence to preserve such claims for appeal. The rulemakers, in promulgating Rule 51, intended to dispense with the need for

> formal exceptions to a trial court's rulings. They chose not to require an objecting party to use any particular language or even to wait until the court issues its ruling. The question is simply whether the claimed error was brought to the court's attention. Here, it was.
>
> The Court of Appeals properly noted that, to win on appeal, a defendant making such a claim must show that the trial court's decision was not reasonable. But that fact is not relevant to the issue here. Our decisions make plain that reasonableness is the label we have given to the familiar abuse-of-discretion standard that applies to *appellate* review of the trial court's sentencing decision. The substantive standard that Congress has prescribed for *trial* courts is the parsimony principle enshrined in § 3553(a). A defendant who, by advocating for a particular sentence, communicates to the trial judge his view that a longer sentence is greater than necessary has thereby informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence. He need not also refer to the standard of review.

Holguin-Hernandez, 140 S.Ct. at 766–767 (citation sentences and most quotation marks silently omitted).

Grant informed the district court that he objected to a 72-month sentence by asking for something less. *See* 1-ER-28–38; *United States v. Grant*, No. 1:22-cr-00069-LEK (D. Haw.), Doc. 41, PageID.194 (Sept. 21, 2023) (defendant's sentencing memorandum) (informing the Court that it should "sentence him to a period of incarceration of no more than 30 months"). By "advocating for [that] particular sentence," he communicated to the district court "that a longer sentence is greater than necessary," and

he "thereby informed the court of the legal error at issue in his appellate challenge to the substantive reasonableness" of the 72-month sentence that the district court imposed. *Holguin-Hernandez*, 140 S.Ct. at 766–767. "Nothing more [was] needed" for Grant to preserve his unreasonable sentence claim.

As noted, the government does not defend the idea that the district court's personal views about fentanyl may inform the district court's sentencing decision. Instead, the government pivots away from the remarks that reflect the court was relying on sensationalized media accounts and its own unreliable personal views about fentanyl, turning instead to various things in the record that the government believes could support a 72-month sentence. But the issue here is whether due process was violated because the district court's sentencing decision was tainted by the judge's consideration of unreliable information that was not a part of the sentencing record. That taint is not dissipated simply because something else, something the district court's remarks didn't emphasize, might (theoretically) be weighed differently than the sentencing court weighed it. If the sentence is tainted by consideration of unreliable information that was

not a part of the sentencing record, then due process requires resentencing. *See* OB-32–35.

III. The government fails to explain how the district court's decision to give Grant's probationary status twice the aggravating weight attributed to defendants in other contemporaneous cases was not arbitrary.

Another issue that Grant pursues on appeal is whether the district court treated him arbitrarily by not giving him the benefit of an anticipated amendment to the "status-point" guideline. *See* OB-29–31. The anticipated amendment would have lowered his criminal history category by giving him only 1 criminal history point, instead of 2, for distributing the fentanyl and selling a gun while on probation in an unrelated state criminal case. *See* OB-29–30; USSG §4A1.1(d) (2021); USSG §4A1.1(e) (2023). At sentencing, the district court acknowledged that its practice was to give defendants the benefit of that anticipated amendment, even though the amendment was not scheduled to take effect until after those defendants were sentenced. 1-ER-23.

Once again, the government largely repeats the reasons that the district court and probation officer gave for not giving Grant the benefit of the anticipated amendment. *See* AB-16–19. But those reasons, as Grant's OB points out, do not explain why Grant's *status* should be treated differently,

and carry more aggravating weight, than the similar status of other defendants at the time they committed their federal offenses. This disconnect makes the district court's choice to treat Grant differently an arbitrary one. None of the court's reasons for imposing its sentence explain why Grant's status should be treated differently—and given twice the weight—than the similar status of others.

IV. The government's attempt to smear Grant should not distract this Court from the legal issues his appeal presents.

Much of the government's brief is devoted to trolling the record as much as possible for ways to portray Grant as irredeemable, undeserving of empathy or sympathy, and unworthy of anything less than the 72-month sentence he is serving. Such emotionally-pitched rhetoric should not sway this Court. "[A] just society is not judged by how it treats its best citizens, but instead, how it treats its worst citizens." *Callins v. State*, 500 P.2d 1333, 1337 (Ok. Ct. Crim. App. 1972) (Brett, J., concurring and dissenting). Placing Grant among the worst, as the government wrongly does, is no reason to diminish the attention given to the legal issues he raises on appeal. That the government emphasizes all the reasons he is unworthy of mercy should not spur less engagement with the legal issues his appeal presents.

This Court, that is, should not repeat the mistake that the district court made. Unreliable information of the kind repeated in the government's answering brief—of the kind, that is, that the district court most likely heard in media accounts of fentanyl's ills, or read in an unsubstantiated and vituperative letter submitted to the court, or inferred from the details of Grant's criminal history—does not justify Grant's 72-month sentence. Nor do the emotionally-pitched portions of the government's answering brief have any bearing on the legal issues this appeal presents.

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 April 26, 2024.

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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 2,278 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.

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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 April 26, 2024 .