UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2487

United States of America

Appellee

v.

Cleophus Reed, Jr.

Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:17-cr-00253-MJD-2)

ORDER

The petition for rehearing by the panel is denied.

September 30, 2020

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

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 19-2487

United States of America

Plaintiff - Appellee

v.

Cleophus Reed, Jr.

Defendant - Appellant

Appeal from United States District Court
for the District of Minnesota

Submitted: June 19, 2020
Filed: August 25, 2020

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

KELLY, Circuit Judge.

Cleophus Reed, Jr., appeals after a jury convicted him on three counts of drug and gun charges. He challenges the sufficiency of the evidence on all counts, the

racial composition of the jury venire, and the length of his sentence. Finding no basis for reversal, we affirm the district court's[1] judgment.

I.

Sergeant Adam Lepinski of the Minneapolis Police Department began investigating a suspected drug-trafficking organization in the spring of 2017. During this investigation, law enforcement executed a search warrant at a house on Colfax Avenue in Minneapolis. No one appeared to reside at the house, but officers found evidence of drug trafficking: respirator masks, latex gloves, scales, packing material, a blender used to grind and cut heroin with other substances, two hydraulic presses for making bricks of heroin, and 300 grams of heroin inside a large travel mug. Officers also found 839 grams of heroin, 751 grams of crack cocaine, and a 9 mm semi-automatic handgun in the trunk of a car parked in the driveway.

Law enforcement later obtained a warrant to search an apartment on Emerson Avenue in Minneapolis, where they believed Reed lived. No one was home when officers executed the search warrant, but they found evidence that Reed lived there, including photographs of his wife, Vivian; men's clothing; and mail, tax documents, and casino rewards cards bearing his name. Officers also found a handwritten note claiming responsibility for everything in the apartment:

> I Cleophus Reed Jr.
> [date of birth] am responsible for
> all activities in [street number] emerson Ave N 19
> To whomever it may
> concern with all knowledge
> Vivian M. Reed, has know [sic]
> knowledge of anything.

[1]The Honorable Nancy E. Brasel, United States District Judge for the District of Minnesota.

Officers discovered evidence of drug trafficking at the Emerson apartment: the same brand of respirator masks, hydraulic press, latex gloves, and travel mug as found at the Colfax house. They also found two guns in an unlocked box on the bedroom floor: a Ruger .40 caliber semi-automatic pistol with a scratched-off serial number and a Taurus .22 caliber semi-automatic pistol with a distinctive tip-up barrel.

After searching the Emerson apartment, law enforcement obtained a warrant to collect Reed's DNA. Lepinski went to the apartment to execute this warrant on July 25, 2017. He could hear someone inside, but no one answered the door. Lepinski testified that he believed Reed was inside the apartment based on text messages later recovered from Reed's phone. One message sent from Reed's phone on that date read: "Police just came by. Stay away from here." Another message sent to Reed's wife read: "Police just left saying call him. Lepenski [sic]."

The next day, Lepinski stopped Reed while he was driving his van. Lepinski's microphone recorded the traffic stop, and the government played the recording at trial. During the stop, Reed told Lepinski, "Let uh, the bird know . . . he'll be decapitated before the Super Bowl." A subsequent search of Reed's van uncovered the same brand of latex gloves found at both the Colfax house and the Emerson apartment. Additionally, text messages on Reed's phone indicated he was involved in drug trafficking. One sender wrote, "I need an oz of fast." Reed replied, "On Rez."

In September 2017, the grand jury returned a six-count indictment charging Reed, David Kline, Timothy Dulaney, and Manley Humphries with drug and firearms offenses. Reed was charged in Count One with conspiracy to distribute heroin, powder cocaine, and crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He was charged in Count Two with possession with intent to distribute heroin and crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and 18 U.S.C. § 2. And he was charged in Count Five with possessing firearms as a convicted felon,

in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Special Agent Bryan Lervoog transported Reed to court to make an initial appearance. Lervoog testified that during the trip, Reed volunteered, without prompting, "The CRI is going to have a bad time."[2]

Reed was the only co-defendant to proceed to trial. During jury selection, he objected to the racial composition of the jury venire as overwhelmingly white. Reed argued the venire did not represent a fair cross-section of the community. The district court provisionally overruled the objection after finding no evidence to establish that the venire was unrepresentative of the community, or that any under-representation was due to a systematic exclusion of any group from the jury pool.

At trial, the government alleged Reed conspired with his co-defendants and others to distribute heroin and cocaine from the Colfax house. The government contended that Dulaney rented the Colfax house and allowed Kline to use it as a stash house. Reed's alleged role in the conspiracy was to prepare heroin for distribution by cutting it with other substances and pressing it into blocks. He also cooked powder cocaine into crack cocaine and would occasionally sell the drugs. The government alleged that while Reed prepared the drugs, he wore a respirator mask and latex gloves to protect himself. A forensic analyst from the Minnesota Bureau of Criminal Apprehension testified that one of the respirator masks from the Colfax house tested positive for Reed's DNA.

Several of Reed's alleged co-conspirators testified for the government at trial. Jevone Gentle acknowledged that he sought "a break on his sentence" by testifying. He implicated Reed in the conspiracy, explaining that Reed would bring heroin and cocaine to the Colfax house and would "cook" the drugs while using the hydraulic

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[2]The government alleged that "CRI" is a common abbreviation for "confidential reliable informant."

presses and respirator masks. Gentle saw Reed put drugs in the trunk of the car parked in the driveway. He also saw Reed with guns on numerous occasions but was unable to provide specific dates.

Dulaney also testified. He had pleaded guilty to the drug-trafficking conspiracy and acknowledged that he also was testifying in hopes of receiving a reduced sentence. He explained that Reed's role was to prepare the drugs and to sometimes sell them. Dulaney said Reed had access to the drugs stored in the car parked at the Colfax house. He also testified that Reed possessed firearms. Kenneth Mack, a cooperating witness, told the jury that he too agreed to testify "[w]ith the hope that [he] will get reduction in his sentence." According to Mack, Reed worked with Kline to produce and sell drugs.

Vivian Reed testified for the defense. She explained that Reed did not have access to the Emerson apartment when the police searched it. She believed law enforcement planted the guns in the apartment. On cross-examination, the government elicited testimony from Vivian about a previous search warrant executed at a home she shared with Reed in 2012, where the police recovered crack cocaine. The government argued this provided context for the handwritten note found at the Emerson apartment: she had been drawn into Reed's illegal activities before, so he wrote the note to prevent the same from happening again.

Reed also testified. He denied being involved in the charged conspiracy and challenged the government's evidence against him. Reed explained that he worked with Kline's mother and, as part of his work, used a respirator mask while cleaning. He suggested this was how a respirator mask with his DNA turned up at the Colfax house. He denied any knowledge of the guns found at the Emerson apartment.

After a three-day trial, the jury convicted Reed on all three counts. Reed then moved for a new trial under Federal Rule of Criminal Procedure 33, based on the

racial composition of the jury venire. The district court denied the motion. At sentencing, the court calculated an offense level of 34 and a criminal history category V, resulting in a Guidelines range of 235 to 293 months in prison. Reed objected to how the Guidelines' drug conversion tables treat crack cocaine significantly more harshly than powder cocaine, and urged the district court to disregard the Guidelines for this reason. The court acknowledged its authority to disagree with the Guidelines for policy reasons but declined to do so. The court imposed a 240-month sentence on Counts One and Two and a concurrent 120-month sentence on Count Five. Reed timely appealed.

II.

Reed first challenges the sufficiency of the evidence against him on all three counts. He argues the three cooperating witnesses only testified against him to receive reduced sentences in their own criminal cases. He notes that Gentle was unable to provide much detail about when Reed participated in the drug conspiracy or possessed firearms. He also points out that Lepinski testified that he never saw Reed with his co-defendants or at any of the properties Lepinski surveilled.

We review the sufficiency of the evidence de novo, evaluating the evidence in the light most favorable to the verdict and drawing all reasonable inferences in its favor. United States v. Parker, 871 F.3d 590, 600 (8th Cir. 2017). We will reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt. United States v. Ways, 832 F.3d 887, 894 (8th Cir. 2016).

A.

To prove Reed guilty of Count One, the government had to establish that: (1) two or more people reached an agreement to distribute heroin, powder cocaine, or crack cocaine; (2) Reed voluntarily and intentionally joined that agreement; and

(3) at the time Reed joined the agreement, he knew its essential purpose. See 21 U.S.C. §§ 841(a)(1), 846; United States v. Meeks, 639 F.3d 522, 527 (8th Cir. 2011). Proof of an express agreement is not necessary, and the government may rely on circumstantial evidence to establish an agreement. Meeks, 639 F.3d at 527. To prove Reed guilty of Count Two, the government had to establish that Reed knowingly possessed a controlled substance and that he intended to distribute the drugs to another person. See 21 U.S.C. § 841(a)(1); United States v. Morales, 813 F.3d 1058, 1065 (8th Cir. 2016).

The government presented sufficient evidence to support Reed's convictions on Counts One and Two. Multiple witnesses consistently identified Reed as a member of the drug conspiracy operating out of the Colfax house. These witnesses testified that Reed was a "cook" who would turn powder cocaine into crack cocaine and mix, cut, and press heroin with hydraulic presses while wearing latex gloves and respirator masks. Reed's DNA was found on a respirator mask in the Colfax house. While Reed explained that his DNA was on the mask because he worked as a cleaner for Kline's mother, the jury was not obligated to credit this testimony over the testimony of the other witnesses. See, e.g., United States v. King, 898 F.3d 797, 808 (8th Cir. 2018) (explaining that a jury may base its verdict on the testimony of cooperating witnesses). In the kitchen of the Colfax house, a large travel mug held 300 grams of heroin. Law enforcement also found large quantities of heroin and crack cocaine and a handgun in a car parked in the driveway. One of the government's witnesses testified that he saw Reed place drugs in the car's trunk. Evidence showed that Reed also occasionally sold the drugs he prepared. Witnesses attested to this fact, and text messages from Reed's phone corroborated their testimony.

Moreover, evidence at the Emerson apartment connected Reed to the drug-trafficking operation at the Colfax house. At the apartment, police found the same type of hydraulic press, respirator mask, latex gloves, and travel mug found at the

Colfax house. Police also discovered tax documents, casino cards, and mail bearing Reed's name, as well as men's clothing and photographs of Reed's wife. A handwritten note, apparently from Reed, claimed responsibility for everything in the apartment. Lepinski's testimony supported the conclusion that Reed was at the apartment when Lepinski tried to execute the DNA warrant. And a subsequent search of Reed's van uncovered the same brand of latex gloves found in both the Colfax house and the Emerson apartment.

The government also introduced evidence that Reed had threatened cooperating witnesses in the presence of law enforcement on two occasions. We have said that a threat against a potential informant is evidence that may show knowledge of and participation in a conspiracy. United States v. Nunn, 940 F.2d 1128, 1131 (8th Cir. 1991). And while Reed strongly denied his guilt at trial, the jury was not obligated to believe him. See United States v. Never Misses A Shot, 781 F.3d 1017, 1026 (8th Cir. 2015).

Finally, Reed argues that the cooperating witnesses were simply not credible because they testified to reduce their own prison sentences. But the jury heard this argument from Reed's attorney during his closing remarks, and the district court instructed the jury to consider the witnesses' motivations when assessing their testimony. The jury is "capable of evaluating the credibility of testimony given in light of the agreements each witness received from the government." United States v. Tillman, 765 F.3d 831, 834 (8th Cir. 2014) (quoting United States v. Conway, 754 F.3d 580, 587 (8th Cir. 2014)). "The jury is the final arbiter of the witnesses' credibility, and we will not disturb that assessment" on appeal. United States v. Listman, 636 F.3d 425, 430 (8th Cir. 2011) (quoting United States v. Hayes, 391 F.3d 958, 961 (8th Cir. 2004)). The evidence was sufficient to support the jury's verdicts on Counts One and Two.

B.

Reed also challenges his conviction for possessing firearms as a felon. See 18 U.S.C. § 922(g)(1). This conviction was based on the Ruger .40 caliber semi-automatic pistol and Taurus .22 caliber semi-automatic pistol found inside the Emerson apartment. Reed stipulated at trial that he was a convicted felon during the relevant time; on appeal, he argues only that the government failed to show that he possessed these firearms.

We conclude the evidence was sufficient to support the jury's verdict. As discussed above, numerous pieces of evidence connected Reed to the Emerson apartment where the guns were found. Gentle and Dulaney testified that they saw Reed with the two guns in question. They identified the guns by their distinctive features: the Ruger had a scratched-off serial number and the Taurus had a tip-up barrel, which a firearms technician explained was made by only a couple of gun manufacturers. Based on this evidence, a jury reasonably could find Reed possessed the guns as the government alleged.

III.

Reed next argues that the district court erred by denying his motion for a new trial. In his motion, Reed reasserted that the jury venire did not represent a fair racial cross-section of the community. In response, the district court found that the District of Minnesota "primarily relies on voter registration lists to select jurors randomly, and supplements the list with driver's license lists; state identification card holder lists; and other similar lists to be used by order of the court, including, but not limited to, tribal member lists." The court also found that jurors called for trial in the District's Third Division (St. Paul courthouse) and those called for trial in the Fourth Division (Minneapolis courthouse) "are drawn from the same pool." The court ultimately

decided that Reed failed to show that the representation of Black people on the venire was unfair or unreasonable in relation to the number of Black people in the community or that any under-representation was due to systematic exclusion.

Generally, we will reverse the district court's ruling on a Rule 33 motion "only if we find that ruling to be a clear and manifest abuse of discretion." United States v. Amaya, 731 F.3d 761, 764 (8th Cir. 2013) (quoting United States v. Malloy, 614 F.3d 852, 862 (8th Cir. 2010)). But where, as here, a defendant claims that jury selection violated his Sixth Amendment right to a fair cross-section of the community, we review the district court's decision de novo. United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998); see also United States v. Rodriguez, 581 F.3d 775, 789 (8th Cir. 2009) ("Allegations of racial discrimination in jury pools involve mixed questions of law and fact, and receive de novo review.").

The Sixth Amendment entitles a defendant to an "impartial jury drawn from a fair cross-section of the community." Taylor v. Louisiana, 419 U.S. 522, 536 (1975). To establish a prima facie Sixth Amendment violation based on the composition of the jury venire, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

There is no dispute that Black people are a "distinctive" group for purposes of the Duren test. United States v. Womack, 985 F.2d 395, 397 (8th Cir. 1993). To satisfy the second part of the Duren test, Reed must first "demonstrate the percentage

of the community made up of the group alleged to be underrepresented." Duren, 439 U.S. at 364. This number is "the conceptual benchmark for the Sixth Amendment fair-cross-section requirement." Id. Then, Reed must show that the representation of this group in the pool of potential jurors is not fair or reasonable in relation to the percentage of this group in the community. Id. A "gross discrepancy" between the percentage of members from the distinctive group in jury venires and the percentage of the distinctive group in the community will satisfy the second part of the Duren test. Id. at 366.

Reed's claim fails to establish the second part of the Duren test. He did not provide evidence of the racial composition of the jury pool used by the District of Minnesota, or even the composition of the potential jurors called for his trial. Instead, he simply provided the percentage of Minnesota residents as a whole who are Black (6.5%) and argued "there is a perception of racial disparity in voting in Minnesota." At oral argument, the government suggested that Reed could have obtained information about the racial composition of the District's jury pool through a Rule 17 subpoena, see Fed. R. Crim. P. 17, but he did not do so. In short, Reed did not present the district court with the relevant statistics to support his motion, and thus failed to show that Black people are under-represented in the District's pool of potential jurors.[3]

[3]Reed's argument also overlooks the fact that the District does not draw its list of potential jurors solely from the state's voter rolls. Rather, the District supplements its list with "driver's license lists; state identification card holder lists; and other similar lists to be used by order of the court, including, but not limited to, tribal member lists." Therefore, even accepting Reed's claim that there is a racial disparity in the state's list of *voters*, he has not demonstrated any racial disparity in the District's list of potential jurors. See Duren, 439 U.S. at 364; Sanchez, 156 F.3d at 879.

IV.

Reed also challenges the length of his sentence. We review Reed's challenge by first ensuring "that the district court committed no significant procedural error." See United States v. Clayton, 828 F.3d 654, 657 (8th Cir. 2016) (quoting Gall v. United States, 552 U.S. 38, 51 (2007)). We then "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." Id. (quoting Gall, 522 U.S. at 51). "A district court abuses its discretion when it fails to consider a relevant factor, gives significant weight to an irrelevant or improper factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." Id. (quoting United States v. San-Miguel, 634 F.3d 471, 475 (8th Cir. 2011)).

Reed argues the district court improperly relied on the Guidelines' drug conversion tables to calculate his offense level. See U.S. Sent'g Guidelines Manual § 2D1.1, cmt. n.8 (U.S. Sent'g Comm'n 2018). Reed asserts that the tables establish an unreasonably high conversion rate for crack cocaine. They equate one gram of crack cocaine to 3,571 grams of converted drug weight. Id. By contrast, the tables equate one gram of powder cocaine to just 200 grams of converted drug weight. Id. Reed suggests this discrepancy affects Black defendants "at a higher rate."[4]

Sentencing courts are "entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines." Spears v. United States, 555 U.S. 261, 265–66 (2009). But "while a district court may choose to deviate from the guidelines because of a policy disagreement, it is not

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[4]Reed did not offer evidence to the district court to support this claim, and he does not challenge the Guidelines' drug conversion tables under the Equal Protection Clause of the Fourteenth Amendment.

required to do so." United States v. Heim, 941 F.3d 338, 340 (8th Cir. 2019) (cleaned up). "In recent years, numerous defendants have argued on appeal that a district court erred when it refused to vary from a guidelines provision for policy reasons," and we have rejected those challenges. Id.

Reed argued at sentencing that the district court should disregard the Guidelines' drug conversion tables because of their unreasonably harsh treatment of crack cocaine. The court expressly recognized its authority to vary based on a disagreement with the crack cocaine conversion rate but declined to do so. The district court did not err. See United States v. Anderson, 618 F.3d 873, 884 (8th Cir. 2010) ("The district court . . . was aware of its discretion to consider a variance based on the crack/powder disparity and did not abuse its discretion in deciding not to exercise such discretion to grant Anderson's requested variance.").

To the extent Reed argues his sentence is otherwise substantively unreasonable, we disagree. His 240-month sentence is within the Guidelines range of 235 to 293 months, and he has not shown that the district court improperly weighed the sentencing factors. See Clayton, 828 F.3d at 657–58. The court considered Reed's criminal history and the "very significant" offenses for which he was found guilty at trial. It also considered the disparity between his sentence and those of his co-defendants. These are appropriate factors to consider when making a sentencing decision, and the record does not show that the court overlooked any relevant factor. See United States v. Hall, 825 F.3d 373, 375 (8th Cir. 2016).[5]

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[5]Reed mentions a few additional concerns in his opening brief, but he does not meaningfully develop or argue them. Because he provides no basis in law or fact for his cursory assertions of error, we cannot consider the merits of these claims. See United States v. Mshihiri, 816 F.3d 997, 1009 n.5 (8th Cir. 2016); see also United States v. Welch, 811 F.3d 275, 278 n.2 (8th Cir. 2016) ("At no point does [Welch] cite authority, cite to the record, or provide reasoning in support of this argument."); United States v. Warren, 788 F.3d 805, 814–15 (8th Cir. 2015) ("Since Warren has

We affirm the district court's judgment.

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failed to go beyond a cursory assertion of this argument in his opening brief and made no mention of it in his reply brief or at oral argument, we refuse to consider the merits of the issue.").

No. 19-2487

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Respondent,

v.

CLEOPHUS REED, JR.,

Petitioner.

PETITIONER CLEOPHUS REED, JR.'S PETITION FOR REHEARING

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PETITION

Petitioner Cleophus Reed, Jr. respectfully petitions the Court for rehearing of his appeal pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Reed instructed Counsel to petition the Court for rehearing in all respects and he now requests a panel rehearing of the decision filed by this Court on August 25, 2020.

ISSUE I

The Court of Appeals reviewed Mr. Reed's claim of insufficiency of the evidence de novo, evaluating the evidence in the light most favorable to the verdict and drawing all reasonable inferences in its favor. *United States v. Parker*, 871 F.3d 590, 600 (8th Cir. 2017). However, Reed claims he raised several issues within this challenge that the Court did not evaluate properly or should have evaluated in his favor.

ISSUE II

Reed challenged his conviction for possession of a firearm as a felon by arguing the Government failed to connect him to the firearms found in his wife's apartment. Reed disagrees that the trial testimony established he possessed the firearms.

ISSUE III

Reed challenged the jury pool on grounds it was not a fair cross-section of the community because Black were underrepresented. The Court of Appeals rejected the argument, but also determined there was not enough information provided to the Court to make a better evaluation. Reed disagrees and requests another opportunity to explain his position.

ISSUE IV

The Court of Appeals found Reed's sentence was procedurally correct and reasonable under the abuse of discretion standard. Reed disagrees and seeks a renewed opportunity to argue why the drug con version table is improper in his case.

CASE BACKGROUND AND DISPOSITION

Cleophus Reed, Jr. has steadfastly maintained his innocence in the instant case from the very beginning. He was charged with conspiracy to distribute heroin, cocaine and crack, possession with intent to distribute, and possession of a firearm as a felon. A jury trial was held and the jury convicted Reed on all three counts. Reed moved for evidentiary rulings before trial, made objections at trial, and moved for a new trial following the guilty verdicts. He was unsuccessful. Reed then initiated the instant appeal.

Reed's appeal broadly challenged the sufficiency of the evidence for the verdicts, the more specific denial of his motion for new trial, and he complained about the reasonableness of the sentence.

The Court of Appeals conducted a full review of his case and ultimately denied affirmed his convictions and sentence.

ARGUMENT

Reed seeks another chance to argue his case because he continues to maintain his innocence. He instructed Counsel to file this petition and "appeal everything." Reed claims specific objections to evidence from the trial should have been reviewed for plain error even if he argued insufficiency of the evidence on appeal. A defendant's conviction may be reversed, and a new trial granted, only"if the District Court made an error that

(1) is plain; (2) 'affects substantial rights'; and (3) 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *U.S. v. Chappell*, 665 F.3d 1012, 1014 (8th Cir. 2012). Counsel is aware of the standard of review cited by the Court of Appeals. Reed believes the trial was full of error by the Court.

Reed cannot believe the jury could find him guilty of conspiracy or the firearm charge in light of the testimony. He argues all a cooperating witness has to say at trial is something to the effect of "yeah, that's the gun" to put it on him. The fact the cooperating witnesses were all housed in the same jail, and had contact with each another, forces Reed to feel they corroborated their testimony.

In regards to his sentence, he disagrees with the Court's characterization that 240 months is reasonable. Reed argues the drug conversion tables, as applied in his case, are unfair. Whether the District Court has the authority to grant a variance from the guidelines or not doesn't change Reed's belief his sentence is not fair. He respectfully requests the Court to re-examine the application of the drug conversion tables in his case.

BEITO & LENGELING, P.A.

Date: September 5, 2020

By *s/ Robert A. Lengeling*

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2020 I electronically filed the foregoing Petition for Rehearing with the Clerk of Court for the Eighth Circuit Court of Appeals by utilizing the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and service will be accomplished through the CM/ECF system.

s/ Robert A. Lengeling
Robert A. Lengeling, #304165

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-2487

UNITED STATES OF AMERICA,

Appellee,

v.

CLEOPHUS REED, JR.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
HON. NANCY E. BRASEL, U.S. DISTRICT COURT JUDGE

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The Defendant, Cleophus Reed, Jr. (hereinafter referred to as "Reed"), was convicted following a jury trial in the District of Minnesota of Counts I, II, and V of a six count Indictment. Count I alleged Conspiracy to Distribute a Controlled Substance pursuant to 21 U.S.C. §841 (a)(1), 21 U.S.C. §841 (b)(1)(A). Count II alleged Possession with Intent to Distribute a Controlled Substance pursuant to 21 U.S.C. §841 (a)(1) and 21 U.S.C. §841 (b)(1)(A). Count V alleged Possession of a Firearm by a Prohibited Person pursuant to 18 U.S.C. §922 (g)(1) and 18 U.S.C. §924 (a)(2).

The advisory guideline sentencing range according to the (PSR) was 292-365 months. The District Court found the offense level to be 34 with criminal history category V. The Court found the range was 235-293 months. The Court sentenced Reed to 240 months.

Reed moved for a new trial and objected to the entire PSR process because he maintains his innocence. Reed did not cooperate with a PSR interview, and objected to specific sentencing issues through counsel. Counsel reviewed the record and conferred with Reed regarding viable appellate issues. Counsel respectfully submits the instant brief at Reed's instruction.

Reed requests the matter be scheduled for oral argument in order to aid the Court in its decision on Reed's issues. He requests 15 minutes per side.

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The Decision for Appeal: Reed appeals the Judgment following a jury verdict convicting him of Conspiracy to Distribute a Controlled Substance, Possession With Intent to Distribute a Controlled Substance, and Possession of a Firearm by a Prohibited Person. Reed also specifically appeals his sentence.

Jurisdiction of the District Court: The United States District Court had jurisdiction over Reed's federal criminal prosecution pursuant to 18 U.S.C. §3231 (2018), which states: "The district courts of the United States shall have original jurisdiction...of all offenses against the laws of the United States." Reed was indicted on September 27, 2017 alleging violations of 21 U.S.C. §841 and 21 U.S.C. §922, 924.

Jurisdiction of this court: The 8th Circuit Court of Appeals has jurisdiction of the appeal pursuant to 28 U.S.C. §1291 (2018). This is an appeal from a final decision of a district court of the United States.

The jury convicted Reed on February 22, 2019. Reed was sentenced on July 2, 2019, but the Judgment was filed on July 8, 2019. After sentencing, Reed instructed Counsel to file a notice of appeal. Counsel filed the Notice of Appeal on July 12, 2019.

STATEMENT OF THE ISSUES FOR REVIEW

I. WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT REED OF CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCES, POSSESSING WITH INTENT TO DISTRIBUTE, OR POSSESSING FIREARMS.

The Appellant was found guilty by a jury.

Apposite case:
United States v. Ojeda-Estrada, 577 F.3d 871 (8th Cir. 2009)

II. WHETHER THE DISTRICT COURT ERRED IN DENYING REED'S MOTION FOR NEW TRIAL.

The District Court denied Appellant's motion for new trial and issued a memorandum opinion.

Apposite case:
United States v. Johnson, 474 F.3d 1044 (8th Cir. 2007)

III. WHETHER THE DISTRICT COURT'S SENTENCE WAS SUBSTANTIVELY AND PROCEDURALLY UNREASONABLE.

The District Court determined the advisory guideline range and denied Appellant's request for variance, sentencing him to a middle of the range sentence of 240 months.

Apposite case:
Freeman v. United States, 564 U.S. 522 (2011)

STATEMENT OF THE CASE

Nature of the Case: This is a direct appeal by Reed of the District Court's Judgment following a jury trial. Reed appeals the conviction and sentence.

Factual and Procedural Background: On September 27, 2017 an Indictment was filed charging Reed , David Kline, Timothy Dulaney, and Manley Humphries with six counts of drug and firearm crimes. Counts I and II charged Reed with distributing 1 kilogram or more of a mixture or substance containing heroin and 280 grams or more of a mixture or substance containing cocaine base. Count V charged possession of a firearm by a prohibited person. Reed entered a not guilty plea and set about litigating several pre-trial issues.

Reed challenged three search warrants in his case: one for the apartment where he allegedly lived, one for his DNA, and another for his vehicle. DOC #104, 124[1]. The Court denied his motion to suppress. DOC #136, 159. Prior to trial, Reed filed a motion in limine seeking to argue various evidentiary matters and objected to the Government's motion in limine. DOC #193, 216. The Government intended to introduce a handwritten note found in the search of his alleged apartment that was purportedly written by Reed. In the note, the author claimed responsibility for everything in the apartment, but it was not signed. Reed also sought to exclude evidence of a 2012 charge for drug possession that was

[1] Reed will refer to the District Court docket as DOC and the transcript as TR.

dismissed and evidence of threatening statements Reed made in the presence of law enforcement. The Court denied each of Reed's requests. DOC #221.

The matter proceeded to trial on February 19, 2019. DOC #223. The jury convicted Reed on February 22, 2019 after deliberating for several hours. DOC #227. Reed objected during voir dire to the jury panel as not a representative cross-section of the community because the racial makeup of the entire jury appeared to be white. Reed filed a motion for new trial (DOC #237), which the Court denied (DOC #266).

The Government alleges Reed was involved in a sophisticated conspiracy to distribute heroin and cocaine base ("crack") in the Minneapolis area. At trial, the Government called ATF Task Force Officer Adam Lepinski as the first witness. Sergeant Lepinski stated the investigation began with another individual, Jovan Gentle. TR Vol I, p. 184. On May 1, 2017 law enforcement conducted surveillance on Gentle. TR Vol. I, p. 185. Gentle was arrested on May 1, 2017 in Minneapolis after conducting a drug sale and he began cooperating immediately. TR Vol. I, p. 185, 186. Officers previously obtained a search warrant for a house located at 3614 Colfax Ave N in Minneapolis. TR Vol. I, p. 186. Leading up to Gentle's arrest, officers conducted surveillance at the Colfax house. TR Vol. I, p. 186. Officers saw Gentle and co-defendant Timothy Dulaney at the house. TR Vol. I, p. 186-87.

The search warrant was executed at the Colfax house on May1, 2017, which was the same day Gentle was arrested. TR Vol. I, p. 194. The Colfax house appeared to be a stash house. TR Vol. I, p. 194. The search turned up many items, including the following:

Item	TR Vol. I, page
grinder/blender	195
hydraulic jack	195
packaging materials for drug sales	195
respirators and scales	196
3/4 lb. heroin	196, 198-99
handgun holster	212
cutting agents such as Superior Manitol and Inositol powder	213

In addition to what was located in the house, officers impounded a vehicle parked in the back driveway. TR Vol. I, p. 216. The vehicle was later searched pursuant to a search warrant. A tool bag was found in the trunk of the vehicle. TR Vol. I, p. 217. Inside the tool bag was a handgun, approximately 893 g of heroin, and approximately 750 g of crack cocaine. TR Vol. I, p. 217-220. According to Sgt. Lepinski, officers also found a receipt from Total Wine in the vehicle. TR Vol. I, p. 224. Sergeant Lepinski later obtained security camera footage from the Total Wine store and observed co-defendant David Kline on the video. TR Vol.I, p. 225-26. Following the search at the Colfax house, officers then searched Gentle's home in Savage, Minnesota. TR Vol. I, p. 232. A jacket in Gentle's closet yielded $23,000 in cash. TR Vol. I, P. 233.

Sergeant Lepinski went on to testify that by June 6, 2017 his investigation shifted to Dulaney. TR Vol. I, p. 237. He obtained a search warrant for Dulaney's home at 2114 Irving Ave N in Minneapolis. TR Vol. I, p. 237. During execution of the search warrant, officers focused on window wells on the exterior of the home. TR Vol. I, p. 238-39. In the window wells, investigators found a bag of crack cocaine and a bag of heroin. TR Vol.I, p. 239. They also confiscated two handguns. TR Vol. I, p. 240. Inside the Irving house, officers discovered Inositol powder and latex gloves like what was found at the Colfax house. TR Vol. I, p. 241.

Sergeant Lepinski then described the next phase of his investigation. Based on information from Gentle and Dulaney, he obtained a search warrant for 705 Emerson Ave N, Apt. 101. Sergeant Lepinski believed this was Reed's apartment. TR Vol. I, p. 247. Officers executed the search warrant on July 13, 2017 and found the following items:

Item	TR page
photos of Reed's wife	248
documents and mail in Reed's name	249
respirator mask	252
compressor	254-55
digital scale	256
magnetic storage box behind TV	258
latex gloves	260
folder with tax documents and note	282

In addition to the items listed above, investigators found a mug labeled Bubba, which was similar to a mug found at the Colfax house. TR Vol. I, p. 250-51. Sergeant Lepinski testified that the respirator mask was similar to ones found at Colfax. TR Vol. I, p. 253. The compressor was similar to the hydraulic jack found at Colfax, TR Vol. I, p. 255, and Sgt. Lepinski claimed the magnetic box found in the apartment matched a box found at Colfax. TR Vol. I, p. 258.

The folder found in the Emerson apartment contained a handwritten note. TR Vol. II, p. 284. It was not signed, but indicated Reed was responsible for everything in the apartment and Vivian Reed (his wife) had nothing to do it. TR Vol. II, p. 284. Reed challenged whether this note should be offered at trial. DOC # 193. More importantly, officers found an unlocked lock-box in the bedroom of the apartment. TR Vol. I, p. 264. The lock-box held two handguns. TR Vol. I, p. 265. Reed stipulated at trial he was prohibited from possessing firearms.

Sergeant Lepinski continued his testimony and explained his next steps in the investigation. Following the search at the Emerson address, officers continued surveillance at the location. TR Vol. II, p. 290. On July 26, 2017 Sgt. Lepinski observed a minivan he attributed to Reed at the Emerson location. TR Vol. II, p. 290. Officers stopped the van with Reed driving so Sgt. Lepinski could execute a search warrant for a DNA sample from Reed. TR Vol. II, p. 289-92. In the process of taking the DNA sample, Sgt. Lepinski claims Reed struck up a

conversation with him. TR Vol. II, p. 299. Reed said he does not cooperate with police and he made what was perceived by Sgt. Lepinski as threatening statements about informants. TR Vol. II, p. 299-300.

Meanwhile, as Reed was providing DNA, officers searched Reed's minivan. TR Vol. II, p. 301. Officers found a latex glove, TR Vol. II, p. 303, and a cell phone that was subsequently searched. TR Vol. II, p. 308. Reed pointed to photos of the van as it appeared during the search to show he lived out of the van at the time. Text messages found on the phone were shown to the jury.

Sergeant Lepinski concluded his direct examination by testifying about how the investigation then included co-defendant Manley Humphries, who is David Kline's father. TR Vol. II, p. 310, 311. Officers executed a search warrant at Humphries house and found one pound of heroin in the garage. TR Vol. II, p. 312. A van located at the Humphries residence was also searched. TR Vol. II, p. 313. The title for the vehicle was inside the van and showed it was recently sold to Humphries by Reed. TR Vol. II, p. 314.

On cross examination, Sgt. Lepinski agreed the Colfax house was rented by co-defendant Dulaney. TR Vol. II, p. 331. He did not uncover any cellphone calls or texts between Reed and Gentle. TR Vol. II, p. 333. And, law enforcement had not conducted any controlled buys of drugs involving Reed. TR Vol. II, p. 334. Sergeant Lepinski described conducting surveillance on the Colfax house at least

"a couple times" per week prior to the search. TR Vol. II, p. 334. Officers never saw Reed at the Colfax house or Gentle's house. TR Vol. II, p. 334. Further, Sgt. Lepinski admitted there was nothing in the Colfax house that belonged to Reed, such as clothing or documents. TR Vol. II, p. 337.

Upon further cross examination, Sgt. Lepinski testified investigators were unable to obtain any fingerprints from Reed on the presses or scales found at Colfax. TR Vol. II, p. 338. The vehicle outside the Colfax house failed to yield any fingerprints or DNA from Reed. TR Vol. II, p. 339-40. However, Sgt. Lepinski did submit a DNA sample for testing taken from one of the respirators found at Colfax. TR Vol. I, p. 243-45. With regard to Gentle, Sgt. Lepinski stated that Gentle began cooperating immediately upon arrest and Gentle named David Kline as his supplier. TR Vol. II, p. 340-41. In fact, Kline was the "leader of the operation." TR Vol. II, p. 342. According to Sgt. Lepinski, Gentle was trying to bargain with officers right away. TR Vol. II, p. 341.

Sergeant Lepinski admitted he never saw Reed at either the Colfax house or Dulaney's house on Irving Avenue. TR Vol. II, p. 334, 341-42. Reed was likewise never seen by police at the Emerson Avenue apartment building before the search. TR Vol. II, p. 343. When Sgt. Lepinski stopped Reed for the DNA sample and subsequently searched the van, he found no drugs or cash. TR Vol. II, p. 351. No heroin or crack cocaine was found in the Emerson apartment. TR Vol.

II, p. 345. Officers were unable to get any fingerprints attributed to Reed from the lock box that contained the two firearms at the Emerson apartment. TR Vol. II, p. 345.

Sergeant Lepinski agreed on cross examination that when Gentle, Kline, and Dulaney were arrested, they had either cash or drugs or both on their person, but Reed did not when he was detained. TR Vol. II, p. 356. While the investigation was ongoing, Gentle was allowed to remain on the streets because he was not indicted with the others. TR Vol. II, p. 358, 428. He stayed out and continued cooperating until he was arrested in October, 2018. TR Vol. II, p. 358. In reality, Gentle was continuing to sell drugs in 2017 through October 2018. TR Vol. II, p. 428-29.

After Sgt. Lepinski, the Government called several other witnesses. Some of the foundational witnesses provided little by way of controversy. Jovan Gentle testified on the second day of trial. Gentle started off by saying he was appearing as a witness for the Government seeking a break in his sentence for substantial assistance. TR Vol. II, p. 396. Gentle identified David Kline, Timothy Dulaney, and Manley Humphries. TR Vol. II, p. 397-99. He then identified Reed in the courtroom and referred to him as "Chi-town." TR Vol. II, p. 403. Gentle testified Kline and Reed would bring heroin and crack cocaine to the Colfax house. TR Vol. II, p. 404. He claims he saw Reed mix drugs there, TR Vol. II, p. 406, use the

compressor to make bricks, TR Vol. II, p. 407, and wear a respirator mask. TR Vol. II, p. 408. Gentle referred to Reed as their "cook." TR Vol. II, p. 409. He also stated he saw Reed with guns about ten times. TR Vol. II, p. 419-21.

Gentle was asked about the vehicle at the Colfax house, and he testified he saw Reed and others put drugs in the vehicle. TR Vol. II, p. 423. Throughout his testimony and cross examination, Gentle never gave any actual dates of when he saw Reed at Colfax. Gentle didn't say the specific drugs found in the vehicle at Colfax were put there by Reed.

The Government also called Timothy Dulaney. On direct examination, Dulaney admitted he plead guilty to conspiracy and possession with a plea agreement that includes a reduction for substantial assistance. TR Vol. II, p. 451-53. Dulaney identified Reed as Chi-town and said Reed's role was to help prepare drugs, mix, deliver, and sometimes sell, too. TR Vol. II, p. 455-56. Reed always helped Kline in this regard. TR Vol. II, p. 456. At some point in December, 2016 Dulaney alleges he agreed to let Gentle use the Colfax house for drug prep and storage. TR Vol. II, p. 459. He, his co-defendants and Gentle used Colfax for about the next six months. TR Vol. II, p. 463.

Dulaney testified Kline and Reed mixed and compressed drugs at Colfax while wearing gloves and respirators. TR Vol. II, p. 464. Dulaney claims he and Gentle cooked cocaine at Colfax himself. TR Vol. II, p. 466, 483. In contrast to

Gentle's testimony, Dulaney said Reed didn't cook crack cocaine, but he sold it. TR Vol. II, p. 466, 483. Dulaney went on to say that everyone stored drugs in the vehicle parked at Colfax at different times, including Reed. TR Vol. II, p. 470. He also identified a firearm he claims Reed possessed. TR Vol. II, p. 474. However, Dulaney provided no specific dates or when he allegedly observed things happening at Colfax.

Following Dulaney, the Government called ATF Special Agent Bryan Lervoog to describe how he transported Reed to custody. During the transport, Lervoog claims Reed made another comment about informants. TR Vol. II, p. 491.

Next up was Minnesota BCA Forensic Scientist Andrea Feia who testified about DNA testing. Feia told the jury that she tested the DNA sample taken from a respirator mask at Colfax and matched it to the DNA sample taken from Reed by Sgt. Lepinski. TR Vol. III, p. 510. There was no other forensic evidence of note.

Lastly, the Government called Kenneth Mack as a cooperating witness. Mack testified he was appearing as part of a plea agreement and he was trying to provide substantial assistance. TR Vol. III, p. 536. According to Mack, he was dealing drugs in 2015 to 2016, which he got from David Kline. TR Vol. III, p. 539. According to Mack, Reed worked with Kline. TR Vol. III, p. 540. Ultimately, Mack's testimony was short and he admitted he was just trying to

reduce his sentence. TR Vol. III, p. 547. All three cooperating witnesses were housed in the Anoka County Jail.

The Government rested its case and Reed called his wife, Vivian Reed, as his first witness. Ms. Reed testified Reed was not living with her in 2017 and he did not have access to her apartment. TR Vol. III, p. 562-63. She said Reed worked as a cleaner in 2017 and worked with Sheila Kline. TR Vol. III, p. 565-66. She also said David Kline would show up from time to time at the workplace. TR Vol. III, p. 567. Ms. Reed was a combative witness and would not say she ever saw Reed wear a respirator when he was working. TR Vol. III, p. 568-69. She knew Reed not to possess guns and she did not know who placed the firearms in her bedroom. TR Vol. III, p. 581, 583. Ms. Reed believed the police were harassing her husband and when confronted by questions about a search of her apartment in 2012 that turned up drugs, Ms. Reed testified she believed the police planted the evidence. TR Vol. III, p. 587. In other words, she agreed it was a grand conspiracy. TR Vol. III, p. 590-91.

Reed was the last to testify. He confirmed he worked as a cleaner in 2017. TR Vol. III, p. 603. He worked with Sheila Kline, who is David Kline's mother. TR Vol. III, p. 604. Reed knew David Kline from playing chess at the school where the cleaning work was done. TR Vol. III, p. 606. Reed described how Sheila Kline had an office that was more like a janitor's closet at the school where

she kept cleaning supplies. TR Vol. III, p. 608. Reed used a respirator mask in his cleaning work and he testified the masks found at Colfax looked familiar from work. TR Vol. III, p. 608-610.

Reed was as combative a witness as his wife throughout his testimony. He denied ever going to the Colfax house. TR Vol. III, p. 616. He stated he does not know Gentle, Dulaney, or Mack. TR Vol. III, p. 611. He denied his involvement in selling heroin. TR Vol. III, p. 611. He is unfamiliar with the vehicle found at the Colfax house. TR Vol. III, p. 612. Reed testified he never sold drugs to Kenneth Mack. TR Vol. III, p. 612. Reed clearly stated to the jury that the respirators found a Colfax were not his and he adamantly maintained his innocence. TR Vol. III, p. 613-14. Finally, Reed denied any knowledge of the guns found in the Emerson apartment. TR Vol. III, p. 614.

The jury had two questions during deliberations before returning guilty verdicts on Counts I, II, and V.

SUMMARY OF THE ARGUMENT

Reed argues the jury verdict is improper because no reasonable fact-finder would conclude the Government proved each element of the counts against him; the District Court should have granted him a new trial primarily because of his objection to the jury panel; and the sentence imposed by the District Court was unreasonable.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICTS FOR CONSPIRACY, POSSESSION WITH INTENT TO DISTRIBUTE, AND PROHIBITED PERSON IN POSSESSION OF A FIREARM.

Standard of Review: This Court reviews "challenges to the sufficiency of the evidence de novo." *United States v. Johnson*, 745 F.3d 866, 968-69 (8th Cir. 2014). When reviewing the sufficiency of the evidence, [the Court] views the facts in the light most favorable to the verdict, and affirm if any rational [factfinder] could have found the defendant guilty beyond a reasonable doubt. *United States v. Ojeda-Estrada*, 577 F.3d 871, 874 (8th Cir. 2009). Reed instructed Counsel to challenge the verdicts.

The instant case offered a parade of cooperators Reed claims he never met. Jovan Gentle was a heroin dealer who could not stop himself from selling drugs even while working for law enforcement. Timothy Dulaney was willing to implicate Reed straight away if it helped him get a lower sentence. And, Kenneth Mack openly stated on cross examination that he simply wanted to get a reduction in his sentence. Each of these cooperators were housed at the Anoka County Jail at the same time, which created doubt about the veracity of their stories.

Jovan Gentle appeared to be a professional cooperator as he was assisting in more than one case at a time. Yet, for all his willingness to give up Reed, Gentle was unable to provide any real detail about what Reed supposedly did or when he

supposedly did it. Gentle was the original target of law enforcement investigations and he began cooperating as soon as he was arrested. In fact, it appeared he was bargaining right from the start.

Timothy Dulaney's story didn't quite match up with Gentle. According to Dulaney, Reed did not make crack cocaine. Rather, Dulaney and Gentle did that and Reed was out trying to sell it. Gentle spun a tale of Reed mixing and packaging both heroin and crack cocaine, while Dulaney's version of events was different. This discrepancy called into question whether Reed had anything to do with crack cocaine.

Reed's position is that he was friends with Kline and that is how he was drawn in to this plot line. Reed played chess with Kline and worked for Kline's mother. This also gave Kline access to cleaning supplies at his mother's business such as gloves and respirators. Reed's was not surprised there was a DNA sample taken from a respirator at the Colfax house since the respirator was likely brought there by Kline from his the cleaning business. It was entirely possible that Reed transferred DNA to a respirator while working and then Kline simply took the respirator for use in his drug business.

At trial, Sgt. Lepinski admitted he never actually saw Reed at any of the properties he was surveilling. He never saw Reed with any of the co-defendants. There are no cell phone records linking Reed to any co-defendants and Reed was

not apprehended with cash or drugs on him. In fact, when Sgt. Lepinski stopped Reed in July, 2017 to execute his DNA warrant, Reed claimed he was living out of his van and staying in casinos. Not the lifestyle of a person making money from illicit drug sales. More to the point, it corroborates his claim that he was not living in the Emerson apartment when the firearms were discovered there. Vivian Reed testified she had no idea how the guns got there and she testified Reed did not have full access to the apartment.

Reed steadfastly denied having anything to do with Kline's drug business or the firearms that were found. Interestingly, the Government did not call Kline as a witness at trial even though Kline was repeatedly identified as the leader of the organization. Reed was described as Kline's assistant, yet Reed claims he inly interacted with Kline in a friendship context.

The Government referred to Kline's organization as a sophisticated drug ring in its arguments. After reviewing the testimony, especially Reed's, it becomes increasingly obvious that no sophisticated drug ring would want a loose cannon like Reed anywhere near its operations. In light of the loose, vague, and contradictory testimony at trial, Reed respectfully requests the Court to find there was insufficient evidence to convict him of Counts I, II or V.

II. THE DISTRICT ERRED IN DENYING REED'S MOTION FOR NEW TRIAL

Standard of Review: This Court reviews a motion for new trial using an abuse of discretion standard. *see United States v. Johnson*, 474 F.3d 1044, 1050 (8th Cir. 2007); *citing United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002). The jury's verdict must be allowed to stand unless "the evidence weighs heavily enough against the verdict [such] that a miscarriage of justice may have occurred. *Johnson*, 474 F.3d at 1051; *citing United States v. Lacey*, 219 F.3d 779, 783 (8th Cir. 2000).

Reed arrived for the first day of trial suspicious of the entire process. He and his wife previously remarked on several occasions how they felt harassed and singled out by police. Reed's worst fears played out almost immediately as trial began. As the jury pool began filing in and began taking their seats, Reed struggled to find anyone that looked like him. Reed is black/African American and the jury pool was almost entirely white. In fact, the venire panel appeared entirely white. During most of the trial, the only black/African American people in the room were Reed and the cooperating witnesses wearing jail clothes.

Reed objected to the jury panel based on the racial makeup of the panel during voir dire. The Court heard brief argument on the objection outside the presence of the jury, but ultimately overruled the objection. Reed persisted in his objection with a motion for new trial.

Reed is entitled to a jury that represents a "fair cross-section of the community in the district or divisions where the court convenes." *see* Jury Selection Plan, Declaration of Policy, ¶ 3 (2018), mnd.uscourts.gov/Jurors/JurySelectionPlan (pdf). The District Court policy on what constitutes a fair cross-section of the community is found in voter registration lists, driver's license lists, state identification card holders, and and similar lists such as tribal membership. *see Id.*, ¶ (6). The Court uses voter registration lists as the primary source for names of potential jurors and supplements with other lists. *Id.*

The United States Census shows the total population of Minnesota is approximately 5, 611, 179.[2] The population of Minnesota is 84.4% white and 6.5% black/African American.[3] That means there are approximately 364, 726 people in Minnesota that are black/African American as of the latest data. In 2018, the Minnesota Secretary of State reported there were 4, 064, 389 eligible voters in Minnesota. Data regarding how the number of eligible voters in Minnesota breaks down by race is not clear. What is clear is that there is a perception of racial disparity in voting in Minnesota.[4] In the 2012 election, the U.S. Census reported

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[2] The current data is from July 1, 2018. *see* United States Census Bureau, census.gov/quickfacts/Minnesota.
[3] *Id.*
[4] Schultz, David, *Minnesota's Other Racial Disparity: Voting*, minnpost.com, October 24, 2016.

66.9% of black/African American people registered to vote.[5] This is important because the 2012 election was thought to have drawn a larger black/African American voter turnout. If that is the case, the number of black/African American people actually on the voter lists in Minnesota is a small percentage of the overall population. The number of black/African American potential jurors is then also diminished.

In addition, the District of Minnesota is divided into six divisions, which is really four divisions because the first and second divisions are pretermitted. The St. Paul courthouse lies in the third division and comprises a corridor of counties from Chisago to the Iowa border. The dividing line runs approximately along Interstate 35 and goes between Ramsey and Hennepin counties. Reed's case involves criminal activity in North Minneapolis. There are many neighborhoods in North Minneapolis that are predominately black/African American in population as compared to other areas in Minnesota. Reed claims there are cultural differences that could be obvious to some but oblivious to others based on where the person lives.

[5] The U.S. Census page containing this information and cited in the Schultz article is no longer available.

According to the Minnesota Secretary of State's website, the largest populated counties in the third division are Washington, Dakota, Olmsted, and Ramsey. As of March, 2019 the registered voters in these counties are:

Washington	163, 652
Dakota	261, 075
Olmsted	91, 718
Ramsey	313, 429

see Voter Registration Counts, sos.state.mn.us

Meanwhile, Hennepin county alone has 780, 104 registered voters. *Id.* The U.S. Census maps on its website show that the black/African American population is concentrated mainly in the metro area. Reed argues that relying primarily on voter registration rolls within the division framework for potential jurors does not produce a cross-section of the community, much less a fair cross-section. Reed's perspective from his seat at trial was he was often the only black/African American person in the room. While we strive to eliminate bias and implicit bias in the judicial system, it was terrifying to Reed that the jurors had a hard time relating to him. Worse, he feared they would dismiss his testimony outright.

In order to prevail on this issue, Reed must show the group alleged to be excluded is a distinctive group in the community, representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community, and underrepresentation of the group is due to systemic exclusion of the group in the jury selection process. *Duren v.*

Missouri, 439 U.S. 357 (1979); *U.S. v. Rodriguez*, 581 F.3d 775, 790 (8th Cir. 2009). Reed is clearly a member of a distinctive group as a black/African American man. Representation of black/African American people in the jury pool was not in relation to the ratio in the population. And, the system by which we pick juries excludes large numbers of people from the African American population by relying too heavily on voter registration. An unfortunate aspect of life in Minnesota is that there are still communities segregated by race.

Reed's position is embodied almost verbatim in a September 18, 2018 Washington Post opinion article by Radley Balko that provides real data for Reed's objections. *ref.* Balko, Radley, "There's overwhelming evidence that the criminal justice system us racist. Here's the proof." *The Washington Post*, (online, Sept. 18, 2018) (www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?utm_term=.16bb92911ebc). In the article, the author analyzed several studies on diverse justice-related topics. According to the article, there is a pervasive problem with racial disparity at all stages of criminal proceedings.

The problem has historical roots in Minnesota that have lasting effects to this day. In the week before Reed's sentencing, the Governor of Minnesota signed a law that finally allows homeowners to denounce restrictive racial covenants on their land titles. *see* News Release,

www.house.leg.state.mn.us/members/profile/news/10126/25602 (RELEASE: Gov. Walz signs into law Rep. Jim Davnie's bill to allow Minnesota homeowners to denounce racial covenants on home titles.) The history of Minneapolis shows tactics like racial covenants and restrictive neighborhoods had the effect of concentrating people of color into defined areas of the city. These neighborhoods often did not enjoy economic growth in the same way as other areas. In time, tough policing focused on neighborhoods like North Minneapolis where the population has a much higher percentage of African Americans. Statistically, black men and women have more police encounters and are more likely to be prosecuted with longer sentences. Balko, *ibid.* Reed argues all of this is inherently unfair and is the backdrop for his case. Yet the jury chosen to judge him appeared to him to lack any diversity at all.

Reed claims that living in his neighborhood put him in proximity to people committing crimes, but it does not mean he is involved. He maintains he did not receive a fair trial because of the jury panel issue, but also because the Court allowed the Government to introduce evidence that was overwhelmingly prejudicial. The 404 (b) evidence of his 2012 dismissed case, the handwritten note of unknown origin, and the statements to police about CRIs all contributed to what he describes as a character attack that prejudiced the jury against him. He also argues that Kenneth Mack should not have been allowed to testify since the

testimony he provided was not charged in the Indictment. There was no corroboration to Mack's testimony and he ultimately showed himself to not be credible.

The handwritten note was unsigned and could not be corroborated. The Government no expert testimony as to the handwriting and there were no samples to compare the note to for authentication. The Government referenced a 2012 case in Minnesota state court charging Reed with drug possession that was ultimately dismissed. Between that evidence and Kenneth Mack's unrelated allegations, Reed argues he was unable to shake off the attack on his character.

Reed asks the Court to vacate the judgment and grant his request for a new trial. He would also ask that the matter be docketed in division four so he has a better chance of picking a jury of his peers.

III. THE DISTRICT COURT'S SENTENCE WAS SUBSTANTIVELY AND PROCEDURALLY UNREASONABLE.

Standard of Review: This Court reviews the reasonableness of the sentence by first ensuring "that the district court committed no significant procedural error." *United States v. Clayton*, 828 F.3d 654, 657 (8th Cir. 2016); *citing Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007). We then "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.*

Reed argues his sentence was longer than necessary because the District Court improperly relied on the drug conversion tables. In Reed's case, the drug conversion tables create a disparity between crack cocaine and powder cocaine. Reed objected to the guideline calculation in the PSR, arguing the disparity in treatment of crack versus powder cocaine was plain wrong. Reed also objected at the sentencing hearing that the announced sentence was not reasonable. The Court overruled the objections and sentenced Reed to the middle of the advisory guideline range (240 months).

Reed complains the drug conversion table in U.S.S.G. §2D1.1 establishes an unreasonably high conversion for cocaine base. It equates 1 gram of crack cocaine to 3,571 grams, which amplifies the actual crack cocaine amount. A gram of powder cocaine is treated as 200 grams on the conversion table. This conversion difference perpetuates the disparity that existed with regard to crack versus powder cocaine cases before *Kimbrough v. United States,* 552 U.S. 85, 128 S.Ct. 558 (2007), *Spears v. United States,* 555 U.S. 261, 129 S.Ct. 840 (2009), and the Fair Sentencing Act.

According to the drug quantity table in §2D1.1 (c), the amount of heroin and crack cocaine found by the jury at trial results in the same base offense level. In this case, the PSR lists 1,202.3 grams of heroin and 751.9 grams of crack. On the drug quantity table, both amounts would be a base offense level 30. Reed argues

there is no reason to employ a drug conversion table in his case other than to arbitrarily enhance the base offense level. The drugs the jury convicted him of are the same offense level and should not be converted even though they are different drugs.

The drug conversion tables started out as the Drug Equivalency Table in the 1991 guidelines. At that time, there was a 100:1 ratio for cocaine base versus powder cocaine. Leaping forward to 2018, the newly minted Drug Conversion Table maintains a difference between cocaine base and powder cocaine, but at a different rate. Reed argues the nefarious effect is the same as the previous disparity in the drug quantity table. According to the U.S.S.G. crack cocaine topic on its website, in 2018 the percentage of crack cocaine traffickers that were men was 92.4%. The percentage of these defendants that were black was 80%. By employing different conversion standards for converted drug weights, the guidelines are again impacting black defendants at a higher rate.

Reed claims his guideline range should have been no more than level 32 in criminal history category V, making his advisory guideline range 188-235. That is a significant difference in potential range.

This Court has outlined the sentencing methodology:

> The district court should begin "by correctly calculating the applicable Guidelines range." "[T]he Guidelines should be the starting point and the initial benchmark, but the Guidelines are not the only consideration." The district judge should allow "both parties an opportunity to argue for

> whatever sentence they deem appropriate," and then should consider all of the §3553 (a) factors to determine whether they support the sentence requested by a party."
> *United States v. Hill*, 552 F.3d 686, 691 (8th Cir. 2009) (quoting *Gall v. United States*, 552 U.S. 38, 49-50, 128 S.Ct. 586 (2007)).

The courts should "continue to engage in the three-step process of first ascertaining the applicable Guidelines range, then considering any permissible departures within the Guidelines's structure, and finally, deciding whether a non-Guidelines sentence would be more appropriate under the circumstances pursuant to §3553 (a). *United States v. Washington*, 515 F.3d 861, 866 (8th Cir. 2008). A district court has an independent obligation to exercise its discretion to craft a sentence that is sufficient, but not greater than necessary, to achieve the goals of §3553 (a). *Freeman v. United States*, 564 U.S. 522, 131 S.Ct. 2685, 2692 (2011).

Even if the Court determined there is no policy disagreement with the drug conversion table, the District Court could still vary from the guideline range using the factors in 18 U.S.C. §3553 (a) to account for the unfair application of the conversion to Reed. "The district court has wide latitude to weigh the §3553 (a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence." *Clayton*, 828 F.3d at 658; *citing United States v. Bridges*, 569 F.3d 374, 379 (8th Cir. 2009). While Reed appreciates the District Court's willingness to overrule the enhancement for maintaining a

premises for drug sales, he still ended up with a sentence that he feels was arbitrarily set at 240 months.

CONCLUSION

In light of the reasons argued herein, Cleophus Reed, Jr. respectfully asks this Court to vacate the Judgment and order a new trial or re-sentencing because the evidence was insufficient to support the conviction, the District Court should have ordered a new trial, and because the sentence was unreasonable.

BEITO & LENGELING, P.A.

Date: October 14, 2019

By *s/ Robert A. Lengeling*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,649 words, including footnotes, endnotes and headers, and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief further complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Word in 14 point Baskerville font.

BEITO & LENGELING, P.A.

Date: October 14, 2019

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CERTIFICATE RE: VIRUS FREE

Pursuant to Rule 28A (h)(2) of the Eighth Circuit Rules of Appellate Procedure, the undersigned counsel for Appellant Cleophus Reed, Jr. certifies that the Appellant's brief has been scanned for viruses and is free from such computer viruses.

Date: October 14, 2019

s/ Robert A. Lengeling

Robert A. Lengeling, MN ID# 304165

Gmail

Vivian <dvc2414@gmail.com>

Tampering with mail

1 message

Vivian <dvc2414@gmail.com> Tue, Jan 5, 2021 at 12:45 PM
To: NCRO/ExecAssistant@bop.gov

Afternoon,

I'm writing in reference to the unethical, and criminal handling of mail at FCI PEKIN.

This letter is concerning Cleophus Reed Jr-21513041 and his mail and property.

Mr. Reed has not exhausted his remaining remedies in court. He has been experiencing undue delays and interferes concerning legal documents. We have proof and evidence of what we mailed to the prison and yet Mr. Reed has yet to retrieve it.

This tampering with his legal mail is against the law and against his constitutional rights. We are prepared to file an official complaint against the public officials responsible for causing an unreasonable breach of duty and negligence towards Cleophus Reed Jr-21513041.

I'm asking that this department and agency would investigate further on this matter as soon as possible to determine the whereabouts of all his legal mail so that he can continue his business in court which is afforded to him by the constitution of the United States.

This delay will be duly noted to the court for reference.

Sincerely,
Vivian Reed

Gmail

Vivian <dvc2414@gmail.com>

Pekin federal prison

1 message

Vivian <dvc2414@gmail.com> Mon, Dec 28, 2020 at 9:12 PM
To: NCRO/ExecAssistant@bop.gov

I'm writing in reference to my husband. Cleophus Reed Jr-21513041. He is at Pekin FCI.

He has not be given access to his mail.
I appreciate the executive response to the administration and the workers at the prison in investigating why this is.

I have been unable to reach anyone of authority at the prison to give me an answer since my inquiries began in November.

I really hope that this agency would consider my complaint and petition seriously.

I understand this is the holiday season and it's possible people are on leave.

Respectfully investigate why my husband has been unable to receive his legal mail.

Thank you for your time,
Vivian Reed

Gmail

Vivian <dvc2414@gmail.com>

PEKIN

1 message

Vivian <dvc2414@gmail.com> Mon, Dec 21, 2020 at 3:07 PM
To: NCRO/ExecAssistant@bop.gov

Afternoon

THIS IS IN REFERENCE TO CLEOPHUS REED JR 21513041.

THE ADMINISTRATION TEAM IS NEVER AVAILABLE FOR MATTERS PERTAINING TO THE LEGAL SERVICES OF THE INMATES. I'VE CALLED SEVERAL TIMES TO DO A WELLNESS CHECK FOR MY HUSBAND WHO TESTED POSITIVE FOR COVID-19. I HAVEN'T HEARD ANYTHING ABOUT HIS HEALTH AND HE'S BEEN IN ISOLATION FOR 23 DAYS.

I WILL FILE A CAUSE OF ACTION FOR NEGLIGENCE AND ANYTHING RELEVANT AND WITHIN MY RIGHTS. IF THIS ISN'T RESOLVED.

I'VE ALREADY WENT TO THE PRESS ABOUT NOT RECEIVING INFORMATION ABOUT HIS STATUS AND HEALTH.

Gmail **Vivian <dvc2414@gmail.com>**

Law Library complaint

1 message

Vivian <dvc2414@gmail.com> Wed, Oct 14, 2020 at 12:22 PM
To: NCRO/ExecAssistant@bop.gov

Good afternoon,

This is in reference to Cleophus Reed 21513041 at FCI PEKIN

The staff at the law library are procrastinating with his request for two forms:

1. Writ of certiorari application/form and;
2. Pauperis form

He has been requesting these forms for weeks and according to federal criminal procedures he has a limited amount of time to submit petitions to the court.

Infringement of these rights are against the law and this agency is required to resolve these disputes with the staff at the prison.

I will personally bring a cause of action against the BOP if Mr. Reed is unable to procure legal materials to Shepardize his case in a reasonable and timely manner.

Thank you,
Vivian Reed