

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO. \_\_\_\_\_

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MARQUES SMITH,

PETITIONER,

“vs.”

UNITED STATES OF AMERICA,

RESPONDENT.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## APPENDIX

Appendix A	Eighth Circuit Opinion and Judgment
Appendix B	District Court Order Deny Motion for New Trial
Appendix C	District Court Judgment
Appendix D	United States District Court, District of South Dakota, Amended Standing Order 16-04

**United States Court of Appeals**  
**For the Eighth Circuit**

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No. 20-1245

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United States of America

*Plaintiff - Appellee*

v.

Marques Smith, also known as CC

*Defendant - Appellant*

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Appeal from United States District Court  
for the District of South Dakota - Pierre

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Submitted: December 15, 2020

Filed: July 20, 2021

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Before GRUENDER, ERICKSON, and KOBES, Circuit Judges.

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KOBES, Circuit Judge.

A jury convicted Marques Smith for conspiracy to distribute a controlled substance. We affirm the district court's<sup>1</sup> denial of his motion for judgment of acquittal.

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<sup>1</sup>The Honorable Roberto A. Lange, Chief Judge, United States District Court for the District of South Dakota.

I.

Smith was indicted for conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). The Government filed a superseding indictment and information alleging Smith had a prior conviction for a serious drug felony. Smith decided to go to trial.

A.

Smith tried to prevent the Government from offering evidence that he trafficked synthetic marijuana and that he possessed a firearm. The district court admitted the evidence, finding the drug trafficking and firearm possession were intrinsic to the conspiracy.

The day before trial, the Government gave Smith a “document dump” that included hundreds of pages of witness statements. Smith says that many of the documents had information he had not seen before. The Government says it followed the district court’s discovery order and timely released previously redacted discovery, but the only differences between what he received earlier and what he received the day before trial were personal identifiers (*e.g.*, social security numbers) and information about unrelated investigations. According to the Government, names of witnesses were never redacted. Neither redacted nor unredacted documents are in the record on appeal.

Smith argues he was unable to fully review the document dump before trial because of a district court Standing Order. The Standing Order bars counsel from leaving copies of sealed or restricted documents with a criminal defendant in custody:

Federal court officers or employees (including probation officers and federal public defender staff), retained counsel, appointed CJA panel attorneys, and any other person in an attorney-client relationship with a detained or incarcerated person may, consistent with this order, review any sealed or restricted portions of the file with their client, but may not provide copies to the defendant.

United States District Court, District of South Dakota, Amended Standing Order 16-04.6.

At the pretrial conference, Smith's lawyer asked to leave the documents with Smith. The court refused because it was concerned cooperating witnesses could be housed in the same jail. Counsel then asked if the documents could be left in a visitation room for Smith to review. The district judge said this would be okay if the jail allowed it. The jail refused, and counsel did not review the unredacted discovery with Smith before trial.

Smith never objected that the Standing Order violated the Constitution or the Federal Rules of Criminal Procedure. Nor did he move for a continuance after his requests were refused.

B.

Sara Pray, who met Smith in 2011, was the first witness at trial.<sup>2</sup> Smith gave Pray methamphetamine within a month of meeting her. For the next six years, they distributed methamphetamine together. Pray saw multiple people pay Smith for methamphetamine using cash and, in one case, a silver handgun. According to Pray, Smith had methamphetamine "every time [she] was around him." Trial Tr. 23.

Pray also testified that she went on multiple trips with Smith to get methamphetamine. Each time, they purchased multiple ounces of

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<sup>2</sup>While Smith disputes the reliability of much of the evidence presented at trial, we describe the case the jury heard at trial.

methamphetamine, including two trips when they purchased one and two pounds of methamphetamine, respectively. Pray also testified that Smith would pick up marijuana in Colorado Springs.

Smith's other distributors also testified. Brooke Shields (not that Brooke Shields) met Smith in 2015. Over two years, she sold half a pound of methamphetamine for Smith. Shields knew Smith usually had an ounce of methamphetamine with him.

Ashley Ross also sold methamphetamine for Smith. After her main source of methamphetamine was cut off, Ross made between \$1,000 and \$3,000 selling for Smith. Ross also saw Smith sell methamphetamine to "[a]t least 15" others. Trial Tr. 86.

Several direct and downstream purchasers also testified. Shanna St. Cloud said she purchased methamphetamine from one of Smith's intermediaries. Franki Zephier testified she accepted methamphetamine from Smith as a form of rent payment. Merle Seeking Land said he purchased methamphetamine directly from Smith.

Members of Smith's sales network also testified about synthetic marijuana. Pray and Ross testified that they saw Smith selling synthetic marijuana and Shields said she purchased synthetic marijuana from Smith.

A few of the witnesses also testified that Smith possessed firearms. In addition to seeing Smith trade methamphetamine for a firearm, Pray saw Smith with a gun several other times. Zephier once saw a gun through Smith's shirt and pants. Seeking Land saw Smith with two handgun magazines when he bought methamphetamine from him.

C.

The jury convicted Smith of conspiracy to distribute more than 500 grams of methamphetamine. Smith filed a motion for a judgment of acquittal, or in the alternative, for a new trial, arguing there was insufficient evidence and that the evidence of marijuana trafficking and firearm possession were improperly admitted. The district court denied the motion and sentenced him to 235 months in prison, followed by 10 years of supervised release. This appeal followed.

II.

Smith first argues that the district court erred by admitting evidence he possessed guns and trafficked synthetic marijuana because it was unlawful propensity evidence under Federal Rule of Evidence 404(b). We review a district court's decision to admit Rule 404(b) evidence for an abuse of discretion and will reverse "only when the evidence clearly had no bearing on the case and was introduced solely to show defendant's propensity to engage in criminal misconduct." *United States v. Young*, 753 F.3d 757, 767 (8th Cir. 2014) (citation omitted).

Rule 404(b)(1) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." "Rule 404(b) applies only to extrinsic, not intrinsic, evidence." *Young*, 753 F.3d at 770. "Evidence of other wrongful conduct is considered intrinsic when it is offered for the purpose of providing the context in which the charged crime occurred." *Id.* (citation omitted). That is, intrinsic evidence "completes the story or provides a total picture of the charged crime." *Id.* (citation omitted).

We first address the guns, then the evidence of Smith's trafficking synthetic marijuana.

A.

Smith argues that the district court abused its discretion by permitting testimony that he possessed firearms. The district court found the evidence was intrinsic. We agree. “Weapons are key tools in the drug trade and can be evidence of a drug conspiracy.” *United States v. Dierling*, 131 F.3d 722, 732 (8th Cir. 1997). Smith argues that the tools-of-the-drug-trade analysis doesn’t work here because the guns were not closely tied to Smith’s alleged drug conspiracy. But a firearm’s proximity to drugs is an avenue to admissibility at trial. *See United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010) (“Firearms may be probative of an ongoing drug conspiracy, especially when they are found in close proximity to drugs.”).

At trial, Merle Seeking Land testified that he saw Smith with an ammunition magazine when he bought methamphetamine. Sara Pray also testified that she saw Smith trade methamphetamine for a gun. This testimony closely tied the firearm possession to the drugs, so we find no abuse of discretion in admitting the firearm as intrinsic evidence.<sup>3</sup>

B.

Smith next argues that the district court abused its discretion by admitting evidence that he trafficked synthetic marijuana. Smith asks us to follow a decision from the Seventh Circuit holding that Rule 404(b) evidence may not be used for identification purposes where it masquerades as pure propensity evidence. *United States v. Gomez*, 763 F.3d 845, 863 (7th Cir. 2014) (en banc). *Gomez* involved a conspiracy to distribute cocaine. Prior to trial, the district court admitted evidence of a small amount of cocaine found in the defendant’s bedroom to show that he was attached to a pseudonym involved in a cocaine dealing conspiracy, despite no

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<sup>3</sup>Because Smith traded methamphetamine for a firearm, the testimony about Smith’s firearm ownership was also direct evidence of distribution.



evidence that the cocaine in the bedroom was the product of the conspiracy. *Id.* at 852. Because there was no evidence linking the cocaine found in the bedroom to the cocaine distributed by the conspiracy, the court found that the cocaine was used as improper propensity evidence to show that because the defendant owned cocaine, he was also distributing cocaine. *Id.* at 863.

*Gomez* is a different case: there was no evidence tying the cocaine to the conspiracy. Here, the evidence of the marijuana trafficking was contemporaneous and intertwined with the conspiracy to distribute methamphetamine. Indeed, the Seventh Circuit suggested that it would be permissible to admit the evidence under circumstances like this. *See id.*

In *United States v. Thomas*, we held that a defendant's distribution of crack cocaine was intrinsic evidence where it was "blended or connected" to the underlying charge of heroin distribution. 760 F.3d 879, 884–85 (8th Cir. 2014) (citation omitted). Members of the conspiracy testified that they bought both crack and heroin from the defendant. *Id.* The same is true here. Smith's downstream and midstream customers testified to buying both methamphetamine and synthetic marijuana. We find no abuse of discretion in admitting the evidence of synthetic marijuana trafficking as intrinsic to his methamphetamine distribution.

### III.

Smith next challenges the district court's denial of his request to review the sealed discovery without counsel supervision. He makes two arguments. First, he claims that the district court's Standing Order violates Federal Rule of Criminal Procedure 16(d)(1). Second, he says that the rule and timing of the unredacted disclosure violated his Sixth Amendment right to cross-examination and that he was materially prejudiced because he was unable to prepare for cross-examining witnesses at trial.

A.

Smith's first argument fails on its own terms. Smith claims that the district court's Standing Order violates Rule 16(d)(1), which he says provides that "[u]pon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred." Smith Br. 27 (alteration in original). According to Smith, the Standing Order flouts the "sufficient showing" requirement.

But Rule 16(d)(1) does *not* have a "sufficient showing" requirement. Instead, it says only that "[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1). So the Standing Order does not run afoul of Rule 16(d)(1).

B.

Smith next argues that the Standing Order, combined with the timing of the disclosure, violated his Sixth Amendment right to cross-examination. Smith did not make this argument to the district court, nor did he request a continuance, so we review for plain error. *See United States v. Clarke*, 564 F.3d 949, 957 (8th Cir. 2009). To show plain error, Smith must show that (1) the district court committed an error; (2) the error is plain; and (3) the error affects his substantial rights. *See United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020). Assuming the first three prongs are met, "[w]e will exercise our discretion to correct such an error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (citation omitted). Smith bears the burden of establishing all four prongs of plain-error review. *See United States v. Barthman*, 919 F.3d 1118, 1121 (8th Cir. 2019).

On the record before us, Smith cannot show any purported error affected his substantial rights. The Government contends that Smith received all necessary discovery a week before trial. Smith says that is not true. Neither the redacted nor unredacted witness statements are part of the appellate record, nor can we find them

in the district court's docket. *See* Smith Add. (only including final judgment, one-page order requiring discovery in compliance with standing order, and minute order granting in part and denying in part motion *in limine*); D. Ct. Dkt. 94 (appeals record transmitted to court of appeals only including sentencing documents, transcripts of pretrial conference and jury trial, and jury trial exhibits). We have no basis for judging the degree of prejudice—if any. *Cf. Rodgers v. City of Des Moines*, 435 F.3d 904, 908 (8th Cir. 2006) (“Without some guidance, we will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments.”). Smith therefore did not meet his burden of showing plain error.

#### IV.

Smith's final argument is that there was insufficient evidence to support his conviction for conspiracy to distribute methamphetamine. We review challenges to the sufficiency of the evidence *de novo*. *United States v. Johnson*, 745 F.3d 866, 868–69 (8th Cir. 2014). “We view the evidence in the light most favorable to the guilty verdict, granting all reasonable inferences that are supported by that evidence.” *United States v. Sullivan*, 714 F.3d 1104, 1107 (8th Cir. 2013) (citation omitted). “We will reverse a conviction only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt.” *Id.* (citation omitted).

Smith says the Government did not show an agreement or common understanding necessary to sustain a conspiracy conviction. “To establish that a defendant conspired to distribute drugs under 21 U.S.C. § 846, the government must prove: (1) that there was a conspiracy, i.e., an agreement to distribute the drugs; (2) that the defendant knew of the conspiracy; and (3) that the defendant intentionally joined the conspiracy.” *United States v. Rolon-Ramos*, 502 F.3d 750, 754 (8th Cir. 2007) (citation omitted).<sup>4</sup> “In a drug conspiracy case, . . . the government is not required to present direct evidence of an explicit agreement; juries may rely upon

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<sup>4</sup>Smith was charged with, and convicted of, conspiracy to distribute more than 500 grams of methamphetamine. He does not argue that the evidence is insufficient as to quantity.

circumstantial evidence to discern a tacit agreement or understanding between the co-conspirators.” *United States v. Hodge*, 594 F.3d 614, 618 (8th Cir. 2010).

There was plenty of evidence to show a conspiracy. At trial, the Government brought forward many witnesses who testified about working with Smith at various links in his drug distribution chain. Pray testified that she made multiple trips with Smith to Kansas City and Colorado Springs to acquire methamphetamine from Smith’s distributors. Pray also testified that she distributed methamphetamine with Smith for six years. Shields testified that she sold about half of a pound of methamphetamine for Smith. Ross similarly testified to distributing methamphetamine for Smith, and St. Cloud testified that she purchased methamphetamine from Smith’s distributors. These relationships existed over a prolonged period, and a reasonable jury could find a methamphetamine distribution model agreed to by at least one of these participants.

Smith challenges the reliability of these witnesses because they were impeached at trial. But in reviewing the sufficiency of the evidence, “[i]t is axiomatic that we do not pass upon the credibility of witnesses or the weight to be given their testimony.” *United States v. Clay*, 618 F.3d 946, 950 (8th Cir. 2010) (citation omitted). “Credibility determinations are uniquely within the province of the trier of fact, and are entitled to special deference.” *United States v. Goodale*, 738 F.3d 917, 923 (8th Cir. 2013) (citation omitted). We see no reason to upset the jury’s credibility determinations here.

V.

The judgment of the district court is affirmed.

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**United States Court of Appeals**  
***For The Eighth Circuit***  
Thomas F. Eagleton U.S. Courthouse  
111 South 10th Street, Room 24.329  
**St. Louis, Missouri 63102**

**Michael E. Gans**  
***Clerk of Court***

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July 20, 2021

Mr. John Stephen Rusch  
RENSCH LAW OFFICE  
P.O. Box 8311  
Rapid City, SD 57709-0000

RE: 20-1245 United States v. Marques Smith

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans  
Clerk of Court

NDG

Enclosure(s)

cc: Mr. Cameron J. Cook  
Marques Smith  
Mr. Matthew W. Thelen

District Court/Agency Case Number(s): 3:19-cr-30045-RAL-1

**United States Court of Appeals**  
***For The Eighth Circuit***  
Thomas F. Eagleton U.S. Courthouse  
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July 20, 2021

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RE: 20-1245 United States v. Marques Smith

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant and appeared on the brief was John Stephen Rusch, of Rapid City, SD.

Counsel who presented argument on behalf of the appellee and appeared on the brief was Cameron J. Cook, AUSA, of Pierre, SD.

The judge who heard the case in the district court was Honorable Roberto A. Lange. The judgment of the district court was entered on January 30, 2020.

If you have any questions concerning this case, please call this office.

Michael E. Gans  
Clerk of Court

NDG

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 3:19-cr-30045-RAL-1

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

UNITED STATES OF AMERICA,  Plaintiff,  vs.  MARQUES SMITH, a/k/a CC,  Defendant.	<b>3:19-CR-30045-RAL</b>  <b>OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR ACQUITTAL AND ALTERNATIVE MOTION FOR NEW TRIAL</b>
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Defendant Marques Smith, a/k/a CC, (Smith) was indicted on a single count of conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance. Smith pleaded not guilty, and this Court conducted a jury trial beginning on October 22, 2019, and ending on October 24, 2019. The jury unanimously found Smith guilty of the crime charged.

Following the guilty verdict, Smith, through counsel, filed a motion for judgment of acquittal or in the alternative, a motion for a new trial. Smith first argues that the government failed to prove a conspiracy because it did not present evidence that Smith entered into an agreement with another person. Alternatively, Smith argues that he should be granted a new trial because this Court allowed testimony of his alleged sale of synthetic marijuana and his alleged possession of a firearm, which Smith argues is irrelevant to the crime charged and highly prejudicial. For the reasons that follow, this Court denies Smith's motion.

**I. SUMMARY OF FACTS FROM JURY TRIAL**



Smith was convicted of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine in the District of South Dakota. At trial, much of the evidence against Smith came from individuals who received methamphetamine from Smith in central or southern South Dakota or from those who travelled with Smith to pick up methamphetamine from his suppliers. Smith testified at his trial and provided personal background information as well as explanations about several incidents in which law enforcement arrested him in possession of methamphetamine.

Sarah Pray testified that she met Smith in 2011 in Fort Thompson, South Dakota, started dealing methamphetamine for and with him in 2011, and continued doing so until her incarceration in 2017. Pray developed a close relationship with Smith and considered him to be “a good man.” She testified that Smith had methamphetamine on him, typically in his pants, whenever he was around, and the most she saw him with at one time was three to four ounces.<sup>1</sup> Smith is not from central South Dakota, but would travel to Fort Thompson on the Crow Creek Sioux Indian Reservation to sell methamphetamine out of a home there. Smith also sold methamphetamine on the nearby Lower Brule Indian Reservation and on the Rosebud Indian Reservation from Franki Zephier’s home. Pray saw Smith provide methamphetamine to many people and recalled a specific instance in which she pooled money with Smith to buy two eight-balls<sup>2</sup> of methamphetamine.

According to Pray, Smith’s main supplier of methamphetamine was an individual she knew as “Shrimp.” In 2016 or 2017, Pray and Smith picked Shrimp up in Omaha, Nebraska, and drove him to Sioux Falls, South Dakota. On that trip, Shrimp had a duffle bag containing clothes and a couple pounds of methamphetamine.

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<sup>1</sup> Three to four ounces of methamphetamine is approximately 85 to 113.4 grams.

<sup>2</sup> An “eight-ball” is a term commonly used in the drug culture, specifically for the distribution of methamphetamine. It refers to a quantity of methamphetamine equal to approximately 3.5 grams.



Pray testified about several other trips with Smith to obtain methamphetamine. She took ten to fifteen trips to Kansas City with Smith to acquire methamphetamine from one of Smith's relatives during 2015 and 2016. She testified that on each trip Smith would receive a couple of ounces of methamphetamine. Pray went on a few trips with Smith to Colorado Springs where he would receive a couple of ounces of methamphetamine from relatives each time, and where he once received a pound of methamphetamine from a friend. According to Pray's testimony, Smith also obtained marijuana and synthetic marijuana known as "Pandy," and sold that as well. Pray took a trip with Smith to Minneapolis, Minnesota, where he received a couple of ounces from someone at the Mall of America. Pray also described a couple of trips with Smith to Grand Island, Nebraska, to receive methamphetamine from a Hispanic male whose nickname was "Unc."

Pray testified that Vincent Battese purchased methamphetamine in substantial quantities from Smith and that Samantha Dolezal also received methamphetamine from Smith. Pray named others as having purchased methamphetamine from Smith. Pray knew users of methamphetamine and brought individuals to Smith to buy from him. Smith then provided methamphetamine free to Pray for her personal use. Pray saw Clinton Haukaas give Smith a gun for methamphetamine in 2016.

Franki Zephier met Smith, whom she knew as CC, through her brother Clinton Haukaas. Zephier between 2014 and 2016 allowed Smith to stay at her home in Rosebud, South Dakota, about five times in exchange for money and methamphetamine. Pray accompanied Smith and stayed in Zephier's home with Smith during some visits. Zephier also testified that she saw what appeared to be a handgun in Smith's waistband, though it was hidden by his shirt and pants.

Ashley Ross testified that although she primarily dealt methamphetamine for a rival dealer, Frank Adams, she received methamphetamine from Smith, whom she knew as CC, a few times in

2016 in Fort Thompson. Ross estimated that she made \$1,000 to \$3,000 on the methamphetamine provided by Smith. Ross recalled seeing about 15 people getting methamphetamine from Smith. Ross also testified that she received synthetic marijuana from Smith and that she saw others get it from him as well.

Shanna St. Cloud testified that she met Smith, whom she knew as CC, in 2013. She said she met him then because she used to smoke synthetic marijuana, but she never received synthetic marijuana from him. St. Cloud likewise never received methamphetamine directly from Smith, but was with Jessica Coleman when she received a "ball"<sup>3</sup> of methamphetamine from Smith at his apartment in Sioux Falls. St. Cloud also received methamphetamine from Brooke Shields who said her source was Smith.

Merle Seeking Land testified that he had dealings with Smith, whom he knew as CC, between November 2013 and March 2014. Seeking Land met Smith at a home in Fort Thompson and saw him between four and seven times. Seeking Land received methamphetamine from Smith on two or three occasions in Fort Thompson. At Ivy Head's home in Fort Thompson, Seeking Land saw Smith weighing and bagging methamphetamine. At Luke Wells's residence in Fort Thompson, Smith fronted<sup>4</sup> Seeking Land an eight-ball of methamphetamine. Seeking Land also obtained methamphetamine from Smith in the parking lot of an apartment building in Sioux Falls. On that occasion, Seeking Land paid Smith from the prior front, received five or six more grams of methamphetamine, observed clips of handgun ammunition in Smith's vehicle, and saw a

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<sup>3</sup> A "ball" is a reference to an eight-ball.

<sup>4</sup> In the drug culture, "fronting" is a method of drug distribution in which the supplier gives a seller a distributable quantity of the drug with the promise that the person will pay for it after the drug has been sold to others.

Tupperware container in Smith's vehicle which Seeking Land estimated to contain 20 to 30 eight-balls<sup>5</sup> of methamphetamine in baggies.

Brooke Shields testified that Sarah Pray introduced her to Smith in 2015 at the Ivy Head home in Fort Thompson, and that she sold methamphetamine for Smith between 2015 and 2017. Shields estimated that she sold about one-half pound of methamphetamine<sup>6</sup> for Smith and testified that he had methamphetamine on him "all of the time." The greatest quantity of methamphetamine that Smith had on him at any one time was six ounces.<sup>7</sup> Shields identified a number of people who received methamphetamine from Smith, and she herself once sold a Dodge Stratus to Smith for synthetic marijuana and five grams of methamphetamine.

Shields also testified that she met Smith's methamphetamine supplier Shrimp and that she took multiple trips with Smith to obtain methamphetamine. Shields saw Smith and Shrimp together four or five times. Shields testified about going with Smith and Pray to St. Louis, Missouri<sup>8</sup>, to obtain methamphetamine and to the Mall of America where she saw about an ounce of methamphetamine after Smith acquired it from someone there.

Shields also testified about a Sioux Falls traffic stop in June of 2017 of a vehicle Smith was driving in which she was the front-seat passenger. When a Sioux Falls police officer stopped their vehicle, Shields passed about one ounce of methamphetamine to Smith who then fled the vehicle and escaped on foot.<sup>9</sup> Shields also attempted to flee but was apprehended. Shields initially told police that the person who fled was an individual named Mike Fallis, but she testified under

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<sup>5</sup> Twenty to thirty eight-balls would be 70 to 105 grams of methamphetamine.

<sup>6</sup> One-half pound of methamphetamine is approximately 276.8 grams.

<sup>7</sup> Six ounces is approximately 208 grams.

<sup>8</sup> By contrast, Pray did not mention any trip to St. Louis, but rather spoke of trips to Kansas City with Smith to obtain methamphetamine.

<sup>9</sup> Smith testified that he played wider receiver in college in Mitchell and then for several years with professional indoor football teams.

oath that it was actually Smith. Smith later gave Shields two eight-balls to replace what she lost during that traffic stop.

Francis Farmer met the person he knew as CC in Lower Brule on a couple of occasions. On one occasion, Farmer overheard the person known as CC boasting about having gone through a drug checkpoint by having a female conceal methamphetamine in a private area. Farmer also testified about receiving methamphetamine at a Lower Brule home when CC was present though he did not get it directly from CC.

On two separate occasions, Smith was arrested in Sioux Falls in possession or control of methamphetamine. In February 2014, Smith's vehicle was pulled over after leaving an apartment complex that was under surveillance for drug distribution. Smith fled the vehicle and ran back to the apartment complex where he later voluntarily surrendered. Smith admitted in interviews that eight grams of methamphetamine which officers recovered from the vehicle belonged to him. In October 2017, detectives who knew Smith had an active warrant for his arrest contacted police after seeing him at a Taco Bell in Sioux Falls. Upon seeing a police officer outside of the restaurant, Smith dropped his food and fled. He was apprehended after a brief chase, and a search revealed that he possessed 4.8 grams of methamphetamine, two cellphones, and \$380. The cellphones were searched pursuant to a warrant and contained some text messages that seemed to relate to drug distribution as well as photos of marijuana, a large sum of money, and Smith.

Smith also was detained by Rosebud Sioux Tribe police in November 2016 after a traffic stop while riding with Sarah Pray. Approximately 13 grams of methamphetamine were found in a bag that spilled near the passenger seat where Smith had been sitting. Smith, who is not a member of a South Dakota tribe, was not charged tribally.

The government introduced an audiotape of a phone conversation from the Hughes County Jail between Smith and his girlfriend Samantha Dolezal. During the conversation, Smith became angry with Dolezal for calling him "CC" rather than Marques. Several of the witnesses who obtained methamphetamine from or through Smith only knew him by his nickname CC.

Smith took the stand and testified that he was born in Colorado Springs and did well in high school there. He received a football scholarship to Dakota Wesleyan University in Mitchell and graduated with a criminal justice degree. Smith then played football for the indoor arena league Sioux Falls Storm from 2005 until 2011 and for the Wisconsin Raptors in 2012. After the 2012 season, Smith returned to Sioux Falls and worked in construction and concrete.

In his testimony, Smith attempted to explain the circumstances surrounding his Sioux Falls arrests and tribal detention. Smith implied that he was arrested in the February 2014 incident because he claimed the methamphetamine in the vehicle was his in an effort to protect the woman who was with him. Smith testified that the methamphetamine found by the Rosebud Sioux Tribe police in November 2016 belonged to Pray. With regard to his October 2017 arrest outside of Taco Bell, Smith explained that, although he had moved to Colorado by that time, he was in Sioux Falls for a funeral and that others sent him to pick up methamphetamine for them. He testified that someone at the Taco Bell gave him one of the phones that the officers found in his possession.

Smith testified that he had never been to St. Louis but acknowledged being from Colorado Springs and having relatives in Kansas City. He also testified that although he uses marijuana and synthetic marijuana occasionally, he has only used methamphetamine once and did not like it because he has a sickle cell disease.

## **II. DISCUSSION**

### **A. Motion for Judgment of Acquittal**

“If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal” if the evidence is insufficient to sustain the conviction. Fed. R. Crim. P. 29. “Jury verdicts are not lightly overturned.” United States v. Hood, 51 F.3d 128, 129 (8th Cir. 1995). When reviewing a jury verdict for sufficiency of the evidence, the court reviews the evidence in the light most favorable to the guilty verdict and presumes that the jury resolved evidentiary conflicts in the government’s favor. United States v. Dupont, 672 F.3d 580, 582 (8th Cir. 2012) (per curiam). “A verdict must be upheld if any interpretation of the evidence would allow a reasonable-minded jury to conclude guilt beyond a reasonable doubt.” Hood, 51 F.3d at 129. Furthermore, “[t]he jury [is] entitled to draw reasonable inferences from the evidence.” Id.

Smith argues that the government failed to meet its burden to convict him in two ways. First, he argues that the government failed to present evidence relating to an essential element of the conspiracy charge, specifically that he had an agreement with another person. Second, Smith argues that the government’s evidence failed to establish the single, unified conspiracy charged in the indictment, and rather tended to show “a series of smaller, uncoordinated conspiracies,” thus constituting an impermissible variance from the indictment.

To convict a defendant for conspiracy to distribute a controlled substance under 21 U.S.C. § 846, the jury is required to find “(1) that there was a conspiracy, i.e., an agreement [among two or more people] to distribute the drugs; (2) that the defendant knew of the conspiracy; and (3) that the defendant intentionally joined the conspiracy.” United States v. Sanchez, 789 F.3d 827, 834 (8th Cir. 2015) (quotation omitted). “Once a conspiracy is established, only slight evidence is required to connect a defendant to the conspiracy.” United States v. Hayes, 391 F.3d 958, 961 (8th Cir. 2004). “In a drug conspiracy case, ... the government is not required to present direct evidence of an explicit agreement; juries may rely upon circumstantial evidence to discern a tacit

agreement or understanding between the co-conspirators.” United States v. Hodge, 594 F.3d 614, 618 (8th Cir. 2010).

A variance occurs when the government’s proof presented at trial proves multiple conspiracies when the indictment alleges only a single conspiracy. Sanchez, 789 F.3d at 835. “In order to prevail ... based on a fatal variance between the single conspiracy charged and the proof offered at trial, [the defendant] must establish that a variance exists, and that the variance affected his substantial rights.” United States v. Lopez-Arce, 267 F.3d 775, 781 (8th Cir. 2001) (citation and internal marks omitted). Whether the evidence establishes a single conspiracy is assessed under the totality of the circumstances, viewing the evidence in the light most favorable to the jury’s verdict. Sanchez, 789 F.3d at 835. Factors to consider when making this determination include “the nature and location of activities and events, identities of the co-conspirators, and the time frame in which the acts occurred.” Id. (citation omitted). The government need not show that all of the conspirators were involved in every piece of the conspiracy or that all of the conspirators even knew each other. Lopez-Arce, 267 F. 3d at 781–82. Rather, evidence showing that a defendant shared a common purpose with a coconspirator or that his acts intentionally facilitated the conspiracy signals the necessary interdependence to establish a unified conspiracy. Id. at 782.

At trial, the government provided sufficient evidence for the jury to find that Smith conspired with at least one other person as part of a single, unified conspiracy to distribute methamphetamine in the District of South Dakota. Sarah Pray’s testimony alone establishes that she and Smith worked in tandem for several years to obtain and distribute more than five hundred grams of methamphetamine. She testified that she dealt methamphetamine with Smith from 2011 until 2017 and that she accompanied him on multiple trips to obtain distributable amounts of methamphetamine. Although Pray did not relate specific details about the terms of her

arrangement with Smith, the evidence of their repeated trips to obtain substantial amounts of methamphetamine and their subsequent distribution of such is circumstantial evidence of their agreement to obtain and distribute methamphetamine in violation of 21 U.S.C. § 841. See United States v. Conway, 754 F.3d 580, 587–88 (8th Cir. 2014) (explaining that “the defendants’ presence in the same car while on a journey to further the conspiracy indicates their cooperation and agreement” and that “evidence is sufficient to show a conspiracy where drugs are purchased for resale”). Although Pray’s testimony indicates that Smith may have had multiple suppliers of methamphetamine, including Shrimp, Unc, relatives, and friends, Pray and Smith continually worked together to bring large quantities of drugs into South Dakota and to arrange for their distribution. Thus, the continued participation of both Smith and Pray, the repeated distribution in the Sioux Falls, Fort Thompson, Lower Brule, and Rosebud areas, and the six-year time frame indicate that there was a single, unified conspiracy involving Smith and others.

The testimony of other witnesses also supported the jury’s finding of a single conspiracy. Brooke Shields testified about taking trips with Pray and Smith to obtain methamphetamine and explained that she would then sell methamphetamine supplied by Smith to others. Merle Seeking Land testified about selling drugs he received from Smith and about seeing a substantial amount of methamphetamine bagged up for distribution inside Smith’s vehicle. Ashley Ross testified that she sold methamphetamine she received from Smith. Franki Zephier testified that Smith paid her money and methamphetamine so that Smith could stay at her home in Rosebud, often with Pray, to deal methamphetamine there. By considering all the evidence presented at trial, a reasonable-minded jury could find that Smith had a common plan with others to distribute methamphetamine in the District of South Dakota.



Smith's motion for judgment of acquittal suggests that there could not have been an agreement between Smith and others because some of the witnesses testified that they never paid Smith for the methamphetamine that they obtained or sold. However, such agreement for a price is not an essential element of the crime charged and does not affect this Court's or the jury's analysis. See Sanchez, 789 F.3d at 834 (listing the elements to prove a conspiracy). The government only needed to prove that Smith had an agreement with at least one other person for the purpose of distributing methamphetamine in the District of South Dakota; the distribution is the illegal conduct. The evidence discussed above provides a basis from which the jury could infer that Smith's purpose in obtaining very large quantities of methamphetamine was to distribute it, regardless of the extent to which he profited from the distribution activity.

Because the government proved a conspiracy existed between Smith, Pray, and others, there has been no impermissible variance between the crime charged in the indictment and the evidence presented at trial. The evidence presented provided a sufficient basis for a reasonable-minded jury to find Smith guilty of the crime charged in the indictment. Therefore, Smith's motion for judgment of acquittal is denied.

#### **B. Motion for New Trial**

Under the Federal Rules of Criminal Procedure, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "[M]otions for a new trial are generally disfavored, and the court must exercise this authority sparingly and with caution." United States v. Clayton, 787 F.3d 929, 935 (8th Cir. 2015) (cleaned up and citation omitted). "Unless the district court ultimately determines that a miscarriage of justice will occur, the jury's verdict must be allowed to stand." Campos, 306 F.3d 577, 579 (8th Cir. 2002).

Smith's alternative motion for a new trial rests on the contention that he was deprived a fair trial because this Court permitted testimony of Smith's alleged sale of synthetic marijuana and his alleged possession of guns, which he argues severely prejudiced him. "The prejudicial effect of any improper testimony is determined by examining the context of the [alleged] error and the strength of the evidence of the defendant's guilt." United States v. Morris, 817 F.3d 1116, 1121 (8th Cir. 2016) (citation omitted). "Generally, remedial instructions cure improper statements[.]" Id. (citation omitted).

This Court in fact gave a limiting instruction to avoid unfair prejudice from the testimony about Smith selling synthetic marijuana and possessing a gun. Final Instruction 16, which was read to the jury in open court and provided to the jury in writing during its deliberations, reads as follows:

You have heard evidence the defendant may have used and distributed marijuana and synthetic marijuana and may have possessed a handgun. The defendant is not charged with any crime relating to handgun possession, marijuana or synthetic marijuana. Testimony on such topics come in as part of witnesses' explanations of how they say they met the defendant and what the defendant's activities were in his claimed dealings with people claimed to be involved as a part of the alleged conspiracy. You may not presume the defendant to be guilty of conspiracy to distribute methamphetamine simply because he may have possessed a handgun or may have been involved with marijuana or synthetic marijuana.

Doc. 64 at 18. Because "[a] jury is presumed to follow its instructions," Blueford v. Ark., 566 U.S. 599, 606 (2012) (citation omitted), evidence related to Smith's possession of a handgun or his distribution of marijuana or synthetic marijuana would not have prejudiced Smith in the jury's determination of his guilt for the crime charged.

The evidence presented at trial relating to Smith's possession of a gun was not unfairly prejudicial in relation to its probative value. The Eighth Circuit has repeatedly found that

“[f]irearms are tools [of] the drug trade.” United States v. Chantharath, 705 F.3d 295, 303 (8th Cir. 2013) (second alteration in original); see United States v. Espinoza, 684 F.3d 766, 779 (8th Cir. 2012); Campos, 306 F.3d at 580; United States v. White, 969 F.2d 681, 684 (8th Cir. 1992). Therefore, testimony that a defendant possessed a firearm can be relevant as circumstantial evidence to show that he was involved in drug distribution. United States v. Caballero, 420 F.3d 819, 821 (8th Cir. 2005). Pray, Seeking Land, and Zephier each testified to observing a handgun or ammunition in Smith’s possession during the time in which the charged conspiracy took place. When considered in connection with the other evidence presented at trial, testimony that Smith at times possessed a handgun or ammunition was not unfairly prejudicial, but rather merely supported other evidence that tended to show he distributed methamphetamine and had methamphetamine on him.

Evidence relating to Smith’s alleged sale of synthetic marijuana (or Pandy or K-2 as witnesses at times referred to it) was also properly admitted into evidence as *res gestae* and did not unfairly prejudice Smith. Evidence of wrongful conduct other than that at issue may be admissible as *res gestae* if “it ‘completes the story or provides a total picture of the crime charged.’” United States v. White Plume, 847 F.3d 624, 628 (2017) (quoting United States v. Brooks, 715 F.3d 1069, 1076 (8th Cir. 2013)). When evidence of other crimes becomes so blended with the one on trial such that proof of one incidentally involves the other, explains its circumstances, or tends to prove one of its elements, that evidence is admissible as an essential part of the charged crime’s immediate context. United States v. Thomas, 760 F.3d 879, 884 (8th Cir. 2014). This sort of evidence is not governed by Rule 404(b). United States v. Cook, 842 F.3d 597, 601 (8th Cir. 2016). Evidence regarding Smith’s involvement with marijuana and synthetic marijuana is inextricably intertwined with the charged methamphetamine distribution conspiracy. Smith’s

alleged co-conspirators, including Pray and Shields, testified that Smith sold synthetic marijuana during the course of the conspiracy. Pray testified that Smith would pick up marijuana to bring back to South Dakota on some of their trips to obtain methamphetamine, and Shields testified about a single transaction she made with Smith in which she exchanged a vehicle for methamphetamine and synthetic marijuana. St. Cloud testified the reason that she met Smith was because she was smoking synthetic marijuana at the time. Because Smith's connection with marijuana and synthetic marijuana provided an essential context for the charged conspiracy, it was properly admitted and did not unfairly prejudice Smith.

Beyond its admissibility as *res gestae*, evidence of Smith's involvement with marijuana and synthetic marijuana was admissible under Federal Rule of Evidence 404(b). Generally, evidence of other acts is not admissible to prove a person's propensity for criminal behavior. Fed. R. Evid. 404(b)(1). However, such evidence may be admissible for other purposes, such as proving a person's intent, plan, or knowledge. Fed. R. Evid. 404(b)(2). For other acts evidence to be admissible, it must be "(1) relevant to a material issue; (2) proved by a preponderance of the evidence; (3) higher in probative value than in prejudicial effect; and (4) similar in kind and close in time to the crime charged." United States v. Gipson, 446 F.3d 828, 831 (8th Cir. 2006) (quotation omitted). Conspiracy to distribute methamphetamine is a specific intent crime, see Sanchez 789 F.3d at 834, and Smith denies his participation in any conspiracy, making his state of mind a material issue, see Gipson, 446 F.3d at 831 ("A general denial defense places the defendant's state of mind at issue."). Multiple witnesses—Pray, Ross, St. Cloud, and Shields—testified about Smith's connection with or distribution of synthetic marijuana, satisfying the preponderance of the evidence standard. Evidence of Smith's distribution of synthetic marijuana has some probative value on his intent to distribute a different drug—methamphetamine. See

Gipson, 446 F.3d at 831 (“Evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime in which intent to distribute drugs is an element.” (cleaned up and citation omitted)); see also United States v. Maichle, 861 F.2d 178, 180 (8th Cir. 1988) (finding that testimony about a defendant’s prior distribution of marijuana was admissible to establish that the defendant intended to distribute cocaine). Finally, the testimony about Smith’s distribution of synthetic marijuana was similar both in nature and time to the evidence of his charged methamphetamine distribution. Witnesses testified that during the time of the charged conspiracy they either received synthetic marijuana from Smith or that they saw others receive it from him. Shields even testified that she received both synthetic marijuana and methamphetamine from Smith in a single transaction in exchange for a vehicle. Because evidence that Smith sold synthetic marijuana is relevant, sufficiently established by the proffered evidence, more probative than prejudicial, and similar in kind and time to the charged conduct, it was properly admitted at trial.

Smith was not unfairly prejudiced by the admission of evidence related to the possession of a gun or to his distribution of synthetic marijuana. Such evidence was admissible, and this Court gave a proper limiting instruction to blunt any possible unfair prejudice. Therefore, no miscarriage of justice has occurred, and the jury’s guilty verdict must be allowed to stand. Smith’s motion for a new trial is accordingly denied.

### III. CONCLUSION

For the reasons contained herein, it is hereby

ORDERED that Smith’s motion for judgment of acquittal or alternative motion for new trial, Doc. 72, is denied.

DATED this 16<sup>th</sup> day of January, 2020.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Roberto A. Lange", is written over a horizontal line.

ROBERTO A. LANGE  
CHIEF JUDGE

## UNITED STATES DISTRICT COURT

District Of South Dakota, Central Division

UNITED STATES OF AMERICA

v.

Marques Smith  
a/k/a CC

## JUDGMENT IN A CRIMINAL CASE

Case Number: 3:19CR30045-1

USM Number: 18033-273

John S. Rusch  
Defendant's Attorney

## THE DEFENDANT:

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

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)	Conspiracy to Distribute a Controlled Substance	10/11/2017	1s

The defendant is sentenced as provided in 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) ☐ 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.

01/27/2020

Date of Imposition of Judgment



Signature of Judge

Roberto A. Lange, Chief Judge

Name and Title of Judge

January 30, 2020

Date

AO 245B (Rev. 09/19) Judgment in Criminal Case  
Sheet 2 — Imprisonment

DEFENDANT: Marques Smith a/k/a CC  
CASE NUMBER: 3:19CR30045-1

### IMPRISONMENT

■ The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 235 months, to run concurrently to Minnehaha County, SD, sentences in 49CRI14001178 and 49CRI17008100.

■ The Court makes the following recommendations to the Bureau of Prisons:

It is recommended that you be evaluated for service of the sentence at a Bureau of Prisons medical facility.

Your history of substance abuse indicates you would be an excellent candidate for the Bureau of Prisons' substance abuse treatment program. It is recommended that you be allowed to participate in that program and, if successful, the term of incarceration be reduced accordingly.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at \_\_\_\_\_ ☐ a.m. ☐ p.m. on \_\_\_\_\_.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on \_\_\_\_\_.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this Judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL



AO 245B (Rev. 09/19) Judgment in a Criminal Case  
Sheet 3 - Supervised Release

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DEFENDANT: Marques Smith a/k/a CC  
CASE NUMBER: 3:19CR30045-1

### **SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of: 10 years.

### **MANDATORY CONDITIONS**

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.
  - ☐ The above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. ☐ 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.)*
6. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other state authorizing a sentence of restitution. *(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: Marques Smith a/k/a CC  
CASE NUMBER: 3:19CR30045-1

### 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 reasonable times, 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.

AO 245B (Rev. 09/19) Judgment in a Criminal Case  
Conditions of Supervision

DEFENDANT: Marques Smith a/k/a CC  
CASE NUMBER: 3:19CR30045-1

### SPECIAL CONDITIONS OF SUPERVISION

1. You must reside and participate in a residential reentry center as directed by the probation office. You will be classified as a prerelease case.
2. You must submit your person, residence, place of business, vehicle, possessions, computer, smart phone, tablet, or any other internet capable device (including passwords) to a search conducted by a United States Probation Officer without a warrant when the officer has reasonable suspicion of a violation of a condition of supervision. You must notify any other residents that the premises and its contents may be subject to searches pursuant to this condition.
3. You must participate in cognitive behavioral training programs as directed by the probation office, including a domestic violence intervention program. You must enter into and comply with the Behavior Agreement for Relations with Intimate Partner as adopted in the District of South Dakota.
4. You must participate in a program approved by and at the direction of the probation office for treatment of substance abuse.
5. You must submit a sample of your blood, breath, or bodily fluids at the discretion or upon the request of the probation office.

### 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](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

AO 245B (Rev. 09/19) Judgment in a Criminal Case  
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Marques Smith a/k/a CC  
CASE NUMBER: 3:19CR30045-1

### CRIMINAL MONETARY PENALTIES

You must pay the total criminal monetary penalties under the Schedule of Payments set below.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
<b>TOTALS</b>	\$100	Not applicable	Waived	Not applicable	Not applicable

- ☐ The determination of restitution is deferred until  
An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ You must make restitution (including community restitution) to the following payees in the amount listed below.

If you make 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>
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**TOTALS** \$ \_\_\_\_\_ \$ \_\_\_\_\_

- ☐ Restitution amount ordered pursuant to Plea Agreement \$ \_\_\_\_\_
- ☐ You 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 the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The Court determined that you do 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:

\*Amy, Vicky, & Andy Child Pornography Assistance Act of 2018, Pub. L. 115-299.

\*\*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.

AO245B (Rev. 09/19) Judgment in a Criminal Case  
Sheet 6 — Schedule of Payments

DEFENDANT: Marques Smith a/k/a CC  
CASE NUMBER: 3:19CR30045-1

### SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$100 due immediately, balance due
- ☐ not later than \_\_\_\_\_, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_, 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 \$ \_\_\_\_\_, to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment of the total restitution and other criminal monetary penalties shall be due in regular quarterly installments of 50% of the deposits in your inmate trust account while the you are in custody, or 10% of your inmate trust account while serving custody at a Residential Reentry Center. Any portion of the monetary obligation(s) not paid in full prior to your release from custody shall be due in monthly installments of \$ \_\_\_\_\_, such payments to begin \_\_\_\_\_ days following your release.
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

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

- ☐ Joint and Several
- | Case Number<br>Defendant and Co-Defendant Names<br>(including defendant number), | Total Amount | Joint and Several<br>Amount | Corresponding Payee,<br>if appropriate |
|--|--------------|-----------------------------|--|
|--|--------------|-----------------------------|--|
- ☐ You shall pay the cost of prosecution.
- ☐ You shall pay the following Court cost(s):
- ☐ You shall forfeit your 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

ACCESS TO CRIMINAL DOCUMENTS        )     AMENDED  
AND TRANSCRIPTS                        )     STANDING ORDER 16-04

In order to protect the safety of all federal inmates regardless of their cooperation with the government, as well as the integrity of any ongoing investigations or related prosecutions, it is the intent of this Court to make it impossible to determine from examining the record whether a defendant did or did not cooperate with the government and to limit access to sealed or restricted criminal documents and transcripts unless the Court orders otherwise. Effective January 1, 2017,

IT IS HEREBY ORDERED:

1. That every plea agreement will include a sealed supplement that either identifies any agreements the defendant has with the government regarding cooperation or states that there is no cooperation.
2. That all sentencing memorandums and motions for departure/variance will be sealed.
3. That every transcript of a change of plea or sentencing hearing will contain a confidential section or reference thereto so that cooperation or the lack thereof may be discussed. If a transcript is prepared, the court reporter or transcriptionist will prepare two versions: a restricted transcript and a public transcript.
  - a. The restricted transcript will include the confidential section. Only the Government and counsel for the defendant will have access to restricted transcripts.
  - b. The public transcript will include the following reference: Pursuant to Standing Order 16-04, portions of all change of plea and sentencing transcripts are restricted.
4. That when an inmate requests copies of any criminal documents and/or transcripts, the copies will be forwarded to the warden of the appropriate institution, along with a copy of this order.
  - a. The Chief Probation Officer or Clerk of Court shall also prepare a letter to the inmate advising that the requested documents have been forwarded to the warden and that

i. all plea agreements contain a sealed supplement that is either a statement that there is cooperation, including the terms thereof, or a statement that there is no cooperation;

ii. all sentencing memorandums and motions for variance/departure are sealed;

iii. all change of plea or sentencing transcripts contain a confidential section or reference thereto so that cooperation or the lack thereof may be discussed resulting in the preparation of two transcripts: a restricted transcript and a public transcript; and, as a result,

iv. it is not possible to determine from examination of docket entries whether a defendant did or did not cooperate with the government.

b. Inmates may review their criminal documents and/or transcripts in an area designated by the warden.

c. Sealed or restricted documents and/or transcripts may neither be retained by an inmate, nor reviewed in the presence of another inmate, consistent with the institutional policies of the Bureau of Prisons.

5. That when detained or incarcerated persons not in the custody of the Bureau of Prisons request copies of criminal documents and/or transcripts, they are also subject to the restrictions and prohibitions contained in this Order.

6. Federal court officers or employees (including probation officers and federal public defender staff), retained counsel, appointed CJA panel attorneys, and any other person in an attorney-client relationship with a detained or incarcerated person may, consistent with this order, review any sealed or restricted portions of the file with their client, but may not provide copies to the defendant.

Dated this 17<sup>th</sup> day of July, 2018.

BY THE COURT:

  
\_\_\_\_\_  
JEFFREY L. VIKEN  
CHIEF JUDGE