

APPENDIX

APPENDIX A:	Judgment of the United States District Court for the Southern District of Iowa, 3:18-cr-00035-001 November 27, 2018.....	1
APPENDIX B:	Opinion of the Eighth Circuit Court of Appeals, 18-3685 April 28, 2020	8
APPENDIX C:	Judgment of the Eighth Circuit Court of Appeals, 18-3685 April 28, 2020	12
APPENDIX D:	Order denying Petition for Rehearing En Banc and Rehearing by Panel by Eighth Circuit Court of Appeals, 18-3685 June 10, 2020	14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

Theodore David Newcomb

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:18-cr-00035-001

USM Number: 18598-030

Terence L. McAtee

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One of the Indictment filed on April 18, 2018.

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

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), 841(b)(1)(B), 846	Conspiracy to Manufacture, Distribute, and Possess with Intent to Distribute at Least Five Grams of Actual Methamphetamine	04/18/2017	One

☐ See additional count(s) on page 2

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.

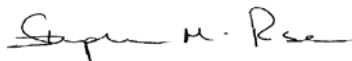
☐ The defendant has been found not guilty on count(s)

☒ Count(s) Two ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 27, 2018

Date of Imposition of Judgment



Signature of Judge

Stephanie M. Rose, U.S. District Judge

Name of Judge

Title of Judge

November 27, 2018

Date

Appendix A

Appendix p. 001

DEFENDANT: Theodore David Newcomb
CASE NUMBER: 3:18-cr-00035-001

IMPRISONMENT

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

188 months as to Count One of the Indictment filed on April 18, 2018.

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

That the defendant be placed at FMC Rochester, FCI Greenville or FCI Oxford as commensurate with his security and classification needs. The Court further recommends that the defendant be made eligible to participate in the 500-hour Residential Drug Abuse Treatment Program (RDAP).

☒ 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 _____ 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 _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Theodore David Newcomb
CASE NUMBER: 3:18-cr-00035-001

Judgment Page: 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
Five years as to Count One of the Indictment filed on April 18, 2018.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (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.

DEFENDANT: Theodore David Newcomb
CASE NUMBER: 3:18-cr-00035-001

Judgment Page: 4 of 7

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: Theodore David Newcomb
CASE NUMBER: 3:18-cr-00035-001

Judgment Page: 5 of 7

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle 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 you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: Theodore David Newcomb
 CASE NUMBER: 3:18-cr-00035-001

CRIMINAL MONETARY PENALTIES

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

- ☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	<u>Assessment</u>	<u>JVTA Assessment *</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$0.00

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

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

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

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$0.00	\$0.00	

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____

- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Theodore David Newcomb
CASE NUMBER: 3:18-cr-00035-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance ☐ 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:
- All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
- While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Eighth Circuit

No. 18-3685

United States of America

Plaintiff - Appellee

v.

Theodore David Newcomb

Defendant - Appellant

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

Submitted: March 9, 2020

Filed: April 28, 2020

[Unpublished]

Before ERICKSON, GRASZ, and KOBES, Circuit Judges.

PER CURIAM.

Theodore Newcomb pled guilty to conspiracy to manufacture, distribute, and possess with intent to distribute five grams or more of actual methamphetamine, in

violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846. The district court¹ determined that Newcomb was a career offender and imposed a low-end of the guidelines sentence of 188 months. In this appeal Newcomb challenges his designation as a career offender. We affirm.

The Presentence Investigative Report identified three felony convictions in Newcomb's criminal history that could qualify as predicate convictions under the career offender guideline: (1) possession of pseudoephedrine with intent to manufacture methamphetamine, in violation of Iowa Code §§ 124.401(4)(a) & (b); (2) manufacture of methamphetamine, in violation of Iowa Code § 124.401(1)(c)(6); and (3) conspiracy to manufacture methamphetamine, in violation of Iowa Code § 124.401(1)(c). Newcomb objected, arguing that his prior convictions did not meet the definition of "controlled substance offense" under U.S.S.G. § 4B1.2.

At sentencing, the government provided evidence to support each prior felony drug offense, including two additional convictions the government argued also qualified as predicate offenses: (1) possession of pseudoephedrine with intent to manufacture methamphetamine, in violation of Iowa Code § 124.401(4)(b); and possession of precursors with intent to manufacture a controlled substance, in violation of Iowa Code § 124.401(4). The government also illuminated Newcomb's Iowa conspiracy conviction by offering Shepherd documents to show that Newcomb was charged with conspiracy to manufacture methamphetamine under § 124.401(1)(c)(6), and later convicted of "the lesser and included offense" of conspiracy to manufacture methamphetamine under Iowa Code §§ 124.401(1)(c), 706.1, and 706.3.

¹The Honorable Stephanie M. Rose, United States District Judge for the Southern District of Iowa.

The district court held that each of Newcomb’s five felony drug convictions qualified as predicate offenses under the career offender guideline. Newcomb was in Criminal History Category VI, with or without the career offender designation. The application of the career offender guideline did, however, increase his total offense level from 25 to 31, increasing the guideline range from 110 to 137 months to 188 to 235 months. The court sentenced Newcomb to 188 months. On appeal, Newcomb renews his argument that his prior Iowa convictions do not meet the definition of “controlled substance offense” in U.S.S.G. § 4B1.2.

We review *de novo* a district court’s decision that a prior conviction qualifies as a sentencing enhancement predicate, including application of the career offender guideline. United States v. Eason, 643 F.3d 622, 623 (8th Cir. 2011). Newcomb is a career offender under the guideline if his criminal history includes “at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1. A “controlled substance offense” is “an offense . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” U.S.S.G. §4B1.2(b). In the commentary to § 4B1.2, the Sentencing Commission specified that “controlled substance offense” includes the offenses of aiding and abetting and conspiracy. U.S.S.G. § 4B1.2, comment. (n.1).

Newcomb’s claim that convictions under Iowa Code § 124.401(1)(c) do not qualify as predicate offenses because Iowa’s law is broader than the federal definition of “controlled substance offense” is foreclosed by precedent. United States v. Boleyn, 929 F.3d 932, 940 (8th Cir. 2019) (explaining that Iowa’s aiding and abetting law is “substantially equivalent to” the federal standard for purposes of determining whether a controlled substance conviction is a qualifying predicate offense).

Newcomb also argues that one of his prior convictions under § 124.401(1)(c) for conspiracy to manufacture methamphetamine is not a predicate offense because his conviction references §§ 706.1 and 706.3, which set forth the definition and penalty for generic conspiracy. Whether a person is convicted under § 124.401(1)(c), a Class C felony, or under §§ 706.1 and 706.3, a Class D felony, the crime of conviction is the same – conspiracy to manufacture methamphetamine.

Under Iowa law, the object of the conspiracy is an element of the conspiracy offense, which must be proven beyond a reasonable doubt. See State v. Boyer, 342 N.W.2d 497, 499 (Iowa 1984) (“[W]e hold that section 706.1 requires that the conspirators actually agree at some point on the criminal act that serves as the object of the conspiracy.”). We have held that “conspiracy to commit a controlled substance offense is itself a controlled substance offense as defined by the Guidelines.” United States v. Merritt, 934 F.3d 809, 811 (8th Cir. 2019). Newcomb’s prior Iowa conviction for conspiracy to manufacture methamphetamine under § 124.401(1)(c) is a predicate offense.

Newcomb has two qualifying prior convictions that meet the definition of “controlled substance offense” under U.S.S.G § 4B1.2. Because Newcomb was properly designated a career offender, we do not consider his other contentions. The judgment of the district court is affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-3685

United States of America

Plaintiff - Appellee

v.

Theodore David Newcomb

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:18-cr-00035-SMR-1)

JUDGMENT

Before ERICKSON, GRASZ, and KOBES, Circuit Judges.

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

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

April 28, 2020

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

/s/ Michael E. Gans

Appendix C
Appendix p. 012

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (*per curiam*); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-3685

United States of America

Appellee

v.

Theodore David Newcomb

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:18-cr-00035-SMR-1)

ORDER

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

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

June 10, 2020

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

/s/ Michael E. Gans