

**United States Court of Appeals**  
**FOR THE EIGHTH CIRCUIT**

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No. 11-1137

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United States of America,

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Appellee,

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v.

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Scott Homer McKinley,

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Appellant.

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[UNPUBLISHED]

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Submitted: June 13, 2011

Filed: August 1, 2011

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Before COLLOTON, CLEVENGER,<sup>1</sup> and BENTON, Circuit Judges.

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PER CURIAM.

Defendant Scott Homer McKinley appeals his sentence following conviction on a guilty plea of conspiracy to distribute 100 grams or more of heroin and oxycodone. See 21 U.S.C. §§ 841(a)(1),(b)(1)(B), 846. Although the district court's<sup>2</sup>

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<sup>1</sup>The Honorable Raymond C. Clevenger, III, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

<sup>2</sup>The Honorable Ann D. Montgomery, District Judge for the District of Minnesota.

sentence of 188 months imprisonment was below the range set forth in the sentencing guidelines, Mr. McKinley argues that the record did not support any sentence above the statutory minimum of 120 months. We disagree, and so affirm.

In his appeal brief, Mr. McKinley describes his personal history of drug addiction, illness, and homelessness. While we are sympathetic to Mr. McKinley's difficulties, the record indicates that the district court was aware of them and, we presume, took them into account in sentencing. United States v. Miles, 499 F.3d 906, 909 (8th Cir. 2007). We note particularly that Mr. McKinley's sentence of 188 months is a substantial downward variance from the range called for in the sentencing guidelines, which was 262 to 327 months. It is well established that a sentence within the advisory guidelines would have been presumptively reasonable on appeal. Rita v. United States, 551 U.S. 338, 350-51 (2007); United States v. Frausto, 636 F.3d 992, 997 (8th Cir. 2011).

The lengthy sentence recommended by the guidelines was, as the district court noted, partly due to Mr. McKinley's criminal history. Nevertheless, the district court determined that a shorter sentence was justified. Given that the longer sentence called for by the guidelines would have been presumptively reasonable, and Mr. McKinley received a lesser sentence than that, we decline Mr. McKinley's request to find that an even shorter sentence was required. United States v. Flying By, 511 F.3d 773, 778 (8th Cir. 2007). We see no basis for finding, as Mr. McKinley urges, that no sentence but the statutory minimum could possibly be applied here. We therefore affirm the district court's judgment.

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