NO. _____

In The
Supreme Court of the United States

LONNELL TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A fourth of the federal cases reported to the United States Sentencing Commission are narcotics prosecutions. The issue of drug quantity frequently heavily influences the element of Relevant Conduct which factors into those offenders' Sentencing Guidelines' Base Offense Levels.

After being convicted by a jury for a federal narcotics conspiracy charge, Petitioner unsuccessfully contested the district judge's approach to determining the quantity of drugs for which he was being held accountable. On appeal, Petitioner contended that the trial judge's methodology should be reviewed *de novo.* The Circuit Court reviewed for clear error, which is the standard followed in three courts of appeals. Conversely, five Circuits apply a *de novo* standard of review; the process employed by two other Circuits is equally rigorous. This distinction can make a difference: courts using the more vigorous standard of review have reversed sentences flowing from methodologies that depended more on conjecture than recognized criteria.

This case is unaffected by the doctrine of sentencing guidelines abstention. Deciding the standard of appellate review is a matter for this Court. Thus understood, the question presented is whether the Court should resolve the circuit conflict by requiring *de novo* review for contested methodologies used to determine Base Offense Levels in narcotics prosecutions.

RULE 14.1(b) CERTIFICATE

Petitioner certifies as follows:

(i) Parties. The parties who appeared before the United States District Court for the District of Columbia and in the District of Columbia Circuit in the proceedings that resulted in the judgment from which a writ of certiorari is sought were Petitioner Lonnell Tucker (U.S. Ct. App. No 19-3042) and Respondent the United States of America. Jonathan Fields and Abdul Samuels were co-defendants at trial. James Venable, Darryl Smith, and Lacy Hamilton pleaded guilty in the District Court. Defendant Calvin Wright was acquitted and Artemis Wilson was a fugitive.

(ii) Corporate disclosure statement: No corporation was before the District Court or Court of Appeals below.

(iii) Related cases: On April 25, 2022, Mr. Fields (U.S. Ct. App. No. 19-3043) filed a petition for a writ of certiorari (21-7724). On April 5, 2022, the Chief Justice granted the Application (No. 21A487) of Mr. Samuels (U.S. Ct. App. No. 19-3078) for an extension of time to file a petition for a writ of certiorari. Petitioner is aware of no other related cases in any other court or before this Court.

The Court of Appeals' opinion is reported at *United States v. Tucker*, 12 F.4th 804 (D.C. Cir. 2021). On January 13, 2022, the Court of Appeals denied Petitioner's timely motions for rehearing or rehearing *en banc*.

/s/ Stephen C. Leckar
Stephen C. Leckar, Counsel of Record

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In the Supreme Court of the United States

UNITED STATES OF AMERICA
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LONNELL TUCKER

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

Lonnell Tucker respectfully petitions for a writ of certiorari to review the United States Court of Appeals for the District of Columbia Circuit's judgment below.

OPINIONS BELOW

The court of appeals' opinion affirming Petitioner's conviction and sentencing is reported at *United States v. Tucker*, 12 F.4th 804 (D.C. Cir. 2021) (Pet. App. 2a-38a).

JURISDICTION

The court of appeals' judgment was entered on September 3, 2021. On January 13, 2022, the circuit court denied Petitioner's motions for rehearing or rehearing *en banc*. (Pet. App. 46a-47a). Jurisdiction is invoked under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINES PROVISION INVOLVED

Section 1B1.3 of the United States Sentencing Guidelines provides:

> (a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense; and
>
> (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
>
> (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
>
> (4) any other information specified in the applicable guideline.

STATEMENT OF THE CASE

Petitioner asks the Court to resolve an inter-circuit split concerning the standard of review governing appeals of federal sentencings that challenge the methodology used to calculate drug quantity under the Sentencing Guidelines' Relevant Conduct provision. As the table below explains, several circuits apply *de*

novo or enhanced review. Others, including the D.C. Circuit, review only for clear error.

De Novo Review	Enhanced Review	Clear Error
First, Fourth, Fifth, Ninth, & Eleventh Circuits.	Second & Tenth Circuits	Third, Seventh, Eighth, & D.C. Circuits

Resolving this split to determine how underlying methodologies should be reviewed is necessary. Determining the "Relevant Conduct," meaning the quantity of illicit drugs involved in an underlying offense, is a crucial aspect of sentencing those convicted of federal narcotics offenses. A greater quantum of drugs results in a higher Base Offense Level and greater potential sentence.

Petitioner's case is a prime example. In 2018 he was included in a multi-defendant multi-count indictment brought in the District Court for the District of Columbia that alleged conspiracy to distribute narcotics and, as to others, various weapons violations. A jury convicted him of the conspiracy offense but made no findings concerning the quantity of drugs involved. Aside from a street-level controlled "buy" of heroin and three unconsummated transactions with a by-then deceased informant, no evidence linked Petitioner to any level of dealings in furtherance of the charged conspiracy. Over objection, the District Judge utilized speculation to determine Petitioner's Base Offense Level and after using a flawed methodology imposed a sentence of sixty months imprisonment and thirty-six months of supervised release.

In upholding that sentence, the D.C. Circuit used a clear error standard of review. That highly deferential approach is ill-suited for reviewing judges' methodologies used to estimate amounts of drugs. Had the court of appeals used a *de novo* standard of review, Petitioner's Relevant Conduct calculation almost surely would have been found unduly speculative and the cause would have been remanded for resentencing.

FACTUAL BACKGROUND[1]

Petitioner's sentence was derived from using a process that depended on flawed assumptions of Relevant Conduct. As a result, his Base Offense Level was artificially inflated.

A. Description of the underlying prosecution

The government alleged a narcotics distribution scheme headed by Jonathan Fields, in which Petitioner and several others had participated. The prosecution charged that scheme ran between June 2017-February 2018, operating from the second floor of a barbershop in the southeastern quadrant of the District of Columbia. Fields leased those premises to store contraband, associated paraphernalia, and weapons. Drugs were dispensed upstairs, and outside of the barbershop and elsewhere.[2]

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[1] Petitioner will refer to pages in his Main Brief ("MB:_"), Reply Brief ("RB:_") and Appendix, as filed in the Court of Appeals ("APP").

[2] MB:4-6, 80-82.

At trial the government presented several agents and investigators, films of "controlled buys," and photographs of the defendants' interaction outside of the barbershop among themselves and others. In addition, the prosecution offered numerous packages of heroin and other drugs, scales, baggies, cutting agents, weapons, and other items seized from the barbershop, together with Fields's coded ledgers and drug-related evidence seized from Fields's car. Byran Clark ("Clark"), the sole testifying cooperating witness, described dealings with Fields during Clark's weekly visits to the barbershop.[3] Several recorded telephone calls made while Fields awaited trial also were presented.[4]

In the defense case, Fields testified. His presentation was so outlandish that his co-defendants unsuccessfully sought severance.[5]

The evidence against Petitioner was limited. The prosecution presented no confessions, admissions or wiretaps implicating him. Save for some coded text messages (which he did not exchange with the co-conspirators (and which the District Judge found undecipherable), the recorded half-gram sale of heroin and three abortive "buys," nobody identified what drugs Petitioner allegedly marketed or how much he was dealing. Fields' drug ledgers revealed nothing about Petitioner. And no

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[3] MB:80-82, 86-88; RB:39.

[4] MB:86, 88.

[5] MB:86-90. The Panel's description of Fields's deportment as "less than exemplary" (12 F.4th at 824) is understated.

evidence revealed him marketing significant amounts of contraband: he lacked a car, residence, and bank account and no cash was seized from him.[6]

What the Government possessed was proximity. Petitioner frequently was near the barbershop—a haven for many African-American men[7]—and two or three times over the seven-month investigation agents observed him around Fields in circumstances that suggested drug deals—but no one could say that they were, much less what drug was sold and what quantity was delivered. Clark also made a vague comment about Petitioner's seemingly having a "license" to be around the barbershop but placed him inside there only once over several months of Clark's visiting Fields. Clark wasn't sure whether Petitioner was secreting drugs or adjusting his pant legs.[8]

Clark never claimed to have seen Petitioner marketing drugs, spoken with him or anyone else about Tucker's dealing anything, or to knowing what Petitioner was selling or his source(s) of supply.[9] Nor did any other witness so testify. And nobody placed Petitioner as offering drugs at a room on Barnaby Place, NE, where various of Fields' cohorts named in the indictment marketed drugs.[10]

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6 MB:83-85,101-102, 107-08, 115; RB:40-41. The prosecutor's opening statement devoted two of seventy minutes to Petitioner. The prosecution witnesses' direct testimony about him appeared on 64 of the 870-page trial record—about 7.3% of the direct examination. MB:77-78.

7 RB:40.

8 MB:84-85, 105-06; RB:40-41, 51-55.

9 MB:84-85, 102-03; RB:40-41.

10 MB:105.

B. The errant sentencing methodology

Other than the one half-gram "controlled" purchase of heroin, the Government never sought at trial to quantify any amounts of narcotics attributable to Petitioner and within his conspiratorial agreement's scope. Nor did the prosecution ask the jury to make any such findings; the verdict merely found 'proven" a "detectable amount" of heroin as within the reasonably foreseeable scope of Tucker's conspiratorial agreement.[11]

At sentencing Petitioner argued that "there was no evidence elicited that [he] received any narcotics (let alone any particular amount) from anyone involved in this alleged conspiracy . . . ."[12] He protested the Presentence Report's proposal to hold him accountable for the drugs found upstairs at the barbershop because no evidence had placed him there.[13] Although GPS evidence placed him around that area on nearly a daily basis, "there was no testimony or evidence that on any one of those particular days or even all of those days . . . that Mr. Tucker was going there to sell drugs."[14] Petitioner contended that "there is as much support for a finding that Mr. Tucker was responsible for 40 grams but less than 60 grams . . . as there is for the higher drug amount" and recommended a 48-month sentence.[15]

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11 Jury Verdict, p.3, ¶4 [223].

12 MB:105; Tucker's Memorandum in Aid of Sentencing at 6 [260].

13 MB:105.

14 MB:105-06.

15 MB:106.

In response, the prosecution demanded that Petitioner be accountable for everything found in the barbershop. The government sought a 234-month sentence—eleven times its pretrial offer of 15-21 months.[16]

The Trial Judge concluded that Tucker was "regularly at the barbershop."[17] The judge then deemed reliable: (a) the deceased informant's single $100 purchase of 0.58 grams of heroin in June 2017; (b) three attempted "buys" made between July and August 2017 (these being recited in the affidavit for a search warrant and then alluded to briefly at trial); and (c) surveillance on three occasions when agents inferred that Petitioner must have made drug sales (although they had no notion of what or how much he had supposedly sold).[18]

The district court recognized that Clark, the testifying cooperator, never placed Petitioner upstairs and that Petitioner's coded texts were indecipherable.[19] The judge characterized Tucker as "dealing on the street level," retailing outside of the barbershop "small quantities of drugs . . . which could theoretically be used either for personal use or resale in small quantities."[20] Petitioner was held responsible and

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16 MB:106; RB:52-55; Government Memorandum in Aid of Sentencing at 18 [259]; Tucker Sentencing Memorandum at 3, 6 [260].

17 MB:106.

18 MB:106-07.

19 MB:107.

20 Tucker Sentencing at 22-26 (June 14, 2019) (App. 59a-63a). The District Judge recognized that Tucker was not found to have any wealth. (App. 63a).

sentenced for five half-gram sales of heroin per week over the thirty weeks of the conspiracy, yielding 75 grams of heroin with a total converted drug weight of 75 kilograms—all without an accurate process to support that conclusion and with no evidence showing which of Fields' wares Petitioner was marketing and how much of it he sold over the course of the conspiracy.[21]

Another signal of concern here is the district court's recognition that Tucker lacked any heroin three of the four times the by-then-deceased informant unsuccessfully approached him.[22] The fact that these other attempted purchases broke down because Tucker lacked the sought-after goods (the precise drugs and quantities sought were never clarified) call into question his ability to make five half-gram sales of heroin per week.

The Court of Appeals devoted scant attention to Tucker's argument on appeal. It recognized that "one sale is a small sample size" but concluded—with no discussion of the Trial Judge's methodology— that would not render the court's extrapolation unduly speculative, particularly when it results in a conservative estimate."[23] Exactly how this yielded a "conservative estimate" was not addressed; the appellate panel simply stated that "Tucker's frequent presence at the barbershop and the quantity of

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[21] Tucker Sentencing at 27 (App. 64a).

[22] *Id.* at 22-23 (App. 59a-60a).

[23] *Tucker*, 12 F.3d at 829.

heroin seized there" was sufficient to support the conclusion that he'd sold five half-gram packets of heroin weekly for thirty weeks.[24] However, this conclusion was not the result of any "art," as the appellate court described it, and it surely was not based on any "science."[25] Instead, it was conjecture based on the thinnest of evidence, as no one had pointed to any successful level of sales made by Tucker apart from the isolated half-gram street "buy."

REASONS FOR GRANTING THE PETITION

A case's substantive outcome can change "depending on which standard [of review] is used."[26] It is undeniable that "[d]rug quantity is an important integer in the sentencing calculus for most controlled substance offenses."[27] In such cases, "relatively small differences in the quantity or kind of drugs involved in an offense

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[24] *Tucker*, 12 F.3d at 829.

[25] *Id*.

[26] *Dickinson v. Zurko*, 527 U.S. 150, 161-162 (1999); *Southwest Voter Registration Educ. Pro. v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (*en banc*) ("standard of review is important to our resolution of this case"). *See* also Peter Nocolas, *De Novo Review in Deferential Robes: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 531 n.1 (2004) (citing examples).

[27] *United States v. Giggey*, 867 F.3d 236, 238-39 (1st Cir. 2017) (citing *United States v. Dunston*, 851 F.3d 91, 94 (1st Cir. 2017)). *See also United States v. Millán-Machuca*, 991 F.3d 7, 30 (1st Cir. 2021) ("The guideline sentencing ranges for controlled substance offenses are determined primarily by the drug quantity for which the defendant is responsible.").

may dramatically alter a defendant's prison term...."[28] And yet the "[f]ederal district courts have long struggled with extrapolating drug amounts under the U.S. Sentencing Guidelines, which instruct that, '[w]here ... the amount [of narcotics] seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.'"[29]

In all events, the practice of judges sentencing offenders based on extrapolations is inherently risky:

> When drug quantities are calculated based on a few key data points, they are particularly vulnerable to error. For instance, the court might misjudge the street price of the drug when converting cash to drug weight or overestimate the capacity of a drug-manufacturing defendant's laboratory. Alternatively, the court might receive bad evidence on the number of drug sales a trafficker typically made, or the quantity of drugs sold in each transaction. In each of these cases, a minor mistake would be multiplied into an enormous miscalculation – a phenomenon described as the "pyramiding [of] unreliable inferences." Accordingly, even when they satisfy the preponderance-of-the-evidence standard of proof, drug quantity estimates based on inference and extrapolation will "inherently possess a degree of uncertainty." [30]

Tucker unsuccessfully sought *de novo* review of the sentencing court's uncertain methodology used to determine his Base Offense Level. That is the

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[28] *United States v. Ruiz*, 446 F.3d 762, 773 (8th Cir. 2006) (cleaned up).

[29] *United States v. Hickman*, 626 F.3d 756, 769 (4th Cir. 2010) (citation omitted).

[30] Jacob Schuman, *Probability and Punishment: How to Improve Sentencing by Taking Account of Probability,* 18 NEW CRIM. L. REV. 214, 248 (2015) (cleaned up).

standard by which the First, Fourth, Fifth, Ninth and Eleventh Circuits have reviewed district judges' approaches to calculating drug quantities in sentencing.[31]

This *de novo*, heightened standard of review of the methods devised to calculate drug weight also conceptually resembles the Second and Tenth Circuits' analytical constructs. In the former court, questions of law over the Guidelines' operation are reviewed *de novo* whereas findings of fact are evaluated for clear error.[32] And "[w]hether narcotics which were neither charged in an indictment nor physically seized can constitute conduct relevant to the offense of conviction is a matter of legal interpretation, and thus is subject to de novo review."[33]

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[31] *Giggey*, 867 F.3d at 240 (1st Cir.; challenge to methodology "amounts to a challenge to the district court's application of the sentencing guidelines" and is reviewed *de novo*) (citation omitted)); *United States v. Flores*, 725 F.3d 1028, 1035 (9th Cir. 2013); *United States v. Hardin*, 437 F.3d 463, 471 (5th Cir. 2006); *United States v. McCrimmon*, 362 F.3d 725, 728 (11th Cir. 2004) (cited in *United States v. Bennett*, 554 Fed. App'x 817, 821n.3 (11th Cir. 2014)); *United States v. Wright*, 42 F.3d 1387, *3 (4th Cir. 1994) (unpublished) ("We review the proper method of calculating drug weight as a legal question subject to *de novo* review…") (citation omitted). *Cf., United States v. Perez*, 962 F.3d 420, 448 (9th Cir. 2020) (recognizing that "method of approximation must be reviewed de novo").

[32] *United States v. Vasquez*, 389 F.3d 65, 68 (2d Cir. 2004).

[33] *United States v. Vazzano*, 906 F.2d 879, 883 (2d Cir. 1990). In the Second Circuit, "[t]o sustain quantity-based enhancements for relevant conduct, the court must base its findings on 'specific evidence' that the offense involved the requisite quantity of items." *United States v. Archer*, 671 F.3d 149, 162 (2d Cir. 2011). For drugs, the "specific evidence" should include records, admissions, sampling or live testimony. *United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir, 1993) (amount of heroin for sentencing invalidly calculated simply by multiplying amount from defendant's last trip by the number of trips), *appeal after remand,* 103 F.3d 1085, 1092-97 (2d Cir. 1997) (rejecting inference that each prior trip contained the same quantity as was seized in final trip).

The Tenth Circuit, which appraises drug quantity calculations for plain error, nonetheless evaluates the underlying methodology on its independent merits—likewise using a heightened standard of review.[34]

Instead of an independent review, the D.C. Circuit applied a less rigorous clear error yardstick to assess the lower court's methodology.[35] That is the path used by the Seventh Circuit, which follows a clear error standard in reviewing sentencing courts' methodologies.[36]

The Seventh Circuit's approach has not been uniform, for it has concluded that "whether the district court followed the proper procedures in imposing sentence is a question of law that [is] reviewed *de novo*."[37] Similarly, the Third and Eighth

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[34] *United States v. Smith*, 705 F.3d 1268, 1274 (10th Cir. 2013) ("We review the factual findings supporting this determination for clear error, but review the ultimate determination of relevant conduct *de novo*"); *United States v. Wacker*, 72 F.3d 1453, 1477 (10th Cir. 1995) (in assessing drug quantity "[w]e review the district court's interpretation and application of the Sentencing Guidelines *de novo*."); *United States v. Williamson*, 53 F.3d 1500, 1528 (10th Cir. 1995) (methodology reviewed "on the merits" with factual findings reviewed for clear error).

[35] *Tucker,* 12 F.4th at 828.

[36] *United States v. Young*, 863 F.3d 685, 688 (7th Cir. 2017).

[37] *Young*, 863 F.3d at 688 (citing *United States v. Mendoza*, 510 F.3d 749, 754 (7th Cir. 2007)). *See also United States v. Hill*, 563 F.3d 572, 577 (7th Cir. 2009) (U.S.S.G. § 3B1.2 Role in the Offense; "We review the district court's construction of a guideline and its methodology in applying the guideline *de novo*, as these present legal questions."). *But see United States v. Acosta*, 534 F.3d 578, 584 (7th Cir. 2008) (no clear error in method to estimate drug quantity that erred on the low side).

Circuits follow the highly deferential "clear error" standard, with no particular focus on the underlying methodology used to determine quantity.[38]

A clear inter-circuit split exists in the standards of review to assess the reliability of district judges' methodologies used to determine drug quantity under the Sentencing Guidelines, under which federal sentencing decisions "are anchored …." The "district courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process;" and "[f]ailing to calculate the correct Guidelines range constitutes procedural error."[39]

[R]egardless of length, a sentence based on an error of law is *per se* unreasonable."[40] Because the methodology chosen to ascertain drug quantity is at least a mixed question of law and fact, if not a pure question of law, this split presents a serious concern in the post-*Booker* era of reasonableness review of sentencing determinations.[41] The Court should resolve the inter-circuit conflict. And it should disallow using a needlessly deferential standard of review to assess the reliability of methodologies devised to resolve contested issues of Relevant Conduct in narcotics

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[38] *See*, *e.g.*, *United States v. Madison*, 863 F.3d 1001, 1005 (8th Cir. 2017); *United States v. Moralez*, 808 F.3d 362, 369 (8th Cir. 2015); *United States v. Freeman*, 763 F.3d 322, 337 (3rd Cir. 2014).

[39] *Peugh v. United States*, 569 U.S. 530, 541 (2013) (emphasis original) (citations omitted).

[40] *United States v. Price*, 409 F.3d 436, 442 (D.C. Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005), *abrogated on other grounds* by *United States v. Fagans*, 406 F.3d 138, 142 (2d Cir. 2005).

[41] *United States v. Booker*, 543 U.S. 220 (2005).

prosecutions. A three-judge appellate panel with a breadth of experience is fully capable of reviewing sentencing transcripts and materials *de novo*, and perhaps better situated for that role.

Using the highly deferential clear error standard to adjudicate a challenge to the process used to establish offenders' placement in the Sentencing Guidelines disserves the basis for resorting to that less rigorous standard of review, which recognizes that sentencing courts' familiarity with the record should be accorded deference. However, the process by which sentencing judges first get to the point of calculating the drug weight demands a more searching review, particularly in circumstances such as this case. If one looks at the reasons why appellate courts defer to trial judges, such as the ability to better make credibility decisions, but one instead is questioning the reasonableness of speculative assumptions that are part of the methodology, the reason for such deference would be absent.

The Government may seek to avoid this Court's interposition by invoking the doctrine of sentencing guidelines abstention articulated in *Braxton v. United States.*[42] However, when "'[t]he Circuit Courts have divided . . . [s]uch division is a traditional ground for certiorari.'"[43] This case does not challenge any Sentencing Commission policy nor raise any issue bearing on its expertise. Instead, this petition focuses on

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[42] 500 U.S. 344 (1991).

[43] *Wheaton Coll. v. Burwell*, 573 U.S. 958, 134 S. Ct. 2806, 2807 (2014) (quoted in Dawinder S. Sidhu, "Sentencing Guidelines Abstention" at 36 & n. 120 (manuscript) (March 15, 2022) (available at: https://ssrn.com/abstract=3950703) (last accessed April 26, 2022)); Sup. Ct. Rule 10.

resolving the proper standard of review of district courts' approaches in establishing the amounts of narcotics that factor into determining Relevant Conduct. The Commission is not positioned to provide a binding interpretation of that issue and the doctrine of abstention therefore is inapplicable.[44]

For the foregoing reasons, this Court should grant the petition and resolve the conflict.

ARGUMENT AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Standards of review have special pertinence in sentencing.[45] Narcotics cases are a quarter of the workload reported to the Sentencing Commission.[46] This Court should reconcile the inter-circuit split by requiring *de novo* appellate review of claims that unreliable practices marred a Relevant Conduct drug quantity determination.

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[44] *See, e.g.*, *Koon v. United States*, 515 U.S. 1190 (1995) (rejecting Government's opposition to petition for certiorari seeking to clarify standard of review of sentencing departure decisions), *later op.,* 518 U.S. 81 (1996).

[45] *See*, *e.g.*, Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV 643, 657-658, 661 (2015) (citing decisions); Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 409, 431 (2011).

[46] United States Sentencing Commission, "Federal Offenders by Type of Crime," FISCAL YEAR 2020 OVERVIEW OF FEDERAL CRIMINAL CASES at 4 (April 2021) (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf) (last accessed October 20, 2021).

I. There is an inter-circuit split on the proper standard of review of the methodology to determine drug quantity findings.

Just as there is a due process right not to be sentenced based on "misinformation of constitutional magnitude,"[47] a defendant has a right under the Sentencing Guidelines to be sentenced based on reliable information. Simply put, a finding in a sentencing "must be based on evidence before the court . . . and not on speculation or hypothesis."[48] And yet, as discussed above, there is a multi-circuit split in how judges' approaches to determining the amounts of narcotics comprising offenders' Relevant Conduct are reviewed.

a. Applying a uniform *de novo* standard of review to evaluate the process used to determine drug quantity is not unorthodox: several appellate courts that apply clear error review when assessing methodologies devised in narcotics cases apply a stricter *de novo* review to methodologies of calculating "loss" under the fraud-related sentencing guidelines. For instance, the Third Circuit recently undertook plenary review to remand a sentence for selling counterfeit rare coins because the methodology of determining the fraud loss was flawed.[49] The Seventh Circuit also

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47 *United States v. (Forrest) Tucker*, 404 U.S. 443, 447 (1972).

48 *United States v. Moore,* 666 F.3d 313, 322 (4th Cir. 2012); *see also United States v. Bradley*, 628 F.3d 394, 400 (7th Cir. 2010) ("Sentencing judges necessarily have discretion to draw conclusions about the testimony given and evidence introduced at sentencing, but due process requires that sentencing determinations be based on reliable evidence, not speculation or unfounded allegations.") (cleaned up).

49 *United States v. Kirschner*, 995 F.3d 327, 333-38 (3d Cir. 2021).

reviews the methodology to derive fraud loss *de novo.*[50] And Eighth Circuit precedent is similar.[51]

b. Those Circuits that apply *de novo* review to narcotics methodologies are equally consistent in reviewing fraud loss methodologies. The First Circuit employs *de novo* review in such cases.[52] The Fifth Circuit does, too.[53] And the Tenth Circuit reviews loss calculation methodologies *de novo* and the actual calculations for clear error.[54] (Although the Sixth Circuit does not appear to have addressed the standard

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[50] *United States v. Senn*, 129 F.3d 886, 898 (7th Cir. 1997) (cleaned up).

[51] *United States v. Hartstein*, 500 F.3d 790, 795 (8th Cir. 2007) (mail fraud and account fraud, 18 U.S.C. §§ 1029(a)(2), 1343) (citing *United States v. Alfonso*, 479 F.3d 570, 572-74 (8th Cir. 2007) (wire fraud, 18 U.S.C. § 1343).

[52] *United States v. Foley*, 783 F.3d 7, 23 (1st Cir. 2015) (distinguishing "the district court's calculation methodology" from "its mathematical application of this methodology" to conclude *de novo* review appropriate; wire fraud, 18 U.S.C. § 1343; money laundering, *id*. § 1957).

[53] *See*, *e.g.*, *United States v. Ainabe* 938 F.3d 685, 692 (5th Cir. 2019) (review of methodology used to determine fraud loss is *de novo* because "'because that is an application of the guidelines. . . .'") (U.S.S.G. § 2B1.1(b)(1)(J)); *United States v. Harris*, 821 F.3d 589, 601 (5th Cir. 2016) (wire fraud, 18 U.S.C. § 1343) (citations omitted); *United States v. Klein*, 543 F.3d 206, 214 (5th Cir. 2008) (mail fraud, 18 U.S.C. § 1341; healthcare fraud, 18 U.S.C. § 1347).

[54] *United States v. Maynard*, 984 F.3d 948, 956 (10th Cir 2020) (failure to pay corporate payroll taxes; stealing or embezzling employee benefit plan and health care contributions, 18 U.S.C. §§ 371, 664, 669) (citing *United States v. Snow*, 663 F.3d 1156, 1160 (10th Cir. 2011) (wire fraud and conspiracy, 18 U.S.C. §§ 1343, 1349)).

of reviewing drug quantity calculations, it reviews fraud loss methodologies *de novo*.[55])

In sum, those courts have reviewed *de novo* the integrity of the *process* used to quantify fraud loss from the evidentiary record; the resulting factual findings then were reviewed for clear error—as Tucker urged be applied to this narcotics case. There is no reason to differentiate the core concepts or have a double standard for narcotics cases; in each instance a sentencing court is seeking to quantify a Base Offense Number based on empirical evidence and rational inferences.

c. The proper standard of review presents a serious concern under any circumstances in an era of reasonableness review of sentencing determinations.[56] Improperly calculating the Guidelines range is a "significant procedural error."[57] A three-judge panel with a breadth of experience is more capable than a single judge of reviewing the sentencing proceedings *de novo* to determine whether a sentence rested on a reliable, objectively valid methodology.

II. A deferential standard of review is not well-suited for assessing a sentencing court's choice of methodologies.

Granting great deference to the process chosen by only one person—the trial judge—invites error, particularly in sentencings, where the standard of proof is only

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[55] *United States v. Riccardi*, 989 F.3d 476, 481 (6th Cir. 2021) (stealing mail as a postal employee; 18 U.S.C. § 1709); *United States v. Chaney,* 921 F.3d 572, 598 (6th Cir. 2019) (health care fraud and conspiracy, 18 U.S.C. §§ 1347, 1349).

[56] *Gall v. United States*, 552 U.S. 38, 49-51 (2007); *Booker*, 543 U.S. at 261-62.

[57] *Gall*, 552 U.S. at 51.

a preponderance of evidence.[58] A standard of *de novo* review is necessary to determine whether district judges properly created a process to calculate drug quantity.

a. An appellate panel's competence to evaluate a district judge's factual findings flowing from a flawed methodology "'may be less a limitation than a source of institutional advantage.'"[59] "[I]t is perhaps not too much to claim for the appellate courts that in their supervisory function they may have the advantage of a wider perspective" than a district judge.[60] "[M]ultiple members of the appellate panel tend to reduce prejudice that may influence a judge's decision were [s]he sitting alone."[61]

b. "[F]requently recurring fact patterns warrant specific judicial norm elaboration rather than being left to the trier of fact under a more general standard."[62] The record here affords a good example of why requiring uniform

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[58] *United States v. McDowell*, 713 F.3d 571, 576 (10th Cir. 2013). *See also* SENTENCING GUIDELINES MANUAL, § 6A1.3(a), § 6A1.3 cmt. (information used in sentencing must have "sufficient indicia of reliability….").

[59] Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2143 (2010) (citations omitted). *See also* Note, *More Than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 967 (2014).

[60] Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249, 275 (1962) (statement of Sobeloff, C.J.).

[61] Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 32 n.151 (2008) (citing Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making,* 151 U. PA. L. REV. 1639, 1647 (2003)).

[62] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 267 (1985).

standard of *de novo* review is appropriate. The evidence of Tucker's transactions with Fields was quite thin. The government submitted scant tangible and no electronic evidence, admissions, and/or incisive corroboration from reliable insider witnesses to justify the extrapolation indulged in by the sentencing court and it was speculative to postulate that Tucker consistently and regularly was selling heroin, let alone a uniform amount of it, sufficient to conclude that he had trafficked 75 grams of heroin.[63]

c. The absence of a uniform and coherent process of reviewing sentences invites a return to the dysfunctional practices that led to sentencing reform legislation in the first place.[64] An independent appellate review of the reliability of the sentencing methodology—an "evaluative determination"[65]—is necessary to "maintain control of, and to clarify the legal principles"[66] and through that process "unify precedent."[67] In addition,"[r]egarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—

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[63] *United States v. Hardin*, 437 F.3d at 471 (*de novo* review required of "whether the guidelines are correctly applied — whether bones [an unusable byproduct of methamphetamine production] are included under [U.S.S.G.] § 2D1.1").

[64] Nancy Gertner, *Apprendi/Booker and Anemic Appellate Review*, 99 N.C. L. REV. 1369, 1376 & n.30 (2021).

[65] Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 143-144 (2005).

[66] *Ornelas v. United States*, 517 U.S. 690, 698 (1996).

[67] *Ornelas*, 517 U.S.at 698. *See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (*de novo* review "helps to assure the uniform general treatment of similarly situated persons…").

are too great to entrust them finally to the judgment of the trier of fact."[68] "Providing clear legal guidance is particularly important in the area of sentencing, not only because it involves important interests like liberty, but also because sentencing affects so many people."[69]

d. The deferential "clearly erroneous" standard of review employed by the Court of Appeals below is based on "the importance of first-hand observation."[70] Here, however, we are speaking of whether the methodology was sufficiently reliable to justify the facts ultimately found—not whether the Trial Judge more likely than not made correct factual findings by using a reasonable methodology.

III. This case is a good example of why this Court should resolve the circuit conflict.

As previously discussed, the D.C. Circuit applied a clear error standard to review the reliability of the underlying sentencing methodology but gave no explanation of why independent appellate review would be unfitting.[71] Yet the standard of review can matter. A *de novo* review of the methodology used here likely would have led to a different result. So much is confirmed by examining

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[68] *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984). *See also Salve Regina College v. Russell*, 499 U.S. 225, 231-233 (1991) (discussing appellate courts' "institutional advantages" in giving legal guidance).

[69] Hessick & Hessick, 60 ALA. L. REV. at 33.

[70] Harry T. Edwards & Linda A. Elliott, FEDERAL STANDARDS OF REVIEW—REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 13 (2007) (cleaned up). *Accord* Hessick & Hessick, 60 ALA. L. REV. at 14.

[71] *Tucker*, 12 F.4th at 828.

representative decisions in Circuits which employ that more demanding standard of review and have remanded sentences based on equally flawed methodologies.

a. The First Circuit's *United States v. Candelaria-Silva* decision involved a lower-echelon defendant within an "immense" heroin conspiracy network who ultimately successfully challenged the imposition of a much higher drug quantity than the record supported.[72] The trial judge's assumptions were tainted by "ignoring troublesome evidentiary gaps"– including the appellant's absence from detailed ledgers maintained by the organization.[73]

In remanding the sentence, the court of appeals emphasized that "[w]e have stated on previous occasions that where, as here, a drug quantity determination relies on multiples of averages or extrapolations, the sentencing court must be mindful of 'the potential for error where one conclusory estimate serves as the multiplier for another (*i.e.*, average number of transactions per hour and average operating hours per day)[, which] may undermine the reasonable reliability essential to a fair sentencing system.'"[74]

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[72] 714 F.3d 651 (1st Cir. 2013).

[73] *Candelaria-Silva,* 714 F.3d at 656-658.

[74] *Id.,* 714 F.3d at 658.

Ultimately the *Candelaria-Silva* appellant's sentence was reduced from 360 months to 235 months. Similar results appear in First Circuit decisions.[75]

Here, the district judge's error was based on a similarly shaky methodology, one influenced primarily by Tucker's presence near the barbershop than by anyone's testimony or objective evidence concerning what (if anything) he was selling in league with Fields, and which was further marred by a failing to appreciate the insignificance of the failed and exiguous street "buys."[76]

b. A series of Ninth Circuit decisions is also instructive. In *United States v. Culps*,[77] the sentencing judge estimated an average drug quantity of 60,250 transactions based on nine "controlled buys." This approach, which involved three times the number of consummated "buys" here, was found by *de novo* review to be

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[75] Docket, *United States v. Santiago-Lugo et al,* 95-cr-029 (D.P.R., Mar. 29, 2016) ([3783]). Similarly, the sentence appealed from in *United States v. Marquez* was vacated because the extrapolation was not "based on a known quantity or readily calculable number of transactions involving clearly established or conservatively estimated quantities." 699 F.3d 556, 561-562 (1st Cir. 2012). On remand, the appellant's sentence was reduced from 121 months to 100 months. Docket, *United States v. Marquez,* 10-cr-10283 (D. Mass., Apr. 27, 2016) ([81]). Previously, in *United States v. Sepulveda*, the court of appeals rejected using a midpoint between four ounces and a kilogram to determine drug quantity for two appellants, whose sentences were remanded. 15 F.3d 1161, 1197 (1st Cir. 1993). A PACER search of the district court docket was unavailing, as the paper files had been sent to the Archives. *United States v. Sepulveda,* 90-cr-13 (D.N.H.).

[76] Mere presence in the vicinity of drug transactions and acquaintance to persons making such transactions is insufficient to establish guilt of a conspiracy. *United States v. Pardo*, 636 F.3d 535, 549-50 (D.C. Cir. 1980). This proposition is just as pertinent to sentencing. *See United States v. Bagcho*, 923 F.3d 1131, 1138-40 (D.C. Cir. 2019) (remanding finding of constructive possession of firearm in narcotics dealings; citing *Pardo*).

[77] 300 F.3d 1069 (9th Cir. 2002).

statistically and legally unreliable and warranted a remand.[78] The district court then resentenced Culps, lowering his term of incarceration from 88 months to 41 months.[79] The reasoning underlying *Culps* should apply here, where the record of Tucker's sales of heroin was equally sparse.

Subsequently, in *United States v. Kilby*[80] the district court had estimated sales of "Foxy" tablets with no evidence of the tablets being the same approximate size and overlooked the varying weights of recovered samples. Although reliable approximations "based on facts specific to the defendant's case" can be acceptable, the court of appeals recognized, its *de novo* review concluded that the approximation was unreliable and remanded for resentencing, after which the appellant's sentence was shortened by 24 months.[81] And here, of course, there was no proof of Tucker regularly offering and selling any quantity of heroin (or other drugs) obtained from Fields. The gauzy films offered by the prosecution were fluff because the agents admitted they had no idea what if anything illicit Tucker was doing.

In another Ninth Circuit decision, *United States v. Chase*,[82] the appellate court exercised *de novo* review to reject methodologies that entailed unreliable estimates of manufacturing glassware capacities, coupled with an unreasonable multiplier

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78 *Culps*, 300 F.3d at 1076 (citing cases).

79 Docket, *United States v. Culps,* 99-cr-2070 (E.D. Wash., Nov. 21,2002) ([146]).

80 443 F.3d 1135 (9th Cir. 2006).

81 *Kilby*, 443 F.3d at 1141-42; Docket, *United States v. Kilby,* 04-cr-144 (D. Id., Aug. 8, 2006) ([47, 65]) (96 months reduced to 72 months).

82 499 F.3d 1061 (9th Cir. 2007).

analysis. The district court had assumed that Chase had cooked 100 boxes of pseudoephedrine once per month for over eight months. However, the court of appeals pointed out that record contained "no reliable evidentiary basis for any of the pivotal assumptions in the drug quantity approximation," which led to a 21-month shorter term of imprisonment following remand.[83]

Here, where the D.C. Circuit followed a clear error review, there was no quantifiable evidence of Tucker's making more than a single controlled street-level "buy"—no admissions, ledgers, wiretaps, or insider testimony. Nor were the unconsummated "buys" informative of his making actual sales on a periodic basis of heroin or any quantity of any other drug whose weight could be converted. (Again: it was speculative in the extreme to factor unconsummated "buys" into the process and thereby deduce that five half-gram sales of heroin per week were consummated.)

The appeal in *United States v. Forrester*[84] also prompted a remand. The court of appeals explained that "when there are two 'equally good measures' for making a calculation under the guidelines, a court must select the one 'bringing the less punishment[.]'"[85] Although the sentencing court's failure to make explicit findings concerning the quantity prompted the remand, the appellate court expressed discomfiture with any future sentence that rested on a higher quantity, absent proof

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[83] *Chase*, 499 F.3d at 1068-70; Docket, *United States v. Chase,* 03-cr-028 (D. Mt., Apr. 10, 2008) ([148, 167]).

[84] 616 F.3d 929 (9th Cir. 2010).

[85] *Id.* at 949 (quoting *Chase*, 499 F.3d at 1069; and *United States v. Hardy*, 289 F.3d 608, 614 (9th Cir. 2002)).

that was derived from "the most reliable method available."[86] Yet here the trial court chose an unreliable method to estimate actual sales by Petitioner that nobody had attested to or admitted, that was not supported by any reliable record evidence, and that was further tainted by considering the isolated unsuccessful street-level "buys."

c. The two decisions cited by the D.C. Circuit to support its application of clear error review are inapposite. They present different scenarios. Their logic supports Petitioner's contention that *de novo* review should be used to assess a questioned methodology in determining Relevant Conduct.

1. The First Circuit opinion in *United States v. Correa-Alicea*[87] stated that it can be reasonable to extrapolate from two controlled "buys" a "'conservative estimate of one transaction a day'" over time.[88] Sometimes that can be accurate—but it depends on whether a reliable process was used to derive the estimate. There, "[a]ccording to the testimony of Ortiz-Cruz and Colón-González, long-time residents of the housing project [and testifying cooperators], Correa-Alicea was 'in charge' of the drug point and was involved in the conspiracy from November 2005 until November 2006. The drug point operated for at least sixteen hours every day, and a large number of people visited the drug point daily."[89] Thus, considering that the

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[86] *Forrester*, 592 F.3d at 991. Following remand, the offender's sentence was pruned from 320 to 264 months. Docket, *United States v. Alba,* 03-cr-3177 (S.D. Cal., May 6, 2011) ([1231]).

[87] 585 F.3d 484 (1st Cir. 2009) (cited in *Tucker*, 12 F.4th at 829).

[88] *Tucker*, 12 F.4th at 829 (quoting *Correa-Alicea*, 585 F.3d at 491).

[89] *Correa-Alicea*, 585 F.3d at 490.

district court's estimate went appreciably below the lowest extrapolation, the "finding as to drug quantity was not a mere 'hunch or intuition;'" rather, "[t]he estimate of one transaction per day, or 365 transactions per year, is highly conservative in light of testimony that the drug point operated for sixteen to seventeen hours per day, 365 days per year, and had a large number of customers daily.[90]

Notably, *Correia-Alicea* eschewed addressing the methodology because there was straightforward testimony from the cooperators and the controlled buys were sufficient for sampling purposes.[91] Hence the decision does not detract from Tucker's contention that the record was so sparse as to support any rational process to appraise the drug quantity that was used to derive Relevant Conduct in his case.

Moreover, the trial judge's approach to determining Relevant Conduct here differs significantly from *Correia*—Tucker oversaw nothing. He was a street-level dealer whom the sentencing judge found occasionally dealt with Fields. No cooperators described Petitioner's dealings in contraband and there was no greater set of transactions against which the single consummated controlled "buy" could be measured and used as a reliable springboard for extrapolation. Hence the extrapolation used to set his Relevant Conduct was unsupportable.

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[90] *Id.* at 585 F.3d at 490-91 (citations omitted).

[91] *Id.* at 489-90.

2. Nothing in *United States v. Block*[92] suggests that the appellants had pressed the Seventh Circuit to embrace *de novo* review of the drug quantity methodology.[93]

Furthermore, *Block* involved a palpably valid methodology. There, a drug trafficking organization's "kingpin" pled guilty and made damaging admissions about the operation's dealings; "'[n]o one was more qualified than [the defendant] himself to put a number on the amounts of cocaine he was purchasing and re-selling, and [the agent] was simply recounting what [the defendant] told him in this regard.'"[94] Moreover, the defendant's girlfriend and another higher-up defendant had supplied detailed corroboration of the leader's concessions.[95] Nor did any of the appellants claim to have been small players in the organization.[96]

Petitioner Tucker was situated nowhere near the *Block* appellants' level in the organizational hierarchy. As the sentencing dialogue recognized, Tucker was a street seller who occasionally dealt with Fields. Even then, the notion that he made periodic sales on any regular weekly basis, as the district court concluded, was fraught with undue speculation.

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92 705 F.3d 755, 760–61 (7th Cir. 2013) (cited in *Tucker*, 12 F.4th at 829).

93 *Block,* 705 F.3d at 759 (citing *United States v. Morales*, 655 F.3d 608, 635 (7th Cir. 2011)).

94 *Block*, 705 F.3d at 760 (cleaned up).

95 *Id.*, 705 F.3d at 760-61.

96 *Id.* at 762.

IV. This case is a good vehicle for review.

The doctrine of sentencing guidelines abstention does not apply to this case. The question presented is within the judiciary's exclusive province: this Court serves as the ultimate determinant of federal criminal procedure and is uniquely situated to provide uniformity to the federal courts. The Sentencing Commission lacks such authority under any constitutional or statutory provision. Nothing in the Sentencing Reform Act suggests that Congress intended for the Court to surrender its traditional role of resolving inter-circuit conflicts to the Commission.[97] If anything, instructive precedent can be derived from *Koon v. United States*, which this Court accepted to resolve an inter-circuit split over the standard of review governing appeals from departures from Guidelines sentencing ranges.[98]

The legal issue, in turn, is discrete and is cleanly presented. The underlying record is well-developed and uncomplicated. Petitioner's role in the underlying case was at a low level and the material facts necessary for review are not extensive. If anything, those circumstances that frequently feature in narcotics-based Relevant Conduct sentencing controversies are not present; the government presented no wiretaps or confessions from Petitioner that were informative of his dealings. Its few photographs of him were widely separated over time and were not informative of what he was marketing and what sales he was making. It seized no appreciable quantities of narcotics or any cash from Petitioner. And the other evidence it

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[97] Sidhu, "Sentencing Guidelines Abstention" at 28, 43, 48-49 (manuscript).

[98] *Koon*, 518 U.S. at 91.

quantities of narcotics or any cash from Petitioner. And the other evidence it presented was of equally limited utility, as the cooperating witness shed no light on what types and quantities of drugs Petitioner supposedly marketed.

Nor do any significant factual disputes exist over the organization and components of the district judge's approach to assess Petitioner's Relevant Conduct: the judge explained how he reached the conclusions that underlay Petitioner's Base Offense Level. Petitioner contends that by using unsupported extrapolations and inferences that the procedure used to calculate his all-important Base Offense Level was and is legally unjustifiable. Use of the *de novo* standard in these circumstances would be outcome-determinative: if the methodology is unsupportable, then the facts derived from its application perforce should also founder. Had this appeal arisen in a circuit that applies *de novo* review to the Relevant Conduct determination, that review would have found error in how Petitioner's Relevant Conduct was calculated and his sentence quite likely would have been remanded.

CONCLUSION

The Court should grant this Petition and determine a uniform standard to review district courts' methodologies used in federal narcotics prosecutions to establish offenders' Relevant Conduct under the Sentencing Guidelines.

Respectfully submitted,

/s/Stephen C. Leckar*
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APPENDIX

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3042 **September Term, 2021**
FILED ON: SEPTEMBER 3, 2021

UNITED STATES OF AMERICA,
APPELLEE

v.

LONNELL TUCKER,
APPELLANT

Consolidated with 19-3043, 19-3078

Appeals from the United States District Court
for the District of Columbia
(No. 1:18-cr-00267-6)
(No. 1:18-cr-00267-1)
(No. 1:18-cr-00267-2)

Before: KATSAS, RAO, and WALKER, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's judgments of conviction be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: September 3, 2021

Opinion Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 9, 2021 Decided September 3, 2021

No. 19-3042

UNITED STATES OF AMERICA,
APPELLEE

v.

LONNELL TUCKER,
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Appeals from the United States District Court
for the District of Columbia
(No. 1:18-cr-00267-1)
(No. 1:18-cr-00267-2)
(No. 1:18-cr-00267-6)

Paul S. Rosenzweig, appointed by the court, argued the cause for appellant Anthony Fields. *Amelia Schmidt*, appointed by the court, argued the cause for appellant Abdul Samuels. With her on the briefs was *Matthew G. Kaiser*, appointed by the court. *Stephen C. Leckar*, appointed by the court, argued the cause for appellant Lonnell Tucker.

Daniel J. Lenerz, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Elizabeth Trosman*, *Chrisellen R. Kolb*, and *Gregory P. Rosen*, Assistant U.S. Attorneys.

Before: KATSAS, RAO, and WALKER, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Appellants Anthony Fields, Abdul Samuels, and Lonnell Tucker were convicted on several drug- and firearm-related offenses. Each appellant challenges his convictions, and Samuels also challenges his sentence. We affirm.

I

In May 2018, a grand jury indicted Fields, Samuels, Tucker, and three other individuals on several charges related to an alleged drug-dealing conspiracy. The indictment stemmed from an investigation by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) of drug activity at Next Level Cuts, a barbershop in the District of Columbia.

Much of the government's evidence came from searches in the months preceding the indictment. During a traffic stop in November 2017, officers found what appeared to be a drug ledger, approximately $9,000, and drug paraphernalia in Fields's vehicle. The ATF executed a search warrant on the barbershop three months later. In a suite above the barbershop, agents found cash, firearms, more drug paraphernalia, and large quantities of narcotics — heroin mixed with fentanyl, PCP, Suboxone, and synthetic marijuana. In the same room, they also found a document listing a medical appointment for Fields and a receipt for a purchase made with his credit card. A search of Fields's home led to more drug ledgers, two of

which listed "Foots" (*i.e.*, Samuels). During the ensuing searches of Samuels's home, ATF agents found a shotgun, drug paraphernalia, crack cocaine, marijuana, and synthetic marijuana. During the search, Samuels admitted that he kept the gun under his bed for protection.

Also central to the government's case was testimony from Byran Clark, a drug dealer who purportedly worked for Fields. Clark testified that Fields ran a drug operation out of the barbershop's upstairs suite and that Samuels often acted as a gatekeeper to the suite. He also reported that Tucker sold drugs out of the barbershop and frequented the suite.

Five defendants proceeded to trial. One pleaded guilty during the trial. The jury returned a mixed verdict as to the other four. It acquitted one defendant on the sole charge against him. It also acquitted Fields and Samuels on several firearms- and narcotics-related charges. But it found Fields, Samuels, and Tucker guilty of conspiracy to distribute and possess with intent to distribute various narcotics. *See* 21 U.S.C. §§ 841, 846.[1] It also found Fields guilty of possessing with intent to distribute each of the narcotics alleged in the conspiracy. *Id.* § 841(a). And it found Samuels guilty of possessing with intent to distribute cocaine base, *id.*, of possessing synthetic marijuana, *id.* § 844, and of felony possession of a firearm, 18 U.S.C. § 922(g).

The district court sentenced Fields to 192 months of imprisonment, Samuels to 84 months of imprisonment, and

[1] The jury found Fields guilty of conspiring to distribute PCP, heroin, fentanyl, buprenorphine, marijuana, and synthetic marijuana. Samuels was found guilty of conspiring to distribute heroin and fentanyl. And Tucker was found guilty of conspiring to distribute heroin.

Tucker to 60 months of imprisonment. All three appealed and collectively raise eight claims. We address each claim in turn.

II

We start with Fields, who contends that the police officers who searched him and his vehicle in November 2017 lacked a sufficient basis to conduct their traffic stop, violating the Fourth Amendment. Prior to the search, officers conducting undercover surveillance on a store known to sell drug paraphernalia witnessed Fields exit the store. The officers followed him. Fields drove to a nearby parking lot where another person entered Fields's car and then left after less than two minutes. Suspecting a drug sale and wanting to remain undercover, the officers called for backup and followed Fields to another nearby parking lot.

When backup officers arrived, they observed Fields illegally speed through that parking lot and then park. They momentarily observed Fields before they approached him and asked for his driver's license and registration. "Due to his nervous behavior and furtive movements," they then asked Fields to step out of his car and keep his hands away from his pockets. App. 145.

Contrary to the instruction, Fields made "constant furtive movements towards his pockets." *Id.* So the backup officers conducted a pat down, during which Fields spontaneously uttered "that white powder in my pocket is a supplement." *Id.* The "white powder" was Mannitol, a known cutting agent for cocaine. *Id.* at 146.

The backup officers also found $2,000 in cash and a ledger on Fields. Inside his car, a K-9 found another $7,001 in cash and multiple bottles with concealed "false bottoms containing

trace amounts of white powder." *Id.* Fields was subsequently arrested.

Months later, in February 2018, ATF agents applied for a search warrant of Fields's car and the barbershop, which was suspected of being a stash house. The 18-page application included a paragraph about the November 2017 stop. After a court granted the search warrant, ATF agents found additional evidence of Fields's drug trafficking.

Before trial, Fields challenged the legality of the vehicular stop and search warrant. The district court held an evidentiary hearing on the stop. Sergeant Chaney (one of the two undercover officers) and Officer Haskett (one of the backup officers) both testified. The court found their testimony credible, concluded that there was probable cause to stop Fields, and denied Fields's suppression motion. The court also denied Fields's motion to suppress evidence from the February 2018 search.

As to the November 2017 stop, Fields challenges the court's findings that (1) the officers were credible, and (2) there was probable cause for the stop. In addition, he disputes the district court's rejection of his argument regarding the 2018 search, and he now adds an argument not raised in the district court — that the evidence from the February 2018 search warrant should be suppressed as poisonous fruit of the allegedly unlawful November 2017 stop.

A

As for the officers' credibility, we review the district court's findings for clear error. *United States v. Delaney*, 955 F.3d 1077, 1081–82 (D.C. Cir. 2020). And we reverse "when a district court credits *exceedingly improbable testimony*."

United States v. Delaney, 651 F.3d 15, 18 (2001) (cleaned up) (emphasis added).

Fields offers three reasons for reversal.

First, he argues that because Officer Haskett did not immediately stop him or take the necessary steps to cite him for speeding, no speeding actually occurred. But that conclusion does not follow from those facts. Officer Haskett was taking steps to cite Fields for speeding until he discovered evidence of a more serious crime — Fields's drug trafficking. It is therefore understandable the stop did not end how it began.

Second, Fields makes much of Sergeant Chaney's statement that he could not recall "[i]f there were any obvious reasons for the stop." App. 118. What Chaney actually said, when asked if he could recall "[i]f there were any obvious reasons for stop," was: "I believe there were, but off the top of my head, I couldn't tell you what it was. *Id.* But in any event, Sergeant Chaney was not even the officer who conducted the stop. Cause for the stop here depends on what was seen by Officer Haskett. And he recalled that Fields was speeding.

Third, Fields argues that Officer Haskett's testimony that Fields "was going a little fast," *id.* at 133, is inconsistent with his written report that Fields was "traveling at a high rate of speed through the parking lot" and that officers approached Fields to confront him "about speeding through the parking lot," *id.* at 145.

That argument, however, distorts Officer Haskett's testimony, which included at least five statements about Fields's driving:

(1) "I saw a silver Range Rover *speeding* through the parking lot";

(2) Fields "was *going a little fast* for people to — for [him] *to react to people walking across the road*";

(3) "I already had probable cause to stop the vehicle because of *speeding*";

(4) "I don't know the exact speed limit, but I do know that he was *driving faster than he should* if people are walking with their children and families shopping"; and

(5) Fields's "[*s*]*peed* [was] *greater than reasonable*."

Hr'g Tr. 9, 11, 31, ECF No. 246 (emphases added).

Contrary to Fields's argument, there is no genuine inconsistency between the written report and the totality of Officer Haskett's testimony. One can imagine a case where it might matter whether a defendant was barely speeding or dangerously speeding. But this is not that case. All that matters is that Fields committed a traffic violation.

The district court did not err in finding the officers' testimony credible. And we, like the district court, rely on it for the next part of our analysis.

B

We review the district court's determination that there was a legal basis for the stop *de novo*. *See Delaney*, 955 F.3d at 1081–82.

Because Officer Haskett observed Fields speeding, he had probable cause for the stop. It is well settled that a traffic stop "is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996); *see also United States v. Sheffield*,

832 F.3d 296, 302 (D.C. Cir. 2016) (quoting *Whren*, 517 U.S. at 810).[2]

We will not consider Fields's argument that the speeding was merely a pretextual justification for the stop because the Supreme Court's precedents "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 813. So too do this court's precedents. *See Sheffield*, 832 F.3d at 302–03.

We affirm the district court's denial of Fields's motion to suppress.

C

Because Officer Haskett lawfully stopped Fields, there is no poisonous tree from which poisonous fruit could fall. Moreover, Fields forfeited his argument that the evidence from the February 2018 search warrant should be suppressed as fruit of the poisonous tree by not raising that argument in district court. "[S]uppression arguments that are not presented to the trial court are deemed waived and cannot be argued on appeal." *United States v. Castle*, 825 F.3d 625, 632 (D.C. Cir. 2016) (cleaned up).

III

Fields next argues that the district court erred when it denied his request to represent himself at trial. Fields had a difficult relationship with his attorneys throughout the prosecution. He fired his first attorney in 2018. Three months

[2] Even without probable cause, an officer's reasonable suspicion is alone enough to justify a traffic stop. *See Heien v. North Carolina*, 574 U.S. 54, 60 (2014).

before trial, he fired that attorney's successor. And then, seven days into trial, he tried to fire his third attorney. At that point, over his co-defendants' objections, Fields moved to represent himself. When the district court asked why, Fields said his attorney had not had time to learn the details of the case. He also believed his attorney was not "aggressive enough" during the trial. App. 361. The district court denied Fields's request, noting they were far along in the trial and Fields's self-representation at that juncture might harm his co-defendants.

Fields asks us to review the district court's decision *de novo*. But when a defendant's request to represent himself is made *after* trial has begun, we review the district court's decision for abuse of the court's "considerable discretion." *United States v. Noah*, 130 F.3d 490, 498 (1st Cir. 1997); *see also United States v. Washington*, 353 F.3d 42, 46 (D.C. Cir. 2004) (applying abuse of discretion standard).

"A person accused of a crime has an absolute right, under the Sixth Amendment, to represent himself *only* if he asserts that right *before trial*." *Washington*, 353 F.3d at 46 (emphases added). But if asserted *after* a trial begins, the right of self-representation is qualified. It must yield to other interests when those interests, such as harm to co-defendants, outweigh it. *See United States v. Bankoff*, 613 F.3d 358, 373–74 (3d Cir. 2010) ("However, after trial has commenced — *i.e.*, at least after the jury has been empaneled — the right of self-representation is curtailed. In that context, district courts have discretion to deny an untimely request to proceed *pro se* after weighing the prejudice to the legitimate interests of the defendant against the potential disruption of proceedings already in progress. How this balance should be struck is ultimately within the sound discretion of the district court, and we will review its decision under a highly deferential abuse-of-discretion standard.") (cleaned up); *United States v. Walker*, 142 F.3d 103, 108 (2d

Cir. 1998) ("Once a trial has begun, the defendant's right to self-representation is sharply curtailed. In cases in which the request is made following the commencement of the trial, the district judge must balance the prejudice to the legitimate interests of the defendant against the potential disruption of proceedings already in progress. On appeal, considerable weight will be given to the district court's assessment of this balance.") (cleaned up); *see also United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972).

Citing this court's concern in *United States v. Washington* that a defendant's request to make his own closing argument may be an attempt to tell his story while evading cross-examination, *see* 353 F.3d at 46, Fields says, "At most, *Washington* stands for the proposition that a defendant may be denied self-representation when the request is an effort to game the system." Appellants' Br. 42. We disagree. Although a defendant's attempt to manipulate the process is a sufficient reason to deny a mid-trial request for self-representation, it is not a necessary reason. Prejudice to co-defendants is also a sufficient reason. So too is disruption of the proceedings. *Bankoff*, 613 F.3d at 373.

Here, the district court stated it could not "ignore the interests and the rights of the other defendants in this case." App. 367. It thoroughly explained to Fields his request would "risk harming" his co-defendants, "whether it's by a question you ask; whether it's by some objection you make or by an objection you don't make." *Id.* The court then again noted its duty to "not only consider your rights but the rights of these four other men" and concluded "the rights of these four other men will be jeopardized." *Id.* Therefore, the court denied Fields's mid-trial request, "given the late juncture and the amount of time that has passed in this case and where we find ourselves in this case." *Id.*

"A trial involving a *pro se* defendant and co-defendants who are assisted by counsel is pregnant with the possibility of prejudice." *United States v. Veteto*, 701 F.2d 136, 139 (11th Cir. 1983) (cleaned up). In this case, the reasons to fear that possibility — listed above by the district court — were compelling. And the district court could have added to those reasons Fields's erratic trial attendance and unwarranted hostility to fair proceedings. *See, e.g.*, Appellee's Supp. App. 422 (Fields: "I'm being railroaded here, man. I'm being railroaded here. I said this from the beginning that we wasn't going to get no justice in this court."); *id.* at 424 (Fields refused to attend afternoon trial proceedings); App. 372 (Fields: "I'm fighting the prosecution and I'm fighting you." Court: "You're not fighting me." Fields: "I'm definitely fighting you.").

The district court did not abuse its considerable discretion when it denied Fields's request to represent himself.

IV

Fields raises two ineffective-assistance-of-counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, he must show (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that the error prejudiced his defense. *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (cleaned up). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Id.* at 105. We "must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Id.* at 104.

Because Fields's claims are raised for the first time before this Court, we have two options — remand for an evidentiary hearing or reject them outright. The latter is permitted when defendants present their claims in a vague or conclusory

manner, when the trial record shows no deficient performance, or when that record shows no prejudice. *United States v. Sitzmann*, 893 F.3d 811, 831–32 (D.C. Cir. 2018) (per curiam); *United States v. Rashad*, 331 F.3d 908, 909–10 (D.C. Cir. 2003).

Here, every paragraph of Fields's brief — with the possible exception of his third of five paragraphs, noted below — is conclusory. And even when his arguments are at their least conclusory, the trial record shows no deficient performance or prejudice.

A

His first claim is laid out in four paragraphs. He begins in paragraph one by alleging that the relationship with his attorneys — recall that he fired the first two, and tried to fire the third — was "broken" and that their investigations were not "adequate":

> As we set forth above, Mr. Fields had a broken relationship with each of his attorneys. With respect to the first two, Mr. McCants and Mr. Retureta, one aspect of their ineffectiveness is already identified in the record but requires further exploration on remand — namely, their lack of adequate investigation.

Appellants' Br. 48.

Then in paragraph two, Fields describes his version of the evidence against him:

> As the Court is aware from the recitation elsewhere in this brief there was limited direct evidence against Mr. Fields. No surveillance

> photos showed him engaging in drug transactions. The only testimonial evidence against him came from a cooperating witness who, like all such witnesses, had mixed motivation. Thus, the main ground for Mr. Fields' conviction lay in the Government's attempt to tie him to drugs found in a room on the second floor above the barbershop. His alleged constructive possession of the goods found in that room was a critical piece of the government's case in chief.

Id.

Next, in paragraph three, Fields comes as close as he gets to a non-conclusory argument. He alleges other people had access to a room above the barbershop where he kept personal items and instrumentalities of drug trafficking. And he faults his initial attorneys for not finding them. But he never says how many people had access, who they were, or why we should believe that these unidentified people actually exist — aside from Fields's entirely self-serving "insiste[nce]" that they do:

> And thus, negating that inference of constructive possession was a vital component of Mr. Fields' defense. Throughout the time prior to trial, Mr. Fields insisted that other individuals also had keys to the room above the barbershop — a fact which, if established, would have afforded him the opportunity to argue the insufficiency of the government's evidence attempting to attribute those drugs to him. Yet, Mr. Fields' initial attorney, Mr. McCants, does not appear to have conducted the investigation necessary to evaluate Fields's

> requests. And Mr. Fields maintains that there is no evidence that Mr. Retureta pursued that investigation, either.

Id. at 48–49 (cleaned up).

Even assuming this, Fields's least conclusory paragraph, is sufficiently non-conclusory — which is doubtful — it was neither deficient performance nor prejudicial for his counsel not to investigate "other individuals" with "keys to the room above the barbershop" where Fields kept cash, drugs, drug paraphernalia, and personal items. Connecting others to the room would not have eliminated the evidence connecting Fields to the room. So even if his attorney had investigated the unnamed "other individuals," and even if they too were drug dealers, the jury would have learned nothing more than the unremarkable fact that Fields, a drug dealer, hung out and shared space with other drug dealers. *Cf.* Trial Tr. 69, ECF No. 312 ("[D]espite the fact that you heard Mr. Fields in person and on the phone again and again and again talk about how everybody has got keys, everybody has access . . . , [m]ultiple people can jointly have property in their constructive possession. That's the concept of both constructive possession and a conspiracy. It's teamwork.").

Finally, in paragraph four, Fields ends his first claim where he began — by repeating his conclusory claim that his attorneys should have "conduct[ed] an investigation":

> As the Supreme Court recently put it: "Counsel . . . has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the

> circumstances, applying a heavy measure of deference to counsel's judgments." Here, no assessment has been made as to the judgment of counsel in failing to conduct an investigation — manifestly necessitating an evidentiary inquiry.

Id. at 49 (cleaned up).

B

Fields's other (conclusory) claim is laid out in one paragraph — paragraph five. There he alleges his attorney did not adequately cross-examine Clark, the government's witness who identified him as the leader of the conspiracy. But Fields identifies no question his attorney should have asked that would have impeached Clark or exculpated Fields. Instead, Fields faults his attorney for not mentioning the absence of call records reflecting Clark's conversations with Fields. The absence of evidence, however, is not evidence of absence. So the absence of call records would not, in Fields's words, have "exploit[ed] inconsistencies" in Clarks's testimony. *Id.* And Fields fails to specify any other purported inconsistencies:

> In addition, at an evidentiary hearing Mr. Fields would also establish the reasons for his dissatisfaction with the representation provided by Ms. West, whose cross-examination of the cooperating witness, Byran Clark, was in Mr. Fields' view inadequate. She failed to exploit inconsistencies between the proffers that Mr. Clark earlier had made to the government and his sworn testimony. By way of example, although Clark contended that he was in frequent contact with Mr. Fields there were no

> call records — none — reflecting conversations between them.

Id.

In short, Fields does little more than state his "dissatisfaction" with his attorneys based on an investigation and cross-examination he deems inadequate for the vaguest of reasons and then conclude that this alone entitles him to relief. But we reject conclusory claims that leave out specific reasons for counsel's deficient performance and prejudice under *Strickland*. It is not nearly enough for Fields to simply state his dissatisfaction and then conclude that his dissatisfaction satisfied *Strickland*. We will therefore not remand Fields's ineffective-assistance-of-counsel claims for an evidentiary hearing and instead reject those claims.[3]

V

We now turn to Samuels's claims. He first contends that his trial counsel, Joseph Conte, provided ineffective assistance. Samuels primarily argues that Conte was ineffective under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which requires the defendant to show "(1) that his lawyer acted under an actual conflict of interest" and (2) that the conflict caused "an actual lapse in representation." *United States v. McGill*, 815 F.3d 846, 943 (D.C. Cir. 2016) (cleaned up); *see Cuyler*, 446 U.S. at 349. Because *Cuyler* relaxes *Strickland*'s prejudice

[3] We also hold a non-conclusory argument would have fared no better. With regard to Clark's testimony, the performance of Fields's trial attorney was not deficient or prejudicial. She repeatedly elicited purported inconsistencies between his pre-trial statements and trial testimony, as did three attorneys for Fields's co-defendants. Fields's attorney even made the point about the absence of text messages in her closing argument.

requirement, we are "reluctant to allow defendants to force their ineffective assistance claims into the 'actual conflict of interest' framework and thereby supplant the strict *Strickland* standard." *United States v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998) (cleaned up). We thus closely scrutinize claims under *Cuyler*.

Samuels argues that Conte was conflicted because his daughter worked for the U.S. Attorney's Office for the District of Columbia, which prosecuted Samuels. Although Conte mentioned his daughter's job to the prosecutor, he informed neither Samuels nor the district court. Shortly before Samuels's sentencing, the district court learned about the issue, appointed new counsel, and ordered briefing. The court concluded that Conte's failure to disclose his daughter's job raised a potential conflict of interest, and it set an evidentiary hearing on that issue. Later, the court granted the parties' joint motion to vacate the hearing without resolving the conflict issue. Now on appeal, Samuels again contends that Conte had a conflict of interest.

As discussed, we ordinarily remand "colorable and previously unexplored claims of ineffective assistance" for evidentiary hearings. *United States v. Marshall*, 946 F.3d 591, 596 (D.C. Cir. 2020) (cleaned up); *see McGill*, 815 F.3d at 942. But remand is unwarranted where the record establishes that counsel was not ineffective, where the appellant's allegations are vague and conclusory, or where the appellant fails to identify an issue that "requires a determination of facts." *Sitzmann*, 893 F.3d at 832 (cleaned up). Moreover, our standard for remand is blunted by "the strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment," which extends to claims under *Cuyler*. *Taylor*, 139 F.3d at 934 (cleaned up); *see also Burger v. Kemp*, 483 U.S. 776, 784 (1987) ("[W]e generally

presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client.").[4]

We assume that Conte was conflicted and resolve this appeal under *Cuyler*'s second prong, which considers whether the conflict led to an "actual lapse in representation." *McGill*, 815 F.3d at 943 (cleaned up). To satisfy this standard, Samuels must articulate a strategy that a reasonable, nonconflicted defense counsel would have pursued. *See United States v. Gantt*, 140 F.3d 249, 254 (D.C. Cir. 1998). The conflict must have caused the failure to pursue this strategy, *United States v. Bruce*, 89 F.3d 886, 896 (D.C. Cir. 1996), and must have "significantly affected counsel's performance . . . rendering the

[4] We are skeptical that Samuels preserved his ineffective-assistance claim. "The law in this circuit is that a claim of ineffective assistance must be made in a motion for a new trial 'when counsel changes prior to appeal and when there is still a reasonable opportunity to challenge a conviction in the District Court.'" *United States v. Wood*, 879 F.2d 927, 933 (D.C. Cir. 1989) (quoting *United States v. Debango*, 780 F.2d 81, 86 (D.C. Cir. 1986)). Before he appealed, Samuels received new counsel and pressed a claim that his former counsel was ineffective because of a conflict of interest. Moreover, after the district court set an evidentiary hearing to explore the conflict issue, Samuels — acting through his new counsel — affirmatively moved to proceed without a hearing. Nevertheless, the government waived any forfeiture (or waiver) argument by stipulating that it would not raise that issue in the joint motion to vacate the evidentiary hearing. *See United States v. Layeni*, 90 F.3d 514, 522 (D.C. Cir. 1996). The government's stipulation is not binding on us, *see Weston v. WMATA*, 78 F.3d 682, 685 (D.C. Cir. 1996), and we have significant concern with remanding now for a hearing that Samuels affirmatively eschewed. But because we may reject Samuels's *Cuyler* claim on the present record, we accept the stipulation and proceed to the merits.

verdict unreliable, even though *Strickland* prejudice cannot be shown," *Mickens v. Taylor*, 535 U.S. 162, 173 (2002).

Under this standard, Conte's failure to tell anyone other than the prosecutor about his daughter's job is not itself enough to establish ineffective assistance. *Cuyler* "requires proof of effect upon representation." *Id*. Without more, the "inadequate disclosure" of a conflict is "not an adverse effect on counsel's performance." *United States v. Mett*, 65 F.3d 1531, 1536 (9th Cir. 1995); *see Blake v. United States*, 723 F.3d 870, 878, 881–82 (7th Cir. 2013). And Samuels does not explain how Conte's limited disclosure so significantly affected his performance as to make the verdict unreliable.

To show an adverse effect, Samuels identifies three points that he claims Conte failed to raise. According to Samuels, Conte (1) missed an argument supporting a motion to suppress his statement about the shotgun found under his bed, (2) failed to timely oppose expert testimony on drug distribution, and (3) did not cite evidence to support a multiple-conspiracy instruction. Samuels posits that Conte avoided these points to advance his daughter's interests as an employee in the U.S. Attorney's office — *i.e.*, he "pulled punches that a reasonable, conflict-free counsel would have thrown." Appellants' Br. 51. Samuels concludes that these failures make his verdict unreliable. We disagree.

To begin, Samuels failed to identify any plausible link between the alleged conflict and the points that Conte purportedly missed. *See Bruce*, 89 F.3d at 896. His theory of causation — that Conte "pulled punches" to help his daughter — is belied by the trial record, which shows that the punches Conte threw were no less forceful than the ones he ostensibly pulled. For example, as explained below, Conte sought to sever Samuels's trial from Fields's, which would have

considerably increased the government's workload, *see Richardson v. Marsh*, 481 U.S. 200, 210 (1987). He also forcefully challenged the credibility of the government's central witness and offered alternative explanations for why Samuels appeared on Fields's ledger (to pay for car insurance) and for why Samuels identified the shotgun (to cover for his girlfriend). With no distinction between these arguments and the ones that Conte ostensibly missed, Samuels's theory of causation is not plausible.

Separate from causation, none of the purportedly missed arguments identifies a plausible lapse in representation. The first concerns Conte's unsuccessful motion to suppress Samuels's admission that he owned the shotgun agents found in his house. Conte had argued that the admission was involuntary because Samuels was suffering from heroin withdrawal at the time. The district court disagreed. On appeal, Samuels faults Conte for not also arguing that the statement was involuntary because he was under the influence of cocaine.

Conte's failure to make this argument was not a colorable lapse in representation. The "mere fact that one has taken drugs, or is intoxicated, or mentally agitated, does not render consent involuntary." *United States v. Castellanos*, 518 F.3d 965, 969 (8th Cir. 2008) (cleaned up). Instead, "coercive police activity" is necessary to find a confession involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). And the district court, in rejecting the heroin-withdrawal argument, found that the audio recording of Samuels's confession showed "no coercive police activity." App. 89. It would thus have been futile to argue that Samuels's consent was involuntary due to cocaine use. And the failure to raise a meritless objection is not colorably deficient. *See Sitzmann*, 893 F.3d at 833.

Second, Samuels argues that Conte failed to investigate or timely challenge testimony from a government expert that the amount of cocaine seized from Samuels's home — approximately 3.5 grams — was consistent with distribution rather than personal use. Conte moved to exclude the testimony on the day of the expert's testimony, but the district court denied the motion as untimely.

Samuels again identifies no colorable deficiency. For one thing, he does not explain why the motion to exclude the expert testimony might have been successful if timely, so this argument is too vague and conclusory to support remand. *See id.* at 832–33. He instead contends that Conte failed to develop evidence to counter the government's expert. But Conte forced the expert to concede that the amount of cocaine in Samuels's possession could have been for personal use. And he relied heavily on the possibility of personal use in his closing arguments, contending, for example, that Samuels owned a scale because he bought in bulk and did not want to be cheated. In other words, Samuels faults Conte for not offering cumulative evidence to support personal use, which is not enough for remand. *See id.* at 833.

Finally, Samuels contends that Conte botched his request for a multiple-conspiracy instruction, which would have clarified that the jury needed to find that Samuels was a member of the same conspiracy charged in the indictment to support a guilty verdict. In denying Conte's request, the district court reasoned that there was no evidence of Samuels "interacting with anyone else . . . who's not identified as a conspirator in this case." App. 609. Samuels contends that there was such evidence, which Conte missed, namely Clark's testimony that Samuels obtained crack cocaine to distribute in Virginia from "a guy named Miguel Harris." *Id.* at 391. The

indictment mentioned neither Harris nor a conspiracy to distribute crack cocaine.

It is at least plausible that Samuels would have received the multiple-conspiracy instruction had Conte flagged this evidence. If requested, a district court must give the instruction where the "record evidence supports the existence of multiple conspiracies." *United States v. Sanders*, 778 F.3d 1042, 1047 (D.C. Cir. 2015) (cleaned up). And Clark testified that Samuels "started purchasing" crack from Harris for distribution. App. 391. This testimony could perhaps support the inference that Harris was a "regular source," which would be enough to create a separate conspiracy. *United States v. Morris*, 836 F.2d 1371, 1374 (D.C. Cir. 1988).

But Conte's failure to secure the instruction is not enough to show that a conflict "significantly affected" his performance and made the verdict "unreliable." *Mickens*, 535 U.S. at 173. Whatever the contours of this standard, the failure to recall a single line of testimony in a three-week trial that might support a peripheral jury instruction cannot fairly be described as significant. Moreover, it casts no doubt on the verdict, which found that Samuels was guilty of conspiring to distribute heroin and fentanyl, not crack cocaine. Samuel's case thus falls well outside *Cuyler*, which "is designed to protect a defendant when it is impossible to reconstruct what might have occurred without counsel's conflict of interest." *Plunk v. Hobbs*, 766 F.3d 760, 766 (8th Cir. 2014).

Samuels alternatively contends that Conte was ineffective under *Strickland*, which requires him to show that his counsel's performance was deficient and prejudicial, *see* 466 U.S. at 687. For the reasons given above, Samuels has not proven deficient performance. And because he does not satisfy *Cuyler*'s lower standard to prove a "significant[]" effect on representation, he

also fails to satisfy *Strickland*'s more demanding requirement of prejudice. *Mickens*, 535 U.S. at 173.

In sum, Samuels has established no colorable claim of ineffective assistance under *Cuyler* or *Strickland*. His *Cuyler* claim fails because he has not plausibly proven that Conte's alleged conflict of interest caused an adverse effect that rises to the level of an actual lapse in representation. And his *Strickland* claim fails for lack of any colorable case for deficient performance or prejudice.

VI

Samuels next argues that the district court impermissibly limited his ability to cross-examine Clark, the government's central witness, about his prior bad acts. When Clark testified, he had previously pleaded guilty to kidnapping and obstruction of justice as part of a plea agreement that depended on his cooperation against Samuels in this case. Samuels claims that Clark earned the kidnapping charge by taking a person hostage at gunpoint, robbing him, and pointing a gun at the victim's head. For obstruction of justice, Samuels contends that Clark directed a third party to threaten a witness to not testify. Clark also had other prior convictions, including one for murder. Samuels sought to cross-examine Clark about his convictions and the facts underlying them to impeach Clark's credibility and to establish that the plea agreement gave Clark a bias.

The district court adopted a halfway approach, explaining that it had to balance the probative value of Clark's prior bad acts against the risk that the facts would "just dirty [him] up because he's a bad dude." App. 428. The court allowed Samuels to cross-examine Clark about the existence of his prior convictions; about the facts underlying charges the government reduced, dropped, or never brought due to Clark's cooperation; and about other possible sources of bias. But it excluded

questions about the facts underlying his convictions, reasoning that they would be "more prejudicial than probative." Appellee's Supp. App. 490. It also agreed with the government that those questions risked a "circus within a circus, a trial within a trial" about Clark. App. 433–34. Finally, it refused to let Samuels question Clark about the alleged witness intimidation after concluding that Samuels had no factual basis in the record to assume a threat occurred.

Samuels contends that the district court's ruling violated both the Confrontation Clause and Federal Rule of Evidence 403. Under the Confrontation Clause, a trial court "may limit cross-examination only after there has been permitted, as a matter of right, a certain threshold level of cross-examination." *United States v. Hall*, 945 F.3d 507, 513 (D.C. Cir. 2019) (cleaned up). That threshold is satisfied "so long as defense counsel is able to elicit enough information to allow a discriminating appraisal of a witness's motives and bias." *Id.* (cleaned up). Otherwise, district courts "retain wide latitude" to "impose reasonable limits on . . . cross-examination" under the Federal Rules of Evidence. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Relevant here, Rule 403 allows courts to exclude evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice" or "confusing the issues." We review limits on cross-examination for an abuse of discretion. *United States v. Lin*, 101 F.3d 760, 768 (D.C. Cir. 1996); *Henderson v. Geo. Wash. Univ.*, 449 F.3d 127, 133 (D.C. Cir. 2006).

The district court did not violate the Confrontation Clause. Such a violation occurs "only when the court bars a legitimate line of inquiry that might have given the jury a significantly different impression of the witness's credibility." *United States v. Miller*, 738 F.3d 361, 375 (D.C. Cir. 2013) (cleaned up). Samuels elicited ample testimony to give the jury the

impression that Clark was lawless and had a substantial reason to testify in favor of the government. Among other impeaching facts, the jury learned about Clark's cooperation agreement; his prior convictions; and that he robbed and kidnapped a man, stole a car, and used a firearm during various crimes. This cross-examination easily clears the threshold required by the Confrontation Clause. *See, e.g.*, *Hall*, 945 F.3d at 513 (no violation where defendant cross-examined government witness on guilty plea in cooperation deal).

Nor did the district court abuse its discretion under Rule 403. Without acknowledging the court's concerns about unfair prejudice, Samuels argues that the salacious facts underlying Clark's prior convictions are "information the jury should have heard to evaluate whether someone with that little regard for human life and the law would have any compunction about lying under oath to reduce his time in prison." Appellants' Br. 75. But while "evidence of lawlessness can undermine the perpetrator's probable truthfulness . . . admission of such evidence is subject to the sound discretion of the trial court." *United States v. Garcia Sota*, 948 F.3d 356, 363 (D.C. Cir. 2020); *see also* FED. R. EVID. 609(a)(1)(A). And the court here acted well within its discretion in concluding that the risk of unfair prejudice stemming from the facts it excluded substantially outweighed any cumulative probative value. This Court has long acknowledged the risk that evidence of prior criminal activity would impermissibly lead juries to discredit witnesses because they are "bad men," rather than because they are biased or not credible. *United States v. Fox*, 473 F.2d 131, 135 (D.C. Cir. 1972). Thus, "when evidence of a prior conviction is admitted for purposes of impeachment, cross-examination is usually limited to the essential facts rather than the surrounding details of the conviction." *United States v. Baylor*, 97 F.3d 542, 544 (D.C. Cir. 1996). Not only did the district court allow cross-examination on the essential facts of

Clark's convictions, it let the jury hear about a wide range of Clark's other criminal activity. We find no error in the district court's limited restrictions on Clark's cross-examination.

Samuels also contends that the details underlying the obstruction charge are particularly probative because they involved a threat to intimidate a witness. But the district court did not limit questions about witness intimidation based on Rule 403. As noted, it restricted those questions because Samuels lacked a factual basis to ask them. *See Lin*, 101 F.3d at 768 ("counsel must have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness") (cleaned up). In his reply brief, Samuels objects that the district court erroneously discounted evidence that provided a factual basis for the questions. This objection is forfeited, *see M.M.V. v. Garland*, 1 F.4th 1100, 1111 (D.C. Cir. 2021), and also meritless. Samuels points to no record evidence suggesting that Clark threatened a witness. Instead, he gestures at unspecified grand-jury testimony that he admits is not in the record, which is not good enough. *See United States v. Boyd*, 54 F.3d 868, 871–72 (D.C. Cir. 1995) (basis for cross-examination must be in the record). Samuels also faults the government for not providing further evidence to support its representation that Clark's obstruction charge did not involve threats. But an objection to limits on cross-examination is not the appropriate vehicle to challenge the government's compliance with discovery obligations. Samuels held the burden of proffering a sufficient factual basis to question Clark about threats. *See Lin*, 101 F.3d at 768. And the district court did not abuse its discretion when it ruled that he failed to satisfy that burden.

Moreover, any error by the district court would have been "rendered fully harmless by the broad range of other heinous conduct that the court allowed defense counsel to bring out in

cross-examination." *Garcia Sota*, 948 F.3d at 363; *see Van Arsdall*, 475 U.S. at 684; *United States v. Whitmore*, 359 F.3d 609, 622 (D.C. Cir. 2004). As explained, Samuels extracted testimony from Clark about his convictions and the facts underlying several violent crimes for which the government declined to prosecute him. Samuels's inability to elicit similar impeaching evidence was harmless because the cross-examination "was enough to enable the jury to assess the relation between [Clark's] lawlessness and his propensity for truthfulness." *Garcia Sota*, 948 F.3d at 363.

In sum, the district court acted well within its discretion under the Confrontation Clause and Rule 403 in limiting Clark's cross-examination, and any improper limits would have amounted to harmless error.

VII

We next consider the arguments made by Samuels and Tucker that the district court abused its discretion in denying their motions to sever their trials from Fields's trial. Samuels and Tucker argue that severance was warranted due to "spillover" prejudice resulting from the disparity in evidence between them and Fields as well as Fields's obstreperous behavior during trial. Fields, the undisputed ringleader of the drug distribution conspiracy, frequently displayed less than exemplary behavior in court. At one point, he absented himself from the trial for part of a day. Towards the end of trial, Fields testified on his behalf. He was the only defendant to do so, and the testimony did not go well. Fields gave conflicting and unbelievable explanations for the evidence against him, accused the government of planting evidence, speculated about the government's motives for prosecuting him and his co-defendants, and became combative with the prosecutor and the district court. Both before and after Fields's testimony,

Samuels and Tucker moved to sever their trials on the ground that Fields's lies and misbehavior would be held against them by the jury. The district court denied this motion, explaining that Fields's credibility was a matter for the jury to decide and that Fields did not say anything "about the other defendants that already didn't come in the government's case-in-chief." App. 725.

"We review the denial of a motion to sever for abuse of discretion." *United States v. Wilson*, 605 F.3d 985, 1015 (D.C. Cir. 2010). The Federal Rules of Criminal Procedure permit joinder of defendants "alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." FED. R. CRIM. P. 8(b). Joint trials are preferred in federal criminal cases because they "promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (cleaned up). The preference for joint trials is "'especially strong' when 'the respective charges require presentation of much the same evidence, testimony of the same witnesses, and involve . . . defendants who are charged, *inter alia*, with participating in the same illegal acts.'" *Wilson*, 605 F.3d at 1016 (cleaned up). We find that neither the disparity in evidence between co-defendants, nor Fields's behavior during trial, warranted severance because any risk of prejudice was curable with appropriate instructions.

A joined defendant may seek to sever his trial from that of his co-defendants. "If the joinder of . . . defendants . . . appears to prejudice a defendant . . . , the court *may* . . . sever the defendants' trials, or provide any other relief that justice requires." FED. R. CRIM. P. 14(a) (emphasis added). The permissive language of this rule makes clear that severance is not required "even if prejudice is

shown." *Zafiro*, 506 U.S. at 538–39. Instead, Rule 14 grants a district court "significant flexibility to determine how to remedy any potential risk of prejudice posed by the joinder of multiple defendants in a single trial." *United States v. Moore*, 651 F.3d 30, 95 (D.C. Cir. 2011) (per curiam). Severance is the exception rather than the rule and is required only when there is "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. Although a serious risk may arise when "defendants are tried together in a complex case and they have markedly different degrees of culpability," even in cases where the risk of prejudice is high, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.* In light of these principles, motions to sever should be granted "sparingly." *United States v. Celis*, 608 F.3d 818, 844 (D.C. Cir. 2010).

Appellants "carr[y] the burden of demonstrating prejudice resulting from a failure to sever." *United States v. Gooch*, 665 F.3d 1318, 1336 (D.C. Cir. 2012). Samuels and Tucker here assert spillover prejudice, namely the risk "the jury would use evidence of one defendant's guilt against another." *United States v. Spriggs*, 102 F.3d 1245, 1256 (D.C. Cir. 1996). They maintain this prejudice arose from trying them, peripheral players in the conspiracy, together with Fields, "a perjurious and obstructionist lead defendant." Appellants' Br. 97. Samuels and Tucker fail to demonstrate prejudice.

First, Samuels and Tucker have not demonstrated prejudice from evidentiary spillover. Disparity in evidence requires severance "when the evidence against one defendant is 'far more damaging' than the evidence against the moving party," but will not require severance in a conspiracy trial when there is "substantial and independent evidence of each

defendant's significant involvement in the conspiracy." *Moore*, 651 F.3d at 95–96 (cleaned up). "[A]bsent a *dramatic* disparity of evidence, any prejudice caused by joinder is best dealt with by instructions to the jury to give individual consideration to each defendant." *Id.* at 95 (cleaned up). The varying roles played by members of a conspiracy will "not render joint trial inappropriate as long as the jury can reasonably compartmentalize the substantial and independent evidence against each defendant." *United States v. Straker*, 800 F.3d 570, 628 (D.C. Cir. 2015) (per curiam). As we will explain in Part VIII, the government introduced substantial and independent evidence of Samuels's and Tucker's involvement in the conspiracy. Although Samuels and Tucker played a subordinate role in the conspiracy led by Fields, we hold "the disparity of evidence did not rise to a level necessary to mandate severance." *Moore*, 651 F.3d at 96.

Second, Samuels and Tucker have not established prejudice from Fields's misbehavior during trial. Courtroom misconduct by a co-defendant must be especially egregious to mandate severance. *See, e.g.*, *United States v. Rocha*, 916 F.2d 219, 229 (5th Cir. 1990) (no severance required when co-defendant "mouthed the words, 'You are dead,' and moved a finger across his throat" during a witness's direct examination); *United States v. Marshall*, 458 F.2d 446, 448, 452 (2d Cir. 1972) (no severance required when a co-defendant directed obscenities at the court and witnesses, absented himself, threw a chair towards the jury box, and cut his wrists during summation). "Cautionary instructions . . . should remain the primary weapons against improper jury bias." *United States v. Mannie*, 509 F.3d 851, 857 (7th Cir. 2007). Fields's behavior was mildly disruptive: he was combative on the stand, refused to attend part of the trial, and made demonstrably false statements during his testimony. This misbehavior is simply not so beyond the pale as to mandate severance.

At bottom, this is not a case in which curative instructions were ineffective against potential prejudice. The district court gave several careful and tailored instructions throughout the trial. When Fields failed to show up one day, the district court instructed the jury that his "absence should not . . . be viewed as evidence or held against any other defendant in this matter in any way whatsoever." App. 347. The district court also instructed the jury that "each defendant is entitled to have the issue of his guilt as to each of the crimes for which he's on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone." Appellee's Supp. App. 784–85. The instructions explicitly stated that the jury's verdict as to one defendant should not "influence [its] verdict with respect to any other defendant as to that count or any other count in the Indictment." *Id.* at 785. The effectiveness of the district court's instructions is indicated by the jury returning mixed verdicts as to each of the defendants, including Fields. *See United States v. Gilliam*, 167 F.3d 628, 636 (D.C. Cir. 1999) (explaining that mixed "verdicts indicate that the jury was able to distinguish between the defendants"). We presume that juries follow the court's instructions when, as here, there is no evidence to the contrary. *Id.*

The district court cured any potential prejudice to Samuels and Tucker with limiting instructions and did not abuse its discretion in denying their motions to sever.

VIII

We turn next to Samuels's and Tucker's challenge to the sufficiency of the evidence to sustain their convictions for conspiracy to distribute heroin under 21 U.S.C. § 846.

To overturn a jury verdict for insufficient evidence, "a defendant faces a high threshold." *United States v. Washington*, 12 F.3d 1128, 1135 (D.C. Cir. 1994). In reviewing for

sufficiency of the evidence, we consider "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Gaskins*, 690 F.3d 569, 576–77 (D.C. Cir. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In applying this standard, we "draw[] no distinction between direct and circumstantial evidence, and 'giv[e] full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact.'" *United States v. Williams*, 836 F.3d 1, 6 (D.C. Cir. 2016) (quoting *United States v. Battle*, 613 F.3d 258, 264 (D.C. Cir. 2010)).

To convict Samuels and Tucker of conspiracy to distribute heroin, the government had to prove they acted knowingly and with the "specific intent to further the conspiracy's objective." *United States v. Childress*, 58 F.3d 693, 708 (D.C. Cir. 1995). The evidence here easily passes muster under our deferential standard of review.

With respect to Samuels, sufficient evidence supports that he knowingly furthered the conspiracy to distribute heroin. Fields controlled operations in the drug distribution conspiracy from the suite above the barbershop, where agents found approximately $60,000 worth of heroin as well as other drug paraphernalia. The evidence established that Samuels assisted Fields in this endeavor. Clark, the cooperating witness who testified that he frequently went to the barbershop to obtain heroin from Fields, placed Samuels regularly with Fields while Fields packaged drugs for distribution. GPS data from Samuels's cellphone also put him in the vicinity of the barbershop hundreds of times during the life of the conspiracy. As Clark testified, Samuels assisted Fields by opening the door and controlling access to the upstairs suite where the drugs were, which was corroborated by text messages to Samuels that

included "let me in" and "open the door." Appellee's Supp. App. 191–92. Text messages also demonstrated that Samuels was in frequent contact with other members of the conspiracy and used coded references to drug transactions. Moreover, Clark testified that Samuels had delivered five grams of heroin on one occasion when Clark was in a car with two other members of the conspiracy. Viewed in the light most favorable to the government, this evidence, combined with Samuels's frequent presence in the barbershop while Fields, the leader of the conspiracy, engaged in drug transactions, is sufficient to sustain Samuels's conviction for conspiracy to distribute heroin. *See, e.g.*, *Childress*, 58 F.3d at 712 (finding the evidence sufficient when defendants personally handled drugs, prepared them for sale, and did so at the direction of the conspiracy's leader).

Sufficient evidence also supported Tucker's conviction and established his role as a street-level dealer in the conspiracy. Clark's testimony put Tucker at the barbershop frequently, "[a]cting like [Tucker had] a license to sell drugs . . . [h]aving . . . no discretion, . . . no trying to hide it or anything, just out in the open." Appellee's Supp. App. 457. Tucker's frequent presence at the barbershop was corroborated by GPS data and law enforcement surveillance. Notably, agents observed Tucker engaged in "what appeared to be a hand-to-hand narcotics transaction" on the street in front of the barbershop. *Id.* at 363. Clark testified that he saw Tucker coming from the upstairs suite of the barbershop adjusting his "lower crotch area," and explained that when he used to sell drugs, he hid his stash in his "crotch area" to avoid detection by the police. *Id.* at 458. Clark also explained that heroin could be pink or tan depending on the substance it was cut with and that dealers often used slang to talk about narcotics. Tucker's text messages mentioned selling pink shirts and tan shoes, statements the jury could reasonably infer were references to

narcotics. Given Tucker's close relationship with Fields and frequent presence at the barbershop, the jury also could reasonably infer that Tucker obtained the heroin he sold from Fields. Viewing the evidence in the light most favorable to the government, sufficient evidence supported Tucker's conviction for conspiracy to distribute heroin.

Samuels and Tucker also seek to rely on *Gaskins*, in which this court found the evidence insufficient to sustain a drug-trafficking conspiracy conviction. In that case, despite extensive police surveillance and searches, no evidence put Gaskins in the presence of drugs, nor did any witness connect him to the conspiracy. *See* 690 F.3d at 572. Tucker argues that the evidence against him is similarly flimsy because he did not directly text members of the conspiracy, and Clark's testimony and the street-level buys at most established his role as an independent street-level dealer. Samuels also points to the lack of controlled buys, wiretaps, or surveillance as reasons why the evidence against him was insufficient. These arguments founder on the fact that the evidence against both Samuels and Tucker was far more robust than the evidence in *Gaskins*. Unlike Gaskins, both Samuels and Tucker "discussed drugs, distributed drugs, [and were] in the presence of drugs connected to the conspiracy." *Gaskins*, 690 F.3d at 577; *see also United States v. Shi*, 991 F.3d 198, 207 (D.C. Cir. 2021) (distinguishing *Gaskins* as a case in which there was an "overwhelming lack of evidence").

For these reasons, the evidence is sufficient to sustain the convictions of Samuels and Tucker.

IX

Tucker also challenges his sentence, arguing that the district court erred in calculating the quantity of heroin attributable to him for purposes of setting his Sentencing

Guidelines range. Although the district court's calculation was based on inferences, those inferences were reasonable in light of the record.

We "review[] a sentence imposed under the Guidelines to determine whether it is 'reasonable.'" *United States v. Flores*, 995 F.3d 214, 219 (D.C. Cir. 2021) (quoting *United States v. Blalock*, 571 F.3d 1282, 1285 (D.C. Cir. 2009)). This determination involves two steps: First, we ensure the district court did not commit a "significant procedural error," and second, we review whether the sentence is objectively reasonable. *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Tucker challenges only the district court's methodology for calculating the drug quantity attributable to him — a procedural error. Significant procedural errors include "failing to calculate (or improperly calculating) the [Sentencing] Guidelines range, . . . selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall*, 552 U.S. at 51.

A defendant's sentence for a drug conspiracy is based on the amount of drugs attributed to him. Under the Sentencing Guidelines, a defendant's base offense level is derived from his "relevant conduct," which includes the drug quantity involved for an offense. U.S.S.G. § 1B1.3 (2018) (cleaned up); *United States v. Burnett*, 827 F.3d 1108, 1120 (D.C. Cir. 2016). When necessary, such as when there has been "no drug seizure or the amount seized does not reflect the scale of the offense," the district court must approximate the drug quantity. U.S.S.G. § 2D1.1 cmt. n.5. Further, when a defendant is part of a drug conspiracy, his relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." *United States v. Bostick*, 791 F.3d 127, 158 (D.C. Cir. 2015) (quoting U.S.S.G.

§ 1B1.3(a)(1)(B)). "We review the District Court's determination of drug quantity relevant for sentencing under a clear error standard." *United States v. Mack*, 841 F.3d 514, 527 (D.C. Cir. 2016).

The district court attributed 75 grams of heroin to Tucker. Although the presentence report found Tucker's relevant conduct included 546.7 grams due to his involvement in the conspiracy, the district court declined to hold Tucker responsible for all the sales made from the barbershop or to Clark. Instead, it estimated the amount of heroin for which Tucker was personally responsible. Based on the amount of heroin sold by Tucker to the confidential informant (0.58 grams), the GPS data, Clark's testimony, and surveillance, the district court estimated that Tucker sold 0.5 grams of heroin five times weekly for thirty weeks, totaling 75 grams. That quantity resulted in a Guidelines range of 51 to 63 months, and with Tucker's career offender enhancement, the range increased to 210 to 262 months. The district court found this range overstated Tucker's criminal history, so it used the sentences received by other members of the conspiracy as benchmarks and ultimately sentenced Tucker to sixty months' imprisonment. The district court's calculation of the drug quantity attributable to Tucker, which was based on reliable evidence in the record, was not clearly erroneous.

Tucker argues the district court erred by using a method for calculating the drug quantity for his base offense level that was "unduly speculative." Appellants' Br. 105. We find, however, that the district court employed a reasonable method, which resulted in a conservative estimate. While it found "Tucker was part of a core group of individuals that operated out of that barbershop," Appellee's Supp. App. 794, it chose not to attribute the 546.7 grams of heroin recommended by the presentence report. The court instead used the amount of

heroin Tucker distributed in a single controlled buy to extrapolate five similarly sized sales per week for thirty weeks. Although one sale is a small sample size, that does not render the court's extrapolation unduly speculative, particularly when it results in a conservative estimate. *Cf. United States v. Correa-Alicea*, 585 F.3d 484, 491 (1st Cir. 2009) (affirming a district court's use of two controlled purchases multiplied by a "highly conservative" "estimate of one transaction per day"). In addition, the district court's estimation that five sales per week were of heroin is reasonable based on Tucker's frequent presence at the barbershop and the quantity of heroin seized there. "[D]rug quantity calculations are an art, not a science," and the district court chose a reasonable method. *United States v. Block*, 705 F.3d 755, 760–61 (7th Cir. 2013) (explaining "we afford trial courts some room for speculation and reasonable estimation so long as percentages and quantities were not pulled out of thin air") (cleaned up).

In sum, the district court did not clearly err in calculating the drug quantity attributable to Tucker.

X

For the foregoing reasons, we affirm.

So ordered.

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA
v.
LONNELL TUCKER

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 18-cr-267-6 (APM)
USM Number: 10852-007

Date of Original Judgment: 6/21/2019
(Or Date of Last Amended Judgment)

Brian Keith McDaniel
Defendant's Attorney

FILED
NOV 12 2019
Clerk, U.S. District and Bankruptcy Courts

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☑ was found guilty on count(s) 1 of the superseding indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to distribute and possess with intent to distribute a mixture and substance containing a detectable amount of heroin.****	2/1/2018	1

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

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

☐ Count(s) ☐ 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.

6/14/2019
Date of Imposition of Judgment

Amit Mehta
Signature of Judge

Amit P. Mehta, U.S. District Judge
Name and Title of Judge

11/12/19
Date

DEFENDANT: LONNELL TUCKER
CASE NUMBER: 18-cr-267-6 (APM)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :
Sixty (60) months on count 1.

☑ The court makes the following recommendations to the Bureau of Prisons:
The court recommends placement in FCI Petersburg or a facility in close proximity to the District of Columbia. Additionally, the defendant is recommended for placement in the following programs: drug abuse education program, parenting program, literacy program, federal industries program, and an occupational educational program.

☑ 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

DEFENDANT: LONNELL TUCKER
CASE NUMBER: 18-cr-267-6 (APM)

SUPERVISED RELEASE

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

Thirty-six (36) months of supervised release on Count 1.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: LONNELL TUCKER
CASE NUMBER: 18-cr-267-6 (APM)

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: LONNELL TUCKER
CASE NUMBER: 18-cr-267-6 (APM)

SPECIAL CONDITIONS OF SUPERVISION

The defendant must submit to substance abuse testing to determine if he has used a prohibited substance. The defendant must not attempt to obstruct or tamper with the testing methods.

The defendant must participate in a vocational services program and follow the rules and regulations of that program. Such a program may include job readiness training and skills development training.

The defendant must participate in an educational services program and follow the rules and regulations of that program. Such programs may include high school equivalency preparation and/or other classes designed to improve his proficiency in skills such as reading, writing, mathematics, or computer use.

The probation office shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court. Treatment agencies shall return the presentence report to the probation office upon the defendant's completion or termination from treatment.

Within sixty days of release from incarceration or placement on supervision, the defendant will appear before the Court for a re-entry progress hearing. Prior to the hearing, the probation officer will submit a report summarizing his status and compliance with release conditions. If the defendant is supervised by a district outside of the Washington DC metropolitan area, the United States Probation Office in that district will submit a progress report to the court within 60 days of the commencement of supervision.

DEFENDANT: LONNELL TUCKER
CASE NUMBER: 18-cr-267-6 (APM)

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$	$	$	$

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

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

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$	0.00

☐ Restitution amount ordered pursuant to plea agreement $

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

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

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 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.

DEFENDANT: LONNELL TUCKER
CASE NUMBER: 18-cr-267-6 (APM)

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

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

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

The special assessment is immediately payable to the Clerk of the Court for the US District Court, District of Columbia. Within 30 days of any change of address, the defendant shall notify the Clerk of the Court of the change until such time as the financial obligation is paid in full.

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

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3042 **September Term, 2021**

1:18-cr-00267-APM-6

Filed On: January 13, 2022

United States of America,

Appellee

v.

Lonnell Tucker,

Appellant

Consolidated with 19-3043, 19-3078

BEFORE: Katsas, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of appellant Tucker's petition for panel rehearing filed in No. 19-3042 on September 20, 2021, and appellant Fields' petition for panel rehearing filed in No. 19-3043 on September 24, 2021, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3042 **September Term, 2021**

1:18-cr-00267-APM-6

Filed On: January 13, 2022

United States of America,

Appellee

v.

Lonnell Tucker,

Appellant

Consolidated with 19-3043, 19-3078

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker and Jackson, Circuit Judges

O R D E R

Upon consideration of appellant Tucker's petition for rehearing en banc filed in No. 19-3042, and appellant Samuels' corrected petition for rehearing en banc filed in No. 19-3078, the opposition thereto, and the absence of a request by any member of the court for a vote in either No. 19-3042 or No. 19-3078, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CR No. 18-267
	)	
	)	Washington, D.C.
vs.	)	June 14, 2019
	)	3:00 p.m.
LONNELL TUCKER (6),	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF SENTENCING HEARING PROCEEDINGS
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

Let me just review what I've reviewed and received, and then we'll talk about drug quantities, as I think that's the only objection that Mr. McDaniel has lodged, but correct me if I'm wrong.

So I've reviewed the Presentence Report, which is at 255, plus the sentencing recommendation of Probation at 256, the government's memorandum in aid of sentencing at 259 and the supplemental memo at 272, defendant's memorandum in aid of sentencing at 265, and the supplemental memo at 273.

I also received via email a submission from Ms. Carson, which consisted of a letter, as well as a couple of slide presentations and some photographs.

I also received via email the police report related to the sex assault conviction Mr. Tucker incurred back in -- well, back in 1995.

So other than that, is there anything else I should have -- is there something I received that I haven't listed?

MR. MACCHIAROLI: Not from the government, Your Honor.

MR. McDANIEL: No, Your Honor.

THE COURT: All right. Then let's turn to the issue at hand.

Let me first ask Mr. McDaniel: Is the drug quantity the only objection to the Presentence Report that

you have?

MR. McDANIEL: Yes, Your Honor.

THE COURT: All right.

MR. McDANIEL: I asked the Court to vary downward in his Criminal History calculation. But I don't view that as an objection, I view that as a request for downward departure.

THE COURT: Right. Understood.

All right. So let's talk about drug quantity.

And just to set the stage here, Probation has calculated the drug quantity attributable to Mr. Tucker is 546.7 kilograms of converted drug weight. Essentially, that's 546.7 grams of marijuana -- excuse me, heroin, which is the only drug as to which the jury found Mr. Tucker responsible in the course of the conspiracy.

That amount, the 546.7, consists of 275 grams that were seized above the barbershop, 31.7 grams seized from Mr. Venable, and then an estimate of 240 grams that were distributed to Mr. Clark, who was the government's cooperating witness. And so that's what gets us to 546.

So I'm happy to hear arguments from both sides.

And let's talk about where you all think things ought to come out in light of the evidence against Mr. Tucker.

MR. McDANIEL: I'm sorry, Your Honor, which page

and his agreement to join the conspiracy consisted of a far lesser role and far lesser quantity.

MR. McDANIEL: Yes, Your Honor.

And even more specifically than that, I would point the Court to the comments for Section 1B1.3 of the Guidelines, which, in essence, supports, I believe, my position.

The question of foreseeability is just one of the questions at Section 1B1.3, comment n.3(A).

THE COURT: Sorry, Mr. McDaniel, I'm going to ask you to repeat that just so I can get on the same page as you.

MR. McDANIEL: I apologize, Your Honor. 1B1.3 --

THE COURT: 1D1.1?

MR. McDANIEL: Yes.

THE COURT: Right.

And which comment?

MR. McDANIEL: N.3.

THE COURT: You say "n.3"?

MR. McDANIEL: I believe that's right. I believe it's note 3(A).

THE COURT: Anyway, why don't you go ahead and read it to me, because I'm not sure I'm following where you are, but go ahead and read it to me.

MR. McDANIEL: So the government has to prove at

Subsection 1 that the narcotics that they're attempting to hold Mr. Tucker responsible for were within the scope of the jointly undertaken criminal activity in furtherance of the criminal activity, and reasonably foreseeable in connection with the criminal activity.

THE COURT: Right.

MR. McDANIEL: And so it's not enough, Your Honor -- in, I think, one of the examples or illustrations that is provided in support of this notion is that -- and it's at No. 4, Subsection 4, that if Defendant P is a street-level drug dealer, who knows of other --

THE COURT: Can I just ask you: Do you have the current Guidelines?

MR. McDANIEL: I think I do, Your Honor.

THE COURT: What page are you?

MR. McDANIEL: I printed this out, and so I'm not exactly sure which page.

THE COURT: Do you have a page on the bottom of your printout?

MR. McDANIEL: No, Your Honor. I apologize.

THE COURT: Okay. Go ahead. I trust --

MR. McDANIEL: The suggestion is, Your Honor, that the fact that Mr. Tucker knows Mr. Fields is not enough for the government upon -- to rely upon in making the assertion that he would have then known about all of the narcotics,

for instance, in this case, that were in a room that no one has testified that he's ever even been in.

And absent that evidence, Your Honor, what we're doing is we are speculating about what it is that Mr. Tucker would have known about, particularly given the dearth of information that the government presented during the trial about Mr. Tucker.

And so there was evidence that Mr. Tucker was in and around that area on nearly a daily basis that was provided by the GPS.

Now, that GPS shows that Mr. Tucker was in and around the barbershop, but there was no testimony or evidence that on any one of those particular days or even all of those days, more importantly for this analysis, that Mr. Tucker was going there to sell drugs. It shows what that evidence is, Your Honor, is that he was there.

The Court must call upon, and the government is responsible for, providing the Court evidence that he was selling drugs on a particular day and what that drug was, because there was evidence -- and I think the government attempted to suggest that Mr. Tucker was also selling other narcotics, marijuana, for instance.

And so the argument is, Your Honor, that the government has a responsibility to provide the Court with evidence that shows the support for what would be

foreseeable to Mr. Tucker, not that he was there, because mere presence alone, Your Honor, does not get them there.

And in addition to that, Your Honor, the testimony from the cooperating witness that the government relies heavily upon was also absent that particular information. The witness never told the Court that it saw Mr. Tucker selling particularly heroin, never said that he saw Mr. Tucker receive any heroin.

The jury was asked to determine whether or not Mr. Tucker was guilty of participating in a conspiracy to sell a detectable amount of heroin. A detectable amount is a very small amount.

Should the government have wanted to hold Mr. Tucker responsible for a higher level of narcotics, then they should have really indicted him for that. They should have indicted him for 100 grams or more or 500 grams or more, whatever it is they wanted to indict him with, because then the jury would have been called to answer the question whether or not the government had proof that he sold any particular amount of heroin.

But there is none, yet now the government wants to fall back on the position that Mr. Tucker is in and around that area and so he should be held responsible for all the drugs that were there because all of that is foreseeable to him, and that just does not meet the burden, Your Honor.

And for that reason, we would ask that the Court not hold him responsible, particularly for the amount of narcotics which is attributable to Mr. Tucker in connection with what was retrieved from the barbershop.

THE COURT: Thank you, Mr. McDaniel.

MS. WEST: Thank you, Your Honor.

THE COURT: Mr. Macchiaroli.

MR. MACCHIAROLI: Your Honor, let me just begin by the fact that we're at sentencing here.

The jury has convicted Mr. Tucker of not just being at the barbershop, not knowing Mr. Fields, but conspiring with Mr. Fields to traffic narcotics from on or about June 1st, 2017, through February 1st, 2018, with the highest standard of proof required in the country: Beyond a reasonable doubt.

This Court asked the government to put forth all the facts in support of the relevant conduct. And for six pages, we submitted proposed findings of fact, laying out every detail: The confidential informant's testimony; that Lonnell Tucker was selling drugs as if he had a license to sell; that he was always selling when he was there to buy drugs from Mr. Fields; we have the text messages that talk about what color it is, gray, is it pink, is it pink hard stuff, all lingo consistent with heroin which was recovered above the barbershop with fentanyl, which is the item that

"If the defendant plays a managerial role in the drug conspiracy, coordinates drug distribution with other managers of the drug conspiracy and shares in the conspiracy's profits, he may be held responsible for the entire drug quantity attributable to the conspiracy during the time he was a participant."

And then further in *U.S. versus Thomas*, it says, "The Court relies on evidence of a defendant's relationship to and involvement with the conspiracy in order to draw permissible inferences regarding his knowledge and agreement to be part of a drug conspiracy and the foreseeability of his co-conspirator's conduct.

"The Court's findings concerning the nature and extent of the defendant's relationship to the conspiracy are used as a basis for a conclusion about whether he should be held vicariously liable for the conduct of his co-conspirators."

So here are my factual findings, having listened to the evidence at this trial and having become quite familiar with the players in this conspiracy:

There's no question that Mr. Samuels -- excuse me, that Mr. Tucker was part of a core group of individuals that operated out of that barbershop. Mr. Fields, Mr. Samuels, Mr. Hamilton, Mr. Tucker, Mr. Venable, Mr. Smith were a regular presence at the barbershop, the core group of people

who worked in and out of that barbershop.

And there's no doubt that it was -- this is, perhaps, an overused term but I think it's accurate in this instance: It was an open-air drug market. You can walk up to the barbershop, buy some drugs, leave the barbershop. That was pretty well-established.

Two locations and, really, three, to actually make drug sales within the barbershop itself, which is on the first ground level floor, and then above the barbershop on the second floor, where the large quantity of drugs were found, and then outside on the front steps or on the front stoop on the sidewalk right out in front of the barbershop.

If not actual transactions taking place, there certainly look to be transactions, suspected transactions, and instances in which people were directed into the barbershop, at least based upon the confidential informant's information regarding the confidential informant, who passed away, being directed to others to actually make purchases and transactions.

There's no doubt Mr. Tucker was regularly at the barbershop. That's confirmed by the GPS data and the testimony of Mr. Clark, who said that every time he was there, which was at least once or twice a week, he would see Mr. Tucker there.

And the reality is that surveillance picks

Mr. Tucker up there all the time.

You know, law enforcement can't be there every day, they don't attempt to be there every day. But this was a seven -- I'm sorry, eight-month-long investigation, at least that's the conspiracy period, and Mr. Tucker is repeatedly seen there. He engages in a controlled purchase with the confidential informant on June the 15th of 2017, .58 grams of heroin for $100, purchased from Mr. Tucker inside the barbershop.

I recognize that the confidential informant's not here to testify, but I can rely on hearsay testimony and that's the evidence that was put before a Magistrate Judge to acquire a search warrant, and I deem that to be reliable.

July the 7th, 2017, confidential informant goes back to try and purchase heroin from Mr. Tucker after, actually, I believe, contacting him. But in that instance, Mr. Tucker only had marijuana and no transaction took place.

August 23rd, again, the confidential informant attempts to make a purchase, contacts Mr. Tucker, who said he would be at the barbershop. But Mr. Tucker didn't have anything with him when the confidential informant got there.

And then again, August 31st, the confidential informant, again, attempts to make a purchase. Mr. Tucker's there, but he's waiting on someone else. These are all facts that come out in the affidavit in support of a

search warrant. Some of this came out during the course of the trial as well.

And then there's the surveillance. According to the search warrant application, September 28th, Mr. Tucker is seen outside the barbershop appearing to make multiple suspected drug transactions, and this, of course, is based upon the trained eye of law enforcement.

October 20th, Mr. Tucker is seen with Mr. Fields in apparent drug transactions. He's seen taking something out of his left jacket pocket and later seen counting money.

November 2nd, 2017, Mr. Tucker is seen outside the barbershop with Mr. Fields.

So what all that establishes clearly is Mr. Tucker has a regular presence there, if not almost on a daily basis, it seems, given the number of times he's there and the frequency with which he was seen there, and the GPS data backs that up.

We also have the testimony of the cooperator, Mr. Clark, who although he doesn't place Mr. Tucker on the second floor, he said he did see Mr. Tucker there almost every time he arrived and came there.

The quote regarding Mr. Tucker, based on his observations, is he's acting like he had a license to sell drugs.

That said, Mr. Clark never put Mr. Tucker

upstairs, not once.

This is actually what I thought was somewhat credible about Mr. Clark's testimony is that he didn't seem to try to do too much. He didn't put Mr. Tucker up there along with others. He said there were three people upstairs; and if he's there with the frequency he's there, he's never seen Mr. Tucker upstairs one time.

He does testify that Mr. Tucker came down one time and he sort of moved his crotch area after coming from the stairs, you know, suggestive of, perhaps, hiding drugs in his pants; also could be suggestive of something else that men regularly do in their crotch areas. So I'm not sure what to make of that.

Then there, of course, are the text messages. And these really do confirm that, Mr. Tucker, you were selling drugs. I mean, there's -- 50 shirts appearing regularly in text messages with the person who's the recipient with all the Ks in his or her name as it's entered in the phone, that term appears multiple times.

You're not a shirt salesman. 50 shirts is clearly code for some drugs, some quantity of drugs. The reality is I don't know what; there's no evidence to support what that is.

Here's what I draw in terms of conclusion based upon all that evidence.

You know, Mr. Tucker is not on the level of Mr. Fields. He's not somebody who acquired large quantities like Mr. Fields in order to then re-sell large quantities to others, who would then re-sell to customers.

He's not a Venable. He's not even a Mr. Clark. He's got no apparent role in this operation as a manager or operator, doesn't supervise others.

It would appear to me, based upon the evidence, and I think this is borne out beyond a reasonable doubt, is that Mr. Tucker's agreement, the extent of his agreement in this conspiracy is to sell drugs that he received from Mr. Fields or others in that barbershop area and sell them outside. You know, perhaps he does some selling on the side or through text messaging, but by and large what the evidence showed was that he was dealing on the street level. He wasn't dealing in large quantities to others.

And so I think when you talk about what the test is, is it reasonably foreseeable that Mr. Tucker would see Mr. Fields selling larger quantities to the others? Sure, he probably understood that. On the other hand, he's not responsible just for what he knows. He's responsible for his joint enterprise in the conspiracy insofar as he's agreed to join it.

And as I understand the evidence and as I see the evidence, the extent to which he's joined this conspiracy

and agreed to be a part of it with others is by selling drugs out on the street and directing people in and out of that barbershop to buy small quantities of drugs, of the kind that we saw with the confidential informant in half-gram amounts, which could theoretically be used either for personal use or resale in small quantities.

There is nothing, no evidence that would suggest Mr. Tucker sold in large quantities. We don't have him with any large quantities of cash. He's not found at any point.

And I understand the limitations of what law enforcement had in terms of being able to locate his residence, and so there was never a search warrant there. But he's not found at any point in time with any large quantity of drugs on him.

And so all of this -- as I said, I can only go with what is before me and what was elicited at trial.

And, again, I think two things; one, his agreement to be part of this conspiracy is limited to selling outside the barbershop, not in large quantities to others to re-sell.

And, two, that just because he knows Mr. Fields is actually operating on that level, as I understand the law, that doesn't make him responsible for that quantity of sales.

And so here's how I come out on this. And I will

concede, this is a little bit -- these are inferences, no doubt, but I think they're fair inferences based upon the testimony and all the evidence that came in, and that is:

Mr. Tucker was undoubtedly a member of this conspiracy for seven and a half months. We know that he began selling in the middle of June because that's when the first cooperating -- the confidential informant's sale took place. And he's in the conspiracy until February 1st, that is 30 weeks.

I am conservatively estimating, and this quite a conservative estimation, that given the quantity of the frequency of times that he's been there and the frequency of times he's seen outside in suspected drug transactions, five half-gram sales per week. If I do that math, it comes out to 75 grams of heroin.

And I think that is -- based upon the evidence and I think the fair inferences that can be drawn from the evidence, I think that is the reasonably foreseeable amount that Mr. Tucker is responsible for based upon his role in the conspiracy. So that is a total converted drug weight of 75 kilograms.

I appreciate the government's position, but I just don't think it's, A, backed up by the law or the evidence, and I think this is a fairer reflection of what the evidence is and Mr. Tucker's role in the overall conspiracy.