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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1289

United States of America

Appellee

v.

Marcos Perez-Trevino

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:15-cr-02037-LRR-9)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

July 18, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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B - Judgment - *United States v. Perez-Trevino*, No. 17-1289 (8th Cir. July 18, 2018)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1289

United States of America

Plaintiff - Appellee

v.

Marcos Perez-Trevino

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:15-cr-02037-LRR-9)

JUDGMENT

Before COLLOTON, BENTON and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 29, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

B-1

C - Panel Opinion – *United States v. Perez-Trevino*, No. 17-1289 (May 29, 2018)

United States Court of Appeals
For the Eighth Circuit

No. 17-1289

United States of America

Plaintiff - Appellee

v.

Marcos Perez-Trevino

Defendant - Appellant

No. 17-1352

United States of America

Plaintiff - Appellee

v.

Juan Flores, also known as Alejandro Becerra

Defendant - Appellant

No. 17-1718

United States of America

Plaintiff - Appellee

v. C-1

Daniela Castellanos

Defendant - Appellant

Appeals from United States District Court
for the Northern District of Iowa - Waterloo

Submitted: January 11, 2018
Filed: May 29, 2018 (Replacement Opinion)

Before COLLOTON, BENTON, and ERICKSON, Circuit Judges.

ERICKSON, Circuit Judge.

Defendants/Appellants Marcos Perez-Trevino ("Perez-Trevino"); Juan Flores, a/k/a Alejandro Becerra ("Flores"); and Daniela Castellanos ("Castellanos") were tried together by a jury in the United States District Court for the Northern District of Iowa for their roles in a conspiracy to distribute methamphetamine. All three were found guilty and were sentenced by the court. After carefully considering the several issues raised by the appellants, we affirm the judgments of the district court.[1]

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[1] The Honorable Linda R. Reade, then Chief Judge, United States District Court for the Northern District of Iowa, adopting reports and recommendations from the Honorable Jon Stuart Scoles, then United States Chief Magistrate Judge for the Northern District of Iowa, with respect to the motions to suppress.

I. BACKGROUND/PROCEDURE

In August 2015, eleven defendants, including the appellants, were charged in a conspiracy to deliver methamphetamine in and around Marshalltown, Iowa. Several of the defendants entered guilty pleas, but the appellants chose to proceed to a jury trial. During the six-day trial, some of the defendants' original co-conspirators cooperated with the government and testified, hoping for more favorable sentencing recommendations.

Prior to trial, Perez-Trevino moved to suppress evidence obtained during an August 12, 2015, traffic stop in Oklahoma. Perez-Trevino argued that the vehicle was improperly impounded and the inventory search was unlawful. The motion was heard by the chief magistrate judge, and Chouteau (Oklahoma) Police Officer Thomas Scott Fisher testified at the hearing. The chief magistrate judge issued a report and recommendation that the motion be denied. The district court overruled Perez-Trevino's objections, adopted the report and recommendation, and denied the motion.

Castellanos brought a pretrial motion to suppress evidence obtained from the interception of wire and electronic communications of a cell phone identified as Target Telephone #16, arguing that the application for the wiretap: (1) lacked sufficient specificity to establish probable cause, and (2) failed to sufficiently show the wiretap was necessary as required by 18 U.S.C. § 2518(3)(c). After argument on the motion without any additional evidence, the chief magistrate judge, finding the affidavit sufficient, issued a report and recommendation that the motion be denied. The district court overruled Castellanos's objections, adopted the report and recommendation, and denied the motion.

During the five-day trial, the government witnesses testified about information gleaned during the investigation including evidence obtained from intercepts of several telephones. The cooperating co-conspirators testified about their own

participation in the conspiracy and their knowledge of the participation of the three defendants. Following the procedures outlined in United States v. Bell, 573 F.2d 1040 (8th Cir. 1978), the trial court conditionally admitted hearsay evidence from alleged co-conspirators. Much of the testimony referenced Mario Murillo-Mora, a member of the conspiracy to distribute methamphetamine, who was connected by evidence to each of the defendants, as well as to other members of the conspiracy. The evidence revealed that the reason the government targeted various electronic devices, including telephone #16, was their connection to communications to and from Murillo-Mora related to the distribution of narcotics.

At the end of the government's case, the court entertained objections to the co-conspirator hearsay testimony. The court overruled the objections, finding that each of the admitted statements was made by a co-conspirator in the course of and in furtherance of the conspiracy. The court denied Perez-Trevino's request for a jury instruction on multiple conspiracies and an instruction regarding a mere buyer/seller relationship.

The jury found Perez-Trevino guilty of conspiracy to distribute 500 grams or more of a substance containing a detectable amount of methamphetamine, which contained more than 50 grams of pure methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Flores and Castellanos were found guilty of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. The district court sentenced Perez-Trevino to 292 months' imprisonment and sentenced Flores and Castellanos to 240 months' imprisonment.

II. SUPPRESSION MOTIONS

"When reviewing the denial of a motion to suppress, we review a district court's factual findings for clear error and legal conclusions de novo." United States v. Evans, 781 F.3d 433, 436 (8th Cir. 2015) (citing United States v. Harris, 747 F.3d

1013, 1016 (8th Cir. 2014)). We "will affirm the district court's denial of a motion to suppress evidence unless it is unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, based on the entire record, it is clear a mistake was made." United States v. Collins, 883 F.3d 1029, 1031 (8th Cir. 2018) (quoting United States v. Braden, 844 F.3d 794, 799 (8th Cir. 2016)). We may affirm on any ground supported by the record. United States v. Murillo-Salgado, 854 F.3d 407, 414 (8th Cir. 2017). For example, in United States v. Wells, 347 F.3d 280, 287 (8th Cir. 2003), we affirmed the denial of a motion to suppress based on the automobile exception to the warrant requirement rather than on the search-incident-to-arrest exception on which the district court relied.

A. Perez-Trevino - Search of Automobile and Contents

On August 12, 2015, Officer Fisher noticed a 2000 Oldsmobile Intrigue with North Dakota license plates traveling north on Highway 69 in Oklahoma. He stopped the vehicle for a taillight violation. As he approached the vehicle, Officer Fisher observed two occupants in the car. Perez-Trevino presented an identification card to Officer Fisher but claimed to be licensed in Texas. Officer Fisher had separate conversations with Perez-Trevino and the passenger. The two gave conflicting stories as to their destination: Perez-Trevino indicating Iowa City and the passenger claiming Marshalltown. Officer Fisher ran Perez-Trevino's identifying information and determined that he did not have a valid license.[2] A license check for the passenger revealed that his license was suspended. Officer Fisher arrested Perez-Trevino for driving without a license. Having been instructed by the chief of police that stopped vehicles are not to be left abandoned on the roadside, Officer Fisher arranged to have the vehicle towed. Before the vehicle was towed, Officer Fisher

[2]At trial, Officer Fisher testified that Perez-Trevino's driving license was suspended in North Dakota, but at the suppression hearing he indicated that Perez-Trevino was unlicensed.

prepared to do an inventory search of the vehicle in order to log any valuables. Officer Fisher testified:

> Any time we have arrested someone out of a vehicle or we have made contact with somebody where a vehicle – where we have become liable for it because of an action from us, we must impound that vehicle with the two wrecker services we have on rotation and then we have to conduct a thorough vehicle inventory.

When Officer Fisher leaned inside the vehicle to begin the inventory, he smelled raw marijuana "directly over the center console." He checked the contents of the center console because, according to his testimony, "[i]t's a common place, along with the glove box, for valuables or anything somebody is going to store in the vehicle." When he lifted the console, he discovered a plastic bag containing a green leafy substance, which was later determined to be marijuana. The inventory search further uncovered various food items and drinks. A one dollar bill containing a clear substance, later determined to be methamphetamine, was found under the passenger seat. Located in the back seat was a large cooler. Upon opening the cooler, Officer Fisher found more food and drinks and a Ziploc bag "containing a large amount of methamphetamine." It was later determined that the bag contained 877 grams of methamphetamine. A list of items found in the search was reported on a "CHOUTEAU POLICE DEPT. STORED VEHICLE REPORT" which indicated the vehicle was registered in North Dakota to Marcos and Maria Perez.

The Chouteau Police Department has a published policy for "Impoundment of Vehicles" that provides guidance for impounding and inventorying vehicles. Among the several stated reasons for impounding vehicles are safekeeping of evidence and "public assistance towing." The public assistance towing section specifically requires towing "[w]hen, following arrest of the owner/operator or for other reasons, the vehicle cannot be left at the scene without substantial risk of theft from or damage to

the vehicle or personal property contained therein." The policy's inventory procedure provides:

1. It is the duty of all officers, who impound motor vehicles, to perform an inventory of those vehicles.
2. The purpose of this inventory will be to ensure a proper accounting of all property in or attached to the vehicle in order to protect the officer from liability of assumed damages and/or missing property.
3. The officer performing the inventory will conduct a thorough and uniform inventory of the vehicle and its compartments.

One of the regulations listed in the policy statement provides that "[o]fficers should take all necessary precautions when towing a vehicle to properly search and inventory a vehicle. An inventory search is intended to protect the citizen, the officer and the wrecker company from claims of loss and theft."

Citing Florida v. Wells, 495 U.S. 1 (1990), Perez-Trevino argues that the inventory search of the car violated the Fourth Amendment because the Chouteau Police Department policy did not provide sufficiently standardized criteria for searching closed containers inside the vehicle. "It is 'well-settled' law that 'a police officer, after lawfully taking custody of an automobile, may conduct a warrantless inventory search of the property to secure and protect vehicles and their contents within police custody.'" United States v. Williams, 777 F.3d 1013, 1015 (8th Cir. 2015) (quoting United States v. Rehkop, 96 F.3d 301, 305 (8th Cir. 1996)). The search "must comply with 'standardized police procedures.'" Id. at 1016 (quoting United States v. Mayfield, 161 F.3d 1143, 1145 (8th Cir. 1998)). "The police are not precluded from conducting inventory searches when they lawfully impound the vehicle of an individual that they also happen to suspect is involved in illegal activity." United States v. Pappas, 452 F.3d 767, 771 (8th Cir. 2006) (quoting United States v. Marshall, 986 F.2d 1171, 1175-76 (8th Cir. 1993)). We conclude that the

Chouteau Police Department towing policy contained sufficiently standardized police procedures for Officer Fisher to inventory the contents of the vehicle and its compartments.

We do not decide whether the Chouteau inventory policy provided Officer Fisher with authority to open the cooler. Instead, we affirm the denial of the motion to suppress because, at the time he opened the cooler, Officer Fisher had sufficient probable cause to search the vehicle and its contents under the "automobile exception" to the Fourth Amendment warrant requirement. Accord United States v. Winters, 221 F.3d 1039, 1042 (8th Cir. 2000) ("Trooper Busch then smelled raw marijuana. This created probable cause to search the car and its containers for drugs."). "Under the automobile exception, officers may search a vehicle without a warrant if they have probable cause to believe the vehicle contains evidence of criminal activity." United States v. Davis, 569 F.3d 813, 817 (8th Cir. 2009) (quoting United States v. Cortez-Palomino, 438 F.3d 910, 913 (8th Cir. 2006) (per curiam). Prior to searching inside the cooler, Officer Fisher had obtained contradictory statements from the car's occupants as to their destination, discovered the plastic bag containing the marijuana, and found the dollar bill containing apparent drug residue. This was sufficient probable cause to search inside the cooler. Accord Davis, 569 F.3d at 817-18 ("If there had been any doubt about whether the smell of smoldering cannabis constituted probable cause to search the vehicle, such doubt was obviated by the discovery of a bag of marijuana in Davis's pocket.").

B. Castellanos - Wiretap of Target Telephone #16

Daniela Castellanos argues that the district court erred in denying her motion to suppress evidence gained from the wiretap of Target Telephone #16. In 18 U.S.C. § 2518, Congress defined the procedure that must be followed for the "interception of wire, oral, or electronic communications." 18 U.S.C. § 2518(10)(a) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –
> (i) the communication was unlawfully intercepted;
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
> (iii) the interception was not made in conformity with the order of authorization or approval.

"The remedies and sanctions described in [chapter 18] with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications." 18 U.S.C. § 2518(10)(c). An "aggrieved person" is defined at 18 U.S.C. § 2510(11) as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." In paragraph No. 2 of her motion to suppress the wiretap evidence, Castellanos alleges: "During the period of time the wiretap authorization was in place, the government contends that Ms. Castellanos was heard on or a party in some of the phone calls and text messages involving target telephone 16."

Castellanos contends that her motion should have been granted because the affidavit attached to the warrant application did not contain sufficient facts to support a finding of probable cause or of necessity as required by 18 U.S.C. § 2518(3)(a-c). We address each asserted error separately, United States v. Thompson, 690 F.3d 977, 984-87 (8th Cir. 2012), and hold that the district court did not err in denying the motion to suppress.

1. Probable Cause

Section 2518 requires a two-step probable cause analysis. First, there must be probable cause that an individual has committed, is committing, or is about to commit a crime listed in 18 U.S.C. § 2516. 18 U.S.C. § 2518(3)(a). Second, the application must show probable cause that "particular communications" relating to the specific offense will be obtained from the interception of the communication. 18 U.S.C. § 2518(3)(b). "We have long held" that the probable cause standards in section 2518 "*are co-extensive* with the constitutional requirements" of the Fourth Amendment. United States v. Gaines, 639 F.3d 423, 430 (8th Cir. 2011) (quoting United States v. Leisure, 844 F.2d 1347, 1354 (8th Cir. 1988)). This guides us in our review of the district court's probable cause analysis. We also recognize, however, that the particularity requirements of section 2518(3)(b) are defined by the statute. Id. at 431-32 (citing United States v. Donovan, 429 U.S. 413, 416, 428 (1977)). The first step is not disputed as § 2516(1)(e) lists any offense involving "the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States."

Our analysis focuses on the second step. The application for the wiretap warrant identified Target Telephone #16 as subscribed to Geoffrey Forney of Des Moines, Iowa, and used by Mario Murillo-Mora. The application sought authorization for intercepting "wire and electronic communications" of several named individuals, including Murillo-Mora, and several unknown males and females who had been communicating with Murillo-Mora and other co-conspirators on prior authorized electronic communication interceptions. Castellanos was not one of the individuals identified in the application. An application for authorizing a wiretap must identify "the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. § 2518(1)(b)(iv). The Supreme Court has interpreted the statute as not requiring the government "to identify an

individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone." United States v. Donovan, 429 U.S. 413, 423 (1977) (citing United States v. Kahn, 415 U.S. 143 (1974)). A wiretap application must, however, "name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone." Id. at 428. A district court's grant of an application for a wiretap is appropriate if it is the result of a "practical, common-sense decision" that "considering the 'totality-of-the-circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Thompson, 690 F.3d at 984-85 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). "In determining probable cause we are bound to consider only the facts contained within the four corners of the affidavit." United States v. Milton, 153 F.3d 891, 894 (8th Cir. 1998) (citing United States v. Gladney, 48 F.3d 309, 312 (8th Cir. 1995)).

The application for the wiretap authorization order specifically names more than twenty individuals, in addition to several yet unidentified target subjects suspected in the conspiracy to distribute narcotics, based on investigations from prior court-authorized wiretaps. The government sufficiently identified all of the individuals it had probable cause to believe were involved in criminal activity.

The application informed the court of the type of evidence law enforcement expected to recover from the targeted telephone. It states:

> In particular, these wire and electronic communications are expected to include conversations of an evidentiary nature revealing:
>
> 1) The details of carrying out the above-named offenses;

2) The identity of individuals as yet unknown who are involved in these offenses and the extent of their involvement;
3) The times and places where illegal transactions will occur;
4) The amounts, prices, etc., of illegal narcotics/controlled substances which have been and are being possessed and distributed by these individuals;
5) The identity of the source of these illegal drugs and the extent of the source's involvement;
6) The manner in which money derived from the sale of illegal narcotics/controlled substances is utilized, concealed and dispensed;
7) The arrangement and verification of meetings between individuals involved in the above-named offenses;
8) The nature and scope of the continuing conspiracy; and
9) The role of each person participating in the conspiracy.

Attached to the application is an affidavit of Bryan J. Furman, a Task Force Officer with the Drug Enforcement Administration ("DEA") in Cedar Rapids, Iowa. At the time he prepared the affidavit, Officer Furman had over twenty years experience in law enforcement and had been with the DEA for over five years. His experience provided him with knowledge of the language and terminology used by illegal narcotics dealers to disguise their illegal activity. The affidavit informs the court of the facts which led the investigators to Target Telephone #16. For example, Murillo-Mora was known to be operating mostly out of the Marshalltown, Iowa, area and was using multiple telephones to communicate with co-conspirators to facilitate the drug trafficking. Murillo-Mora was identified as using Target Telephone #16 to conduct business with other known co-conspirators using targeted telephones already subject to court-authorized wiretaps. Transcripts of specific conversations involving the facilitation of narcotics deliveries are included in the affidavit.

The affidavit contains more than twenty-five pages, including nineteen separate paragraphs, detailing information known to the Task Force that supported the

application to intercept communications from Target Telephone #16. Castellanos contends that because Furman repeatedly used the phrase "I believe" to introduce his factual references, the statements are not facts that the magistrate can rely on but are instead mere beliefs, hunches, and speculative opinions. Such hyper-technical parsing of phrasing is inconsistent with the evidence and common sense. While it might have been more appropriate for Officer Furman to have written "it is my opinion, based on my experience in law enforcement and narcotics investigations," rather than "I believe," his choice of words did not negate the factual information he related to the court in the affidavit.

Based on all of the circumstances, we conclude that the district court's grant of authority to intercept communications to and from Target Telephone #16 was the result of a "practical, common-sense decision" that there was a "fair probability that contraband or evidence" of criminal activity would be found. E.g., Thompson, 690 F.3d at 984-85. The application and affidavit contained sufficient facts to establish probable cause.

2. Necessity

In addition to finding probable cause, in order to issue a warrant for a wiretap, the court must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). "This necessity requirement prevents the government from routinely using wiretaps 'as the initial step in an investigation.'" United States v. Colbert, 828 F.3d 718, 725 (8th Cir. 2016) (quoting United States v. Thompson, 210 F.3d 855, 858-59 (8th Cir. 2000)). "But as we have repeatedly held, the necessity requirement does not mandate that the government 'exhaust all possible techniques before applying for a wiretap.'" Id. (quoting United States v. Macklin, 902 F.2d 1320, 1326-27 (8th Cir. 1990)). "The government is simply not required to use a wiretap only as a last resort." Macklin, 902 F.2d at 1327 (citing United States v. Matya, 541

F.2d 741, 745 (8th Cir. 1976)). The issuing judge determines "in a commonsense manner" whether the necessity requirement is met. Id. (citations omitted). We may reverse this determination of fact only if it is clearly erroneous. Thompson, 690 F.3d at 986 (quoting Macklin, 902 F.2d at 1327)).

This is not a case in which the government decided to use a wiretap at the beginning of its investigation of criminal activity. Officer Furman's affidavit contains sixty-eight paragraphs providing details of various investigative techniques used prior to requesting the wiretap of Target Telephone #16. Investigators utilized prior wiretaps, confidential sources, controlled purchases, physical surveillance, undercover agents, search warrants, interviews, and trash searches, among other strategies. Investigators interviewed suspects and utilized grand jury subpoenas to the extent possible. The affidavit adequately explains the limited success of specific investigative techniques, the likely lack of success of certain strategies, and the possible dangers related to particular investigative tactics. The affidavit indicates that the application was based on the conclusion that "[t]he only reasonable method of developing the necessary evidence of violations is to intercept telephonic and electronic communications as requested."

Officer Furman's affidavit contains sufficient facts to support a finding that the necessity requirement of § 2518(3)(c) was met. The district court determination on this issue is not clearly erroneous.

III. PEREZ-TREVINO'S MOTION FOR JUDGMENT OF ACQUITTAL

We review *de novo* a denial of a motion for judgment of acquittal, "evaluating the evidence in the light most favorable to the verdict and drawing all reasonable inferences in its favor." United States v. Almeida-Olivas, 865 F.3d 1060, 1062 (8th Cir. 2017) (quoting United States v. Wright, 739 F.3d 1160, 1167 (8th Cir. 2014)). The conviction will not be disturbed unless "no reasonable jury could have found the

defendant guilty beyond a reasonable doubt." Id. (quoting United States v. Serrano-Lopez, 366 F.3d 628, 634 (8th Cir. 2004)). To prove a conspiracy, "the government need not prove a formal agreement existed, but rather 'a tacit understanding' between the parties." United States v. Parker, 871 F.3d 590, 600-01 (8th Cir. 2017) (quoting United States v. May, 476 F.3d 638, 641 (8th Cir. 2007)). "We will not reverse the verdict if the evidence is sufficient for a jury to find beyond a reasonable doubt that the defendant participated in the conspiracy." Id.

"To convict [Perez-Trevino] for conspiracy to distribute more than 500 grams of a mixture and substance containing methamphetamine, 'the government must prove: (1) that there was a conspiracy, i.e., an agreement to distribute the [methamphetamine]; (2) that [Perez-Trevino] knew of the conspiracy; and (3) that [he] intentionally joined the conspiracy.'" Almeida-Olivas, 865 F.3d at 1062 (quoting United States v. Sanchez, 789 F.3d 827, 834 (8th Cir. 2015) (second alteration in original)). Perez-Trevino argues that there was insufficient evidence for a jury to find proof beyond a reasonable doubt that he knew of the conspiracy or intentionally joined it. He cites United States v. Carper, 942 F.2d 1298 (8th Cir. 1991), and United States v. Cox, 942 F.2d 1282 (8th Cir. 1991), to support his argument for acquittal. In Cox, we reiterated that "[a] conspiracy conviction requires a showing that the alleged individuals joined together to further an agreed-to criminal purpose: here, distribution of cocaine." 942 F.2d at 1285 (citations omitted). Because the government's evidence failed to "explain why various unnamed individuals accompanied Cox," we reversed his conspiracy conviction. Id. at 1285-86. We specifically explained: "Without some evidence that the accompanying individuals agreed to take cocaine for distributive purposes, we do not see how a rational trier of fact could find beyond a reasonable doubt that a conspiracy existed for that purpose." Id. at 1286. In Carper, we reversed Juliette Stark's conviction because the evidence never identified her unnamed source for methamphetamine. 942 F.2d at 1302. We noted that, without speculating that Carper was her source, the evidence tended "to

prove Juliette Stark is guilty of a crime, but not conspiracy with Carper to distribute methamphetamine." Id.

As the trial court summarized in its order denying the motion for acquittal, substantial evidence supported the finding that a conspiracy to distribute methamphetamine existed, Perez-Trevino knew of the conspiracy, and he intentionally participated in the conspiracy. Witnesses, who included six co-conspirators, confirmed the existence of a dynamic conspiracy, in which several individuals participated. Perez-Trevino, along with Murillo-Mora and Flores, participated as higher-level suppliers of methamphetamine, supplying some of the same customers. Perez-Trevino was caught several times with substantial amounts of methamphetamine in his possession. Perez-Trevino resided with other co-conspirators, exchanged multiple telephone calls with co-conspirators, including Murillo-Mora and Jessica Ceniceros, and purchased a vehicle from one of the co-conspirators. Perez-Trevino used Ceniceros's garage to store two pounds of methamphetamine. In exchange, Ceniceros kept a quarter of a pound to sell for herself. Vania Guadarrama, a member of the conspiracy who testified at trial, purchased methamphetamine from a source known as El Bote, who also supplied methamphetamine to Perez-Trevino. Guadarrama testified that she purchased methamphetamine from Perez-Trevino. There was also evidence that Perez-Trevino "fronted" methamphetamine to Guadarrama and later went to her residence to collect an undischarged debt.

Substantial evidence supports the jury verdict. Cox and Carper are clearly distinguishable. The record contains evidence that Perez-Trevino had direct and substantial contact with several known, identified conspirators. Further, the evidence shows that these contacts were for the purpose of facilitating the distribution of methamphetamine in and around Marshalltown, Iowa. Accord United States v. Garcia, 569 F.3d 885, 889 (8th Cir. 2009) ("A reasonable jury evaluating this evidence could find that [defendant] was an actual participant in the

methamphetamine-distribution conspiracy."). The district court correctly denied the motion for judgment of acquittal.

VI. PEREZ-TREVINO'S PROPOSED MULTIPLE CONSPIRACY INSTRUCTION

"The 'issue of whether the defense produced sufficient evidence to sustain a particular instruction, such as a multiple conspiracy instruction, is generally a question of law subject to de novo review.'" United State v. Maza, 93 F. 3d 1390, 1398 (8th Cir. 1996) (quoting United States v. Jackson, 67 F.3d 1359, 1367 (8th Cir. 1995)); see also United States v. Hull, 419 F.3d 762, 769 (8th Cir. 2005). When the evidence supports the existence of a single conspiracy, a court does not err in denying a request for a multiple conspiracy instruction. In United States v. Delgado, 653 F.3d 729, 735-36 (8th Cir. 2011) (citations omitted) (internal quotation marks omitted), we summarized:

> A single conspiracy is composed of individuals sharing common purposes or objectives under one general agreement. In evaluating whether a variance occurred, we look to the totality of the circumstances and give the verdict the benefit of all reasonable inferences that can be drawn from the evidence. A variance based on multiple conspiracies justifies reversal only if a "spillover" of evidence from one conspiracy to another prejudices the defendant's substantial rights.

A single conspiracy is not converted to multiple conspiracies simply because different defendants enter a conspiracy at different times or perform different functions. Maza, 93 F.3d at 1398 (citing United States v. Baker, 855 F.2d 1353, 1357 (8th Cir. 1988). Nor does "the fact that different individual defendants contributed a portion of the total drugs to suppliers or participated in numerous separate transactions . . . convert a single conspiracy to multiple conspiracies." Id. at 1398-99 (citing United States v. Spector, 793 F.2d 932, 935 (8th Cir. 1986). A single conspiracy can be proven even

though the participants and their activities change over time. United States v. Slagg, 651 F.3d 832, 840 (8th Cir. 2011). This is true even if some participants are unknown to other conspirators or uninvolved in some transactions. United States v. Longs, 613 F.3d 1174, 1176 (8th Cir. 2010). Drug dealers who sometimes compete with one another may in fact be members of the same conspiracy. Slagg, 651 F.3d at 842; Delgado, 653 F.3d at 736 (citing United States v. Jeffers, 570 F.3d 557, 568 (4th Cir. 2009)).

As indicated above, the evidence at trial easily supports a finding that Perez-Trevino knowingly participated in the single conspiracy alleged at trial. The trial court did not err in denying the motion for a jury instruction on multiple conspiracies.[3]

V. DEFENDANTS' OBJECTIONS TO THE ADMISSION OF TESTIMONY

"We review the district court's admission of evidence for an abuse of discretion, affording 'deference to the district judge who saw and heard the evidence.'" United States v. Melton, 870 F.3d 830, 837 (8th Cir. 2017) (quoting United States v. Two Elk, 536 F.3d 890, 900 (8th Cir. 2008)). "An evidentiary ruling is harmless if the substantial rights of the defendant were unaffected, and the error had no, or only a slight, influence on the verdict." Id. (quoting United States v. Worman, 622 F.3d 969, 976 (8th Cir. 2010)). We will affirm the district court's decision unless we find an abuse of discretion that is both clear and prejudicial. E.g., United States v. Womack, 191 F.3d 879, 883 (8th Cir. 1999).

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[3]There is no indication that Perez-Trevino was inhibited from arguing his lack of knowledge of, or participation in, the conspiracy as it was alleged at trial. A trial court does not err in denying a proposed instruction when the instructions as a whole adequately advise the jury of the law and permit the parties to argue appropriately to the jury. See United States v. Thunder, 745 F.3d 870, 874 (8th Cir. 2014) (citing United States v. Christy, 647 F.3d 768, 770 (8th Cir. 2011)).

A. Flores/Castellanos - Hearsay Co-conspirators

To admit "statements of co-conspirators against a defendant 'the government must prove by a preponderance of the evidence that (1) a conspiracy existed; (2) the defendant and the declarant were members of the conspiracy; and (3) the declaration was made during the course of and in furtherance of the conspiracy.'" Womack, 191 F.3d at 883 (quoting United States v. Guerra, 113 F.3d 809, 813 (8th Cir. 1997)); Fed. R. Evid. 801(d)(2)(E). In Bell, we provided guidance to district courts for ruling on objections to the admission of out-of-court statements of co-conspirators. We outlined a procedure that included conditionally admitting the evidence and then ruling on the objections at the close of the government's case. 573 F.2d at 1044. The procedural steps are made outside of the jury's presence, and the court makes its admissibility ruling on the record before submitting the case to the jury. Id.

The trial court properly followed the Bell procedure, conditionally admitting the statements and then taking up the objections at the close of evidence. The evidence objected to on hearsay grounds included the following:

1) A statement by witness Rachel Berrones in which she testified that Murillo-Mora said he was upset with Castellanos because he had given Castellanos money to wire to Mexico and she told him the money was stolen. He expressed to Berrones his view that Castellanos lied and spent the money.
2) A statement by witness Rogelio Avalos-Sanchez concerning what Murillo-Mora said regarding Flores's involvement in the organization. The testimony indicated Flores was Murillo-Mora's driver until they ended their friendship because they were not agreeing on business and Murillo-Mora wanted to go his separate way.
3) Testimony by Avalos-Sanchez as to what Murillo-Mora told him about using Castellanos to transfer money.

The trial court overruled all of the objections, concluding that a preponderance of the evidence supported a finding that a conspiracy existed, the statements were made by conspirators, and the statements provided information furthering the conspiracy. We hold that the district court did not abuse its discretion by admitting the evidence under rule 801(d)(2)(E) because the statements furthered the conspiracy by identifying co-conspirators and their roles. Accord United States v. Camacho, 555 F.3d 695, 703 (8th Cir. 2009) (recognizing that the "district court made the appropriate *Bell* inquiry and we cannot say that its findings are erroneous" and holding that the district court's ruling was not an abuse of discretion).

B. Flores - Letters

Flores challenges the admission of testimony by co-conspirator Frances Gasca. During cross-examination of Gasca, Flores's attorney asked about two letters Gasca sent to Flores while she was in pretrial detention. The government was unaware of the correspondence between Gasca and Flores before the questioning began. While answering the questions regarding her letters to Flores, Gasca attempted to explain that she was responding to communications she had received from Flores. Her explanation was truncated by defense counsel. On redirect, the government's counsel asked Gasca to explain what she wanted to explain during cross-examination. Gasca began, "I wrote that because he wrote a letter to Daniela Castellanos saying for me to tell everybody that . . .," at which time Flores's counsel interrupted with an objection for lack of foundation. The court, apparently sensing a failure in the foundation, directed the government to "break that down a little bit so that we don't have an objection." The following redirect ensued:

Q. You were housed with Ms. Castellanos at some point in time?
A. Yes.
Q. And during that time did she show you letters from Juan Flores?
A. Yes.
Q. And did you read those letters?

A. Yes.
Q. And what did he write to Ms. Castellanos in those letters?
A. To say that –
MR. BELL: Objection, foundation as to who wrote the letter.
THE COURT: Objection overruled. You may answer.
A. To say that – to tell them that I was – he was only taking me to D to have sex with and that he was just my ride and that there was no involvement of meth.
Q. So Mr. Flores wrote Ms. Castellanos a letter trying to tell you what to say in court today?
A. That was a while ago, but, yes.

Gasca then testified that she saw that letter with her own eyes. During recross-examination, Flores's attorney elicited the following testimony:

Q. Now, as I understand your response to Ms. Williams's questions about writing this letter to Juan, you indicated that you did not receive any letter from Juan; it was somebody else who allegedly received it?
A. Yes.
Q. And when you – has Juan ever written to you other than – has Juan ever written a letter to you?
A. He sent me a card.
Q. When?
A. I don't remember, but it was maybe February.
Q. And what did he – did he handwrite anything on it or did he just sign it?
A. He wrote – I can't recall exactly what he wrote, but he signed it as well.
* * *
Q. Okay. And how many times did you see this letter that is alleged to have been sent by Juan to Ms. Castellanos?
A. Like once or twice.
* * *
Q. And when you saw this letter in the jail, that was in the Linn County Jail?

A. Yes.
Q. When you saw it, was the envelope already open?
A. Yes.
Q. Okay. Were you present when the envelope was opened?
A. Was I? No.
Q. Since you had never seen anything that Juan had written before, I'm assuming you couldn't identify whether that was his writing or not in that letter, correct.
A. Correct.
Q. And you have no idea if that was what was in the letter – in the envelope when it came or whether somebody replaced it with something else?
A. Well, I saw letters prior to that that he wrote that had the same writing.
Q. From who?
A. Daniela, from Juan.
Q. But you never independently obtained his writing to verify?
A. No.
Q. And you're certainly not a handwriting expert?
A. What?
Q. You're certainly not a handwriting expert?
A. No.

By the time Flores was done with his recross-examination of Gasca, he had elicited the necessary foundation. The testimony informed the jury that Gasca was not a handwriting expert and provided a basis for Gasca's lay belief that the letters were from Flores. The jury then had the information it needed to appropriately weigh the testimony. Even if the admission of the testimony were the result of an abuse of discretion, the error would be harmless considering the mass of evidence supporting Flores's conviction and the lack of any indication that Flores's substantial rights were prejudiced. E.g., Melton, 870 F.3d at 837.

VI. SENTENCING

In reviewing a district court's sentence we "first ensure that the district court committed no significant procedural error." United States v. Salazar-Aleman, 741 F.3d 878, 880 (8th Cir. 2013) (quoting United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (en banc)). "We then consider whether the sentence is substantively reasonable." Id. "Regardless of whether the final sentence is inside or outside the Guidelines range, we review a defendant's sentence under a deferential abuse-of-discretion standard." United States v. Boykin, 850 F.3d 985, 988 (8th Cir. 2017) (citing United States v. Goodale, 738 F.3d 917, 924 (8th Cir. 2013)).

A. Flores

Flores argues that his sentence is substantively unreasonable because the court attributed improper amounts of methamphetamine to him, denied his motion for downward departure, and failed to properly consider his history and character. At sentencing, the court informed the parties that it considered every factor under 18 U.S.C. § 3553(a). Based on the evidence at trial, the court calculated that Flores "should be held accountable for 2,265.9 grams of ice methamphetamine, resulting in a score of 36." The court then found obstruction of justice because Flores tried to influence the testimony of a witness and he used a false name and birth certificate in an attempt to confuse law enforcement. This resulted in a two-level upward adjustment to 38. Flores had a criminal history of I. The Guideline range for the offense was 235 to 293 months. The court sentenced Flores to the statutory maximum of 240 months, a sentence near the low end of the Guideline range. In explaining the sentence the court noted Flores's substantial criminal behavior even while under court supervision and his high risk to recidivate.

The sentence is within the correctly-calculated Guideline range. Nothing in the record supports a finding that the sentence is substantively unreasonable. The court did not abuse its discretion in sentencing Flores to 240 months' incarceration.

B. Castellanos

Castellanos challenges her 240-month sentence on three grounds. She first asserts that the court attributed too much methamphetamine to her. She also contends that the court miscalculated her criminal history score. Finally, she argues that the court erred by failing to apply a two-level decrease to her offense, pursuant to U.S.S.G. § 3B1.2, as a minor participant.

At sentencing the district court heard arguments regarding the evidence relating to the amount of methamphetamine attributable to Castellanos, including evidence that Castellanos had delivered five pounds of methamphetamine on one occasion. The record supports the court's conclusion that Castellanos be held accountable for over 4.5 kilograms of methamphetamine ("ice"), specifically 4,819.5 grams, putting the base offense level at 38. The record supports the court's decision that Castellanos did not meet her burden of proof for the two-level reduction for minor role in a conspiracy. The court further noted that the calculation of 240 months would be the same even with the reduction. The court also did not err in calculating Castellanos's criminal history score by including two prior felony convictions for driving while barred. See United States v. Philips, 633 F.3d 1147, 1148 (8th Cir. 2011) (per curiam). The statutory maximum of 240 months is well below the Guideline range of 292 to 365 months. Nothing in the record supports a conclusion that the sentence is substantively unreasonable. The court did not abuse its discretion in sentencing Castellanos to 240 months' incarceration.

VII. CONCLUSION

We affirm the judgments of the district court.

D - Order Appointment CJA Counsel - *United States v. Perez-Trevino*, No. 17-1289 (Feb. 8, 2017)

C-26

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1289

United States of America

Appellee

v.

Marcos Perez-Trevino

Appellant

Appeal from U.S. District Court for the Northern District of Iowa, Waterloo
(6:15-cr-02037-LRR-9)

ORDER

Attorney, Rockne Ole Cole is hereby appointed to represent appellant in this appeal under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

February 08, 2017

Order Entered under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

D-1

E - Notice of Appeal - *United States v. Perez-Trevino*, 6:15-CR-2037-LRR (Feb. 6, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	DEFENDANT'S NOTICE OF
	)	APPEAL
	)	
vs.	)	
	)	**IFP PREVIOUSLY GRANTED**
MARCOS PEREZ-TREVINO,	)	
	)	
Defendant,	)	

COMES NOW, the Defendant, through counsel, and hereby, pursuant to Fed. R. Crim. Proc. 4 (b) (1) (A), appeals from the judgment and sentence entered on January 30, 2017, November 10, 2016 Order Denying Motion for Judgment of Acquittal, the August 16, 2016 Jury Verdict, the May 10, 2016 Order Denying Motion to Suppress, and each and every other adverse ruling entered herein. In forma pauperis status has been previously granted.

RESPECTFULLY SUBMITTED,
/s/ Rockne Cole

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ATTORNEY FOR DEFENDANT

E-1

Certificate of Service

I, Rockne Cole, certify that I copy of

of this Notice was served upon all parties

of record on February 6, 2017.

/s/ Rockne Cole

E-2

F - Judgment - *United States v. Perez-Trevino*, 6:15-CR-2037-LRR (Jan. 30, 2017)

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA
v.
MARCOS PEREZ-TREVINO

JUDGMENT IN A CRIMINAL CASE

Case Number: **0862 6:15CR02037-009**

USM Number: **13851-062**

Rockne Cole
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) **1 of the Indictment filed on August 26, 2015** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846	**Conspiracy to Distribute 500 Grams or More of a Mixture or Substance Containing a Detectable Amount of Methamphetamine, Which Contained 50 Grams or More of Pure Methamphetamine**	**08/26/2015**	**1**

The defendant is sentenced as provided in pages 2 through 6 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) _____ ☐ is ☐ are 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.

January 30, 2017
Date of Imposition of Judgment

Signature of Judge

Linda R. Reade
Chief U.S. District Court Judge
Name and Title of Judge

January 30, 2017
Date

F-1

DEFENDANT: **MARCOS PEREZ-TREVINO**
CASE NUMBER: **0862 6:15CR02037-009**

IMPRISONMENT

☒ The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **292 months on Count 1 of the Indictment. This term of imprisonment is ordered to run concurrently with any term of imprisonment that may be imposed in the Iowa District Court for Marshall County Case Nos. FECR086367, SMCR086856, SRCR086855, and AGCR087129.**

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a Bureau of Prisons facility as close to the defendant's family (in state of Texas) as possible, commensurate with the defendant's security and custody classification needs.

That the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

Pursuant to 18 U.S.C. § 3584, it is recommended that the sentence for the instant offense be ordered to run consecutively to any term of imprisonment that may be imposed in The Iowa District Court for Marshall County, Case Nos.: STA0038450, STA0041747, SMCR087130; Emmons County, North Dakota, District Court, Case No.: 15-10-K-00015; and Stutsman County, North Dakota, District Court, Case Nos.: 10CR243 and 10CR244.

☒ 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 _____ ☐ a.m. ☐ p.m. 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 p.m. 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

F-2

DEFENDANT: **MARCOS PEREZ-TREVINO**
CASE NUMBER: **0862 6:15CR02037-009**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **5 years on Count 1 of the Indictment.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **MARCOS PEREZ-TREVINO**
CASE NUMBER: **0862 6:15CR02037-009**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the U.S. Probation Office:

1) **The defendant must participate in and successfully complete a program of testing and treatment for substance abuse.**

2) **The defendant must not use alcohol and is prohibited from entering any establishment that holds itself out to the public to be a bar or tavern.**

3) **The defendant must participate in the Remote Alcohol Testing Program during any period of the defendant's supervision. The defendant must abide by all rules and regulations of the Remote Alcohol Testing Program. The defendant will be responsible for the cost of the Remote Alcohol Testing Program.**

4) **If not employed at a regular lawful occupation, as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.**

5) **The defendant must submit to a search of the defendant's person, residence, adjacent structures, office or vehicle, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant must warn any other residents that the residence or vehicle may be subject to searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the United States Marshals Service.**

Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

DEFENDANT: **MARCOS PEREZ-TREVINO**
CASE NUMBER: **0862 6:15CR02037-009**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	**$ 100**	**$ 0**	**$ 0**

☐ 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 ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* 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.

DEFENDANT: **MARCOS PEREZ-TREVINO**
CASE NUMBER: **0862 6:15CR02037-009**

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 $ **100** due immediately, balance due

☐ not later than _____ , or
☐ 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

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and 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.

G - Order Adopting Report and Recommendation Denying Motion to Suppress -

United States v. Perez-Trevino, No. 15-CR-2037-LRR (May 10, 2018)

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

UNITED STATES OF AMERICA, Plaintiff, vs. MARCOS PEREZ-TREVINO, Defendant.	No. 15-CR-2037-LRR **ORDER**

TABLE OF CONTENTS

I. INTRODUCTION

The matter before the court is Defendant Marcos Perez-Trevino's Objections to Report and Recommendation ("Objections") (docket no. 247), timely filed in response to United States Chief Magistrate Judge Jon S. Scoles's Report and Recommendation (docket no. 242), which recommends that the court deny Defendant's "Motion to Suppress Evidence" ("Motion") (docket no. 194).

II. RELEVANT PROCEDURAL BACKGROUND

On August 26, 2015, a grand jury returned a one-count Indictment (docket no. 12) charging Defendant and ten others with one count of conspiracy to distribute

methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The Indictment also contains a forfeiture allegation. On March 16, 2016, Defendant filed the Motion. On March 25, 2016, the government filed a Resistance (docket no. 214). On April 1, 2016, Judge Scoles held a hearing on the Motion and several other matters not relevant to this Order. *See* April 1, 2016 Minute Entry (docket no. 233); *see also* Hearing Transcript (docket no. 234). Defendant appeared in court with his attorney, Rockne Cole. Assistant United States Attorney Lisa Williams represented the government. On April 12, 2016, Judge Scoles issued the Report and Recommendation, which recommends that the court deny the Motion. On April 26, 2016, Defendant filed the Objections. The government has not filed a response to the Objections and the time for doing so has expired. Defendant requests oral argument on the Objections. However, the court finds that oral argument is unnecessary. The Report and Recommendation and the Objections are fully submitted and ready for decision.

III. STANDARD OF REVIEW

When a party files a timely objection to a magistrate judge's report and recommendation, "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge must consider de novo any objection to the magistrate judge's recommendation."); *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (noting that a district judge must "undertake[] a de novo review of the disputed portions of a magistrate judge's report and recommendations"). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions."). It is reversible error

for a district court to fail to engage in a de novo review of a magistrate judge's report when such review is required. *See Lothridge*, 324 F.3d at 601. Accordingly, the court reviews the disputed portions of the Report and Recommendation de novo.

IV. RELEVANT FACTUAL BACKGROUND

On August 12, 2015, Officer Thomas Fisher of the Chouteau, Oklahoma Police Department observed a white Oldsmobile Intrigue with a passenger-side taillight out.[1] Officer Fisher initiated a traffic stop of the vehicle and made contact on the passenger side. Defendant was driving the vehicle accompanied by a passenger, Bradley Carter. Officer Fisher requested identification from Defendant. Defendant produced an ID card and stated that he had a license in Texas. Defendant then accompanied Officer Fisher to the squad car and was seated in the front passenger seat. According to Officer Fisher, Defendant appeared nervous and was overly apologetic about the taillight. Officer Fisher requested that dispatch run Defendant's driver's license and was informed that Defendant was not eligible to drive. At that time, Officer Fisher placed Defendant under arrest. Officer Fisher also learned that Carter's license was suspended.

Because neither occupant of the vehicle was authorized to drive, Officer Fisher believed that police policy required him to impound the vehicle. Hearing Transcript at 2 (stating that police "cannot leave a vehicle that [they] have stopped on the side of the road"). Upon learning that the vehicle was going to be impounded, Defendant became agitated and requested that he be allowed to leave the car on the side of the road or park it somewhere for someone else to pick it up. Officer Fisher determined that the vehicle

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[1] The passenger-side taillight in question can be seen on Officer Fisher's squad car's dash camera footage, admitted as Government Exhibit 5. *See* April 1, 2016 Minute Entry.

should be impounded and proceeded to conduct an inventory of the vehicle's contents as provided by police policy.[2]

As Officer Fisher conducted the inventory he smelled what he describes as the "odor of raw marijuana" emanating from the center console. *Id.* at 7. He opened the center console and found a plastic sack containing a green leafy substance that was later identified as marijuana. He continued his inventory and found a folded dollar bill under the passenger seat that contained a crystalline substance that was later identified as methamphetamine. In a compartment on the driver's side door, Officer Fisher found two field methamphetamine test kits.[3] In the back seat, there was a large, closed, blue cooler. After opening it, Officer Fisher found various food, drinks and a large ziploc bag containing approximately 877 kilograms of methamphetamine.[4] Following his inventory

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[2] The "Impoundment of Vehicles" policy ("Policy") has been filed as Government Exhibit 1 (docket no. 241-1).

[3] Officer Fisher did not testify regarding the test kits at the hearing, however, footage from Officer Fisher's body camera footage, admitted as Government Exhibit 4, depicts the discovery of the test kits. *See* April 1, 2016 Minute Entry.

[4] Defendant objects to an allegedly "material omission of fact" in the Report and Recommendation. Brief in Support of the Objections (docket no. 247-1) at 5 (formatting omitted). He states that Judge Scoles failed to "make it clear that the [z]iploc baggie containing methamphetamine was found within a closed storage container." *Id.* However, as Defendant concedes, the fact that the cooler was closed is "implied" in the Report and Recommendation. *Id.* In the Report and Recommendation's discussion regarding the cooler, Judge Scoles concluded that "[o]pening closed compartments, or a cooler in this case, during an inventory search is not violative of the Fourth Amendment." Report and Recommendation at 8. Therefore, the fact that Judge Scoles may not have explicitly called the cooler a "closed container" in the factual section of the Report and Recommendation was neither prejudicial nor material. Accordingly, the court shall overrule this portion of the Objections.

of the vehicle, Officer Fisher completed a Stored Vehicle Report listing the items he found in the vehicle.[5]

At that time, Officer Fisher returned to the squad car and advised Defendant of his *Miranda* rights. However, before Officer Fisher could question Defendant about the cooler's contents, Defendant stated that he had located "it" at a rest stop in Texas, and that he planned to sell it in Iowa, believing it to be cocaine. Officer Fisher understood Defendant's statement to refer to the methamphetamine in the cooler.

V. ANALYSIS

In the Objections, Defendant argues that Judge Scoles erred in finding that the inventory of the vehicle pursuant to the Policy was constitutional. A well-established exception to the Fourth Amendment's warrant requirement is the so-called inventory search exception. "Law enforcement officers may conduct a warrantless search when taking custody of a vehicle to inventory the vehicle's contents 'in order to protect the owner's property, to protect the police against claims of lost or stolen property, and to protect the police from potential danger.'" *United States v. Ball*, 804 F.3d 1238, 1240-41 (8th Cir. 2015) (quoting *United States v. Hartje*, 251 F.3d 771, 775 (8th Cir. 2001)). However, "[o]fficers 'may not raise the inventory-search banner in an after-the-fact attempt to justify what was . . . purely and simply a search for incriminating evidence . . . .'" *Id.* at 1241 (quoting *United States v. Beal*, 430 F.3d 950, 954 (8th Cir. 2005)). In conducting the inventory search, officers need not turn a blind eye toward "potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime." *Id.* (quoting *Beal*, 430 F.3d at 954). An inventory search must still comport with the Fourth Amendment's demand of reasonableness. *Id.* "The reasonableness requirement is met when an inventory search

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[5] The Stored Vehicle Report has been filed as Government Exhibit 3 (docket no. 214-3).

is conducted according to standardized police procedures, which generally remove the inference that the police have used inventory searches as a purposeful and general means of discovering evidence of a crime." *United Sates v. Smith*, 715 F.3d 1110, 1117 (8th Cir. 2013) (quoting *United States v. Taylor*, 636 F.3d 461, 464 (8th Cir. 2011)). Even when officers fail to strictly follow standardized procedure, suppression is not warranted unless there is "something else" that suggests that the inventory search was merely an illegitimate attempt to conduct a search for incriminating evidence. *Id.* at 1117-18 (quoting *United States v. Rowland*, 341 F.3d 774, 780 (8th Cir. 2003)).

Defendant argues that the Policy is not sufficiently standardized to authorize Officer Fisher to conduct an inventory search of the vehicle. Brief in Support of the Objections at 6-12. He argues that the Policy is "per se defective because it did not provide any limitation on the officer's discretion to conduct an inventory search." *Id.* at 7 (formatting omitted). He argues that, because the Policy does not specifically address searching containers within the vehicle as part of an inventory, it does not provide sufficiently standardized criteria to limit the search of the vehicle. *Id.* at 8. Defendant also states that Officer Fisher did not testify as to any "alternative basis such as department custom to justify the inventory search." *Id.* at 11.

The Policy states, in relevant part:

> 1. It is the duty of all officers, who impound motor vehicles, to perform an inventory of those vehicles.
>
> 2. The purpose of this inventory will be to ensure a proper accounting of all property in or attached to the vehicle in order to protect the officer from liability of assumed damages and/or missing property.
>
> 3. The officer performing the inventory will conduct a thorough and uniform inventory of the vehicle and its compartments.

Exhibit 1 at 3.

Defendant argues that the Policy's language that the inventory must be "thorough and uniform" is "no limitation at all." Brief in Support of the Objections at 8. He argues that the Policy is unconstitutional per se and the court should invalidate the inventory search. *Id.* Defendant offers no authority for the proposition that the phrase "thorough and uniform" is constitutionally deficient per se. The Policy directs that searches are to be "uniform" and that they must be confined to the "vehicle and its compartments." The court finds that the Policy provides sufficiently standardized criteria, making inventory searches pursuant to it constitutional. This is especially true when officers are guided by the Policy's overarching concern with "protect[ing] the officer from liability of assumed damages and/or missing property" from the vehicle. Exhibit 1 at 3. Furthermore, a directive that officers search the vehicle's "compartments" plainly encompasses the vehicle's center console where Officer Fisher discovered the marijuana and the driver's side door where Officer Fisher discovered the methamphetamine field test kits. *See, e.g.*, *United States v. Ball*, 804 F.3d 1238, 1241 (8th Cir. 2015) (finding an inventory search of a vehicle's air filter compartment valid where the policy directs officers to search in "areas where an owner or operator would ordinarily place or store property or equipment"); *United States v. Pappas*, 452 F.3d 767, 772 (8th Cir. 2006) (finding an inventory search of the vehicle's engine compartment is a proper area for an inventory search); *United States v. Barry*, 98 F.3d 373, 376-77 (8th Cir. 1996) (finding an inventory search of a vehicle's unlocked glove compartment to be valid). Accordingly, the court shall overrule the Objections to the extent that they argue that the marijuana or methamphetamine field test kids should be suppressed.

Defendant also argues that the court should suppress the methamphetamine found in the blue cooler because the Policy does not specifically address the opening of closed containers. *See* Brief in Support of the Objections at 8-9. Defendant cites the Supreme Court's decision in *Florida v. Wells*, 495 U.S. 1 (1990), in support of this argument. In

Wells, officers impounded a defendant's vehicle and forced open a locked suitcase in the vehicle's trunk, which held a large amount of marijuana. *Wells*, 495 U.S. at 2. The police conducted the inventory search pursuant to police policy, but such policy was silent as to whether police were authorized to open closed containers within the vehicle. *Id.* at 4. The Supreme Court found that inventory policies need not authorize officers to open closed containers in a "totally mechanical 'all or nothing' fashion," but that the policy did need to contain some "standardized criteria" to limit the officer's discretion in conducting the inventory search. *Id.* By way of example, the Supreme Court stated that "it would be . . . permissible . . . to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors." *Id.* However, because the department in *Wells* "had no policy whatever with respect to the opening of closed containers encountered during an inventory search," the Supreme Court held that the search "was not sufficiently regulated to satisfy the Fourth Amendment" and that the marijuana was properly suppressed. *Id.* at 4-5.

Since *Wells*, several cases have addressed various defendants' arguments that inventory policies were constitutionally deficient because they did not specifically address the opening of closed containers. Courts addressing such arguments have declined to require that police policies explicitly mention "closed containers," so long as the policies contain some other language sufficiently limiting officers' discretion. For example, the Seventh Circuit Court of Appeals has held that, "[w]hile the . . . policy [at issue did] not use the buzz words 'closed container' . . . [it was] convinced that the term 'contents' provides sufficient elucidation to satisfy the requirements of *Wells*." *United States v. Wilson*, 938 F.3d 785, 789 (7th Cir. 1991); *see also United States v. Lowe*, 9 F.3d 43, 46 (8th Cir. 1993) (citing *Wilson* with approval). More recently, the Third Circuit Court of Appeals recognized that a policy need not contain any "magic words relating specifically to closed containers" and that a policy which directed officers to "search all accessible

areas of the vehicle . . . to determine if they contain 'any . . . personal property of value,' or other effects" was sufficient under *Wells*. *United States v. Mundy*, 621 F.3d 283, 291-92 (3d Cir. 2010); *see also United States v. Matthews*, 591 F.3d 230, 237 (4th Cir. 2009) (holding that a policy that required "[a] complete inventory [to] be taken on all impounded or confiscated vehicles including the interior, glove compartment and trunk" complied with *Wells* (alterations in original)); *United States v. Thompson*, 29 F.3d 62 (2d Cir. 1994) (finding that a policy that directs officers to "inventory the *contents* of the vehicle" and that "[i]t is not necessary to enter *locked portions*" of a vehicle complied with *Wells*); *United States v. Foots*, 340 Fed. App'x 969, 973-74 (9th Cir. 2009) (unpublished decision) (finding that a policy requiring "inventorying the subject's property entirely" authorized the opening of closed containers, especially when "the inventory search was conducted pursuant to a standardized procedure appropriately limited by a policy of safekeeping"); *United States v. Hall*, 391 F. Supp. 2d 760, 867 (N.D. Iowa 2005) (distinguishing *Wells* and concluding that a policy requiring police to inventory "the contents" of a vehicle and to make a "complete inventory" permits officers to open closed containers within the vehicle), *aff'd*, 497 F.3d 846 (8th Cir. 2007).

Here, the Policy states that officers must conduct the inventory search "to ensure a proper accounting of all property in or attached to the vehicle" and that such inventory search should be conducted in "a thorough and uniform" manner, limited to "the vehicle and its compartments." Exhibit 1 at 3. The court finds that, when considered together, the language in parts one through three of the Policy as reproduced above is sufficiently similar to language used in the policies at issue in cases such as *Wilson*, *Mundy* and *Hall* to find the Policy valid and the inventory search done pursuant to it similarly valid. The Policy sufficiently limits officers' discretion by limiting the area of the search to the "vehicle and its compartments" and requiring that officers detail "all property" in the vehicle. Although the Policy does not specifically mention closed containers, its plain

language directs officers to make a complete inventory of all of the contents of the vehicle. The language of the Policy reasonably requires officers to open any unlocked storage containers where property would normally be stored. *See Mundy*, 621 F.3d at 291. Accordingly, the court finds that the Policy complies with *Wells*.

Finally, Defendant argues that *United States v. Kennedy*, 427 F.3d 1136, 1145 (8th Cir. 2005), is analogous to the instant case and is instructive. The court disagrees. In *Kennedy*, police responded to a call from the defendant's girlfriend, who reported that the defendant stole certain property from her. 427 F.3d at 1139. Police eventually arrested the defendant in his car for driving without a license and performed an initial inventory search of the vehicle. *Id.* After the arrest, an officer spoke with the defendant's girlfriend, who told the officer that the defendant was engaged in the distribution of methamphetamine and that he stored a large amount of methamphetamine under a loose speaker in the trunk of his vehicle. *Id.* at 1139-40. Following this discussion, the officer returned to the defendant's vehicle, searched under the loose speaker and discovered two large packages of methamphetamine and $6,000 cash. *Id.* at 1140. The district court suppressed the evidence. In affirming the district court, the Eighth Circuit focused not on whether the policy, on its face, was constitutionally deficient—as Defendant urges here—but rather on whether officers complied with the policy at issue. *Id.* at 1143-45. The Eighth Circuit expressed concern that the government did not present evidence that the officer who conducted the inventory search would have searched under the speaker solely pursuant to the language in the policy and absent the information from the defendant's girlfriend. *Id.* Because the government was unable to demonstrate as much, the Eighth Circuit ruled that the inventory search exception did not apply and suppression was warranted. *Id.*

Here, there is no indication that the inventory search was mere pretext for a general investigatory search. Officer Fisher did not request consent to search the vehicle, which

might, in hindsight, raise the suspicion that the later inventory search was a last-ditch effort to obtain incriminating evidence. Similarly, Officer Fisher did not suspect that he would find any controlled substances inside the vehicle. *See* Hearing Transcript at 6 (Officer Fisher testifying that he did not "smell any suspicious substances coming out of the vehicle" during the initial stop and that he did not "observe anything inside the vehicle that suggested . . . that there could be drugs inside the vehicle"). Therefore, the court finds that the government has met its burden of demonstrating the validity of the inventory search.[6] Accordingly, the court shall overrule the Objections.

VI. CONCLUSION

In light of the foregoing, the Objections (docket no. 247) are **OVERRULED**, the Report and Recommendation (docket no. 242) is **ADOPTED** and the Motion (docket no. 194) is **DENIED**.

IT IS SO ORDERED.

DATED this 10th day of May, 2016.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

[6] At the Hearing, Officer Fisher and the government stated that, upon smelling the scent of marijuana from the center console, the search became a probable cause search. *See id.* at 7, 15. However, because the court has found that Officer Fisher's inventory search was valid, the court shall not address this argument. *See also* Report and Recommendation at 7-8 (finding the inventory search valid and declining to rely on the probable cause argument).

H - Report and Recommendation - *United States v. Perez-Trevino*, No. 15-CR-2037-LRR (April 12, 2018)

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

UNITED STATES OF AMERICA,	
Plaintiff,	**Case No. CR15-2037**
vs.	**REPORT AND RECOMMENDATION**
MARCOS PEREZ-TREVINO,	
Defendant.	

On the 1st day of April 2016, this matter came on for hearing on the Motion to Suppress Evidence (docket number 194) filed by Defendant Marcos Perez-Trevino on March 16, 2016. The Government was represented by Assistant United States Attorney Lisa C. Williams. Defendant appeared in court and was represented by his attorney, Rockne Cole.

I. PROCEDURAL HISTORY

On August 26, 2015, Defendant and ten others were charged by indictment with one count of conspiracy to distribute methamphetamine. Defendant was arraigned on November 24, 2015. Trial was initially scheduled for January 25, 2016, but was later continued to May 2 and consolidated with the trial of the other defendants. At Defendants Becerra's and Castellanos' requests, the trial for all defendants was continued again to August 8.

II. ISSUE PRESENTED

Defendant challenges the admissibility of evidence collected during a traffic stop in Oklahoma on August 12, 2015. Defendant argues the inventory search of the vehicle was unlawful, and evidence of the drugs discovered in the car should be suppressed.

III. RELEVANT FACTS

On August 12, 2015, Officer Thomas Scott Fisher of the Chouteau, Oklahoma, Police Department was on routine patrol when a car passed by with a malfunctioning taillight. Fisher conducted a routine traffic stop. Defendant Marcos Perez-Trevino was driving the vehicle and was accompanied by another male in the front passenger seat. Defendant seemed nervous when Fisher first approached the car, although Fisher acknowledged it is not uncommon for a person stopped by a law enforcement officer to be nervous. When Fisher asked Defendant for a driver's license, Defendant produced an "ID card" and said he had a license in Texas. At Fisher's request, Defendant accompanied Fisher back to the squad car.

With Defendant sitting in the front passenger seat of the squad car, Officer Fisher observed the carotid artery in Defendant's neck was "pulsing," he was sweating, and he "wouldn't make eye contact" with Fisher. According to Fisher, Defendant was "overly apologetic" for the nonfunctioning taillight. Fisher checked with "dispatch" regarding Defendant's license and was advised that Defendant was not eligible to drive. Fisher also checked on the passenger's driver's license and was advised that it was suspended. That is, neither Defendant nor the passenger were legally authorized to drive. Fisher determined Defendant would be arrested and the car would be towed. According to Fisher, once Defendant knew the car was going to be impounded, he was "very adamant" that it just be left on the side of the road or that someone be permitted to come and pick it up.[1] At that point, Defendant was arrested for driving without a license.

Officer Fisher then conducted an inventory search of the vehicle. Fisher testified that as soon as he leaned into the vehicle from the passenger side, with his face "basically

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[1] The interaction between Officer Fisher and Defendant was recorded on Fisher's body camera and introduced as Government's Exhibit 4.

directly over the center console," he could smell the odor of "raw marijuana."[2] Upon opening the center console, Fisher found a plastic sack containing a green leafy substance, which was later identified as marijuana. Under the passenger seat, Fisher found a folded one-dollar bill that contained a clear crystal substance, which was later determined to be methamphetamine. In the backseat, there was a large cooler. The cooler contained food, drinks, and a large ziploc bag containing 877 grams of methamphetamine.

After locating the methamphetamine inside the car, Officer Fisher returned to the squad car and read Defendant a *Miranda* warning. Fisher testified that "before I could even ask him a question," Defendant told Fisher he had located "it" at a rest stop in Texas. Fisher assumed Defendant was referring to the methamphetamine in the cooler. Defendant told Fisher that "his plan was to take it to Iowa and sell it to make money."

IV. DISCUSSION

Officer Fisher testified Defendant was pulled over because one of the taillights on the passenger side of the car was not functioning. According to Fisher, Oklahoma law requires that any manufacturer-installed lights on a vehicle be working. Defendant conceded at the hearing that the stop was lawful. Defendant does *not* argue that Oklahoma law only requires one functioning taillight on the passenger side and, even if that is the law, the argument would be unavailing. *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (an objectively reasonable mistake of law does not invalidate a vehicle stop). *See also Heien v. North Carolina*, _____ U.S. _____, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014) ("Because the officer's mistake about the brake-light law was reasonable, the stop in this case was lawful under the Fourth Amendment.").

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[2] Officer Fisher can be heard on the video recording taking several deep breaths, but his smelling marijuana when he leaned into the car was apparently not included in his police report.

Similarly, Defendant concedes that Officer Fisher was permitted to ask him routine questions and, after determining Defendant was not authorized to drive, place him under arrest. Defendant argues, however, that his car was improperly impounded and the inventory search was unlawful.

The law regarding inventory searches is well-established, and was recently summarized by the Eighth Circuit Court of Appeals as follows:

> Inventory searches are one exception to the general rule that searches conducted without a warrant are unreasonable. The purpose of an inventory search is to protect "owner's property while it remains in police custody," as well as to protect "police against claims or disputes over lost or stolen property" and "from potential dangers." An inventory search must "be reasonable under the totality of the circumstances and may not be a ruse for general rummaging in order to discover incriminating evidence." "The reasonableness requirement is met when an inventory search is conducted according to standardized police procedures, which generally remove the inference that the police have used inventory searches as a purposeful and general means of discovering evidence of a crime." However, "inventory searches need not be conducted in a totally mechanical, all or nothing fashion." And, "even when law enforcement fails to conduct a search according to standardized procedures, this does not mandate the suppression of the evidence discovered as a result of the search." "There must be something else; something to suggest the police raised 'the inventory-search banner in an after-the-fact attempt to justify' a simple investigatory search for incriminating evidence."

United States v. Smith, 715 F.3d 1110, 1117-18 (8th Cir. 2013) (all citations omitted).

On July 1, 2013, the Chouteau Police Department adopted an "Impoundment of Vehicles" policy. *See* Government's Exhibit 1. The policy provides that a vehicle shall

be impounded for "safekeeping" if a subject is arrested.[3] Furthermore, the vehicle may be towed under the public assistance section "[w]hen, following arrest of the owner/operator or for other reasons, the vehicle cannot be left at the scene without substantial risk of theft from or damage to the vehicle or personnel property contained therein."[4] The policy provides generally that "[v]ehicles impounded or otherwise taken into custody by personnel of the Chouteau Police Department shall be inventoried in a manner consistent with this policy."[5]

If a vehicle is to be impounded, the policy sets forth the manner in which the inventory is to be conducted:

> 1. It is the duty of all officers, who impound motor vehicles, to perform an inventory of those vehicles.
>
> 2. The purpose of this inventory will be to ensure a proper accounting of all property in or attached to the vehicle in order to protect the officer from liability of assumed damages and/or missing property.
>
> 3. The officer performing the inventory will conduct a thorough and uniform inventory of the vehicle and its compartments.

Impoundment of Vehicles policy at 3, ¶ III(A)(1)-(3). Furthermore, the policy provides that "Officers should take all necessary precautions when towing a vehicle to properly

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[3] Impoundment of Vehicles policy at 2, ¶ II(1)(c).

[4] *Id.* at 3, ¶ II(G)(3).

[5] *Id.* at 1, ¶ A(3).

search and inventory a vehicle. An inventory search is intended to protect the citizen, the officer and the wrecker company from claims of loss and theft."[6]

In his motion and supporting brief, Defendant sets forth the law regarding vehicle stops and inventory searches, but he does not assert *how* Officer Fisher's actions in this case were violative of the Constitution. At the time of hearing, Defendant was unwilling to concede that the decision to impound the vehicle was lawful, but he was unable to cite any authority to support his claim that impounding the vehicle under these circumstances violates the Constitution. Defendant concedes he was lawfully stopped and arrested. After it was determined that his passenger was not lawfully entitled to drive, I find no constitutional violation in the decision to have the car towed from the scene, where it was parked illegally.

In *Colorado v. Bertine*, 479 U.S. 367 (1987), the Court rejected the respondent's argument that an inventory search was unconstitutional because "departmental regulations gave the police officer's discretion to choose between impounding his van and parking and locking it in a public parking place." *Id.* at 375. The Court concluded that the exercise of police discretion is permitted "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Id.* Here, Officer Fisher decided to tow Defendant's vehicle pursuant to a standardized policy. The Chouteau Police Department impoundment of vehicles policy authorizes, and perhaps requires, the impoundment of a vehicle if the driver has been arrested or the vehicle cannot be left at the scene without substantial risk of theft from or damage to the vehicle. Therefore, the decision to impound and tow the vehicle does not violate the Fourth Amendment. *See also United States v. Arrocha*, 713 F.3d 1159, 1163 (8th Cir. 2013) (Although an officer exercised "some discretion" in deciding to tow the

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[6] *Id.* at 3, Regulations (2).

defendant's vehicle, "he acted within the degree of 'standardized criteria' or "established routine' that our prior towing cases require.").

Pursuant to the policy adopted by the Chouteau Police Department, it was then incumbent upon Officer Fisher to conduct a thorough inventory of the vehicle and its compartments. Almost immediately after beginning the inventory search in this case, Officer Fisher found marijuana in the center console. Fisher testified that he could smell marijuana when he leaned into the car, thus converting the inventory search to a probable cause search.[7] The Government does *not* rely on probable cause, however, and instead argues that Fisher conducted a valid inventory search.

Defendant's brief is silent on the issue of *how* Officer Fisher's inventory search violated the Fourth Amendment. At the time of hearing, however, Defendant seemed to argue that opening the center console, or the cooler in the backseat, violated the impoundment of vehicles policy. Defendant concedes the policy directs the officer to conduct a "thorough" inventory of the vehicle and its "compartments," but argues such a policy "is not sufficiently standardized." Again, Defendant offers no authority for this argument.

In *Bertine*, the respondent was arrested for drunk driving and, before a tow truck arrived, an officer inventoried the contents of his van. The officer opened a closed backpack and found a nylon bag containing metal canisters. Opening the canisters, the officer discovered drugs, paraphernalia, and cash. 479 U.S. at 369. The Colorado Supreme Court found the search violated the Fourth Amendment. The United States Supreme Court reversed. The Court rejected the state court's opinion that, before

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[7] "The so-called 'automobile exception' permits police to conduct a warrantless search of an automobile if, at the time of the search, they have probable cause to believe that the vehicle contains contraband or other evidence of a crime." *United States v. Kennedy*, 427 F.3d 1136, 1140-41 (8th Cir. 2005).

inventorying a container, the police must "weigh the strength of the individual's privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items." *Id.* at 374. The Court concluded it would be unreasonable to expect police officers "to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." *Id.* at 375 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983)).

> When a legitimate search is underway, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

Bertine, 479 U.S. at 375 (quoting *United States v. Ross*, 456 U.S. 798, 821 (1982)).

The facts in this case are similar to those in *United States v. Davis*, 882 F.2d 1334 (8th Cir. 1989). There, the defendant was stopped for speeding and arrested after it was discovered he was driving without a valid license. Following standard local police procedure, the officer determined the car would have to be towed and he proceeded to conduct an inventory search of the car. The officer spotted two paper bags on the passenger-side front floorboard, one of which was partially opened. The officer opened both bags and found contraband. Citing *Bertine*, the Court concluded that there was no persuasive reason for finding the inventory search to be unconstitutional. *Id.* at 1339.

Similarly, I find no constitutional violation here. Defendant concedes he was lawfully stopped and arrested. Pursuant to established policy, Officer Fisher determined the vehicle would have to be towed. Fisher then conducted a lawful inventory search pursuant to a policy adopted by the Chouteau Police Department. Opening closed compartments, or a cooler in this case, during an inventory search is not violative of the Fourth Amendment.

V. RECOMMENDATION

I respectfully recommend that the Motion to Suppress Evidence (docket number 194) filed by Defendant Marcos Perez-Trevino be **DENIED**. The parties are advised, pursuant to 28 U.S.C. § 636(b)(1), that within fourteen (14) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections with the district court. ***The parties are reminded that pursuant to Local Rule 72.1, "[a] party asserting such objections must arrange promptly for a transcription of all portions of the record the district court judge will need to rule on the objections." Accordingly, if the parties are going to object to this Report and Recommendation, they must promptly order a transcript of the hearing held on April 1, 2016.***

DATED this 11th day of April, 2016.

JON STUART SCOLES
CHIEF MAGISTRATE JUDGE
NORTHERN DISTRICT OF IOWA

I - Government Ex. 1 - Choteau Police Department Inventory Policy

CHOUTEAU POLICE DEPARTMENT

Policy Title	Policy Number	Effective Date
Impoundment of Vehicles	Section 8	July 1, 2013
Topics	**Standard References**	**Number of Pages**
Purpose, Policy, Procedure, Impoundment for Evidence, Inventory & Release, Regulations		3
Issued By	**Special Instructions**	
Lynn Hershberger, Police Chief		

Purpose: The Purpose of this policy is to provide guidelines for towing, impoundment, inventory, and release of vehicles.

The objectives of this policy are multiple:

- Protection of the Public
- Protection of the Chouteau Police Department
- Protection of the Employee
- To critique, modify, eliminate or change existing policies

Policy:
Officers are routinely faced with the question of whether to impound or tow motor vehicles for purposes of safekeeping property, securing evidence, protecting the public, or securing property under asset forfeiture statutes. It is the policy of the Chouteau Police Department to tow, impound, inventory, and release vehicles in accordance with the procedures in this policy.

Statutory References:
Impoundment, removal of illegally parked vehicles, see 47 O.S. §§ 951 et seq. and 47 O.S. §§ 901 to 904:

Procedures:

A. General

1. The Chouteau Police Department shall use commercial towing services and impoundment lots as authorized by the City of Chouteau with the exception of city owned vehicles or exigent circumstances.

2. Vehicles impounded or otherwise taken into custody by personnel of the Chouteau Police Department shall be inventoried in a manner consistent with this policy.

3. Motor vehicles shall not be impounded for purposes other than those defined by the Oklahoma State Statutes or the City of Chouteau and shall never be impounded as a form of punishment or a means of conducting a vehicle search when probable cause does not exist or the consent to search cannot be obtained.

4. A Record of all vehicles towed, impounded or stored under the direction of any law enforcement officer, through the Communication Center, will be maintained in the Wrecker log book.

5. When impoundment is ordered, the operator and any passengers should not be left stranded. Every attempt should be made to offer assistance to citizens in need.

6. Vehicle owners and/or operators may be permitted to remove unsecured valuables and/or necessities of a non-evidentiary nature from the vehicle prior to its removal for impoundment, as long as these items are not required as evidence. The nature of these valuables and/or necessities shall be documented on the impoundment form.

I-1

Government Exhibit 1 (Mot)
Case 15-CR-2037-9

II. Impoundment for Evidence

1. A vehicle shall be impounded if a subject is arrested for the purpose of incarceration and one of the following circumstances exists:
    a. The vehicle was used as an instrument in a crime:
    b. The vehicle contains evidence of a crime that cannot be processed at the scene and must be secured to ensure its evidentiary integrity;
    c. Safekeeping
2. A hold may be placed on any vehicle impounded for evidence within a reasonable time period. If there is a possibility the vehicle may not be able to be processed in a timely manner, the vehicle should be stored in the CPD impound lot.

B. Recovered Stolen Vehicles

1. Impoundment of stolen vehicles or suspected stolen vehicles is appropriate when the following circumstances exist:

The owner/designee cannot be contacted:

a. The owner/designee is contacted and cannot or will not respond in a reasonable amount of time:
b. Immediate removal is necessary for safety reasons
c. The vehicle was used in the commission of a crime and impoundment is necessary to collect evidence.

C. Motor Vehicle Accidents

1. Vehicles may be impounded if the vehicle is needed for the investigation following a vehicle accident involving serious personal injury or for leaving the scene of an accident. Such cases may, but do not necessarily, involve custody of the vehicle operator.
2. Following motor vehicle accidents, an officer may request impoundment when the operator is unwilling or unable to take charge of the vehicle, and:
    a. The vehicle cannot be legally parked and sufficiently secured at the scene, or
    b. There is property in or attached to the vehicle that cannot be sufficiently secured at the scene or placed in the custody of a responsible third party.

D. Impoundment for Seizure

1. Officers may impound a motor vehicle with the intent of initiating forfeiture proceedings when the vehicle is used in the commission of a crime as specified by the Oklahoma State Statutes. When confiscation is a possibility the officer should take the following steps:
    ✓ Leave a copy of all reports to the Chief of Police. The impounding officer will be responsible for follow up on any confiscation, notification of the District Attorney's office and verification of whether or not seizure is viable.
    ✓ Have the vehicle towed to the CPD impound lot by the wrecker service and not to the company yard. Officers may wish to drive the vehicle themselves in certain situations. Perform a complete inventory of the contents and include a copy of the inventory/tow in to the Chief of Police.

E. Other Bases for Impoundment

1. Officers may impound a vehicle when a license plate(s) is displayed on the vehicle not assigned to that vehicle and it is reasonable to believe the owner/operator of the vehicle intended to circumvent or violate the law.
2. Officers may impound when a Vehicle Identification Number (VIN) has been removed, replaced, or purposely modified and there is probable cause to believe the owner or operator of the vehicle intended to circumvent or violate the law.
3. An Officer may impound when a vehicle, because of faulty equipment, is determined to be a hazard if operated.
4. Officers may impound when otherwise permitted by the Oklahoma State Statutes or City of Chouteau Ordinances, specifically a vehicle may be towed if it displays an expired license plate and there is probable cause to believe the owner has failed to pay taxes due the state.

G. Public Assistance Towing

Public assistance towing of motor vehicle is distinguished from impoundment, as it does not typically involve police

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custody of the motor vehicle. If the vehicle is towed under the public assistance towing section the owner may select a towing service of their choice and the officer shall make a reasonable effort to assist in contacting the towing service.

1. Officers may order vehicles towed when they present a danger to the public as defined by Oklahoma State Statues.

2. Officers may request towing services as an aid to motorist following a motor vehicle accident or other instances where vehicles are inoperable.

3. When, following arrest of the owner/operator or for other reasons, the vehicle cannot be left at the scene without substantial risk of theft from or damage to the vehicle or personal property contained therein.

III. INVENTORY AND RELEASE PROCEDURES

A. Vehicle Inventory

1. It is the duty of all officers, who impound motor vehicles, to perform an inventory of those vehicles.
2. The purpose of this inventory will be to ensure a proper accounting of all property in or attached to the vehicle in order to protect the officer from liability of assumed damages and/or missing property.
3. The officer performing the inventory will conduct a thorough and uniform inventory of the vehicle and its compartments

B. Release of Impounded Vehicles

1. Release of an impounded vehicle that is <u>not</u> being held for investigative holds, evidence or seizure should not be held by the wrecker service on behalf of the police department. Release of such vehicles will be at the discretion of the wrecker company and all liability or procedures connected to release are based on state law and their own regulations.

C. Holds on vehicles

1. Vehicles held as/for evidence should only be held until the evidence is collected.
2. The officer requesting a hold for a vehicle shall document the reason for the hold in their report.
3. If there is a chance the vehicle may not be processed within a timely manner, have the vehicle towed to the CPD impound lot to avoid excessive storage fees.

D. Release of Locally Recovered Stolen Vehicles

1. All vehicles recovered under the following conditions may be released directly to the owner or his or her agent. If impoundment is not necessary to accomplish additional processing for evidence.
    a. If the communications officer is able to contact the owner who can respond to the scene in a reasonable period of time.

Regulations:

1. Officers will not tow a vehicle for punitive reasons or to punish a citizen and will only tow in accordance with state law, city ordinance and the guidelines of this procedure.
2. Officers should take all necessary precautions when towing a vehicle to properly search and inventory a vehicle. An inventory search is intended to protect the citizen, the officer and the wrecker company from claims of loss and theft.
3. Officers will not leave citizens without some means of transportation or contact when such impoundment leaves the citizen without the basic means or method of communication or transportation.
4. Officers may tow vehicles and place a hold on the vehicle for investigative purposes, collection of evidence or when the vehicle is evidence in a crime and in those cases where taxes are due the state as dictated in the Oklahoma State Statutes.

J - Indictment - *United States v. Perez-Trevino,* No. 15-CR-2037-LRR (Aug. 26, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN (WATERLOO) DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DONITA URBAN, SCOTT MATHEWS, DANIELA CASTELLANOS, BRIAN SWARTZ, ROGELIO AVALOS-SANCHEZ, JENNIFER MARES-FLORES, MIGUEL MENDOZA, a/k/a "Loko," ALVARO HERNANDEZ, MARCOS PEREZ-TREVINO, FRANCIS GASCA, and ALEJANDRO BECERRA, a/k/a "Juan Flores," Defendants.	)	No. 15-CR-2037 **INDICTMENT** Count 1 21 U.S.C. § 846: Conspiracy to Distribute a Controlled Substance Forfeiture

PRESENTED IN OPEN COURT
BY THE
FOREMAN OF THE GRAND JURY
And filed 8/26/15
ROBERT L. PHELPS, CLERK

The Grand Jury charges:

Count 1

Conspiracy to Distribute a Controlled Substance

Beginning in about the Spring of 2013, and continuing to the present, in the Northern District of Iowa and elsewhere, defendants DONITA URBAN, SCOTT MATHEWS, DANIELA CASTELLANOS, BRIAN SWARTZ, ROGELIO AVALOS-SANCHEZ, JENNIFER MARES-FLORES, MIGUEL MENDOZA, a/k/a "Loko," ALVARO HERNANDEZ, MARCOS PEREZ-TREVINO, FRANCIS GASCA, and ALEJANDRO BECERRA, a/k/a "Juan Flores" did knowingly and intentionally combine, conspire, confederate, and agree with each other and with persons known and unknown to the Grand Jury, to distribute a mixture or substance containing a

detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 846.

Quantity Allegation

1. The offense alleged herein as committed by DONITA URBAN, BRIAN SWARTZ, ALVARO HERNANDEZ, and MARCOS PEREZ-TREVINO involved 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, which contained 50 grams or more of pure (actual) methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(A).

2. The offense alleged herein as committed by SCOTT MATHEWS, DANIELA CASTELLANOS, ROGELIO AVALOS-SANCHEZ, JENNIFER MARES-FLORES, MIGUEL MENDOZA, a/k/a "Loko," FRANCIS GASCA, and ALEJANDRO BECERRA, a/k/a "Juan Flores" involved a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(C).

This was in violation of Title 21, United States Code, Section 846.

Forfeiture Allegations

Drug Forfeiture

1. The allegations contained in Count 1 of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 21, United States Code, Section 853.

2. Pursuant to Title 21, United States Code, Section 853, upon conviction

of an offense in violation of Title 21, United States Code, Section 841, the defendants, DONITA URBAN, SCOTT MATHEWS, DANIELA CASTELLANOS, BRIAN SWARTZ, ROGELIO AVALOS-SANCHEZ, JENNIFER MARES-FLORES, MIGUEL MENDOZA, a/k/a "Loko," ALVARO HERNANDEZ, MARCOS PEREZ-TREVINO, FRANCIS GASCA, and ALEJANDRO BECERRA, a/k/a "Juan Flores" shall forfeit to the United States of America any property constituting, or derived from, any proceeds obtained, directly or indirectly, as the result of such offense and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, the offense. The property to be forfeited includes, but is not limited to, the following: $300,000 in U.S. Currency.

3. If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p).

KEVIN W. TECHAU
United States Attorney

By: Lisa C. Williams

LISA C. WILLIAMS
Assistant United States Attorney

A TRUE BILL

s/Foreperson

Foreman

K - Relevant Constitutional and Statutory Provisions

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

4th Amendment to US Constitution

"The right of the people to be secure in their persons, houses, papers, and effects,[a] against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statutory Provisions

21 U.S.C. § 846

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

21 U.S. Code § 841

(a) Unlawful acts Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.