
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Kenny Eugene Smart,

Petitioner,

-vs.-

United States of America,

Respondent.

**On Petition for Writ of Certiorari to
the Eighth Circuit Court of Appeals**

Appendix to Petition for Writ of Certiorari

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United States Court of Appeals
For the Eighth Circuit

No. 22-1129
No. 22-1131

United States of America

Plaintiff - Appellee

v.

Kenny Eugene Smart

Defendant - Appellant

Appeals from United States District Court
for the Southern District of Iowa

Submitted: October 20, 2022
Filed: February 21, 2023

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

LOKEN, Circuit Judge.

A jury convicted Kenny Eugene Smart of being a felon in possession of a firearm and possessing a firearm in furtherance of a drug trafficking crime. 18 U.S.C.

§§ 922(g)(1), 924(a)(2), 924(c)(1)(A)(i). The district court¹ denied his motion for a new trial in a thirty-page Order and sentenced Smart as an armed career criminal to 360 months' imprisonment. See 18 U.S.C. § 924(e). The court also revoked Smart's supervised release and imposed a consecutive fifty-four month sentence. Smart appeals his conviction and sentence, arguing there was insufficient evidence to convict him of the firearm offenses; the district court committed evidentiary errors and improperly instructed the jury; the government committed Brady violations; his trial counsel was ineffective; and the district court erred in sentencing him as an armed career criminal and abused its discretion in revoking supervised release. We affirm the conviction. Based on an intervening armed-career-criminal decision, we remand for resentencing.

I. Sufficiency of the Evidence

Smart argues the evidence was insufficient to convict him of actual or constructive possession of a firearm in furtherance of a drug trafficking crime. “We review the sufficiency of the evidence *de novo*, viewing evidence in the light most favorable to the jury's verdict, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict.” United States v. Harris-Thompson, 751 F.3d 590, 598 (8th Cir.), cert. denied, 574 U.S. 965 (2014).

At trial, law enforcement agents testified that in November 2020 they executed a search warrant at 1121 Clark Street in Des Moines, a duplex rented by Elisa Harper. The warrant was based on probable cause to believe the residence was used to manufacture and distribute crack cocaine. The entry team stopped Smart and his girlfriend, Jennifer Dibble, as they exited a small bedroom where a loaded Ruger pistol was found “in plain view on the floor.” A criminalist testified that DNA swabs

¹The Honorable Rebecca Goodgame Ebinger, United States District Court for the Southern District of Iowa.

from the firearm matched Smart's DNA. Smart was found with \$1240 cash. He inquired about "his tablet," which was found near the firearm.

Charles Loggins, Smart's uncle, testified that he saw Smart cook crack cocaine at Loggins's residence on multiple occasions. Loggins testified that Smart often brought the pistol found in the Clark Street bedroom and put it on the kitchen counter while he cooked crack. Heidi Kipnusu, Loggins's live-in girlfriend, testified she watched Smart cook crack cocaine at her house and saw him with a handgun on multiple occasions. Both Loggins and Kipnusu testified that Smart sold them crack cocaine. Lometa Welch testified that she purchased crack cocaine from Smart at the Clark Street residence "at least fifteen times." Early in the morning on the day of the warrant search, she went to purchase crack cocaine from Smart and saw him asleep in the bedroom which he later exited. Welch glimpsed the pistol on the floor, within Smart's reach.

The government also introduced recorded jail calls as evidence of Smart's consciousness of guilt. In one, Smart told Jennifer Dibble "it would be beautiful if your brother [Avery] would say he was missing something, a weapon of some type." In a subsequent call, Smart learned that Avery had not said anything when questioned. Smart said to Avery, "I'm trying to figure out why you didn't listen to your sister."

Brian Larson, Kipnusu's brother, testified that he was moved into Smart's cellblock shortly before Smart's trial began on June 7, 2021. Smart approached Larson and told him to "start making telephone calls right now and to get [Kipnusu] out of state or to [Larson's] wife's house." If Kipnusu testified, Larson "was going to be the one paying the price." On June 6, when Larson told Smart he could not reach Kipnusu, Smart said "he was going to get to her through [Larson]." Larson reported to a jail officer he did not feel safe in his housing unit.

The district court concluded the trial evidence demonstrated Smart's constructive possession of the handgun in furtherance of drug trafficking activity. "The evidence does not weigh against the jury's verdicts and no miscarriage of justice has occurred." On appeal, Smart first argues the court erred in denying his motion for judgment of acquittal because the DNA evidence was "scant" and the government otherwise "relied solely upon the testimony of uncorroborated, unreliable civilian witnesses." However, as Smart acknowledges, "it is within the province of the jury to make credibility assessments and resolve conflicting testimony." United States v. Dunn, 723 F.3d 919, 925 (8th Cir. 2013). Here, the testimony of Loggins, Kipnusu, and Welch alone, if credited by the jury, was sufficient evidence that Smart possessed the Ruger handgun in furtherance of a drug trafficking crime. There was no error denying judgment of acquittal.

Smart further argues the district court abused its discretion in denying his motion for a new trial because the evidence weighed heavily against the verdicts and a miscarriage of justice may have occurred. See Harris-Thompson, 751 F.3d at 600 (standard of review). We disagree. "Motions for new trials based on the weight of the evidence generally are disfavored. . . . A district court may grant a new trial for insufficiency of the evidence only if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred." United States v. Vore, 743 F.3d 1175, 1181 (8th Cir. 2014) (cleaned up). After careful review of the record, we conclude there was no abuse of discretion. The evidence weighed heavily in favor of, not against, the jury's verdict. There was no miscarriage of justice.

II. Evidentiary Issues

A. Smart's Prior Convictions. Prior to trial, Smart declined to stipulate to his status as a felon, his knowledge of that status, and the admissibility of two prior felony convictions. See Old Chief v. United States, 519 U.S. 172, 191 (1997). The government filed a motion *in limine* to admit evidence under Rule 404(b) of the

Federal Rules of Evidence, namely, his 2004 state conviction for possession with intent to deliver and conspiracy to deliver crack cocaine and his 2006 federal conviction for being a felon in possession of a firearm. The district court granted the motion over Smart's objection and overruled his trial objection to the government's Rule 404(b) evidence. The court concluded that this evidence was admissible on the felon in possession count "as substantive evidence of Smart's status as a felon and his knowledge of that status," and that it was relevant substantive evidence of possession in furtherance of cocaine distribution to demonstrate his knowledge and intent to distribute. We agree.

Rule 404(b) provides that evidence of another crime "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" -- in other words, to prove propensity to commit crimes -- but "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." To be admitted under Rule 404(b), the evidence must be "(1) relevant to a material issue; (2) similar in kind and not overly remote in time to the crime charged; (3) supported by sufficient evidence; and (4) higher in probative value than in prejudicial effect." United States v. Bragg, 44 F.4th 1067, 1073-74 (8th Cir. 2022) (citation omitted). In this circuit, Rule 404(b) is a rule of inclusion. We review the admission of Rule 404(b) evidence for abuse of discretion. See United States v. Drew, 9 F.4th 718, 722 (8th Cir. 2021), cert. denied, 142 S. Ct. 1159 (2022).

Prior to trial, the government sought to introduce evidence of Smart's prior convictions to show his "knowledge motive, and intent to possess a firearm and to possess a firearm in furtherance of distribution of cocaine," and to show his status as a convicted felon and knowledge of that status, elements of the felon in possession offense that he refused to stipulate. On appeal, ignoring the status issues, Smart argues "[t]here was no legitimate purpose in offering this evidence, other than propensity evidence." We have "routinely affirmed the use of past gun possession

offenses to prove the element of knowing possession in violation of 18 U.S.C. § 922(g)(1).” Bragg, 44 F.4th at 1074.

Here, at trial, defense counsel did not object that any specific 404(b) testimony created a risk of unfair prejudice that outweighed its probative value. The defense simply adhered to its pretrial position that *no* 404(b) evidence should be admitted. When the district court adhered to its pretrial ruling, defense counsel agreed that the court’s comprehensive limiting instruction was appropriate. As in United States v. Turner, 781 F.3d 374, 391 (8th Cir.), cert. denied, 577 U.S. 889, cert. denied, 577 U.S. 980 (2015), given the overwhelming evidence supporting the jury’s verdict against Smart, any error in the admission of these prior convictions was harmless. Evidence of Smart’s prior convictions for similar conduct “did not have substantial and injurious effect or influence in determining the jury’s verdict.” United States v. Mejia-Uribe, 75 F.3d 395, 399 (8th Cir.), cert. denied, 519 U.S. 855 (1996) (quotation omitted). There was no abuse of discretion in denying a new trial on this ground.

B. Smart’s Jail Calls. Smart next argues the district abused its discretion in admitting the recorded jail phone calls. He argues the calls “provided no evidence Smart was eliciting false testimony at trial, no evidence about hiding evidence, and no evidence about anything incriminating.” Therefore they should have been excluded as irrelevant and unfairly prejudicial because they disclosed Smart was held in jail before trial. See Fed. R. Evid. 403. This contention is without merit.

The government offered this evidence as probative of consciousness of guilt. We agree with the district court that “a jury could infer Smart attempted to persuade his girlfriend to direct her brother to tell police he lost a weapon. These statements are probative of consciousness of guilt.” Smart declined to stipulate to admission of the recordings, which would have eliminated the need for foundation explaining how they were obtained. The recordings as admitted redacted any reference to Smart being incarcerated. Smart did make a reference to Jennifer about a “new detention

hearing,” but any prejudice from that vague statement is outweighed by the probative value of the substance of the phone calls. There was no abuse of the district court’s evidentiary discretion in denying a new trial on this ground. See United States v. Cross, 888 F.3d 985, 990 (8th Cir.), cert. denied, 139 S. Ct. 351 (2018).

C. Welch and Kipnusu Prior Theft Convictions. Government witness Heidi Kipnusu was convicted in 2002 of theft in the fourth degree. Lometa Welch had prior theft convictions from 1989 and 2006. Smart argues the district court abused its discretion when it granted the government’s motion to exclude evidence of the theft convictions because they show a “life-long pattern of deceit” by the witnesses that would have aided his effort to discredit them.

Evidence of a witness’s prior conviction is admissible to attack her character for truthfulness if the crime involved “a dishonest act or false statement.” Fed. R. Evid. 609(a)(2). We do not characterize theft as “a crime involving ‘dishonesty or false statement’ within the meaning of Rule 609 (a)(2).” United States v. Yeo, 739 F.2d 385, 387 (8th Cir. 1984). Here, in ruling the convictions inadmissible, the district court relied on a lack of evidence that any of the thefts were accomplished by deception. On appeal, Smart simply argues that some courts consider theft to be a crime involving deception and therefore the evidence should have been admitted. This is hardly a showing of abuse of discretion. Moreover, if more than ten years has passed since the conviction or the witness’s release from confinement, as in this case, it is not admissible unless “its probative value . . . substantially outweighs its prejudicial effect.” Fed. R. Evid. 609 (b). Such convictions “should be admitted very rarely and only in exceptional circumstances.” United States v. Stoltz, 683 F.3d 934, 940 (8th Cir. 2012) (quotation omitted). There was no abuse of discretion in excluding the convictions and denying a new trial on this ground.

D. Brian Larson’s Testimony. Smart argues that the district court erred in admitting the testimony of Brian Larson regarding his eve-of-trial interaction with Smart in their jail cellblock because the defense “was not provided adequate time to investigate, and contest, the evidence.” The government, the district court, and Smart’s trial counsel learned from the Marshals Service that Smart had “threatened harm [to] a fellow inmate at the Polk County Jail” on June 7, 2021, just before the start of trial. The government advised it was investigating and might call a witness regarding the threats. Defense counsel objected to this eleventh hour evidence. “If they can develop the case for witness tampering, that’s a separate charge that would require discovery and due process.” Expressing “grave concern about this defendant’s attempts to undermine the administration of justice,” the court ruled it:

will allow the Government to have an offer of proof prior to the presentation of evidence in regards to any allegations of attempts to influence witnesses The defendant will have the opportunity to cross-examine at that time. The Court will make a finding as to whether or not there’s sufficient evidence to put that in front of the jury.

Subsequently, as defense counsel requested, the government shared jail surveillance footage showing an interaction between Smart and Larson shortly before Larson reported feeling unsafe, an interview with Larson, and phone calls between Larson and his wife discussing Smart’s threats. At the start of the second day of trial, defense counsel “strenuously object[ed] to bringing in this witness at this late time” with no opportunity to do discovery and “our own investigation.” Noting the government would not introduce video evidence showing the in-custody interactions, the district court ruled that testimony by Larson “in regards to attempts to intimidate a witness is relevant to an issue at trial. . . . The defendant generated this evidence by his own conduct, and the timeliness issue is, therefore, not grounds to prohibit the Government from introducing this probative evidence.” Smart did not move for a continuance. Larson testified for seven transcript pages later that day.

On appeal, Smart argues the district court erred because allowing such testimony without giving the defense time to investigate is “the definition of unfair surprise” that violates a defendant’s Fifth Amendment right to due process. Trial counsel was not prepared to cross examine Larson, whose testimony again reminded the jury that Smart was in custody prior to trial. As Smart acknowledges, evidence of threats against witnesses is generally admissible to show consciousness of guilt and as direct evidence of the crime charged, even if prejudicial. See United States v. Skarda, 845 F.3d 370, 377-78 (8th Cir. 2016); United States v. Castleman, 795 F.3d 904, 915 (8th Cir. 2015), cert. denied, 577 U.S. 1109 (2016). Smart’s due process contention is without merit because the timing issue was generated entirely by Smart’s conduct, the district court and the government made reasonable efforts to mitigate any trial prejudice, and Smart did not move for a continuance. A criminal defendant may not threaten a family member of a government witness on the eve of trial and then cry unfair surprise when the government calls that person to testify.

Smart further challenges Jury Instruction No. 6, which permitted the jury to consider whether an attempt to influence a witness shows consciousness of guilt, because Larson’s testimony was wrongly admitted. As Larson’s testimony was not wrongly admitted, the jury instruction was not an abuse of discretion.

E. The Posed Photograph. During the warrant search, the police encountered Smart and ordered him to the floor. Money fell from his pockets. He asked for the money back after he was handcuffed. An officer picked up the money, placed it on Smart’s lap, and took a photo showing him handcuffed on a couch with money strewn on his lap. At trial, a member of the search and entry team identified the photo, and it was admitted over Smart’s foundation objection. On appeal, Smart argues the district court abused its discretion in admitting a highly prejudicial photo because it does not depict a correct likeness of the scene it purported to represent. The government argues the photograph is relevant because it depicts Smart wearing the clothing shown in the police officer’s video of the search, seated “near the bedroom

where he was encountered,” and the cash found in his pockets was consistent with drug trafficking.

“In order to be admissible, a photograph must be shown to be an accurate representation of the thing depicted as it appeared at the relevant time.” Schmidt v. City of Bella Villa, 557 F.3d 564, 569 (8th Cir. 2009). In Schmidt, we held that, where a proffered photograph was taken after the incident at issue by a person with no personal knowledge of whether it was an accurate representation of what was depicted at the relevant time, there was “no abuse of discretion in the district court’s decision to strike the photograph for lack of foundation.” Id.

Here, there was no lack of foundation. The photograph was taken at the relevant time by a person with personal knowledge of what it depicted. Smart’s complaint on appeal is that the photograph’s limited probative value was outweighed by the unfair prejudice of a posed photograph. See Fed. R. Evid. 403. That objection was not made at trial, so we review for plain error. We agree the probative value of the photograph is relatively low. The police video depicted the information the government claims is relevant, and a police officer testified that Smart exited the bedroom with money falling from his pockets.

In United States v. Jefferson, 975 F.3d 700, 706 (8th Cir. 2020), cert. denied, 141 S. Ct. 2820 (2021), we held that it was not an abuse of discretion warranting a new trial to admit a photograph showing the defendant handcuffed during a warrant search. Thus, any error admitting this photograph after a showing of proper foundation, and subject to defense counsel’s cross examination, was hardly plain. Moreover, any error did not affect Smart’s substantial rights and was therefore harmless. There was substantial evidence of Smart’s guilt, and the photograph, even if posed, was not instrumental in establishing his guilt. See United States v. McPike, 512 F.3d 1052, 1055 (8th Cir. 2008).

III. Jury Instruction Issues

On appeal, Smart argues the district court abused its discretion when it rejected two jury instructions he requested. “A defendant is entitled to an instruction explaining his defense theory if the request is timely, the proffered instruction is supported by the evidence, and the instruction correctly states the law.” United States v. Gianakos, 415 F.3d 912, 920 (8th Cir.), cert. denied, 546 U.S. 1045 (2005) (citation omitted). We will affirm if “the instructions, taken as a whole, fairly and adequately submitted the issues to the jury.” United States v. Janis, 995 F.3d 647, 650 (8th Cir.), cert. denied, 142 S. Ct. 483 (2021) (quotation omitted).

A. Addict-Informer Instruction. Smart argues the district court erred in denying his request for an addict-informer instruction, the Third Circuit’s model instruction regarding the credibility of a witness who used drugs when the events took place or at the time of trial. We have not “adopted the rule that an addict-informer instruction must be given if requested.” United States v. Gladney, 474 F.3d 1027, 1032 (8th Cir. 2007). Rather, we leave this issue to the district court’s discretion, depending on the circumstances of each case. “The presence of any of the following factors may make an addict-informer instruction unnecessary: (1) a dispute as to whether the informant is actually an addict, (2) cross-examination concerning the informant’s addiction, (3) an instruction alerting the jury to view the informant’s testimony with care, and (4) corroboration of the informant’s testimony.” Id.

Here, Smart’s trial counsel cross-examined Loggins, Kipnusu, and Welch regarding their drug use during the dates in question. Their testimony was reinforced by the government’s other evidence. And the district court modified our model credibility instructions to include, “In deciding what testimony to believe, consider . . . the extent to which drug use or other conditions affected the ability of the witnesses to perceive the events testified about.” As in Gladney, we conclude the

district court did not abuse its discretion in refusing to give a standalone addict-informer instruction.

B. Mere Presence Instruction. Smart argues the district court erred when it refused to give a “mere presence” instruction. This instruction is unnecessary when the instructions taken as a whole adequately convey that more than mere presence is required to convict, making the requested instruction “largely duplicative.” Drew, 9 F.4th at 725; see United States v. Franklin, 960 F.3d 1070, 1072 (8th Cir. 2020). Here, the instructions required the government to prove that “the defendant knowingly possessed a firearm,” that possession could be either actual or constructive, and defined constructive possession as having “both the power and the intention at a given time to exercise dominion or control over a thing.” The instructions thus required the jury to find that Smart *knew* he was in possession of a firearm, not that he was merely in the presence of it. As the instructions as a whole required the government to prove more than mere proximity to the gun, the district court did not abuse its discretion in refusing to give the requested instruction.

IV. The Brady Issues

Smart argues the district court erred in denying his motion for a new trial because the government twice suppressed materially favorable evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). To establish a claim under Brady, Smart must establish that the government (1) suppressed evidence; (2) that was favorable to him; and (3) material to the outcome of the trial. See United States v. Garrett, 898 F.3d 811, 816 (8th Cir. 2018), cert. denied, 139 S. Ct. 1226 (2019). We review this issue for abuse of discretion. See United States v. Delgrosso, 852 F.3d 821, 827 (8th Cir. 2017). The district court found the government’s failure to disclose this evidence “unacceptable” but nonetheless denied a new trial.

A. Pole Camera Video Footage. Welch testified she went to 1121 Clark Street shortly before the search warrant was executed to purchase crack cocaine from Smart, but he was asleep in the same back bedroom identified as the bedroom from which Smart exited during the police raid. She testified that when she looked into the bedroom he was sleeping in, the lights were off but she had “a glimpse of the firearm.” “[I]t was in his reach, within his vicinity.” She also testified she was handed drugs “from Lisa Harper.” Harper was not at 1121 Clark Street during the execution of the search warrant. She was interviewed later but was not called as a witness by either side.

In the motion for new trial, Smart stated that the government did not disclose until after the trial, video footage from the Clark Street residence’s pole camera on the morning of the warrant search. In a pretrial interview with police officers made available to the defense, Welch had stated she was at the residence “maybe a half-hour” before the police executed the search warrant. She came in a burgundy Ford Focus and had “another girl with her” who also purchased drugs. At trial, defense counsel did not question Welch about the timing of when she went to the house, whom she went to the house with, or whether Harper was present. Smart argued the undisclosed pole camera footage does not depict a burgundy car, does not depict a second person entering the residence with Welch, and does not depict Harper leaving the residence after Welch left. Thus, this evidence “contradicts the heart of the government’s case” because Welch was “the only witness who put the gun in Smart’s vicinity and control on the date it was seized.” Not being able to use this evidence to impeach Welch’s trial testimony was a miscarriage of justice.

The district court concluded a new trial was not warranted because the pole camera video footage was neither material nor exculpatory. It did not provide evidence Smart did not have before trial -- Smart knew prior to trial Welch visited the residence with a friend and that Harper was not there when the search warrant was executed -- and it did not demonstrate the information Smart had before trial was

false or deficient. Because it is unclear what the “grey” and “grainy” full footage shows, “its omission does not undermine Welch’s statements [or] the Court’s confidence Smart received a fair trial.”

For evidence to be material, there must be a “reasonable probability that, had it been disclosed, the result of the proceeding would have been different.” United States v. Robinson, 809 F.3d 991, 996 (8th Cir. 2016) (quotation omitted). A Brady violation is established by showing the undisclosed “evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Kyles v. Whitley, 514 U.S. 419, 435 (1995). In determining whether impeachment evidence is material, “the impeachment evidence must be viewed in context, alongside the witness’s testimony, in light of any other impeachment evidence, and in light of corroborating evidence that bears on the witness’s credibility.” Pederson v. Fabian, 491 F.3d 816, 826 (8th Cir. 2007).

Here, Welch was cross-examined regarding her drug use, memory, and motives, so the jury was “sufficiently apprised of the potential taint on the witness’s credibility.” Clay v. Bowersox, 367 F.3d 993, 1000 (8th Cir. 2004) (citation omitted). Nor was the government’s case dependent on Welch’s testimony. Loggins and Kipnusu testified that they saw Smart put the same firearm on a kitchen counter while he cooked crack cocaine. Welch’s testimony was unquestionably important, and the pole camera footage would have provided an additional basis to question her recollection. But her testimony that she saw Smart asleep in the bedroom with the gun within reach was not discredited by the pole camera footage, and that testimony was corroborated by other, even more damaging evidence. The district court did not abuse its discretion in denying Smart’s motion for a new trial based on the post-trial disclosure of the full footage.

B. Cory Turner Interview. Cory Turner was an associate of Smart who had been interviewed by the prosecution in February 2021 as a potential trial witness. A report of those interviews was disclosed to the defense. A few days before trial began the prosecution again interviewed Turner “in preparation for potential testimony against” Smart. In this interview, Turner told the prosecution that Smart does not know how to cook crack cocaine, he had never seen Smart with a firearm, and Turner would be surprised if Smart had a firearm because he was “not into anything,” “plus he’s old.” Turner did not testify at trial. The government did not produce the report of this last interview until Smart filed his motion for a new trial in September.

Smart argued the failure to turn over this report prior to trial was a Brady violation. The district court criticized the non-disclosure but ruled that the failure to disclose did not violate Brady and denied a new trial:

Turner’s June 2021 statements did not provide the defense with information it did not already have. In Turner’s February 2021 statements -- disclosed to Smart in April 2021 -- Turner shared the same information. Failure to disclose Turner’s June 2021 statements could not reasonably be understood to put the whole case in a different light so as to undermine the Court’s confidence in the verdicts.

On appeal, Smart argues that the statements in the February interview were “not as exculpatory as the new statement.” Though they may have been less inculpatory, they were not truly exculpatory -- they did not put the whole case in a different light so as to undermine the verdict. Moreover, in Smart’s motion for a new trial -- filed prior to disclosure of the June interview report -- he argued that trial counsel was ineffective in not calling Turner as a witness because Turner would have testified he “never saw . . . [Smart] with a gun” and Smart “did not know how to cook crack cocaine.” This confirms that the defense already knew the information contained in the undisclosed June interview report. There was no abuse of discretion in declining to find a Brady violation that warranted a new trial.

V. Ineffective Assistance of Counsel

Smart argues the district court erred in denying his motion for a new trial because trial counsel's assistance was ineffective in many respects, some of which are "readily apparent on the available record" -- failure to file a motion to suppress the DNA test results; failure to call Jennifer Dibble at trial after she testified before the grand jury; failure to call Cody Turner; and failure to cross examine Welch and Kipnusu about their inconsistent statements.

We review claims of ineffective assistance of counsel on direct appeal only in "exceptional cases," as they typically can only be properly reviewed in post-conviction proceedings. United States v. Sanchez-Gonzalez, 643 F.3d 626, 628 (8th Cir. 2011), citing United States v. Hernandez, 281 F.3d 746, 749 (8th Cir. 2002). "An 'exceptional case' that justifies our review of the claim on direct appeal exists if the relevant factual record has been fully developed, a failure to consider the claim on direct appeal would constitute a 'plain miscarriage of justice,' or the alleged error of trial counsel is 'readily apparent.'" Sanchez-Gonzalez, 643 F.3d at 628-29 (citation omitted). We have no difficulty concluding this is not an exceptional case. The above-cited allegations of trial counsel errors are anything but "readily apparent" instances of ineffective assistance of counsel. Those issues will require a fully developed record in which trial counsel has an opportunity to explain his decisions in terms of trial tactics and strategy, and important issues of prejudice can be fully explored. We decline to address these issues on direct appeal.

VI. Armed Career Criminal Enhancement Issues

At sentencing, the district court determined that Smart has four prior qualifying felony convictions under the Armed Career Criminal Act ("ACCA") -- three Iowa convictions for possession with intent to deliver a controlled substance, and a Georgia aggravated assault conviction. This resulted in a 15-year mandatory

minimum sentence. See 18 U.S.C. § 924(e). On appeal, Smart argues that two Iowa drug convictions for violating Iowa Code § 204.401 in 1991 and 1994 and the Georgia assault conviction are not ACCA predicate felony convictions. We review this issue *de novo*. See Bragg, 44 F.4th at 1075.

A. The Two Iowa Convictions. The district court determined that the two Iowa controlled substance offenses are qualifying ACCA predicate offenses based on prior Eighth Circuit decisions the court considered controlling and McNeill v. United States, 563 U.S. 816, 820, 823 (2011). On August 10, 2022, after appellate briefing was completed, a panel of this court filed its decision in United States v. Perez, 46 F.4th 691 (8th Cir. 2022). The panel first held that “the federal law in effect at the time of the federal sentencing is the relevant definition for ACCA purposes,” an issue on which other courts differ. Id. at 699. Therefore, the panel concluded, the defendant’s three prior convictions for violating Iowa Code § 124.401(1)(c)(2) were *not* ACCA predicates because the definition of cocaine under Iowa law in 2013, Iowa Code § 124.206(2)(d), was broader than the definition of cocaine in the federal drug schedules under the Controlled Substances Act at the time of Perez’s federal conviction. See id. at 698-99; 21 U.S.C. § 812(c) Schedule II(a)(4); 21 C.F.R. § 1308.12(b)(4) (2018).

At oral argument, without conceding the merits of these issues, government counsel conceded that Perez would require a different outcome and therefore we should remand for further proceedings on whether Smart was properly sentenced under the ACCA. We agree that is the proper course of action. As the district court may decide that the Iowa convictions are no longer proper ACCA predicate offenses, an issue we do not decide, that would moot the question whether the Georgia conviction is a qualifying ACCA predicate, absent a second appeal.

VII. Supervised Release Revocation

Finally, Smart argues the district court abused its discretion in revoking his supervised release based on this conviction because he was “improperly convicted.” See United States v. Montgomery, 532 F.3d 811, 814 (8th Cir. 2008) (standard of review). As we have upheld this conviction, there was no abuse of discretion.

VIII. Conclusion

For the foregoing reasons, we vacate Smart’s sentence and remand to the district court for further sentencing proceedings not inconsistent with this opinion. In all other respects, the judgment of the district court is affirmed.

21a
**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-1131

United States of America

Appellee

v.

Kenny Eugene Smart

Appellant

No: 22-1129

United States of America

Appellee

v.

Kenny Eugene Smart, also known as Solo

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:03-cr-00295-RGE-1)
(4:20-cr-00219-RGE-1)

ORDER

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

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

March 29, 2023

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

KENNY EUGENE SMART,
a/k/a "Solo"

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:20-CR-00219-001

USM Number: 06996-030

Angela Lynnette Campbell
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☒ was found guilty on count(s) One and Two of the Superseding Indictment filed on January 21, 2021.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Format m/d/yyyy	
		Offense Ended	Count
18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(e)(1)	Felon in Possession of a Firearm	11/18/2020	One
18 U.S.C. § 924(c)(1)(A)(i)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	11/18/2020	Two

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

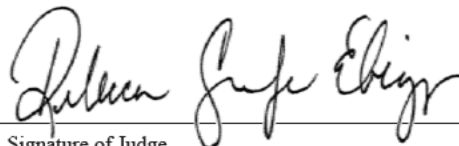
☐ The defendant has been found not guilty on count(s)

☐ 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.

January 13, 2022

Date of Imposition of Judgment



Signature of Judge

Rebecca Goodgame Ebinger, U.S. District Judge

Name of Judge

Title of Judge

January 13, 2022

Date

DEFENDANT: KENNY EUGENE SMART, a/k/a "Solo"
CASE NUMBER: 4:20-CR-00219-001

IMPRISONMENT

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

360 months, consisting of 180 months as to Count One and 180 months as to Count Two of the Superseding Indictment filed on January 21, 2021, to be served consecutively to each other, and consecutively to the sentence imposed for the revocation in Docket Number 4:03-CR-00295-001.

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

The defendant be placed as close to Iowa as possible.

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

☐ The defendant is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

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

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

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

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: KENNY EUGENE SMART, a/k/a "Solo"
CASE NUMBER: 4:20-CR-00219-001

Judgment Page: 3 of 8

SUPERVISED RELEASE

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

Five years as to each of Counts One and Two of the Indictment filed on January 21, 2021, to be served concurrently.

MANDATORY CONDITIONS

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

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

DEFENDANT: KENNY EUGENE SMART, a/k/a "Solo"
CASE NUMBER: 4:20-CR-00219-001

Judgment Page: 4 of 8

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: KENNY EUGENE SMART, a/k/a "Solo"
CASE NUMBER: 4:20-CR-00219-001

Judgment Page: 5 of 8

SPECIAL CONDITIONS OF SUPERVISION

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

You must submit to a mental health evaluation. If treatment is recommended, you must participate in an approved treatment program and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment and/or compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You must participate in a cognitive behavioral treatment program, which may include journaling and other curriculum requirements, as directed by the U.S. Probation Officer.

You must participate in an approved treatment program for anger control. Participation may include inpatient/outpatient treatment. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You shall not knowingly associate or communicate with any member of the Crips and Satanas criminal street gangs, or any other criminal street gang.

You must comply with all sex offender laws for the state in which you reside and must register with the local sheriff's office within the applicable time frame.

You must participate and follow the rules of a sex offense-specific treatment program, as directed by the U.S. Probation Officer. Participation may include inpatient/outpatient treatment and/or compliance with a medication regimen. You must contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment. Sex offense-specific treatment shall be conducted by therapists approved by the U.S. Probation Office, who shall release all reports to the U.S. Probation Office.

You must submit to periodic polygraph testing, as directed by the U.S. Probation Office, to ensure that you are in compliance with the requirements of your supervision or treatment program. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment. Polygraph testing will be conducted by polygraph examiners approved by the U.S. Probation Office, who will release all reports to the U.S. Probation Office. The results of polygraph examinations will not be used for the purpose of revocation of supervised release or probation. As used in this paragraph, "the results" that will not be used in a revocation hearing are the polygraph examiner's ultimate opinions or findings regarding whether deception or a significant response has been detected during the examination. Any statements made by you during the polygraph examination during pre-examination or post-examination interview(s) may be used in any manner, including to generate separate leads or investigations, at a revocation hearing. Failure to answer questions during the polygraph examination may be grounds for revocation, unless you choose not to answer any questions perceived or deemed incriminating, which may then be referred to the Court for resolution.

You must provide the U.S. Probation Officer with truthful and complete information and inventory regarding all computers (as defined in 18 U.S.C. § 1030(e)(1)), internet capable devices, cellular telephones, and other electronic communications, computer hardware, software, electronic services, internet accounts/identifiers, and data storage media to which you have access.

You must not associate with any prostitute or anyone you should reasonably know to be a prostitute or places where prostitution is a known activity.

DEFENDANT: KENNY EUGENE SMART, a/k/a "Solo"
CASE NUMBER: 4:20-CR-00219-001

Judgment Page: 6 of 8

ADDITIONAL SPECIAL CONDITIONS OF SUPERVISION

You must not contact the victims, L.W. and A.P., nor the victim's families without prior permission from the U.S. Probation Officer.

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

DEFENDANT: KENNY EUGENE SMART, a/k/a "Solo"
 CASE NUMBER: 4:20-CR-00219-001

Judgment Page: 7 of 8

CRIMINAL MONETARY PENALTIES

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

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 200.00	\$0.00	\$ 0.00	\$ 0.00	\$ 0.00

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

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

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

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

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*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: KENNY EUGENE SMART, a/k/a "Solo"
CASE NUMBER: 4:20-CR-00219-001

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 200.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.

While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

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

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

☐ Joint and Several

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:

A loaded Ruger, Model P95DC, 9mm caliber pistol (SN: 311-37454), as described in the Preliminary Order of Forfeiture entered on September 2, 2021.

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

UNITED STATES DISTRICT COURT

Southern District of Iowa

UNITED STATES OF AMERICA

v.

KENNY EUGENE SMART

Amended Judgment in a Criminal Case

(For Revocation of Probation or Supervised Release)

Case No. 4:03-cr-00295

USM No. 06996-030

Angela L. Campbell

Defendant's Attorney

Date of Original Judgment/Last Amended Judgment: January 13, 2022

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☒ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ admitted guilt to violation of condition(s) _____ of the term of supervision.
- ☒ was found in violation of condition(s) count(s) 1 & 2 _____ after denial of guilt.

The defendant is adjudicated guilty of these violations:

<u>Violation Number</u>	<u>Nature of Violation</u>	<u>Violation Ended</u>
1.	New Law Violation - Felon in Possession of a Firearm	11/19/2020
2.	New Law Violation - Possession of a Firearm in Furthance of a Drug Trafficking Crime	11/19/2020

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

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.

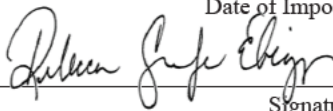
Last Four Digits of Defendant's Soc. Sec. No.: 9582

01/24/2022

Defendant's Year of Birth: 1973

Date of Imposition of Judgment

City and State of Defendant's Residence:
Des Moines, Iowa



Signature of Judge

Rebecca Goodgame Ebinger U.S. District Judge

Name and Title of Judge

01/24/2022

Date

DEFENDANT: KENNY EUGENE SMART
CASE NUMBER: 4:03-cr-00295

IMPRISONMENT

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

54 months, to be served consecutively to both counts in Southern District of Iowa case number 4:20-cr-00219*

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

As close to Iowa as possible

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

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

☐ at _____ ☐ a m. ☐ p m. on _____

☐ as notified by the United States Marshal.

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

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KENNY EUGENE SMART
CASE NUMBER: 4:03-cr-00295

Judgment Page: 3 of 3

SUPERVISED RELEASE

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

No supervised release to follow