No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2019

****

GENESIS LEE WHITTED, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

MOTION TO PROCEED IN FORMA PAUPERIS

****

Petitioner, Genesis Lee Whitted, Jr., by his undersigned counsel, requests leave to file a Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39 of the Supreme Court Rules. Counsel was appointed in the lower court pursuant to 18 U.S.C. § 3006 and Rule 44, Fed. R. CR. P.

This the 7th day of November, 2019.

Respectfully submitted,

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2019

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GENESIS LEE WHITTED, Jr., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

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QUESTION PRESENTED

I. WHETHER THE DISTRICT COURT IMPROPERLY EXPANDED GUIDEINE § 1B1.3 BY INCLUDING DRUG AMOUNTS ASSOCIATED WITH CONDUCT OCCURRING SIGNIFICANTLY OUTSIDE THE DATES OF THE INDICTMENT, RESULTING IN AN ARTIFICALLY HIGH DRUG WEIGHT CALCULATION AND BASE OFFENSE LEVEL, AND THE FOURTH CIRCUIT ERRED IN HOLDING THIS TO BE RELEVANT CONDUCT DISPITE A SUBSTANTIAL TIME INTERVAL.

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CASES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Genesis Lee Whitted, Jr. respectfully prays this Court that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit, issued on August 21, 2019, affirming his judgment and sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is United States v. Genesis Lee Whitted, Jr., No. 18-4166 (4th Cir., August 21, 2019). The opinion is unpublished. The opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to this petition as Appendix A. The judgment is reproduced as Appendix B. The mandate is reproduced as Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was issued on August 21, 2019. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

On December 21, 2016 Petitioner was charged in a superseding indictment with several drug and firearm offenses. Count One charged him with conspiracy to distribute and possess with intent to distribute 28 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1) and § 846. (App. E, F). Counts Three, Four, Five,

Six, Eight, and Nine charged him with distributing a quantity of cocaine base in violation of 21 U.S.C. § 841(a)(1) (App. E), and Counts Two and Seven charged him with firearm offenses under 18 U.S.C. § 924(c)(1)(A).

This appeal concerns the alleged relevant conduct under Guideline § 1B1.3 (App. G), which dramatically raised the guideline base offense level. The guideline base offense level was calculated under Guideline § 2D1.1. (App. H).

STATEMENT OF THE CASE

Procedural History

On December 21, 2016, Petitioner Genesis Lee Whitted, Jr. was charged in a superseding indictment with several drug and firearm offenses. Count One charged him with conspiracy to distribute and possess with intent to distribute 28 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1) and § 846. (App. E, F). Count Two charged him with using and carrying a firearm and brandishing in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Counts Three, Four, Five, Six, Eight, and Nine charged him with distributing a quantity of cocaine base in violation of 21 U.S.C. § 841(a)(1) (App. E). Count Seven charged him with possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A), which related to the distribution charge in Count Six.

The case came on for trial at the October 16, 2017 criminal term of court sitting in Greenville, North Carolina, the Honorable Malcolm J. Howard, District Court Judge presiding. On October 18, 2017 the jury found the Petitioner guilty of

Counts One, Three, Four, Five, Six, Seven, Eight, and Nine, and not guilty of Count Two.

The sentencing hearing was held on March 6, 2018, Judge Howard presiding. Objections were lodged to the calculation of the drug weight, computation of the alleged relevant conduct, and the base offense level. As a result of the significant elevation of the base offense level and other enhancements, the guideline range for the drug counts was life imprisonment, which was above the statutory maximum for any of the charges. Judge Howard granted a downward variance to 360 months on Count One, and 240 months as to Counts Three, Four, Five, Six, Eight, and Nine to run concurrently to each other and to Count One. He imposed a term of 60 months on Count Seven, the firearm charge, to be served consecutively to all counts, producing a total term of 420 months. (App. D).

The Petitioner's notice of appeal was filed on March 13, 2018. In an opinion filed on August 21, 2019 the Fourth Circuit Court of Appeals affirmed. (App. A).

Statement Of Facts

This case arose out of an investigation conducted by the Fayetteville, North Carolina Police Department and the FBI, regarding Genesis Whitted and others. The Count One conspiracy was from in or about 2015 up to and including December 15, 2015. The investigation involved placing a pole camera outside LLB Carwash, a business operated by Mr. Whitted. The investigation also involved information provided by a confidential informant (CI), who was subsequently used by the FBI to conduct controlled purchases of drugs from the conspirators. Each incident was

supported by surveillance, video, and audio recordings. The incidents were as follows:

Count Three – November 9, 2015	6.35 grams of cocaine base
Count Four – November 13, 2015	2.94 grams of cocaine base
Count Five – November 16, 2015	5.27 grams of cocaine base
Count Six – November 18, 2015	5.78 grams of cocaine base
Count Eight – November 24, 2015	3.02 grams of cocaine base
Count Nine – November 30, 2015	12.02 grams of cocaine base
Total	**35.38 grams of cocaine base**

Count Seven was a firearm charge on November 18, 2015 pertaining to the Count Six allegation. Count Two was a December 2, 2015 firearm charge, brandishing. It was not associated with a distribution count, and Petitioner was found not guilty of that charge.

The Presentence Report went back to 2008 with many unverified statements of cooperating witnesses regarding alleged drug dealings by Genesis Whitted. Portions of two pages from the Petitioner's Presentence Report which have been redacted of personal information illustrate the very significant increase in drug amounts from the counts charged and the uncharged conduct going back as far as 2008. Paragraph 21 of the Presentence Report outlines the drug amounts from the particular charges herein. (J.A. 803; App. I-1). The total is 35.38 grams of cocaine base. Paragraph 85 of the Presentence Report, using alleged relevant conduct, upped the cocaine base amount to 2538.075 gm., with a marijuana equivalency of

9063.47 kg. (J.A. 816; App. I-2). This increase was found by the Probation Office through Government documents of cooperating witness interviews. It was neither charged nor submitted to a jury for determination. It was merely found by a preponderance of the evidence by the district court judge at the sentencing hearing.

Further facts will be developed during the argument portion of this petition.

REASONS FOR GRANTING THE PETITION

I. GUIDELINE § 1B1.3 WAS IMPROPERLY EXPANDED TO INCLUDE DRUG AMOUNTS ASSOCIATED WITH CONDUCT OCCURRING SIGNIFICANTLY OUTSIDE THE DATES OF THE INDICTMENT, WHICH RESULTED IN AN ARTIFICIALLY HIGH DRUG WEIGHT CALCULATION AND BASE OFFENSE LEVEL, AND THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THIS TO BE RELEVANT CONDUCT DESPITE A SUBSTANTIAL TIME INTERVAL.

The basis of this petition is the dramatic increase in drug weight attributed to the Petitioner based upon uncharged conduct alleged to have occurred many years before the parameters of the superseding indictment. Genesis Whitted's drug quantity for the charged offenses in the superseding indictment totaled 35.38 grams of cocaine base. (App. I-1). Nonetheless, relying on a more than significant amount of alleged historical background, paragraph 85 of the Presentence Report computed a base offense level of 34 based upon a drug quantity of 2538.075 grams of cocaine base, with a marijuana equivalency of 9063.47 kg. Adding additional historical conduct for some cocaine, marijuana, and heroin, the total marijuana equivalency was 10,398.86 kg. (App. I-2).

It is respectfully contended that the drug weight calculation in the Presentence Report (PSR) resulted in an artificially high base offense level. The

Fourth Circuit opinion noted that the PSR based its sentence in part on twenty or so unlawful acts between 2008 and 2015, which it determined to be relevant conduct, even though Petitioner had not been charged for these acts. The Fourth Circuit opinion also noted that the Government learned about these acts with sixteen cooperating witnesses and police reports. (App. A-4). It is respectfully urged that these interviews appear vague and uncorroborated and consist of a number of hand-to-hand buys or transactions which are not part of the same course of conduct or common scheme or plan of the 2015 conspiracy charged herein.

The Fourth Circuit opinion cites its decision in United States v. Pineda, 770 F.3d 313, 318 (4th Cir. 2014), for its standard of review. Petitioner understands that under United States v. Pineda, for relevant conduct purposes, it makes no difference whether the specific criminal conduct is charged in a count of conviction. 770 F.3d at 319. It should be noted however that the uncharged conduct in Pineda occurred on November 30, 2011, and the charged conduct occurred on January 25, 2012 and February 8, 2012.

The Fourth Circuit has held that to be part of the same course of conduct or common scheme or plan as the offense of conviction, the other conduct must be substantially connected by at least one common factor. See United States v. Dugger, 485 F.3d 236, 241-242 (4th Cir. 2007), which further held that conduct may be considered "relevant conduct" if the offenses are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Mr. Dugger was convicted of distribution of

cocaine base following entry of a guilty plea. While incarcerated, he was involved in a scheme to deal marijuana and Xanax pills. The Fourth Circuit held that the sale of drugs while in the detention center did not meet the requirements to be considered "relevant conduct". Petitioner respectfully urges that the prior conduct alleged herein is not substantially connected nor sufficiently related to be classified as relevant conduct, and that the Fourth Circuit erred by failing to follow its decision in Dugger.

Relevant conduct is defined under Guideline § 1B1.3(a) as follows:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were –
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline. (App. G-1, 2).

Application note 3(B) of Guideline § 1B1.3 addresses the scope of jointly undertaken criminal activity. It provides in part:

> "In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the subject of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities." (App. G-3).

Petitioner respectfully contends that the alleged relevant conduct in his case does not point to one jointly undertaken criminal activity but is a number of separate alleged criminal activities. He further contends that the activities consist of a number of isolated incidents over a long period of time and are totally unrelated to the criminal activity in 2015.

While the Fourth Circuit acknowledged a substantial time interval from 2008 until Petitioner's arrest, it found evidence of similarity and regularity to support the

district court's decision to consider the uncharged acts. (App. A-7). Petitioner argues that the tremendously disproportionate share of uncharged alleged relevant conduct resulted in a significantly higher guideline range than a range dictated by the jury's verdict. The Presentence Report noted that the guideline imprisonment range was life, however the statutorily authorized maximum sentences were less than the maximum of the applicable guideline range. (App. I-3). Therefore the alleged relevant conduct under Guideline § 1B1.3 has resulted in a guideline sentence higher than any of the statutorily authorized maximum penalties herein.

Since a jury did not determine the above issue, it is respectfully urged that this amounts to error under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004). The Supreme Court in Blakely stated:

> "This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000): 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that 'an accusation which lacks any particular fact which the law makes essential to a punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason,' 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).[5] These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see 530

> U.S., at 476-483, 489-490, n. 15; *id.*, at 501-518, 120 S.Ct. 2348 (THOMAS, J., concurring), and need not repeat them here.[6]"

542 U.S. at 301-302, 124 S.Ct. at 2536-2537.

In United States v. Bell, 667 F.3d 431 (4th Cir. 2011), a conspiracy to distribute oxycodone pills, the case was remanded to require the district court to explain on the record its factual findings underlying its drug quantity calculations. It warned against relevant conduct based upon the "approximation" by "uncertain" witness estimates. The Fourth Circuit stated:

> "For example, although we have approved reliance on direct or hearsay testimony of lay witnesses as to the quantities attributable to a defendant, *see United States v. Cook*, 76 F.3d 596, 604 (4th Cir. 1996), we have cautioned that when the approximation is based only upon 'uncertain' witness estimates, district courts should sentence at the low end of the range to which the witnesses testified. *United States v. Sampson*, 140 F.3d 585, 592 (4th Cir. 1998); *see also* U.S.S.G. § 6A1.3(a) (policy statement) (permitting sentencing courts to rely on 'relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy')."

667 F.3d at 441.

The Fourth Circuit opinion noted that the Petitioner pointed them to United States v. Bell. However the Fourth Circuit opinion mistakenly claimed that Petitioner misinterpreted Bell by suggesting that it prohibits the use of witness estimates about drug quantities all together. Petitioner did not claim or suggest this. The purpose in citing Bell was the cautionary language when relevant conduct was at issue and where the Government must prove the drug quantity attributable

to a particular defendant by a preponderance of the evidence. 667 F.3d at 441. In Bell the Fourth Circuit remanded the case for the district court to explain on the record its factual findings underlying its drug quantity calculation. The remand was made pursuant to Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), for failing to adequately explain the chosen sentence and allow for meaningful appellate review. 667 F.3d at 440, 444.

Petitioner Whitted contends that the cautionary language by the Fourth Circuit in Bell relying upon the Supreme Court decision in Gall illustrates the intent of the appellate courts to protect a defendant from an unwarranted and unsubstantiated sentence. While a jury verdict clearly shows what conduct violated an applicable statute, relevant conduct does not offer the same safeguard. Petitioner therefore contends that by expanding relevant conduct to include drug amounts associated with alleged incidents occurring significantly outside the dates of the indictment, he received an artificially high drug weight calculation and base offense level. Therefore this petition for certiorari should be allowed, and Petitioner should be entitled to a new sentencing hearing.

CONCLUSION

For the foregoing reasons, Petitioner Genesis Lee Whitted, Jr. respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit affirming his conviction and sentence.

This the 7th of November, 2019.

DUNN, PITTMAN, SKINNER & CUSHMAN, PLLC
Counsel for Petitioner Genesis Lee Whitted, Jr.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2019

****

GENESIS LEE WHITTED, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

ENTRY OF APPEARANCE

and

CERTIFICATE OF SERVICE

****

I, Rudolph A. Ashton, III, a member of the North Carolina State Bar, having been appointed to represent the Petitioner in the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, hereby enter my appearance in this Court in respect to this Petition for a Writ of Certiorari.

I, Rudolph A. Ashton, III, do swear or declare that on this date, the 7th day of November, 2019, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached motion for leave to proceed *in forma pauperis* and petition for a writ of certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing in an envelope containing the above documents in the United States mail properly addressed to each of them and

with first-class postage prepaid. The names and addresses of those served are as follows:

Jennifer P. May-Parker, AUSA
Kristine L. Fritz, AUSA
Office of the United States Attorney
Eastern District of North Carolina
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N.W.
Washington DC 20530-0001

This the 7th day of November, 2019.

Respectfully submitted,

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Subscribed and Sworn to Before Me

This the 7th day of November, 2019

TERESA K. LEWIS NOTARY PUBLIC CRAVEN COUNTY, NC

Teresa K Lewis

Notary Public

My Commission Expires: 3/19/2024

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4166

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

GENESIS LEE WHITTED, JR., a/k/a Gen, a/k/a Juice Man,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, Senior District Judge. (5:15-cr-00372-H-1)

Submitted: April 2, 2019 Decided: August 21, 2019

Before GREGORY, Chief Judge, and DIAZ and THACKER, Circuit Judges.

Affirmed by unpublished opinion. Judge Diaz wrote the opinion, in which Chief Judge Gregory and Judge Thacker joined.

Rudolph A. Ashton, III, DUNN PITTMAN SKINNER & CUSHMAN, PLLC, New Bern, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, Kristine L. Fritz, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

DIAZ, Circuit Judge:

Genesis Whitted, Jr. was convicted of conspiracy to distribute cocaine base in 2015. He was sentenced to 35 years in prison, based in part on a history of drug-related conduct that was not part of the charged offense. Whitted challenges this sentence on appeal. First, he argues that his uncharged drug-related acts, some going back to 2008, weren't relevant to the 2015 conspiracy for sentencing purposes. Second, he argues that even if his uncharged acts were relevant, they were based on unreliable evidence. Finally, he says that the district court erred in refusing to grant him a two-level decrease in his offense level, because he accepted responsibility for some of his offenses. For the reasons that follow, we affirm.

I.

A.

The FBI and local police had long suspected that Whitted was responsible for several crimes in Fayetteville, North Carolina. They believed that Whitted, the leader of a local Bloods gang, distributed large amounts of cocaine in Fayetteville. They also believed that he and his associates regularly robbed drug dealers and prospective customers of drugs and valuables.

Around 2014, the FBI and Fayetteville police began working with several cooperating witnesses to build a case against Whitted. Soon after, agents installed a camera across from a car wash Whitted owned to monitor his daily activities. As the recordings soon revealed, this was no ordinary car wash: Whitted used it primarily to distribute large

quantities of drugs, mostly cocaine and cocaine base. A confidential informant later agreed to take part in seven controlled purchases from Whitted. Between November and December of 2015, Whitted ultimately sold the informant 35 grams of cocaine base.

B.

In 2016, based on the controlled purchases, Whitted was charged in a superseding indictment with conspiracy to distribute cocaine base, *see* 21 U.S.C. § 846; seven counts of distributing cocaine base, *see id.* § 841(a)(1); and two counts of possessing a firearm in furtherance of a drug trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A).

During Whitted's first arraignment hearing, counsel said Whitted was willing to plead guilty to the drug charges, but not the gun charges. As the hearing continued, however, counsel grew increasingly concerned that Whitted wasn't competent to make an informed plea decision. Counsel also worried that Whitted's family was improperly pressuring him to go to trial. Out of caution, the court ordered a competency evaluation. The evaluator deemed Whitted competent and found that he was exaggerating his psychological symptoms. A cooperating witness later stated that Whitted had hoped to be diagnosed with a mental illness in order to receive a lighter sentence.

At Whitted's second arraignment hearing, he pleaded not guilty to all counts. The court, aware that he previously intended to plead guilty to the drug-related charges, asked several times if he wanted to plead not guilty to every count. Each time, Whitted responded in the affirmative.

Leading up to the trial, Whitted made several attempts to influence witness testimony. For example, he called an old associate and asked him to withdraw prior

statements about Whitted's past drug- and gun-related acts. The associate obliged. But the call was monitored, and the associate later admitted that a letter repudiating his prior statements was false.

On the eve of trial, Whitted tried to accept a plea offer that the government had tendered some months before. But the government pointed out that the offer had expired. And while it wasn't willing to give Whitted a plea deal as favorable as the previous one, the government extended him two new offers. Whitted refused to accept them and the case went to trial. At trial, Whitted's attorney only disputed the gun-related counts and conceded guilt on the drug-related counts. A jury found Whitted guilty on every count except for one gun-related charge.

C.

Following the jury's verdict, the probation office issued its presentence investigation report ("PSR"). The PSR recommended a sentence based in part on twenty or so unlawful acts between 2008 and 2015. Whitted had not been charged for these acts, but the probation office determined they were relevant conduct under the United States Sentencing Guidelines ("U.S.S.G."). The government learned about these acts from interviews with sixteen cooperating witnesses and police reports from three traffic stops. The acts related to Whitted's (1) drug trafficking operation, which included buying, selling, manufacturing, and stealing drugs, mainly cocaine and cocaine base; and (2) armed robberies of drugs dealers and prospective customers.

For example, one cooperating witness sold Whitted cocaine base on numerous occasions between 2008 and 2014. These sales totaled at least 1,645 grams of cocaine base

(though the witness estimated the amount could be as high as 2,145 grams). Another witness said he bought 510 grams of cocaine base from Whitted between 2011 and 2013. And another said he saw Whitted cook at least 893 grams of cocaine base between 2014 and 2015. Whitted and his associates also committed eight robberies (all to steal drugs or drug proceeds) between 2008 and 2015, at a pace of about one per year. In each robbery, they threatened victims with firearms.

Based on Whitted's past acts, the PSR recommended holding him responsible for a converted drug weight of 10,398.86 kilograms.[1] It also applied sentencing enhancements based on Whitted's use of physical restraint and his leadership role in the criminal operation. *See* U.S.S.G. §§ 3A1.3, 3B1.1(a). It applied a criminal history of III based on Whitted's past criminal convictions and his commission of criminal acts between 2008 and 2013, while he was on probation for state offenses. *See* U.S.S.G. § 4A1.1(d). These criminal acts were among the uncharged acts that were deemed relevant conduct and treated as part of the instant offense for sentencing purposes. Finally, the PSR declined to recommend an acceptance of responsibility adjustment. *See* U.S.S.G. § 3E1.1.

The district court adopted the recommendations in the PSR. Although Whitted's guidelines range was life imprisonment, the court varied downward and sentenced him to 35 years in prison. Whitted timely appealed his sentence.

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[1] In all, the converted drug weight was based on 8984.3 grams of cocaine or cocaine base, 3,628.8 grams of marijuana, and 42.525 grams of heroin. The PSR didn't count drugs and currency attributed to Whitted by witnesses where there was a possibility of double counting or the drug amount was unascertainable.

II.

We review the district court's factual findings at sentencing for clear error and its evidentiary decisions, including credibility determinations, for abuse of discretion. *United States v. Pineda*, 770 F.3d 313, 318 (4th Cir. 2014) (citation omitted).

Whitted first argues that the district court clearly erred by finding his uncharged drug-related acts relevant to his charged 2015 drug trafficking conspiracy. He next asserts that even if his past acts were relevant, the district court abused its discretion by crediting the accounts of these acts provided by the government's witnesses. He finally argues the district court clearly erred by finding he didn't accept responsibility for his drug-related counts. We find none of his arguments persuasive.

A.

Under the sentencing guidelines, district courts may sentence defendants not only for the conduct for which they were convicted, but for any conduct deemed "relevant" to the counts of conviction. U.S.S.G. § 1B1.3. For offenses like the drug crimes Whitted was convicted of, the guidelines define relevant conduct to include "all acts and omissions that [are] part of the same course of conduct . . . as the offense of conviction." *Id.* § 1B1.3(a)(2).

To determine whether Whitted's past acts are part of the same course of conduct as his 2015 drug trafficking conspiracy, we ask whether they are part of an ongoing, identifiable pattern of criminal conduct. *Id.* § 1B1.3 cmt. n.5(B)(ii). Factors to consider include (1) the degree of similarity between the offenses, (2) the regularity of the offenses,

and (3) the time interval between them. *Id.* When one factor is lacking, there must be a stronger presence of another to compensate. *Id.* For example, in *United States v. Hodge*, a four-year gap between several uncharged cocaine sales and the charged offense of cocaine possession was overcome by the fact that the defendant continuously sold cocaine throughout the intervening period. 354 F.3d 305, 313–15, (4th Cir. 2004).

Whitted argues the district court clearly erred by finding his uncharged drug-related acts relevant to his charged 2015 drug trafficking conspiracy. His principal contention is that the time interval between the uncharged and charged acts is too great. He also appears to argue that the past acts didn't occur regularly, and that they were dissimilar to the charged conspiracy.

The government doesn't seriously dispute that the time interval is substantial. But it argues that its investigation of Whitted, as well as its interviews with sixteen witnesses, show that he engaged in an ongoing pattern of conduct from 2008 to his arrest. This scheme involved regularly buying, selling, manufacturing, and stealing drugs (mainly cocaine), often by violent means.

We too acknowledge the substantial time interval between Whitted's charged acts and most of the uncharged ones. But we agree with the government that the evidence of similarity and regularity supports the district court's decision to consider the uncharged acts.

In our view, the record shows a similarity between the charged and uncharged acts because Whitted was at all times aiming to further his drug trafficking operation, using similar methods, persons, and locations. Whitted's uncharged acts primarily involved

buying, selling, or manufacturing drugs. He generally shared in the profits of these drug transactions, which all occurred in the Fayetteville area and usually involved cocaine or cocaine base. And the purpose of the uncharged robberies was to steal drugs and drug proceeds from dealers or prospective customers.

As for regularity, Whitted conducted multiple drug transactions each year from 2008 to 2015. He likewise committed a drug-related robbery in almost every year between 2008 and 2015.

Whitted's long and unbroken chain of drug transactions and related robberies bore significant similarities and served a common purpose. We are therefore satisfied that Whitted's uncharged acts form a single, ongoing course of conduct, even though they extend back several years before the charged conspiracy.

B.

We next turn to Whitted's two evidentiary challenges. He first contends that the district court abused its discretion by finding the witnesses' descriptions of his uncharged acts sufficiently reliable. We disagree. The statements of two cooperating witnesses established most of the drug weight that the PSR attributed to Whitted. One of the witnesses testified at trial, and the other was prepared to do so. Their willingness to testify supports the finding that they were reliable. And their statements were consistent with each other (and with the statements of the fourteen other cooperating witnesses) in all

material respects. Finally, their statements were consistent with the trial evidence, which suggested that Whitted was an experienced drug manufacturer and dealer.[2]

Whitted's second argument attacks the PSR's drug calculation. He points us to *United States v. Bell*, in which we warned that where drug calculations are "based only upon 'uncertain' witness estimates, district courts should sentence at the low end of the range to which the witness[es] testified." 667 F.3d 431, 441 (4th Cir. 2011) (citation omitted). But that's precisely what the district court did here by adopting the PSR's recommendation. Whenever cooperating witnesses made imprecise estimates, the PSR adopted the amount at the low end of the range. For example, one witness estimated that Whitted sold him between 1,645 and 2,145 grams of cocaine base, and the PSR used the smaller figure. Whitted misinterprets *Bell* when he suggests that it prohibits the use of witness estimates about drug quantities altogether. We expressly noted that sentencing courts may rely on "hearsay testimony of lay witnesses as to the quantities attributable to a defendant." *Id.*

The district court therefore didn't abuse its discretion by finding the cooperating witnesses' statements and drug estimates reliable.[3]

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[2] Whitted also notes the evidence is hearsay, which he suggests is per se unreliable for sentencing purposes. But sentencing courts aren't bound by the rules of evidence. U.S.S.G. § 6A1.3(a); *United States v. Crawford*, 734 F.3d 339, 342 (4th Cir. 2013) (collecting cases).

[3] Whitted's remaining arguments each depend on the premise that his uncharged conduct either is not relevant for sentencing purposes or was not established by reliable evidence. Accordingly, we reject them for the same reasons given above. *See* U.S.S.G. § 1B1.3(a) (providing that unless otherwise specified, relevant conduct is to be used in (Continued)

C.

We finally consider Whitted's assertion that he was entitled to a two-level reduction in his offense level for acceptance of responsibility. When a defendant clearly demonstrates that he has accepted responsibility for his offenses, he is entitled to a two-level decrease in his offense level. U.S.S.G. § 3E1.1(a). We review the district court's decision to deny this reduction for clear error. *United States v. Kise*, 369 F.3d 766, 771; *see also* U.S.S.G. § 3E1.1 cmt. n.5 ("The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review."). The commentary to the guidelines directs district courts to consider several nonexclusive factors, including whether the defendant admits to committing the offense of conviction and "any additional relevant conduct." U.S.S.G. § 3E1.1 cmt. n.1(A).

Whitted argues that his is one of those "rare" cases where, despite having gone to trial on both the drug and gun charges, he should nonetheless receive an acceptance of responsibility adjustment for the drug counts. *Id.* § 3E1.1 cmt. n.2. He first argues that the government and his family thwarted his efforts to enter an acceptable plea agreement. Appellant's Br. at 24–25. Second, Whitted argues that because his trial attorney conceded guilt on the drug counts, he accepted responsibility for them. We find his arguments unpersuasive.

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applying sentencing adjustments and enhancements); *United States v. Self*, 132 F.3d 1039, 1043 (4th Cir. 1997) ("As a general matter, then, the term 'offense' refers to the offense of conviction including relevant conduct within the meaning of § 1B1.3 . . . .").

With respect to alleged government interference, Whitted points us to his first arraignment hearing where he said he was willing to plead guilty to the drug-related charges. Yet at his second arraignment hearing, he stated (more than once) that he wanted to go to trial on *both* sets of charges. He also says he tried to accept a plea offer before his trial began. This plea offer, however, had already expired. The government extended two additional plea offers to Whitted. But he rejected both because they weren't as favorable as the earlier offer. It therefore isn't clear to us how the government thwarted his efforts to reach a plea agreement.

As for the alleged familial interference, the district court did note that Whitted's family had been giving him detrimental legal advice (presumably to go to trial). But beyond that, the record and Whitted's briefs aren't clear on how Whitted's family interfered with his decision making process. We therefore decline to reverse the district court's determination on this basis alone.

Whitted's next point is that his trial attorney conceded he was guilty of the drug counts. He relies on *United States v. Hargrove*, in which we held that a district court wasn't barred from affording a defendant an acceptance of responsibility adjustment where he pleaded guilty to his drug-related charges, but not his gun-related charges. 478 F.3d 195, 204–05 (4th Cir. 2007). But unlike *Hargrove*, Whitted went to trial on both his drug and gun charges. Therefore, while *Hargrove* is instructive, it is not dispositive.

We are satisfied that, under these circumstances, the district court did not clearly err in refusing to grant Whitted a two-level reduction for acceptance of responsibility. Even today, Whitted still challenges not just whether the uncharged conduct is legally relevant,

but also the evidence establishing that the conduct occurred. He also attempted to alter witness testimony before his trial. And he apparently tried to mislead the court about his mental competence to get a lighter sentence. This is a far cry from accepting responsibility.

III.

For the reasons given, we affirm Whitted's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

App. B

FILED: August 21, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4166
(5:15-cr-00372-H-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GENESIS LEE WHITTED, JR., a/k/a Gen, a/k/a Juice Man

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

App. C

FILED: September 12, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4166
(5:15-cr-00372-H-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GENESIS LEE WHITTED, JR., a/k/a Gen, a/k/a Juice Man

Defendant - Appellant

MANDATE

The judgment of this court, entered August 21, 2019, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA
v.
GENESIS LEE WHITTED, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:15-CR-372-1H

USM Number: 61101-056

James M. Ayers, II & Elizabeth Hopkins Thomas
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) 1s, 3s, 4s, 5s, 6s, 7s, 8s and 9s (Superseding Indictment)
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. § 846, 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 841(b)(1)(B)	Conspiracy to Distribute and Possess With Intent to Distribute 28 Grams or More of Cocaine Base	12/15/2015	1s

Continued on page 2.....

The defendant is sentenced as provided in pages 2 through 10 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) 2s

☐ 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.

3/6/2018
Date of Imposition of Judgment

Signature of Judge

Honorable Malcolm J. Howard, Senior United States District Judge
Name and Title of Judge

3/6/2018
Date

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C)	Distribution of a Quantity of Cocaine Base	12/15/2015	3s, 5s, 6s, 8s, and 9s
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C), and 18 U.S.C. § 2	Distribution of a Quantity of Cocaine Base and Aiding and Abetting	12/15/2015	4s
18 U.S.C. § 924(c)(1)(A), 18 U.S.C. § 924(c)(1)(A)(i)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	12/15/2015	7s

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

420 months (360 months as to Count 1s, 240 months as to Counts 3s, 4s, 5s, 6s, 8s, and 9s, to run concurrently to each other and to Count 1, and a term of 60 months on Count 7s, to be served consecutively to all counts, producing a total term of 420 months)

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ 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

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years (5 years on Counts 1s and 7s, and 3 years on Counts 3s, 4s, 5s, 6s, 8s, and 9s, all to run concurrently)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must 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 the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of mental health treatment, as directed by the probation office.

2. The defendant shall consent to a warrantless search by a United States Probation Officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

3. The defendant shall participate in such vocational training program as may be directed by the probation office.

4. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

5. The defendant shall support his dependent(s).

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 800.00	$	$	$

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

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

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

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

TOTALS	$ 0.00	$ 0.00

☐ 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:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** 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: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

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 $ _____ 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:

Payment of the special assessment is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: GENESIS LEE WHITTED, JR.
CASE NUMBER: 5:15-CR-372-1H

DENIAL OF FEDERAL BENEFITS

(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

☑ ineligible for all federal benefits for a period of 10 years .

☐ ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

OR

☐ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____ .

☐ be ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

☐ Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk of court is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531

to this chapter. For complete classification, see Short Title note set out under 21 U.S.C.A. § 801 and Tables.

Section 309, referred to in subsec. (c)(7), is section 309 of Pub.L. 91–513, which is classified to 21 U.S.C.A. § 829.

For the effective date of this section, referred to in subsec. (d)(3), see Effective and Applicability Provisions note set out under 21 U.S.C.A. § 802.

The Indian Self-Determination and Education Assistance Act, referred to in subsec. (g)(1), (2)(B), is Pub.L. 93–638, Jan. 4, 1975, 88 Stat. 2203, which was classified principally to subchapter II of chapter 14 of title 25, 25 U.S.C.A. § 450 et seq., prior to editorial reclassification as chapter 46, 25 U.S.C.A. § 5301 et seq. For complete classification, see Short Title note set out under 25 U.S.C.A. § 5301 and Tables.

Effective and Applicability Provisions

2008 Acts. Except as otherwise provided, section effective 180 days after Oct. 15, 2008, and for provisions relating to definitions and temporary phase-in of regulations of practice of telemedicine, see Pub.L. 110–425, § 3(j), set out as a note under 21 U.S.C.A. § 802.

Guidelines and Regulations for Pub.L. 110–425

The Attorney General may promulgate and enforce any rules, regulations, and procedures necessary and appropriate for efficient execution of functions under Pub.L. 110–425 or the amendments made by that Act, and, with the concurrence of the Secretary of Health and Human Services, may promulgate interim rules necessary for implementation of Pub.L. 110–425 prior to its effective date, see Pub.L. 110–425, § 3(k), set out as a note under 21 U.S.C.A. § 802.

Rules of Construction

Nothing in Pub.L. 110–425 or the amendments made by that Act shall be construed as authorizing, prohibiting, or limiting the use of electronic prescriptions for controlled substances, see Pub.L. 110–425, § 4, set out as a note under 21 U.S.C.A. § 802.

§ 832. Suspicious orders

(a) Reporting

Each registrant shall—

(1) design and operate a system to identify suspicious orders for the registrant;

(2) ensure that the system designed and operated under paragraph (1) by the registrant complies with applicable Federal and State privacy laws; and

(3) upon discovering a suspicious order or series of orders, notify the Administrator of the Drug Enforcement Administration and the Special Agent in Charge of the Division Office of the Drug Enforcement Administration for the area in which the registrant is located or conducts business.

(b) Suspicious order database

(1) In general

Not later than 1 year after October 24, 2018, the Attorney General shall establish a centralized database for collecting reports of suspicious orders.

(2) Satisfaction of reporting requirements

If a registrant reports a suspicious order to the centralized database established under paragraph (1), the registrant shall be considered to have complied with the requirement under subsection (a)(3) to notify the Administrator of the Drug Enforcement Administration and the Special Agent in Charge of the Division Office of the Drug Enforcement Administration for the area in which the registrant is located or conducts business.

(c) Sharing information with the States

(1) In general

The Attorney General shall prepare and make available information regarding suspicious orders in a State, including information in the database established under subsection (b)(1), to the point of contact for purposes of administrative, civil, and criminal oversight relating to the diversion of controlled substances for the State, as designated by the Governor or chief executive officer of the State.

(2) Timing

The Attorney General shall provide information in accordance with paragraph (1) within a reasonable period of time after obtaining the information.

(3) Coordination

In establishing the process for the provision of information under this subsection, the Attorney General shall coordinate with States to ensure that the Attorney General has access to information, as permitted under State law, possessed by the States relating to prescriptions for controlled substances that will assist in enforcing Federal law.

(Pub.L. 91–513, Title II, § 312, as added Pub.L. 115–271, Title III, § 3292(b), Oct. 24, 2018, 132 Stat. 3956.)

PART D—OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(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.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced

(5) the individual agrees to submit to a drug test, and such test shows the individual to be drug free.

A nonpublic record of a disposition under this subsection shall be retained by the Department of Justice solely for the purpose of determining in any subsequent proceeding whether the person qualified for a civil penalty or expungement under this section. If a record is expunged under this subsection, an individual concerning whom such an expungement has been made shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this section or the results thereof in response to an inquiry made of him for any purpose.

(Pub.L. 91–513, Title II, § 405, formerly Pub.L. 100–690, Title VI, § 6486, Nov. 18, 1988, 102 Stat. 4384, renumbered § 405 of Pub.L. 91–513, and amended Pub.L. 101–647, Title X, § 1002(g)(1), (2), Nov. 29, 1990, 104 Stat. 4828.)

So in original. Probably should be "section".

HISTORICAL AND STATUTORY NOTES

Prior Provisions

A prior section 405 of Pub.L. 91–513, Title II, Oct. 27, 1970, 84 Stat. 1265, was redesignated section 418 by Pub.L. 101–647, § 1002(a)(1) and is classified to 21 U.S.C.A. § 859.

§ 845. Transferred to § 859

§ 845a. Transferred to § 860

§ 845b. Transferred to § 861

§ 846. Attempt and conspiracy

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.

(Pub.L. 91–513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265; Pub.L. 100–690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

HISTORICAL AND STATUTORY NOTES

References in Text

"This subchapter", referred to in text, was in the original "this title", which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under § 801 of this title and Tables.

Effective and Applicability Provisions

1970 Acts. Section effective the first day of the seventh calendar month that begins after the day immediately preceding Oct. 27, 1970, see § 704(a) of Pub.L. 95–513, set out as a note under § 801 of this title.

§ 847. Additional penalties

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(Pub.L. 91–513, Title II, § 407, Oct. 27, 1970, 84 Stat. 1265.)

HISTORICAL AND STATUTORY NOTES

References in Text

"This subchapter", referred to in text, was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under § 801 of this title and Tables.

Effective and Applicability Provisions

1970 Acts. Section effective the first day of the seventh calendar month that begins after the day immediately preceding Oct. 27, 1970, see § 704(a) of Pub.L. 91–513, set out as a note under § 801 of this title.

§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

any applicable specific offense characteristics (under that guideline), and any other applicable sentencing factors pursuant to the relevant conduct definition in §1B1.3. Where there is more than one base offense level within a particular guideline, the determination of the applicable base offense level is treated in the same manner as a determination of a specific offense characteristic. Accordingly, the "relevant conduct" criteria of §1B1.3 are to be used, unless conviction under a specific statute is expressly required.

3. Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

4. Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (*e.g.*, a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 2); November 1, 1989 (amendments 73–75 and 303); November 1, 1991 (amendment 434); November 1, 1992 (amendment 438); November 1, 2000 (amendment 591); November 1, 2001 (amendments 613 and 617).

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) CHAPTERS FOUR (CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD) AND FIVE (DETERMINING THE SENTENCE). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. **Sentencing Accountability and Criminal Liability.**—The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

2. **Accountability Under More Than One Provision.**—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guide-

line. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

3. **Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—**

(A) **In General.**—A "***jointly undertaken criminal activity***" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

(i) within the scope of the jointly undertaken criminal activity;

(ii) in furtherance of that criminal activity; and

(iii) reasonably foreseeable in connection with that criminal activity.

The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (*i.e.*, "within the scope," "in furtherance," and "reasonably foreseeable") is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

(B) **Scope.**—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the "jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (*e.g.*, in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission

does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

(C) **In Furtherance.**—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.

(D) **Reasonably Foreseeable.**—The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity. (B

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. **Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).**—

(A) **Acts and omissions aided or abetted by the defendant.**—

(i) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of (C

reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. *See* Application Note 2.

(B) **Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.—**

(i) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(C) **Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable.—**

(i) Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain

$15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not within the scope of the jointly undertaken criminal activity (*i.e.*, the forgery of the $800 check).

(ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.

(iii) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (*see* the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection

(a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (*i.e.*, the one delivery).

(vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

(vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (*i.e.*, the 500 grams).

(viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. *See* Application Note 3(B).

5. **Application of Subsection (a)(2).—**

(A) **Relationship to Grouping of Multiple Counts.**—"Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.

As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

(B) **"Same Course of Conduct or Common Scheme or Plan".**—"Common scheme or plan" and "same course of conduct" are two closely related concepts.

(i) **Common scheme or plan.** For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; *i.e.*, the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of *modus operandi* (the same or similar computer manipulations were used to execute the scheme).

(ii) **Same course of conduct.** Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as

part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (*e.g.*, a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

(C) **Conduct Associated with a Prior Sentence.**—For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and *modus operandi*. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; *see* §4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

6. **Application of Subsection (a)(3).**—

(A) **Definition of "Harm".**—"*Harm*" includes bodily injury, monetary loss, property damage and any resulting harm.

(B) **Risk or Danger of Harm.**—If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. *See, e.g.*, §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (*e.g.*, §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (*e.g.*, §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be

treated as the equivalent of harm that occurred. In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. *See generally* §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.

7. **Factors Requiring Conviction under a Specific Statute.**—A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "was convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense involved conduct described in 18 U.S.C. § 2242").

Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. *See* Application Note 3(C) of §2S1.1.

8. **Partially Completed Offense.**—In the case of a partially completed offense (*e.g.*, an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).

9. **Solicitation, Misprision, or Accessory After the Fact.**—In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant

to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which §3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 3); November 1, 1989 (amendments 76–78 and 303); November 1, 1990 (amendment 309); November 1, 1991 (amendment 389); November 1, 1992 (amendment 439); November 1, 1994 (amendment 509); November 1, 2001 (amendments 617 and 634); November 1, 2004 (amendment 674); November 1, 2010 (amendment 746); November 1, 2015 (amendments 790 and 797).

PART D — OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

Historical Note	Effective November 1, 1987. Amended effective November 1, 2007 (amendment 711).

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level

is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a), decrease to level 32.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.

(3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.

(6) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.

(7) If 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 computer service, increase by 2 levels.

(8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

(9) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

(10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.

(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.

(13) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If—

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(14) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels.

(15) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by 2 levels.

(16) If the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by 2 levels.

(17) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
(1) • 90 KG or more of Heroin; • 450 KG or more of Cocaine; • 25.2 KG or more of Cocaine Base; • 90 KG or more of PCP, or 9 KG or more of PCP (actual); • 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice"; • 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); • 900 G or more of LSD; • 36 KG or more of Fentanyl; • 9 KG or more of a Fentanyl Analogue; • 90,000 KG or more of Marihuana; • 18,000 KG or more of Hashish; • 1,800 KG or more of Hashish Oil; • 90,000,000 units or more of Ketamine; • 90,000,000 units or more of Schedule I or II Depressants; • 5,625,000 units or more of Flunitrazepam.	**Level 38**
(2) • At least 30 KG but less than 90 KG of Heroin; • At least 150 KG but less than 450 KG of Cocaine; • At least 8.4 KG but less than 25.2 KG of Cocaine Base; • At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); • At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of "Ice"; • At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); • At least 300 G but less than 900 G of LSD; • At least 12 KG but less than 36 KG of Fentanyl; • At least 3 KG but less than 9 KG of a Fentanyl Analogue; • At least 30,000 KG but less than 90,000 KG of Marihuana; • At least 6,000 KG but less than 18,000 KG of Hashish; • At least 600 KG but less than 1,800 KG of Hashish Oil; • At least 30,000,000 units but less than 90,000,000 units of Ketamine; • At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants; • At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.	**Level 36**
(3) • At least 10 KG but less than 30 KG of Heroin; • At least 50 KG but less than 150 KG of Cocaine; • At least 2.8 KG but less than 8.4 KG of Cocaine Base; • At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); • At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; • At least 5 KG but less than 15 KG of Amphetamine, or	**Level 34**

at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

Level 32

(4)
- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 840 G but less than 2.8 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or
  at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or
  at least 150 G but less than 500 G of Methamphetamine (actual), or
  at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or
  at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

Level 30

(5)
- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 280 G but less than 840 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or
  at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or
  at least 50 G but less than 150 G of Methamphetamine (actual), or
  at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or
  at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

(6) ● At least 700 G but less than 1 KG of Heroin; **Level 28**
● At least 3.5 KG but less than 5 KG of Cocaine;
● At least 196 G but less than 280 G of Cocaine Base;
● At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
● At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of "Ice";
● At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
● At least 7 G but less than 10 G of LSD;
● At least 280 G but less than 400 G of Fentanyl;
● At least 70 G but less than 100 G of a Fentanyl Analogue;
● At least 700 KG but less than 1,000 KG of Marihuana;
● At least 140 KG but less than 200 KG of Hashish;
● At least 14 KG but less than 20 KG of Hashish Oil;
● At least 700,000 but less than 1,000,000 units of Ketamine;
● At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
● At least 43,750 but less than 62,500 units of Flunitrazepam.

(7) ● At least 400 G but less than 700 G of Heroin; **Level 26**
● At least 2 KG but less than 3.5 KG of Cocaine;
● At least 112 G but less than 196 G of Cocaine Base;
● At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
● At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of "Ice";
● At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
● At least 4 G but less than 7 G of LSD;
● At least 160 G but less than 280 G of Fentanyl;
● At least 40 G but less than 70 G of a Fentanyl Analogue;
● At least 400 KG but less than 700 KG of Marihuana;
● At least 80 KG but less than 140 KG of Hashish;
● At least 8 KG but less than 14 KG of Hashish Oil;
● At least 400,000 but less than 700,000 units of Ketamine;
● At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
● At least 25,000 but less than 43,750 units of Flunitrazepam.

(8) ● At least 100 G but less than 400 G of Heroin; **Level 24**
● At least 500 G but less than 2 KG of Cocaine;
● At least 28 G but less than 112 G of Cocaine Base;
● At least 100 G but less than 400 G of PCP, or
at least 10 G but less than 40 G of PCP (actual);
● At least 50 G but less than 200 G of Methamphetamine, or
at least 5 G but less than 20 G of Methamphetamine (actual), or
at least 5 G but less than 20 G of "Ice";
● At least 50 G but less than 200 G of Amphetamine, or
at least 5 G but less than 20 G of Amphetamine (actual);
● At least 1 G but less than 4 G of LSD;
● At least 40 G but less than 160 G of Fentanyl;
● At least 10 G but less than 40 G of a Fentanyl Analogue;

The Investigation

21. The investigation involved information provided by a confidential informant (CI), who was subsequently used by the FBI to conduct controlled purchases of cocaine and cocaine base from the conspirators. During the controlled purchases, **WHITTED** brokered the deals with the CI and possessed a firearm during the controlled purchase on November 18, 2015. , and assisted **WHITTED** during controlled purchases as are detailed below:

Date	Conspirator(s) Involved	Drug Quantity
November 9, 2015	**WHITTED** and (unindicted)	6.35 grams of cocaine base
November 13, 2015	**WHITTED** and	2.94 grams of cocaine base
November 16, 2015[1]	**WHITTED** and	5.27 grams of cocaine base
November 18, 2015[2]	**WHITTED** and	5.78 grams of cocaine base
November 23, 2015	**WHITTED** and	13 grams of a substance later to be determined as baking soda
November 24, 2015	**WHITTED** and	3.02 grams of cocaine base
November 30, 2015[3]	**WHITTED** and	12.02 grams of cocaine base
	Total	35.38 grams of cocaine base*

*To avoid potential double counting with historical information, the controlled purchases are not counted.

85. **Base Offense Level:** The guideline for a violation of 21 U.S.C. § 846 is USSG §2D1.1. The defendant is conservatively held accountable for 10,398.86 kilograms of marijuana equivalency. Therefore, because the offense involved at least 10,000 kilograms, but less than 30,000 kilograms of marijuana, the base offense level is 34. USSG §2D1.1(c)(3). **34**

Drug Name	Drug Quantity	Marihuana Equivalency
Cocaine Base "Crack"	2538.075 gm	9063.47 kg
Cocaine	6446.225 gm	1289.24 kg
Marihuana	3628.8 gm	3.63 kg
Heroin	42.525 gm	42.52 kg
Total		10398.86 kg

PART E. SENTENCING OPTIONS

Custody

95. **Statutory Provisions:** Count 1: The minimum term of imprisonment is 5 years and the maximum term is 40 years. 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(B). Count 3: The maximum term of imprisonment is 20 years. 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C). Count 4: The maximum term of imprisonment is 20 years. 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C). Count 5: The maximum term of imprisonment is 20 years. 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C). Count 6: The maximum term of imprisonment is 20 years. 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C). Count 7: The minimum term of imprisonment is five years and the maximum term is life. 18 U.S.C. § 924(c)(1)(A)(i) and 18 U.S.C. § 924(c)(1)(A)(i). Count 8: The maximum term of imprisonment is 20 years. 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C). Count 9: The maximum term of imprisonment is 20 years. 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C).

96. The term of imprisonment on Count 7 must be imposed consecutively to any other counts.

97. **Guideline Provisions:** Based upon a total offense level of 43 and a criminal history category of III the guideline imprisonment range is life. The guideline sentence for Count 7 is the minimum term of imprisonment required by statute. USSG §2K2.4(b). However, the statutorily authorized maximum sentences are less than the maximum of the applicable guideline range; therefore, pursuant to USSG §5G1.2(d), the sentences for each count can be imposed to run consecutively to the extent necessary to produce a life sentence.