No. 20-_____

SUPREME COURT OF THE UNITED STATES

Angelo Johnson,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

NATE NIEMAN
ATTORNEY AT LAW
329 18TH ST.
ROCK ISLAND, IL 61201
(309) 623-4831
nate@niemanlaw.com

I. Question Presented

Should a defendant be denied a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 when the defendant enters a timely guilty plea but later challenges the application of the Guidelines at sentencing?

II. Parties to the Proceedings

All parties appear in the caption on the cover page.

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V. Petition for Writ of Certiorari

Angelo Johnson, an inmate currently incarcerated at Allenwood USP in White Deer, PA, by and through Nate Nieman, appointed CJA counsel, respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

VI. Opinion Below

A final sentencing judgment was entered in the Southern District of Iowa in 3:17-cr-00073 (*United States v. Angelo Johnson*) on December 20, 2018. That judgment was affirmed on appeal. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the District Court's judgment is reported at *United States v. Moore*, 798 F. App'x 952, 958 (8th Cir. 2020), and is reproduced in the appendix to this petition at Pet. App. ("App.") at 1-11. Mr. Johnson did not file a petition for rehearing.

VII. Jurisdiction

The United States District Court had jurisdiction over Mr. Johnson's federal criminal prosecution pursuant to 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Mr. Johnson filed a timely notice of appeal on December 21, 2018 from the judgment formally entered on December 20, 2018. *See* Fed. R. App. P. 4(b)(1)(A)(i). The Eighth Circuit Court of Appeals had jurisdiction of Mr. Johnson's appeal pursuant to 28 U.S.C. § 1291 (The courts of appeals ". . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ").

The District Court's judgment was affirmed on direct appeal on January 7, 2020. Mr. Johnson invokes this Court's jurisdiction under 28 U.S.C. §1254(1). Furthermore, this petition is timely filed. Under U.S. Supreme Court Rule 13, "Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment," making the original due date for the petition April 6, 2020.

However, due to coronavirus disruptions, the Court entered an order on March 19, 2020 extending the time for filing a petition for certiorari to "150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." *See* App. at 12-13. Accordingly, Mr. Johnson's petition for certiorari is due in this Court on June 5, 2020. Where this petition has been filed on that date, it is timely.

VIII. United States Sentencing Guideline Provisions Involved

U.S.S.G. § 3E1.1:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the

government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

IX. Statement of the Case

The three-level decrease of offense level under U.S.S.G. § 3E1.1 incentivizes a defendant to plead guilty in federal court. See *United States v. Perez-Franco*, 873 F.2d 455, 464 (1st Cir. 1989). The three-level reduction for acceptance of responsibility does not serve that function when a district court denies a reduction in offense level under U.S.S.G. § 3E1.1 when the defendant challenges the application of the guidelines at sentencing. This is what happened here.

1. District Court proceedings.

Mr. Johnson pled guilty to conspiracy to manufacture, distribute, and possess with intent to distribute at least 100 grams of a mixture and substance containing heroin and less than 50 kilograms of a mixture and substance containing marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 841(b)(1)(D), and 846. *United States v. Moore*, 798 F. App'x 952, 958 (8th Cir. 2020).

In determining Mr. Johnson's Guidelines sentencing range, the district court found that he was responsible for distributing more than 1 kilogram of heroin; applied a two-level increase for possession of a firearm, *see* U.S.S.G. § 2D1.1(b)(1); applied a three-level increase for his role in the offense as a manager or supervisor, *see* U.S.S.G. § 3B1.1(b); and denied a three-level reduction for acceptance of responsibility, *see* U.S.S.G. § 3E1.1. *Id.* Mr. Johnson's total offense level was 35, his criminal history category was IV, and his Guidelines sentencing range was 235 to 293 months'

imprisonment. *Id.* The district court varied downward and imposed a 200-month sentence. *Id.* Mr. Johnson appealed.

2. Direct Appeal

On direct appeal, Johnson challenged "the district court's drug calculation, the application of the two enhancements, and the denial of the reduction for acceptance of responsibility." *Id*. The Eighth Circuit Court of Appeals found that "the district court did not clearly err in finding that Johnson distributed more than one kilogram of heroin," *Moore*, 798 F. App'x at 958, that the evidence adduced at sentencing "supported the findings that Johnson possessed a firearm and that it was not "clearly improbable" that the firearm was connected with the offense," *id.* at 959, that "the evidence is sufficient to support the district court's finding that Johnson acted as a manager or supervisor," *id*., and that "the district court did not err in concluding that [Mr. Johnson] acted in a manner inconsistent with acceptance of responsibility." *Id.*

As to the acceptance of responsibility issue in question here, the Eighth Circuit stated the following:

> Finally, Johnson argues that the district court clearly erred in denying him a three-level decrease for accepting responsibility under Guidelines § 3E1.1. United States v. Fischer, 551 F.3d 751, 754 (8th Cir. 2008) (standard of review). The district court denied the decrease because Johnson challenged the amount of drugs involved, the manner in which they were distributed, and whether he possessed a firearm. The evidence set forth above wholly discredited Johnson's claim that he did not possess the Glock nine-millimeter firearm. As the district court explained, firearms "are not peripheral to drug conspiracies and it isn't peripheral here." Because Johnson falsely denied or frivolously contested relevant conduct the court determined to be true—particularly his possession of a firearm— the district court did not err in concluding that he acted in a manner inconsistent with acceptance of responsibility. See U.S.S.G. § 3E1.1 cmt. n.1(A) ("A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to

> be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous....”). *Id.* at 959-60.

Johnson petitions this Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

X. REASONS FOR GRANTING THE WRIT

The question presented here is whether a defendant should be denied a three-level reduction for acceptance of responsibility under U.S.S.G., § 3E1.1 when the defendant enters a timely guilty plea but later challenges the application of the Guidelines at sentencing. Johnson asks this Court to resolve this issue in his favor by holding that a defendant should receive a three-level reduction for acceptance of responsibility under U.S.S.G., § 3E1.1 if he enters a timely guilty plea but later disputes the application of the guidelines to his case at sentencing, so long as the challenges that defendant makes at sentencing are challenges beyond the offense of conviction.

The district court denied a three-level decrease on offense level under U.S.S.G. § 3E1.1 because Johnson challenged the amount of drugs involved, the manner in which they were distributed, and whether he possessed a firearm. See *Moore*, 798 F. App'x at 959. The Court of Appeals affirmed the District Court's denial of a three-level decrease on offense level under U.S.S.G. § 3E1.1 “Because Johnson falsely denied or frivolously contested relevant conduct the court determined to be true.” *Id.*

Even though Mr. Johnson challenged some of the adjustments that the Government sought, he still should have received a reduction for acceptance of

responsibility. Under U.S.S.G., § 3E1.1, "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." U.S.S.G. § 3E1.1(a). A defendant can also receive an additional one-level decrease if he timely notifies the Government of his intention to plead guilty. U.S.S.G. § 3E1.1(b). Under U.S.S.G. § 3E1.1 Application Note (1)(A), "a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous."

Mr. Johnson should have received a three-point reduction in offense level under U.S.S.G. § 3E1.1. Under U.S.S.G. § 3E1.1 Application Note (1)(A), Mr. Johnson was "not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a)." Mr. Johnson's "offense of conviction" was conspiracy to manufacture, distribute, and possess with intent to distribute at least 100 grams of a mixture and substance containing heroin and less than 50 kilograms of a mixture and substance containing marijuana. Mr. Johnson was not required to affirmatively admit to relevant conduct beyond that offense of conviction. *See* U.S.S.G. § 3E1.1, n. (1)(A). Accordingly, as is

his right, Mr. Johnson did not affirmatively admit to the relevant conduct beyond his offense of conviction—instead, he challenged it.

A defendant should be able to put the Government to its low burden on ancillary issues at sentencing and still enjoy the benefit of a three-level reduction in offense level for saving the Government the time and expense of going to trial. As the First Circuit has observed, "the two point reduction serves the invaluable function of inducing the defendant to plead guilty. Without such a reduction, there is little incentive for a defendant to plead guilty, as he will receive the same sentence if he pleads guilty as he would if he were to go to trial and is found guilty." *Perez-Franco*, 873 F.2d 455, 464 (1st Cir. 1989). A defendant should not be required to stand by mute, lest he lose his acceptance of responsibility reduction, while the Government devises and advocates for any adjustment it sees fit. If that were the case, a defendant is better off standing trial, which U.S.S.G. § 3E1.1 seeks to disincentivize. *See id.*

U.S.S.G. § 3E1.1 creates an incentive for defendants to plead guilty. See *United States v. Cohen*, 171 F.3d 796, 805 (3d Cir. 1999) ("Sentencing Guideline 3E1.1 creates an analogous incentive for defendants to plead guilty, and under *Corbitt,* this incentive is constitutional."). The guilty plea has a central role in the criminal process. *United States v. Cox*, 464 F.2d 937, 943 (6th Cir. 1972) (citing *Brady v. United States*, 397 U.S. 742, 752, n. 10 (1970)). Approximately 90% of all criminal proceedings commenced in the United States district courts are settled by the entrance of a plea of guilty or one of nolo contendere. *Id.* (citing *Santobello v. New York*, 404 U.S. 257 (1971) (Douglas, J., concurring, at n. 2)). Plea bargaining is now

openly recognized as an important prosecutorial tool in obtaining these pleas which are indispensable to the smooth functioning of the existing system of criminal justice. *Id*.

If the purpose of U.S.S.G. § 3E1.1 is to incentivize defendants to enter guilty pleas, *Cohen*, 171 F.3d at 805, which are "indispensable to the smooth functioning of the existing system of criminal justice," *Cox*, 464 F.2d at 943, denying acceptance of responsibility reductions to defendants who challenged the application of the Guidelines to their case at sentencing frustrates the purpose of U.S.S.G. § 3E1.1 and disrupts the "smooth functioning" of the criminal justice system. Defendants should retain the ability to challenge the guideline applications in their case without fear of reprisal because even if the guidelines are challenged, pleading guilty still saves the court and the government the expense and time of having a trial. The effects of a defendant pleading guilty to a criminal offense in the District Court also has positive downstream effects on the Court of Appeals and Supreme Court because the only issues that a defendant could raise on appeal would be sentencing issues, as opposed to trial issues. Punishing a defendant for challenging the drug weight attributed to him by the Government's offense conduct statement and making good-faith challenges to firearm and role enhancements is contrary to the stated purpose of the Guideline, which is to promote efficient functioning of the federal criminal justice system.

Accordingly, a defendant should still receive acceptance of responsibility under U.S.S.G. § 3E1.1 if he enters a timely guilty plea but later disputes the application of

the guidelines to his case at sentencing, so long as the challenges that defendant makes at sentencing are challenges beyond the offense of conviction.

XI. CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

____/s/ Nate Nieman___

NATE NIEMAN
ATTORNEY AT LAW
329 18TH ST.
ROCK ISLAND, IL 61201
(309) 623-4831
nate@niemanlaw.com

XII. Appendix

United States Court of Appeals
For the Eighth Circuit

No. 18-3026

United States of America

Plaintiff - Appellee

v.

Lamaar Moore

Defendant - Appellant

No. 18-3474

United States of America

Plaintiff - Appellee

v.

Kearnice C. Overton, also known as Kearnice Overton

Defendant - Appellant

No. 18-3732

United States of America

Plaintiff - Appellee

v.

Angelo Johnson

Defendant - Appellant

Appeals from United States District Court
for the Southern District of Iowa - Davenport

Submitted: September 27, 2019
Filed: January 7, 2020
[Unpublished]

Before SMITH, Chief Judge, WOLLMAN and ERICKSON, Circuit Judges.

PER CURIAM.

Lamaar Moore, Kearnice Overton, and Angelo Johnson pleaded guilty to offenses related to a drug conspiracy. They challenge their sentences on appeal, arguing that the district court[1] erred in calculating their offense levels under the U.S. Sentencing Guidelines (U.S.S.G. or Guidelines). Overton also argues that he is entitled to resentencing because the government breached the plea agreement. We affirm.

I. Lamaar Moore

Moore pleaded guilty to conspiracy to manufacture, distribute, and possess with intent to distribute at least 100 kilograms of a mixture and substance containing

[1]The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846, and possession with intent to distribute less than 50 kilograms of a mixture and substance containing marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D). Before sentencing, Moore objected to the presentence report's recommendation that his base offense level be increased by three for his aggravating role in the offense, see U.S.S.G. § 3B1.1(b), and by two for maintaining a premises for the purpose of manufacturing or distributing controlled substances, see U.S.S.G. § 2D1.1(b)(12). The district court overruled Moore's objections and applied the enhancements. Moore's total offense level was 30, his criminal history category was III, and his Guidelines sentencing range was 121 to 151 months' imprisonment. The district court varied downward, imposing a 108-month sentence on the conspiracy count and a concurrent 60-month sentence on the possession count.

Moore argues that the district court clearly erred in finding that he had acted as a manager or supervisor in the drug conspiracy. See United States v. Alcalde, 818 F.3d 791, 794 (8th Cir. 2016) (standard of review). Guidelines § 3B1.1(b) instructs the district court to apply a three-level increase "[i]f the defendant was a manager or supervisor . . . and the criminal activity involved five or more participants or was otherwise extensive." We have said that a defendant may be subject to the enhancement even if he managed or supervised only one participant in a single transaction. United States v. Irlmeier, 750 F.3d 759, 764 (8th Cir. 2014). A witness testified at Moore's sentencing hearing that he once overheard Moore direct his girlfriend to obtain marijuana from a certain location and sell it at a certain price to Moore's customer. Moore acknowledges that his girlfriend sometimes sold marijuana for him when he was traveling, but he contends that he did not control her actions because they were participants in a joint enterprise. The district court's finding to the contrary is not clearly erroneous, however, because the evidence permits a finding that Moore managed or supervised his girlfriend with respect to at least one transaction.

Moore next argues that the district court clearly erred in finding that he maintained his residence for the purpose of distributing a controlled substance. See United States v. Miller, 698 F.3d 699, 705 (8th Cir. 2012) (standard of review). Moore shared the residence with his girlfriend. He claims that it was primarily their family home and that there is "little evidence that the couple used the residence for the business itself." Moore's Br. 11. Guidelines § 2D1.1(b)(12) instructs the district court to apply a two-level increase for "maintain[ing] a premises for the purpose of manufacturing or distributing a controlled substance." For the enhancement to apply, drug distribution "need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises." U.S.S.G. § 2D1.1 cmt. n.17. We have held that the enhancement applies "when a defendant uses the premises for the purpose of substantial drug-trafficking activities, even if the premises was also [the] family home at the times in question." Miller, 698 F.3d at 707.[2] Moore conceded that drug transactions occurred at his residence. When the apartment was searched, officers seized nine empty one-pound vacuum seal bags with marijuana residue, approximately two pounds of high-grade marijuana, digital scales, and clear plastic baggies, which the district court found to be "substantial indicia of high levels of trafficking at the home." We conclude that the district court did not clearly err in finding that Moore maintained his residence for the purpose of distributing marijuana.

II. Kearnice Overton

Overton pleaded guilty to conspiracy to manufacture, distribute, and possess with intent to distribute 100 grams and more of a mixture and substance containing heroin and 100 kilograms and more of a mixture and substance containing marijuana,

[2]Moore argues that United States v. Miller was wrongly decided, but "[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." Owsley v. Luebbers, 281 F.3d 687, 690 (8th Cir. 2002) (per curiam).

in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, and 851. In determining that Overton's base offense level was 32, the presentence report attributed quantities of heroin, marijuana, and cocaine to him. Overton objected, arguing that his plea agreement prevented the government from presenting evidence of cocaine distribution and that any cocaine distribution was not relevant conduct under U.S.S.G. § 1B1.3. The district court overruled Overton's objections and determined that his base offense level was 32, that his total offense level was 37, that his criminal history category was VI, and that his Guidelines sentencing range was 360 months' to life imprisonment. The district court varied downward and imposed a 300-month sentence.

Overton first argues that the district court erred in concluding that the government did not breach the plea agreement by presenting evidence of cocaine distribution. He claims that the government stipulated in the plea agreement that the conspiracy involved only heroin and marijuana. We review *de novo* issues concerning the interpretation and enforcement of a plea agreement. United States v. DeWitt, 366 F.3d 667, 669 (8th Cir. 2004). "Plea agreements are contractual in nature, and should be interpreted according to general contract principles." Id.

Although the plea agreement specified heroin and marijuana as types of drugs that would be used to calculate Overton's Guidelines sentencing range, it did not exclude other types of drugs from that calculation. Overton admitted that the object of the conspiracy was to "manufacture, distribute, and possess with intent to distribute controlled substances including marijuana and heroin." The plea agreement stated that the advisory Guidelines sentencing range would be "based upon factors determined to be present in the case, which include, but are not limited to . . . [t]he type and quantity of drugs involved in the offense." The parties did not stipulate to Overton's base offense level, but instead agreed "that the conspiracy involved more than 100 grams of heroin and more than 100 kilograms of marijuana the exact amount of drugs to be attributed to the defendant (above the amount admitted here) will be determined by the court at the time of sentencing based upon U.S.S.G. § 1B1.3."

Moreover, the plea agreement reserved to both parties the right to "make whatever comment and evidentiary offer they deem appropriate at the time of sentencing . . . , provided that such offer or comment does not violate any other provision of this Plea Agreement." We conclude that the government did not violate any provision of the plea agreement when it presented evidence that Overton distributed cocaine. See United States v. Leach, 491 F.3d 858, 864 (8th Cir. 2007) (holding that the government did not breach the plea agreement because it "did not advocate for anything inconsistent with the stipulations of the plea agreement; it advocated for something that was not resolved by the plea agreement").

We disagree with Overton's contention that our decisions in United States v. Lara, 690 F.3d 1079 (8th Cir. 2012), and United States v. DeWitt, 366 F.3d 667 (8th Cir. 2004), control here. In those cases, "we held that the Government breached a plea agreement when it stipulated to a drug quantity and corresponding base offense level and then initiated an effort at the sentencing hearing to obtain a higher drug quantity and base offense level." See United States v. Noriega, 760 F.3d 908, 911 (8th Cir. 2014). In this case, the government did not stipulate to a drug type or quantity or to a base offense level. The parties merely agreed that the conspiracy involved at least 100 grams of heroin and 100 kilograms of marijuana—the drug types and quantities charged in the indictment—and allowed the district court to determine the drugs and drug quantities to be attributed to Overton at sentencing. See United States v. Guardado, 863 F.3d 991, 993 (8th Cir. 2017) (holding that the government did not breach the plea agreement when it urged the district court to sentence the defendant based on a quantity of drugs greater than the amount to which the defendant stipulated in the factual basis statement of the plea agreement, because the plea agreement did not specify the amount of drugs that would be used to calculate the defendant's sentencing range and it allowed both parties "to present at sentencing any evidence and argument on issues not explicitly agreed to or decided in the document").

Overton next argues that the district court erred in determining his base offense level. He contends that the district court should not have included cocaine in its drug quantity calculation because any cocaine distribution did not constitute relevant conduct. According to Overton, the alleged cocaine distribution occurred well before he entered into the conspiracy to distribute heroin and marijuana. Overton also challenges the credibility of the confidential informants who told law enforcement that Overton distributed cocaine after 2011. He notes that law enforcement found no cocaine or cocaine residue in any of its searches.

The base offense level for Overton's conspiracy conviction is based upon drug quantity. See U.S.S.G. § 2D1.1(c). "[I]n 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"—that is, if they were part of the defendant's relevant conduct. U.S.S.G. § 1B1.3 cmt. background. Factors to be considered in determining whether uncharged conduct is part of a common scheme or plan include the similarity, regularity, and temporal proximity of the charged and uncharged conduct. U.S.S.G. § 1B1.3 cmt. n.5(B)(ii). We review the district court's relevant conduct findings for clear error. United States v. Ault, 446 F.3d 821, 823 (8th Cir. 2006).

The district court did not clearly err in finding that Overton's cocaine distribution was relevant conduct. Overton admitted in his plea agreement that the conspiracy to distribute marijuana and heroin began "[s]ometime prior to October of 2013." Law enforcement officers testified at sentencing that confidential informants, whom the officers found to be reliable, had purchased cocaine from Overton from 2011 to 2012 and from 2013 to early 2014. A witness testified that Overton had supplied him with cocaine for distribution from 2011 until the witness was arrested in 2013. The witness further testified that the conspiracy changed while he was in prison. Upon his release in 2016, "[i]t was no longer crack cocaine and cocaine, it was strictly marijuana." Another witness testified that Overton had taught him how

to cook cocaine into crack cocaine and that he had purchased cocaine from Overton from 2009 until the witness's arrest in 2011. The government's evidence thus showed that Overton's conduct with respect to cocaine distribution and the charged conspiracy involved some of the same participants and partly overlapped in time. The record supports the court's credibility findings, as well as its finding that Overton was involved in an "ongoing criminal conspiracy to distribute narcotics," in which the drugs distributed "change[d] over time, but the players stayed the same."

III. Angelo Johnson

Johnson pleaded guilty to conspiracy to manufacture, distribute, and possess with intent to distribute at least 100 grams of a mixture and substance containing heroin and less than 50 kilograms of a mixture and substance containing marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 841(b)(1)(D), and 846. Johnson was sentenced to 200 months' imprisonment. In determining Johnson's Guidelines sentencing range, the district court found that he was responsible for distributing more than 1 kilogram of heroin; applied a two-level increase for possession of a firearm, see U.S.S.G. § 2D1.1(b)(1); applied a three-level increase for his role in the offense as a manager or supervisor, see U.S.S.G. § 3B1.1(b); and denied a three-level reduction for acceptance of responsibility, see U.S.S.G. § 3E1.1. Johnson's total offense level was 35, his criminal history category was IV, and his Guidelines sentencing range was 235 to 293 months' imprisonment. The district court varied downward and imposed a 200-month sentence. Johnson challenges the district court's drug calculation, the application of the two enhancements, and the denial of the reduction for acceptance of responsibility.

Johnson argues that the district court clearly erred in finding that he had distributed more than one kilogram of heroin. See United States v. Harris, 908 F.3d 1151, 1153 (8th Cir. 2018) (standard of review). We disagree. One witness testified that she purchased between one-half to one gram of heroin from Johnson every day for two years. A second witness testified that he purchased one to two grams of

heroin every day for two years. Using the conservative numbers, the court found that the first witness had purchased 365 grams from Johnson and that the second had purchased 730 grams. The government also presented evidence that Johnson distributed other quantities of heroin. We thus conclude that the district court did not clearly err in finding that Johnson distributed more than one kilogram of heroin. See U.S.S.G. § 2D1.1 cmt. n.5 ("Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.").

Johnson next argues that the district court clearly erred in finding that he possessed a firearm. See United States v. Anderson, 618 F.3d 873, 879 (8th Cir. 2010) (standard of review). Guidelines § 2D1.1(b)(1) instructs the district court to apply a two-level increase "[i]f a dangerous weapon (including a firearm) was possessed." This enhancement "reflects the increased danger of violence when drug traffickers possess weapons," and it "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 cmt. n.11(A). At sentencing, a police sergeant testified regarding Johnson's arrest and the search of his residence.[3] An informant reported that Johnson had been holding a gun before his arrest. A pill bottle containing heroin, crack cocaine, and alprazolam was found in the stairwell leading to the basement. A Glock nine-millimeter pistol with an extended magazine and two additional magazines were recovered from the basement of Johnson's residence. The pistol had been buried in

[3]The presentence report identified Johnson's residence as being located in the 400 block of Ninth Street in Davenport, Iowa, where the firearm was found. In his appellate reply brief, Johnson argues that the government did not prove that Johnson lived at the Ninth Street address. The government was not required to offer evidence that Johnson lived there, however, because Johnson did not object to the paragraph in the presentence report identifying the Ninth Street address as his residence. See United States v. Razo-Guerra, 534 F.3d 970, 975 (8th Cir. 2008) (explaining that in determining whether the government has proven the facts necessary to establish a sentencing enhancement, the district court "may accept any undisputed portion of the [presentence report] as a finding of fact" (quoting Fed. R. Crim. P. 32(i)(3)(A))).

loose dirt, and officers noticed dirt on Johnson's pants and cobwebs in his hair when they arrested him. Two witnesses also testified that Johnson possessed firearms during drug deals. The evidence thus supported the findings that Johnson possessed a firearm and that it was not "clearly improbable" that the firearm was connected with the offense.

Johnson contends that the district court clearly erred in finding that he managed or supervised another participant in the drug conspiracy. Although he does not dispute the evidence that his sister and an individual identified as "MellyMel" sometimes delivered heroin after buyers placed orders with him, Johnson argues that the government did not produce any evidence of supervision, management, or control. A fair inference from the evidence presented is that Johnson instructed his sister and MellyMel where to meet his customers and how much to collect from them, and we thus conclude that the evidence is sufficient to support the district court's finding that Johnson acted as a manager or supervisor. See Alcalde, 818 F.3d at 794 (holding that the district court did not err in applying a role enhancement based on evidence that the defendant "directed the actions of two coconspirators by instructing them to deposit drug proceeds and by instructing one of them to send photos of drug packages").

Finally, Johnson argues that the district court clearly erred in denying him a three-level decrease for accepting responsibility under Guidelines § 3E1.1. United States v. Fischer, 551 F.3d 751, 754 (8th Cir. 2008) (standard of review). The district court denied the decrease because Johnson challenged the amount of drugs involved, the manner in which they were distributed, and whether he possessed a firearm. The evidence set forth above wholly discredited Johnson's claim that he did not possess the Glock nine-millimeter firearm. As the district court explained, firearms "are not peripheral to drug conspiracies and it isn't peripheral here." Because Johnson falsely denied or frivolously contested relevant conduct the court determined to be true—particularly his possession of a firearm— the district court did not err in concluding that he acted in a manner inconsistent with acceptance of responsibility.

See U.S.S.G. § 3E1.1 cmt. n.1(A) ("A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous . . . .").

The judgments are affirmed.

(ORDER LIST: 589 U.S.)

THURSDAY, MARCH 19, 2020

ORDER

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.