DOCKET NUMBER_____

IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA

Plaintiff/Respondent

vs.

DUSTIN JOHNSON

Defendant/Petitioner

On Petition For Writ of Certiorari to the
United States Court of Appeals
For The Sixth Circuit
Docket No. 19-5534 *Below*

PETITION FOR WRIT OF CERTIORARI

CHRISTIAN LANIER
Attorney for Defendant/Petitioner
Dustin Johnson
2158 Northgate Park Lane, Suite 412
Chattanooga, Tennessee 37415
Telephone (423) 756-1015
Facsimile (423) 756-1208
Lanierlaw@comcast.net
BPR # 4670

QUESTIONS PRESENTED FOR REVIEW

Issue I

Whether the District Court erred in sentencing the Defendant based on ice ("actual" methamphetamine) rather than a mixture and substance containing a detectable quantity of methamphetamine, to which the Defendant had plead guilty?

Issue II

Whether sentencing the Appellant on the "ice" or "methamphetamine actual" guidelines violates the Due Process clause of the 5th Amendment and the Equal Protection Clause of the 14th Amendment of the U.S. Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Dustin Johnson, Petitioner

United States of America, Respondent

TABLE OF CONTENTS

INDEX TO APPENDICES

Table of Authorities

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

FEDERAL SENTENCING GUIDELINES

PUBLICATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's appeal.

OPINION BELOW

An Opinion denying the Petitioner's appeal as was entered by the United States Court of Appeals for the Sixth Circuit was on May 7, 2020, and appears at **Appendix A** to the Petition. A Mandate was issued on May 29, 2020. The Judgment of the United States District Court for the Eastern District of Tennessee appears at **Appendix B** to the Petition.

JURISDICTION

The Decision of the United States Court of Appeals for the Sixth Circuit was filed on May 7, 2020. No petition for rehearing was filed in this case. Jurisdiction of this Court is invoked pursuant to **28 U.S.C. § 1254(1)**.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINE PROVISIONS INVOLVED

Amendment 5 —U.S. Constitution

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

Amendment 14 —U.S. Constitution

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 U.S.C. Section 841

21 USCS § 841. Prohibited Acts A

(a) Unlawful acts. Except as authorized by this title, 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 409, 418, 419, or 420 [21

USCS § 849, 859, 860, or 861], 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—

* * *

(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, United States Code, 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, United States Code, 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 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] 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—

* * *

> (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, United States Code, 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, United States Code, 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 under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.
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, United States Code, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 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 6 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 the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

28 U.S.C. § 1254(1)

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

18 U.S.C.A. § 3553

(a) Factors to be considered in imposing a sentence.--The court shall impose a

sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) Sentencing.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;
(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;
(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and
(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.
In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence

imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, [3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the

appropriateness of the imposition of such an order; and
(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.
Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--
(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
(3) the offense did not result in death or serious bodily injury to any person;
(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
(5) not later than the time of the sentencing hearing, the defendant has

truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

USSG §2D1.1

§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):

* * *

(5)

* * *

• 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";

Level 30

* * *

(8)

* * *

• 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";

Level 24

STATEMENT OF THE CASE

PROCEDURAL HISTORY OF CASE

The Defendant-Appellant, Dustin Johnson, was indicted in Counts 1 and 13 of the Superseding Indictment of Docket Number 1:17-CR-140. He was charged with participating in a conspiracy to distribute or possess to distribute 50 grams or more of actual methamphetamine and 500 grams or more of a mixture and substance containing a detectable quantity of methamphetamine (Count 1) and possession with intent to distribute 50 grams or more of a mixture and substance containing methamphetamine on December 7, 2017 (Count 13). (R. 77, Superseding Indictment, ID Pages ## 193-200). His girlfriend, Amanda Hampton, was also indicted in the conspiracy and on Court 13. They both ultimately plead guilty to Count 13. (R. 142, Plea Agreement of Amanda Hampton, Page ID ## 322-330; R. 158, Plea Agreement of Dustin Johnson, Page ID ## 600-609; R. 191, Revised Plea Agreement of Dustin Johnson, Page ID ## 831-838).

The Appellant was arraigned and ordered to be detained on April 18, 2018. (R. 87, Memorandum and Order, Page ID ## 219; R. 88, Order of Detention, Page ID ## 220; R. 89, Minute Entry, Page ID ## 221). The Appellant's Plea Agreement was filed in error as to all defendants in the case on August 28, 2018. (R. 158, Plea Agreement, Page ID ## 600-609). A Revised Plea Agreement was filed on October

12, 2018. (R. 191, Plea Agreement Revised, Page ID ## 831-838).

The Appellant entered a plea of "guilty" per the Revised Plea Agreement on November 7, 2018. (R. 215, Minute Entry, Page ID ## 1150; R. 376, Transcript for Hearing of November 7, 2018, Page ID ## 3810-3830; R. 374, Transcript, Re-Arraignment Hearing, Page ID. ## 3799-3808).

The Appellant's Sentencing Hearing was set for March 27, 2019. (R. 248, Notice of Hearing, Page ID ## 2068).

The Pre-Sentence Report was filed February 20, 2019. (R. 267, Pre-Sentence Report, Page ID ## 2069-2087). The Government filed a Notice of No Objections on March 5, 2019. (R. 279, Notice of No Objections, Page ID ## 2298-2299). The Appellant filed a Notice of Objections to the Pre-Sentence Report on March 5, 2019. (R. 280, Notice of Objections, Page ID ## 2300-2305).

The Appellant filed a Motion To Continue Sentencing Hearing on March 19, 2019. (R. 290, Motion To Continue Sentencing Hearing, Page ID ## 2329-2330). The Appellant also filed a Notice of Filing of Letters of Support on March 19, 2019. (R. 291, Notice of Filing of Letters of Support, Page ID ## 2331-2336).

An Addendum to the PSR was filed on March 20, 2019. (R. 293, Addendum to PSR, Page ID ## 2340-2347). Additionally a Revised Pre-Sentence Report was filed on March 20, 2019. (R. 294, Revised Pre-Sentence Report, Page ID ## 2348-

2366).

On March 20, 2019, the Court granted the Appellant's Motion To Continue. (R. 295, Order, Page ID ## 2367). On March 25, 2019, the Appellant filed a Motion For Downward Departure And/Or To Grant Credit Toward Sentence. (R. 298, Motion For Downward Departure And/Or To Grant Credit Toward Sentence, Page ID ## 2387-2414). A Second Addendum to the PSR and Second Revised Pre-Sentence Report were filed on May 1, 2019. (R. 331, Second Addendum, Page ID ## 2795 ; R. 332, Second Revised Pre-Sentence Report, Page ID ## 2796-2814). The Appellant filed a Submission of Courses Attended at Silverdale Workhouse on May 6, 2019. (R. 339, Supplement Submission of Courses Attended At Silverdale Workhouse, Page ID ## 274-2876).

The Government filed a Response to the Motion For Downward Departure filed by the Appellant on March 25, 2019, (R. 344, Response To Motion, Page ID ## 2886-2887). Additional documents were submitted on behalf of the Appellant on May 6, 2019. (R. 346, Supplement Submission of Additional Documents, Page ID ## 2893-2899). On May 7, 2019, the Appellant filed a Motion For Variance of Sentence, a Notice of Objections To Pre-Sentence Report, and Sentencing Memorandum. (R. 347, Motion For Variance of Sentence, Page ID ## 2900-2902; R. 348, Notice of Objections To Pre-Sentence Report, Page ID ## 2903-2906; R.

349, Sentencing Memorandum, Page ID ## 2907-3133).

On May 8, 2019, the Court sentenced the Appellant to 108 months. (R. 351, Minutes, Page ID ## 3135; R. 377, Transcript, Sentencing Hearing, Page ID ## 3831-3892). The Judgment was entered on May 14, 2019. (R. 359, Judgment, Page ID ## 3161-3167). A Notice of Appeal was filed by the Appellant on May 17, 2019. (R. 364, Notice of Appeal, Page ID ## 3184-3185).

The Sixth Circuit Court of Appeals issued its Decision denying the Appeallant's requested relief on May 7, 2020. Its Mandate was issued on May 29, 2020.

STATEMENT OF FACTS

The Defendant-Appellant, Dustin Johnson, was indicted in Counts 1 and 13 of the Superseding Indictment of Docket Number 1:17-CR-140. He was charged with participating in a conspiracy to distribute or possess to distribute 50 grams or more of actual methamphetamine and 500 grams or more of a mixture and substance containing a detectable quantity of methamphetamine (Count 1) and possession with intent to distribute 50 grams or more of a mixture and substance containing methamphetamine on December 7, 2017 (Count 13). (R. 77, Superseding Indictment, ID Pages ## 193-200).

The Appellant entered a plea of "guilty" per the Revised Plea Agreement on

November 7, 2018. (R. 215, Minute Entry, Page ID ## 1150; R. 376, Transcript for Hearing of November 7, 2018, Page ID ## 3810-3830).

The Appellant's Sentencing Hearing was set for March 27, 2019. (R. 248, Notice of Hearing, Page ID ## 1951).

The Pre-Sentence Report was filed February 20, 2019. (R. 267, Pre-Sentence Report, Page ID ## 2069-2087). The PSR issued on February 20, 2019, calculated the Offense Level as follows:

> 22. **Base Offense Level:** The guideline for a violation of 21 U.S.C. § 841(a)(1) is USSG §2D1.1. The base offense level is 30 for at least 500 grams but less than 1.5 kilograms of methamphetamine. USSG §2D1.1(a)(5). 30
> 23. **Specific Offense Characteristics:** Pursuant to USSG §2D1.1(b), if a weapon is possessed, increase by two-levels. In this case, weapons were possessed in the motel room where the drugs were located. **+2**
> 24. **Victim Related Adjustment:** None. **0**
> 25. **Adjustment for Role in the Offense:** None. **0**
> 26. **Adjustment for Obstruction of Justice:** None. **0**
> 27. **Adjusted Offense Level (Subtotal): 32**
> 28. **Chapter Four Enhancement:** None. **0**
> 29. **Acceptance of Responsibility:** The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two
> levels. USSG §3E1.1(a). **-2**
> 30. **Acceptance of Responsibility:** The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. USSG §3E1.1(b). **-1**
> 31. **Total Offense Level: 29**
> (R. 267, Pre-Sentence Report, Page ID ## 2073-2074).

With a Criminal History Category of III, the resulting Guideline Range of 108 to 135 months. (R. 267, Pre-Sentence Report, Page ID # 2081).

The Government filed a **Notice of No Objections** on March 5, 2019. (R. 279, Notice of No Objections, Page ID ## 2298-2299).

The Appellant filed a **Notice of Objections to the Pre-Sentence Report** on March 5, 2019. (R. 280, Notice of Objections, Page ID ## 2300-2305). In particular he cited

> "1. **Objection To Conversion of Money.**
>
> The Defendant objects to Paragraph 17 in which there is a conversion of the $43,687.00 ($3,247.00 found in Defendant's wallet and the remaining $40,440.00 found in a yellow bag in the motel room occupied by the Defendant and Amanda Hampton) to 436.87 grams of methamphetamine. As a preliminary matter, methamphetamine was not the only drug found in the room. Marijuana and an assortment of pills were found. (PSR Paragraphs 14 and 15). If there were to be a conversion at all, it should be to marijuana, if not the pills. The clear amount of methamphetamine attributable to both Mr. Johnson and his co-defendant, Amanda Hampton, is the 85 grams found in their joint motel room.
>
> In Paragraph 4 of his Revised Plea Agreement it states, "The co-defendant [Ms. Hampton] provided consent to search the room and approximately 80 grams of a mixture and substance containing a detectable quantity of methamphetamine was located. ****Inside the bathroom, in addition to the methamphetamine, agents found ...more than $40,000 in cash."
>
> There being no admission, confession or other evidence to support the allegation that the money was the proceeds of methamphetamine sales, the money should not be converted to drugs. Thus, 85 grams of Methamphetamine would be Base Offense Level 24.

Adding 2 Levels for the firearms raises the Offense Level to 26. With 3 Levels off for Acceptance of Responsibility, that results in Level 23.

Should the Court find that the money should be converted to drugs, there having been marijuana in Defendant's possession, all the money and drugs should be converted to marijuana, in which case he would start at Offense Level 24. Adding 2 Levels for the firearms raises the Offense Level to 26. With 3 Levels off for Acceptance of Responsibility, that results in the very same Level 23.

The marijuana calculations would be as follows:

	Amount of Money	**Amount of Marijuana at $500.00/ LB**	**Amount of Marijuana at $700.00/lb**
Money	$43,670.00	28.37 KG	39.71 KG
85 Grams of Meth		170.00 KG	170.00 KG
TOTALS		198.37 KG	209.71 KG
Offense Level		**Level 24**	**Level 24**

2. **Objection To Criminal History Calculation.**

The Defendant objects to the determination to add two Criminal History Points on the grounds the Defendant "committed the instant offense while under a criminal justice sentence for the sentence imposed on December 9, 2016."

The date of the instant offense was December 8, 2017. (PSR Paragraph 10). The cases in which a sentence was imposed on December 9, 2016 (PSR Paragraph 36) notes that the Defendant plead to sentences of 11 months, 29 days with slight other variations of how long he was to be actually incarcerated. With respect to the 3rd charge, Aggravated Criminal Trespassing, a Probation Violation warrant was executed on 10/27/2017. A hearing was scheduled on 6/13/2018 with no further disposition being noted. Technically speaking although he was served with a warrant for an alleged violation on 10/27/2017, there

was no hearing prior to the expiration of the 11 months 29 days term of the sentence such that probation expired at the end of the 11 months, 29 days. Moreover, despite a hearing being scheduled on 6/13/2018, nothing ever came of it which implies no Judgment extending the original 11 months, 29 days was ever entered. In either instance, ***11 months, 29 days would be 2 days short of a year such that the Defendant's sentences and probation expired on December 7, 2017, one day before the instant offense.***

Therefore, the two additional Criminal History Points under **USSG Section 4A1.1(d)** should not be added. The Defendant would thus have Four (4) Criminal History Points and be in Criminal History Category II.

3. **Guideline Range Calculations.**

The Defendant respectfully submits that the Guideline Range should be calculated as follows:

PSR Paragraph Number	Description	Levels	Levels
22	**Base Offense Level**	23	24
23	**Specific Offense Characteristics (Guns Present)**	2	2
30	**Acceptance of Responsibility**	-3	-3
31	**Total Offense Level**	22	23
38	**Criminal History Points**	4	4
	Criminal History Range	II	II
65	**Guideline Range**	46-57 Months	51-63 Months
64	**Effective Range**	60 Months	60-63 Months

Insofar as the minimum mandatory for an offense under 21 **U.S.C. Section 841(b)(1)(B)** is 5 years, the Defendant's Effective Range is either 60 Months or 60 to 63 Months."

In light of these objections, a **Revised Pre-Sentence Report** was issued on March 20, 2019, which calculated the Offense Level as follows:

22. Base Offense Level: The guideline for a violation of 21 U.S.C. 841 is USSG §2D1.1. The base offense level is 24 for at least 50 grams but less than 200 grams of methamphetamine. USSG §2D1.1(a)(5) and (c)(8). 24

23. Specific Offense Characteristics: Pursuant to USSG §2D1. I (b)(l), if a weapon is possessed, increase by two-levels. In this case, weapons were possessed in the motel room where the drugs were located. +2

24. Victim Related Adjustment: None.

25. Adjustment for Role in the Offense: None.

26. Adjustment for Obstruction of Justice: None.

27. Adjusted Offense Level (Subtotal): 26

28. Chapter Four Enhancement: None. 0

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

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

31. Total Offense Level: 23

As shown in Paragraph 65, an Offense Level of 23 and Criminal History Category III results in a Guideline Range of 57 to 71 months. Because of a statutory minimum mandatory of 5 years, the effective range was 60 to 71 months. (R. 293, Addendum to PSR, Page ID ## 2340-2341; R. 294, First Revised Pre-Sentence Report, Page ID ## 2352-2353, 2360).

The Appellant filed a Motion To Continue Sentencing Hearing on March 19, 2019. (R. 290, Motion To Continue Sentencing Hearing, Page ID ## 2329-2330). The Appellant also filed a Notice of Filing of Letters of Support on March 19, 2019. (R. 291, Notice of Filing of Letters of Support, Page ID ## 2331-2336).

On March 20, 2019, the Court granted the Appellant's Motion To Continue. (R. 295, Order, Page ID ## 2367-2367). On March 25, 2019, the Appellant filed a Motion For Downward Departure And/Or To Grant Credit Toward Sentence. (R. 298, Motion For Downward Departure And/Or To Grant Credit Toward Sentence, Page ID ## 2387-2394).

The Appellant filed a Submission of Courses Attended at Silverdale Workhouse on May 6, 2019. (R. 339, Supplement Submission of Courses Attended At Silverdale Workhouse, Page ID ## 2874-2876).

The Government filed a Response to the Motion For Downward Departure filed by the Appellant on March 25, 2019, (R. 344, Response To Motion, Page ID ## 2886-2887). Additional documents were submitted on behalf of the Appellant on May 6, 2019. (R. 346, Supplement Submission of Additional Documents, Page ID ## 2893-2899).

A Lab report came in and was provided to the Defense on April 17, 2019. It calculated the drug quantity as "67.71 grams of methamphetamine (actual)" (Paragraph 17, Second Revised PSR) in contrast to "85 grams of a mixture and substance conntaining methamphetamine" (Paragraph 17, First Revised PSR). (R. 332 Second Revised Pre-Sentence Report, Page ID ## 2800; R. 294, First Revised Pre-Sentence Report, Page ID ## 2352). The Second Addendum to the PSR and Second Revised Pre-Sentence Report were filed on May 1, 2019. (R. 331, Second Addendum, Page ID ## 2795); R. 332, Second Revised Pre-Sentence Report, Page ID ## 2796-2814).

The Second Revised Pre-Sentence Report calculated the Offense Level as follows:

> 22. **Base Offense Level:** The guideline for a violation of 21 U.S.C. § 841(a)(1) is USSG §2D1.1. The base offense level is 30 for at least 50 grams but less than 150 grams of methamphetamine (actual). USSG §2D1.1(a)(5) and (c)(5). **30**
> 23. **Specific Offense Characteristics:** Pursuant to USSG §2D1.1(b)(1), if a weapon is possessed, increase by two-levels. In this case, weapons were possessed in themotel room where the drugs were located. **+2**

24. **Victim Related Adjustment:** None. **0**
25. **Adjustment for Role in the Offense:** None. **0**
26. **Adjustment for Obstruction of Justice:** None. **0**
27. **Adjusted Offense Level (Subtotal): 32**
28. **Chapter Four Enhancement:** None. **0**
29. **Acceptance of Responsibility:** The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. USSG §3E1.1(a). **-2**
30. **Acceptance of Responsibility:** The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. USSG §3E1.1(b). **-1**
31. **Total Offense Level: 29**
(R. 332, Second Revised Pre-Sentence Report, Page ID ## 2800-2801). This recalculated the Appellant's Guideline Range to 108 to 135 months. (R. 332, Second Revised Pre-Sentence Report, Page ID ## 2808).

On May 7, 2019, the Appellant filed a Motion For Variance of Sentence, a Notice of Objections To (Second Revised) Pre-Sentence Report, and Sentencing Memorandum. (R. 347, Motion For Variance of Sentence, Page ID ##2900-2902; R. 348, Notice of Objections To Pre-Sentence Report, Page ID ## 2903-2906; R. 349, Sentencing Memorandum, Page ID ## 2907-3133). The Appellant made the following objections to the Second Revised Pre-Sentence Report:

"1. **Paragraph 17:** The Defendant objects to calculating his Guideline Range on "ice" rather than "a mixture and substance containing a detectable quantity of methamphetamine" and to the documents being offered as DEA Lab Reports which claim the methamphetamine as "ice" rather than "a mixture and substance containing a detectable quantity of methamphetamine", to their use

or inclusion for sentencing calculation purposes and to any increase in the calculated Guideline Range due to such Reports.

The Defendant's Plea Agreement (ECF 158 and 191) was specifically revised to state that he was pleading to "a mixture and substance containing methamphetamine". This has been in all prior Pre-Sentence Reports pertaining to this Defendant and that of his girlfriend, Amanda Hampton (PSR ¶ 10-13), who was sentenced to 60 months based upon the very same "mixture and substance". It would not be just, fair, or in accordance with Equal Protection and Due Process under the 5th Amendment to sentence one of them on "mixture and substance" and the other for "ice" based on the very same drugs found in the same room at the same time.

Thus, the Defendant should be sentenced based on 85 grams of a mixture and substance containing a detectable quantity of Methamphetamine.

2. **Paragraphs 22, 27 and 31.** The Base Offense Level would be Base Offense Level 24 in Paragraph 22. Adding 2 Levels for the firearms (Paragraph 23) raises the Offense Level to 26 in Paragraph 27. With 3 Levels off for Acceptance of Responsibility, that results in Level 23 in Paragraph 31.

Wherefore, the Revised Pre-Sentence Report (ECF 294) should be adopted and his Guideline Range be determined to be 60 to 71 months. The Defendant should receive the Jail Credit sought in Defendant's Motion For Downward Departure (ECF 298)."

At the Sentencing Hearing on May 8, 2019, the Court denied the Appellant's Objections and based the sentence on "ice" rather than "mixture and substance" and sentenced the Appellant to 108 months. (R. 351, Minutes, Page ID ## 3135; R.377, Transcript, Sentencing Hearing, Page ID ## 3831-3892). The Judgment was entered on May 14, 2019. (R. 359, Judgment, Page ID ## 3161-3167). A Notice of Appeal

was filed by the Appellant on May 17, 2019. (R. 364, Notice of Appeal, Page ID ## 3184-3185).

REASONS FOR GRANTING THE WRIT

Summary of Reasons for Granting The Writ:

The Appellant plead guilty to Count Thirteen, aiding and abetting each other in the ***possession with intent to distribute fifty grams or more of a mixture and substance containing methamphetamine***, in violation of **21 U.S.C. §§ 841(a)(l)** and **841(b)(l)(B)**. (R. 191, Revised Plea Agreement, Page ID # 831; R. 376, Transcript, Re-Arraignment Hearing, Page ID ## 3820-3822).

The Appellant, having plead to possession with intent to distribute fifty grams or more of ***a mixture and substance containing methamphetamine***, should have been sentenced according to the First Revised Pre-Sentence Report which calculated the drug quantity as 85 grams of ***a mixture and substance containing methamphetamine***. (R. 294, First Revised Pre-Sentence Report, Paragraph 17, Page ID # 2352). This would have been within a Guideline Range of 60 to 71 months. (R. 294, First Revised Pre-Sentence Report, Paragraph 17, Page ID # 2360).

The District Court erred in using the Second Revised Pre-Sentence Report's 67.71 grams of ***actual (ice) methmaphetamine*** to calculate his Offense Level. (R. 332, Second Revised Pre-Sentence Report, Page ID ## 2796-2814). The Court should have

used the First Revised Pre-Sentence Report's 85 grams of ***a mixture and substance containing a detectable quantity of methamphetamine*** to determine the applicable Guideline Range. (R. 294, First Revised Pre-Sentence Report, Page ID ## 2348-2366).

There was a denial of Due Process (in violation of the 5th Amendment to the United States Constitution) in that the Appellant's Plea Agreement was for possession of fifty grams or more of ***a mixture and substance containing methamphetamine***, not methamphetamine actual or "ice". He was denied Equal Protection under the 14th Amendment to the United States Constitution in that his girlfriend, Amanda Hampton, was sentenced to 60 months on fifty grams or more of ***a mixture and substance containing methamphetamine*** whereas he was sentenced to 108 months based on methamphetamine actual or "ice".

REASONS TO GRANT CERTIORARI

Issue I

Whether the District Court erred in sentencing the Defendant based on ice ("actual" methamphetamine) rather than a mixture and substance containing a detectable quantity of methamphetamine, to which the Defendant had plead guilty?

In the instant matter the Defendant plead guilty to possession with intent to distribute ***"a mixture and substance containing methamphetamine"*** and he should

have been sentenced on that basis rather than for possession with intent to distribute methamphetamine (actual) otherwise known as "ice".

The Defendant objected to calculating his Guideline Range based on "ice" rather than "mixture and substance containing methamphetamine". (R. 337, Transcript, Sentencing Hearing, Page ID ## 3838;

Historically the Eighth Circuit looked at the question of whether it was proper for a Court to sentence on the basis of "ice" rather than a "mixture" in the following way:

> "HN12 The Guidelines do not require the government to establish the identity, quantity, or purity of methamphetamine by laboratory analysis. See ***United States v. Koonce***, 884 F.2d 349, 352-53 (8th Cir. 1989); ***United States v. Garcia-Panama***, 432 F. App'x 641, 642-43 (8th Cir. 2011) [**16] (unpublished per curiam) (explaining the government need not "conduct a purity calculation on all of the methamphetamine distributed during the course of the conspiracy" to establish drug identity or quantity under **§ 2D1.1**). Nor do the Guidelines "require absolute certainty about the amount of drugs or their purity when the drugs are not seized or the amount seized does not reflect the scale of the offense." ***United States v. Cockerill***, No. 99-4634, 2000 U.S. App. LEXIS 15203, 2000 WL 852608, at *2-3 (4th Cir. June 28, 2000) (unpublished per curiam) (determining the sentencing court did not clearly err in attributing pure methamphetamine to the defendant based upon the testimony of a coconspirator that the unseized methamphetamine "was of very good quality"), cited with approval in ***United States v. Houston***, 338 F.3d 876, 879 (8th Cir. 2003); accord ***United States v. Long***, 532 F.3d 791, 796 (8th Cir. 2008) (calculating the total quantity of actual (pure) methamphetamine attributable to the defendant by extrapolating the percentage of purity of a tested quantity to the unrecovered quantities).

"HN13 A sentencing court may "determine drug quantity using imprecise evidence, so long as the record reflects a basis for the court's [**17] decision." **Bradley**, 643 F.3d at 1126-27 (quoting ***United States v. Zierke***, 618 F.3d 755, 761 (8th Cir. 2010)) (internal quotation marks omitted). When no illegal drugs have been recovered, "the government may prove" the identity of such drugs or "the purity of quantities [of such drugs] attributed to the defendant," ***Houston***, 338 F.3d at 879, "by circumstantial [*424] evidence and opinion testimony," ***Covington***, 133 F.3d at 644 (quoting ***United States v. Williams***, 982 F.2d 1209, 1212 (8th Cir. 1992) (accepting the testimony of an experienced narcotics detective as to the identity of drugs as sufficient evidence to support the jury verdict)) (internal marks omitted). Such evidence may include "a conspirator's reliable testimony that purchased methamphetamine was 'undiluted, unadulterated . . . not cut . . . pure,' or an expert's testimony as to the normal purity of methamphetamine produced in a lab." ***Houston***, 338 F.3d at 879 (quoting ***Cockerill***, 2000 U.S. App. LEXIS 15203, 2000 WL 852608, at *1) (internal quotation marks and citations omitted).

"HN14 The specificity of the Guidelines definition of "ice"—requiring 80% purity—does not fundamentally change the means by which the government may meet its burden of proving drug quantity. [**18] See id. In evaluating whether methamphetamine is "ice" as defined in the Guidelines, the sentencing court may consider, among other things, the source of the controlled substance, see id., "the price generally obtained for the controlled substance," **U.S.S.G. § 2D1.1, cmt. n.12**, the substance's appearance and form, and reports of the identity and quality of the substance from its users and distributors, see ***United States v. Brown***, 156 F.3d 813, 816 (8th Cir. 1998). "The verdict of the marketplace is strong confirmation" of the identity and quality of an illegal drug because the users and distributors "who regularly smoke it or sell it" are "among the most knowledgeable experts on" such drugs. Id.; see also ***United States v. Hyatt***, 207 F.3d 1036, 1038 (8th Cir. 2000) (affirming a sentencing court's drug identity determination based in part on the "co-conspirators' belief that the drug they were distributing was methamphetamine").

"Applying this legal framework, we are not persuaded the district court clearly erred in determining Walker and Hyde distributed "ice" as

> defined in the Guidelines. Walker, Hyde, and their coconspirators consistently identified the methamphetamine from Arizona [**19] as "ice" or "crystal meth." Walker and Hyde's coconspirators distinguished the "ice" methamphetamine Hyde obtained from Arizona from the anhydrous methamphetamine manufactured in Iowa based on its appearance, form, price, and quality." ***United States v. Walker***, 688 F.3d 416, 423-24 (8th Cir. 2012).
> Most significant, as far as the instant matter is concerned, in ***Walker***,

Footnote 4 pointed out:

> "'We also agree with the Third Circuit's observation that "where a written plea agreement is entered[,] questions of notice and proof at sentencing could be greatly minimized by simply ***including language in the plea agreement by which a defendant acknowledges the identity of the drugs involved***." ***United States v. Roman***, 121 F.3d 136, 141 n.4 (3d Cir. 1997).'" ***United States v. Walker***, 688 F.3d 416, 425 n.4 (8th Cir. 2012). Emphasis added.

Here, the Revised Plea Agreement expressly stated the plea and factual basis was about "mixture" rather than "ice". (R. 191, Revised Plea Agreement, Page ID ## 831, 833). The originally filed Plea Agreement had the words "a mixture and substance containing" inserted hand written between the typed words "of" and "methamphetamine" in Paragraph 4 on Page 3 of the Plea Agreement (Page ID # 602). The difference in the Original Plea Agreement and the Revised Plea Agreement is that the Government took the Original Plea Agreement and typed the handwritten words into the Revised Plea Agreement. ***There can thus be no doubt about the intent of the parties that the Defendant was pleading to "a mixture" and not "ice".***

And to double down this point, the last sentence of Paragraph 4 of both the original and revised Plea Agreements says, "The Defendant admits that he possessed with intent to distribute fifty grams or more of a mixture or substance containing methamphetamine." (R.158, Original Plea Agreement, Paragraph 4, Page ID ## 602). ***The clear intent and agreement of the parties....actually expressly written, signed, and filed twice was that the plea was to 50 grams or more of a mixture or substance containing methamphetamine and clearly not ice.*** The Court accepted the parties' agreement. (R. 377, Transcript, Sentencing Hearing, Page ID # 3833). The Defendant having plead to a "***mixture or substance containing methamphetamine "*** and not "ice", and the Court having accepted the Revised Plea Agreement, sentencing should be based on a "***mixture or substance containing methamphetamine "*** and not ice.

The sentencing differences for methamphetamine were well explained in ***United States v. Bean***, 2019 DNH 027, 371 F. Supp. 3d 46 (USDC NH, 2019):

> "The guidelines at issue here are those determining a defendant's base offense level according to the quantity and purity of methamphetamine [**5] involved. See ***U.S.S.G. § 2D1.1(c)*** (drug quantity table). Base offense levels for federal drug crimes are calculated according to the Drug Quantity Table in the guidelines, which uses a graduated scale based on the type and quantity of drugs involved. See id.
> Methamphetamine is quantified based on purity. See id.
> The guidelines refer to three categories of methamphetamine according to relative purity: methamphetamine, methamphetamine (actual), and ice. See ***U.S.S.G. § 2D1.1(c)***, Notes to Drug Quantity Table (B)-(C).

"Methamphetamine" refers to the gross weight of a mixture containing a detectable amount of methamphetamine (hereinafter referred to as "methamphetamine mixture"). See id. at Notes to Drug Quantity Table (A). "Methamphetamine [*50] (actual)" denotes the weight of actual methamphetamine contained in the mixture (hereinafter referred to as "actual methamphetamine"). See id. at (B). "Ice" means the weight of a mixture of at least 80% purity. Id. at (C). The guidelines direct the court to determine a defendant's base offense level using either the total weight of methamphetamine mixture or the weight of the actual methamphetamine contained within the mixture, whichever results in the greater base offense level. See id. at [**6] (B). Actual methamphetamine and ice are treated identically under the guidelines, i.e., the same weights of ice and actual methamphetamine result in the same base offense levels. See, e.g., **U.S.S.G. § 2D1.1(c)(3)** (500 grams of actual methamphetamine and 500 grams of ice both qualify for base offense level of 34).

The guidelines establish a 10:1 ratio in their treatment of quantities of methamphetamine mixture and actual methamphetamine or ice. For example, 5 kilograms of methamphetamine mixture, 500 grams of actual methamphetamine, and 500 grams of ice are all treated the same way under the guidelines: all receive a base offense level of 34. See id. The government argues, and the court agrees, that the 10:1 ratio at issue here is not a ratio based on different forms of methamphetamine. Rather, the applicable statutes and guidelines distinguish between different concentrations of methamphetamine in a mixture. See ***United States v. Stoner***, 927 F.2d 45, 47 (1st Cir. 1991) (rejecting defendant's argument that statute distinguished between "pure" methamphetamine and methamphetamine mixture as different forms of the drug). In this way, the ratio imposed by the methamphetamine guidelines is different from the 100:1 crack-cocaine ratio at issue in ***Kimbrough***. While [**7] the guidelines distinguish between two forms of cocaine (cocaine and cocaine base/crack), they do not distinguish between different forms of methamphetamine. See **U.S.S.G. § 2D1.1(c)**. Despite the differences between the guidelines governing methamphetamine and cocaine, the government concedes that—as applied—there is a 10:1 ratio between quantities of actual methamphetamine and methamphetamine mixture that result in the same base offense level. That 10:1 ratio is the focus of Bean's motion.

Bean argues that this court should categorically reject, on policy grounds, the 10:1 ratio between quantities of actual methamphetamine and methamphetamine mixture in the guidelines. A growing number of district courts have declared a categorical policy disagreement with the purity-driven methamphetamine guidelines. See ***United States v. Hoover***, No. 4:17-CR-327-BLW, 2018 U.S. Dist. LEXIS 195196, 2018 WL 5924500, at *4 (D. Idaho Nov. 13, 2018) (Winmill, J); ***United States v. Ferguson***, No. CR 17-204 (JRT/BRT), 2018 U.S. Dist. LEXIS 129802, 2018 WL 3682509, at *3-4 (D. Minn. Aug. 2, 2018); ***United States v. Saldana***, No. 1:17-cr-271-1, 2018 U.S. Dist. LEXIS 110790, at *7-10 (W.D. Mich. July [*51] 3, 2018); ***United States v. Harry***, 313 F. Supp. 3d 969, 974 (N.D. Iowa 2018) (Strand, J.); ***United States v. Nawanna***, 321 F. Supp. 3d 943, 955 (N.D. Iowa 2018) (Bennett, J.); ***United States v. Ibarra-Sandoval***, 265 F. Supp. 3d 1249, 1256 (D.N.M. 2017). ***This court finds the collective reasoning employed in these decisions persuasive and joins them by declaring a categorical policy disagreement with the methamphetamine guidelines for the following reasons: (1) there appears [**8] to be no empirical basis for the Sentencing Commission's harsher treatment of offenses involving higher purity methamphetamine; (2) methamphetamine purity is no longer an accurate indicator of a defendant's role in a drug-trafficking conspiracy; and (3) the methamphetamine guidelines create unwarranted sentencing disparities between methamphetamine offenses and offenses involving other major drugs." United States v. Bean***, 2019 DNH 027, 371 F. Supp. 3d 46, 49-51. (Emphasis added).

The ***Bean*** Court further noted:
"Methamphetamine offenses receive more severe sentences than any other drug. See ***Nawanna***, 321 F. Supp. 3d at 953-54 (reviewing Sentencing Commission's 2017 statistics regarding methamphetamine sentences). The average length of imprisonment for methamphetamine offenders in 2017 was 91 months, higher than for any other drug including heroin. Id. at 953. This disparity in sentencing between methamphetamine and other drug offenses arises from the fact that the guidelines provide higher base offense levels for actual methamphetamine than for other comparable drugs. The guidelines' higher base offense levels for actual methamphetamine combined with

the ubiquity of high purity methamphetamine in the market result in more severe sentences for methamphetamine offenders.
By way of illustration, 500 grams of actual methamphetamine earns a base offense level of 34, while the same quantities of other drugs result in lower base offense levels: fentanyl (30), cocaine base (crack) (30), heroin (26), and cocaine (24). See **U.S.S.G § 2D1.1(c)**. By contrast, the base offense level for 500 grams of methamphetamine mixture is 30—a level more [*54] comparable to that advised for the same quantity of other major drugs. See id.

These disparities [**15] in base offense levels result in corresponding disparities in guidelines sentence ranges. As a hypothetical, consider a defendant convicted of distributing 500 grams of a controlled substance. Assuming only a three-level decrease for acceptance of responsibility and a criminal history category of V, the following guidelines sentence ranges would result:

DRUG (500 GRAMS)	**BASE OFFENSE LEVEL**	**GUIDELINES SENTENCE RANGE**
Actual Methamphetamine	34	168 to 210 months
Methamphetamine Mixture	30	120 to 150 months
Cocaine Base (Crack)	30	120 to 150 months
Fentanyl	30	120 to 150 months
Heroin	26	84 to 105 months
Cocaine (Powder)	24	70 to 87 months

Table 1 (Return to related document text)

The government agreed at the hearing that actual methamphetamine is penalized more severely by weight than any other major drug. At least one other court has noted that no empirical evidence supports this harsher treatment of actual methamphetamine as compared to other

drugs. See ***Harry***, 313 F. Supp. 3d at 973 [***United States v. Harry***, 313 F. Supp. 3d 969, 969 (N.D. Iowa 2018)].

The government provided no such evidence in this case. For all these reasons, this court finds that the guidelines' harsher treatment of actual methamphetamine as compared to other drugs is unsupported by empirical data and runs contrary to the "need to avoid unwarranted sentence disparities among defendants [**16] with similar records who have been found guilty of similar conduct." 18 U.S.C § 3553(a)(6)." ***United States v. Bean***, 2019 DNH 027, 371 F. Supp. 3d 46, 53-54.

In ***Bean***, the U.S. District Court for New Hamphsire declared a policy disagreement with the methamphetamine guidelines and found that in situations such as this, unwarranted disparities existed in sentencing Defendants in methamphetamine cases and that sentencing should be effected as follows:

"Accordingly, the court will use the following sentencing methodology in all actual methamphetamine and ice cases: (1) [*56] calculate the guidelines sentencing range using the purity-driven methamphetamine guidelines; (2) recalculate the guidelines using the base offense level for the same quantity of methamphetamine mixture; and (3) evaluate whether any upward or downward variances are appropriate based upon the individual characteristics of the defendant and the other § 3553(a) factors. The court will apply this approach in all actual methamphetamine and ice cases regardless of whether the defendant [**20] requests the court to do so." ***United States v. Bean***, 2019 DNH 027, 371 F. Supp. 3d 46, 55-56.

The ***Bean*** Court also pointed out that:
"Other district courts have adopted this same three-step approach. See ***Harry***, 313 F. Supp. 3d at 974 (rejecting court's own prior "ad hoc" approach to applying policy disagreement, and declaring that it would, in all actual methamphetamine and ice cases, engage in a separate analytical step to determine the guideline range based on methamphetamine mixture guidelines); ***Saldana***, 2018 U.S. Dist.

LEXIS 110790, at *11 ("This Court's methodology for sentencing in methamphetamine cases will be to treat all methamphetamine quantities as mixtures."); see also ***United States v. Gully***, 619 F. Supp. 2d 633, 644-45 (N.D. Iowa 2009) (adopting three-step sentencing analysis to implement policy disagreement with crack-powder cocaine guidelines); Michelman, **Doing Kimbrough Justice**, supra at 1105 n.99 (collecting cases that implemented policy disagreement with guidelines by adding intermediate analytical step between the two steps identified in ***Gall***)." ***United States v. Bean***, 2019 DNH 027, 371 F. Supp. 3d 46, 56.

For contrast there is ***Clark v. United States***, No. 1:07-CV-505, 2009 U.S. Dist. LEXIS 124708, at *10-11 (E.D. Tex. Dec. 23, 2009) the District Court for the Eastern District of Texas noted:

"On direct appeal, the Fifth Circuit concluded that the type of methamphetamine is not an element of the offense because it does not affect the statutory penalty. ***United States v. Clark***, 199 Fed.Appx. 392, 393 (5th Cir. 2006). Rejecting movant's claim that his guilty plea was unknowing or involuntary, the Fifth Circuit held that the district court was not required to ensure that movant understood or agreed that the offense involved ice. Id. The Fifth Circuit found that "the fact that [*11] Clark pleaded guilty to an offense involving 'methamphetamine' does not prohibit the district court from finding, or the Government from arguing, that he be sentenced based on 'ice.'" Id. at 394.
The factual basis and stipulation referred to "methamphetamine," rather than "ice." However, as previously discussed the type of methamphetamine is a sentencing issue, not an element of the offense. Movant pled guilty without a plea agreement, so there was no agreement that the government would not seek a finding that the methamphetamine was ice. Movant was obviously aware at the time he pled guilty that the government intended to prove the substance involved in the conspiracy was ice. Although most of the methamphetamine involved in the conspiracy was not recovered, four samples were seized and tested for purity. Three of the samples were 99 to 100 percent pure. The fourth sample was 77 percent pure." ***Clark v.***

United States, No. 1:07-CV-505, 2009 U.S. Dist. LEXIS 124708, at *11 (E.D. Tex. Dec. 23, 2009).

In the instant case, two versions of the Plea Agreement specifically stated that the Appellant was pleading to "a mixture and substance containing methamphetamine." (R. 158, Original Plea Agreement, Page ID #602; R. 191, Revised Plea Agreement, Page ID # 833). Moreover, the Appellant's girlfriend's Plea Agreement likewise stated she was pleading to "a mixture and substance containing methamphetamine" and by the time it came to Appellant's sentencing, Ms. Hampton had been sentenced to 60 months (within his Guideline Range under the Revised Pre-Sentence Report). (R. 142, Plea Agreement of Amanda Hampton, Page ID ## 322-330; R. 158, Plea Agreement of Dustin Johnson, Page ID ## 600-609; R. 191, Revised Plea Agreement of Dustin Johnson, Page ID ## 831-838; R. 219, Pre-Sentence Report of Amanda Hampton, Page ID##_____; R. 237, Revised Pre-Sentence Report of Amanda Hampton, Page ID ##_____; R. 240, Second Revised Pre-Sentence Report of Amanda Hampton, Page ID ##_____;R. 267, Pre-Sentence Report of Dustin Johnson, Page ID## 2069-2087; R. , Revised Pre-Sentence Report of Dustin Johnson, Page ID ## 2348-2366; R. 240, Second Revised Pre-Sentence Report of Dustin Johnson, Page ID ## 2796; R. 256, Judgment, Amanda Hampton, Page ID ## 1961-1967; R. 359, Judgment, Dustin Johnson, Page ID ## 3161-3167).

Another example of the emerging challenge to the "mixture vs. ice guidelines" is found in ***United States v. Moreno***, No. 5:19CR002, 2019 U.S. Dist. LEXIS 130450, at *6-9 (W.D. Va. Aug. 5, 2019):

> "Finally, courts have questioned the severity of the methamphetamine Guidelines in comparison to other dangerous drugs, including heroin. In ***Harry***, the court posed a hypothetical comparing the Guidelines range for a defendant facing a charge of conspiracy to distribute 500 grams of heroin versus 500 grams of 95% pure methamphetamine. All else being equal, the court calculated that the Guidelines range for methamphetamine offenses is "more than twice the range of the heroin conspirator. Why? Is ice methamphetamine more than twice as potent, dangerous, destructive or addictive than heroin? I am aware of no objective evidence — from the United States Sentencing Commission or otherwise — supporting such a proposition. ***Harry***, 313 F. Supp. 3d at 973." ***United States v. Moreno***, No. 5:19CR002, 2019 U.S. Dist. LEXIS 130450, at *6-9 (W.D. Va. Aug. 5, 2019).

The disagreement with the methamphetamine/ice guidelines additionally appears in ***United States v. Hayes***, 948 F. Supp. 2d 1009 (ND Iowa, 2013).

The Western District of Michigan has likewise arrived at a policy disagreement and solution for dealing with the mixture vs. ice sentencing disparity:

> "This Court's methodology for sentencing in methamphetamine cases will be to treat all methamphetamine quantities as mixtures. This Court had a policy disagreement with the Sentencing Commission on the cocaine sentencing guidelines, which this Court concluded supported sentencing on a 1:1 ratio, crack to powder cocaine, in all cases. This Court likewise concludes that its policy disagreement with the Sentencing Commission on the methamphetamine sentencing guidelines supports sentencing all cases by considering all methamphetamine quantities to be methamphetamine mixtures. The Court notes that even this modest change yields guideline ranges that

> are (a) higher than the ranges for similar ranges for heroin and cocaine, and (b) generally equivalent to the ranges for similar quantities of fentanyl and crack cocaine. After calculating the guidelines using that formula, the Court will evaluate the question of variances under § 3553(a) on a case-by-case basis to achieve the statutory purpose of a sentence that is sufficient but not greater than necessary to satisfy goals [*12] of the statute." ***United States v. Saldana***, No. 1:17-cr-271-1, 2018 U.S. Dist. LEXIS 110790, at *11-12 (W.D. Mich. July 3, 2018).

When the "mixture" vs. "ice" differential was first adopted, it was soundly grounded on the behavior and conduct of the defendant. Those possessing "ice" or "methamphetamine actual" were invariably manufacturers as portrayed in the television series **"Breaking Bad"** (though usually lacking in chemistry education and lab safety training) or high level Drug Lords. Street dealers and those one level up almost never possessed highly pure methamphetamine Such is not the case today.

Now, virtually all methamphetamine is highly pure and imported from Mexico. As is noted in the **2018 National Drug Threat Assessment** published by the DEA:

> "Purity [38] , potency[39], and price data indicate methamphetamine availability is increasing in the United States. Through September 2016, DEA reported methamphetamine per-gram purity levels averaged above 90 percent, while prices remained low and stable. Additionally, seizures sampled through the DEA Methamphetamine Profiling Program (MPP) continue to have high purity and potency, indicating high availability of methamphetamine.

> • Methamphetamine sampled through the MPP in the second half of 2017 averaged 96.9 percent purity and 94.6 percent potency (see Figure 70).
> • Analysis of domestic methamphetamine purchases from January 2012 through March 2017 indicates the price per pure gram of methamphetamine decreased 13.6 percent— from $81 to $70— while the purity increased six percent— from 87.9 percent to 93.2 percent (see Figure 71).
>
> Methamphetamine prices continue to decline throughout the United States, as Mexican TCOs continue to be the primary producer and supplier of low cost, high purity methamphetamine. Mexican TCOs continue to regularly produce large multikilogram quantities of methamphetamine, which has led to a large supply of methamphetamine in the U.S. market. Additionally, the majority of Mexican TCOs are involved in methamphetamine trafficking, which has led to increased competition among the different TCO groups. As a result, Mexican TCOs continue to explore new markets in an attempt to increase the methamphetamine customer base. The price of methamphetamine may begin to rebound with a market expansion, as current established market prices remain low and steady." (R. 349-4, 2018, **National Drug Threat Assessment**, p. 59-75, Page ID ## 3040-3056).

It is now time for the Court to reject the distinction between a "mixture and substance" containing methamphetamine and "ice" (and/or "methamphetamine actual") and order sentencing based on the "mixture" guidelines. Even using the "mixture" guidelines will still see higher level offenders punished more harshly through the factors of drug quantity and the Leadership Role Guidelines (Aggravating Role). **USSG §3B1.1.**

Issue II

Whether sentencing the Appellant on the "ice" or "methamphetamine actual" guidelines violates the Due Process clause of the 5th Amendment and the Equal Protection Clause of the 14th Amendment of the U.S. Constitution?

Sentencing the Appellant on the "ice" or "methamphetamine actual" guidelines violates the **Due Process** clause of the **5th Amendment** and the **Equal Protection Clause** of the **14th Amendment** of the U.S. Constitution. The Appellant's girlfriend, Amanda Hampton, who occupied the same motel room with the Defendant at the time of the conduct which constituted the factual basis of both of their "guilty" pleas, was sentenced on the basis of the very same drugs as the Appellant, at the time of her sentencing characterized as "a mixture and substance" rather than "methamphetamine actual" or "ice" upon which basis the Appellant was sentenced. She received 60 months, he received 108 months. (R. 142, Plea Agreement of Amanda Hampton, Page ID ## 322-330; R. 158, Plea Agreement of Dustin Johnson, Page ID ## 600-609; R. 191, Revised Plea Agreement of Dustin Johnson, Page ID ## 831-838; R. 219, Pre-Sentence Report of Amanda Hampton, Page ID##_____; R. 237, Revised Pre-Sentence Report of Amanda Hampton, Page ID ##_____; R. 240, Second Revised Pre-Sentence Report of Amanda Hampton, Page ID ##_____;R. 267, Pre-Sentence Report of Dustin Johnson, Page ID## 2069-2087; R. , Revised Pre-Sentence Report of Dustin Johnson, Page ID ##

2348-2366; R. 240, Second Revised Pre-Sentence Report of Dustin Johnson, Page ID ## 2796; R. 256, Judgment, Amanda Hampton, Page ID ## 1961-1967; R. 359, Judgment, Dustin Johnson, Page ID ## 3161-3167).

Methamphetamine is Methamphetamine and equal protection and due process require that Defendants be treated the same, sentenced the same for the same

quantity of methamphetamine, irrespective of which version of the drug they offended. According to **USSG Section 2D1.1 Note C**, provides, "(C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity." This results in a far harsher guideline being imposed than if it were of 79% purity.

Historically, perhaps, this was warranted when those purveying highly pure versions of methamphetamine were manufacturers or at the "top of the food chain", aka "kingpins". Now, virtually all methamphetamine is highly pure and imported from Mexico. As is noted in the **2018 National Drug Threat Assessment** published by the DEA:

> "Purity [38] , potency[39], and price data indicate methamphetamine availability is increasing in the United States. Through September 2016, DEA reported methamphetamine per-gram purity levels averaged above 90 percent, while prices remained low and stable. Additionally, seizures sampled through the DEA Methamphetamine Profiling Program (MPP) continue to

have high purity and potency, indicating high availability of methamphetamine.

- Methamphetamine sampled through the MPP in the second half of 2017 averaged 96.9 percent purity and 94.6 percent potency (see Figure 70).
- Analysis of domestic methamphetamine purchases from January 2012 through March 2017 indicates the price per pure gram of methamphetamine decreased 13.6 percent— from $81 to $70— while the purity increased six percent— from 87.9 percent to 93.2 percent (see Figure 71).

Methamphetamine prices continue to decline throughout the United States, as Mexican TCOs continue to be the primary producer and supplier of low cost, high purity methamphetamine. Mexican TCOs continue to regularly produce large multikilogram quantities of methamphetamine, which has led to a large supply of methamphetamine in the U.S. market. Additionally, the majority of Mexican TCOs are involved in methamphetamine trafficking, which has led to increased competition among the different TCO groups. As a result, Mexican TCOs continue to explore new markets in an attempt to increase the methamphetamine customer base. The price of methamphetamine may begin to rebound with a market expansion, as current established market prices remain low and steady." (R. 349-4, 2018, **National Drug Threat Assessment**, p. 59-75, Page ID ## 3040-3056).

The Court should reject the guidelines' different treatment of mixed methamphetamine from methamphetamine actual (ice) and sentence the Defendant based on 85 grams of a mixture and substance containing a detectable quantity of Methamphetamine. (**Revised Pre-Sentence Investigation Report**, 3/20/19, ECF # 294, Paragraph 65).

In the recent case, ***United States v. Johnson***, 379 F. Supp. 3d 1213, 1215 (M.D. Ala. 2019), from the Middle District of Northern Alabama, the District Court noted,

> "As orally explained at his sentencing and elaborated below, the court granted Johnson's motion for a downward variance based on the policy disagreements with the methamphetamine guidelines that this court shares with a growing number of district courts across the country. Specifically, sentence lengths are inordinately driven by the quantity and purity of the methamphetamine involved in the offense. Both quantity and purity are unreliable proxies for the offender's role in the crime and his culpability. In fact, the guidelines do not give enough weight to the offender's role, which better indicates culpability. Simply put, the methamphetamine guidelines overemphasize quantity [**3] and purity, and underemphasize criminal role. Furthermore, the court's authority to vary downward based on these objections was at its apex, given that the methamphetamine guidelines are not the result of the Sentencing Commission's empirical research or expertise. The government did not dispute any of these criticisms of the methamphetamine guidelines; instead, it contended that those critiques did not apply to Johnson's particular circumstances. The court disagrees. The policy flaws directly and instructively impacted Johnson, who had a relatively low-level role in the crime, yet still confronted a high Guidelines range due to the quantity and purity of the methamphetamine involved." ***United States v. Johnson***, 379 F. Supp. 3d 1213, 1215 (M.D. Ala. 2019).

In Footnote 5 of ***United States v. Bean***, 2019 DNH 027 n.5, 371 F. Supp. 3d 46 the District Court of New Hampshire noted:

> "Other courts have raised an additional and related criticism of the methamphetamine guidelines: they lead to unwarranted sentencing disparities between cases where the drug is lab tested for purity and those where it is not. See, e.g., ***Hartle***, 2017 U.S. Dist. LEXIS 93367, 2017 WL 2608221, at *3; ***Ferguson***, 2018 U.S. Dist. LEXIS 129802,

2018 WL 3682509, at *4. Those courts claim that this disparity arises from the fact that whether lab testing for purity is performed "in any case [is] completely arbitrary." ***Hartle***, 2017 U.S. Dist. LEXIS 93367, 2017 WL 2608221, at *3. This concern, however, does not appear relevant in this district at this time. The government represented that in this district lab tests for purity are performed in all federal methamphetamine cases." ***United States v. Bean***, 2019 DNH 027 n.5, 371 F. Supp. 3d 46, 53.

The disparity issue is further illustrated in ***United States v. Moreno***, No. 5:19CR002, 2019 U.S. Dist. LEXIS 130450, at *6-9 (W.D. Va. Aug. 5, 2019):

> "As recognized by an emerging chorus of district courts around the country, one problem with the Sentencing Commission's promulgation of the methamphetamine Guidelines is that "the Sentencing Commission deviated from the empirical approach when setting the Guideline ranges for drug offenses. Rather, the Commission chose to instead key the Guidelines to the statutory mandatory minimum sentences that Congress established for those crimes." ***Pereda***, 2019 U.S. Dist. LEXIS 19183, 2019 WL 463027, at *3 (D. Colo. Feb 6, 2019) (citing ***Gall***, 552 U.S. at 46 n.2, and ***United States v. Diaz***, No. 11-821, 2013 U.S. Dist. LEXIS 11386, 2013 WL 322243, at *3-6 (E.D.N.Y. Jan. 28, 2013)). "This creates Guideline ranges for actual (and ice) methamphetamine that are excessive and not similar to other Guidelines, which are intended to be representative of a 'heartland' or 'a set of typical cases embodying the conduct that each guideline describes." ***Pereda***, 2019 U.S. Dist. LEXIS 19183, 2019 WL 463027, at *4 (citing ***Harry***, 313 F. Supp. 3d at 972; ***Diaz***, 2013 U.S. Dist. LEXIS 11386, 2013 WL 322243, at *8 (quoting U.S.S.G. Manual § 1A4.13 (1987)).
>
> A second problem with the methamphetamine guidelines is that methamphetamine purity is no longer an accurate indicator of a defendant's role in a drug trafficking conspiracy. "The average purity of all methamphetamine in the United States is greater than 90% — and has been since 2011 — according to the DEA." ***Pereda***, 2019 U.S. Dist. LEXIS 19183, 2019 WL 463027, at *4 (citing U.S. Dep't. of Justice, Drug Enforcement Admin., 2017 National Drug Threat Assessment

67-70 (2017), https://www.dea.gov/sites/default/files/2018-07/DIR-040-172017-NDTA.pdf; see also ***Ferguson***, 2018 U.S. Dist. LEXIS 129802, 2018 WL 3682509, at *4; ***Harry***, 313 F. Supp. 3d at 972; ***Nawanna***, 321 F. Supp. 3d at 951-52; ***Ibarra-Sandoval***, 265 F. Supp. 3d at 1253; ***Jennings***, 2017 U.S. Dist. LEXIS 93368, 2017 WL 2609038, at *3; ***Ortega***, 2010 U.S. Dist. LEXIS 48346, 2010 WL 1994870, at *7.) The purity of methamphetamine has risen over time.

> Average methamphetamine purity has not always been this high. Between the 1980s and 2007, the average purity of methamphetamine fluctuated between approximately 30% and 80%. . . . Consequently, at one time, the guidelines' harsher treatment of higher purity methamphetamine was more grounded in fact. See ***Nawanna***, 321 F. Supp. 3d at 951 (noting that there was once some truth to the assumption that high purity indicates greater culpability). Now however, that is no longer the case due to the consistently high average purity of methamphetamine.

Bean, 371 F. Supp. 3d at 52. As a result, punishment meted out based on drug quantity [*8] and purity alone runs the real risk of overstating the culpability of offenders playing lesser roles in the methamphetamine distribution, and "can lead to perverse sentencing outcomes," ***Nawanna***, 321 F. Supp. 3d at 952. See ***Ferguson*** 2018 U.S. Dist. LEXIS 129802, 2018 WL 3682509, at *4; ***Harry***, 313 F. Supp. 3d at 972-75; ***Ibarra-Sandoval***, 265 F. Supp. 3d at 1253; ***Jennings***, 2017 U.S. Dist. LEXIS 93368, 2017 WL 2609038, at *3; ***Ortega***, 2010 U.S. Dist. LEXIS 48346, 2010 WL 1994870, at *7. As one court noted, "the Commission's assumption regarding the connection between methamphetamine purity and criminal role is divorced from reality. . . . Wile average purity of methamphetamine today is over 90 percent. This means that the sentencing Guidelines would treat the average individual convicted of a crime involving methamphetamine as a kingpin or leader, even though that simply is not true." ***Ibarra-Sandoval***, 265 F. Supp. 3d at 1255-56.

Third, because the determination of purity can only be ascertained after laboratory testing, "the prevalence of high-purity methamphetamine virtually guarantees that a defendant's base offense level under the Guidelines will substantially increase if the methamphetamine is tested for purity — a decision that can be purely arbitrary." ***Ferguson***, 2018

U.S. Dist. LEXIS 129802, 2018 WL 3682509, at *4 (citing ***Nawanna***, 321 F. Supp. 3d 943, 2018 WL 2021350, at *3; ***Jennings***, 2017 U.S. Dist. LEXIS 93368, 2017 WL 2609038, at *4; ***Ortega***, 2010 U.S. Dist. LEXIS 48346, 2010 WL 1994870, at *4-7.) As the court noted in ***Ibarra-Sandoval***, "[t]his problem is exacerbated by the fact that purity testing, which will on average reveal a purity level [*9] that leads to a harsher sentence, occurs capriciously." 265 F. Supp. 3d at 1257.

Finally, courts have questioned the severity of the methamphetamine Guidelines in comparison to other dangerous drugs, including heroin. In ***Harry***, the court posed a hypothetical comparing the Guidelines range for a defendant facing a charge of conspiracy to distribute 500 grams of heroin versus 500 grams of 95% pure methamphetamine. All else being equal, the court calculated that the Guidelines range for methamphetamine offenses is "more than twice the range of the heroin conspirator. Why? Is ice methamphetamine more than twice as potent, dangerous, destructive or addictive than heroin? I am aware of no objective evidence — from the United States Sentencing Commission or otherwise — supporting such a proposition. ***Harry***, 313 F. Supp. 3d at 973." ***United States v. Moreno***, No. 5:19CR002, 2019 U.S. Dist. LEXIS 130450, at *6-9 (W.D. Va. Aug. 5, 2019).

Here the Appellant was denied Due Process and Equal Protection by being sentenced for the same drugs as "ice" or "methamphetamine actual" as his girlfriend was sentenced on a "mixture and substance basis. His Judgment should be reveresed and his case remanded for resentencing on the basis of 85 grams of a mixture and substance containing methamphetamine.

CONCLUSION

Wherefore, the Petitioner prays that this Court issue a Writ of Certiorari, reverse the underlying decisions and order that this matter be remanded for resentencing on the basis that the prohibited drugs were "a mixture and substance containing a detectable quantity of methamphetamine" rather than "ice" or "methamphetamine actual".

Respectfully submitted,

Christian Lanier
Attorney for Petitioner
Dustin Johnson
Suite 412, 2158 Northgate Park Lane
Chattanooga, Tennessee 37415
Telephone (423) 756-1015
Facsimile (423) 756-1208
Lanierlaw@comcast.net
BPR # 4670

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: May 07, 2020

Mr. Alfred Christian Lanier III
2158 Northgate Park Lane
Suite 412
Chattanooga, TN 37415

Brian Samuelson
Office of the U.S. Attorney
800 Market Street
Suite 211
Knoxville, TN 37902

Re: Case No. 19-5534, *USA v. Dustin Johnson*
Originating Case No. : 1:17-cr-00140-10

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. John L. Medearis

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0257n.06

No. 19-5534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
v.	)	THE EASTERN DISTRICT OF
	)	TENNESSEE
DUSTIN JOHNSON,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: MERRITT, GUY, and STRANCH, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge. Dustin Johnson appeals the 108-month sentence he received after pleading guilty to possession with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine. He contends that it was error to calculate his Guidelines range based on post-plea laboratory results that showed the amount of "actual" methamphetamine in that mixture. Johnson also argues that the resulting disparity between his Guidelines range and that of his already-sentenced codefendant was unjust, unfair, and a violation of due process and equal protection. Because these arguments are unavailing, we affirm.

I.

Charged as part of a larger methamphetamine-distribution conspiracy, Johnson and his girlfriend Amanda Hampton pleaded guilty to one count of aiding and abetting each other in the

possession with intent to distribute 50 grams or more of a mixture containing methamphetamine. *See* 21 U.S.C. § 841(a) and (b)(1)(B)(viii). As Johnson admitted in his plea agreement, he and Hampton were arrested together in a hotel room from which agents recovered "approximately 80 grams of a mixture or substance containing a detectable quantity of methamphetamine," three loaded firearms, new and used syringes, and more than $40,000 in cash. Johnson stipulated that he was found attempting to flush evidence down the toilet with white powder all over the floor and one of the firearms on the back of the toilet.

The plea agreement contained no agreement as to his sentence, which would be determined by the court based on the PSR, "any information presented by the parties," the Guidelines, and the relevant sentencing factors in 18 U.S.C. § 3553(a). Johnson and the government also expressly retained the right to present additional facts relevant to sentencing. This appeal concerns one such fact—that laboratory testing of the purity of the methamphetamine mixture showed that it contained 67.71 grams of "actual" methamphetamine. This information did not affect Hampton because she had already been sentenced when the lab results became available. Johnson, however, was adversely affected because this new information triggered an increase in his base offense level from 24 to 30 and a corresponding increase in his Guidelines range.

The Drug Enforcement Administration lab results mattered because Johnson's base offense level (like Hampton's) was determined by reference to the Drug Quantity Table, which provides graduated offense levels based on the type and quantity of the drugs involved. *See* USSG § 2D1.1(a)(5) and (c). Methamphetamine is further categorized in terms of purity into "methamphetamine," "methamphetamine (actual)" and "ice." The first of these refers to "the entire weight of any mixture or substance containing a detectable amount" of methamphetamine (*i.e.*, a methamphetamine mixture). USSG § 2D1.1(c) (n.(A)). "Ice," which is not at issue here,

is specifically defined as a mixture containing "d-methamphetamine hydrochloride of at least 80% purity." *Id.* at (n.(C)). Lastly, "methamphetamine (actual)" refers to "the weight of the controlled substance, itself, contained in the mixture or substance." *Id.* at (n.(B)) ("For example, a mixture weighing 10 grams containing [methamphetamine] at 50% purity contains 5 grams of [methamphetamine] (actual)."). Significantly, the Drug Quantity Table employs a 10:1 weight ratio between methamphetamine mixtures and actual methamphetamine or ice. In other words, 10 grams of a methamphetamine mixture is the equivalent of 1 gram of actual methamphetamine or ice. And, in the case of a mixture, the base offense level is to be determined by (1) the entire weight of the methamphetamine mixture or (2) the weight of the "methamphetamine (actual), *whichever is greater*." *Id.* (emphasis added).

There is no dispute that Johnson and Hampton were to be held accountable for the same 85-gram methamphetamine mixture, which corresponds to a base offense level of 24. USSG § 2D1.1(c)(8) ("[a]t least 50 G but less than 200 G of Methamphetamine"). In Johnson's case, with the addition of 2 levels for possession of a firearm and the subtraction of 3 levels for acceptance of responsibility, Johnson's adjusted offense level of 23 and criminal history category of III produced an effective Guidelines range of 60 to 71 months (restricted by a 60-month mandatory minimum). Similarly, although Hampton received an additional 2 level minimal-role adjustment, her adjusted offense level of 21 and criminal history category of IV produced the same effective Guidelines range as Johnson. In fact, Hampton was sentenced at the bottom of that range to 60 months of imprisonment before the lab results became available. Much to Johnson's detriment, his sentencing was delayed for unrelated reasons and the lab results became available a short time later.

The lab results showed—based on the purity of the entire 85 grams of methamphetamine mixture—that the mixture contained more than 67 grams of "actual" methamphetamine. And that quantity of "actual" methamphetamine corresponds to a base offense level of 30. USSG § 2D1.1(c)(5) ("at least 50 G but less than 150 G of Methamphetamine (actual)"). Johnson's PSR was revised accordingly, and with all other calculations remaining the same, his new Guidelines range increased to 108 to 135 months of imprisonment.

Johnson objected, arguing that use of the higher base offense level was inconsistent with his plea agreement, should be rejected due to policy disagreements with the 10:1 mixture-to-actual methamphetamine ratio, and would result in a disparity between his and Hampton's sentences that was unfair, unjust and a violation of due process and equal protection. The district court addressed Johnson's arguments at sentencing, but overruled his objections and denied his requests for variance. Johnson was sentenced at the bottom of his revised Guidelines range to 108 months of imprisonment. This appeal followed.

II.

Challenges to the procedural or substantive reasonableness of a sentence are reviewed under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). For a sentence to be procedurally reasonable, the district court "must properly calculate the guidelines range, treat that range as advisory, consider the sentencing factors in [] § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence." *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018) (citing *Gall*, 552 U.S. at 51). Even if a sentence is procedurally reasonable, we ask as part of the substantive reasonableness inquiry whether the district court nevertheless imposed a sentence that is "greater than necessary." *Holguin-Hernandez*, 140 S. Ct. 762, 766–67 (2020).

A sentence is substantively unreasonable if the court places "too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual." *Rayyan*, 885 F.3d at 442. (A defendant's claim "that a sentence is substantively unreasonable is a claim that a sentence is too long."). "Sentences that fall within the applicable Guidelines range are rebuttably presumed to be reasonable." *United States v. Brooks*, 628 F.3d 791, 796 (6th Cir. 2011) (citing *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc)). In reviewing for substantive reasonableness, the fact that an appellate court would have imposed a different sentence is insufficient to justify reversal of the district court. *See Gall*, 552 U.S. at 51.

A.

The district court properly rejected Johnson's argument that use of the higher base offense level was precluded by his plea agreement. It is true that Johnson pleaded guilty to possession with intent to distribute 50 grams or more of "a mixture and substance containing methamphetamine." But that plea served only to limit the statutory penalties to a term of not less than 5 or more than 40 years in prison as prescribed under 21 U.S.C. § 841(b)(1)(B)(viii), not the calculation of the offense level. *See United States v. Molina*, 469 F.3d 408, 414 (5th Cir. 2006) (explaining that the language of the indictment does not determine the offense level under the Guidelines).

Johnson also pointed to the agreement's factual admission that approximately 80 grams of a "mixture containing methamphetamine" was found in the hotel room. It is true, of course, that this admitted nothing about the purity of that mixture. It also did not preclude the government from presenting additional facts at sentencing concerning the purity of that mixture. Indeed, as noted, the plea agreement here even expressly contemplated that additional facts could be presented to and considered by the court. That is precisely what happened.

Nor does the decision in *United States v. Walker* dictate a different conclusion. 688 F.3d 416, 425 n.4 (8th Cir. 2012). There, the issue was whether the testimony presented at sentencing was sufficient to establish by a preponderance of the evidence that the conspiracy involved the distribution of "ice." *Id.* at 424-25. Finding no clear error in the district court's drug quantity determination, the Eighth Circuit suggested that issues of notice and proof might be minimized by having a defendant acknowledge the identity of the controlled substance in his plea agreement. *Id.* at 425 n.4. Although an admission that a substance was "ice" would obviate the need to prove the purity of the substance in question, *Walker* did not hold that the absence of such an admission would somehow limit the proof that could be considered at sentencing.

Here, the district court inquired into and satisfied itself that the timing of the lab report was bad fortune for Johnson—not bad faith by the government—and that Johnson was not seeking to withdraw his plea. It was not error, and therefore not an abuse of discretion, to determine Johnson's base offense level by the weight of the "actual" methamphetamine contained in the mixture that he admitted having possessed with the requisite intent.

B.

Arguing for a downward variance, Johnson urged the district court to reject the 10:1 mixture-to-actual methamphetamine ratio in favor of the lesser base offense level that would apply to the entire methamphetamine mixture. The issue was addressed at sentencing, but the district court was not persuaded to vary downward for policy reasons.

The advisory Guidelines range is "the starting point and the initial benchmark" for choosing a defendant's sentence. *Gall*, 552 U.S. at 49. The district court, however, "may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (alterations adopted); *see also*

Spears v. United States, 555 U.S. 261, 264 (2009). Although this authority was recognized in the crack-to-powder cocaine context, it extends to other aspects of the Guidelines. *United States v. Herrera-Zuniga*, 571 F.3d 568, 585 (6th Cir. 2009) ("We thus see no reason to limit the authority recognized in *Kimbrough* and confirmed in *Spears* to the crack-powder cocaine context.").

A number of district courts have rejected the 10:1 mixture-to-actual methamphetamine ratio based on policy disagreements with the Guidelines. In one such case, the district court joined those cases and declared "a categorical policy disagreement with the methamphetamine guidelines [because] (1) there appears to be no empirical basis for the Sentencing Commission's harsher treatment of offenses involving higher purity methamphetamine; (2) methamphetamine purity is no longer an accurate indicator of a defendant's role in a drug-trafficking conspiracy; and (3) the methamphetamine guidelines create unwarranted sentencing disparities between methamphetamine offenses and offenses involving other major drugs." *United States v. Bean*, 371 F. Supp. 3d 46, 51 (D. N.H. 2019) (citing cases); *see also United States v. Nawanna*, 321 F. Supp. 3d 943, 955 (N.D. Iowa 2018) (rejecting purity-based disparity and recalculating the base offense level by treating all methamphetamine attributable to the defendant as a methamphetamine mixture).

The question for this court is not whether we might find any of those reasons persuasive—only whether it was an abuse of discretion for the district court to decide *not* to vary downward based on those policy disagreements. But "the fact that a district court *may* disagree with a Guideline for policy reasons and *may* reject the Guidelines range because of that disagreement does not mean that the court *must* disagree with that Guideline or that it *must* reject the Guidelines range if it disagrees." *United States v. Brooks*, 628 F.3d 791, 800 (6th Cir. 2011) (emphasis in original); *see also United States v. Heim*, 941 F.3d 338, 341 (8th Cir. 2019) (refusing to compel

policy disagreement with the methamphetamine Guideline just because other judges have done so). The district court did not abuse its discretion by choosing *not* to disagree with the 10:1 ratio in the Guidelines on policy grounds. *See United States v. Lynde*, 926 F.3d 275, 281 (6th Cir. 2019).[1]

C.

Johnson also asked the district court to vary from the Guidelines "as a matter of basic fairness, equal protection and due process" to avoid punishing him more severely than Hampton for the same offense involving the "very same drugs, in the very same room, at the very same time." Despite the invocation of constitutional principles in his statement of issues, Johnson has forfeited such claims by failing to flesh out or provide support for a *constitutional* challenge. *See United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) ("[I]ssued adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed [forfeited]."). Johnson did argue for a below-Guidelines sentence to match Hampton's on the grounds that it was unfair or unjust, so we review the substantive reasonableness of his sentence (*i.e.*, that it was greater than necessary to accomplish the goals of § 3553(a)(2)). *See Holguin-Hernandez*, 140 S. Ct. at 766-67; *Vonner*, 516 F.3d at 392.

At sentencing, the government acknowledged that there was something "fundamentally unfair" about the defendants having different Guidelines ranges based on the same drugs. The district court recognized that there was indeed an injustice—but saw it to be the fact that Hampton had escaped a higher sentence because she was sentenced before accurate information about the

[1]Johnson does not argue that the district court failed to adequately state its reasons, but if he had, such a claim would be reviewed for plain error because he failed to object on that basis after the court's inquiry pursuant to *United States v. Bostic*, 371 F.3d 865, 872-73 (6th Cir. 2004). There is no plain error here.

purity of the methamphetamine mixture was known. Referencing the familiar adage that "two wrongs don't make a right," the district court found that it would be wrong to disregard the additional information in sentencing Johnson. Ultimately, after weighing the relevant § 3553(a) factors, the district court sentenced Johnson at the bottom of his applicable Guidelines range.

At first blush, there is some appeal to Johnson's argument that his sentence was too long because the 4-year difference between Hampton's and Johnson's sentences is directly attributable to the different treatment of the same drugs under the Guidelines. The district court did not find Johnson's sentence would be greater than necessary; rather, Hampton's sentence had failed to reflect the seriousness of the offense or provide just punishment. The disparity was neither arbitrary nor unwarranted, as it resulted entirely from the different information presented at the time of sentencing. The district court correctly observed that § 3553(a)(6) is concerned with national disparities among like offenders in sentencing—not disparities between individual codefendants. *See United States v. Simmons*, 501 F.3d 620, 623-24 (6th Cir. 2007). While the district court could exercise its discretion to sentence Johnson in light of Hampton's sentence, *id.* at 624, the district court's decision not to vary downward on that basis was not an abuse of that discretion. Johnson's within-Guidelines sentence was not substantively unreasonable.

* * *

The judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

v.

DUSTIN WESLEY JOHNSON
USM#53198-074

JUDGMENT IN A CRIMINAL CASE
(For Offenses committed on or after November 1, 1987)

Case Number: **1:17-CR-00140-CLC-CHS(10)**

A Christian Lanier, III
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s): Thirteen of the Superseding Indictment.
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☐ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section and Nature of Offense	**Date Violation Concluded**	**Count**
21 U.S.C. §§ 841(a)(1) and (b)(1)(B) Aiding and Abetting the Possession with Intent to Distribute Fifty Grams or More of a Mixture and Substance Containing Methamphetamine	12/8/2017	13s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. 3553.

☐ The defendant has been found not guilty on count(s).
☒ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

May 8, 2019
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

Curtis L. Collier, United States District Judge
Name & Title of Judicial Officer

May 14, 2019
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **108 months as to Count Thirteen**. The defendant shall receive credit for time served on the Sequatchie County, Tennessee case referenced in paragraph 50 of the Presentence Report, which is considered relevant conduct.

☒ The court makes the following recommendations to the Bureau of Prisons: The Court recommends that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons' Institution Residential Drug Abuse Treatment Program. The Court also recommends that once in the custody of the Bureau of Prisons, the defendant receive a mental health evaluation and any treatment deemed necessary or appropriate.

☒ 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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **four (4) years.**

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 sentencing 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 (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which 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.

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 mandatory, standard, and any special 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 _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant must participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer

2. The defendant must participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

3. The defendant must waive all rights to confidentiality regarding mental health treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the mental health treatment provider.

4. The defendant must take all medication prescribed by the treatment program as directed. If deemed appropriate by the treatment provider or the probation officer, the defendant must submit to quarterly blood tests to determine whether the defendant is taking the medication as prescribed.

5. The defendant must submit his person, property, house, residence, vehicle, papers, computers, or office, to a search conducted by a United States Probation Officer or designee. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision, and the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$100.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until after such determination. An *Amended Judgment in a Criminal Case (AO245C)* will be entered

☐ 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.

☐ 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 under the Schedule of Payments sheet of this judgment 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.

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 payments of $ 100.00 due immediately, balance due
☐ not later than , or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

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

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

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

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

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

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 900 Georgia Avenue, Joel W. Solomon Federal Building, United States Courthouse, Chattanooga, TN, 37402.** Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ 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.