APPENDIX

TABLE OF APPENDICES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
v.	)	No. 13 CR 772-2
	)	
Joseph Faulkner	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

This multi-defendant case charges putative members of the Insane Imperial Vice Lords street gang with a range of unlawful conduct including racketeering, armed violence, and drug distribution. Defendant Joseph Faulkner, allegedly a high-ranking member of the gang, is charged in Counts I (racketeering conspiracy), II (conspiracy to commit assault with a dangerous weapon), III (use of a firearm during a crime of violence), and IX (conspiracy to distribute heroin, cocaine, and marijuana). Faulkner previously pled guilty, in Case No. 11 CR 120 (N.D. Ill.), to a two-count superseding information charging the use of a communication facility in facilitation of a drug-related felony.

On September 8, 2014, Faulkner filed a *pro se* motion to dismiss the indictment in this case, arguing that because his sentence in the earlier case reflected enhancements for the same drug- and firearm-related conduct that is at the heart of the

current charges against him, these charges amount to an unconstitutional attempt to punish him twice for the same criminal conduct. The government responded that Faulkner's argument is barred by *Witte v. U.S.* 515 U.S. 389 (1995), and Faulkner filed a counseled reply—two, actually[1]—in which he argues that *Witte* notwithstanding, double jeopardy principles compel dismissal of the instant indictment. For the following reasons, I deny Faulkner's motion.

I.

Faulkner's plea agreement in his 2011 case stated that on December 27, 2007, and February 28, 2008, Faulkner had telephone conversations with an individual who was, unbeknownst to Faulkner, cooperating with the government. During these conversations, Faulkner agreed to meet the individual to conduct drug transactions. The transactions were later completed as arranged. At sentencing, the parties and the court agreed that the correct guidelines sentencing range was 57-71 months, but the government sought and received an above guidelines sentence

[1] The briefing schedule entered on defendant's motion provided that any reply by defendant was to be filed by October 2, 2014. Faulkner's counsel did, indeed, file a reply on that date, then filed a second, unauthorized "additional" reply on October 6, 2014 (the day before ruling was to issue). Although the latter document was captioned "Defendant's Motion to File Additional Reply Combined With His Additional Reply in Support of Defendant's Motion to Dismiss Based Upon Former Jeopardy," it was neither filed as a motion on the docket nor noticed for hearing as L.R. 5.3 requires of all motions.

on the ground that § 3552(a) factors supported such an enhancement. Specifically, the government pointed to Faulkner's previous convictions for armed violence and fleeing from the police with a firearm, as well as Faulkner's own admission to extensive heroin trafficking over a period of roughly fifteen years. The court concluded that an above-guidelines sentence was warranted because Faulkner's "criminal history is not accurately reflective of the person that he actually was, the level of drug dealing that he was engaged in, and the serious impact that it has on the community." The district court also noted that the characteristically violent nature of drug distribution "is reflected in some of the past history of the defendant."

II.

The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. It "affords a defendant three basic protections," prohibiting: 1) a second prosecution for the same offense after an acquittal, 2) a second prosecution for the same offense after conviction, and 3) multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498 (1984). In *Witte v. U.S.*, 515 U.S. 389 (1995), the Court held that prosecution for conduct that was

previously the basis for a sentencing enhancement in a separate case did not violate the Double Jeopardy Clause.

In *Witte*, the defendant pled guilty to a charge of attempting to possess marijuana with the intent to distribute. *Id.* at 393. At sentencing, the court considered evidence that the defendant was also involved in cocaine transactions and enhanced his sentence based on that conduct. *Id.* at 393-94. Defendant argued that his later prosecution for the cocaine offenses violated the Double Jeopardy Clause.

The Court rejected Witte's argument, holding that "the use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause." *Witte*, 515 U.S. at 399 (citing *Williams v. Oklahoma*, 358 U.S. 576 (1959)). The Court reiterated its explicit rejection, in *Williams*, of "the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime." *Id.* at 389. *See also Watts*, 519 U.S. at 154 ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction") (*per curiam*) (citing *Witte*, 515 U.S. at 402-03).

Turning to the present case, I note at the outset that as Faulkner acknowledges, he bears the burden of establishing, *prima facie*, that both prosecutions are for the same offense, i.e., that the conduct used to enhance his sentencing in the 2011 case is the same as the conduct charged in the indictment in this case. *See United States v. Doyle*, 121 F.3d 1078, 1089 (7th Cir. 1997). In this connection, while the government acknowledges an "overlap" between the conduct considered at sentencing and the conduct charged in Counts I and IX, Faulkner points to no evidence that the specific conduct alleged in Counts II and III, which relate to violent conduct allegedly committed on January 15, 2010, was considered by Judge Kendall at his earlier sentencing. Faulkner argues that Judge Kendall "made frequent references to the use of firearms," and to "Mr. Faulkner's regular use of guns during gang activity and numerous acts of armed violence." But general statements such as these do not, without more, establish that she considered the specific conduct alleged in Counts II and III. I need not linger on this issue, however, because even assuming that Faulkner had made a prima facie showing that all four counts in the instant case were considered at his previous sentencing, his double jeopardy argument runs headlong into *Witte*.

Tacitly conceding that *Witte*, on its face, bars his double jeopardy claim, Faulkner attacks the Court's rationale as

"befuddling" and insists that the case is "antiquated, as subsequent Supreme Court Decisions have altered sentencing perceptions." But while the cases Faulkner cites—*Apprendi v. New Jersey*, 530 U.S. 446 (2000), *U.S. v. Booker*, 543 U.S. 220 (2005), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (overruling *Harris v. United States*, 536 U.S. 545 (2002))—have unquestionably cabined the discretion of sentencing judges to impose sentences outside the range authorized by a jury verdict, none of these cases overrules the principle articulated in *Witte* and *Watts*. Indeed, in *U.S. v. Waltower*, 643 F.3d 572 (7th Cir. 2011), the Seventh Circuit explained at length why *Watts* remains good law in the wake of *Apprendi* and *Booker*. *Id.* at 575-578 (observing that *Watts* has not been "overturned by the Supreme Court's line of cases beginning with *Apprendi*" and explaining that, to the contrary, "*Booker* itself suggests that *Watts* is still good law.").

Nor does Faulkner's argument gain any traction from his citation to *United States v. Gurley*, 860 F. Supp. 2d 95 (D. Mass. 2012), which explicitly addressed "the exact issue" that was not before the Court in *Witte* and *Watts*, and is not before me in this case, namely, "whether the jury verdict authorized" the sentencing enhancement at issue. *Id.* at 115.

Finally, for the sake of completeness, I briefly address the four-sentence argument Faulkner raises in his unauthorized,

"additional reply," which is that the Double Jeopardy Clause bars his prosecution because the government agreed to dismiss the original indictment in his 2011 case with prejudice at the time of sentencing. In this connection, Faulkner offers an unadorned citation to the Seventh Circuit's observation, in *United States v. Davis*, 2014 WL 4402121 (7th Cir. 2014) that dismissal with prejudice means the government is "surrendering the ability to reindict the defendant[]." *Davis*, however, was about the finality of a lower court decision for the purpose of appeal, and had nothing at all to do with application of the Double Jeopardy Clause. Faulkner's belated, barebones contention that *Davis* compels dismissal of the indictment in this case is unavailing.

III.

For the foregoing reasons, defendant Faulkner's motion to dismiss the indictment on grounds of double jeopardy is denied.

ENTER ORDER:

Elaine E. Bucklo

Elaine E. Bucklo
United States District Judge

Dated: October 9, 2014

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

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Teste:

Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

FINAL JUDGMENT

July 15, 2015

Before: DIANE P. WOOD, Chief Judge
ILANA DIAMOND ROVNER, Circuit Judge
THERESA L. SPRINGMANN, District Court Judge*

No. 14-3332	UNITED STATES OF AMERICA, Plaintiff - Appellee v. JOSEPH FAULKNER, also known as Little Joe, Defendant - Appellant
Originating Case Information:	
District Court No: 1:13-cr-00772-2 Northern District of Illinois, Eastern Division District Judge Elaine E. Bucklo	

The judgment of the District Court is **AFFIRMED** in accordance with the decision of this court entered on this date.

*Hon. Theresa L. Springmann of the Northern District of Indiana, sitting by designation.

form name: **c7_FinalJudgment**(form ID: **132**)

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-3332

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH FAULKNER,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 13 CR 772-2 — **Elaine E. Bucklo**, *Judge.*

ARGUED APRIL 13, 2015 — DECIDED JULY 15, 2015

Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and SPRINGMANN, *District Judge*.*

WOOD, *Chief Judge*. Joseph Faulkner brings this appeal because he believes that his rights under the Double Jeopardy Clause of the Fifth Amendment have been violated. In 2011 Faulkner pleaded guilty to two counts of the use of a

* Hon. Theresa L. Springmann of the Northern District of Indiana, sitting by designation.

communication facility in facilitation of a drug-related felony; he was sentenced to a 91-month term of imprisonment on those charges. Two years later, he—along with several other members of the Imperial Insane Vice Lords gang—was indicted on a variety of conspiracy, firearms, and drug charges. Faulkner moved to dismiss the new indictment because, he argued, the judge enhanced his 2011 sentence based on the same conduct that the 2013 indictment covered. Worse, he asserted, the charges included in the 2011 indictment (which were dropped pursuant to a plea agreement) are the same as those in the current indictment. He thus argues that he is being "twice put in jeopardy" on the "same offence," as the Constitution puts it. If that were the case, he would be entitled to have the 2013 indictment dismissed. But we conclude that it is not, and so we affirm the district court's denial of his motion to dismiss.

I

In 2011 Faulkner was indicted on four counts of heroin distribution in violation of 21 U.S.C. § 841(a)(1). He later agreed to plead guilty to two counts of the use of a communication facility in facilitation of a drug-related felony, in violation of 21 U.S.C. § 843(b). Each count carried a maximum term of imprisonment of four years. See 21 U.S.C. § 843(d)(1). In exchange for the guilty plea, the government agreed to move to dismiss the original indictment. At sentencing and upon the government's motion, the court granted that motion and dismissed the original heroin distribution charges.

After an initial dispute, the government and Faulkner agreed that the applicable advisory sentencing range under the U.S. Sentencing Guidelines was 57 to 71 months for the

two communication facility charges. The government nonetheless argued for an above-guidelines sentence, in part on the ground that Faulkner's criminal history category did not accurately reflect his record. See 18 U.S.C. § 3553(a)(1) (identifying "the history and characteristics of the defendant" as a sentencing factor). In support of that position, the government relied on Faulkner's admission in the plea agreement that he had engaged in heroin trafficking as part of a drug gang for many years. It asserted that the court should take these activities into account in assessing Faulkner's history and characteristics.

The district judge agreed and imposed an above-guidelines sentence of 91 months. She noted that Faulkner's official criminal history did not fully represent "the level of drug dealing that he was facilitating ... [which] was a very high level." The judge also emphasized Faulkner's violent past: "[W]hen anyone is distributing drugs, through the street gangs, there also is incumbent with that violence. And the violence is reflected in some of the past history of the defendant." She highlighted Faulkner's use of firearms, explaining that "handguns were used regularly in the course of this distribution."

In 2013, Faulkner and other members of the Imperial Insane Vice Lords were before the court on new charges. This time the indictment accused Faulkner of engaging in a racketeering conspiracy in violation of 18 U.S.C. § 1962 (Count I); conspiring to commit assault with a dangerous weapon as part of racketeering activity in violation of 18 U.S.C. § 1959(a)(6) (Count II); carrying, brandishing, and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) (Count III); and conspir-

ing to distribute heroin, cocaine, and marijuana in violation of 21 U.S.C. § 846 (Count IX). Counts II and III specifically referred to an incident that occurred on January 15, 2010.

Faulkner moved to dismiss the indictment on double jeopardy grounds. He principally claimed that he had already been punished for the conduct described in the 2013 indictment, because the judge in his 2011 case had taken that conduct into account when sentencing him on the communication facility charges. The district court denied the motion, finding that the claim was precluded by *Witte v. United States*, 515 U.S. 389 (1995). Faulkner then timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine, which allows a criminal defendant immediately to appeal a denial of a motion to dismiss an indictment on double jeopardy grounds. See *Abney v. United States*, 431 U.S. 651, 662 (1977).

II

We review *de novo* a district court's denial of a motion to dismiss an indictment based on double jeopardy. See *United States v. Doyle*, 121 F.3d 1078, 1083 (7th Cir. 1997). The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Clause "applies both to successive punishments and to successive prosecutions for the same criminal offense." *United States v. Dixon*, 509 U.S. 688, 696 (1993); see also *Ohio v. Johnson*, 467 U.S. 493, 498 (1984). It protects against both actual punishment and the attempt to convict and punish a defendant twice for the same crime. See *Price v. Georgia*, 398 U.S. 323, 326 (1970).

In the district court, Faulkner's principal claim was that the government was attempting to punish him twice for the same conduct. On appeal, it appears that he is also arguing that the indictment subjects him to multiple prosecutions for the same offense. For the sake of completeness, we will address both claims.

A

We begin with Faulkner's multiple punishment argument: that the indictment at issue in this case is an attempt to punish him for conduct for which he has already been punished. Faulkner argues that comments made by the judge at his 2011 sentencing, including references to drugs, gang activity, and violence, demonstrate that he was punished in that proceeding for the same conduct charged in his current indictment.

Faulkner overstates the overlap between the two cases. Counts II and III of the 2013 indictment relate to a specific incident of violent conduct that took place on January 15, 2010, but the judge made no reference to this particular episode at the sentencing hearing. Nevertheless, even if the conduct were identical, Faulkner's claim suffers from a more fundamental problem. The Supreme Court has held that the "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause." *Witte*, 515 U.S. at 399. Thus, for purposes of the Double Jeopardy Clause, any use the judge made of evidence of Faulkner's involvement with controlled substances, gangs, and violence did not constitute "punishment" for that

conduct, and thus a later conviction on the basis of that conduct does not violate the Clause.

Faulkner argues that *Witte* should not control here, but he has not explained why we, a lower court, are authorized to disregard binding precedent from the Supreme Court. Perhaps recognizing the untenability of that position, he suggests that *Witte* is distinguishable from our case. But in fact, the pertinent circumstances are quite similar. When sentencing Witte on a marijuana-related charge, the judge took into consideration uncharged conduct involving cocaine. *Id.* at 394. When Witte was later charged with importing cocaine (the same cocaine that had been considered in the previous proceedings), he moved to dismiss the indictment on double jeopardy grounds. *Id.* at 394–95. The Supreme Court upheld the denial of Witte's motion, concluding that the consideration of uncharged conduct in the context of sentencing is not "punishment" under the Double Jeopardy Clause. *Id.* at 399. Just as in *Witte*, Faulkner's involvement with drugs, gangs, and firearms was uncharged conduct considered by the judge in the sentencing context. Therefore, just as in *Witte*, this consideration does not constitute "punishment" for purposes of double jeopardy.

Faulkner also suggests that *Witte* is no longer good law. He argues that *Witte*'s holding relied critically on the mandatory character of the Sentencing Guidelines, and thus, with its analytical underpinning destroyed by *United States v. Booker*, 543 U.S. 220, 245 (2005), it has lost all force. That argument, however, must be directed to the Supreme Court. All we can do is confirm that Faulkner has preserved it.

Even if Faulkner is making the more modest point that *Witte* applies only if safeguards analogous to the provisions

in the Guidelines exist, we would reject it. *Witte*'s musings about the guidelines were not in the section explaining why there was no double jeopardy problem with Witte's prosecution. See *Witte*, 515 U.S. at 404 (explaining that Witte's argument about the guidelines was "not a claim that the instant cocaine prosecution violates principles of double jeopardy"). The Court's discussion of double jeopardy referred to the long, pre-guidelines history of judges taking other relevant conduct into consideration when determining punishment. It noted that "[r]egardless of whether particular conduct is taken into account by rule or as an act of discretion, the defendant is still being punished only for the offense of conviction," and it confirmed that "[a] defendant has not been 'punished' any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account." *Id.* at 401–02.

Another reason to doubt that *Witte* has been undermined comes from the Court's reasoning in *Peugh v. United States*, 133 S. Ct. 2072 (2013). *Peugh* demonstrates that the post-*Booker* advisory guidelines still have considerable force. There, the Court singled out the anchoring nature of the guidelines when it found a violation of the Ex Post Facto Clause where the defendant was sentenced under a stricter version of the guidelines than the version in effect at the time of the offense. See *id.* at 2087. Finally, the Court has given no indication that it has retreated from *Witte*, and our sister circuits continue to rely on it. See, *e.g.*, *United States v. Lawrence*, 735 F.3d 385, 427 (6th Cir. 2013); *United States v. Moore*, 670 F.3d 222, 236 (2d Cir. 2012); *United States v. Lomeli*, 596 F.3d 496, 502 (8th Cir. 2010); see also *United States v. An-*

drews, 447 F.3d 806, 810 (10th Cir. 2006) (discussing *Witte*'s analysis of recidivism statutes).

Faulkner next argues that recent Supreme Court decisions requiring juries to find the factual predicates for sentencing enhancements have implicitly overruled *Witte*. He is mistaken. The cases to which he points, *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), require that juries make factual findings that increase either the minimum or maximum length of a statutory sentencing range. Faulkner's sentence, though above-guidelines, still fell within the normal statutory range; thus, these cases are inapplicable. Moreover, neither one called *Witte*'s validity into question; the *Witte* Court explicitly noted that its holding regarding the consideration of uncharged conduct applied only where the original sentence was "within the authorized statutory limits." *Witte*, 515 U.S. at 399.

Witte has not been implicitly overruled by any of the cases Faulkner has mentioned. A straightforward application of *Witte* leads to the conclusion that his successive punishment claim fails, because the consideration of uncharged conduct in the sentencing context is not "punishment" within the meaning of the Double Jeopardy Clause.

B

Next, we address Faulkner's multiple prosecution claim: that the crimes for which he was either originally indicted or to which he eventually pleaded guilty in 2011 are the same as those with which he is now charged. At times Faulkner presents this contention as a variation on his multiple punishment claim, but it is best characterized as an argument against multiple prosecutions for the same offense. Regard-

less of the exact parsing of this allegation, it fails for one basic reason: the offenses with which Faulkner was originally charged (and those to which he pleaded guilty) are *not* the same as those charged under the current indictment.

To succeed on this type of double jeopardy claim, Faulkner must establish a *prima facie* showing that both prosecutions were for identical offenses; if he does, the burden shifts to the government to show, by a preponderance of the evidence, that the indictments (or informations) charged different crimes. See *Doyle*, 121 F.3d at 1089. To determine whether the indictments charged the same offense, the court generally looks to the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932): "whether each offense contains an element not contained in the other." *Doyle*, 121 F.3d at 1089.

We first consider the heroin distribution charges, which were ultimately dropped in exchange for Faulkner's guilty plea. The government argues that jeopardy does not attach to charges dismissed with prejudice pursuant to a plea agreement. This is an unsettled proposition. Compare *United States v. Dionisio*, 503 F.3d 78, 79 (2d Cir. 2007) (jeopardy does not attach to a dismissal in these circumstances, when there was no "adjudication of elements of the offense charged, in a way that reflected a genuine risk of conviction"), with *United States v. Mintz*, 16 F.3d 1101, 1106 (10th Cir. 1994) (affirming dismissal based on double jeopardy because defendants had been previously indicted for the same conspiracy in a charge that had been dismissed with prejudice based on a plea agreement). We need not wade into this debate because, even if we assume that jeopardy did attach, Faulkner has not shown that the newly charged offenses are identical to the heroin distribution counts.

Counts II and III (conspiracy to commit assault with a dangerous weapon and using a firearm during a crime of violence) are clearly distinct from heroin distribution. Even the more factually similar charges, Counts I and IX (racketeering conspiracy and conspiracy to distribute controlled substances), survive the *Blockburger* test. Conspiracy involves the element of an agreement, which is not an element of a substantive drug distribution offense; on the other side, the substantive offense requires completion of the crime, which is not an element of conspiracy. See *Pinkerton v. United States*, 328 U.S. 640, 643 (1946) ("It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."); CHARLES DOYLE, CONG. RESEARCH SERV., R41222, FEDERAL CONSPIRACY LAW: A SKETCH 7 (2010) (concluding that there are no double jeopardy concerns with the successive prosecution of a "conspiracy and its attendant substantive offense").

The same analysis applies to the offense to which Faulkner eventually pleaded guilty: the use of a communication facility to facilitate a drug-related felony. This offense has little to do with Faulkner's current firearms-related charges. The racketeering and distribution conspiracy charges are distinct from this substantive offense for the reasons explained above. Thus, we reject Faulkner's multiple prosecution claim because none of his previously charged offenses are identical to the offenses charged in the current indictment.

III

Faulkner's multiple punishment claim fails because it is squarely foreclosed by *Witte*. His effort to show that he is the

victim of multiple prosecutions for the same offense falls short because he has not shown that the offenses with which he was charged and to which he pleaded guilty in 2011 are identical to those alleged in his current indictment. We therefore AFFIRM the district court's denial of Faulkner's motion to dismiss based on the Double Jeopardy Clause.

DEFENDANT: JOSEPH FAULKNER
CASE NUMBER: 13 CR 772-2

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA

v.

JOSEPH FAULKNER

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 772-2

USM Number: 43059-24

Defendant's Attorney

Date of Original Judgment: 6/23/2016
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☒ was found guilty on count(s) 1s, 2s, 3, 9s after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C.§1962 (d)	Racketeering Conspiracy	9/2013	1s
18 U.S.C.§1959(a)(6)	Conspiracy to Commit Assault With a Dangerous Weapon in Aid of Racketeting	9/2013	2s
18 U.S.C.§924(c)(1)(A)(iii)	Discharge of a Firearm During and in Relationto a Crime of Violence	9/2013	3s
21 U.S.C.§846	Conspiracy to Possess With Intent to Distribute and Distributio of Controlled Substances	9/2013	9s
21 U.S.C.§841(b)(1)(A)			

The defendant is sentenced as provided in pages **2** through 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. **Other than the amendments or modifications stated in this judgment, the judgment previously entered shall stand. (See attachments)**

- ☐ The defendant has been found not guilty on count(s)
- ☒ Count(s) 1, 2, 3, and 9 dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2018 JUN 20 AM 11:41

June 20, 2018
Date of Imposition of Judgment

Signature of Judge

Hon. Elaine E. Bucklo, U.S. District Judge
Name and Title of Judge

DATE: 6/20/2018

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
JOSEPH FAULKNER

JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 772 - 2

USM Number: 43059-424

STEVEN GREENBERG
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) 1s,2s,3,9s after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §1962(d)	Racketeering Conspiracy	9/2013	1s
18 U.S.C. §1959(a)(6)	Conspiracy to Commit Assault With a Dangerous Weapon in Aid of Racketeering	9/2013	2s
18 U.S.C. §924(c)(1)(A)(iii)	Discharge of a Firearm During and in Relation to a Crime of Violence	9/2013	3s
21 U.S.C. §846 21 U.S.C. §841(b)(1)(A)	Conspiracy to Possess With Intent to Distribute and Distribution of Controlled Substances	9/2013	9s

The defendant is sentenced as provided in pages 2 through of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 1,2,3,and 9 of the Original Indictment dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

23 JUNE 2016
Date of Imposition of Judgment

Signature of Judge

ELAINE E. BUCKLO
U.S. District Judge
Name and Title of Judge

6/24/16
Date

DEFENDANT: JOSEPH FAULKNER
CASE NUMBER: 13 CR 772 - 2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: THIRTY (30) YEARS ON EACH OF Counts 1s and 9s to run concurrently with each other and the sentence imposed in 11 CR 210; THIRTY-SIX (36) MONTHS on Count 2s to run concurrently with Counts 1s and 9s and the sentence imposed in 11 CR 210; and ONE HUNDRED TWENTY (120) MONTHS on Count 3s to run CONSECUTIVELY to the sentencing imposed on Counts 1s,2s,9s and the sentence imposed in 11 CR 210. Defendant shall be given credit for time served on the sentence imposed on 11 CR 210.

☒ The court makes the following recommendations to the Bureau of Prisons: Pekin, IL

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ☐ before 2:00 pm on
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows: _____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSEPH FAULKNER
CASE NUMBER: 13 CR 772 - 2

MANDATORY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3583(d)

Upon release from imprisonment, you shall be on supervised release for a term of:
FIVE (5) YEARS on each of Counts 1s,3s,9s to run concurrently with each other and THREE (3) YEARS on Count 2s to run concurrently with the term of supervised release imposed on Counts 1s,3s, and 9s..

You must report to the probation office in the district to which you are released within 72 hours of release from the custody of the Bureau of Prisons. The court imposes those conditions identified by checkmarks below:

During the period of supervised release:

☒ (1) you shall not commit another Federal, State, or local crime.
☒ (2) you shall not unlawfully possess a controlled substance.
☐ (3) you shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, if an approved program is readily available within a 50-mile radius of your legal residence. [Use for a first conviction of a domestic violence crime, as defined in **§ 3561(b)**.]
☐ (4) you shall register and comply with all requirements of the Sex Offender Registration and Notification Act (**42 U.S.C. § 16913**).
☒ (5) you shall cooperate in the collection of a DNA sample if the collection of such a sample is required by law.
☒ (6) you shall refrain from any unlawful use of a controlled substance AND submit to one drug test within 15 days of release on supervised release and at least two periodic tests thereafter, up to 104 periodic tests for use of a controlled substance during each year of supervised release. [This mandatory condition may be ameliorated or suspended by the court for any defendant if reliable sentencing information indicates a low risk of future substance abuse by the defendant.]

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3563(b) AND 18 U.S.C § 3583(d)

Discretionary Conditions — The court orders that you abide by the following conditions during the term of supervised release because such conditions are reasonably related to the factors set forth in § 3553(a)(1) and (a)(2)(B), (C), and (D); such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in § 3553 (a)(2) (B), (C), and (D); and such conditions are consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to **28 U.S.C. 994a**.
The court imposes those conditions identified by checkmarks below:

During the period of supervised release:

☒ (1) you shall provide financial support to any dependents if financially able.
☐ (2) you shall make restitution to a victim of the offense under § 3556 (but not subject to the limitation of § 3663(a) or § 3663A(c)(1)(A)).
☐ (3) you shall give to the victims of the offense notice pursuant to the provisions of § 3555, as follows:
☒ (4) you shall seek, and work conscientiously at, lawful employment or pursue conscientiously a course of study or vocational training that will equip you for employment.
☐ (5) you shall refrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances; (if checked yes, please indicate restriction(s)) .
☐ (6) you shall refrain from knowingly meeting or communicating with any person whom you know to be engaged, or planning to be engaged, in criminal activity and from:
  ☐ visiting the following type of places: .
  ☐ knowingly meeting or communicating with the following persons: .
☐ (7) you shall refrain from ☐ any or ☒ excessive use of alcohol (defined as ☐ having a blood alcohol concentration greater than 0.08; or ☐), or any use of a narcotic drug or other controlled substance, as defined in § 102 of the Controlled Substances Act (21 U.S.C. § 802), without a prescription by a licensed medical practitioner.
☒ (8) you shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
☒ (9) ☒ you shall participate, at the direction of a probation officer, in a substance abuse treatment program, which may include urine testing up to a maximum of 104 tests per year.
  ☒ you shall participate, at the direction of a probation officer, in a mental health treatment program, which may include the use of prescription medications.
  ☐ you shall participate, at the direction of a probation officer, in medical care; (if checked yes, please specify: .)
☐ (10) (intermittent confinement): you shall remain in the custody of the Bureau of Prisons during nights, weekends, or other

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intervals of time, totaling [redacted] [no more than the lesser of one year or the term of imprisonment authorized for the offense], during the first year of the term of supervised release (provided, however, that a condition set forth in § **3563(b)(10)** shall be imposed only for a violation of a condition of supervised release in accordance with **§ 3583(e)(2)** and only when facilities are available) for the following period [redacted].

☐ (11) (community confinement): you shall reside at, or participate in the program of a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of supervised release, for a period of [redacted] months.

☐ (12) you shall work in community service for [redacted] hours as directed by a probation officer.

☐ (13) you shall reside in the following place or area: [redacted], or refrain from residing in a specified place or area: [redacted].

☒ (14) you shall remain within the jurisdiction where you are being supervised, unless granted permission to leave by the court or a probation officer.

☒ (15) you shall report to a probation officer as directed by the court or a probation officer.

☒ (16) ☒ you shall permit a probation officer to visit you ☒ at any reasonable time or ☐ as specified:
☒ at home ☒ at work ☐ at school ☐ at a community service location
☒ other reasonable location specified by a probation officer
☒ you shall permit confiscation of any contraband observed in plain view of the probation officer.

☒ (17) you shall notify a probation officer promptly, within 72 hours, of any change in residence, employer, or workplace and, absent constitutional or other legal privilege, answer inquiries by a probation officer.

☒ (18) you shall notify a probation officer promptly, within 72 hours, if arrested or questioned by a law enforcement officer.

☐ (19) (home confinement): you shall remain at your place of residence for a total of [redacted] months during nonworking hours. [This condition may be imposed only as an alternative to incarceration.]
☐ Compliance with this condition shall be monitored by telephonic or electronic signaling devices (the selection of which shall be determined by a probation officer). Electronic monitoring shall ordinarily be used in connection with home detention as it provides continuous monitoring of your whereabouts. Voice identification may be used in lieu of electronic monitoring to monitor home confinement and provides for random monitoring of your whereabouts. If the offender is unable to wear an electronic monitoring device due to health or medical reasons, it is recommended that home confinement with voice identification be ordered, which will provide for random checks on your whereabouts. Home detention with electronic monitoring or voice identification is not deemed appropriate and cannot be effectively administered in cases in which the offender has no bona fide residence, has a history of violent behavior, serious mental health problems, or substance abuse; has pending criminal charges elsewhere; requires frequent travel inside or outside the district; or is required to work more than 60 hours per week.
☐ You shall pay the cost of electronic monitoring or voice identification at the daily contractual rate, if you are financially able to do so.
☐ The Court waives the electronic/location monitoring component of this condition.

☐ (20) you shall comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by you for the support and maintenance of a child or of a child and the parent with whom the child is living.

☐ (21) (deportation): you shall be surrendered to a duly authorized official of the Homeland Security Department for a determination on the issue of deportability by the appropriate authority in accordance with the laws under the Immigration and Nationality Act and the established implementing regulations. If ordered deported, you shall not reenter the United States without obtaining, in advance, the express written consent of the Attorney General or the Secretary of the Department of Homeland Security.

☒ (22) you shall satisfy such other special conditions as ordered below.

☐ (23) (if required to register under the Sex Offender Registration and Notification Act) you shall submit at any time, with or without a warrant, to a search of your person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, by any law enforcement or probation officer having reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by you, and by any probation officer in the lawful discharge of the officer's supervision functions (see special conditions section).

☐ (24) Other:

SPECIAL CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C. 3563(b)(22) and 3583(d)

The court imposes those conditions identified by checkmarks below:

During the term of supervised release:

☐ (1) if you have not obtained a high school diploma or equivalent, you shall participate in a General Educational Development (GED) preparation course and seek to obtain a GED within the first year of supervision.

☒ (2) you shall participate in an approved job skill-training program at the direction of a probation officer within the first 60 days of placement on supervision.

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☐ (3) you shall, if unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or lay-off from employment, perform at least 20 hours of community service per week at the direction of the U.S. Probation Office until gainfully employed. The amount of community service shall not exceed [redacted] hours.

☐ (4) you shall not maintain employment where you have access to other individual's personal information, including, but not limited to, Social Security numbers and credit card numbers (or money) unless approved by a probation officer.

☐ (5) you shall not incur new credit charges or open additional lines of credit without the approval of a probation officer unless you are in compliance with the financial obligations imposed by this judgment.

☐ (6) you shall provide a probation officer with access to any requested financial information necessary to monitor compliance with conditions of supervised release.

☐ (7) you shall notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

☒ (8) you shall provide documentation to the IRS and pay taxes as required by law.

☐ (9) you shall participate in a sex offender treatment program. The specific program and provider will be determined by a probation officer. You shall comply with all recommended treatment which may include psychological and physiological testing. You shall maintain use of all prescribed medications.

- ☐ You shall comply with the requirements of the Computer and Internet Monitoring Program as administered by the United States Probation Office. You shall consent to the installation of computer monitoring software on all identified computers to which you have access. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. You shall not remove, tamper with, reverse engineer, or in any way circumvent the software.
- ☐ The cost of the monitoring shall be paid by you at the monthly contractual rate, if you are financially able, subject to satisfaction of other financial obligations imposed by this judgment.
- ☐ You shall not possess or use any device with access to any online computer service at any location (including place of employment) without the prior approval of a probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or email system.
- ☐ You shall not possess any device that could be used for covert photography without the prior approval of a probation officer.
- ☐ You shall not view or possess child pornography. If the treatment provider determines that exposure to other sexually stimulating material may be detrimental to the treatment process, or that additional conditions are likely to assist the treatment process, such proposed conditions shall be promptly presented to the court, for a determination, pursuant to **18 U.S.C. § 3583(e)(2),** regarding whether to enlarge or otherwise modify the conditions of supervision to include conditions consistent with the recommendations of the treatment provider.
- ☐ You shall not, without the approval of a probation officer and treatment provider, engage in activities that will put you in unsupervised private contact with any person under the age of 18, or visit locations where children regularly congregate (*e.g.*, locations specified in the Sex Offender Registration and Notification Act.)
- ☐ This condition does not apply to your family members: [redacted] [Names]
- ☐ Your employment shall be restricted to the district and division where you reside or are supervised, unless approval is granted by a probation officer. Prior to accepting any form of employmentyou shall seek the approval of a probation officer, in order to allow the probation officer the opportunity to assess the level of risk to the community you will pose if employed in a particular capacity. You shall not participate in any volunteer activity that may cause you to come into direct contact with children except under circumstances approved in advance by a probation officer and treatment provider.
- ☐ You shall provide the probation officer with copies of your telephone bills, all credit card statements/receipts, and any other financial information requested.
- ☐ You shall comply with all state and local laws pertaining to convicted sex offenders, including such laws that impose restrictions beyond those set forth in this order.

☐ (10) you shall pay any financial penalty that is imposed by this judgment that remains unpaid at the commencement of the term of supervised release. Your monthly payment schedule shall be an amount that is at least $[redacted] or [redacted]% of your net monthly income, defined as income net of reasonable expenses for basic necessities such as food, shelter, utilities, insurance, and employment-related expenses.

☒ (11) you shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

☐ (12) you shall repay the United States "buy money" in the amount of $ which you received during the commission of this offense.

☐ (13) if the probation officer determines that you pose a risk to another person (including an organization or members of the community), the probation officer may require you to tell the person about the risk, and you must comply with that instruction. Such notification could include advising the person about your record of arrests and convictions and

substance use. The probation officer may contact the person and confirm that you have told the person about the risk.

☐ (14) Other:

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CASE NUMBER: 13 CR 772 - 2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals	$400.00	$	$

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to **18 U.S.C. § 3664(i)**, all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:			

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant **to 18 U.S.C. § 3612(f)**. All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to **18 U.S.C. § 3612(g)**.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the .

☐ the interest requirement for the is modified as follows:

☐ The defendant's non-exempt assets, if any, are subject to immediate execution to satisfy any outstanding restitution or fine obligations.

* Findings for the total amount of losses are required under **Chapters 109A, 110, 110A, and 113A of Title 18** for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $400.00 due immediately.

☐ balance due not later than , or

☐ balance due in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal *(e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if Appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

March 19, 2018

Before: FRANK H. EASTERBROOK, Circuit Judge

AMY C. BARRETT, Circuit Judge

J. P. STADTMUELLER, District Court Judge*

Nos. 16-2860 & 16-3525	UNITED STATES OF AMERICA, Plaintiff - Appellee v. JOSEPH FAULKNER and OTIS SYKES, Defendants - Appellants
Originating Case Information:	
District Court Nos: 1:13-cr-00772-2 & 18 Northern District of Illinois, Eastern Division District Judge Elaine E. Bucklo	

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

*Of the Eastern District of Wisconsin, sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 16-2860 & 16-3525

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH FAULKNER and OTIS SYKES,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 13-CR-772-2 & 13-CR-772-18 — **Elaine E. Bucklo**, *Judge.*

ARGUED JANUARY 11, 2018 — DECIDED MARCH 19, 2018

Before EASTERBROOK and BARRETT, *Circuit Judges*, and STADTMUELLER, *District Judge.*[*]

STADTMUELLER, *District Judge.* Joseph Faulkner and Otis Sykes were convicted of conspiring to sell heroin at a place called the Keystone, an open-air drug market on Chicago's west side. Faulkner was a leader of the gang which ran the

[*] Of the Eastern District of Wisconsin, sitting by designation.

market and Sykes was a low-level street dealer. In this consolidated appeal, Faulkner challenges numerous aspects of his conviction, while Sykes takes issue with his sentence. Neither presents arguments which merit reversal of the district court. Accordingly, we affirm the appellants' convictions and sentences. We have jurisdiction over these appeals pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

I. JOSEPH FAULKNER

A. Factual & Procedural Background

Faulkner was a high-ranking member of the Imperial Insane Vice Lords, a Chicago street gang, also known as the Double I's. In 2011, he was prosecuted for heroin distribution that occurred in 2007 and 2008, and as well as charges related to heroin found in his apartment, discovered upon his arrest in February 2011. Following his arrest, Faulkner debriefed extensively with federal agents, explaining his role in the Double I's, their drug distribution activities, and the identities and roles of other gang members. He pled guilty to a superseding indictment asserting two counts of using a telephone to facilitate drug crimes. At his sentencing for the 2011 prosecution, the government sought, and the court imposed, an above-Guidelines sentence based upon the information Faulkner provided in his own debrief.

In September 2013, while Faulkner remained in prison, the government indicted him again. He and ten other defendants were charged with drug trafficking through the Double I's organization or within its territory. Count One charged Faulkner with participating in a RICO conspiracy under 18 U.S.C. § 1962(d). The government alleged that Faulkner conspired to distribute drugs at the Keystone from 1996 until his arrest in

2011. It also included a generic drug distribution conspiracy count, Count Nine, pursuant to 21 U.S.C. §§ 841(a)(1) and 846.

The final two counts directed at Faulkner, Counts Two and Three, related to the shooting of Tony Carr in January 2010. Count Two charged Faulkner with conspiracy to commit assault with a dangerous weapon, and Count Three was a related gun charge under 18 U.S.C. § 924(c). Carr sold marijuana near Double I territory but was not a member of the gang. Double I member Troy Ross and an accomplice broke into Carr's apartment in January 2010 and stole some marijuana. Carr found out that Ross was responsible and attacked him a few days later. Faulkner and another Double I member came to the scene. The other person helped Ross, but Faulkner did not intervene.

Carr ran away to his base of operations, a nearby cell phone store. Faulkner, Ross, and the other Double I member followed a while later. Ross pulled out a gun and shot Carr. Again, Faulkner stood by and did nothing. Faulkner was the only person charged in the Carr shooting. Ross himself received full federal immunity and a reduced state sentence, which prosecutors called "a phenomenal deal." According to Ross, Faulkner had ordered the shooting and provided the firearm.

Faulkner believed that the 2013 indictment concerned the very same drug distribution conduct that underlay his 2011 prosecution and sentencing. He moved to dismiss the second indictment as a violation of his Fifth Amendment right against double jeopardy. The trial court denied the motion, and this Court affirmed in July 2015. *United States v. Faulkner* [*Faulkner I*], 793 F.3d 752 (7th Cir. 2015).

Faulkner then proceeded to trial before the court sitting without a jury. The government alleged that Faulkner conspired to sell drugs at the Keystone with gang members and affiliated non-members. As to Count One, the evidence adduced at trial consisted of testimony from Double I member Darrell Pitts and two government agents, who testified about the Double I's and their Keystone operation. Faulkner's debrief was also introduced. Finally, the government offered a series of recorded calls obtained pursuant to a wiretap of various Double I members. As to Counts Two and Three, testimony about the shooting came from Ross, Carr, a clerk at the cell phone store, and a Chicago police officer who processed the scene. Faulkner vigorously disputed the quality of the government's evidence, including Ross' credibility, the relevance of Pitts' testimony, and the admissibility of the recorded calls. Despite these concerns, the district judge found him guilty on all counts.

Prior to the trial, the parties waived formal findings, but Judge Bucklo provided detailed findings anyway. As to Count One, she found that the Double I's were indeed a drug trafficking conspiracy and that Faulkner was a member. As to Counts Two and Three, Judge Bucklo found Ross' testimony credible that Faulkner ordered the shooting and did so to intimidate Carr and enhance Faulkner's position in the Double I's. Finally, as to Count Nine, she concluded that Faulkner's long-time leadership of the Keystone market made him responsible for distributing over 1,000 grams of heroin. On June 28, 2016, Faulkner was sentenced to 30 years' imprisonment on Counts One and Nine, 3 years on Count Two, and 10 years on Count Three.

B. Legal Analysis

Faulkner filed a timely notice of appeal on July 3, 2016. He raises four issues on appeal: (1) whether the evidence presented at trial was sufficient to support his convictions on Counts One, Two, and Three; (2) whether the district court erred in finding that he did not withdraw from the conspiracy as of the time of his arrest in February 2011; (3) whether his Sixth Amendment right to confrontation was violated by the admission of hearsay statements from alleged co-conspirators; and (4) whether his Fifth Amendment right to be free from double jeopardy was violated by the two prosecutions. The Court will address each point in turn.

1. Sufficiency of the Evidence

Faulkner first challenges his convictions on Counts One, Two, and Three. "[W]e review a challenge to the sufficiency of the evidence," as Faulkner presents here, "to determine only whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the government." *United States v. Webster*, 775 F.3d 897, 904–05 (7th Cir. 2015). We cannot re-weigh the evidence or reassess witness credibility. *United States v. Wasson*, 679 F.3d 938, 949 (7th Cir. 2012). In other words, "we will 'overturn the jury's verdict only when the record contains no evidence, regardless of how it is weighed, from which the [factfinder] could find guilt beyond a reasonable doubt.'" *United States v. Peterson*, 823 F.3d 1113, 1120 (7th Cir. 2016) (quoting *United States v. Pribble*, 127 F.3d 583, 590 (7th Cir. 1997)). This burden has been described as "nearly insurmountable." *United States v. Taylor*, 637 F.3d 812, 815 (7th Cir. 2011). None of Faulkner's arguments can carry it.

As to Count One, the government was required to prove "that another member of the enterprise committed ... two predicate acts and that [Faulkner] 'knew about and agreed to facilitate the scheme.'" *United States v. Garcia*, 754 F.3d 460, 477 (7th Cir. 2014) (quoting *Salinas v. United States*, 522 U.S. 52, 66 (1997)); Seventh Circuit Pattern Jury Instructions, 18 U.S.C. § 1962(d) Racketeering Conspiracy – Elements, Pattern Requirement – Racketeering Conspiracy; *see also United States v. Amaya*, 828 F.3d 518, 531–32 (7th Cir. 2016) (upholding RICO conspiracy conviction where defendant was an enforcer of gang rules with knowledge that those rules encouraged violence and drug dealing). It did not, as Faulkner suggests, need to show that he was personally involved in two or more of the predicate acts. *Garcia*, 754 F.3d at 477. Thus, Faulkner's first contention—that the district court failed to identify any specific predicate acts—is a non-starter. The evidence adduced on Count Nine, a conviction Faulkner does not challenge on appeal, supplied more than five specific incidents of drug distribution.

Faulkner further argues that the conspiracy charge was improperly predicated solely on his own debrief. *See United States v. Fearns*, 589 F.2d 1316, 1321 (7th Cir. 1978) ("It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused."). The government counters that the debrief was supported by the narcotics recovered during the 2011 arrest and the testimony of various witnesses regarding Faulkner's role as the manager of the Keystone. The government is correct that the debrief was indeed corroborated.

As to Counts Two and Three, Faulkner makes two arguments. First, he alleges that the government failed to prove that he was involved in the Carr shooting. According to Faulkner, Ross' testimony was critical to his conviction on those counts, and Ross' testimony was so rife with inconsistencies that it was entirely beyond belief. Yet, if Ross' testimony is believed, Faulkner does not contest that it establishes that he ordered the Carr shooting. Second, Faulkner says the government did not prove a necessary element of Count Two—namely, that Faulkner was motivated to order the shooting "because he knew it was expected of him by reason of his membership in the [Double I's] or that he committed it in furtherance of that membership." *United States v. DeSilva*, 505 F.3d 711, 715 (7th Cir. 2007) (quotation omitted). Again, Ross' allegedly fantastical testimony supplies the evidence on this element.

The only way this theory can succeed is if Faulkner proves that Ross' testimony was incredible as a matter of law. That occurs when the testimony "is contrary to the laws of nature or so internally inconsistent or implausible on its face that no reasonable factfinder would credit it[.]" *United States v. Collins*, 604 F.3d 481, 486 (7th Cir. 2010).[1] Despite the apparent

[1] Faulkner does not cite this concept in his opening brief, but once raised by the government in its response, he makes this the centerpiece of his reply. The Court could thus treat his invocation of this doctrine as waived. *United States v. Alhalabi*, 443 F.3d 605, 611 (7th Cir. 2006). The principle of declaring testimony incredible as a matter of law has certainly existed for decades. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985); *United States v. Cardona-Rivera*, 904 F.2d 1149, 1152 (7th Cir. 1990).

contradiction with the standard of review, this Court has occasionally applied this concept in a sufficiency-of-the-evidence analysis. *United States v. Farmer*, 717 F.3d 559, 561–63 (7th Cir. 2013); *United States v. Saunders*, 973 F.2d 1354, 1359–60 (7th Cir. 1992). For instance, in *Saunders*, the jury heard from a witness with poor and inconsistent recollection regarding a charged cocaine distribution conspiracy. We explained that:

> [t]he [challenged] evidence was not inherently unbelievable or improbable. Although James' testimony on direct and cross-examination did contain some inconsistencies—which, we note, defense counsel called to the jury's attention—the jury chose to believe James nonetheless. ... The jury heard and rejected Saunders' claim that James' testimony was "wildly improbable," and we are not at liberty to second-guess that determination.

Saunders, 973 F.2d at 1359–60. Like Saunders, Faulkner argued that Ross' testimony was filled with material inconsistencies and impossibilities. The district court was well aware of them and credited Ross' testimony anyway. We detect nothing so "wildly improbable" in his testimony that Judge Bucklo's credibility determination cannot stand as a matter of law. This is reinforced by the deference we must accord to any factfinder, be they judge or jury. The factfinder, not this Court, was in the best position to assess Ross' age, his intelligence, his ability to comprehend and remember events, his demeanor, and the strength of any potential bias.

Faulkner also makes much of the alleged irrationality underpinning his involvement in and motivation for the Carr

shooting. He stresses, for instance, that it made no sense to murder Carr without first trying other means to force him out, for Ross to not be punished for failing to kill Carr, or for Faulkner to allow Carr to live, and indeed resume his business, after the failed assassination. This assumes that individuals, including those like Faulkner or otherwise, only act towards their highest, most rational ends. Judge Bucklo was not required to make such an assumption, and neither are we. Ross' testimony supports the motivation requirement, and that ends the inquiry. *Webster*, 775 F.3d at 904–05.

Though we may have assessed Ross' credibility differently in the first instance, that is not our task today. With Ross' testimony in hand, it is clear that sufficient evidence exists to support Faulkner's convictions on Counts Two and Three.

2. Withdrawal From the Conspiracy and Co-Conspirator Statements

Faulkner's second and third points on appeal fall together. The second bears upon Count One. He says that the government conceded the end of his involvement in the gang by limiting its conspiracy charge to February 2011, the time of his arrest and debrief. He also notes that after he debriefed, the government began wiretapping the Double I's. Only one witness, and only one call, from that post-arrest period allegedly involved Faulkner himself. The call was not recorded, however, and there was nothing to corroborate its occurrence. All of the other relevant calls were third parties talking about, rather than with, Faulkner. Faulkner contends that he necessarily withdrew from the conspiracy as of the date he debriefed with the government. *See United States v. Nagelvoort*, 856 F.3d 1117, 1128–29 (7th Cir. 2017). In his third point,

Faulkner asserts that the recorded calls were inadmissible, either because he had already withdrawn from the conspiracy, or, even if he had not, the statements in the calls were not made in furtherance of the conspiracy. *Id.*; *see also* Fed. R. Evid. 801(d)(2)(E).

These points are academic, as Faulkner does not explain why he suffered any prejudice from the erroneous admission of this evidence. Faulkner may only come before us to contest his conviction and sentence. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742(a). His points on appeal must relate to one or both of those issues, but the withdrawal argument is untethered from either. As to his conviction, "[a] withdrawal defense to a conspiracy charge is relevant only when 'coupled with the defense of statute of limitations.'" *United States v. Nava-Salazar*, 30 F.3d 788, 799 (7th Cir. 1994) (quoting *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981)). Withdrawal does not "absolve a defendant from his membership in the conspiracy" or otherwise "negate that charge." *Id.*

Faulkner obfuscates the reasons why withdrawal matters. In his opening brief, he states:

> In the typical case, a withdrawal defense is important when coupled with the statute of limitations defense. Here, even if Faulkner withdrew, the Indictment was brought before the statute of limitations expired. Still, the defense informs other areas, including whether statements admitted were co-conspirator statements (if Faulkner had withdrawn, the statements are hearsay -- Issue III), whether double jeopardy applies (Issue IV), and whether his drug amount was properly calculated, and a correct

> sentence imposed (the amount was not, nor is the sentence).

(Docket #27 at 41). This paragraph is confusing at best. Faulkner concedes that he does not raise a statute of limitations defense, and other than this single offhand remark, his appeal does not challenge his drug quantity or sentence. While Faulkner maintains that the withdrawal issue "informs" other areas of his appeal, this is not the case in practice. Faulkner fails to even mention the withdrawal issue in his double jeopardy argument, and in his reply, he tries to stretch the withdrawal issue into his sufficiency of the evidence attack.

Whatever his shifting theories on the matter, Faulkner does not explain why the verdict would have been different without the post-arrest evidence. Indeed, Judge Bucklo herself indicated it would not have been.[2] As noted above, Faulkner's convictions were amply supported by conduct occurring prior to his February 2011 arrest. Faulkner does not argue otherwise. *See Nava-Salazar*, 30 F.3d at 799 ("[A]ny alleged

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[2] From the December 8, 2015 hearing wherein Judge Bucklo delivered her verdict:

> MR. GREENBERG: Judge, I have a question. You – we had submitted a withdrawal defense. And you said intercepted calls after he was arrested, after Mr. Faulkner was arrested, I thought I heard you say?
>
> THE COURT: In truth, I don't know that it makes any difference at all in terms of the verdict, but I – it seems to me that it's pretty clear that he would have to make an affirmative step to withdraw. And I think I can consider the statements of other people who were involved in the conspiracy as to whether he withdrew. I know I must – must decide that somebody is involved in the conspiracy by their own statements. But, at any rate, I'm not – I don't know what difference it would make anyway.").

(Docket #35 at GA 14–15).

withdrawal of these two defendants from the conspiracy was irrelevant in determining their guilt or innocence of the conspiracy charged in the indictment. Neither makes any claim or showing that the denial of a withdrawal instruction prejudiced him, as might be the situation if actions by other conspirators after a particular conspirator withdrew are used to prove the guilt of that withdrawing conspirator."). And as discussed below, the withdrawal issue is ultimately irrelevant to Faulkner's double jeopardy argument, as it fails for other reasons. We are left, then, with no material purpose for addressing withdrawal. This court is not in the business of offering advice on legal quandaries. *See United States v. McHugh*, 528 F.3d 538, 541 (7th Cir. 2008) (a recommendation to the Bureau of Prisons made after sentencing presented no justiciable controversy).

The same logic applies to Faulkner's admissibility argument. Whether or not the co-conspirator statements were actually admissible, Judge Bucklo committed no harmful error by admitting them. *United States v. Garcia-Avila*, 737 F.3d 484, 490 (7th Cir. 2013) (even when evidence is erroneously admitted, "reversal only follows if ... an average juror would find the prosecution's case significantly less persuasive without the improper evidence.") (citations and quotations omitted). Again, Faulkner offers no reason to suggest that the calls altered the outcome of the case. Instead, he emphasizes what appears to always have been his main objective in excluding the calls: his claim that double jeopardy bars this prosecution.

3. Double Jeopardy

Faulkner's final point on appeal is his renewed claim of double jeopardy. He has already appealed and lost on that ground. *Faulkner I*, 793 F.3d at 758. At that time, the Court of

Appeals observed that Faulkner raised two species of double jeopardy claims. *Faulkner I*, 793 F.3d at 755. First, he alleged that he was punished twice for the same drug dealing conduct. *Id.* at 756. Though the drug distribution charges were dropped in the 2011 prosecution, the evidence thereof formed part of the district court's sentencing determination. *Faulkner I* determined that under *Witte v. United States*, 515 U.S. 389, 399 (1995), using the same conduct for a prosecution and for a sentencing does not constitute double punishment. *Id.*

Second, Faulkner argued that he was prosecuted multiple times for the same offense. *Id.* at 757. To prove that claim,

> Faulkner must establish a *prima facie* showing that both prosecutions were for identical offenses; if he does, the burden shifts to the government to show, by a preponderance of the evidence, that the indictments (or informations) charged different crimes. To determine whether the indictments charged the same offense, the court generally looks to the test set forth in *Blockburger v. United States*, 284 U.S. 299 ... (1932): "whether each offense contains an element not contained in the other."

Id. at 757–58 (citations omitted). *Faulkner I* held that each count in the new prosecution survived the *Blockburger* test. *Id.* at 758. Counts Two and Three, violence charges related to the Carr shooting, were "clearly distinct from heroin distribution." *Id.* Counts One and Nine, though directly related to drug dealing, were conspiracy charges. Thus, two material differences arose: "[c]onspiracy involves the element of an agreement, which is not an element of a substantive drug dis-

tribution offense; on the other side, the substantive offense requires completion of the crime, which is not an element of conspiracy." *Id.* Finally, the court applied *Blockburger* to the charges to which Faulkner eventually pleaded guilty—using a phone to commit a felony. *Id.* The distinctions between those crimes and the charges in the 2013 were, as might seem obvious, even greater. *Id.*

The government asserts that these holdings are the binding law of the case. That doctrine provides that we should find *Faulkner I* controlling on the double jeopardy question unless "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *White v. United States*, 371 F.3d 900, 902 (7th Cir. 2004) (quotation omitted). Faulkner appears to offer the same two species of double jeopardy claims as he presented earlier. He maintains that his trial, and the evidence presented therein, confirms that the prosecutions were for the same conduct. In particular, Faulkner says that if the improperly admitted recorded calls are excluded, the evidence is precisely the same.

These arguments miss the mark. Faulkner focuses on the merits of his double jeopardy challenge, paying little heed to the law of the case doctrine. He does not even attempt to explain which of the three paths he seeks to navigate to avoid *Faulkner I*, but the only one that might apply is the last. He has cited no new, controlling authority, and he makes no argument that the evidence presented at trial was different than that available to him during the interlocutory appeal. Notably, Faulkner's evidentiary comparisons are directed at the similarity of the evidence between the two prosecutions, not

between the evidence presented during the earlier appeal and at trial.

Further, we find no clear error in our prior decision. The primary distinction between the instant appeal and the prior one is Faulkner's discussion of *United States v. Schiro*, 679 F.3d 521, 527–28 (7th Cir. 2012), which suggested that duplicative evidence in successive prosecutions may present a double jeopardy problem. This same concept is found in *United States v. Calabrese*, however, which Faulkner cited in the prior appeal. 490 F.3d 575, 580–81 (7th Cir. 2007). The prior panel thus considered the issue and, although it did not comment upon *Calabrese* directly, necessarily rejected Faulkner's argument.

The only other material new to this appeal is a citation to *Gries*, which states the ordinary proposition that "[a] lesser-included offense nests within the greater offense and therefore flunks the *Blockburger* test." *United States v. Gries*, 877 F.3d 255, 259 (7th Cir. 2017). Faulkner hopes to extend that holding to his case by claiming that "[h]ere, the earlier prosecution 'nests' within the latter." (Docket #45 at 22). In a problem that plagues several aspects of his appeal, Faulkner raises this argument for the first time in his reply, thus waiving it. *Alhalabi*, 443 F.3d at 611. Besides, were it not waived, *Faulkner I* provided a detailed rejection of the position. *Faulkner I*, 793 F.3d at 758.

At oral argument, Faulkner all but conceded that his double jeopardy argument must fail before this court. In response to the panel's questioning, counsel stated that "if I don't raise it here, I can't try and disagree with [the Supreme Court's *Witte* decision] later on." He may rest assured that the matter is preserved for a petition for a writ of certiorari. In this court,

however, he fails to provide good reasons to overturn *Faulkner I*, and that forecloses the point at this stage.

II. OTIS SYKES

We now turn to Faulkner's co-defendant, Otis Sykes. He was charged in the same 2013 indictment attacking the Double I's operations. Sykes was not a member of the gang but worked as a street-level seller. He was nevertheless charged with conspiring to distribute a controlled substance, in violation of 21 U.S.C. § 846, and seven counts of distributing heroin and cocaine base, in violation of 21 U.S.C. § 841(a)(1). After a bench trial, he was found guilty on all counts. Judge Bucklo found that Sykes was responsible for distributing less than 100 grams of heroin.

The matter proceeded to sentencing. The presentence report calculated a sentencing Guidelines range of 135 to 168 months' imprisonment. It further noted the government's intention to introduce evidence of uncharged conduct, namely the murder of Andre Brown. Brown was a Double I member and engaged in various acts of extortion and violence in the Keystone area. He had also robbed Sykes about a week prior to his death. He was killed on the street by two hooded men on June 22, 2012. The district court held multiple evidentiary hearings on the Brown murder. It took testimony from several witnesses who placed Sykes at the scene with a gun, though none saw him actually shoot Brown. Sykes contends that the witnesses lacked credibility and that someone else likely killed Brown.

The district court also conducted multiple hearings on Sykes' sentence, largely directed at arriving at the correct Guidelines calculation. In the course of those hearings, the

district court held that Sykes' participation in the Brown murder was established by a preponderance of the evidence. Judge Bucklo nevertheless stated that she would accord it little weight in determining an appropriate sentence. The government argued for a 226-month sentence based on the Brown murder, Sykes' repeated re-involvement in drug dealing, the quantity of drugs, and Sykes' criminal history. The government observed that Sykes was nearly a career offender, and if he had been, his Guidelines range would have been 210 to 262 months' imprisonment.

Sykes asserted that the government's invocation of the Brown murder violated the spirit, though not the rule, of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires "that juries make factual findings that increase either the minimum or maximum length of a statutory sentencing range." *Faulkner I*, 793 F.3d at 757. He maintained his innocence of the shooting. Sykes further argued that he was a street-level dealer selling small quantities of drugs, and so the government's requested sentence would be disparate from those of his similarly situated co-defendants. Finally, Sykes explained that while his criminal history was significant, it did not include weapons-related or violent convictions.

Judge Bucklo sentenced Sykes to 195 months' imprisonment. She felt that the Guidelines range did not account for all of Sykes' conduct that she was required to consider under the sentencing factors stated in 18 U.S.C. § 3553(a). First, although Sykes himself was not convicted of violent crimes, he participated in a drug conspiracy for years which he knew involved violence. Second, he had not learned any respect for the law from his prior drug convictions. Each time he was re-

leased back to the community, Sykes returned to drug dealing. Third, Sykes had participated in the Brown murder. Again, however, Judge Bucklo stated that she would accord it limited weight. Finally, Judge Bucklo noted that Sykes did not accept responsibility for participating in the conspiracy.

Sykes presents one issue on appeal: whether his above-Guidelines sentence was unreasonable because the district court misapplied the Section 3553(a) factors. Section 3553(a) provides that a sentencing court must "impose a sentence sufficient, but not greater than necessary" to achieve the goals of sentencing, which include promoting respect for the law, punishment, deterrence, and protection of the public. 18 U.S.C. § 3553(a), (a)(2). It supplies seven factors the court must consider in carrying out this task. *Id.* § 3553(a)(1)–(7). These include accounting for the circumstances of the offense charged, the defendant's criminal history, the need for deterrence and public protection, the Guidelines range, and the desire to avoid unwarranted sentence disparities among similarly situated defendants. *Id.*

We use a two-step process to review Judge Bucklo's sentencing determination. First, "we determine whether the district court committed any procedural error, 'such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.'" *United States v. Reyes-Hernandez*, 624 F.3d 405, 409 (7th Cir. 2010) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Review for procedural errors is *de novo*. *United*

States v. Rivera, 847 F.3d 847, 849 (7th Cir. 2017). If no procedural error is found, then the sentence is reviewed for substantive reasonableness. *Reyes-Hernandez*, 624 F.3d at 409. A sentence is substantively unreasonable only when the district court abused its discretion in imposing the sentence in question. *Gall*, 552 U.S. at 51.

"We presume that a sentence within a properly calculated Guidelines range is reasonable, but there is no corresponding presumption of unreasonableness for a non-Guidelines sentence." *Reyes-Hernandez*, 624 F.3d at 409 (quotation omitted). Above-Guidelines sentences will be upheld if the district court offered an adequate statement of reasoning therefor, consistent with the Section 3553(a) factors. *United States v. Lewis*, 842 F.3d 467, 477 (7th Cir. 2016). The appellate court must determine whether the justification offered comports with the degree of variance from the Guidelines. *Id.* at 477–78. This assessment accounts for the sentencing judge's "superior position to find facts and judge their import under section 3553(a) in the individual case." *Id.* at 478 (quotation omitted).

Sykes argues that Judge Bucklo made three errors in arriving at his above-Guidelines sentence. First, he alleges that she gave too much weight to his criminal history. Most of the prior convictions were for drug distribution which were subsumed into the conspiracy charge. These were thus already considered in arriving at the Guidelines range, and should not have been used to further increase his sentence. Second, Sykes argues that the Brown murder should have been accorded no weight at all, as he was never charged with the murder or tried by a jury, and the evidence arrayed against him was unreliable. Though Judge Bucklo said she gave the matter little weight, Sykes believes she in fact gave it substantial weight as

shown by her substantial upward variance from the Guidelines. Third, Sykes believes that Judge Bucklo failed to consider the disparity between his sentence and those of similar co-defendants. He notes that the other street-level dealers received sentences ranging from 21 to 75 months. Sykes claims that Judge Bucklo did not address the question of disparity or justify his sentence in comparison with the others.[3]

None of these allegations of error have merit. Sykes does not dispute his criminal history. The presentence report discusses an extensive history with ten convictions, spanning nine years, with eight of those for drug-related offenses. Sykes contends that Judge Bucklo unduly relied on his criminal history despite many of the convictions being subsumed into his offense conduct. Sykes also argues that to the extent they were properly considered, the prior convictions were minor marijuana possession and distribution of small drug quantities, and which should not count for much. But Judge Bucklo was primarily concerned with the length of the history, and the pattern of offenses, namely that Sykes never learned to leave the drug dealing life behind even after so many convictions.

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[3] The government characterizes these as accusations of procedural error, and couches its brief in those terms. We are not so sure. Sykes does not clearly delineate whether he pursues a procedural or substantive challenge to the sentence. His brief says that Judge Bucklo "misapplied" the Section 3553(a) factors and imposed a sentence which was too long. (Docket #24 at 17). Misapplication, as he uses the term, equates to weighing the factors incorrectly. This is not the same as failing to consider them at all, which *would* be a procedural error. Additionally, his arguments emphasize the alleged unreasonableness of his sentence, further suggesting that his is a substantive challenge. In the end, it matters little; Judge Bucklo's sentencing determination is beyond reproach even upon *de novo* review.

Next, Sykes suggests that Judge Bucklo should not have concluded that he was involved in the Brown murder by a preponderance of the evidence. He does not contest that the conduct is a valid sentencing consideration once Judge Bucklo made that finding, however. It appears that Sykes' primary point is that Judge Bucklo should have given little or no weight to the Brown murder as an enhancement. We must, however, take Judge Bucklo at her word when she said it was given little weight. Judge Bucklo mentioned the murder at the final sentencing hearing and emphasized that she would give it less weight than what one would expect from such a serious offense.

Finally, Judge Bucklo admittedly said nothing about disparity. This was not error, however, for two reasons. First, there is generally no disparity problem so long as the remainder of the sentencing explanation makes it plain that the disparity was warranted. *United States v. Castaldi*, 743 F.3d 589, 597–98 (7th Cir. 2014). Judge Bucklo's citation to the particular facts of Sykes' case make this plain.

Second, and more importantly, Sykes said precious little about disparity himself. He cannot now fault Judge Bucklo for failing to address it more thoroughly. His sentencing memorandum listed the sentences of eight co-defendants and claimed that they were similarly situated street-level dealers. The memorandum does not explain the facts of the co-defendants' cases, their Guidelines ranges, or any other sentencing considerations. The only analogy Sykes offered was to Jasmine McClain, saying that the two "were literally standing side-by-side making similar sales of small quantities." But Sykes gave no further details about why McClain received her particular sentence. Sykes' sentencing colloquy was similarly

lacking in detail, mentioning disparity without delving into the facts of the co-defendants' sentences. Sykes also simply reiterated what he said about McClain in his memorandum.

Only now, on appeal, does he come close to a developed disparity argument, though it is still short on important details as to each of the allegedly similar co-defendants. He lists the same eight co-defendants and their sentences and offers the same argument regarding McClain. The only new information relates to Kyle Pagan, where Sykes discusses Pagan's offense level, criminal history category, and Guidelines range. The Pagan argument was not presented to Judge Bucklo and we will not consider it for the first time on appeal. *Ennin v. CNH Indus. Am., LLC*, 878 F.3d 590, 595 (7th Cir. 2017).

The root of Sykes' disparity argument was revealed at oral argument. There, counsel admitted that before Judge Bucklo, Sykes' trial counsel did not raise the disparity issue "as one might have hoped it would be raised." Instead, counsel suggested that Judge Bucklo should have further addressed disparity simply because she was "the same judge who had sentenced all of these people." This is no reason to question her sentencing determination. District judges sentence numerous defendants every year, and in multi-defendant cases, each of the accused may be sentenced months apart. Sykes has no right to rely on Judge Bucklo's general familiarity with the case as a substitute for a well-developed argument. Sykes' filings, before both this Court and the district court, do not adequately explain how the sentencing differences should be viewed as a disparity. *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006) (holding that "a sentencing difference is not a forbidden 'disparity' if it is justified by legitimate considerations").

It is worth noting that Judge Bucklo exceeded the Guidelines range by just eighteen percent. This variance was well-founded in her sentencing explanation. We find no error, procedural or substantive, in Sykes' sentence. *Castaldi*, 734 F.3d at 598–99 (sentence fifty percent above Guidelines range was substantively reasonable with explanation from district court); *United States v. Smart*, 603 F. App'x 500, 502 (7th Cir. 2015) (similar, at thirty-five percent above Guidelines); *United States v. Hayden*, 775 F.3d 847, 849–51 (7th Cir. 2014) (similar, at fifty percent above Guidelines, with a defendant whose "real complaint," like Sykes, "seems to be that he did not get what he wanted, not that the district court didn't consider the [factors]"). We must therefore affirm the sentence.

***

Neither Faulkner nor Sykes offers sufficient reasons to call their convictions or sentences into question. As a result, we AFFIRM.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

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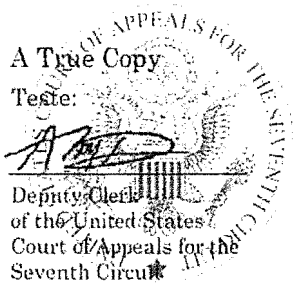

April 11, 2018

Before

FRANK H. EASTERBROOK, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

J.P. STADTMUELLER, *District Judge*[*]

No. 16-2860

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH FAULKNER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13-CR-772-2
Elaine E. Bucklo, *Judge.*

Order

Defendant-appellant filed a petition for rehearing on April 2, 2018. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

[*] Of the Eastern District of Wisconsin, sitting by designation.