

Petitioner's Appendix A

United States of America
v.
Brian Keith Wells

Decision of the United States
Court of Appeals for the Sixth Circuit
(published)

Docket Number 21-5890

Issued December 22, 2022

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

Deborah S. Hunt
Clerk

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

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

Filed: December 22, 2022

Mr. William Samuel Dotson
Office of the U.S. Attorney
Eastern District of Kentucky
601 Meyers Baker Road
Suite 200
London, KY 40741

Mr. John Patrick Grant
Mr. Charles P. Wisdom Jr.
Office of the U.S. Attorney
Eastern District of Kentucky
260 W. Vine Street
Suite 300
Lexington, KY 40507-1612

Ms. Stephenie Lape Wolfinbarger
810 Sycamore Street, Sixth Floor
Cincinnati, OH 45202

Re: Case No. 21-5890, *USA v. Brian Wells*
Originating Case No. : 7:20-cr-00006-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Robert R. Carr

Enclosures

Mandate to issue

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0275p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAN KEITH WELLS, aka B. K. Wells,

Defendant-Appellant.

No. 21-5890

Appeal from the United States District Court for the Eastern District of Kentucky at Pikeville.
No. 7:20-cr-00006-1—Robert E. Wier, District Judge.

Decided and Filed: December 22, 2022

Before: SILER, GILMAN, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Stephenie N. Lape Wolfinbarger, STEPHENIE N. LAPE, PLLC, Cincinnati, Ohio, for Appellant. John Patrick Grant, Charles P. Wisdom, Jr., UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee.

OPINION

SILER, Circuit Judge. Defendant-Appellant Brian Keith Wells appeals his below-Guidelines sentence, challenging the district court's refusal to appoint substitute counsel, the application of a four-level role enhancement to his Guidelines range, and the substantive reasonableness of his sentence. For the following reasons, we AFFIRM.

I.

In 2020, a federal grand jury charged Wells and co-defendant Christina L. Tidwell in a one-count indictment with conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, from about November 2018 and continuing to about February 2020. The court appointed counsel to represent Wells on May 14, 2020, and Wells subsequently entered a plea of not guilty on May 19, 2020.

On July 20, 2020, Wells sent a letter to the court complaining about his court-appointed counsel. His counsel moved to withdraw, and a magistrate judge granted the motion and appointed new counsel on July 28, 2020. The court granted Wells's motions to continue the trial, and coupled with delays due to the COVID-19 pandemic, a trial was ultimately scheduled for May 5, 2021.

At a hearing before the court on April 26, 2021, Wells pleaded guilty to the one count charged in the indictment pursuant to a plea agreement. Wells admitted several facts outlined in the Plea Agreement, including:

Specifically, during this timeframe [around November 2018 to around February 2020], the Defendant was obtaining multiple ounces of methamphetamine from a source of supply based out of the Cincinnati, OH area, which he would then distribute to street-level drug dealers and end drug users in Pike County, KY and Mingo County, WV. At times, the Defendant would use runners or mules to travel to Cincinnati, OH to obtain the meth and bring it back to him. In addition, the codefendant, Christina Tidwell, assisted Wells in his distribution activities by selling to the Defendant's drug customers when he was not available. Moreover, . . . Tidwell maintained and continued the Defendant's distribution activities on his behalf whenever he was incarcerated.

At the hearing, Wells admitted to the factual statements in the Plea Agreement and confirmed their accuracy. Wells also assured the court that he had no complaints with his lawyer's performance and was not withholding any complaints against his counsel of which he was aware. The court accepted Wells's entry of a guilty plea, and scheduled sentencing for August 18, 2021.

Two months later, on June 23, 2021, Wells sent another letter to the court, seeking to withdraw his guilty plea and requesting new counsel. Wells asserted in his letter that he was "improperly misled by coun[s]el about the circumstances of the case," and he was provided

“false information” about his case, leading to his acceptance of the Plea Agreement. On July 9, 2021, the court conducted an ex parte *Iles/Benitez*¹ hearing to inquire about the relationship between Wells and his counsel.

The court conducted a searching inquiry into Wells’s complaint and engaged with both Wells and his counsel several times to unearth the reasons behind Wells’s letter. Wells’s counsel indicated that he had not had any issues with Wells and thought they had an appropriate relationship, meeting several times either by phone or in person up to and following the plea hearing. However, Wells informed the court that he had initially wanted to go to trial “without any doubt,” which he had told his counsel; but, he entered into the Plea Agreement “because [he] was under the assumption that [he] was being charged with another charge,” and he did not find out until the plea hearing “that it was only an investigation and not a charge.”

The court stated that it did not understand Wells’s complaint as Wells pleaded guilty to the only count charged in the indictment. Counsel then explained that, following Wells’s arrest, Wells had allegedly engaged in conduct that constituted material false statements to a federal officer. The government informed Wells’s counsel that it was considering charging Wells as a result, but if he accepted the Plea Agreement in the underlying case, the government would not pursue this additional charge. The Plea Agreement reflected this compromise.

The court asked Wells again to explain his complaint. Wells remained adamant that he only pleaded guilty because he thought the government was adding an additional charge for the material false statement offense, and he did not understand that it was only an investigation until after the plea hearing. However, the court concluded that Wells received the deal for which he had bargained, and Wells confirmed with the court that he entered his guilty plea so he would avoid facing these additional charges.

Wells then argued that he was not guilty of the conspiracy and only entered into the Plea Agreement because it was in his “best interest.” Wells maintained that he was just trying “to get the best deal [he] could get,” and was just “trying to do the least time [he could] do.”

¹*Benitez v. United States*, 521 F.3d 625 (6th Cir. 2008); *United States v. Iles*, 906 F.2d 1122 (6th Cir. 1990).

The court asked Wells if he was able to talk to his counsel, whether he understood his counsel, and whether they were able to communicate with each other, all of which Wells confirmed. Wells's counsel then confirmed he was willing to continue the relationship. The court ultimately found that none of Wells's complaints formed a basis for substituting counsel, as Wells received "precisely what he expected" and his status was "precisely what he negotiated it to be post-plea." The court determined that it was "not going to do a counsel change without a basis showing the dissatisfaction. There is a public interest at play here. The matter comes up two months post-plea, a month and a half prior to sentencing. That's not a timely way to raise an issue of this type." For these reasons, the court denied Wells's request to replace his counsel but agreed to move the sentencing hearing to September so Wells and his counsel could confer on the issues that arose during the hearing.

At sentencing, the court first addressed the Presentence Investigation Report (PSI), including Wells's objection to the Probation Officer's recommendation to apply a four-level enhancement under USSG § 3B1.1(a) for Wells's alleged role as an organizer or leader of the conspiracy. The government relied on the facts in the PSI and the factual statements in Wells's Plea Agreement to support the application of the enhancement under § 3B1.1(a). Specifically, the government cited Wells's admissions in the Plea Agreement that "he would use runners or mules to travel to Cincinnati to obtain meth to bring back to him, which he distributed" and that "his codefendant, Christina Tidwell, assisted him in distribution activities by selling to [Wells's] customers when he was not available."

The court considered the factors listed in the commentary to § 3B1.1(a), including the exercise of decision-making authority, the degree of participation, recruitment, and financial stake. Based on these factors and the evidence presented before the court, specifically Wells's admissions in the Plea Agreement and the investigating officer's corroborating testimony, the court overruled Wells's objection and applied the four-level enhancement under § 3B1.1(a). The court determined that Wells had a total offense level of 33, with a criminal history category of V, resulting in a Guidelines range of 210 to 262 months with a mandatory minimum of 120 months.

Wells's counsel then indicated to the court that Wells had asked him not to argue anything on his behalf. The court asked Wells why he took this position, and Wells responded, "I'm just ready to get this over with." The court recommended that Wells allow his counsel to make an argument on his behalf, but Wells maintained his objection. However, Wells's counsel asked the court to consider the written arguments he had submitted and to sentence Wells to 120 months—that is, the statutory minimum and 90 months below the bottom of Wells's Guidelines range.

The court thoroughly considered the factors under 18 U.S.C. § 3553(a) and various mitigating factors, as well as Wells's request for a downward variance to the mandatory minimum. It agreed with the government and Wells that it was fair to vary 13 months below the Guidelines range for the period Wells was in custody following the issuance of the writ on the present federal charge until the time an unrelated state sentence was discharged; however, it found that a variance down to the statutory minimum was unwarranted. It sentenced Wells to 197 months of imprisonment followed by five years of supervised release.

II.

Wells presents three challenges on appeal: the court 1) erred in denying his request to substitute counsel; 2) erred in applying the four-level role enhancement under § 3B1.1(a) to his Guidelines range; and 3) improperly balanced the § 3553(a) factors and imposed a substantively unreasonable sentence. We reject each one of Wells's contentions in turn.

A. Wells's Motion to Substitute Counsel

Wells first claims that the court erred in denying his second request to substitute counsel. "[T]he Sixth Amendment is implicated where a criminal defendant seeks to change the status of his representation." *Benitez*, 521 F.3d at 631 (emphasis omitted). However, "the right to counsel of choice is not absolute. An indigent defendant must show 'good cause' to warrant substitution of counsel." *United States v. Chapman*, 796 F. App'x 873, 876 (6th Cir. 2019) (quoting *Iles*, 906 F.2d at 1130–31).

We review a district court’s decision that an indigent defendant did not show good cause to substitute counsel for an abuse of discretion. *United States v. Marrero*, 651 F.3d 453, 464 (6th Cir. 2011). We consider the following four factors in determining whether the district court abused its discretion in denying such a request:

(1) the timeliness of the motion, (2) the adequacy of the court’s inquiry into the matter, (3) the extent of the conflict between the attorney and client and whether it was so great that it resulted in a total lack of communication preventing an adequate defense, and (4) the balancing of these factors with the public’s interest in the prompt and efficient administration of justice.

United States v. Mack, 258 F.3d 548, 556 (6th Cir. 2001); *see Marrero*, 651 F.3d at 464.

With respect to the timing of Wells’s motion, “we have previously found motions for new counsel untimely when the defendant claims to have been unhappy with counsel all along but waits to file.” *Chapman*, 796 F. App’x at 877 (citing *United States v. Jackson*, 662 F. App’x 416, 423 (6th Cir. 2016)); *see also United States v. Chambers*, 441 F.3d 438, 447 (6th Cir. 2006) (noting that the defendant “waited until just prior to trial to raise” his dissatisfaction with counsel). Here, Wells claimed that he initially became unhappy about his entry into the Plea Agreement following the plea hearing when he realized he was not being charged with any additional offense, which was the basis for his complaint against his attorney. However, Wells failed to submit his request for new counsel until two months after the plea hearing—and just weeks ahead of the scheduled sentencing. Moreover, the court expressed its concerns with the timelines of Wells’s request. *See United States v. Gilliam*, 384 F. App’x 497, 498 (6th Cir. 2010); *cf. Chapman*, 796 F. App’x at 877 (“[T]he district court did not express any concerns about the timeliness of [the defendant’s] motion, a consideration that has weighed in favor of finding a request timely.” (citing *Marrero*, 651 F.3d at 465)). Thus, the timing factor weighs against Wells.

As to the adequacy of the court’s inquiry into Wells’s complaint, the transcript spanned over 20 pages, and the court heard from both Wells and his counsel several times. *See Chapman*, 796 F. App’x at 878 (“The district court’s inquiry is adequate when it allows all of the interested parties to present their respective evidence and arguments.” (quotation marks and citation

omitted)). Ultimately, the court was able to unearth that Wells was really just “trying to do the least time [he could] do.”

The third factor—whether the extent of the conflict between the attorney and the defendant was so great as to impede the communication between the parties—also weighs against Wells. Wells’s counsel outlined the history between him and Wells leading up to the hearing at issue and informed the court that there had not been any issues discussing Wells’s charges or the proceedings during their several meetings. Counsel confirmed it was a cordial and appropriate relationship. The court also specifically asked Wells whether he was able to talk to his counsel, understand him, and communicate with him back and forth—all of which Wells confirmed was true. Wells has not otherwise shown that the relationship was hindered due to the alleged conflict or that there was any lack of communication, *see id.* at 881–82, and he did not raise the issue again at the sentencing hearing.²

Finally, the court determined that there was “a public interest at play here.” This was Wells’s second request for a third, new attorney, and it came just weeks before the sentencing hearing. Moreover, his complaint appeared to be one of either misunderstanding the government’s discretionary authority to charge additional offenses or buyer’s remorse—he pleaded guilty to avoid additional charges for allegedly making material false statements to a law enforcement officer but then complained to the court that no further charges were being pursued, which was the exact benefit for which he bargained. Replacing counsel at that stage due to either

²On appeal, as a final argument, Wells asserts that his adamance at sentencing to not have his counsel provide argument, coupled with his June 23, 2021 letter requesting new counsel, “should have triggered an additional *Iles/Benitez* inquiry” by the district court. Wells relies on *Benitez*, where this court found that, even though the defendant did not indicate he wanted new counsel, he did indicate that he did not want his counsel to represent him any further at the sentencing hearing, which was sufficient to trigger an inquiry under the Sixth Amendment as to the source and nature of the defendant’s dissatisfaction with his counsel. 521 F.3d at 631–36. However, unlike in that case where the defendant repeatedly indicated at the sentencing hearing that he did not want his counsel to represent him, in this case, Wells simply expressed his frustration with the proceedings generally, indicating he did not want his counsel to argue on his behalf because he was “just ready to get this over with.” Wells then proceeded to refuse to offer anything further on his own behalf. Accordingly, Wells’s statements at the sentencing hearing were insufficient to put the court on notice that he remained dissatisfied with his counsel, as he did not “try to ‘fire’ his counsel, ask for new counsel, or suggest that he wished to conduct his own defense.” *See Iles*, 906 F.2d at 1131. In any event, even if the district court should have inquired further into the extent of any additional or continued conflict between Wells and his attorney, Wells’s statements at the sentencing hearing were untimely and “changing counsel in the middle of [Wells’s] sentencing hearing would have further delayed the proceedings, a reality at odds with the public’s interest in the prompt administration of justice.” *United States v. Jones*, Nos. 21-5493/5494, 2022 WL 2375730, at *4 (6th Cir. June 30, 2022).

Wells's misunderstanding or his remorse, rather than a disagreement with his counsel, likely "would have thwarted the prompt and efficient administration of justice," just weeks ahead of the scheduled sentencing. *United States v. Clark*, 328 F. App'x 992, 999 (6th Cir. 2009); *see United States v. Saldivar-Trujillo*, 380 F.3d 274, 278 (6th Cir. 2004).

Because all of the *Mack* factors weigh against Wells, we find that the district court did not abuse its discretion in denying his motion to substitute counsel for lack of good cause.

B. Application of the Four-Level Enhancement to Wells's Guidelines Range

Wells next claims that the evidence presented before the court was insufficient to support the application of the four-level role enhancement to his Guidelines range under § 3B1.1(a). Our review of the district court's "legal conclusion that a person is an organizer or leader under Section 3B1.1 is . . . deferential." *United States v. Washington*, 715 F.3d 975, 983 (6th Cir. 2013). We review the district court's factual findings for clear error. *See United States v. Wright*, 747 F.3d 399, 412 (6th Cir. 2014).

The Sentencing Guidelines provide that a four-level enhancement is appropriate "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." § 3B1.1(a). We consider the several factors listed in the commentary to § 3B1.1 to determine whether the district court properly found that a defendant served as a leader or organizer of the criminal activity. § 3B1.1 cmt. n.4; *see United States v. Arrechavaleta*, 851 F. App'x 570, 573 (6th Cir. 2021) (quoting *United States v. Hernandez*, 227 F.3d 686, 699–700 (6th Cir. 2000)). Moreover, more than one individual may qualify as a leader or organizer of the conspiracy. *See* § 3B1.1 cmt. n.4; *Washington*, 715 F.3d at 984. "A defendant only needs to be a leader of 'one or more other participants' to qualify for the enhancement." *Washington*, 715 F.3d at 983 (quoting § 3B1.1 cmt. n.2).

The government must establish by a preponderance of the evidence that the leadership enhancement under § 3B1.1(a) applies. *United States v. Hills*, 27 F.4th 1155, 1198–99 (6th Cir. 2022). We have held that "[c]oncessions in a plea agreement are sufficient to support a § 3B1.1 enhancement." *United States v. Ashiq*, 307 F. App'x 913, 916 (6th Cir. 2009) (collecting cases).

Wells largely relies on his incarceration for all but one month of the alleged duration of the conspiracy to support his claim that the evidence failed to establish that he was an organizer or leader of the conspiracy. He also claims that the government failed to produce evidence of any discussion of the division of the profits or that he had ever paid anyone to aid him in the conspiracy. He further points to the several phone calls between him and his co-defendant, Tidwell, while he was in custody, arguing that none of the calls established that Wells was providing Tidwell with directions or was making any decisions in support of the conspiracy. He claims that the evidence tends to show that Tidwell was more of an equal or a partner in the activity, but Tidwell did not receive any role enhancement. In all, Wells contends that the evidence is similar to that produced in *United States v. Walker*, where we found that the evidence was insufficient to support the application of the role enhancement. 160 F.3d 1078, 1091–92 (6th Cir. 1998).

However, Wells's reliance on *Walker* is misplaced. In *Walker*, we found that no witness had ever indicated that the defendant engaged in any organizational role, “either administratively (by setting up deals or keeping track of people’s salaries, as it were), or by actually directing the action.” *Id.* at 1091. Furthermore, there was no evidence that the defendant “direct[ed] anyone to do anything.” *Id.* at 1091–92. Conversely, in this case, relying on both the factual statements to which Wells admitted in the Plea Agreement and the investigating officer’s testimony, the court found that Wells exercised decision-making authority over at least three of his coconspirators; recruited others through the use of runners and mules; had a financial incentive as “runners and mules are not really economic participants;” and participated in the planning and organizing of the conspiracy. Moreover, the court appropriately rejected Wells’s argument that his incarceration disproved any alleged leadership or organizational role as he admitted in the Plea Agreement that he conspired with the others from 2018 to 2020. He also admitted in the Plea Agreement that Tidwell carried out his distribution activities when he was unavailable—and incarcerated.

The court’s findings were not clearly erroneous based on the evidence presented before it, namely Wells’s concessions in the Plea Agreement and the investigating officer’s testimony at the sentencing hearing, and we defer to the court’s legal conclusion that Wells served as a leader

or organizer of the conspiracy. *See United States v. Polly*, 385 F. App'x 454, 459–60 (6th Cir. 2010) (concluding similarly that the defendant's reliance on *Walker* was "inapposite" given the defendant's admissions in the plea agreement). Accordingly, we uphold the court's application of the four-level enhancement under § 3B1.1(a).

C. Substantive Reasonableness of Wells's Below-Guidelines Sentence

Finally, Wells maintains that the court's sentence of 197 months of imprisonment—a sentence 13 months below his Guidelines range of 210 to 262 months—is substantively unreasonable. We review the substantive reasonableness of a district court's sentence for abuse of discretion. *United States v. Greco*, 734 F.3d 441, 444 (6th Cir. 2013). "A defendant challenging a below-guidelines sentence as substantively unreasonable bears an 'even more demanding' burden than does a defendant challenging a within-guidelines sentence." *United States v. Cornejo-Jimenez*, 563 F. App'x 480, 481 (6th Cir. 2014) (quoting *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008)).

Wells points to Tidwell's substantially lower sentence of 78 months to prove that his sentence is substantively unreasonable. He also maintains that, as to the § 3553(a) factors, "the district court focused almost entirely on the nature of the offense and placed very little weight on other mitigating factors."

Wells's disparity argument is unavailing. We have held that "[s]ubsection 3553(a)(6) is concerned with national disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct." *United States v. Simmons*, 501 F.3d 620, 623 (6th Cir. 2007). Even between co-defendants, § 3553(a)(6) "is not concerned with disparities between one individual's sentence and another individual's sentence." *Id.* Like the defendant in *Simmons*, there is no evidence in the record that Wells's sentence does not conform with national standards, and Wells fails to present any such evidence here. *See id.* at 626. In any event, as Wells himself acknowledges, Tidwell pleaded guilty to a lesser-included offense, and, unlike Wells, she did not receive an enhancement to her Guidelines range for her role in the conspiracy. *See Greco*, 734 F.3d at 450–51; *United States v. Wright*, 991 F.3d 717, 720 (6th Cir. 2021).

The court also carefully outlined the relevant § 3553(a) factors and their application in this matter. Contrary to Wells's contention on appeal, the court weighed several mitigating factors, including Wells's employment and education history, a relatively clean period of criminal conduct from 2011 to 2016, and a background of minimal violence. Despite Wells's refusal to argue on his own behalf, or allow his counsel to do so, the district court varied below the Guidelines range by 13 months. However, it explicitly rejected Wells's request to vary 90 months below the minimum of his Guidelines range to the statutory minimum of 120 months given Wells's "criminal history category, the role in the case, the conduct on supervision, the quantity at issue and the felony trafficking recidivism."

Accordingly, Wells has failed to carry his heavy burden of establishing that his below-Guidelines sentence is substantively unreasonable. We find that the court did not abuse its discretion in sentencing Wells to 197 months of imprisonment.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-5890

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN KEITH WELLS, aka B. K. Wells,

Defendant - Appellant.

FILED
Dec 22, 2022
DEBORAH S. HUNT, Clerk

Before: SILER, GILMAN, and NALBANDIAN, Circuit Judges.

JUDGMENTOn Appeal from the United States District Court
for the Eastern District of Kentucky at Pikeville.THIS CAUSE was heard on the record from the district court and was submitted on the briefs
without oral argument.IN CONSIDERATION THEREOF, it is ORDERED that the sentence imposed on Brian Wells by
the district court is AFFIRMED.**ENTERED BY ORDER OF THE COURT**

Deborah S. Hunt, Clerk

Petitioner's Appendix B

United States of America
v.
Brian Keith Wells

Judgment of the United States
District Court for the Eastern District
of Kentucky, Southern Division
(unpublished)

Docket Number 7:20-cr-00006-REW-EBA

Filed September 14, 2021

UNITED STATES DISTRICT COURT

SEP 14 2021

Eastern District of Kentucky – Southern Division at Pikeville

AT LEXINGTON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

UNITED STATES OF AMERICA

v.

Brian Keith Wells aka B.K. Wells

JUDGMENT IN A CRIMINAL CASE

Case Number: 7:20-CR-006-REW-01
USM Number: 23211-032
Sebastian M. Joy
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 [DE 1]

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

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

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846	Conspiracy to Distribute 500 Grams or More of a Mixture or Substance Containing Methamphetamine	February 2020	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.

September 13, 2021

Date of Imposition of Judgment



Signature of Judge

Honorable Robert E. Wier, U.S. District Judge

Name and Title of Judge



Date

DEFENDANT: Brian Keith Wells aka B.K. Wells
CASE NUMBER: 7:20-CR-006-REW-01

IMPRISONMENT

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

ONE HUNDRED NINETY-SEVEN (197) MONTHS

The Court finds that Wells should receive pretrial custody credit since his federal custody date of June 21, 2021. Though BOP has the responsibility to assess credit, the Court intends that Wells receive credit for his custody period, i.e. the full period from June 21, 2021, the date of his federal custody coinciding with a serve-out on the state custodial sentence, through commencement of his federal sentence.

- The court makes the following recommendations to the Bureau of Prisons:
 - That the defendant participate in the 500-hour residential drug abuse program or any other substance abuse treatment programs as may be apt for him.
 - That the defendant participate in any educational and vocational training for which he qualifies.
 - That the defendant participate in any appropriate mental/emotional health screening and treatment for which he qualifies.
 - That the defendant be designated to the facility for which he qualifies closest to his residence.
- 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: Brian Keith Wells aka B.K. Wells
CASE NUMBER: 7:20-CR-006-REW-01

SUPERVISED RELEASE

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

FIVE (5) YEARS

STATUTORILY MANDATED CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess or use a controlled substance.
3. You must submit to a drug test within 15 days of supervision commencement. USPO shall subsequently test Defendant at least twice thereafter and may test Defendant as frequently as twice weekly during the supervision term. USPO may seek Court permission for more frequent testing, if warranted. USPO may re-test if any test sample is invalid.
 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 pages. The Court has considered § 3583(d)(1)-(3) in formulating all additional conditions.

DEFENDANT: Brian Keith Wells aka B.K. Wells
CASE NUMBER: 7:20-CR-006-REW-01

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. **Christina Tidwell is an exemption to this rule given their mutual children.**
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: Brian Keith Wells aka B.K. Wells
CASE NUMBER: 7:20-CR-006-REW-01

SPECIAL CONDITIONS OF SUPERVISION

1. You must abstain from the use of alcohol.
2. The Court does not, at this time, order substance abuse or mental health treatment upon release from custody. USPO shall promptly assess Defendant post-release and may seek Court modification of conditions if USPO determines then (or at any later time) that Defendant's condition warrants treatment.
3. You must refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing which is required as a condition of release.
4. You must submit your person, house, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. 1030(e)(1)), and other electronic communications / data storage devices and media to a search conducted by a United States Probation Officer, who may conduct a search pursuant to this condition only when he or she has reasonable suspicion that you have violated one or more conditions of your supervised release and that the area(s) or thing(s) to be searched contain evidence of the suspected violation(s). The USPO must conduct any such search at a reasonable time and in a reasonable manner. Failure to submit to such a search would be a violation of your supervised release and may be grounds for revocation. You must inform other occupant(s) of any area potentially subject to such a search of that status.

DEFENDANT: Brian Keith Wells aka B.K. Wells
CASE NUMBER: 7:20-CR-006-REW-01

CRIMINAL MONETARY PENALTIES

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

<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS \$ 100.00	\$ Community Waived	\$ Waived	\$ N/A	\$ N/A

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

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

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

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

Restitution amount ordered pursuant to plea agreement \$ _____

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

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

the interest requirement is waived for the fine restitution.

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

* 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: Brian Keith Wells aka B.K. Wells
CASE NUMBER: 7:20-CR-006-REW-01

SCHEDULE OF PAYMENTS

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

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance 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:

Criminal monetary penalties are payable to:
 Clerk, U. S. District Court, Eastern District of Kentucky
 110 Main Street, Suite 203, Pikeville, KY 41501

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

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 (<i>including defendant number</i>)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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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.

Petitioner's Appendix C

Text of

Federal Rule of Criminal Procedure 11(d)

Fed. R. Crim. P. 11(d) – Withdrawing a Guilty or Nolo Contendere Plea.

A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5);

or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

Petitioner's Appendix D

Text of
USSG § 3B1.1(a)

PART B – ROLE IN THE OFFENSE

Introductory Commentary

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e.*, all conduct included under §1B1.3(a)(1)–(4), and not solely on the basis of elements and acts cited in the count of conviction.

When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.

Historical Note

Effective November 1, 1987. Amended effective November 1, 1990 (amendment 345); November 1, 1992 (amendment 456).

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

Commentary

Application Notes:

1. A “*participant*” is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (*e.g.*, an undercover law enforcement officer) is not a participant.
2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.
3. In assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

Petitioner's Appendix E

Text of
18 U.S.C. §3553(a)

18 U.S.C. § 3553 -- Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--

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

- (1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2)** the need for the sentence imposed—
 - (A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B)** to afford adequate deterrence to criminal conduct;
 - (C)** to protect the public from further crimes of the defendant; and
 - (D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3)** the kinds of sentences available;
- (4)** the kinds of sentence and the sentencing range established for—
 - (A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

- (i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
- (B)** in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

- (A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

- (B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7)** the need to provide restitution to any victims of the offense.