

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

LARRY BURSTEIN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE(S)

**WHETHER A FORTY-EIGHT (48) MONTH PRISON SENTENCE
FOR A FIRST TIME NON-VIOLENT, DRUG DEALING, SIXTY-NINE (69)
YEAR OLD GRANDFATHER, IS UNREASONABLE, VIOLATIVE OF
THE UNITED STATES CONSTITUTION AND SUPREME COURT
PRECEDENT .**

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **Larry Burstein**, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on January 24, 2019.

OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-7 a) is unpublished.

JURISDICTION

The Petitioner, **Larry Burstein**, was prosecuted by an Indictment alleging violation of Federal Criminal Laws in the United States District Court for the Northern of Florida, convicted and sentenced to 48 months. He appealed his sentence to the Eleventh Circuit Court of Appeals invoking the Court's jurisdiction under 28 U.S.C. § 1291. (Doc. 149) His sentence was affirmed by an Order entered January 24, 2019. (Doc. 187)

The jurisdiction of this Court to review the Judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Fifth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Course of the Proceedings and Dispositions in the Court Below¹

Charge(s) and Conviction(s)

On May 24, 2016, the Federal Grand Jury in the Northern District of Florida, Gainesville Division, returned a Nine Count Indictment alleging violations of the Federal Drug Laws against both defendant, and, co-defendant, Edward Leonfonte. (Doc. 1)

On June 28, 2016, the Federal Grand Jury in the Northern District of Florida, Gainesville Division, returned a sixteen count Superseding Indictment against the defendants Edward Leonforte and Larry Burstein. (Doc. 30)

Count 1 charges that between on or about June 11, 2007, and on or about November 30, 2013, the defendants Edward Leonforte and Larry Burstein, did knowingly and willfully combine, conspire, confederate, and agree together and with other persons to distribute a controlled substance, involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. §841(b)(1)(C) and 21 U.S.C. § 846. (Doc. 30)

Count 2 charges that between, on, or, about November 20, 2012, and, on, or, about September 17, 2015, the defendant, Edward Leonforte, did knowingly and willfully combine, conspire, confederate and agree with other persons to distribute a controlled substance, involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 21 U.S.C. § 846. (Doc. 30)

¹ Most of the facts were adopted from the PSR unless where defendant objected; the facts were tailored to the issue(s) on Appeal. Additionally, the following facts are supported by the record on Appeal, but, are not necessarily conceded as true by Mr. Burstein. (Docs. 90, 107, 143)

Count 3 charges that on or about October 29, 2012, the defendant Larry Burstein, did knowingly and intentionally distribute a controlled substance involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2. (Doc. 30)

Count 4 charges that on or about February 26, 2013, the defendant Larry Burstein did knowingly and intentionally distribute a controlled substance involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2. (Doc. 30)

Count 5 charges that on or about May 15, 2013, the defendant, Larry Burstein, did knowingly and intentionally distribute a controlled substance involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2. (Doc. 30)

Count 6 charges that on or about May 17, 2013, the defendant Edward Leonforte, did knowingly and intentionally distribute a controlled substance involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2. (Doc. 30)

Count 7 charges that on or about June 20, 2013, the defendant Larry Burstein, did knowingly and intentionally distribute a controlled substance involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2.

Count 8 charges that on or about July 1, 2013, the defendant Edward Leonforte, did knowingly and intentionally distribute a controlled substance involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2. (Doc. 30)

Count 9 charges that on or about August 5, 2013, the defendant Edward Leonforte, did knowingly and intentionally distribute a controlled substance involving Codeine, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2. (Doc. 30)

Count 10 charges that on or about January 29, 2015, the defendant Edward Leonforte, did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, to wit, payments drawn on the Loud Lion Enterprises Inc. account ending in 3844 at Wells Fargo Bank, N.A., payee Michael Prescott in the amount of \$9,647.77, which transactions involved the proceeds of a specified unlawful activity, that is, conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846, as charged in Count 2 of this Superseding Indictment, with intent to promote the carrying on of that specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 2. (Doc. 30)

Count 11 charges that on or about March 2, 2015, the defendant Edward Leonforte, did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, to wit, payments drawn on the Loud Lion Enterprises Inc. account ending in 3844 at Wells Fargo Bank, N.A., payee Michael Prescott in the amount of \$9,647.77, which transactions involved the proceeds of a specified unlawful activity, that is, conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846, as charged in Count 2 of this Superseding Indictment, with intent to promote the carrying on of that specified unlawful activity, in violation

of 18 U.S.C. § 1956(a)(1)(A)(i) and 2. (Doc. 30)

Count 12 charges that on or about March 31, 2015, the defendant Edward Leonforte, did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, to wit, payments drawn on the Loud Lion Enterprises Inc. account ending in 3844 at Wells Fargo Bank, N.A., payee Michael Prescott in the amount of \$9,647.77, which transactions involved the proceeds of a specified unlawful activity, that is, conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846, as charged in Count 2 of this Superseding Indictment, with intent to promote the carrying on of that specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 2. (Doc. 30)

Count 13 charges that on or about April 30, 2015, the defendant Edward Leonforte, did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, to wit, payments drawn on the Loud Lion Enterprises Inc. account ending in 3844 at Wells Fargo Bank, N.A., payee Michael Prescott in the amount of \$9,647.77, which transactions involved the proceeds of a specified unlawful activity, that is, conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846, as charged in Count 2 of this Superseding Indictment, with intent to promote the carrying on of that specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 2. (Doc. 30)

Count 14 charges that on or about May 29, 2015, the defendant Edward Leonforte, did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, to wit, payments drawn on the Loud Lion Enterprises Inc. account ending in 3844 at Wells Fargo Bank, N.A., payee Michael Prescott in the amount of \$9,647.77, which transactions involved the proceeds of a

specified unlawful activity, that is, conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846, as charged in Count 2 of this Superseding Indictment, with intent to promote the carrying on of that specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 2. (Doc. 30)

Count 15 charges that on or about June 30, 2015, the defendant Edward Leonforte, did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, to wit, payments drawn on the Loud Lion Enterprises Inc. account ending in 3844, at Wells Fargo Bank, N. A. payee Michael Prescott, in the amount of \$9,647.77, which transactions involved the proceeds of a specified unlawful activity, that is, conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846, as charged in Count 2 of this Superseding Indictment, with intent to promote the carrying on of that specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 2. (Doc. 30)

Count 16 charges that on or about July 30, 2015, the defendant Edward Leonforte, did knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, to wit, payments drawn on the Loud Lion Enterprises Inc. account ending in 3844 at Wells Fargo Bank, N.A., payee Michael Prescott, in the amount of \$9,647.77, which transactions involved the proceeds of a specified unlawful activity, that is, conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846, as charged in Count 2 of this Superseding Indictment,

with intent to promote the carrying on of that specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 2. (Doc. 30)

From their engagement in the violations alleged in Count 1 through Count 16 of this Superseding Indictment, the defendants Edward Leonforte and Larry Burstein, shall forfeit any and all interest in property constituting and derived from any proceeds the defendants obtained as the result of such violations and any property used and intended to be used to commit and facilitate the commission of such violations, pursuant to 21 U.S.C. 853. The property to be forfeited includes, but is not limited to, the following:

- (a) The cash value of the contents of Wells Fargo Bank, N.A. Number 7454416723, which value is \$25,262.59.
- (b) The cash value of the contents of Wells Fargo Bank, N.A. 8965833844, which value is \$29,131.61.
- (c) Real Property located at 18711 NW 138th Avenue, Alachua, Florida, with all improvements and appurtenances thereon, more particularly described as Lot 11, Harrington Plantation, according to the plat thereof, as recorded in Plat Book T, Page 56 of the Public Records of Alachua County, Florida; and

(d) Real property referred to as 18613 138th Avenue, Alachua, Florida, with all improvements and appurtenances thereon, more particularly described as Lot 10, Harrington Plantation, according to the plat thereof, as recorded in Plat Book T, Page 56 of the Public Records of Alachua County, Florida. (Doc. 30)

On June 2, 2016, the defendant appeared before the Honorable Gary R. Jones, United States Magistrate, for an initial appearance on a nine-count Indictment. The defendant entered a plea of not guilty on all counts and trial was scheduled for July 26, 2016. The defendant was released on a \$50,000 unsecured bond with pretrial services.

On June 28, 2016, the Federal Grand Jury in the Northern District of Florida, Gainesville Division, returned a sixteen count **Superseding** Indictment against the defendants Edward Leonforte and Larry Burstein. (e.s.)

On November 17, 2016, the defendant entered a plea of guilty to Count 1 of a sixteen count Superseding Indictment. (Doc. 67) The Government agreed to dismiss the remaining counts at Sentencing.

Pursuant to a written plea agreement, the government agreed to recommend a three level reduction for acceptance of responsibility, pursuant to USSG §3E1.1. (Doc. 69) This was conditioned upon the defendant clearly demonstrating acceptance

of responsibility for the offense, and assisting authorities in the investigation or prosecution of the misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently. (Doc.

69) Pretrial services records indicate the defendant has complied with all Court ordered conditions of release.

The Second Final PSR recommended 46-57 months imprisonment. (Doc. 143, ¶104) The Plea Agreement was accepted and sentencing was held on August 28, 2017, when the District Court Judge sentenced defendant to, inter alia, 48 months imprisonment. (Doc. 73) (Doc. 146) Doc. 147) Defendant is currently incarcerated in the Federal Prison System.

Plea Agreement

The parties agreed that the defendant will plead guilty to Count 1 of the Superseding Indictment. (Doc. 69) As to Count 1, the defendant faced a maximum twenty year term of imprisonment, at least three years supervised release, a \$1,000,000 fine and a \$100 special monetary assessment. (Doc. 69)

The Government agreed not to file any further criminal proceedings against the defendant arising out of the same transaction or occurrences to which the defendant has pled. The parties agreed that the sentence to be imposed is left solely

to the discretion of the Court, which is required to consult the United States Sentencing Guidelines and take them into account when sentencing the defendant.

The parties further understood and agreed that the District Court's discretion in imposing sentence is limited only by the statutory maximum sentence and any mandatory minimum sentence prescribed by statute for the offense.

Background

The defendant, **Larry Burstein**, created www.medsindia.net, an Internet pharmacy that brokered the sale of controlled substances to individuals without a valid prescription, in 2007. The disclaimer on medsindia.net stated, "Prescription medications featured on this site are now available for personal use in up to 90-day supply without a prescription." The website listed generic versions of Darvocet, Xanax, Soma, Valium, and, Codeine among other controlled substances and shipped to customers in the United States. **Burstein** used the company India Ayurveda Inc., which he owned, to receive payments for orders placed on the Meds India website.

The co-defendant, Edward Leonforte, assisted Burstein by providing customer support and facilitating online orders for medsindia.net. Leonforte utilized his company, Loud Lion Enterprises, a Florida corporation, to operate his customer support business. According to the Florida Department of State Division of

Corporations, Leonforte registered Loud Lion Enterprises, on March 17, 2008.

Numerous employees were hired by Loud Lion Enterprises between 2008 and 2015 to assist in supporting medsindia.net and later assisted in supporting freeworldpharmacy.com.

In approximately 2012, Leonforte and Burstein began having disagreements regarding the business arrangement. Leonforte was receiving 10% of Burstein's profit and demanded a bigger cut of the proceeds. Leonforte then hired an individual to develop a new website, freeworldpharmacy.com, based on the Medsindia business model. Leonforte instructed his employees to divert Medsindia customers to his own pharmacy website. In November 2013, Leonforte requested that Loud Lion stop support of medsindia.net which forced the web site to shut down.

In July 2013, Loud Lion moved into its leased premises in Progress Park in Alachua, Florida, for approximately \$10,000.00 a month. Leonforte maintained control over freeworldpharmacy.com and its related business between 2012 and 2015. Leonforte sold Codeine, a Schedule II controlled substance, through freeworldpharmacy.com among other substances. As of July 6, 2015, freeworldpharmacy.com was selling 120 Codeine tablets (15 mg) for \$166.00. The disclaimer on freeworldpharmacy.com stated, "Before placing your order you must

agree that you are responsible for understanding your country's laws regarding the drugs you order. You must also confirm that you have a valid prescription for any prescription drugs you order. You don't have to show it to us. We will not require you to prove to us that you have it or submit it to us because we are not in the US and don't have the ability to validate or verify it."

Controlled Purchases — Meds India

On September 11, 2012, a Drug Enforcement Administration Task Force Officer (UC#1), used a laptop computer to place an order for 120 Codeine pills (15 mg) for \$253.80, which included shipping and handling, at www.medsindia.net.

The UC did not provide a valid prescription during the transaction. UC#1 received an email from customer support with payment instructions that included sending a money order, made payable to India Ayurveda Inc., to an address in London. On October 29, 2012, UC#1 received 120 Codeine pills at the address provided during the transaction.

On November 29, 2012, UC#1 used a laptop computer to place an order for 120 Codeine pills (15 mg) for \$229.92, which included shipping and handling, at www.medsindia.net. The order was finalized for a total of \$253.80 and would be processed once the payment was received. UC#1 obtained a money order, made payable to India Ayurveda Inc., and sent it to the address in London. On February 26, 2013, UC#1 received 120 Codeine pills at the address provided during the transaction. The money orders sent to London as payment for the preceding transactions were deposited into co-defendant Larry Burstein's account at T.D. Bank

in Gainesville, Florida.

On April 18, 2013, UC#1 used a laptop computer to place an order for 120 Codeine pills (15 mg) for \$253.80, which included shipping and handling, at www.medsindia.net. UC#1 paid for the order using EFT (or eCheck) payable to a third party credit card processor operated by Willow Systems Corp. On May 15, 2013, UC#1 received 120 Codeine pills at the address provided during the transaction.

On May 30, 2013, UC#1 used a laptop computer to place an order for 120 Codeine pills(15 mg) for \$253.80, which included shipping and handling, at www.medsindia.net. UC#1 paid for the order using EFT payable to a third party credit card processor operated by Willow Systems Corp. On June 20, 2013, UC#1 received 120 Codeine pills at the address provided during the transaction.

The UC#1 received an email stating that Meds India had changed their domain to realcustomersupport.com and informed customers that their bank transfer options are "far more convenient than the Money Order option at Medsindia." The email listed the new sites as freeworldpharmacy.com, freemarketpharmacy.com, and funpharm.com with support managed by realcustomersupport.com.

Agent Jeff Brown, Internal Revenue Service, received records confirming the total amount of Codeine sold between 2009 and 2014, as well as the total gross sales for *Medsindia* between 2007 and 2014. Agent Brown determined that the drug

amounts involved in the conspiracy attributable to Larry Burstein are as follows:

Date	Description	Dosage (mg)	Pills	Total Weight (mg)
April 2009	Codeine	15	8,770	131,550
May 2009	Codeine	15	7,900	118,500
June 2009	Codeine	15	5,664	84,960
July 2009	Codeine	15	1,740	26,100
Mar 2010	Codeine	15	7,770	116,550
April 2010	Codeine	15	6,570	98,550
May 2010	Codeine	15	7,950	119,250
June 2010	Codeine	15	7,440	111,600
Feb 2011	Codeine	15	5,490	82,350
May 2011	Codeine	15	4,350	65,250
June 2011	Codeine	15	4,560	68,400
July 2011	Codeine	15	4,680	70,200
Sept 2011	Codeine	15	4,980	74,700
Oct 2011	Codeine	15	5,910	88,650
Nov 2011	Codeine	15	6,030	90,450
Dec 2011	Codeine	15	6,174	92,450

Feb 2012	Codeine	15	5,430	81,450
March 2012	Codeine	15	9,866	147,990
Dec 2012	Codeine	15	1,860	27,900
Feb 2013	Codeine	15	1,710	25,650
March 2013	Codeine	15	5,700	85,500
April 2013	Codeine	15	1,980	29,700
June 2013	Codeine	15	2,280	34,200
July 2013	Codeine	15	900	13,500
Aug 2013	Codeine	15	600	9,000
Sept 2013	Codeine	15	7,950	119,250
Nov 2013	Codeine	15	4,380	65,700
Dec 2013	Codeine	15	3,510	52,650
Jan 2014	Codeine	15	4,710	70,650
Feb 2014	Codeine	15	1,860	27,900
			148,714	2,230,710

Records indicate that between October of 2007 and January 2014, the gross sales for Medsindia totaled \$7,757, 584.19.

Controlled Purchases- Free World Pharmacy

On April 19, 2013, UC#1 used a computer to connect to www.freeworldpharmacy.com via the internet and created a new account. Utilizing this website and the newly activated account, UC#1 ordered 120 Codeine pills (15 mg) for \$237.11. The purchase was made via EFT and processed by Willow Systems under account number ending in 2140. Willow Systems' records show that this

account belongs to Loud Lion. On May 17, 2013, UC#1 received 120 Codeine pills at an undercover post office box in Gainesville, Florida. UC#1 purchased this Schedule II Codeine without providing a valid prescription to Free World Pharmacy; however, the shipment included a prescription issued by "MUDr. L. Smrcek, MD."

On May 30, 2013, UC#1 used a computer to connect to www.freeworldpharmacy.com to order 240 Codeine pills (15 mg) for \$239.00. The purchase was made via EFT (or eCheck) and processed by Willow Systems under account number ending in 2140. Willow Systems subsequently deposited these funds into the Loud Lion Business Account as part of a batch deposit. On July 1, 2013, UC#1 received 240 Codeine pills at an undercover post office box in Gainesville, Florida, in two separate shipments. Both packages were shipped from Romania and included a prescription issued by "MUDr. L. Smrcek, MD," with each shipment of 120 pills.

On July 15, 2013, UC#1 used a computer to connect to www.freeworldpharmacy.com to order 120 Codeine pills (15 mg) for \$239.00. The purchase was made via debit card and processed in total for \$251.68 including fees. On August 5, 2013, UC#1 received 120 Codeine pills at an undercover post office box in Gainesville, Florida. The package was shipped from Romania.

Samples from all of the controlled purchases were sent to a DEA laboratory, which continued the pills contained Codeine, a Schedule II controlled substance. The purchases were made without providing a prescription to Free World Pharmacy or Meds India.

Search Warrant Executed at Loud Lion

On September 17, 2015, agents with the Internal Revenue Service and the Drug

Enforcement Administration executed a search warrant at Loud Lion's business premises in Progress Park in Alachua, Florida. An employee, identified as "J.K.," volunteered to download data to a local computer from Loud Lion's Canadian server. While the download was in progress, Loud Lion's servers in Canada were shut down. Thus, the IRS agents only obtained a portion of Loud Lion's sales data. Agents were able to determine that sales from freeworldpharmacy.com increased from approximately \$257,421 in 2012 to approximately \$2,589,769 in 2013. Total sales in 2014 were approximately \$3,000,313. Total sales in the first nine months of 2015 were approximately \$2,084,151.

Agents reviewed itemized sales data for the period of January 5, 2015, through September 3 2015 During this specified time frame in 2015, the majority of the drugs being sold unlawfully by Loud Lion were controlled substances. A common substance sold was Codeine, in which customers in the United States placed 1,598 orders for a total of 219,197 Codeine pills. The orders for Codeine generated sales of approximately \$385,589. These figures do not include Loud Lion revenue from supporting other illegal online pharmacy sites.

"J. K." began working for Leonforte at Loud Lion in 2008 as a part-time contractor then promoted to a full-time position in 2009. He was responsible for providing customer support and technical support to the constituent Internet pharmacy websites operated by Loud Lion. In 2008, "J. K." learned that the pharmaceutical supplier utilized by medsindia.net was based in India. Leonforte falsely told "J. K." that the supplier was licensed to export pharmaceuticals to the United States. The shipping was handled by the supplier, who utilized EMS Speedpost in India that would then transfer the packages to the United States Postal Service.

Payments accepted by medsindia.net included cashier's check, wire transfer, eCheck and credit card. Medsindia.net also utilized Willow Systems, a credit card and eCheck processing company, to process orders paid by electronic means. The products offered for sale on medsindia.net came from a list that Burstein received from the supplier that would then be given to Loud Lion. Leonforte conducted research to determine the extent to which the pharmaceutical was controlled, addictive, or otherwise risky to sell to evade law enforcement detection.

The suppliers for Free World Pharmacy were in Romania and India and shipped orders directly to the customers. "J. K." reported that Loud Lion accepted several four's of payment to process orders. "J. K." estimated that Loud Lion made approximately \$5,000,000 in 2014 by marking up the price of pharmaceuticals three to four times their normal price. In early 2015, **Burstein** threatened to sue Leonforte for essentially stealing his business. Leonforte subsequently settled with **Burstein** and made several payments in the amount of \$2,000.00 per week.

The Second Final PSI also stated:

Protected Information Covered by §1B1.8

None

Victim Impact

This is a Title 21 offense and there is no identifiable victim.

Adjustment for Obstruction of Justice

The probation officer has no information indicating the defendant impeded or obstructed justice

Adjustment for Acceptance of Responsibility

The defendant entered a timely admission of guilt as evidenced by his guilty plea.

Offense Level Computation

The November 1, 2016 Guidelines Manual, incorporating all guideline

amendments, was used to determine the defendant's offense level. USSG §1B1.11.

Count 1: Conspiracy to Distribute a Controlled Substance

Base Offense Level: The guideline for 21 U.S.C. § 841(a)(1) offenses is found in USSG §2D1.1 of the guidelines. The defendant is responsible for approximately 148,714 Codeine pills per sales in 2009 through 2014 (148,714 Codeine pills x 15mg per pill = 2,230.7 grams). Pursuant to §2D1.1, offenses for substances not referenced in the Drug Quantity Table are converted by using their marijuana equivalent. According to the Drug Equivalency Tables, 1 gram of Codeine is equivalent to 80 grams of marijuana. Therefore, 2,230.7 grams of Codeine is equivalent to 178,456 grams of marijuana (2,230.7 grams x 80 grams = 178,456 grams or 178.5 kilograms). Pursuant to §2D1.1(c) (5), offenses involving at least 100 kilograms but less than 400 kilograms of marijuana have a base offense level of 24.

24

Specific Offense Characteristics: Pursuant to §2D1.1(b)(7), since the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive

+2

Victim Related Adjustment: NONE

0

Adjustment for Role in the Offense: NONE

0

Adjustment for Obstruction of Justice: NONE

0

Adjusted Offense Level (Subtotal) 26

Chapter Four Enhancement: NONE 0

Acceptance of Responsibility: The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels, pursuant to USSG §3E1.1(a). -2

Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly of the offense level is decreased by one additional level, pursuant to USSG §3E1.1(b). -1

Total Offense Level: 23

Offense Behavior Not Part of Relevant Conduct: NONE

[emphasis supplied]

REASON(S) FOR GRANTING THE PETITION

A FORTY-EIGHT (48) MONTH PRISON SENTENCE FOR A FIRST TIME NON-VIOLENT, DRUG DEALING, SIXTY-NINE (69) YEAR OLD GRANDFATHER, IS UNREASONABLE.

A. Booker and Its Progeny: Reasonableness at Sentencing in an Advisory Guidelines System

The remedial portion of United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 764 (2005), excised the portions of the Sentencing Guidelines which made them mandatory, and held that District Courts should consider the Guidelines, but are not bound by them. The Supreme Court later clarified that the Guidelines should be "the starting point and the initial benchmark," but that ultimately, the sentence imposed must be procedurally and substantively reasonable. Gall v. United States, 552 U.S. 38, 49-50 (2007); Rita v. United States, 551 U.S. 338, 127 S. Ct. 2456 (2007). See also United States v. Campbell, 491 F.3d 1306, 1314 (11th Cir. 2007). The Supreme Court has held that if the sentence is within the applicable voluntary guideline range, the Appellate Court may apply a presumption of reasonableness to the sentence. See Rita, 551 U.S. at 347-51. However, the Eleventh Circuit has decided not to apply that presumption, instead concluding that in their Circuit, a guideline sentence is not presumptively reasonable. See, e.g., Campbell, 491 F.3d at 1313.

If this Supreme Court finds that the District Court made no procedural errors at sentencing, it must determine whether, considering the totality of the circumstances, the sentence was substantively unreasonable. A review of the substantive reasonableness of a sentence requires a determination as to whether the sentence is supported by the factors laid out in 18 U.S.C. § 3553(a). Gall, 552 U.S. at 56. See also United States v. Pugh, 515 F.3d 1179, 1191 (11th Cir. 2008).

Section 3553(a) "requires Judges to take into account the Guidelines together with other sentencing goals" in fashioning an appropriate sentence. See Booker, 543 U. S. at 259-60. Section principle, directing Courts to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in § 3553(a)(2). See id; see generally ABA Standards Of Criminal Justice § 18-24 (sentences imposed), taking into account the gravity of the offense, should be no more than necessary to achieve the social purposes for which they are authorized). This provision requires the District Court to consider each of the following seven relevant factors in imposing sentence:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed-
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the Defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- (3) the kinds of sentences available;
- (4) [the applicable sentencing guideline range];
- (5) any pertinent [sentencing guidelines] policy statement;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and,
- (7) the need to provide restitution to any victim of the offense.

Id.

After Booker, the District Court must properly calculate the sentencing guideline range and consider any upward or downward departure motions. Then, the District Court must consider the Guidelines, along with the other §3553 factors, and impose a reasonable sentence. "In short, after Booker, 'the District Courts, while not bound to apply the Guidelines, must consult those Guidelines, and take them into account when sentencing.'" United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005) (quoting Booker, 125 S. Ct. at 767). After taking the Guidelines into account, the Court is free to impose a more severe or less severe sentence than called for by the Guidelines as long as the sentence is reasonable. Crawford, 407 F.3d at 1179. The sentencing court may not presume that a guideline sentence is reasonable. Nelson v. United States, 129 S. Ct. 890, 892 (2009). A sentence is substantively unreasonable if, in light of the §3553(a) factors, it is somehow outside the range of

reasonable sentences available for the offense and the offender. Pugh, 515 F.3d at 1191. This is what has occurred in Mr. Burstein's case.

The Eleventh Circuit Court of Appeals has affirmed numerous below Guideline sentences since Booker, even without cooperation with the Government. See, e. g., United States v. Montgomery, __ F.3d __ (11th Cir. February 7, 2006) [8 month sentence for bank fraud] [unpublished]; United States v. Gray, 2006 WL 1752372 (11th Cir. June 28, 2006) [affirming 72 month sentence even though low end of the Guidelines was 151 months]; United States v. Halsema, 2006 WL 1229005 (11th Cir. May 9, 2006) [unpublished] [affirming 24 months sentence even though Guidelines were 57 to 71 months, and, even though grounds for variance would not have supported departure and United States v. Williams, 435 F.3d 1350 (11th Cir. 2006) [90 months imprisonment was sufficient, but greater than necessary to punish, deter and rehabilitate defendant even though low end of Guidelines was 188 months.

Now that the Guidelines are advisory only, they are simply "one sentencing factor among many." United States v. Reinhart, 442 F.3d 857, 864 (5th Cir. 2006); United States v. Duhon, 440 F.3d 711, 715-716 (5th Cir. 2006). Accordingly, the Court below had full discretion to sentence Mr. Burstein below the advisory range without a Motion for Departure as long as the resulting sentence was reasonable. See Williams, *supra* at 1363.

Mr. Burstein's sentence of 48 months imprisonment is substantively unreasonable. Although it is true that the 48 months sentence was within the applicable guideline range, the sentence is not presumptively reasonable. United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006); United States v. Talley, 431 F.3d 784 (11th Cir. 2005). Indeed, this Court and others have held that a sentence in the guideline range can produce an unreasonable result. United States v. Hunt, 459 F.3d 1180, 1184 ("There are, however, many instances where the guideline range will not yield a reasonable sentence"); United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006)(en banc); United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006). See also Nelson, 129 S. Ct. at 892.

In Jimenez-Beltre, the First Circuit explained:

Yet the guidelines are still generalizations that can point to outcomes that may appear unreasonable to sentencing Judges in particular cases. Some of the guidelines in particular cases were not reflections of existing practice but were deliberate deviations or turned tendencies into absolutes. Others have been affected by directions from Congress. Booker's remedial solution makes it possible for courts to impose non-guideline sentences that override the guidelines, subject only to the ultimate requirement of reasonableness.

Jimenez-Beltre, 440 F.3d at 518 (citation omitted). In light of this authority, the fact that Mr. Burstein's sentence is within the guideline range does not make it reasonable. In Rita v. United States, 551 U.S. 338 (2007), the Supreme Court held

that Courts of Appeals may adopt an Appellate presumption that a sentence in the guideline range is reasonable. 551 U.S. at 346-47. However, the Court did not require the Courts of Appeals to create and apply such a presumption. Since the Eleventh Circuit Court has already rejected such a presumption and the decision in Rita does not mandate the presumption, there is no Appellate presumption that the guideline sentence is reasonable in this case. Hunt, 459 F.3d at 1185.

B. Mr. Burstein's Sentence Was Substantively Unreasonable

As argued to the District Court, a Guidelines sentence in this case was substantively unreasonable. Mr. Burstein was literally, although not actually, a first time offender and the Sentencing Commission itself acknowledges that the Guidelines could be lower for true first offenders, as opposed to those who are in category I for criminal history because their convictions are too old to count.

The Sentencing Commissions's 2004 report on recidivism indicates that "[p]ossible sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates." Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf, at 15.

Rather than following the parsimony principle and imposing a sentence sufficient to meet the goals of sentencing, the District Court instead imposed a sentence which was longer than necessary to accomplish those goals. The sentence

imposed by the District Court in this case was substantively unreasonable, and this Court should vacate that sentence and remand the case to the sentencing Judge for resentencing. Given Mr. Burstein's personal history and characteristics, the statutory directives contained in 18 U.S.C. § 3553(a) would be satisfied by a below-guideline sentence, and the imposed sentence of 48 months was unreasonable.

Statistical Information

The Sentencing Commission ("Commission") maintains statistics on a combination of variables impacting the actual sentences imposed within the nation, the circuit, and the district that largely define the comparative configurations of those sentences. A synopsis of the data is instructive in determining what constitutes a conventional range for the "heartland" of sentences imposed for particular offenses. With regard to the length of sentences by criminal history category and primary offense guideline (i.e., USSG §2D1.1), for fiscal years 2014 through 2016, there were only 58,579 cases nationally sentenced under this guideline with a criminal history category I. The median sentence imposed for those cases was 33 months of imprisonment.² Although the sentences were higher within the 11th Circuit and in the Northern District of Florida, none of the statistical sentences approaches the advisory guideline sentence in this case of 46

² U.S. Sentencing Commission, 2014-2016 Datafiles, USSCFY2014-2016.

to 57 months imprisonment for a “putative” first time offender who is otherwise safety valve eligible. [emphasis added] The appellant’s prior felony conviction is old, stale and dated to warrant any serious consideration.

Status as “True” First Time Offender

The Sentencing Reform Act of 1984 requires that the Guidelines reflect the appropriateness of imposing a sentence other than imprisonment for the first-time offender who has not been convicted of a crime of violence or otherwise serious offense.³ The Sentencing Commission has determined that those who, like Mr. Burstein, are not only first time offenders under the Guidelines, but who also have no prior (substantial) arrests are the least likely to commit further offenses.⁴ Mr. Burstein prior conviction is old, stale and dated. They have the lowest recidivism rate at 6.8 percent, and are described in the Commission’s report as “easily the most empirically identifiable group of guideline federal offenders who are the least likely to re-

³ Alternative Sentencing in the Federal Criminal Justice System, from World Wide Web, http://www.ussc.gov/research_and_statistics/research_projects/alternatives/2009020206_alternatives.pdf, p.4,Jan. 2009.

⁴ United States Sentencing Commission, *Recidivism and the “First Offender”* (May 2004), at 17. Available at www.ussc.gov/publicat/Recidivism_FirstOffender.pdf. The Committee notes that there are two other groups that, under the Guidelines, are technically first offenders, those who have arrests and no convictions and those who have convictions which, for one reason or another, are not counted. Both have higher recidivism rates than those who have never been arrested.

offend.”⁵ Consequently, any consideration that the Court may have regarding most of the factors listed at 18 U.S.C. § 3553(a)(2), such as the need to afford adequate deterrence, is very likely satisfied by the fact of Mr. Burstein’s status as a “true” first-time offender, whose present attitude and reflections demonstrate his rectification over the prior 14-15 months on successful and admirable pre-trial release. (Doc. 143,

¶ 23)

Alternatives to Imprisonment

Although the offenses of conviction are serious, and the advisory guidelines recommend against sentencing alternatives to imprisonment, a term of probation is not precluded by statute (Doc. 143 PSR 2 ¶ 108). Likewise, the use of a sentence with home detention as an intermediate sanction is not precluded by statute. Based on a thorough review of the nature and circumstances of the offense, as well as the history and characteristics of the appellant, the appellant’s status as a “true” first-time offender warrants strong consideration in this case. Should the Court conclude that either a departure, or a variance from the advisory guidelines system, or both, is warranted, alternatives to imprisonment may range from a sentence of probation with appropriate special conditions, to probation with appropriate term of home detention, to a sentence of time-served to be followed by an appropriate period of time on

⁵ *Id.* at 16-17.

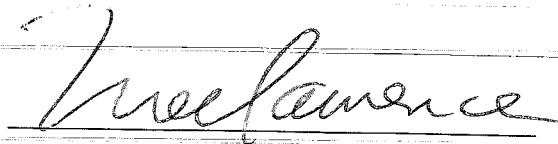
supervised release.

Mr. Burstein was 69 years old, at sentencing. He was evicted from his home in August of 2017; he accepted full responsibility in this conspiracy. After donating hundreds of thousands of dollars to various ISKCON Ministries, he was living off of a small income from Social Security. Mr. Burstein had no automobile, no spouse nor partner, and, was struggling with escalating health issues, due to diabetes, chronic back pain, anxiety, arthritis, and mental health issues. It is anticipated that Mr. Burstein's status as a first-time offender in modern times, the need for correctional treatment, and, the extenuating circumstances concerning his age and health would suggest that any of these viable alternatives to imprisonment are warranted in this case

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted



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