APPENDIX

***Michael O'Bannon v. United States*, No. 23-A248**

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United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael O'BANNON, Defendant-Appellant.

No. 20-2498

June 21, 2023

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:18-cr-00116-JRS-MJD-3, James R. Sweeney, II, Judge.

ORDER

On consideration of defendant Michael O'Bannon's petition for rehearing or rehearing en banc, filed June 5, 2023, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for rehearing.*

Accordingly, the petition for rehearing or rehearing en banc filed by defendant Michael O'Bannon is DENIED.

* Circuit Judge Doris L. Pryor did not participate in the consideration of this petition for rehearing en banc.

United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Thomas JONES, et al., Defendant-Appellants.

Nos. 20-1405, 20-1442, 20-2112, 20-2304, 20-2420, 20-2458, 20-2462, 20-2498, 20-2499, 20-3266, & 21-1002

Argued April 20, 2022

Decided December 22, 2022

Before Wood, Hamilton, and Kirsch, Circuit Judges.

Opinion

Hamilton, Circuit Judge.

Fourteen people were charged and convicted for a conspiracy to transport illegal drugs from Georgia for distribution in Kokomo, Indiana. In these consolidated appeals, ten defendants challenge their convictions and/or sentences on a host of issues: Pierre Riley, Reggie Balentine, Michael O'Bannon, Michael Jones, Jason Reed, Shaun Myers, Perry Jones, Thomas Jones, Derrick Owens, and Antwon Abbott. We affirm all challenged convictions, and we affirm the sentences of all but one defendant. We vacate the sentence of Thomas Jones and remand his case for

resentencing. We begin with an outline of the drug conspiracy and the procedural history of this case, adding more details later as needed for specific issues.

I. Factual and Procedural Background

A. The Drug Distribution Conspiracy

In 2016, the Kokomo, Indiana, Drug Task Force was investigating Reggie Balentine, Michael O'Bannon, Michael Jones, and others for illegal drug activity. The investigation expanded when agents from the federal Drug Enforcement Administration joined in late 2017.

The evidence at trial showed that, from mid-2016 to May 2018, the targeted defendants and others obtained and distributed substantial quantities of methamphetamine, cocaine, and heroin. Reggie Balentine, who lived in Kokomo, pooled money from co-conspirators in Indiana to buy the drugs from Pierre Riley, their source in Georgia. For most shipments, Balentine and Riley arranged to have couriers drive or travel by bus from Indiana to Georgia with cash to buy drugs and transport them back to Kokomo. Riley or his associates would meet the couriers, who would exchange the money for drugs and quickly return to Indiana. When the drugs arrived in Kokomo, Balentine stored them in the homes of his associates and other locations until the drugs could be sold. Balentine then distributed the drugs to Michael O'Bannon, Michael Jones, Shaun Myers, Jason Reed, Derrick Owens, Perry Jones, and Antwon Abbott.

In April 2018, investigators began closing in on the operation. On April 25, 2018, officers intercepted a courier on her way to Indiana. They seized the methamphetamine and cocaine she was transporting, but they did not arrest her at the time. The drugs seized were only the first of two shipments from one transaction arranged by Balentine. Because of the police attention on the first courier, Myers volunteered his girlfriend to drive to Georgia to pick up the second shipment. Balentine and Riley agreed. Aware of the conspirators' attempt to retrieve the second shipment, officers stopped Myers' girlfriend after she completed the exchange with Riley on April 26, 2018. They seized the rest of the drugs.

To protect the drug trafficking operation, Riley and Balentine plotted to kill a person they suspected was a confidential informant. They later sought help from O'Bannon, whose home the suspected informant had allegedly robbed. Riley and Balentine put up money for the murder and helped O'Bannon pay his share. O'Bannon was responsible for hiring out-of-state hitmen, and he met them when they arrived in Kokomo. Officers foiled the plot by stopping O'Bannon as he drove with the hitmen to the target's home. Officers later found several firearms in the hitmen's hotel room.

On April 26, 2018, the DEA special agent in charge of the investigation applied for a warrant to search the residences of several conspirators, including Balentine, Abbott, and O'Bannon. The searches turned up guns and drugs.

B. Pretrial Proceedings

A federal indictment charged fourteen people with conspiracy to distribute controlled substances and individual counts related to drugs, firearms, murder for hire, and money laundering. Nine defendants pleaded guilty. Michael Jones, Myers, Reed, and O'Bannon were tried together before a jury and convicted on most charges. Abbott's charges were severed, and he was convicted in a separate bench trial. The district court then sentenced the defendants to lengthy terms in prison.

Ten defendants have appealed, challenging decisions on pretrial motions to suppress, jury selection, admission of trial evidence, the sufficiency of evidence, and sentencing. We have sorted the challenges into five major groups that follow the sequence of the prosecution. Part II of this opinion addresses the pretrial motions to suppress. Part III addresses a Batson challenge to the government's use of peremptory strikes in jury selection. Part IV addresses a challenge to so-called dual-role witness testimony at trial and an instruction the court gave during that testimony. Part V explains why the evidence was sufficient to support all convictions at trial. Finally, Part VI addresses multiple sentencing issues.

II. Pretrial Motions to Suppress

We begin by reviewing the district court's denial of two motions to suppress. The first sought to suppress evidence obtained through use of court-approved wiretaps. In the second, Abbott sought to suppress evidence seized in a search of his residence.

A. Motion to Suppress the Wiretap Evidence

The four defendants in the jury trial, Michael Jones, Reed, Myers, and O'Bannon, argue that the district court erred by denying a motion to suppress evidence obtained from use of a wiretap, supposedly in violation of 18 U.S.C. § 2518. Before the government can use a wiretap to gather evidence of a crime, it must apply for court authorization. 18 U.S.C. § 2516; United States v. Mandell, 833 F.3d 816, 820 (7th Cir. 2016).

Section 2518 governs the standards and procedures for approving a wiretap. The government's application must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." § 2518(1)(c). To grant the application, the court must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." § 2518(3)(c). Evidence obtained from a wiretap that fails to comply with federal law is inadmissible. Mandell, 833 F.3d at 820, citing § 2515.[1]

[1] Defendants also assert that the intercepted conversations and text messages were obtained in violation of their Fourth Amendment rights, but, given the more demanding requirements of 18 U.S.C. § 2518, that argument adds nothing to their statutory arguments. See United States v. Giordano, 416 U.S. 505, 526–27, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (grounds for suppression in Wiretap Act included, but were not limited to, constitutional violations and likely included a wiretap application that failed to establish probable cause).

In February 2018, investigators sought court approval to intercept wire and electronic communications from Balentine's phones. Attached to the application was an affidavit from the lead case agent. The district court authorized the initial wiretap on February 22, 2018. After that authority expired, investigators sought approval for another wiretap in April 2018, which the court also granted.

Several defendants moved to suppress evidence obtained from the wiretaps. The district court denied the motions, finding that the government's affidavits demonstrated what is sometimes described as the "necessity" for each wiretap. On appeal, defendants challenge the court's conclusion that the "necessity" requirement was satisfied.

To be clear, the wiretap statute does not require literal "necessity." The statute "was not intended to ensure that wiretaps are used only as a last resort in an investigation, but rather that they are not to be routinely employed as the initial step in a criminal investigation." Mandell, 833 F.3d at 821, quoting United States v. McLee, 436 F.3d 751, 762–63 (7th Cir. 2006). The government's burden of establishing that normal methods have not worked or are unlikely to work or would be too dangerous "is not great," and we consider its supporting evidence "in a practical and common-sense fashion." Id., quoting McLee, 436 F.3d at 763.

We review for an abuse of discretion the issuing judge's conclusion that the statute has been satisfied. McLee, 436 F.3d at 763, citing United States v.

Zambrana, 841 F.2d 1320, 1329 (7th Cir. 1988). Defendants contend that the supporting affidavits for both the February and April wiretap applications failed to justify use of wiretaps.

1. The February Wiretap Application

Defendants argue that the February application contained largely conclusory statements with insufficient factual support and thus failed to establish that normal investigatory tools were insufficient. They assert that those traditional methods were in fact fruitful and permitted investigators to begin identifying Balentine's associates as well as some of the locations where he was storing the controlled substances. We have cautioned, however, that the success of traditional techniques does not prevent investigators from otherwise establishing sufficient grounds for a wiretap. See, e.g., United States v. Campos, 541 F.3d 735, 748 (7th Cir. 2008) (rejecting argument that wiretap was not necessary because normal investigative techniques were "working and working well").

The investigators here had made progress with normal investigative techniques, but the February wiretap application and supporting affidavit established sufficient grounds to use a wiretap. For example, the affidavit explained that physical surveillance of Balentine's home indicated that he conducted drug trafficking from his home. But without electronic surveillance, investigators did not know whether Balentine stored the drugs at his home or whether they were stored elsewhere and brought to

Balentine's home for specific transactions. Investigators observed people dropping off packages at Balentine's home at times that coincided with a confidential informant's requests for drugs, which led to their suspicion that Balentine may not have kept the drugs in his home.

The investigators had also used mobile tracking devices, but they were not as helpful because Balentine stayed at his home most of the time and apparently coordinated the drug distribution network through his phone. A stationary pole camera outside of his home was helpful but did not show whether visits were related to drugs.

According to the affidavit, investigators considered other techniques, such as using an undercover agent and applying for a search warrant, but these strategies were deemed to be either unsafe or ineffective. The application further explained that a wiretap was needed to help investigators determine the identities and roles of various accomplices to the conspiracy, the nature and methods of the drug trafficking business, and where the drugs were stored.

The issuing judge did not abuse her discretion in finding that the February affidavit was sufficient to justify use of the wiretap. See, e.g., Campos, 541 F.3d at 747 (§ 2518 was satisfied where search warrant was not feasible because officers did not know where drugs were stored, continuation of physical surveillance would alert suspects to investigation, and use of confidential informant was dangerous); McLee, 436 F.3d at 763 (affirming wiretap authorization where officers had been unable to identify primary supplier

or roles of conspirators in overall scheme using normal investigatory techniques).

2. The April Wiretap Application

In April, investigators sought authorization for a second wiretap to permit them to continue intercepting communications from one of the phones subject to the February wiretap and to begin intercepting communications on two more phones used by Balentine and Michael Jones. Defendants argue that the April affidavit failed to demonstrate why, after the first wiretap expired, normal investigative procedures were insufficient to further the investigation.

The April application showed that, after investigators obtained authorization for the February wiretap, they continued to use traditional investigative techniques. The supporting affidavit explained that investigators had been using a confidential informant and that, while the informant had proved helpful, it had become too dangerous for him to continue assisting investigators. Despite these risks, investigators attempted to find a new confidential informant. They recruited a potential informant, but that person had only secondary contact with the conspiracy and thus could not be as helpful.

The affidavit also said that officers had arrested Owens' father and the hitmen in the murder-for-hire plot, but that those individuals had provided no useful information and "did not further the investigation in any substantial way."

Finally, the April affidavit described the same inadequacies of traditional techniques that justified the February wiretap. For example, the April affidavit explained that the investigators were still using physical surveillance and that the wiretap let them confirm that some of the visitors were coming to Balentine's house for drug-related reasons. Yet investigators were still not able to confirm the true nature of many visits. The investigators had also obtained approval to place GPS trackers on the phones of some known members of the conspiracy, including Riley and Everhart. The tracking allowed them to identify and then to search Everhart's residence for drugs. But knowing the location of the conspirators, without knowing what they were doing or why, limited the value of the GPS tracking. The April affidavit thus showed that investigators continued to use traditional investigative techniques but that the techniques were either unsafe or limited in their usefulness. The April affidavit also provided sufficient grounds for the district court to find that the requirements of § 2518 were satisfied. We affirm the district court's denial of the motion to suppress evidence obtained from the use of the wiretaps to intercept communications between the defendants.

B. Abbott's Motion to Suppress

On April 26, 2018, the lead DEA agent applied for warrants to search the residences of several members of the drug conspiracy. The application included a reference to a North Philips Street address that was designated as the residence of Antwon Abbott. Officers searched that residence and seized methamphetamine.

Abbott moved to suppress evidence seized in the search on the ground that the warrant was not supported by probable cause. He also moved for an evidentiary hearing to resolve a dispute about whether the home searched was his residence at relevant times. The district court denied both motions, finding that the search warrant affidavit established probable cause and that an evidentiary hearing was not required because there was no dispute of material fact that would affect the outcome of his motion.

1. Motion to Suppress

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures, and searches based on warrants require probable cause. To establish probable cause, a search warrant affidavit must set forth facts "sufficient to induce a reasonably prudent person to believe that a search thereof will uncover evidence of a crime." United States v. Johnson, 867 F.3d 737, 741 (7th Cir. 2017), quoting United States v. Gregory, 795 F.3d 735, 741 (7th Cir. 2015). We give "great deference" to an issuing judge's probable cause determination. Id., quoting United States v. Robinson, 724 F.3d 878, 884 (7th Cir. 2013). We review de novo a district court's legal conclusions in denying a motion to suppress, and we review its factual findings for clear error. Id.

Abbott challenges the district court's probable cause determination on two grounds. First, he argues that the affidavit failed to establish that the North Philips Street address was his residence. Second, he

argues that the information in the affidavit indicating that there may be drugs on the premises was stale and otherwise insufficient.

The agent's affidavit offered sufficient facts to infer that the North Philips Street address was in fact Abbott's residence. The affidavit noted that on March 11, 2018, Abbott told Balentine to deliver drugs he had purchased to "my crib." The affidavit explained that "my crib" was a reference to Abbott's residence on North Philips Street. Then, on April 8, 2018, Abbott gave Balentine the North Philips Street address after Balentine asked where Abbott was and said that he was in the area and could stop by.

Officers had also conducted surveillance of the North Philips Street address for weeks, observing Abbott there on April 11, 2018. In the week before the warrant application was submitted, officers also saw Abbott's car in the driveway. Together, these facts were sufficient for the district court to find that the North Philips Street address was probably Abbott's residence at the time of the search.

Abbott also argues that the affidavit did not show probable cause to believe contraband would be found at his home on the day of the search because the evidence in the affidavit, especially the reference to the March 11 drug transaction, was stale. When making a probable cause determination, a court must consider the age of the information in the warrant affidavit. United States v. Seiver, 692 F.3d 774, 777 (7th Cir. 2012) (" 'Staleness' is highly relevant to the legality of a search for a perishable or consumable object, like cocaine...."). But the age of the information

alone does not require a court to deny a warrant if "other factors indicate that the information is reliable and that the object of the search will still be on the premises." Edmond v. United States, 899 F.3d 446, 454 (7th Cir. 2018), quoting United States v. Lamon, 930 F.2d 1183, 1188 (7th Cir. 1991).

For example, when the affidavit describes "ongoing, continuous criminal activity, the passage of time becomes less critical." Edmond, 899 F.3d at 454, quoting Lamon, 930 F.2d at 1188. We have such ongoing activity here. The affidavit referred to intercepted communications between Abbott and Balentine on April 10, April 11, and April 16 in which Abbott ordered drugs. That last communication occurred just ten days before the warrant application.

In addition, courts making probable cause determinations may rely on an officer's experience with drug trafficking operations and her resulting belief that indicia of drug trafficking will likely be found at a suspect's home. E.g., United States v. Zamudio, 909 F.3d 172, 176–77 (7th Cir. 2018) (affirming probable cause finding based in part on officer's sworn statements that drug traffickers typically store drug paraphernalia, drug money, and records of their dealings at their homes). In the affidavit here, the lead agent said that in previous drug investigations, he had found evidence of drug trafficking and other contraband when conducting residential searches. The agent's experience provided additional support for the probable cause determination. The district court did not err in denying the motion to suppress evidence obtained from officers' execution of the search warrant.

2. No Evidentiary Hearing

Abbott also argues that the district court should at least have held an evidentiary hearing to decide whether and when he actually lived at the North Philips Street address. A defendant bears the burden of showing the need for an evidentiary hearing on a motion to suppress. A hearing is required only "when a substantial claim is presented and there are disputed issues of material fact that will affect the outcome of the motion." United States v. Curlin, 638 F.3d 562, 564 (7th Cir. 2011).

Abbott has not offered reason to think that the district court was misled by information in the agent's affidavit, nor has he offered a genuine dispute about where he lived and when. At oral argument, he claimed that certain details related to the March 11 transaction with Balentine were left out of the affidavit. But the affidavit established probable cause for the search even without reference to the March 11 transaction. The district court did not abuse its discretion by denying Abbott's motion without an evidentiary hearing.

III. The Batson Challenge

Moving to the trial itself, defendants O'Bannon, Michael Jones, Reed, and Myers argue that the district court erred by denying a Batson challenge to the government's use of peremptory strikes to exclude two African American jurors.

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that the Constitution forbids the government from exercising a peremptory strike against a juror solely on account of the juror's race. The analysis for such claims of purposeful discrimination involves three steps. First, the defendant "must make a prima facie case that the peremptory strike was racially motivated." United States v. Lovies, 16 F.4th 493, 499 (7th Cir. 2021). The burden at step one is "low" and requires "only circumstances raising a suspicion that discrimination occurred." Id., quoting United States v. Cruse, 805 F.3d 795, 807 (7th Cir. 2015). Second, the prosecution must then provide a non-discriminatory explanation for its decision to strike the juror. The persuasiveness of that justification is not relevant at step two. Id. at 500. Third, the trial court must determine "whether the opponent of the strike has carried his burden of proving purposeful discrimination." Id., quoting Cruse, 805 F.3d at 807. The key question is "whether a strike was racially motivated," and courts must assess "the honesty—not the accuracy—of a proffered race-neutral explanation." Id., quoting Cruse, 805 F.3d at 808 (emphasis in original).

We review a district court's Batson findings for clear error and give deference to its credibility determinations. Lovies, 16 F.4th at 500. We will affirm the district court's findings "unless 'we arrive at a definite and firm conviction that a mistake has been made.' " Id., quoting Cruse, 805 F.3d at 806.

Defendants target step three of the Batson analysis, so we focus our review there. They argue

that the district court made two distinct errors: (1) at step three, the court did not consider the rate at which the government struck African Americans, and (2) the government's explanations for the strikes were obviously pretextual.

A. Consideration of Statistical Evidence

First, defendants assert that the district court was required to consider the government's "strike rates" at step three of the Batson analysis and that its failure to do so was reversible error. Here, after 29 prospective jurors were excused for hardship or other cause, 42 jurors remained. Of those remaining, seven were African American. The government used three of its six peremptory strikes on the remaining African Americans. This resulted in the exclusion of 43% of eligible African American venire members compared to just 13% of white venire members.

Defendants recognize that "more than 'bare statistics' is required to prove purposeful discrimination." Mahaffey v. Ramos, 588 F.3d 1142, 1146 (7th Cir. 2009), quoting Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). They insist, however, that the court must at least consider such statistical evidence, which they assert here "overwhelmingly indicate[d]" discriminatory intent. They rely on our decision in Harris v. Hardy, 680 F.3d 942 (7th Cir. 2012), and in particular our statement that the "State's disproportionate use of its peremptory challenges to exclude African Americans must be taken into account" and "given appropriate weight." Id. at 951, 953 (emphasis added).

We do not read Harris, though, to go so far as to mandate as a matter of law the reversal of a district court's Batson determination solely because it did not address statistical evidence of discriminatory intent at step three. In Harris, the state used at least 75% of its preemptory strikes to remove at least 70% of the prospective jurors who were African American. 680 F.3d at 951. The problem was that the state courts did not even consider that pattern of strikes in assessing the credibility of the prosecutor's explanations at step three. Id. The courts in Harris instead reviewed each strike in isolation, ignoring the pattern of strikes against African Americans, which gave rise to an inference of discriminatory intent. Id. at 951–52. It was not just the failure to give weight to the pattern of strikes alone, however, that led us to grant habeas relief under Batson. We said that the implausibility of the state's proffered reasons for the strikes was "[e]ven more compelling." Id. at 953.

It is important for courts to consider all "circumstantial and direct evidence of intent as may be available," including a pattern of peremptory strikes, that may support an inference of discriminatory intent. Harris, 680 F.3d at 952, quoting Batson, 476 U.S. at 93, 106 S.Ct. 1712. We have not deferred to a district court's Batson findings of fact when it "incorrectly recount[ed] much of the record and fail[ed] to note material portions." United States v. Stephens, 514 F.3d 703, 713 (7th Cir. 2008) (reversing grant of new trial under Batson; district court's "central error was its failure to take into account the government's non-discriminatory explanations for its peremptory challenges," leading it

to ignore strategic race-neutral reasons for the strikes).

We are not persuaded that the district court misunderstood or misstated the record. The court noted the strike rates at step one. The rates were also relevant at step three and could have lent modest support to defendants' challenge. But the fact that the court did not repeat the overall strike rates a little later at step three does not require reversal of its Batson determination as a matter of law. The statistical evidence is equivocal at best, given the small numbers in comparison to Harris. Only two strikes are disputed. And as we explain next, the court properly focused on the credibility of the government's explanations for those strikes.

B. The Government's Explanations

1. Juror 52

As noted, the government used three of its six peremptory strikes against African American venire members. Two are challenged on appeal: Juror 52 and Juror 57. At Batson step two, the government offered two race-neutral explanations for striking Juror 52. First, it expressed concern about his ability to stay focused during the trial because he had expressed concern about losing clients if he were to miss work to serve on the jury. Second, the government said it doubted that Juror 52 could be neutral after he made an "agenda-driven comment" in voir dire. At step three, the court found that the government's race-neutral explanations for striking Juror 52 were "credible."

Defendants contend that neither of the stated reasons for striking Juror 52 is credible. First, they argue that the government's failure to strike Juror 52 for hardship or cause undermines its argument that prosecutors were concerned he would be unable to focus on the trial. They also insist that the government's concerns over Juror 52's ability to focus were based on mere speculation. Second, defendants argue that neither the court nor the government sufficiently explained why Juror 52's comments during voir dire suggested he had "an agenda."

Defendants bore the burden at step three of proving that the government's justifications for striking Juror 52 were a pretext, thus permitting an inference of discrimination. The district court reasonably concluded that they failed to meet their burden.

The district court accepted the government's explanation that it was concerned that Juror 52 would be unable to focus on the trial given his apprehensions about missing work. Juror 52 worked in a client-focused field, selling musical instruments, and he expressed concern that serving on the jury would negatively affect his business. A court could reasonably find that Juror 52's apprehension provided a legitimate justification for exercising a peremptory strike against him. The government's failure to challenge Juror 52 for cause (hardship) does not, on its own, necessarily undermine its reliance on a related argument to justify a peremptory strike. See Hernandez v. New York, 500 U.S. 352, 362–63, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) ("While the reason

offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.") (internal citation omitted).

Nor did the district court err in rejecting defendants' attempt to compare Juror 52 to Juror 59, who was not struck. One way for defendants to satisfy their burden at Batson step three is to identify a similarly situated, non-African American juror to whom the government's proffered reason for striking Juror 52 also applied but who was not struck. Miller-El, 545 U.S. at 241, 125 S.Ct. 2317; Harris, 680 F.3d at 949. Defendants argued that Juror 59 also expressed concerns about her work situation. The district court reasonably rejected the comparison. Juror 59 said she would not be paid after ten days of missing work, but she expressed no concerns about losing her job. By contrast, Juror 52 said that he worked in sales, which required building "rapport," and he expressed fears that missing work would cause him to lose clients.

The district court also did not err in accepting as credible the government's explanation that it feared Juror 52's statements in voir dire reflected possible bias. During jury selection, defense counsel asked potential jurors whether they could commit to the idea that "until the end of the trial, [defendants] are constantly considered not guilty until the government proves otherwise." In response, Juror 52 said, "you're saying they're considered to be not guilty. I would say they're not guilty, not considered anything." Defense counsel asked Juror 52 to repeat

his comment, and Juror 52 said, "You're saying as they're sitting here, they are considered to be not guilty. Why aren't they just not guilty?" to which defense counsel replied, "Correct."

Before the district court, the government said that Juror 52's comments were "agenda-driven," and it justified striking him on the grounds that it "wanted to have a fair trial." We can understand how the government might reasonably interpret Juror 52's question why defendants at trial are merely "considered" not guilty rather than "just not guilty" as indicating a potential slant in favor of the defense. The government might have been more explicit in its explanation, but we have approved reasons given by the government that rest on "intuitive assumptions." United States v. Jordan, 223 F.3d 676, 687 (7th Cir. 2000), quoting United States v. Williams, 934 F.2d 847, 850 (7th Cir. 1991). Without other evidence that disputed or called into question the hardship and potential bias offered to explain the government's strike of Juror 52, the district court did not clearly err in rejecting the defendants' Batson challenge to that strike.

2. Juror 57

At Batson step two, the government offered several raceneutral reasons for striking Juror 57. Her oldest son was incarcerated at the time, and she believed her youngest son's schizophrenia was caused by his drug addiction. The government also noted that the trial would create potential hardships for Juror 57, who needed flexibility to care for her youngest son. Juror 57 had explained that her employer allowed her

to leave on short notice to care for her son, but the government cautioned that providing such latitude "certainly would be problematic in this environment."

At step three, the court initially upheld the Batson challenge to the strike of Juror 57, admitting that it was a "tougher call." The court at first found persuasive defendants' argument that Juror 57's speculation that drugs caused her youngest son's schizophrenia made her predisposed against the defense and thus undermined the government's reliance on that issue as an explanation for its strike. Upon the government's request for reconsideration of that decision, however, the court changed course and overruled the Batson challenge. The court found that the government attorneys appeared "earnest and determined to express a race-neutral reason." The court also observed that no non-African American jurors were situated similarly to Juror 57. The court then also struck Juror 57 sua sponte for hardship based on her need to care for her son.

Defendants do not challenge on appeal the district court's decision to remove Juror 57 for cause based on the hardship she would face in caring for her younger son during trial. We would find no abuse of discretion in any event, given the legitimate need to avoid disruptions at trial and to ensure that all jurors are able to appear each day. That conclusion seems to render the Batson issue moot with respect to Juror 57. Even if the Batson challenge were not moot, the district court did not clearly err in finding credible the government's reasons for striking Juror 57.

First, the fact that a juror has a family member in prison can be a valid, race-neutral justification for a strike. United States v. Hendrix, 509 F.3d 362, 370 (7th Cir. 2007); United States v. Lewis, 117 F.3d 980, 983 (7th Cir. 1997). The court could reasonably credit the government's explanation for its strike: that Juror 57's son was incarcerated, which might bias her against the government.

As with Juror 52, defendants offer no similarly situated non-African American juror who was not struck. For the first time on appeal, however, defendants attempt to offer as a comparator a juror who said in voir dire that she did not currently have alternative childcare to take her son to school in the morning on a "couple days throughout the length of the trial," which might cause her to run late on those days. We agree with the government, however, that those circumstances could be accommodated more easily than Juror 57's. Juror 57 said that the difference between being at trial and at work was that, at work, "they're aware of my situation with my son [and] ... if I have to leave, they usually make accommodation for that and tell me to leave if there's an emergency with him." Juror 57's situation reflected a need for flexibility that would not work well in the environment of a trial, especially a long, multi-defendant trial.

Some prospective jurors overestimate the burdens of serving, but others underestimate the burden. They also may not appreciate how disruptive accommodations might be for everyone else involved in the trial. The district court did not err in finding that explanation from the government credible as

well. Whether the Batson challenge was rendered moot by the court's dismissal for cause or was properly denied as without merit, Juror 57's dismissal was not a reversible error.

IV. Admission of Case Agent's Trial Testimony

During the jury trial, a DEA special agent who led the investigation offered so-called "dual-role" testimony, offering both expert opinions from his general experience in law enforcement and lay testimony based on the specific insights he gained investigating this conspiracy. Defendants Myers, Reed, Michael Jones, and O'Bannon objected at trial and renew their challenge on appeal on two main grounds.

First, defendants argue that the district court abused its discretion when it permitted the agent's dual-role testimony and did not put in place sufficient procedures to minimize the dangers of such testimony. Second, they contend that the district court erred when it allowed the agent to interpret whole telephone conversations rather than limiting the testimony to interpreting specific "code words" that the jury may not have understood. We review a district court's decision to admit or exclude expert testimony for abuse of discretion. United States v. Jett, 908 F.3d 252, 265 (7th Cir. 2018).

A. Dual-Role Testimony

We have permitted dual-role (both expert and fact) witness testimony in cases "where experienced law enforcement officers were involved in the

particular investigation at issue." United States v. Parkhurst, 865 F.3d 509, 518 (7th Cir. 2017), quoting United States v. York, 572 F.3d 415, 425 (7th Cir. 2009). We have assumed, however, that such dual-role testimony can be confusing to jurors. Id.

In Jett, we clarified the procedures that district courts should consider using to reduce the risks posed by dual-role testimony. For example, we explained that when the district court learns the prosecution will be presenting dual-role testimony from a case agent, "it should first encourage the government to present the expert and lay testimony separately," to avoid the confusion that might be created by switching back and forth. 908 F.3d at 269. When the expert portion of the testimony begins, the court should allow the government to establish the agent's qualifications and then "instruct the jury that the testimony it is about to hear is the witness's opinion based on training and experience, not firsthand knowledge, and that it is for the jury to determine how much weight, if any, to give that opinion." Id. at 269–70.

The goal is to ensure that the jury understands that expert opinion testimony is different and should be evaluated differently than factual testimony. Id. at 270. We also provided an example of a helpful cautionary jury instruction addressing this issue. Id., quoting United States v. Garrett, 757 F.3d 560, 570 (7th Cir. 2014).

In this case the district court at times did not follow the procedures we suggested (but did not mandate) in Jett. In particular, the court's cautionary

instruction about the dual-role testimony was problematic, as explained next. But defendants have not persuaded us that they were prejudiced by the court's handling of the agent's testimony. We find no reversible error, though district courts should not use the instruction given in this trial as a model.

1. The Cautionary Instruction

Defendants asked the court to provide a cautionary instruction like that in Jett to address the agent's dual-role testimony and to help the jury distinguish between the different forms of testimony he would provide. The court offered to give an instruction that mirrored the language we approved in Jett:

> You're hearing the testimony of [the case agent], who will testify to both facts and opinions. Each of these types of testimony should be given the proper weight. As to the testimony to facts, consider the factors discussed earlier in the preliminary instructions ... As to the testimony on opinion, you do not have to accept the agent's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions, along with the other factors discussed in these instructions for weighing the credibility of witnesses.

See Jett, 908 F.3d at 270. Neither the government nor defendants objected to that language. Because defendants approved, the government argues

that any challenge to the instruction on appeal is waived.[2]

If the district court had given the instruction the defendants approved, we would agree. But the instruction the court actually gave was not what the parties approved. The actual instruction was improvised and confusing. Of greatest concern to us, it included an unexpected summary of the court's findings on the factors used to determine the admissibility of expert testimony under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), phrased as an endorsement of the testimony. Defendants' approval of the proposed instruction did not prevent them from challenging on appeal the materially different instruction actually given.

In relevant part, emphasis ours, the district court instructed the jury:

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[2] The government also argues that any cross-references in defendants' briefs to their appendices as support for their challenge to the testimony are waived and should not be considered. See DeSilva v. DiLeonardi, 181 F.3d 865, 866 (7th Cir. 1999) (refusing to consider arguments that were adopted by reference but not actually made in appellate briefs because "adoption by reference amounts to a self-help increase in the length of the appellate brief"). The defendants did not, however, include new arguments in their appendices. Instead, they used the appendices to organize factual examples that they referenced in their briefs. Given the volume of material, that was a reasonable way to present the issue and did not give the defense an unfair advantage. We have considered those examples in our review of this issue.

Now, you may recall that prior to the break, the government tendered [the case agent] as an expert. And as you may recall from when we discussed [the police captain] yesterday, that based on certain qualifications, to include specialized knowledge, experience, education and training, as we've just heard about this morning with respect to [the case agent] and with respect to [the police captain] yesterday, that they can be tendered as witnesses if their testimony will be helpful to the jury to determine a fact at issue, which we found yesterday with [the police captain], which I think is the case today with [the case agent] with respect to code words. We talked about code words. We've heard again this morning on the amount of data that the agent has considered and his career as well as in this case in particular and the same with [the police captain]. The testimony will be the product of reliable principles and methods, which is basically their experience in this case, and that they have reliably applied those principles and methods to the facts in this particular case. So we think that this -- the Court thinks that this testimony will be helpful to you.

We are particularly concerned by the court's reference to its findings on the Rule 702 and Daubert factors. The judge told the jury in so many words that he had determined that the agent's testimony would be helpful and that the testimony was the product of reliable principles and methods.

Under Rule 702 and Daubert, the district court serves as a "gatekeeper" to prevent unreliable and irrelevant evidence from reaching the jury, but the district court does not "take the place of the jury to decide ultimate issues of credibility and accuracy."

Lapsley v. Xtek, Inc., 689 F.3d 802, 805, 809 (7th Cir. 2012). "If the proposed expert testimony meets the Daubert threshold of relevance and reliability, the accuracy of the actual evidence is to be tested before the jury with the familiar tools of 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.' " Id. at 805, quoting Daubert, 509 U.S. at 596, 113 S.Ct. 2786.

We have not been directed to other cases in which a judge disclosed his or her Rule 702 or Daubert findings to a jury, let alone given such an endorsement of the witness's testimony. The district court's instruction improperly endorsed the case agent's testimony by indicating that the court had already found his testimony to be reliable, relevant, and helpful. This type of explicit judicial endorsement of a witness's testimony was not appropriate. Such an endorsement can be even riskier with dual-role testimony, where there is already a risk that the jury "might be smitten by an expert's 'aura of special reliability' and therefore give his factual testimony undue weight." York, 572 F.3d at 425, quoting United States v. Brown, 7 F.3d 648, 655 (7th Cir. 1993).

During the trial, however, defendants did not object to the court's improvised changes to the agreed instruction. Accordingly, we could reverse only if the court's instruction amounted to plain error. See generally Fed. R. Crim. P. 30(d) & 52(b); United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The instruction actually given was an error, and the error was plain. But defendants have not persuaded us that the error affected their substantial rights or that we should exercise our

discretion to set aside the results of the trial on this basis. See id. at 732, 113 S.Ct. 1770.

As a general rule, district judges should avoid the sort of endorsement of a witness that occurred here. The substance of the challenged testimony here, however, simply was not that important or controversial. If defendants had thought the unexpected endorsement in the instruction was important, they had every right and would have had every reason to raise the issue with the district judge. They could have asked for an immediate corrective instruction disavowing the explicit endorsement of the agent's opinion testimony. We are confident that the jury could have understood such a correction. Defendants did not do so. Moreover, the evidence against the defendants was strong, and we are not persuaded that any specific testimony by the agent was so critical as to cause us to question the reliability of the jury's ultimate verdicts. We decline to reverse on this basis.

2. Structure of the Testimony

In addition to their criticism of the court's jury instruction, defendants assert that the government's questioning of the case agent did not clearly distinguish the capacity in which he was testifying. They cite several portions of the trial transcript where the government did not preface each question with a specific reference to the agent's own case investigation or his general expertise in the field. For example, the government referred to intercepted communications between O'Bannon and Balentine and then simply asked the agent: "What did you understand that to

mean?" Similarly, the government quoted intercepted communications between Balentine and Myers and then asked: "What did you understand that to be a reference to?"

Failure to ensure that testimony is structured to provide a clear distinction between the different capacities in which a witness is testifying can pose a problem. For example, in York, we acknowledged that the government had "started off well" in its examination of the officer by prefacing its questions with phrases like "based on your experience in crack cocaine investigations," which indicated a focus on the witness's expert perspective. 572 F.3d at 426. But "things got murky" when the government asked questions about the specific investigation and then immediately inquired into the meaning of general code words. Id. More concerning was the government's prefacing of questions: "Based on your experience of crack cocaine investigations and this investigation in particular." Id. (emphasis in original). That lumped the two capacities together. We held in York that the district court erred in admitting responses to a few specific questions in part because the government's phrasing of the questions likely confused the jury. We said it was difficult to discern whether the witness's interpretation of "code words" was based on his expertise or his work on that particular investigation, though we ultimately found the error harmless. Id. at 429–30.

Here, too, the government did not include a qualifier in every question to clarify in which capacity the case agent was testifying. But from our reading of the transcript, we are confident that the jury could

follow the nature of the agent's testimony based on the flow of questioning. For example, the question that immediately preceded the one about O'Bannon and Balentine's conversation included a "through this investigation" qualifier. The last properly prefaced question before the one defendants cite regarding the conversation between Balentine and Myers was more distant, about two pages' worth of questions. But again, the line of questioning there was focused on the agent's work on this particular investigation. The jury should have been able to understand the question in context.

The government also tended to structure its questioning so that it asked several questions at a time about the agent's general expertise or his work in this specific investigation rather than switching back and forth more frequently. It also tried to indicate clearly when it was transitioning from one perspective to another. For instance, the government began its inquiry about the agent's general experience with "I would like to discuss with you your knowledge based upon your training and experience and what you've learned in your capacity as a law enforcement officer ... not anything specific to this case, okay?" Then, when it wanted to focus on case-specific questions, it explained, "I would like to, if I may at this time, now return your attention and your testimony to questions based solely on your involvement in this investigation ... and move away from your opinions based upon your expertise and training, okay?" These are the sorts of clear signals that we have deemed helpful in managing dual-role testimony.

3. Prejudice

Considering the case agent's testimony as a whole, we conclude that the district court did not commit reversible error in permitting the dual-role testimony. The court's handling of the testimony was at times confusing, and it did not implement our suggested precautions as well as possible. And, as discussed above, we are troubled by the cautionary jury instruction, which improperly signaled to the jury that the judge deemed the case agent's testimony reliable and helpful. But defendants simply have not shown that any errors in the presentation of the agent's dual-role testimony were likely to have caused unfair prejudice to them. See York, 572 F.3d at 429–30 (court's failure to consistently implement protective procedures for the dual-role witness testimony was harmless error given otherwise "overwhelming" evidence of guilt). Without grounds for thinking that the errors likely affected the jury's verdicts, we find no reversible error.

B. Interpretation of Whole Messages

Defendants also maintain that the court abused its discretion when it permitted the case agent to interpret whole telephone conversations instead of limiting his testimony to individual words or phrases. In support, they point to questions like: "Mr. Riley says, 'We'll pay for it.' What did you understand that to mean?" Defendants acknowledge that we have often allowed expert witnesses to interpret code words. See, e.g., United States v. Are, 590 F.3d 499, 512 (7th Cir. 2009); York, 572 F.3d at 423–24. But they assert that the case agent's testimony here was a far cry from such accepted testimony because he was

not interpreting individual words and phrases but was instead interpreting entire conversations, even when no interpretation was required.

We agree with the government that the agent's challenged interpretations were offered not as expert testimony but as lay testimony based on his work with this specific investigation. See United States v. Cheek, 740 F.3d 440, 447 (7th Cir. 2014) ("When a law enforcement officer testifies about the meaning of drug code words used by defendants based on personal knowledge obtained from the investigation of those defendants, the officer is testifying as a lay witness.").

Asking a case agent to testify about his "impressions" of intercepted communications poses an avoidable risk that the agent will invade the jury's province. Such testimony on direct can also prompt argumentative cross-examination. That's a fair response to argumentative direct testimony, but there are usually better ways to spend a jury's time.

In a similar case, however, we declined to reverse after an agent involved in the investigation testified about his "impressions" of intercepted conversations based on his interpretation of conspirators' use of code words. In United States v. Rollins, 544 F.3d 820 (7th Cir. 2008), the prosecutor had asked, for example, for the agent's "impression of what it means for them to say they are going to go have a drink at 10:30 to 11:00 o'clock?" Id. at 830–31. We held that the testimony was properly admitted as lay testimony. It was rationally based on the agent's "first-hand perception of the intercepted phone calls" and assisted the jury in determining whether the

elements of the charge had been proven. Id. at 831–32. We emphasized that the "impressions" testimony was particularly useful there because the conspirators did not use typical drug words but instead made up code words as they went along. Id. at 832.

Here, the case agent's testimony did not amount to reversible error solely because it was not limited to the interpretation of specific code words and phrases. As in Rollins, the agent testified to his perception of the conversations in a way that may have been useful to the jury. And, even if some of the government's questions risked invading the province of the jury, defendants have not shown that they were prejudiced as a result, such as by offering examples of communications that the agent misunderstood. In light of the considerable evidence in the record of defendants' guilt, any error arising from the case agent's "impressions" testimony was harmless. See Jett, 908 F.3d at 267 (holding that even if district court had abused discretion in admitting testimony interpreting defendants' text messages, error was harmless where other evidence was "plenty persuasive" of defendants' guilt). We find no reversible error in the admission of the case agent's testimony.

V. Sufficiency of the Evidence

Defendants Michael Jones, Reed, and Myers (but not O'Bannon) contend that the district court should have granted their motions for judgment of acquittal for insufficient evidence. All three contest their convictions on Count 1 for conspiracy to distribute and to possess controlled substances with

the intent to distribute. 21 U.S.C. §§ 841(a)(1) & 846. Michael Jones also challenges his convictions on Count 14, possession with intent to distribute controlled substances, 21 U.S.C. § 841(a)(1), and Count 20, laundering of monetary instruments, 18 U.S.C. § 1956(a)(1)(A)(i).

In considering challenges to the sufficiency of the evidence, we "afford great deference to a jury's verdict of conviction" and review the evidence in the light most favorable to the government. United States v. Godinez, 7 F.4th 628, 638 (7th Cir. 2021). We will overturn a conviction only when "the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt." Id., quoting United States v. Khan, 937 F.3d 1042, 1055 (7th Cir. 2019). While a defendant faces a significant hurdle in challenging his conviction, "the height of the hurdle depends directly on the strength of the government's evidence," for we recognize that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." United States v. Moreno, 922 F.3d 787, 793 (7th Cir. 2019), quoting United States v. Garcia, 919 F.3d 489, 496–97 (7th Cir. 2019), quoting in turn Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

A. Count 1 Conspiracy

Count 1 charged defendants with conspiring to possess with the intent to distribute and to distribute controlled substances. To convict a defendant of a drug conspiracy, "the government must prove that (1) two or more people agreed to commit an unlawful act,

and (2) the defendant knowingly and intentionally joined in the agreement." United States v. Hidalgo-Sanchez, 29 F.4th 915, 924 (7th Cir. 2022), quoting United States v. Hopper, 934 F.3d 740, 754 (7th Cir. 2019). In a drug-distribution conspiracy, like that charged here, there must be "proof that the defendant knowingly agreed—either implicitly or explicitly—with someone else to distribute drugs." United States v. Thomas, 845 F.3d 824, 830 (7th Cir. 2017), quoting United States v. Johnson, 592 F.3d 749, 754 (7th Cir. 2010). While there may be an express agreement, the government most often relies on circumstantial evidence. We consider the totality of the circumstances to determine whether the evidence supported the verdict. Id.

A challenge for the prosecution in drug-distribution conspiracies is that "characteristics inherent in any ongoing buyer-seller relationship will also generally suggest the existence of a conspiracy." Johnson, 592 F.3d at 754. For example, both a typical buyer-seller relationship and a conspiracy may involve "sales of large quantities of drugs, repeated and/or standardized transactions, and a prolonged relationship between the parties." Id. But the existence of a routine buyer-seller relationship alone is not sufficient to establish a conspiracy. Moreno, 922 F.3d at 794; see also United States v. Pulgar, 789 F.3d 807, 812 (7th Cir. 2015) (explaining that in drug-distribution conspiracy cases "we will also overturn a conviction when the plausibility of a mere buyer-seller arrangement is the same as the plausibility of a drug-distribution conspiracy").

To prove a conspiracy, as opposed to a mere buyer-seller relationship, "the government must offer evidence establishing an agreement to distribute drugs that is distinct from evidence of the agreement to complete the underlying drug deals." United States v. Maldonado, 893 F.3d 480, 484 (7th Cir. 2018), quoting Johnson, 592 F.3d at 755. Circumstances that may show a conspiracy include "sales on credit, an agreement to look for customers, commission payments, evidence that one party provided advice for the other's business, or an agreement to warn of future threats to each other's business from competitors or law enforcement." United States v. Villasenor, 664 F.3d 673, 680 (7th Cir. 2011); accord, United States v. Harris, 51 F.4th 705, 715–16 (7th Cir. 2022).

The evidence as to Michael Jones, Reed, and Myers was sufficient for a reasonable jury to find that they knowingly agreed to participate in the conspiracy. The jury was properly instructed on the difference between a conspiracy and a buyer-seller relationship, and it found all defendants guilty of conspiracy.

1. Michael Jones

Michael Jones argues that the evidence was insufficient to prove his part in the Count 1 conspiracy because he did not share a common purpose with Balentine. He concedes that he purchased large quantities of drugs from Balentine, but he insists that he did not otherwise share a common goal with Balentine to sell to a particular customer and that his

independent drug dealing was never traced back to Balentine.

Despite Jones' attempts to downplay his relationship with Balentine, the trial evidence was sufficient for the jury to find that he was a knowing co-conspirator. First, Jones bought large amounts of methamphetamine from Balentine on credit. Those transactions were reflected in a drug debt of about $16,000 that he owed Balentine in March 2018. A reasonable jury could infer from the multiple, large-quantity sales on credit that Jones was involved in the conspiracy. E.g., Harris, 51 F.4th at 716; Maldonado, 893 F.3d at 485; cf. Villasenor, 664 F.3d at 680 (explaining that credit sales of small quantities for buyer's personal consumption would not be sufficient to establish conspiracy).

Second, Jones' and Balentine's plan to find out whether a mutual customer was an informant provided strong evidence that they had shared interests for their drug dealing. Jones had suspected that the customer was an informant because he continued to try to buy drugs from him even when Jones charged a higher price. When Jones expressed his concerns, Balentine suggested that Jones offer to sell drugs to the customer at a price higher than he would have to pay to get the same drugs from Balentine. If the customer agreed to pay the higher price, then they would know that he was an informant. (Their theory was that only an informant, using cash from the police, would be willing to pay such a high price for drugs when he could get them more cheaply from someone else.)

The plan to detect a potential police informant is the type of coordination to further shared interests that can signal a conspiratorial relationship. See, e.g., Moreno, 922 F.3d at 795 (affirming conspiracy conviction where defendant sought to protect co-conspirators by warning them about potential law enforcement intervention, telling them to stop using certain phones, and discussing with co-conspirators other threats to their criminal activity); Maldonado, 893 F.3d at 485 (affirming conspiracy conviction where defendants worked cooperatively, which included negotiating and coordinating deals together, checking quality of cocaine together, and teaching each other how to hide drugs in a car).

Third, intercepted communications between Michael Jones and Balentine indicated that they purchased drugs together. In one call, Balentine told Jones that he had been trying to get in touch with him because the couriers were leaving for Georgia, and Balentine wanted to know whether Jones wanted to put in money. Jones responded that he had something for Balentine, and the case agent testified that he understood that to mean that he had money for Balentine. The trial evidence supported the verdict finding Michael Jones guilty beyond a reasonable doubt on Count 1.

2. Jason Reed

Reed challenges his conviction on Count 1 on two grounds. He first asserts that the testimony of Melissa Baird, connecting him to Balentine and the conspiracy, was unreliable. He argues that her

testimony was self-serving to obtain leniency and that it lacked sufficient corroboration.

Baird was Reed's girlfriend at some point during the life of the conspiracy. She testified that she and Reed traveled from Kokomo to Terre Haute once or twice a week to deliver drugs to two of Reed's customers. She also said that Reed obtained the methamphetamine he sold from Balentine, and she knew this because they would go to Balentine's home to pick up the drugs.

"[E]valuating the credibility of the witnesses is the jury's job." Cruse, 805 F.3d at 812. Finding a witness incredible as a matter of law is typically reserved for "extreme situations," where, for example, it was "physically impossible for the witness to observe what he described" or "impossible under the laws of nature for those events to have occurred at all." United States v. Conley, 875 F.3d 391, 400 (7th Cir. 2017), quoting United States v. Hayes, 236 F.3d 891, 896 (7th Cir. 2001).

Reed's appellate attack on Baird's credibility fails. Her testimony could be challenged as biased, self-serving, and/or unreliable, but such challenges to Baird's credibility of this kind were for the jury to assess. Reed has not shown that the jury was required, as a matter of law, to disregard her testimony.

In addition, other evidence supported the conspiracy verdict against Reed. On at least some occasions, Reed bought drugs from Balentine on credit. Reed also worked with Balentine to ensure

they were both repaid for drugs they had sold to others on credit. The plan started when Reed's customer, Derrick Owens, was pulled over for a traffic stop and managed to discard drugs he had purchased from Reed on credit to avoid their discovery. Owens was thus unable to pay Reed, who himself had purchased the drugs from Balentine on credit. Owens agreed to buy methamphetamine from Balentine directly and to resell it so he could start to pay off his debt to Reed, and Reed his resulting debt to Balentine. In arranging this deal, Reed communicated with both Balentine and Owens to sort out the details and arrange a meeting. Reed and Balentine also agreed that neither of them would sell drugs to Owens, or Michael Reynolds, who was also Reed's customer, on credit until they were able to pay off their debts. Evidence of Reed's coordination with Balentine and Owens to execute this plan contributed to the evidence supporting the verdict.

In his second argument, Reed contends that the Owens transaction did not establish his ongoing involvement in the conspiracy because there were no future arrangements or promises that he would profit from that transaction. This argument is not persuasive. The coordination between Reed and Balentine to complete the Owens transaction reflected an "informed and interested cooperation" that can mark a conspiracy. United States v. Colon, 549 F.3d 565, 568 (7th Cir. 2008), quoting Direct Sales Co. v. United States, 319 U.S. 703, 713, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943); see also Maldonado, 893 F.3d at 485 (affirming conspiracy conviction where defendant and co-conspirator worked together to negotiate and coordinate drug transaction with third party and both

took a cut from the deal). We affirm Reed's conviction on Count 1.

3. Shaun Myers

Like Michael Jones and Reed, Myers challenges his Count 1 conviction on the grounds that he had a simple buyer-seller relationship with Balentine and was not engaged in the broader drug conspiracy. He concedes that he was recorded talking to Balentine about a shipment of drugs from Georgia, but he contends he did not have a financial stake in the drugs and did not plan to receive any of them.

The jury could reasonably find Myers' contentions implausible, given the other direct evidence of his stake in the drug conspiracy and his efforts to further it. Myers was not just an isolated buyer of drugs from Balentine. The government offered evidence that Myers was fully aware of Balentine's plans to buy drugs from Riley in Georgia. Strong evidence of conspiracy came from Myers' giving Balentine $35,000 to help buy drugs from Riley in April 2018. Balentine also informed Myers when the drugs were intercepted. Myers' financial contribution to the drug purchase offered strong, and certainly sufficient, evidence of his participation in the conspiracy.

In addition, after that first portion of the shipment was intercepted by police, Myers sent his girlfriend to Georgia to pick up the second. See Hopper, 934 F.3d at 757 (by " 'put[ting] their money and transportation resources together for an extended period of time,' the co-conspirators 'thereby ha[d] a

stake in each other's success, and kn[ew] that the others intended to resell' the drugs") (alterations in original), quoting United States v. Harris, 567 F.3d 846, 851 (7th Cir. 2009); see also United States v. Lomax, 816 F.3d 468, 475 (7th Cir. 2016). We affirm Myers' conviction on Count 1.

B. Michael Jones – Counts 14 and 20

1. Count 14

Michael Jones also argues that we should reverse his conviction on Count 14 for possession with intent to distribute controlled substances. He presents his argument as one about the sufficiency of the evidence. But we agree with the government that his argument is better understood as a claim that the district court erred in admitting witness testimony that went to an element of the offense. Jones' argument is complicated, however, by the fact that he seems at times to assert that the witness impermissibly testified to his intent to possess the drugs, while at others he seems to argue that the witness should not have been allowed to offer his opinion as to whether Jones or his girlfriend possessed the drugs. The government also notes that Jones did not clearly object at trial to the witness's testimony on the ground that it went to his intent but objected more generally to "speculation" and irrelevance.

We need not decide whether Michael Jones' objection at trial preserved this issue. We are not persuaded there was a reversible error. Here are the facts: On May 1, 2018, officers executed a search warrant at Jones' home, which he shared with his

girlfriend, Rebecca Myers. Officers found several controlled substances and a digital scale in the master bedroom. They also seized firearms and about $9,000 in cash. At the time of the search, officers arrested Jones on an outstanding arrest warrant. Based on the contraband, officers also arrested Myers.

At trial, the government asked the officer who provided the probable cause affidavit for Myers' arrest if it was "your understanding that it was Rebecca Myers and Rebecca Myers alone that possessed the methamphetamine that morning?" The officer answered "No." The government then asked, "What did you believe?" Jones' counsel objected, arguing that the question called for speculation and was not relevant. The court overruled the objection, explaining that "certainly he can say what he believed at the time." The officer testified that he believed Michael Jones also possessed the methamphetamine.

We do not understand the decision to overrule the defense objection. In a trial on guilt or innocence, the opinion of an investigating officer about guilt or innocence is not helpful or relevant. United States v. Noel, 581 F.3d 490, 496–98 (7th Cir. 2009) (error to admit officer's opinion that photographs met legal definition of child pornography, but error was harmless). The issue is whether the government can present admissible evidence of the underlying facts that convinces the jury of guilt, beyond a reasonable doubt.

As a general rule, of course, lay or expert opinion testimony should not be excluded simply "because it embraces an ultimate issue." Fed. R. Evid.

704(a). Nevertheless, an expert in a criminal case cannot testify to "an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged." Fed. R. Evid. 704(b). An expert may testify, however, "in general terms about facts or circumstances from which a jury might infer that the defendant" possessed drugs with intent to distribute them. United States v. Winbush, 580 F.3d 503, 512 (7th Cir. 2009). In considering whether to admit such opinion testimony, the most important question for a court is whether it will be "helpful to the trier of fact." Noel, 581 F.3d at 496.

The officer's belief as to whether Rebecca Myers alone possessed the seized drugs could not have been helpful to the jury or relevant as a general matter. It went directly to the question of whether Jones possessed the drugs, an element of the charge. It was the jury's job to make its own finding on that question from the relevant evidence in the record. See Noel, 581 F.3d at 497 (explaining that a detective's testimony about whether photographs the defendant possessed met the definition of child pornography "was a bare conclusion that provided nothing but the bottom line," and even as an expert, the detective "could not 'merely tell the jury what result to reach' "), quoting Fed. R. Evid. 704 advisory committee's note to 1972 rule. The officer's testimony invaded the province of the jury and amounted to one officer's opinion about whether the accused was guilty.

Whether the error was reversible is another matter. With the issue framed as a challenge to the sufficiency of the evidence, as opposed to an

evidentiary error, we find no reversible error. The opinion was admitted and was available to support the conviction. More important, the government presented other evidence sufficient to support the verdict.

Jones did not physically possess the drugs at the time of the search. But of course a defendant can be convicted for possession based on constructive possession of the contraband. United States v. Perryman, 20 F.4th 1127, 1133 (7th Cir. 2021). To prove constructive possession, the government must demonstrate a "connection between the defendant and the illegal drugs" that shows that he had the "power and [the] intention to exercise dominion and control over the object, either directly or through others." Id., quoting United States v. Griffin, 684 F.3d 691, 695 (7th Cir. 2012). When a defendant does not exclusively control the property where the contraband is found, the government may satisfy its burden by showing "a 'substantial connection' to the location where contraband was seized." United States v. Morris, 576 F.3d 661, 667 (7th Cir. 2009). A defendant who has joint control over contraband may be found guilty of possessing it. United States v. Lawrence, 788 F.3d 234, 240–41 (7th Cir. 2015).

The evidence here was certainly sufficient for the jury to find that Michael Jones possessed the Count 14 methamphetamine, at least constructively and jointly. Officers found the drugs in the bedroom of the home that Jones shared with Myers. Both Myers and Jones sold drugs. See, e.g., Lawrence, 788 F.3d at 240–42 (upholding drug possession conviction where drugs were found in a drawer of the bedroom that

defendant shared with his fiancée and defendant himself sold drugs). We affirm Michael Jones' conviction on Count 14.

2. Count 20

Michael Jones also argues that there was insufficient evidence to sustain his conviction for money laundering. Count 20 of the indictment charged him with laundering monetary instruments, 18 U.S.C. § 1956(a)(1)(A)(i), when he bought a sport utility vehicle in September 2017.

To affirm the conviction for money laundering, "we must determine that a rational trier of fact could have concluded from the record that [Jones] knowingly used the proceeds from a specified unlawful activity in financial transactions that were intended to promote the continuation of the unlawful activity, or were designed to conceal or disguise the proceeds of the unlawful activity." United States v. Arthur, 582 F.3d 713, 718 (7th Cir. 2009).

Jones contends that the record does not support the verdict because there is no evidence that he used drug proceeds to purchase the vehicle. He instead argues that Rebecca Myers, whose name was on the title, purchased the vehicle with her own money. He also argues that even if he did purchase the vehicle, he could have done so with legal gambling winnings rather than illegal drug proceeds.

As a preliminary matter, the government asserts that Jones waived the argument he raises now by conceding the point in his original motion for

judgment of acquittal or a new trial. In that motion, he noted that the "government certainly provided circumstantial evidence that when viewed most favorably to the verdict, proves [Jones] conducted a financial transaction with proceeds that derived from the distribution of controlled substances." In his motion for judgment of acquittal, he instead argued that there was insufficient evidence that he purchased the vehicle to further or promote his illegal drug dealing.

A defendant waives an argument when he "intentionally relinquishes a known right." United States v. Barnes, 883 F.3d 955, 957 (7th Cir. 2018), quoting United States v. Haddad, 462 F.3d 783, 793 (7th Cir. 2006). Evidence that the decision not to raise an argument was strategic permits an inference that the argument was waived. Id. at 957–58 (explaining that defendant had made strategic choice to focus on criminal history category during sentencing and argued for the exclusion of some prior offenses while telling the court that the points for other offenses were appropriate). Here, it is reasonable to infer that Jones' concession reflected a strategic decision to challenge his conviction on a ground he thought would be more successful and that in doing so he waived his argument on appeal. Id. at 957. The argument was waived.

Even if Jones had not waived this argument, his challenge would still fail. The evidence was sufficient for the jury to find he did purchase the vehicle and used drug proceeds to do so. The salesman spoke only to Jones when negotiating the purchase of the vehicle, and he paid for it in cash that day. To be

sure, given the practical realities of car buying, a jury might have believed that Jones was merely negotiating on Rebecca Myers' behalf. The salesman testified that it is "not uncommon" for one person to negotiate the sale for a second person in whose name the car is registered. But the jury did not have to accept that benign version. See United States v. Colon, 919 F.3d 510, 516 (7th Cir. 2019) (jury can "employ common sense in making reasonable inferences from circumstantial evidence," and government's case "need not exclude every reasonable hypothesis of innocence so long as the total evidence permits a conclusion of guilt beyond a reasonable doubt"), quoting United States v. Starks, 309 F.3d 1017, 1021–22 (7th Cir. 2002). The jury "is free to choose among various reasonable constructions of the evidence." Id., quoting Starks, 309 F.3d at 1022.

Moreover, the money that Jones claims he made from legal gambling was earned in April 2018, several months after he bought the vehicle. Jones also filed no federal tax returns and received no W-2 forms from 2015 to 2017, which made it less likely that he bought the vehicle using legitimate income obtained through employment. Considered together, ample evidence supported a finding beyond a reasonable doubt that Michael Jones was guilty on Count 20 for laundering monetary instruments.

VI. Sentencing

We turn now to a host of sentencing issues, which together take up the second half of this opinion. Six defendants argue that various Sentencing Guideline enhancements were erroneously applied to

them. Two defendants argue that the district court erred in its drug quantity calculations. Three contend that the district court erred by relying upon inaccurate or unreliable information in calculating their sentences. One defendant challenges the substantive reasonableness of his sentence, and another asks us to depart from controlling Supreme Court precedent on considering at sentencing conduct for which the defendant was tried and acquitted.

A. Aggravating Role Enhancements

Defendants Riley, Balentine, and Michael Jones all argue that the district court erred in finding that they played aggravating roles in the conspiracy that justified enhancing their sentences. Under the Sentencing Guidelines, a defendant's offense level is increased by four levels if he is an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive" and by three levels if he was a "manager or supervisor" of the same. U.S.S.G. § 3B1.1(a)–(b).

The Guidelines do not explicitly define the terms "organizer," "leader," "manager," or "supervisor," but the accompanying commentary offers a list of factors that courts can use to distinguish between the organizer or leader roles and the manager or supervisor roles. These factors include the exercise of decision-making authority, the nature of participation in the offense, the recruitment of accomplices, a claimed right to a greater share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the offense, and the degree of control

exercised over others. § 3B1.1 n.4. Ultimately, in applying the enhancement, the court must conduct a practical inquiry and make a "commonsense judgment about the defendant's relative culpability given his status in the criminal hierarchy." United States v. House, 883 F.3d 720, 724 (7th Cir. 2018), quoting United States v. Dade, 787 F.3d 1165, 1167 (7th Cir. 2015). The court may consider the Sentencing Guidelines factors, but none of those alone is a prerequisite for applying the enhancement. Id.

We review the district court's findings of fact for clear error, and we review de novo whether those facts support the enhancement. House, 883 F.3d at 723. We will reverse a district court's application of an aggravating role enhancement only if "we are left with a 'definite and firm conviction that a mistake has been made.' " Id., quoting United States v. Harris, 791 F.3d 772, 780 (7th Cir. 2015).

1. Pierre Riley

Riley pleaded guilty to Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 6 (conspiracy to use facilities of interstate commerce to commit murder for hire), and Count 19 (conspiracy to launder monetary instruments). The district court found that Riley's offense level was 46 (which was adjusted down to the maximum of 43), and that his applicable criminal history category was IV. In calculating Riley's offense level, the district court applied several enhancements, including a four-level increase for his role as an organizer or leader in the Count 1 conspiracy and a two-level increase for his role as an organizer or leader

in the Count 19 money laundering conspiracy. The district court's calculations yielded an advisory guideline range of life imprisonment for Count 1, 120 months on Count 6, and 240 months on Count 19. The court sentenced Riley to 490 months in prison on Count 1 and 120 months on each of Counts 6 and 19, to be served concurrently.

Over Riley's objections, the district court found by a preponderance of the evidence that he acted as an organizer or leader when he directed the activities of Kristen Kinney, Brianna Glover, Balentine, and O'Bannon. The court noted that Riley told Kinney to hold on to drug proceeds, to deposit the proceeds in accounts that he controlled, to pay bills for him, to pick him and the drug couriers up from the bus stop, and to hold onto and deliver methamphetamine to Balentine. The court also observed that true leaders immunize or insulate themselves from their subordinates, which it found "certainly was indicative or indicated in this case by the use of others in the co-conspiracy, especially women." Finally, the court found that Riley directed O'Bannon and Balentine and played a "definitive role" in the murder-for-hire plot, as Riley gave the initial order to have the suspected informant killed.

Riley argues first that he was merely the drug source for the conspiracy and that a supplier for a large-scale drug operation is not always an organizer or leader of the conspiracy. See Colon, 919 F.3d at 518 ("A defendant who acts as a mere conduit in an operation—even one that deals in large quantities of drugs—should not (without more) receive a leadership enhancement."). Here, however, additional facts

indicate that Riley did much more than merely supply drugs, including planning the murder for hire.

Riley also challenges the district court's findings that he directed specific individuals in the conspiracy. For example, he contends that there was little support for the finding that he directed Balentine and O'Bannon in the murder-for-hire plot. The presentence report said that Riley told Balentine to call O'Bannon and to instruct O'Bannon to locate hitmen, and that O'Bannon complied. Riley argues that any reliance on the murder-for-hire plot to establish his leadership role was an error because the court did not apply an organizer or leader enhancement for that count. But as we discuss below, the murder-for-hire plot is relevant conduct for the drug conspiracy. The district court could rely on that evidence to apply the enhancement for Count 1.

Perhaps Riley's instructions to O'Bannon might be understood as isolated requests to an equal rather than as part of the continual and ongoing supervision often required to establish an aggravating role enhancement. See United States v. Weaver, 716 F.3d 439, 444 (7th Cir. 2013). But the district judge who presided over the trial and guilty pleas was not limited to the presentence report. Riley contributed money for the planned hit, and he decided initially not to include O'Bannon before changing his mind. Riley also received updates from Balentine on what was happening on the ground in Kokomo. This evidence may not have established that Riley was directing Balentine, given their comparable involvement in the plot: Balentine told Riley they needed to move faster and that he wanted to use out-of-state hitmen. But it

was nevertheless sufficient for the court to find that Riley was exercising control or authority over O'Bannon, who was responsible for trying to carry out the murder.

As is often the case under the aggravating-role Guideline, whether the control Riley exerted over O'Bannon fit better within the four levels for an organizer or leader or three levels for a manager or supervisor enhancement could be considered a close question, and one where we give considerable deference to the district court. But here, because Riley's offense level was 46, it makes no difference to his ultimate sentence whether a four-level or a three-level enhancement is applied. In either case, his offense level will be adjusted down to the maximum of 43. Because we are confident that the evidence supported at least the three-level enhancement, we affirm.

Riley's role in the murder-for-hire plot resembles that of the defendant in House, where we upheld the application of the three-level manager or supervisor enhancement. 883 F.3d at 724. That defendant was instrumental in designing the loan fraud scheme, used his business as a front to secure the loans, and provided the information that co-conspirators used to apply for the loans. Id. Riley's role here as a coordinator, funder, and supervisor of the murder plot would similarly support at least the three-level enhancement. If the district court had applied the three-level manager or supervisor enhancement instead of the four-level organizer or leader enhancement, the one-level reduction would

not have changed Riley's guideline range. It still would have been life in prison for Count 1.

Riley also challenges the district court's finding that he directed Kinney. Riley focuses mainly on inconsistencies in Kinney's testimony about how often and in what ways he directed her. He contends these weaknesses undermine the court's reliance on her testimony. We find no reversible error. To be sure, inconsistent evidence in some cases may in fact be unreliable, and the court must make a searching inquiry into the accuracy of such evidence. United States v. Galbraith, 200 F.3d 1006, 1012 (7th Cir. 2000). Here, however, the inconsistencies Riley identifies do not undermine the finding about whether he was directing Kinney. They relate only to how often he directed her. As noted above, the leadership enhancement requires evidence of ongoing supervision. The evidence supported that here. Kinney testified at trial that she went to the bank ten to twelve times on Riley's behalf to convert the drug money. The fact that Kinney, on a different occasion, said that she went to the bank more often does not require reversal of the court's finding that Riley continually supervised her.

Riley also insists that the apparent obligation Kinney felt to Riley to follow his instructions and those of Balentine did not make him an organizer or leader. But Kinney's personal relationship with and commitment to Riley also did not preclude the court's finding that she acted at his direction.

Finally, Riley argues that there was insufficient evidence for the court to find that he led

or controlled Glover. The court received evidence that Riley directed Glover to pick up or drop off drugs on at least two occasions on April 24 and 26. The limited and short-term nature of his direction of Glover might not, by itself, support the organizer or leader enhancement. See Colon, 919 F.3d at 519 (defendant's requests that a courier drive him to a drug sale did not suffice to show he acted as a manager/supervisor, "much less an organizer or leader"). The case agent testified that Riley often had Glover perform other tasks for him, though it is not clear from the record what those tasks were or if they related to the drug conspiracy. Perhaps if we considered only Riley's control over Glover, the evidence might not be enough to establish the organizer or leader enhancement.

But given the evidence that Riley also directed O'Bannon and Kinney, the district court did not clearly err in applying the organizer or leader enhancement. And as mentioned above, even if the four-level organizer or leader enhancement did not apply, the three-level manager or supervisor enhancement certainly would have, in which case Riley's guideline sentence would not have changed. Any error in the district court's choice between a three- or four-level role enhancement would have been harmless. See, e.g., United States v. Prado, 41 F.4th 951, 955 (7th Cir. 2022) (finding any error harmless where district court's calculation and defendant's proposed calculation resulted in same guideline range); United States v. Thomas, 897 F.3d 807, 817 (7th Cir. 2018) (same); United States v. Fletcher, 763 F.3d 711, 718 (7th Cir. 2014) (same).

2. Reggie Balentine

Balentine pleaded guilty to Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 4 (distribution of 50 grams or more of methamphetamine), Count 6 (conspiracy to use facilities of interstate commerce to commit murder for hire), Count 8 (felon in possession of firearm), Count 10 (attempted possession with intent to distribute 50 grams or more of methamphetamine), and Count 18 (actual possession with intent to distribute 50 grams or more of methamphetamine). The district court calculated his total offense level as 46, which was reduced to the maximum of 43, and his criminal history category as VI. The court applied a four-level enhancement for Balentine's aggravated role as an organizer or leader in the Count 1 drug conspiracy. The court calculated Balentine's guideline range as life in prison. Balentine was ultimately sentenced to concurrent terms of 504 months in prison on each of Counts 1, 4, 10, and 18, and 120 months on each of Counts 6 and 8.

In applying the four-level enhancement, the district court explained that Balentine was responsible for gathering money to buy drugs from Riley in Georgia, he directed the activities of Kristen Kinney, including telling her when to pick up drug proceeds and drop off methamphetamine to him, and he also directed the activities of Melissa Baird and Perry Jones, who similarly delivered drugs and picked up drug proceeds for him. The court also justified its decision on the ground that Michael Jones received a three-level aggravating role enhancement, and it was clear that Jones' role was not as critical as Balentine's.

On appeal, Balentine argues that the court should not have applied any aggravating role enhancement. He asserts that the conspiracy was made up of individuals with equal roles and that no single co-conspirator exercised control or coercive power over another. In the alternative, Balentine argues that he qualified at most for the three-level manager or supervisor enhancement.

The district court did not clearly err in applying the four-level organizer or leader enhancement. As discussed above, the conspiracy at issue here was not strictly hierarchical. Some conspirators, such as Riley and Balentine, seem to have operated as equals. But there was certainly evidence of a hierarchy, with some conspirators having more authority and control in the drug operation than others. For example, Balentine coordinated with Riley to decide how much methamphetamine and other drugs to buy and when they should be bought to ensure a steady supply. Lower-level members of the conspiracy, like Myers, would contact Balentine for updates on when the next shipment of drugs would arrive. Balentine was also responsible for pooling the money from his co-conspirators in Indiana to buy the drugs, and he kept track of how much each person would receive from a new shipment. After officers seized the load that Melissa Baird was transporting, Balentine conferred with Myers about raising prices to make up the loss. Balentine recommended that Myers sell the methamphetamine at $500 per ounce. Balentine also agreed to split up the second shipment among the various co-conspirators instead of keeping it for Riley and himself. He also helped protect the drug operation by giving advice to his co-conspirators about how to

deal with customers who were suspected of being informants and were threats to the operation.

Balentine's actions resemble those of other defendants for whom we have upheld the application of the organizer or leader enhancement. See, e.g., United States v. Grigsby, 692 F.3d 778, 791 (7th Cir. 2012) (upholding application of manager or supervisor enhancement but noting that defendant who "initiated the scheme, played a leading role in recruiting the coconspirators, and supervised the execution" of offense could also qualify for organizer or leader enhancement).

Balentine's direction of Perry Jones, Baird, and Kinney in furtherance of the drug conspiracy reinforced the district court's application of the enhancement. On several occasions, Balentine told Perry Jones to pick up drug proceeds or to deliver drugs to Balentine's customers, including Michael Jones and O'Bannon. (As a result, the fact that Perry Jones had his own customers does not mean that he was not also working at the direction of Balentine.) Balentine also directed Baird to sell drugs on his behalf to various buyers after she stopped working for Reed, who had been arrested and jailed. Baird also stored drugs for Balentine at her house. According to Baird, Balentine agreed to give her a loan if she traveled to Georgia to pick up the drugs, and she complied. Balentine used Kinney in a similar way, directing her to take cash to the bank for him and to store drugs at her home.

Accordingly, the district court did not clearly err in applying the enhancement. Balentine "used his

compatriots to insulate himself from some of the perils of dealing by directing them" to engage in those actions and exercised sufficient control over them to support the enhancement. United States v. Noble, 246 F.3d 946, 954 (7th Cir. 2001) (upholding organizer or leader enhancement where defendant provided drugs for whole distribution scheme, controlled drug price, directed co-conspirators to deliver drugs for him and to store drugs at their homes, and exercised such control over others that they agreed to go to jail for him).

3. Michael Jones

The jury convicted Michael Jones on Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 2 (distribution of 50 grams or more of methamphetamine), Count 14 (possession with intent to distribute 5 grams or more of methamphetamine), Count 16 (felon in possession of a firearm), and Count 20 (laundering of monetary instruments). The district court calculated Michael Jones' offense level to be 47, which was reduced to the maximum of 43, and it found his criminal history category was VI. Over Jones' objection, the court applied a three-level enhancement for his role as a manager or supervisor in the conspiracy. Jones' final guideline range was life in prison. The court sentenced him to concurrent terms of 420 months on Counts 1, 2, and 14, 120 months on Count 16, and 240 months on Count 20.

The district court acknowledged that Jones' aggravating role presented a close question but found by a preponderance of the evidence that he managed

or supervised Thomas Jones and Rebecca Myers. The court relied upon the circumstances surrounding the transaction with the suspected informant. Michael Jones made arrangements for the deal with the suspected informant, but Thomas Jones actually carried out the exchange. The court also found that Rebecca Myers worked under Michael Jones' direction and delivered drugs at his request.

On appeal, Jones asserts that the evidence failed to establish that he was a manager or supervisor. Specifically, he contends there was conflicting testimony as to whether he directed Thomas Jones. He also argues more generally that there was no proof he managed Thomas Jones or Rebecca Myers in furtherance of the conspiracy.

The district court did not clearly err in applying the enhancement to Michael Jones. Thomas Jones delivered the methamphetamine to the suspected informant after Michael Jones negotiated the terms of the deal. Two associates of Michael Jones testified that Thomas Jones was a courier for Michael and often present during Michael's drug dealing. As for Rebecca Myers, intercepted communications between Balentine and Michael Jones indicated that, at Jones' direction, she hid drugs in a body cavity to keep the police from finding them. She later recovered the drugs and gave them back to Michael Jones, presumably so he could sell them. Such evidence was sufficient to find that Michael Jones acted as a manager or supervisor, directing both Thomas Jones and Rebecca Myers in connection with the drug distribution conspiracy.

Moreover, even if the court had erred with this enhancement, it would have been harmless. See Thomas, 897 F.3d at 817 (explaining that a "guideline error that does not actually affect the final guideline range calculated" does not affect substantial rights in plain-error analysis). Michael Jones' total offense level was 47, but because this was greater than the guideline maximum of 43, the court treated his offense level as 43. Even a complete reversal of any role enhancement (rather than, say, a reduction to a two-level increase) would yield an offense level of 44, which would also be treated as 43. Jones would face the same guideline range of life in prison. We affirm the court's application of the enhancement.

B. Firearm Enhancement

Riley, Thomas Jones, and Abbott all argue that the district court erred in applying the two-level firearm enhancement to their sentences. We affirm the application of the firearm enhancement for Riley and Abbott but reverse as to Thomas Jones.

Under the principal drug Guideline, a two-level enhancement applies if "a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The enhancement may apply to a defendant who did not personally possess the firearm. United States v. Ramirez, 783 F.3d 687, 690 (7th Cir. 2015). Another person's possession can be attributed to a defendant if it involves "jointly undertaken criminal activity," so that "all acts and omissions of others that were—(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable

in connection with that criminal activity" are offense conduct attributable to the defendant. U.S.S.G. § 1B1.3(a)(1)(B); see also Ramirez, 783 F.3d at 690. Before a court can apply the firearm enhancement to a defendant who did not personally possess a firearm "or have actual knowledge of a coconspirator's gun possession," it must find by a preponderance of the evidence "(1) that someone in the conspiracy actually possessed a firearm in furtherance of the conspiracy, and (2) that the firearm possession was reasonably foreseeable to the defendant." Ramirez, 783 F.3d at 690. We review the district court's findings of fact for clear error and will reverse only "if we are left with a definite and firm conviction that a mistake has been made." Id.

1. Pierre Riley

At Riley's sentencing, the district court applied a two-level enhancement to Count 1 based on the multiple firearms possessed by his co-conspirators. Riley objected, arguing that he knew few of those in the conspiracy and that their possession of firearms was not readily foreseeable to him. The district court found otherwise and relied particularly on the foreseeability of firearms in the murder-for-hire plot. The court also found that it should have been foreseeable to Riley that members of a large-scale drug conspiracy would possess firearms.

As a preliminary matter, Riley argues that the court erred in relying on the possession of guns in connection with the murder-for-hire plot on the theory that the hitmen were not part of the broader drug conspiracy. Their possession of firearms, in his view,

thus could not have been in furtherance of or connected to the drug conspiracy.

We reject Riley's attempt to separate the murder-for-hire plot from the drug conspiracy it was intended to protect. The firearm enhancement may apply when the evidence establishes "that a gun was possessed during the commission of the offense or relevant conduct." United States v. Olson, 450 F.3d 655, 684 (7th Cir. 2006). For jointly undertaken criminal activity, relevant conduct includes acts and omissions "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1)(B).

The murder-for-hire plot was both relevant conduct and in furtherance of the drug conspiracy. Riley and Balentine decided to have a person killed because they suspected he was an informant. After an associate warned both Balentine and Riley not to sell drugs to that person anymore because he might be an informant, Balentine told Riley they needed to move faster with their plan. They hatched the murder-for-hire plot to further their drug conspiracy by preventing its detection and prosecution.

O'Bannon may have had his own reasons for participating in the murder-for-hire plot, given his suspicions that the targeted victim had robbed his home. But Riley and Balentine did not even include O'Bannon in their plan at first. They brought him in only later, in part because he could find out-of-state hitmen. Ample evidence showed that Riley and

Balentine devised the murder-for-hire plot to protect the drug conspiracy.

The possession of the guns by the hitmen was of course reasonably foreseeable to Riley. When officers pulled over O'Bannon, who was driving the hitmen toward the target's home, officers found ammunition in the vehicle. That same day, officers found two handguns in the hitmen's hotel room. The simple fact that it was a murder-for-hire plot made it foreseeable to Riley that guns or other dangerous weapons would likely be involved. We affirm the firearm enhancement for Riley.

2. Thomas Jones

Thomas Jones, the nephew of Michael Jones, pleaded guilty to Count 2 for distributing 50 grams or more of methamphetamine. That conviction was based on his sale of methamphetamine, on behalf of Michael Jones, to a suspected informant in January 2018.

The district court calculated Thomas Jones' offense level as 30 and his criminal history category as IV. Over his objection, the calculation included a two-level enhancement for firearms possessed in relation to the offense under U.S.S.G. § 2D1.1(b)(1). The court determined that Jones' guideline range was 135 to 168 months in prison. The court sentenced him to 135 months in prison on Count 2.

Thomas Jones challenges the application of the firearm enhancement on two grounds. First, he contends that the district court did not properly define

the scope of the criminal conduct he jointly undertook. In the alternative, he argues that the evidence did not support the district court's finding that any gun possession was both in furtherance of the criminal activity and reasonably foreseeable to him.

a. Scope of Criminal Activity

When applying § 1B1.3(a)(1)(B), the district court must first determine the scope of the criminal activity that the defendant agreed to undertake jointly. United States v. Salem, 597 F.3d 877, 886 (7th Cir. 2010). The "scope of the jointly undertaken criminal activity 'is not necessarily the same as the scope of the entire [scheme].' " Id. at 889, quoting § 1B1.3 cmt. n.3(B). After some initial uncertainty, the district court here made sufficiently clear that it was focusing on Thomas Jones' participation in the January 2018 drug transaction charged in Count 2 involving Thomas Jones, Michael Jones, and the suspected informant.

b. Actual Possession in Furtherance of the Criminal Activity

On the merits, Thomas Jones argues that the evidence did not support the court's finding that others' possession of firearms was in furtherance of that transaction and reasonably foreseeable to him. The transaction in Count 2 was negotiated between Michael Jones and the buyer. It was completed when Thomas Jones delivered drugs to the buyer. The buyer, who had never before met or spoken to Michael Jones, contacted Michael on January 25, 2018 via a social media site and asked to purchase

methamphetamine. Jones agreed, and the buyer drove to Kokomo to pick up the drugs. The buyer brought his wife, his child, and a few friends with him on the trip. His wife, who accompanied her husband for "protection," carried a concealed gun on her hip.

When the buyer arrived, he and his wife got into Michael Jones' vehicle to discuss the terms of the deal. Thomas Jones was also a passenger in the vehicle. Michael Jones and the buyer did not discuss anything orally. Instead, they negotiated by typing and then deleting notes on a cell phone. (The buyer speculated that they did so because Michael Jones did not know him and did not know whether he might be wearing a recording device.) After they agreed on a price, the parties went their separate ways. The buyer then met up with Thomas Jones later that evening to carry out the exchange of money for meth.

On these facts, the district court found that the firearm enhancement applied to Thomas Jones. As mentioned above, to apply the firearm enhancement for a defendant who did not personally possess a firearm, like Thomas Jones here, the court must find by a preponderance of the evidence "(1) that someone in the conspiracy actually possessed a firearm in furtherance of the conspiracy, and (2) that the firearm possession was reasonably foreseeable to the defendant." Ramirez, 783 F.3d at 690. Here, in defining the scope of the joint criminal activity for Thomas Jones, the court noted that a firearm was present during the Count 2 transaction. It ruled that the evidence supported the enhancement because "Mr. Michael Jones possessed a firearm in furtherance of the joint criminal act, and/or [the

buyer] possessed a firearm in furtherance of the joint criminal act; and such possession was reasonably foreseeable by the defendant."

On this record, application of the firearm enhancement to Thomas Jones was clearly erroneous. There must be actual possession of a firearm by a co-conspirator for the enhancement to apply on a theory of possession related to jointly undertaken criminal activity. See United States v. Vold, 66 F.3d 915, 920–21 (7th Cir. 1995) (assumption that co-conspirator possessed a firearm on a particular occasion based solely on evidence from others that he usually had a firearm was erroneous and "unwarranted"); accord, Ramirez, 783 F.3d at 690 (concluding that first step of court's inquiry was met when defendant conceded that her co-conspirators possessed four firearms in furtherance of the drug enterprise); United States v. Block, 705 F.3d 755, 763 (7th Cir. 2013). The record here includes no evidence that Michael Jones or even the buyer actually possessed a firearm in connection with the January 2018 transaction. The evidence does indicate that the buyer's wife wore a concealed firearm in the initial meeting, but Thomas Jones is not accountable for that firearm.

The district court found by a preponderance of the evidence that Michael Jones actually possessed a firearm during the January 2018 transaction. It justified its findings, in part, on testimony from a customer of Michael's who said that he was "always" armed. The customer testified that he never saw Michael Jones without a gun during their drug transactions and that he never left his home without a gun. But that customer was not a party to the drug

transaction in question. The court also pointed to an incident in April 2018 when Michael Jones and his girlfriend, Rebecca Myers, were pulled over by police and police recovered a pistol in the yard near where the traffic stop occurred. Thomas Jones was not involved in that incident, and it occurred several months after the events charged in Count 2. Finally, the court noted that guns were recovered during a search of Michael Jones' home. Again though, that search occurred on May 1, 2018, about four months after the drug transaction in question. None of that evidence establishes that Michael Jones actually possessed a firearm during the January 2018 transaction with the suspected informant.[3]

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[3] The dissenting opinion cites United States v. Luster, 480 F.3d 551, 558 (7th Cir. 2007), for the proposition that step one is not an "onerous burden" and can be satisfied by evidence showing that a co-conspirator "regularly carried a gun during the course of the conspiracy." We do not read Luster to hold that a co-conspirator's habit of carrying a gun is enough to establish that he actually possessed a firearm during the jointly undertaken criminal activity. Rather, the relevant language in Luster referred to the second requirement at step one: that the co-conspirator's actual possession of a firearm be in furtherance of the conspiracy. That, we said, was not an "onerous burden, as firearms found in close proximity to illegal drugs create a presumption that they are possessed in connection with the drug offense." Id. Evidence in Luster clearly established that Luster's coconspirators actually possessed firearms during the nine-month conspiracy to distribute cocaine: one co-conspirator stored drugs and firearms at his music studio and the other "regularly carried" a gun during the conspiratorial time period. Id. Here, by contrast, though testimony indicated that Michael Jones regularly possessed firearms, that testimony did not establish that he possessed a firearm during the joint criminal activity with Thomas Jones.

There was similarly no evidence that the buyer possessed a firearm in connection with the transaction. Instead, the only person who actually possessed a firearm at the January 2018 meeting was the buyer's wife. At trial, the buyer testified that he brought his wife and two friends to Kokomo with him when he met Jones. He said that he brought them as "security" to "watch [his] back" in case Jones, whom he was meeting for the first time, robbed him. When they arrived in Kokomo, his two friends stayed at a gas station with his daughter while he and his wife went for a ride in Michael Jones' vehicle. The buyer testified that his wife was carrying a gun and that she accompanied him for protection. He also testified that he told his wife that he was meeting Michael Jones to buy marijuana, not methamphetamine.

As discussed above, the district court determined that the scope of criminal activity for purposes of the Thomas Jones firearm enhancement was the January 2018 transaction. The buyer's wife was a participant in that purchase: though she was kept in the dark about details, she knew her husband was buying drugs and she accompanied him for protection. But she was on the other side of the transaction, which was a first-time sale by Michael Jones to the buyer. Michael and Thomas Jones were not conspiring with the buyer and his wife, so her possession of a firearm is difficult if not impossible to attribute to Thomas Jones.

c. Foreseeability

The district court found that it was foreseeable to Thomas Jones that the buyer's wife would carry a

gun given the "distrust" among the parties, the "amounts of drugs that were involved," and the "precautions that were taken with respect to the meet[ing]." The court also noted that Thomas Jones lived on and off with Michael, who had guns in his home, and that weapons had been involved in Thomas Jones' own drug dealing.

It is true that the parties to the January 2018 transaction distrusted one another. But the fact that Thomas Jones had never met the buyer or his wife and knew nothing about them cuts in the other direction: he had no reason to know that either of them would carry a gun to that first meeting, where Michael and Thomas brought no drugs. Her possession of a firearm was foreseeable to Thomas Jones only in the sense that parties to any drug transaction might be armed because, as the government argued at sentencing, drug dealing is dangerous. The firearm enhancement in § 2D1.1(b)(1) requires more specific evidence tied to the case. See Block, 705 F.3d at 764 (noting that while district courts may consider the "practical reality of the drug trafficking industry" in evaluating foreseeability, "common sense assumptions about the drug trade only go so far and cannot alone satisfy the foreseeability requirement"); Vold, 66 F.3d at 921 ("We have never held, however, that the mere risk involved in a drug manufacturing conspiracy establishes the reasonable foreseeability of a concealed firearm under Guideline § 2D1.1(b)(1) absent other evidence.").

The alternative conclusion would come close to making the firearm enhancement a strict liability penalty for everyone any time one party to a drug

transaction possessed even a concealed firearm, regardless of whether the particular defendant had any specific reason to expect that a gun would be present. This would be inconsistent with the purpose of the firearm enhancement, which is to reflect the increased danger of violence that exists when drug traffickers possess weapons. U.S.S.G. § 2D1.1(b)(1) cmt. n. 11(A). The firearm enhancement should not be applied to treat as equally culpable a person who brings the firearm to a deal and a counter-party who is not armed and is not even aware the other is carrying. In this case, there was no particular reason for Thomas Jones to foresee that the buyer's wife was carrying a firearm. The enhancement could have no deterrent effect. The district court clearly erred in applying the enhancement to Thomas Jones. We vacate his sentence and remand for resentencing.

3. Antwon Abbott

Abbott was convicted on Count 21 (possession with intent to distribute five grams or more of methamphetamine). The district court calculated his total offense level as 30 and his criminal history category as III. The court applied a two-level enhancement, finding that Abbott's co-conspirators possessed firearms and that their possession was foreseeable to him. The court concluded that Abbott's guideline range was 121 to 151 months in prison. He was sentenced to 121 months.

In applying the enhancement, the district court referred to evidence that Abbott and Balentine were involved in a jointly undertaken criminal activity, that Balentine possessed firearms in his home where

he stored and dealt drugs, and that his possession was reasonably foreseeable to Abbott.

Abbott argues on appeal that it was not reasonably foreseeable to him that Balentine possessed firearms. But intercepted communications between Balentine and Abbott undermine his argument and support the court's application of the enhancement. In March 2018, Abbott tried to sell Balentine two firearms for $600 apiece. Balentine declined to buy the guns, telling Abbott that he had just purchased another firearm. Balentine's admission to Abbott that he already had a firearm at his home was sufficient to demonstrate reasonable foreseeability as to Abbott. We affirm the application of the firearm enhancement to Abbott.

C. Career Offender Enhancement

Owens, Michael Jones, and Balentine all challenge the district court's findings that they were career offenders under U.S.S.G. § 4B1.1. The defendants argue that their prior Indiana state drug convictions do not qualify as predicate "controlled substance offense[s]" because Indiana law applies to substances not covered by the definition of a "controlled substance" under the federal Controlled Substances Act.

These defendants recognize that our decision in United States v. Ruth, 966 F.3d 642 (7th Cir. 2020), rejected an identical argument. They ask us to reconsider that decision. Ruth held that the definition of "controlled substance" in the Sentencing Guidelines is not limited to the definition of "controlled

substance" in the federal Controlled Substances Act. Id. at 654. In reaching that conclusion, we acknowledged there was a circuit split on that question with several circuits choosing an approach contrary to our own. Id. at 653. But without a signal from the Sentencing Commission that it intended to incorporate the federal definition into the Guidelines, we declined to do so ourselves. Id. at 652. Since Ruth, we have rejected repeated arguments that we should abandon it. We do so again here and affirm application of the career offender enhancement to these defendants.

D. Livelihood Enhancement

Balentine argues that the district court erred when it applied the so-called livelihood enhancement to him. A defendant who receives an aggravating role adjustment and who "committed the offense as part of a pattern of criminal conduct engaged in as a livelihood" is subject to a further two-level increase in his offense level. U.S.S.G. § 2D1.1(b)(16)(E). The phrase "engaged in as a livelihood" is defined in the commentary for § 4B1.3. A defendant engages in criminal conduct "as a livelihood" if "(A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then-existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period." U.S.S.G. § 4B1.3 cmt. n.2. Again, we review the district court's factual findings on such a guideline issue for clear error. United States v. Taylor, 45 F.3d 1104, 1106 (7th Cir. 1995).

Over Balentine's objection, the district court found by a preponderance of the evidence that he received $90,000 from his sale of methamphetamine from May 2017 to May 2018. The $90,000 figure was based on the conservative estimate that Balentine sold at least 20 kilograms of methamphetamine in that period and received $4,500 per kilogram, though other evidence indicated he received as much as $21,000 per kilogram. The court also found by a preponderance of the evidence that methamphetamine distribution was Balentine's primary occupation during that period.

On appeal, Balentine argues first that the district court erred in calculating the income he derived from drug trafficking because the court failed to consider the $81,000 he lost when the drugs Baird was transporting to Indiana were seized. If the court had considered that loss, he contends, his income from drug trafficking would not have satisfied the enhancement's first prong.[4]

The district court did not err in estimating the income Balentine derived from his criminal activity. As an initial matter, the government confirmed at sentencing that the drugs seized by police were not

[4] It is not clear why such a loss from an ongoing criminal sales business should actually matter under the Guidelines, let alone to a judge trying to implement the broader penological purposes of sentencing set forth in 18 U.S.C. § 3553(a). Consider, for example, whether a court should be concerned about the reasons for a loss. Should it matter whether a loss resulted from law enforcement interdiction or betrayal by a co-conspirator? But we need not dwell on the point here.

included in the 20-kilogram figure used to calculate Balentine's income over the relevant period. The court was therefore right to conclude that Balentine's gross income from selling methamphetamine was at least $90,000. Balentine argues that the $81,000 must be deducted from this figure to arrive at his net income, but this argument overlooks the fact that Balentine and his co-conspirators pooled their money together to purchase the seized drugs. It would not be proper to attribute the full loss of $81,000 to him even if we assumed it mattered.

The government satisfies prong one if it can show that the defendant earned more than 2,000 times the then-current federal minimum hourly wage. In this case, the government needed to show only that Balentine earned more than $14,500 in a year from drug dealing. Consequently, even if the full $81,000 loss were credited to Balentine, prong one would be satisfied if he earned more than $95,500 from dealing drugs. The court's estimate of $90,000 was conservative, and the full $81,000 loss cannot be attributed solely to Balentine. The district court would not have erred on prong one even if Balentine were entitled to deduct his net loss from the interdiction.

Balentine next argues that the district court erred in finding that drug dealing was his primary occupation because it failed to consider all of his legitimate sources of income. Balentine has not shown that he maintained any legitimate employment. He did not file any federal tax returns, and no W-2s were filed on his behalf showing he had legal employment at the time. Instead, he relies on the $18,000 annually

that he received from his mother's death settlement. Courts must consider the totality of the circumstances when determining whether criminal conduct is the defendant's primary occupation. U.S.S.G. § 4B1.3 cmt. n.2. The district court here did take into account the $18,000 that Balentine received annually from the settlement, even though it expressed skepticism about whether that was an "occupation." The district court did not clearly err in finding that the facts justified application of the livelihood enhancement to Balentine.[5]

E. Enhancement for Use of Violence

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[5] We doubt that receipt of passive income, such as from a structured settlement of a lawsuit or an annuity, would properly count as "legitimate employment" for guideline purposes under the definition in § 4B1.3. Nor is it apparent why a sentencing judge exercising sound discretion under § 3553(a) should care about the answer to that question. Countless questions can arise under the Guidelines that have little to do with an appropriate sentence. See, e.g., United States v. Marks, 864 F.3d 575, 576–77 (7th Cir. 2017) (application of career-offender guideline depended on whether state court records showed exactly which of several earlier convictions were covered by a particular earlier state parole revocation, bringing those convictions within time period considered for criminal history calculation); United States v. Iovino, 777 F.3d 578, 581 (2d Cir. 2015) (discussing precedents on counting victims under fraud Guideline and holding that where defendant embezzled from condominium association, individual condominium owners were all victims where their assessments were raised to cover losses); United States v. Smith, 751 F.3d 107, 120 (3d Cir. 2014) (counting as victims for guideline purposes both banks and individual account holders who suffered pecuniary harm). As we said in Marks, when faced with such arcane questions, a sentencing judge may and often should ask, "Why should I care?" 864 F.3d at 576.

Michael Jones' offense level was increased by two levels because "the defendant used violence, made a credible threat to use violence, or directed the use of violence." U.S.S.G. § 2D1.1(b)(2). He argues on appeal that the enhancement was erroneous. Again, we review the district court's findings of fact for clear error and will reverse only "if we are left with a definite and firm conviction that a mistake has been made." Ramirez, 783 F.3d at 690.

At sentencing, the district court found by a preponderance of the evidence that Jones had used violence to collect drug debts. The court relied mainly on evidence that in the second half of 2016, Michael Jones kidnapped a woman and held her hostage in his home because her boyfriend had not paid a drug debt.

Jones argues that the alleged kidnapping was outside the scope of the charged conspiracy and thus did not further it. He argues that the first evidence of his involvement in the conspiracy was from January 2018, long after the violent incident allegedly occurred.

The district court did not clearly err in finding that the facts supported the enhancement. The indictment alleged and trial evidence showed that the drug distribution conspiracy began no later than mid-2016. The PSR summarized evidence that Jones was involved before January 2018. In particular, the PSR referred to instances in December 2016 and August 2017 when Jones possessed drugs, or paraphernalia with drug residue on it, and money. An incident that occurred in the latter half of 2016 would have been

within the scope of the conspiracy and his involvement in it.

We also have no trouble agreeing with the district court that kidnapping as leverage to collect a drug debt can be understood as a credible threat of violence in furtherance of the conspiracy, or at least as relevant conduct. Evidence showed that Michael Jones owed money to Balentine. Late payments by his customers would prevent him from repaying his debts to Balentine. We affirm the enhancement for Michael Jones.

F. Drug Quantity Calculations

Michael Jones and Abbott also challenge the district court's drug quantity calculations used to set their respective base offense levels. Drug quantity, of course, is a powerful driver of guideline calculations for drug offenders.

The government must prove by a preponderance of the evidence the quantity of drugs attributable to the defendant. United States v. Freeman, 815 F.3d 347, 353 (7th Cir. 2016). A defendant in a drug conspiracy is responsible "not only for drug quantities directly attributable to him but also for amounts involved in transactions by coconspirators that were reasonably foreseeable to him." Id., quoting United States v. Turner, 604 F.3d 381, 385 (7th Cir. 2010).

Since drug networks and dealers rarely keep transparent and reliable accounts, determining drug quantities under the Guidelines is "not an exact

science," and district courts may make reasonable estimates based on the evidence. United States v. Austin, 806 F.3d 425, 431 (7th Cir. 2015), quoting United States v. Sewell, 780 F.3d 839, 849 (7th Cir. 2015). In estimating drug quantity, the district court may use "testimony about the frequency of dealing and the amount dealt over a specified period of time." United States v. Hernandez, 544 F.3d 743, 746 (7th Cir. 2008), quoting Noble, 246 F.3d at 952. That information must bear "sufficient indicia of reliability to support its probable accuracy." Freeman, 815 F.3d at 354, quoting United States v. Hankton, 432 F.3d 779, 789 (7th Cir. 2005). We review a district court's drug quantity calculation for clear error. Id. at 353.

1. Michael Jones

The court found by a preponderance of the evidence that Jones was accountable for 5,647.6 grams of methamphetamine, 4.73 grams of heroin, and 499 grams of cocaine, yielding a base offense level of 38. The court's calculation included drugs that Jones received while the conspiracy was ongoing but from individuals unrelated to the conspiracy. The court concluded that those transactions were also relevant conduct. The court's calculation also included drugs that were purchased and sold as part of the larger Count 1 conspiracy, even though Michael Jones was not directly involved himself in those transactions. The court reasoned that because Jones bought large amounts of drugs from Balentine, he had to know that the broader conspiracy was moving similarly large amounts of drugs through other people.

On appeal, Michael Jones argues that he should be responsible only for the 91 grams of methamphetamine that he sold to one buyer in January 2018, not the much larger quantities of drugs that Balentine transported from Georgia or the drugs Jones received from suppliers not charged in the indictment. Michael Jones contends that the drugs transported from Georgia were not reasonably foreseeable to him and that the drugs he received from people other than those named in the indictment were not within the scope of relevant conduct.

Drugs obtained from sources outside the conspiracy should not be included automatically in the relevant conduct analysis; a closer look is needed. "The mere fact that the defendant has engaged in other drug transactions is not sufficient to justify treating those transactions as 'relevant conduct' for sentencing purposes." United States v. Purham, 754 F.3d 411, 415 (7th Cir. 2014), quoting United States v. Crockett, 82 F.3d 722, 730 (7th Cir. 1996). The district court did not err here, however, when it included the drugs Jones received from sources outside the charged conspiracy.

When setting a defendant's base offense level, the district court considers acts or omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. U.S.S.G. § 1B1.3(a)(2). "Two offenses are part of the same course of conduct where they are 'connected or sufficiently related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.' " Purham, 754 F.3d at 414, quoting § 1B1.3 cmt. n.5(B). In determining whether two

offenses are sufficiently related to be considered the same course of conduct, courts should consider the "degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." U.S.S.G. § 1B1.3 cmt. n.5(B).

The drug transactions at issue here occurred from late 2017 to May 2018 and thus overlapped with the charged conspiracy. Cf. Purham, 754 F.3d at 414 (district court erred in treating as relevant conduct drug transactions that occurred two years before the charged conspiracy). Michael Jones regularly received methamphetamine from individuals outside the conspiracy. He received approximately one pound of methamphetamine from his outside source each week. Finally, both the conspiracy and Jones' transactions with the outside sources involved methamphetamine eventually sold in Kokomo, so the offenses were very similar. Cf. United States v. Soto-Piedra, 525 F.3d 527, 531–32 (7th Cir. 2008) (sale of crack cocaine by defendant's co-conspirators was not relevant conduct because defendant never sold crack himself and there was no evidence he knew that powder cocaine he sold was being converted to crack then sold by his co-conspirators); Purham, 754 F.3d at 415 (sales of cocaine to residents of same city on two separate occasions years apart did not link two instances as "relevant conduct").

The overlap between the drugs in the conspiracy and those Michael Jones obtained from other sources at the same time, for distribution in the same city, was sufficient to treat them as relevant conduct, for we "define relevant conduct broadly." United States v. Orozco-Sanchez, 814 F.3d 844, 850

(7th Cir. 2016). The district court did not err by treating the drugs Jones purchased from sources outside the charged conspiracy as relevant conduct.

The court also did not err when it included in the Michael Jones calculation the drugs Balentine transported from Georgia as part of the Count 1 conspiracy. Those transactions were foreseeable to Jones, who contributed money to make the purchase. The district court did not err in its drug quantity calculation for Michael Jones.

2. Antwon Abbott

The district court attributed 23.2 grams of actual methamphetamine and 127.6 grams of methamphetamine mixture to Abbott, for a base offense level of 28. At sentencing, Abbott objected to the 127.6 grams of methamphetamine mixture. According to wiretap evidence, that was the amount he purchased from Balentine. The court overruled the objection, finding that the evidence of drug quantity was sufficiently reliable.

Abbott first argues there was insufficient evidence that he was purchasing any methamphetamine from Balentine. During Abbott's bench trial, the case agent testified that Abbott texted Balentine, "Need one, cuz." Based on his knowledge obtained through the investigation, the agent explained that Abbott was requesting one ounce of methamphetamine. Abbott points out that Balentine sold drugs other than methamphetamine. But the agent testified that methamphetamine was Balentine's primary product, and other evidence he

gathered over the course of the investigation supported his understanding that Abbott was requesting methamphetamine. There was no error on this point.

Abbott argues next that a methamphetamine transaction he had planned with Balentine in March 2018 did not in fact occur. "[N]egotiated quantities of undelivered drugs can be included so long as there was true negotiation and not idle talk." United States v. Corral, 324 F.3d 866, 871 (7th Cir. 2003). Abbott's request was not idle talk. He reached out to Balentine on the evening of March 15 requesting one ounce of methamphetamine. According to Balentine, Perry Jones tried to contact Abbott about the deal later that evening. The deal was cancelled later when Abbott learned that his potential customer had stopped in Lafayette and would not be able to meet him to complete the deal. The evidence thus indicated that Abbott arranged to purchase one ounce of methamphetamine from Balentine. The district court did not clearly err in including that planned March 2018 transaction in its drug quantity calculation.

G. Inaccurate or Unreliable Evidence

Reed, O'Bannon, and Perry Jones all challenge their sentences on the ground that they were based on unreliable testimony or inaccurate information regarding their prior offenses. We reject these challenges.

Criminal defendants have a Fifth Amendment right to be sentenced based on accurate information. United States v. Tucker, 404 U.S. 443, 448–49, 92

S.Ct. 589, 30 L.Ed.2d 592 (1972), cited in United States v. Walton, 907 F.3d 548, 552 (7th Cir. 2018). To prove a violation of that right, "a defendant must show both that the information is false and that the court relied on it." Walton, 907 F.3d at 552.

1. Jason Reed

Reed was found guilty on Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 4 (distribution of controlled substances), and Count 9 (felon in possession of a firearm). The district court found that Reed's offense level was 43 and that his criminal history category was VI. The district court applied a three-level enhancement for his role as a manager or supervisor in the conspiracy. Reed's guideline sentence was life in prison. He was sentenced to concurrent terms of 420 months on Counts 1 and 4 and 120 months on Count 9.

Reed argues that his sentence should be vacated because his leadership role enhancement and drug quantity determination were based on unreliable testimony from Melissa Baird, his former girlfriend and co-conspirator. Specifically, he asserts that Baird's testimony that Reed obtained methamphetamine from Balentine for her benefit was unreliable, given that Baird had a personal relationship with Balentine. Similarly, he insists that Baird's testimony that Reed directed her was not believable since Baird had relationships with Balentine and Riley that were independent of Reed.

The district court addressed Baird's credibility. The judge saw her testify at trial and found her testimony to be credible. The judge considered Baird's personal relationship with Balentine but did not find it undermined her credibility. The judge also noted that while independent corroboration of Baird's testimony was not necessary, some was available in the form of Reed's coordination of the drug deal between Balentine and Owens. The court also overruled Reed's objection to the drug quantity and base offense level, again crediting Baird's testimony.

The district court's decision to credit Baird's testimony was not clearly erroneous. Reed's arguments attacking Baird's credibility are, to put it mildly, common in drug prosecutions. His attacks presented issues for the district court to weigh and decide. Baird's interest in seeking some favor or leniency in her own prosecution did not require the district court to discredit her testimony. United States v. Lockwood, 840 F.3d 896, 901 (7th Cir. 2016) (district court may credit testimony that is "totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant"), quoting United States v. White, 360 F.3d 718, 720 (7th Cir. 2004). Baird's personal relationship with Balentine did not require the court to find that Reed could not have obtained drugs for Baird. Nor did it preclude the court from finding that Baird was working on Reed's behalf. We affirm Reed's sentence.

2. Michael O'Bannon

The jury found O'Bannon guilty on Count 6 (conspiracy to use facilities of interstate commerce to commit murder for hire), Count 11 (possession with intent to distribute between 5 and 50 grams of methamphetamine), and Count 13 (possession of a firearm as a previously convicted felon). The district court found that O'Bannon's total offense level was 47, which was adjusted down to the maximum of 43, and that his criminal history category was IV. His guideline sentence would have been life, but statutory maximums on the counts of conviction meant that the guideline sentence became the de facto life sentence of 720 months (consecutive statutory maximums). The district court gave O'Bannon a long but below-guideline sentence totaling 450 months: concurrent terms of 450 months on Count 11 and 120 months each on Counts 6 and 13.

On appeal, O'Bannon argues that the district court calculated his guideline range based on unreliable evidence. At sentencing, he objected to the district court's reliance on statements made by an associate of his. The district court did not acknowledge the argument and did not make any findings as to the associate's reliability. O'Bannon asserts that the district court's silence on the point requires us to vacate his sentence. We agree that the district court's silence was an error, but a close look at the overall sentencing decision shows that the error was harmless.[6]

[6] The government did not respond to this argument in its brief, and we denied its later request to file a supplemental brief.

To explain, when a defendant is sentenced based on the drug quantity Guidelines, the court "must find the government's information sufficiently reliable to determine drug quantity by a preponderance of the evidence." United States v. Helding, 948 F.3d 864, 870 (7th Cir. 2020). The court must also "take care in determining the accuracy" of evidence that would substantially increase the drug quantity. Id. A sentencing court has discretion to credit statements of confidential informants about drug quantity, but when a defendant objects to the evidence as unreliable, the court needs to make a finding about its reliability. Id. at 866 (vacating sentence and remanding where district court made no finding about reliability of key evidence).

Here, the district court found that O'Bannon was responsible for a conservative estimate of 48 pounds or 21.77 kilograms of methamphetamine based on a statement made by O'Bannon's associate to the case agent. The associate did not testify at the trial or sentencing hearing. In his statement, the associate claimed that for at least two years, he traveled to Georgia with O'Bannon two to five times a month to conduct drug business. He said they would pick up two to eight pounds of methamphetamine on each trip. At another point, however, the associate said they bought seven to eight pounds of methamphetamine per trip. O'Bannon alerted the district court to this inconsistency and other errors in the associate's statement that made the math calculations "fuzzy," but the court did not make any

findings that explained its reliance on the associate's statement.[7]

That was a procedural error. Both Federal Rule of Criminal Procedure 32(i) and U.S.S.G. § 6A1.3 require the court to make findings on disputed issues. While we have often said that a district court need not belabor the obvious at sentencing, the reliability of secondhand information from an associate about the volume of a defendant's dealings is not obvious. A sentencing court "may pass over in silence frivolous arguments for leniency, but where a defendant presents an argument that is 'not so weak as not to merit discussion,' a court is required to explain its reason for rejecting that argument." United States v. Schroeder, 536 F.3d 746, 755 (7th Cir. 2008), quoting United States v. Miranda, 505 F.3d 785, 792 (7th Cir. 2007). O'Bannon pointed to inconsistencies suggesting that the associate's statement was unreliable. The court should have explained why it nevertheless found the associate credible. Helding, 948 F.3d at 871–72 (vacating sentence where trial court did not take steps to ensure that out-of-court statements from confidential informants about quantity defendant sold had "a modicum of reliability").

In this case, however, we are persuaded that even if the amounts attributed to O'Bannon by that associate were removed from the calculation, there

[7] The associate also claimed that methamphetamine sold for about $40,000 per kilogram in Kokomo. At the sentencing hearing, however, the case agent said that estimate was "not accurate whatsoever," and that methamphetamine sold for about $10,000 per kilogram.

would have been no bottom-line effect on the guideline recommendation. The judge made clear that he thought a preponderance of the evidence showed that O'Bannon could properly be found accountable for the even larger drug quantities attributed to Reggie Balentine and Perry Jones. If the judge had done so, he would have used a base offense level of 38 for O'Bannon's drug count rather than the 36 that was actually used. See O'Bannon Sent. Tr. 118–19, 128, 168.

In other words, despite the erroneous failure to address the credibility of the associate's statement, the judge cut O'Bannon a significant break on drug quantity. Numerous other enhancements would still have applied regardless of the base offense level: two levels for possession of firearms, two levels for using or directing use of violence, two levels for a pattern of criminal conduct, three levels for being a manager or supervisor, and two more levels for obstructing justice. O'Bannon Sent. Tr. 134.

If we were to remand for a finding on the associate's statement, and if the district court were to find the statement about drug quantity not credible, we have no doubt the court would hold O'Bannon accountable for Balentine's and Perry Jones' drug quantities. That would raise his base offense level by two levels. Under either base offense level, the total guideline calculation would still be literally off the chart, and the result would be a total offense level of 43 with a recommendation of a life sentence. Because no count of conviction authorized a life sentence, the life recommendation would in turn be converted to a recommendation of maximum statutory sentences

totaling 720 months. O'Bannon Sent. Tr. 135. The judge varied downward substantially from the recommendation, providing a detailed explanation under 18 U.S.C. § 3553(a) that showed thoughtful consideration of powerful aggravating and mitigating circumstances and the individual circumstances of O'Bannon's life and his crimes.

Because O'Bannon's guideline range and ultimate sentence would not change on remand, the district court's oversight was harmless, so we affirm O'Bannon's sentence. See Thomas, 897 F.3d at 817 (two-level error harmless where final range would still have been life in prison); Fletcher, 763 F.3d at 718 (guideline error harmless where either calculation was higher than statutory maximum, so that final guideline recommendation of statutory maximum would stay the same); United States v. Anderson, 517 F.3d 953, 966 (7th Cir. 2008) (guideline error harmless where Guidelines would call for same range upon resentencing).

3. Perry Jones

Perry Jones pleaded guilty to Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 7 (felon in possession of a firearm), and Count 17 (felon in possession of a firearm). The district court found that his total offense level was 38 and his criminal history category was V, which yielded a guideline range of 360 months to life. The court sentenced him to concurrent terms of 260 months on Count 1, 60 months on Count 7, and 60 months on Count 17.

At sentencing, Perry Jones sought a downward departure or variance on the ground that his criminal history category overstated the seriousness of his record. Specifically, he argued that his 1994 Indiana conviction for dealing cocaine within 1000 feet of school property, for which he was sentenced to 25 years in prison, did not deserve three criminal history points. The only information about the offense available to the court was that Jones had sold cocaine to an informant for $40. The Sentencing Guidelines encourage departures where criminal history calculations over- or underrepresent the seriousness of the defendant's record and the likelihood that the defendant will commit other crimes. U.S.S.G. § 4A1.3(b)(1). Courts have wide discretion in deciding whether to grant a departure or variance. United States v. Marin-Castano, 688 F.3d 899, 905 (7th Cir. 2012). Here, the district court denied Perry Jones' request for a downward departure or variance based on criminal history, though its final sentence was 100 months below the bottom of the guideline range.

On appeal, Jones argues that the district court erred by assuming that there were aggravating factors involved in his 1994 offense and giving "specific consideration" to those assumptions when setting his sentence. We are not persuaded.

In considering Perry Jones' request for a downward departure, the district court explained that it did not know what the rules were under Indiana law, but "it would appear that ... there was a reason for a serious sentence like that." The court acknowledged that the low ($40) stakes in the transaction presented the best argument for a

downward departure but said "there's just scant little here on the $40 to justify a 25-year sentence. I think there's got to be more." The court again expressed its suspicions about the circumstances of the offense, explaining, "I don't know what the law is, but a 25-year sentence is not insignificant. So I think that there had to be some serious stuff going on there. It's within a school. Maybe that was it." In response to defense counsel's assertion that the court should focus on what was in the record and not speculate on what may have justified the sentence, the court explained that it would be improper to look the other way and say this was a minor offense when "the severity of the sentence argues otherwise."

The district court had before it hard evidence showing that the state court imposed a 25-year sentence—a long sentence by any standards. It was not speculative for the court to interpret that sentence as a reflection of the seriousness of the offense. Though the low stakes of the transaction weighed in favor of a downward departure, the district court, with the limited information it had before it, was not required to find that the Guidelines overstated the seriousness of Jones' 1994 conviction.

More generally, as we see the issue, the problem is not that the district court relied on bad information. The problem is instead that Jones did not provide enough information to convince the court to disregard the guideline calculations. Based on the available information about Jones' 1994 conviction, the district court correctly assessed three criminal history points. Jones offered one additional detail (that the deal was for only $40 worth of drugs) but

nothing more. The judge considered the point and candidly speculated about possible explanations for the severe sentence. In the absence of more information about the circumstances of the 1994 case, the judge simply was not persuaded to depart. Jones has not shown that the court relied on speculation in setting his (below-guideline) sentence.

It is possible that additional information might show that three criminal history points overstate the seriousness of the 1994 conviction. But the district court's calculation was correct. If Jones had additional information showing that his criminal history points overstated the seriousness of his 1994 conviction, he had the opportunity to provide it to the court and should have done so. The court was not required to depart from the Guidelines as written, especially without reliable information supporting Jones' argument that those provisions overstated the seriousness of the conviction.

We recognize that the judge wondered aloud why the 1994 sentence was so serious and speculated about possible explanations. There is nothing wrong with such questioning and speculating along the path to a final decision. The judge's questions could not be answered by the parties, but that does not mean the court relied upon false information in deciding the sentence. Instead, the court followed the Guidelines in the criminal history calculation for the 1994 conviction. Jones simply did not provide information to the court requiring it to vary or depart from that technically correct calculation.

Moreover, considering the court's broader explanation for the sentence, the 1994 conviction that is the focus on appeal played little if any role in the court's ultimate decision to give Jones a below-guideline sentence. When addressing criminal history, the court focused instead on several undisputed aspects of his record that weighed against a downward departure or variance. Jones had been in and out of prison his whole life. Even after he received a 25-year sentence when he was only 18 years old, he continued to engage in crime. The court also noted that Jones had been released early on parole for the 1994 conviction, but he violated parole and went back to prison, as he did several other times. The district court did not err in its treatment of Jones' criminal history in general or the 1994 conviction in particular.

H. Substantive Reasonableness

At the time of sentencing, Perry Jones was 45 years old. He reports that he is in poor health and asserts that African American men his age have an average life expectancy of about seventeen years. Even the below-guideline sentence of 260 months may amount to a life sentence for him. Given all this, Perry Jones argues that his sentence was substantively unreasonable.

We review the substantive reasonableness of a district court's sentencing decisions for abuse of discretion. United States v. Griffith, 913 F.3d 683, 687 (7th Cir. 2019). "When assessing the substantive reasonableness of a sentence under the abuse of discretion standard, we presume that a within-guidelines sentence is reasonable." Id. at 689. It

follows that we also presume that a below-guidelines sentence is not unreasonably harsh. Id. The defendant "bears the burden of rebutting that presumption by demonstrating that the sentence is unreasonably high in light of the section 3553(a) factors." Id.

Jones argues that his "addiction-related, non-violent, low-level drug distribution[ ]" convictions mandate a lower sentence. In other words, he contends that the circumstances of his criminal history and life in general justify a further reduced sentence.

We have often said that the probability that a defendant "will not live out his sentence should certainly give pause to a sentencing court." United States v. McDonald, 981 F.3d 579, 582 (7th Cir. 2020), quoting United States v. Wurzinger, 467 F.3d 649, 652 (7th Cir. 2006). Such sentences can arise where a defendant has amassed a long record of repeated criminal activity, as Perry Jones had. We have affirmed such de facto life sentences where the sentencing court appreciated the severity of the sentence, as the court did here. Id.

Different judges might have responded differently to Jones' mitigating arguments, but such differences do not show error. The district court considered these circumstances in setting this sentence. The court acknowledged that Jones had faced many challenges in his life and that he had been introduced to drugs early on, leading to an addiction that he struggled to overcome. The court acknowledged that Jones' criminal activity was not necessarily a product of greed or a desire to create a

large-scale drug operation but was instead driven by his addiction. The court also considered Jones' age when setting his below-guideline sentence. The court ultimately concluded, however, that the seriousness of the offense, including the involvement of guns and the fact that Jones fled from police on multiple occasions, justified the sentence imposed.

Jones cites the thorough opinion by the late Judge Weinstein in United States v. Bannister, 786 F. Supp. 2d 617 (E.D.N.Y. 2011), which reviewed broad issues of race, poverty, and history shaping the criminal justice system, federal sentencing law, and individual sentencing decisions. Bannister is an example of the broad discretion district judges regained in the wake of United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), as the Sentencing Guidelines were rendered effectively advisory.

The district court here had the discretion to follow an approach like Bannister, but it was not required to do so. The court in this case weighed the mitigating factors differently than Jones would have liked. That is not sufficient to rebut the presumption that his below-guideline sentence was not unreasonably severe. See United States v. Trujillo-Castillon, 692 F.3d 575, 578 (7th Cir. 2012) (district court did not err in evaluating mitigating evidence simply because it assigned such evidence less weight than defendant would have liked).

Perry Jones also argues that the current conversion ratio for methamphetamine is "faulty" because it does not comport with changes in how the

drug is manufactured and trafficked. This challenge amounts to a generalized policy disagreement with the Guidelines. District courts may depart or vary from the advice of the Guidelines based on such policy disagreements, but they are not obliged to do so. United States v. Oberg, 877 F.3d 261, 264 (7th Cir. 2017); United States v. Stephens, 986 F.3d 1004, 1010 (7th Cir. 2021) ("[A] sentencing court may pass over generalized policy disagreements with the Guidelines."). The potentially "problematic" treatment of methamphetamine in the Guidelines is an issue that may be addressed by Congress or the Sentencing Commission, or by individual judges. It does not make Perry Jones' sentence unreasonable. We affirm his sentence.

I. Acquitted Conduct

Finally, O'Bannon argues that he was unconstitutionally sentenced based on conduct for which he was acquitted. The jury acquitted him of the Count 1 conspiracy, but the district court nevertheless imposed a three-level enhancement for his role as a manager or supervisor of that conspiracy after finding by a preponderance of the evidence that O'Bannon had actually participated in the conspiracy. As O'Bannon acknowledges, his argument is foreclosed by binding Supreme Court precedent. United States v. Watts, 519 U.S. 148, 157, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) (jury's verdict of acquittal does not prevent sentencing court from considering conduct underlying acquitted charge so long as conduct has been proved by preponderance of evidence); accord, e.g., United States v. Bridgewater, 950 F.3d 928, 938 (7th Cir. 2020); United States v. Hurn, 496 F.3d 784,

788 (7th Cir. 2007). The district court did not err on this point.

* * *

We AFFIRM the convictions of all the defendants. We also AFFIRM the sentences for all defendants, except for Thomas Jones, whose sentence is VACATED and whose case is REMANDED for resentencing consistent with this opinion.

Kirsch, Circuit Judge, dissenting in part.

I agree with the majority's resolution of every issue but one. In my view, the district judge committed no error in applying the firearm enhancement to Thomas Jones, and therefore, he is not entitled to resentencing.

Our review of the district court's application of a firearm enhancement is highly deferential. "We review the district court's factual findings for clear error and will reverse only if we are left with a definite and firm conviction that a mistake has been made." United States v. Ramirez, 783 F.3d 687, 690 (7th Cir. 2015). For the enhancement to apply to Thomas Jones, the district court needed to find by a preponderance of the evidence that: (1) someone in the jointly undertaken criminal activity actually possessed a firearm in furtherance of the activity, and (2) the firearm possession was reasonably foreseeable to Thomas Jones. See id. The district court found that Thomas Jones's uncle and co-conspirator Michael Jones possessed a firearm in furtherance of the joint criminal act—the January 2018 drug deal—and his

possession was reasonably foreseeable to Thomas Jones. Neither finding was erroneous.

A sentencing judge's factual finding at step one "is not an onerous burden," and can be satisfied by evidence that a co-conspirator "regularly carried a gun during the course of the conspiracy." See United States v. Luster, 480 F.3d 551, 558 (7th Cir. 2007). The district court found that Michael Jones possessed a gun at the January 2018 transaction based on exactly this type of evidence. The judge found credible the trial testimony of Michael Bradley, a drug dealer who purchased methamphetamine from Michael Jones on several occasions from the fall of 2017 to March 2018. Bradley testified that Michael Jones was "always" armed and never left his home without a gun. Bradley further testified that "[t]here was never a time that [Michael Jones] didn't have a gun" during their drug transactions. According to Bradley, Michael Jones kept a gun on his person and in his Hummer—the same vehicle in which Thomas and Michael Jones met with the buyer and his wife and executed the January 2018 transaction. The judge also relied on corroborating evidence demonstrating that Michael Jones possessed guns on other occasions. This reliable evidence that Michael Jones always possessed a gun and kept a gun in his Hummer supported an inference that he possessed a gun at the January 2018 drug deal.

The majority eschews clear error review to discard the district court's supported factual findings. But nothing in the record suggests that the district court made a mistake. The majority says that the record contains "no evidence that Michael Jones ...

actually possessed a firearm in connection with the January 2018 transaction." Ante at ——. To reach that conclusion, the majority dismisses Bradley's testimony because he "was not a party to the drug transaction in question." Id. at ——. But sentencing judges are not required to track down direct evidence from an eyewitness or an individual actually involved in the particular jointly undertaken activity. Bradley's credible testimony supported a finding that Michael Jones possessed a gun at the January 2018 drug transaction because he "always" possessed a gun during drug transactions from the fall of 2017 to March 2018 and kept one in his Hummer. Nothing in the record suggests that this inference was implausible. See United States v. DeLeon, 603 F.3d 397, 402 (7th Cir. 2010). The majority might view Bradley's testimony differently than the district judge, but our "task on appeal is not to see whether there is any view of the evidence that might undercut the district court's finding; it is to see whether there is any evidence in the record to support the finding." United States v. Wade, 114 F.3d 103, 105 (7th Cir. 1997); see also United States v. Ford, 22 F.4th 687, 693 (7th Cir. 2022) (clear error does not permit reversal simply because the facts before the sentencing judge "allowed room for argument"); United States v. Jarrett, 705 F.2d 198, 208 (7th Cir. 1983) (as the factfinder at sentencing, the district court is entitled to accord such weight as it sees fit to witness testimony).

Because the majority holds that the district judge clearly erred at step one, it does not address whether Michael Jones's gun possession was reasonably foreseeable to Thomas Jones. Clearly, it

was. Michael and Thomas Jones lived together and conspired to sell methamphetamine at the January 2018 transaction and on several other occasions. According to Rebecca Myers, after Thomas Jones got out of prison for another meth conviction in December 2017, he lived with her and Michael Jones. As the majority acknowledges, the district court "noted that Thomas Jones lived on and off with Michael, who had guns in his home[.]" When agents searched the residence in May 2018, they recovered four firearms. The district judge also found that there was evidence that Thomas Jones "was not a stranger to weapons in his own past drug dealings," making it foreseeable that this type of transaction might include guns. (In February 2016, officers executing a search warrant searched Thomas Jones's safe and found a gun, magazine, and drugs.) There is nothing unusual about guns at drug transactions, particularly by those who regularly possess guns in connection to drug dealing. See United States v. Jones, 900 F.3d 440, 449 (7th Cir. 2018) ("Our court has recognized that, given the dangers of drug trafficking, guns and drugs often go hand in hand."). I would affirm the district court's unremarkable factual finding that Michael Jones's gun possession at the January 2018 drug deal was reasonably foreseeable to Thomas Jones.

In sum, I respectfully dissent from the majority's holding that the district court clearly erred in applying the firearm enhancement based on Michael Jones's possession at the January 2018 transaction. But this holding does not bar application of the enhancement for a different reason on remand. The first time around, the district court opted to define the scope of the joint criminal undertaking as

the January 2018 transaction because "even though [it] could" find that Thomas Jones participated in the broader conspiracy, the judge didn't believe he needed to make such a finding. It will be up to the district judge on remand to decide whether to re-evaluate the scope of Thomas Jones's participation in jointly undertaken criminal activity.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, V. PIERRE RILEY, ET AL., DEFENDANTS

CAUSE NO. 1:18-CR-00116-JRS-MJD

FIFTH SUPERSEDING INDICTMENT

The Grand Jury charges that:

Count One

(21 USC. 841 (a)(l) and 846-Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances)

Beginning at a date unknown to the grand jury, but no later than mid-2016, and continuing up to and including May 1, 2018, in the Southern District of Indiana and elsewhere, PIERRE RILEY, REGGIE BALENTINE a/k/a Pudge, MICHAEL O'BANNON a/k/a Lunchy, KRISTIN KINNEY a/k/a Cupcake, MICHAEL JONES a/k/a MJ, JASON REED a/k/a Jamon a/k/a Jasil, DERRICK OWENS, DESHOUN EVERHART, PERRY JONES, SHAUN MYERS a/k/a OL, MELISSA BAIRD, BRADLEY CLARK, and

THOMAS JONES, defendants herein, did knowingly conspire together and with diverse other persons, known and unknown to the Grand Jury, to possess with intent to distribute and to distribute controlled substances, in violation of Title 21, United States Code, Section 84l(a)(l).

OBJECT OF THE CONSPIRACY

The charged conspiracy had the following objects:

1. The possession with intent to distribute and the distribution of 50 grams or more of methamphetamine (actual), a Schedule II controlled substance.

2. The possession with intent to distribute and the distribution of a mixture oi substance containing a detectable amount of cocaine, a Schedule II controlled substance.

3. The possession with intent to distribute and the distribution of a mixture or substance containing a detectable amount of heroin, a Schedule II controlled substance.

MANNER AND MEANS

1. REGGIE BALENTINE was the leader of a drug trafficking organization that distributed methamphetamine, cocaine, and heroin in Kokomo, Indiana.

2. PIERRE RILEY, a resident of Macon, Georgia, supplied BALENTINE's organization with controlled substances, including methamphetamine and cocaine.

3. REGGIE BALENTINE would pool cash with individuals such as PERRY JONES and SHAUN MYERS, both Kokomo, Indiana residents, to purchase controlled substances from PIERRE RILEY.

4. PIERRE RILEY and REGGIE BALENTINE would utilize female couriers to travel between Kokomo, Indiana and the State of Georgia to deliver controlled substances to REGGIE BALENTINE in Kokomo, Indiana, and to deliver drug proceeds to PIERRE RILEY in Georgia. These couriers would travel by bus or vehicle to complete this task.

5. REGGIE BALENTINE worked with individuals such as PERRY JONES and others to distribute the controlled substances in Kokomo, Indiana, and to pick up outstanding drug debts for REGGIE BALENTINE.

6. REGGIE BALENTINE would distribute controlled substances to individuals such as MICHAEL O'BANNON, MICHAEL JONES, JASON REED, DERRICK OWENS, DESHOUN EVERHART, PERRY JONES and SHAUN MYERS. Throughout the conspiracy, the defendants receiving the controlled substances would further distribute them to others for a profit.

7. REGGIE BALENTINE would routinely distribute these controlled substances on credit, with the expectation that the drug debt be paid after the controlled substances were re-sold to others.

8. MICHAEL JONES was assisted in his methamphetamine distribution activities in Kokomo, Indiana by THOMAS JONES.

9. REGGIE BALENTINE routinely stored drugs and/or drug proceeds with individuals such as KRISTIN KINNEY, MELISSA BAIRD, and BRADLEY CLARK. KRISTIN KINNEY would bring REGGIE BALENTINE the controlled substances when BALENTINE was ready to sell them. KINNEY would also assist in counting the drug proceeds for BALENTINE. MELISSA BAIRD acted in a similar role as KINNEY, in that she would hold BALENTINE's controlled substances, and traveled to Georgia at BALENTINE's request to pick up controlled substances. BRADLEY CLARK resided at a Kokomo, Indiana home which REGGIE BALENTINE and PERRY JONES utilized to store controlled substances and firearms.

10. Throughout the conspiracy, the defendants routinely utilized cellular phones to communicate and discuss their ongoing drug distribution activities. The defendants spoke on telephones using coded and cryptic language to discuss their drug trafficking operation.

11. Throughout the conspiracy, many of the coconspirators also possessed firearms in relation to their drug trafficking activities, in order to protect themselves, their drugs, and their drug proceeds.

OVERT ACTS

1. On July 11, 2016, REGGIE BALENTINE possessed $5,076 in cash and two cellular phones in Kokomo, Indiana; at least one of these phones was used by REGGIE BALENTINE to further his drug trafficking activities.

2. On December 7, 2016, MICHAEL JONES possessed heroin and $3,935 in currency in Kokomo, Indiana.

3. On August 22, 2017, MICHAEL JONES possessed a digital scale with methamphetamine residue on it and $1,708 in currency in Kokomo, Indiana.

4. On December 8, 2017, REGGIE BALENTINE sold approximately 52.8 grams of methamphetamine in Kokomo, Indiana.

5. On December 13, 2017, REGGIE BALENTINE sold approximately 44.2 grams of methamphetamine in Kokomo, Indiana.

6. On January 11, 2018, REGGIE BALENTINE sold approximately 52.8 grams of methamphetamine in Kokomo, Indiana.

7. On January 26, 2018, DESHOUN EVERHART met with MICHAEL JONES and THOMAS JONES in Kokomo, Indiana to arrange for the purchase of methamphetamine from MICHAEL JONES.

8. On January 26, 2018, after MICHAEL JONES agreed to sell methamphetamine to DESHOUN EVERHART, THOMAS JONES met again with DESHOUN EVERHART in Kokomo, Indiana and delivered approximately 89.1 grams of methamphetamine to DESHOUN EVERHART.

9. On February 5, 2018, REGGIE BALENTINE sold approximately 110.2 grams of methamphetamine in Kokomo, Indiana.

10. On February 23, 2018, MICHAEL O'BANNON and REGGIE BALENTINE spoke on the phone; in these phone calls, MICHAEL O'BANNON requested multiple ounces of methamphetamine, which REGGIE BALENTINE agreed to provide.

11. On February 24, 2018, REGGIE BALENTINE and JASON REED spoke on the phone to arrange for the delivery of methamphetamine to Terre Haute, Indiana resident DERRICK OWENS.

12. On February 24, 2018, REGGIE BALENTINE and KRISTIN KINNEY drove from Kokomo, Indiana to Indianapolis, Indiana to meet with DERRICK OWENS; in that meeting, REGGIE BALENTINE gave DERRICK OWENS approximately 160.9 grams of methamphetamine, and DERRICK OWENS gave REGGIE BALENTINE currency and two firearms in exchange.

13. On February 26, 2018, MICHAEL O'BANNON called REGGIE BALENTINE and, using coded language, asked for five ounces of methamphetamine.

14. After receiving the request for five ounces of methamphetamine on February 26, 2018, REGGIE BALENTINE then called PERRY JONES and asked PERRY JONES to bring MICHAEL O'BANNON the controlled substances that O'BANNON had requested.

15. On March 1, 2018, REGGIE BALENTINE received phone calls from MICHAEL JONES and MICHAEL O'BANNON, both using coded language to request ounces of methamphetamine from REGGIE BALENTINE; thereafter, REGGIE BALENTINE

called PERRY JONES and requested that PERRY JONES bring him methamphetamine, so that he could get the methamphetamine distributed to MICHAEL JONES and MICHAEL O'BANNON.

16. On March 1, 2018, PIERRE RILEY, REGGIE BALENTINE, and MICHAEL O'BANNON engaged in phone calls discussing an individual they believed was a government informant (hereinafter referred to as Individual 1). In these phone calls, the three agreed to kill Individual 1, due, in part, to the belief that Individual 1 was a government informant, and due, in part, to the belief that Individual 1 had robbed the organization of drugs and/or drug proceeds.

17. On March 1, 2018, MICHAEL O'BANNON called an alternate source of supply, a relative in Georgia, and requested that someone be sent to Kokomo, Indiana to kill Individual 1.

18. On March 2, 2018, MICHAEL O'BANNON met with two individuals who had arrived from Georgia to kill Individual 1, and drove those two individuals to Individual 1 's Kokomo, Indiana residence, driving them around the block repeatedly, so that these individuals would know where Individual 1 lived.

19. On March 5, 2018, KRISTIN KINNEY traveled from Kokomo, Indiana to the Megabus stop in Indianapolis, Indiana, where she picked up a female courier who had arrived from Georgia with controlled substances. KINNEY then drove the courier back to Kokomo, Indiana.

20. On March 8, 2018, REGGIE BALENTINE traveled from Kokomo, Indiana to the Megabus stop

in Indianapolis, Indiana, where he picked up a female courier who had arrived from Georgia, and brought her to Kokomo, Indiana.

21. On March 14, 2018, REGGIE BALENTINE contacted a law office, and asked to retain an attorney to represent JASON REED in the criminal case that JASON REED sustained after picking up firearms from REGGIE BALENTINE's residence on March 11, 2018.

22. On March 19, 2018, a female courier traveled via Megabus from Georgia to Indianapolis, Indiana with controlled substances for REGGIE BALENTINE. At REGGIE BALENTINE's direction, KRISTIN KINNEY picked the female courier up in Indianapolis, took custody of the controlled substances from the courier, and brought the female courier to Kokomo, Indiana.

23. On April 8, 2018, REGGIE BALENTINE called MICHAEL O'BANNON and asked MICHAEL O'BANNON for an extra key to 720 S. Courtland Avenue, Kokomo, Indiana, because REGGIE BALENTINE had locked himself out of that residence; in this phone call, REGGIE BALENTINE relayed to MICHAEL O'BANNON that the request was urgent, as REGGIE BALENTINE had left a large amount of methamphetamine in plain view inside the residence.

24. On April 12, 2018, MICHAEL O'BANNON and REGGIE BALENTINE spoke on the phone; MICHAEL O'BANNON gave REGGIE BALENTINE a list of his drug customers that owed MICHAEL O'BANNON drug proceeds, so that REGGIE

BALENTINE could collect them for MICHAEL O'BANNON if he was unable to do so.

25. On April 22, 2018, in preparation for obtaining another load of methamphetamine and cocaine from PIERRE RILEY in Georgia, REGGIE BALENTINE collected drug proceeds in Kokomo, Indiana from SHAUN MYERS and other defendants.

26. On April 23, 2018, REGGIE BALENTINE drove MELISSA BAIRD from Kokomo, Indiana to the Megabus stop in Indianapolis, Indiana, so that MELISSA BAIRD could travel via Megabus to Georgia to drop off drug proceeds to PIERRE RILEY, and pick up methamphetamine and cocaine from PIERRE RILEY.

27. On April 25, 2018, MELISSA BAIRD traveled via Megabus from Georgia, carrying a bag that contained approximately 3,900.6 grams of methamphetamine and 499.6 grams of cocaine. After this bag of controlled substances was seized in Tennessee, MELISSA BAIRD informed REGGIE BALENTINE of the seizure via cell phone.

28. After the April 25, 2018 seizure of controlled substances, REGGIE BALENTINE and SHAUN MYERS had a discussion over the phone, wherein they discussed sending a second courier to Georgia to pick up more methamphetamine.

29. On April 26, 2018, a female courier left SHAUN MYERS' Kokomo, Indiana residence and traveled in a vehicle to Georgia, where she met with PIERRE RILEY and picked up approximately 1,327.9 grams of methamphetamine.

30. On May 1, 2018, PIERRE RILEY possessed approximately $12,200 in cash at a residence in Macon, Georgia.

31. On May 1, 2018, REGGIE BALENTINE and PERRY JONES possessed $14,891 in cash at 720 S. Courtland Avenue, Kokomo, Indiana. On this date, PERRY JONES also possessed a firearm, heroin, and cocaine at 720 S. Courtland Avenue.

32. On May 1, 2018, KRISTIN KINNEY possessed $15,000 of REGGIE BALENTINE's cash, as well as 1,627.3 grams of REGGIE BALENTINE's methamphetamine at a Kokomo, Indiana residence.

33. On May 1, 2018, REGGIE BALENTINE and PERRY JONES were storing approximately 587.3 grams of methamphetamine, 75.7 grams of heroin, 122.4 grams of cocaine, and multiple firearms at a Kokomo, Indiana residence, 312 S. Calumet Street, which was utilized as a 'stash house' by both REGGIE BALENTINE and PERRY JONES.

34. On May 1, 2018, MICHAEL O'BANNON possessed approximately 48 grams of methamphetamine, 13 .9 grams of cocaine, three firearms, and approximately $3,205 in cash at a residence, 1121 N. Courtland Avenue, Kokomo, Indiana.

35. On May 1, 2018, MICHAEL JONES possessed approximately 34 grams of methamphetamine, four grams of heroin, four firearms, and $9,481 in cash at a residence, 1935 Windsor Court, Kokomo, Indiana.

All in violation of Title 21, United States Code, Section 846.

Count Two

(21 USC. 841 (a)(l) Distribution of Controlled Substances)

On or about January 26, 2018, in the Southern District of Indiana, MICHAEL JONES a/k/a MJ and THOMAS JONES, defendants herein, knowingly and intentionally distributed 50 grams or more of methamphetamine (actual), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(l) and Title 18, United States Code, Section 2.

Count Three

(21 USC. 841 (a)(l) Possession with Intent to Distribute Controlled Substances)

On or about January 26, 2018, in the Southern District of Indiana, DESHOUN EVERHART, defendant herein, knowingly and intentionally possessed with the intent to distribute 50 grams or more of methamphetamine (actual), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 84l(a)(l).

Count Four

(21 US.C. 841 (a)(1) Distribution of Controlled Substances)

On or about February 24, 2018, in the Southern District of Indiana, REGGIE BALENTINE a/k/a

Pudge and JASON REED a/k/a Jamon a/k/a Jasil, defendants herein, knowingly and intentionally distributed 50 grams or more of methamphetamine (actual), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 84 l(a)(l) and Title 18, United States Code, Section 2.

Count Five

(21 US.C. 841 (a)(1) Possession with Intent to Distribute Controlled Substances)

On or about February 24, 2018, in the Southern District of Indiana, DERRICK OWENS, defendant herein, knowingly and intentionally possessed with the intent to distribute 50 grams or more of methamphetamine (actual), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(l).

Count Six

(18 US.C. 1958, Conspiracy to Use Interstate Commerce in the Commission of Murder-for-Hire)

Beginning in or around early 2018, continuing until on or about March 2, 2018, the exact dates being unknown to the grand jury, in the Southern District of Indiana and elsewhere, defendants PIERRE RILEY, REGGIE BALENTINE a/k/a Pudge, and MICHAEL O'BANNON a/k/a Lunchy, did knowingly and unlawfully conspire together and with diverse other persons, known and unknown to the Grand Jury, to knowingly cause one or more individuals to travel in interstate commerce, and to use and cause another to use an interstate facility, that is, a

telephone, with the intent that a murder be committed in violation of the laws of the State of Indiana, and as consideration for a promise and agreement to pay a thing of pecuniary value, to wit: a sum of United States currency.

MANNER AND MEANS

1. Defendants PIERRE RILEY and REGGIE BALENTINE agreed to pay U.S. Currency to effect the murder an individual (referred to above in Count One, and hereinafter, as Individual 1).

2. Defendant MICHAEL O'BANNON was tasked with obtaining the individuals from Georgia to commit Individual 1 's murder.

3. Defendant MICHAEL O'BANNON was further tasked with showing the individuals where Individual 1 lived in Kokomo, Indiana, so as to assist the individuals in performing the murder.

OVERT ACTS

1. On March 1, 2018, PIERRE RILEY and REGGIE BALENTINE spoke over the phone to discuss Individual 1. In these phone calls, the two agreed, in coded language, to have Individual 1 killed. PIERRE RILEY and REGGIE BALENTINE agreed that they would pay to have this murder committed, and the concern was expressed that the killer(s) be hired from outside the Kokomo, Indiana area.

2. On March 1, 2018, PIERRE RILEY instructed REGGIE BALENTINE to call MICHAEL O'BANNON and have MICHAEL O'BANNON call a relative in

Georgia to obtain individuals willing to kill Individual 1.

3. REGGIE BALENTINE then called MICHAEL O'BANNON on March 1, 2018, and instructed MICHAEL O'BANNON to make the call so as to obtain individuals to travel to Kokomo, Indiana to kill Individual 1.

4. Later on March 1, 2018, MICHAEL O'BANNON informed REGGIE BALENTINE that he had made the phone call to Georgia, as instructed.

5. As a result of the phone call made by MICHAEL O'BANNON on March 1, 2018, Sirajuddin Abdul Qadir, Jamil Williamson, and Cynthia Foster drove from Georgia to Kokomo, Indiana in the overnight hours, arriving in Kokomo, Indiana in the early morning hours of March 2, 2018, and obtaining a hotel room at the Quality Inn and Suites in Kokomo, Indiana.

6. Early on March 2, 2018, MICHAEL O'BANNON met with Sirajuddin Abdul Qadir and Jamil Williamson. MICHAEL O'BANNON drove them to the location of Individual 1 's Kokomo, Indiana residence, and drove them past this residence repeatedly before driving them back to the Quality Inn and Suites in Kokomo, Indiana, where the two were staying.

7. On March 2, 2018, MICHAEL O'BANNON drove Sirajuddin Abdul Qadir and Jamil Williamson to the Quality Inn and Suites in Kokomo, Indiana, where Qadir and Williamson possessed two firearms in their hotel room.

All in violation of Title 18, United States Code, Section 1958.

Count Seven

(18 US.C. 922(g)(l) Felon in Possession of a Firearm)

On or about March 8, 2018, in the Southern District of Indiana, PERRY JONES, defendant herein, did knowingly possess in and affecting interstate commerce a firearm, to wit: a black Springfield Armory XD40 handgun, and/or a black Taurus PTl 1 G 9mm handgun, after having knowingly been convicted of a felony offense punishable by imprisonment for a term exceeding one year, to wit: felony Possession of Cocaine, Howard County, Indiana, Cause Number 34D01-9308-CF-00068; felony Dealing in Cocaine within 1,000 Feet of School Property, Howard County, Indiana, Cause Number 34CO1-9311-CF-00078.

All of which is in violation of Title 18, United States Code, Section 922(g)(l).

Count Eight

(18 US.C. 922(g)(l) Felon in Possession of a Firearm)

From on or about March 8, 2018 through on or about March 11, 2018, in the Southern District of Indiana, REGGIE BALENTINE a/k/a Pudge, defendant herein, did knowingly possess in and affecting interstate commerce a firearm, to wit: a black Springfield Armory XD40 handgun, and/or a black Taurus PTl 1 G 9mm handgun, after having knowingly been convicted of a felony offense

punishable by imprisonment for a term exceeding one year, to wit: felony Obstruction of Justice, Howard County, Indiana, Cause Number 34D04-0911-FC-000165; felony Conspiracy to Commit Dealing and Dealing in Cocaine, Howard County, Indiana, Cause Number 34C01-9611-CF-00072; felony Assisting a Criminal, Howard County, Indiana, Cause Number 34D01-0911-MR-001001; and felony Conspiracy to Commit Dealing in Cocaine, Howard County, Indiana, Cause Number 34D01-0912-FA-01146.

All of which is in violation of Title 18, United States Code, Section 922(g)(l).

Count Nine

(18 US. C. 922(g)(l) Felon in Possession of a Firearm)

On or about March 11, 2018, in the Southern District oflndiana, JASON REED a/k/a Jamon a/k/a Jasil, defendant herein, did knowingly possess in and affecting interstate commerce a firearm, to wit: a black Springfield Armory XD40 handgun, and/or a black Taurus PTl 1 G 9mm handgun, after having knowingly been convicted of a crime punishable by imprisonment for a term exceeding one year, to wit: felony Conspiracy to Distribute Cocaine Base, Southern District of Illinois, Cause Number 4:97-CR-40071-001; felony Resisting Law Enforcement, Howard County, Indiana, Cause Number 34D02-0310- FB-00396; felony Possession of Cocaine or Narcotic Drug, Howard County, Indiana, Cause Number 34D01-0701-MR-00040.

All of which is in violation of Title 18, United States Code, Section 922(g)(l).

Count Ten

(21 USC. 841 (a)(l) Attempted Possession with Intent to Distribute Controlled Substances)

Between on or about April 25, 2018 and April 26, 2018, in the Southern District of Indiana and elsewhere, REGGIE BALENTINE a/k/a Pudge and SHAUN MYERS, defendants herein, knowingly and intentionally attempted to possess with the intent to distribute 50 grams or more of methamphetamine (actual), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(l).

SUBSTANTIAL STEP

The defendants took substantial steps in furtherance of the attempt to possess with intent to distribute methamphetamine, including, but not limited to the following:

1. On or about April 25, 2018, REGGIE BALENTINE and SHAUN MYERS had a conversation over the telephone, wherein they agreed that they would send a courier to Georgia to pick up methamphetamine that they had previously purchased and bring it to them in Kokomo, Indiana.

2. On or about April 25, 2018, REGGIE BALENTINE called PIERRE RILEY and asked RILEY if BALENTINE could give SHAUN MYERS one of the phone numbers utilized by RILEY, because SHAUN MYERS had found a courier to meet with RILEY in Georgia to pick up the methamphetamine package,

and MYERS would need to coordinate with RILEY for this pick-up to occur.

3. On or about April 26, 2018, at SHAUN MYERS' direction, a female courier traveled to Georgia, and then met with PIERRE RILEY to pick up the methamphetamine previously ordered by SHAUN MYERS and REGGIE BALENTINE.

All in violation of Title 21, United States Code, Section 846.

Count Eleven

(21 US.C. 841 (a)(l)-Possession with Intent to Distribute Controlled Substances)

On or about May 1, 2018, in the Southern District of Indiana, MICHAEL O'BANNON, defendant herein, did knowingly and intentionally possess with the intent to distribute 5 grams or more of methamphetamine (actual), a Schedule II Controlled Substance, and a mixture or substance containing a detectable amount of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(l).

Count Twelve

(18 US. C. 924(c)-Possession of a Firearm in Furtherance of a Drug Trafficking Crime)

On or about May 1, 2018, in the Southern District of Indiana, MICHAEL O'BANNON, defendant herein, did knowingly possess a firearm, that is, a Model 27 Glock .40 caliber pistol, in furtherance of a drug

trafficking crime for which he may be prosecuted in a court of the United States, that is, the possession with intent to distribute controlled substances on or about May 1, 2018; all in violation of Title 18, United States Code, Section 924(c)(l)(A).

Count Thirteen

(18 USC 922(g)(l)-Possession of a Firearm as a Previously Convicted Felon)

On or about May 1, 2018, in the Southern District of Indiana, MICHAEL O'BANNON, defendant herein, did knowingly possess in and affecting interstate commerce a firearm, to wit: a a Model 27 Glock.40 caliber pistol and/or a Taurus PT 1111 G2 9 millimeter pistol, after having knowingly been convicted of a crime punishable by imprisonment for a term exceeding one year, to wit: felony Dealing in Cocaine in Howard County, Indiana, Cause Number 34D01-0908-FA-00754; and/or felony Possession of a Narcotic Drug, in Howard County, Indiana, Cause Number 34D01-1502-F6-00182.

All in violation of Title 18, United States Code, Section 922(g)(l).

Count Fourteen

(21 USC 841 (a)(l)-Possession with Intent to Distribute Controlled Substances)

On or about May 1, 2018, in the Southern District of Indiana, MICHAEL JONES a/k/a MJ, defendant herein, did knowingly and intentionally possess with the intent to distribute 5 grams or more of

methamphetamine (actual), a Schedule II Controlled Substance, and a mixture or substance containing a detectable amount of heroin, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(l).

Count Fifteen

(18 USC 924(c)-Possession of a Firearm in Furtherance of a Drug Trafficking Crime)

On or about May 1, 2018, in the Southern District of Indiana, MICHAEL JONES a/k/a MJ, defendant herein, did knowingly possess a firearm, that is, a Smith and Wesson Model M&P 15-22 rifle, a Remington Model 770 7 millimeter rifle and/or a Tisa Model American Tactical F59 9 millimeter pistol, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, the possession with intent to distribute controlled substances on or about May 1, 2018; all in violation of Title 18, United States Code, Section 924(c)(l)(A).

Count Sixteen

(18 USC. 922(g)(l)-Possession of a Firearm as a Previously Convicted Felon)

On or about May 1, 2018, in the Southern District of Indiana, MICHAEL JONES a/k/a MJ, defendant herein, did knowingly possess in and affecting interstate commerce, firearm, to wit: a Smith and Wesson Model M&P 15-22, a Marlin, 30-30 caliber rifle, a Remington Model 770 7 millimeter rifle, and/or a Tisa Model American Tactical F59 9 millimeter pistol; after having knowingly been convicted of a

crime punishable by imprisonment for a term exceeding one year, to wit: felony Possession with Intent to Deliver Methamphetamine in Howard County, Indiana, Cause Number 34C01-0507-FA-00217; felony Aggravated Battery in Howard County, Indiana, Cause Number 34 D02-0511-MR-00463; felony Possession of Cocaine in Miami County, Indiana, Cause Number 52C0 l-0004-CF-000029; felony Battery in Howard County, Indiana, Cause Number 34D01-9910-CF-000259; and/or felony Burglary in Howard County, Indiana, Cause Number 34D01-9811-CF-000307.

All in violation of Title 18, United States Code, Sections 922(g)(l) and 924(e)(l).

Count Seventeen

(18 USC. 922(g)(l)-Possession of a Firearm as a Previously Convicted Felon)

On or about May 1, 2018, in the Southern District of Indiana, PERRY JONES, defendant herein, did knowingly possess in and affecting interstate commerce a firearm, to wit: a Ruger Model P345 .45 caliber pistol, after having knowingly been convicted of a crime punishable by imprisonment for a term exceeding one year, to wit: felony Possession of a Narcotic Drug in Howard County, Indiana, Cause Number 34 DO 1-151 0-F6-00931; felony Possession of a Narcotic Drug in Howard County, Indiana, Cause Number 34D01-1412-F5-00949; felony Dealing in Cocaine within 1000 Feet of School Property in Howard County, Indiana, Cause Number 34C01-9311-CF-00078.

All in violation of Title 18, United States Code, Section 922(g)(l).

Count Eighteen

(21 USC 841 (a}(l)-Possession with Intent to Distribute Controlled Substances)

On or about May 1, 2018, in the Southern District of Indiana, REGGIE BALENTINE a/k/a Pudge and Kristin KINNEY a/k/a Cupcake, defendants herein, did knowingly and intentionally possess with the intent to distribute a mixture or substance containing 50 grams or more of methamphetamine (actual), a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(l).

Count Nineteen

(18 USC 1956(h)-Conspiracy to Launder Monetary Instruments)

From on or about May 10, 2016 through May 1, 2018, the exact dates being unknown to the Grand Jury, in the Southern District of Indiana and elsewhere, PIERRE RILEY and KRISTIN KINNEY a/k/a Cupcake, defendants herein, did knowingly conspire together and with diverse other persons known and unknown to the Grand Jury to knowingly and intentionally conduct and attempt to conduct financial transactions, knowing that the property involved in the financial transactions represented the proceeds of a specified unlawful activity (that is, distribution of controlled substances), and knowing that the transactions were designed in whole or in part to conceal or disguise the nature, location, source,

ownership, and control of the proceeds of specified unlawful activity; in violation of Title 18, United States Code, Section 1956(a)(l)(B)(i).

MANNER AND MEANS

1. PIERRE RILEY, a Georgia resident, distributed controlled substances to individuals in Kokomo, Indiana.

2. This drug distribution activity generated drug proceeds in Kokomo, Indiana.

3. KRISTIN KINNEY, a Kokomo, Indiana resident, assisted PIERRE RILEY in concealing and disguising the nature, source, ownership, and control of the drug proceeds, through various means.

a. At PIERRE RILEY' s direction, KRISTIN KINNEY would take PIERRE RILEY' s drug cash and purchase money orders and cashiers checks in Indiana, so as to convert the cash proceeds to negotiable instruments, so as to conceal and disguise the nature, source and ownership of those drug proceeds. Those money orders and cashiers checks were ultimately deposited in Wells Fargo bank accounts controlled by PIERRE RILEY.

b. At PIERRE RILEY's direction, KRISTIN KINNEY would take PIERRE RILEY's drug cash to an Indiana Wells Fargo branch location, where she would then deposit that cash into bank accounts controlled by PIERRE RILEY, so as to conceal and disguise the nature, source and ownership of those drug proceeds.

c. At PIERRE RILEY's direction, KRISTIN KINNEY would take PIERRE RILEY's drug cash and purchase money orders, which she would then use to make payments on PIERRE RILEY' s mortgage deed in Ouachita Parish, Louisiana, so as to conceal and disguise the nature, source and ownership of those drug proceeds.

d. At PIERRE RILEY's direction, KRISTIN KINNEY would take PIERRE RILEY' s drug cash and deposit it into her BMO Harris bank account; KRISTIN KINNEY would then direct the electronic payment from that bank account to make payments to the lender of fa loan for PIERRE RILEY' s Dodge Ram truck, so as to conceal and disguise the nature, source and ownership of those drug proceeds.

All in violation of Title 18, United States Code, Section l 956(h).

Count Twenty

(18 USC. 1956(a)(l)(A)(i)-Laundering of Monetary Instruments)

On or about September 8, 2017, in the Southern District of Indiana, MICHAEL JONES, defendant herein, did knowingly conduct a financial transaction affecting interstate commerce (to wit: the purchase of a grey 2007 Hummer H3 from Delong Auto Group in Kokomo, Indiana); which transaction involved the proceeds of a specified unlawful activity, that is, the distribution of controlled substances in violation of Title 21, United States Code, Section 841(a)(l), with the intent to promote the carrying on of this same specified unlawful activity, and that while conducting

such financial transaction, defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity.

All in violation of Title 18, United States Code, Section 1956(a)(l)(A)(i).

Count Twenty One

(21 USC. 841 (a)(l)-Possession with Intent to Distribute Controlled Substances)

On or about May 1, 2018, in the Southern District of Indiana, ANTWON ABBOTT, defendant herein, did knowingly and intentionally possess with the intent to distribute 5 grams or more of methamphetamine (actual), a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(l).

Count Twenty Two

(18 US.C. 922(g)(3) User of Controlled Substances in Possession of a Firearm)

On or about May 1, 2018, in the Southern District of Indiana, BRADLEY CLARK defendant herein, did knowingly possess in and affecting interstate or foreign commerce a firearm, that is, a Jiminez .380 caliber handgun, a Ruger .45 caliber handgun, a Hi-Point 9 millimeter handgun, a Rossi 32 caliber Smith & Wesson revolver, a Rossi .357 caliber revolver, and/or a Hi-Point 9 millimeter handgun, while then knowingly being an illegal user of a controlled

substance as defined by Title 21, United States Code, Section 802.

All in violation of Title 18, United States Code, Section 922(g)(3).

SENTENCING ENHANCEMENTS

The Grand Jury further alleges that:

1. Before PIERRE RILEY, defendant herein, committed the offense charged in Count One, PIERRE RILEY had sustained a final conviction for a serious drug felony, namely, a conviction for Conspiracy to Commit Dealing in Cocaine, a B felony in Grant County, Indiana, Cause Number 27C01-9912-CF-95, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offense charged in Count One.

2. Before REGGIE BALENTINE, defendant herein, committed the offenses charged in Counts One, Four, Ten, and Eighteen, REGGIE BALENTINE had sustained a final conviction for a serious drug felony, namely, a conviction for Conspiracy to Commit Dealing in Cocaine, a Class B felony in Howard County, Indiana, Cause Number 34D01-0912-FA-01146, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One, Four, Ten, and Eighteen.

3. Before REGGIE BALENTINE, defendant herein, committed the offenses charged in Counts One, Four, Ten, and Eighteen, REGGIE BALENTINE had sustained a final conviction for a serious drug felony, namely, a conviction for Dealing in Cocaine, a Class A felony, and Conspiracy to Commit Dealing in Cocaine, a Class A felony, in Howard County, Indiana, Cause Number 34C01-9611-CF-00072, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One, Four, Ten, and Eighteen.

4. Before MICHAEL O'BANNON, defendant herein, committed the offenses charged in Counts One and Eleven, MICHAEL O'BANNON had sustained a final conviction for a serious drug felony, namely, a conviction for Dealing in Cocaine, a Class B felony, in Howard County, Indiana, Cause Number 34D01-0908-FA-00754, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One and Eleven.

5. Before MICHAEL JONES, defendant herein, committed the offenses charged in Counts One, Two, and Fourteen, MICHAEL JONES had sustained a final conviction for a serious drug felony, namely, a conviction for Possession with Intent to Deliver Methamphetamine, a Class B felony, in Howard County, Indiana, Cause Number 34C01-0507-FA-217, for which he served more than 12 months of

imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One, Two, and Fourteen.

6. Before JASON REED, defendant herein, committed the offenses charged in Counts One and Four, JASON REED had sustained a final conviction for a serious drug felony, namely, a conviction for Conspiracy to Distribute Cocaine Base, in the United States District Court, Southern District of Illinois, Cause Number 4:97-CR-40071, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One and Four.

7. Before DERRICK OWENS, defendant herein, committed the offenses charged in Counts One and Five, DERRICK OWENS had sustained a final conviction for a serious drug felony, namely, a conviction for Dealing in Cocaine, a Class B felony, in Vigo County, Indiana, Cause Number 84D03-0307-FB-0 1852, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One and Five.

8. Before DERRICK OWENS, defendant herein, committed the offenses charged in Counts One and Five, DERRICK OWENS had sustained a final conviction for a serious drug felony, namely, a conviction for Dealing in Cocaine, a Class A felony in

Vigo County, Indiana, Cause Number 84D01-0904-FA-01148, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One and Five.

9. Before PERRY JONES, defendant herein, committed the offenses charged in Counts One and Sixteen, PERRY JONES had sustained a final conviction for a serious drug felony, namely, a conviction for Dealing in Cocaine within 1000 Feet of School Property, a Class A felony, Howard County, Indiana, Cause Number 34C01-9311-CF-00078, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One and Sixteen.

10. Before SHAUN MYERS, defendant herein, committed the offenses charged in Counts One and Ten, SHAUN MYERS had sustained a final conviction for a serious drug felony, namely, a conviction for Dealing in Cocaine, a Class B felony, Howard County, Indiana, Cause Number 34D01-0305-FAOO 192, for which he served more than 12 months of imprisonment, and for which he was released from serving any term of imprisonment related to that offense within 15 years of the commencement of the instant offenses charged in Counts One and Ten.

FORFEITURE

1. Pursuant to Title 21, United States Code, Section 853, if convicted of any of the offenses set forth in

Counts One through Five, or Counts Ten, Eleven, Fourteen, Eighteen, or Twenty One of the Fifth Superseding Indictment, the defendants shall forfeit to the United States any and all property constituting or derived from any proceeds the defendants obtained directly or indirectly as a result of the offenses, and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the offenses.

2. The United States shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), and as incorporated by Title 28, United States Code, Section 2461(c), if any of the property described above in paragraph 1, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has ·peen transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty ..

3. Pursuant to Title 18, United States Code, Section 981(a)(l)(C), made applicable through Title 28, United States Code, Section 2461(c), if convicted of the offense set forth in Count Six of the Fifth Superseding Indictment, defendants PIERRE RILEY, REGGIE BALENTINE; and MICAHEL O'BANNON, shall forfeit to the United States any and all property, real

or personal, which constitutes or is derived from proceeds traceable to a violation of Title 18, United States Code, Section 1958.

4. Pursuant to Title 18, United States Code, Section 924(d), if convicted of the offenses set forth in Counts Seven through Nine, Thirteen, Fifteen through Seventeen, or Twenty Two of this Fifth Superseding Indictment, the defendants shall forfeit to the United States "any firearm or ammunition

involved in" the offense.

A TRUE BILL

[REDACTED]

FOREPERSON

JOSH J. MINKLER

United States Attorney

By: Michelle P. Brady

Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, V. MICHAEL O'BANNON, ET AL., DEFENDANTS

CAUSE NO. 1:18-CR-00116-JRS-MJD

VERDICT

COUNT 1: CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE AND TO DISTRIBUTE CONTROLLED SUBSTANCES

With respect to the charge of conspiracy to possess with intent to distribute and to distribute controlled substances, in violation of Title 21, United States Code Sections 841(a)(l) and 846, as described in Count One of the Indictment, we, the jury, unanimously find the

Defendant, MICHAEL O'BANNON, as follows [Check one]:

Guilty

Not Guilty X

With respect to the charge of conspiracy to possess with intent to distribute and to distribute controlled substances, in violation of Title 21, United States Code Sections 841 (a)(l) and 846, as described in Count One of the Indictment, we, the jury, unanimously find the Defendant, MICHAEL JONES, as follows [Check one]:

Guilty X

Not Guilty

With respect to the charge of conspiracy to possess with intent to distribute and to distribute controlled substances, in violation of Title 21, United States Code Sections 841(a)(l) and 846, as described in Count One of the Indictment, we, the jury, unanimously find the Defendant, JASON REED, as follows [Check one]:

Guilty X

Not Guilty

With respect to the charge of conspiracy to possess with intent to distribute and to distribute controlled substances, in violation of Title 21, United States Code Sections 841(a)(l) and 846, as described in Count One of the Indictment, we, the jury, unanimously find the Defendant, SHAUN MYERS, as follows [Check one]:

Guilty X

Not Guilty

If you find any of the defendants guilty of Count One, you must determine the quantity of

methamphetamine involved in the offense. You must answer that question by checking the applicable line.

We, the jury, find that the following has been proven beyond a reasonable doubt [Check one]:

The conspiracy involved 50 grams or more of actual methamphetamine X

The conspiracy involved between 5 and 50 grams of actual methamphetamine

The conspiracy involved less than 5 grams of actual methamphetamine

COUNT 2: DISTRIBUTION OF CONTROLLED SUBSTANCES

With respect to the charge of distribution of controlled substances, in violation of Title 21, United States Code, Section 841(a)(l), and Title 18, United States Code, Section 2, as described in the Indictment, we, the jury, unanimously find the Defendant, MICHAEL JONES, as follows [Check one]:

Guilty X

Not Guilty

If you find the defendant MICHAEL JONES guilty of Count Two, you must determine the quantity of methamphetamine involved in the offense. You must answer that question by checking the applicable line.

We, the jury, find that the following has been proven beyond a reasonable doubt [Check one]:

The defendant distributed 50 grams or more of actual methamphetamine X

The defendant distributed between 5 and 50 grams of actual methamphetamine

The defendant distributed less than 5 grams of actual methamphetamine

COUNT 4: DISTRIBUTION OF CONTROLLED SUBSTANCES

With respect to the charge of distribution of controlled substances, in violation of Title 21, United States Code, Section 841(a)(l), and Title 18, United States Code, Section 2, as described in the Indictment, we, the jury, unanimously find the Defendant, JASON REED, as follows [Check one]:

Guilty X

Not Guilty

If you find the defendant JASON REED guilty of Count Four, you must determine the quantity of methamphetamine involved in the offense. You must answer that question by checking the applicable line.

We, the jury, find that the following has been proven beyond a reasonable doubt [Check one]:

The defendant distributed 50 grams or more of actual methamphetamine X

The defendant distributed between 5 and 50 grams of actual methamphetamine

The defendant distributed less than 5 grams of actual methamphetamine

COUNT 6: CONSPIRACY TO USE INTERSTATE COMMERCE IN THE COMMISSION OF MURDER-FOR-HIRE

With respect to the charge of conspiracy to use interstate commerce in the commission of Murder-for-Hire, in violation of Title 18, United States Code, Section 1958, as described in the Indictment, we the jury, unanimously find the Defendant, MICHAEL O'BANNON, as follows [Check one]:

Guilty X

Not Guilty

COUNT 9: FELON IN POSSESSION OF A FIREARM

With respect to the charge of being a Felon in Possession of a Firearm, in violation of Title 18, United States Code, Section 922(g), as described in the Indictment, we the jury, unanimously find the Defendant, JASON REED, as follows [Check one]:

Guilty X

Not Guilty

COUNT 10: ATTEMPTED POSSESSION WITH INTENT TO DISTRBUTE CONTROLLED SUBSTANCES

With respect to the charge of attempted possession with intent to distribute controlled substances, in

violation of Title 21, United States Code, Section 841(a)(l), as described in the Indictment, we, the jury, unanimously find the Defendant, SHAUN MYERS, as follows [Check one]:

Guilty X

Not Guilty

If you find the defendant SHAUN MYERS Guilty of Count Ten, you must determine the quantity of methamphetamine involved in the offense. You must answer that question by checking the applicable line.

We, the jury, find that the following has been proven beyond a reasonable doubt [Check one]:

The attempted possession with intent to distribute Involved 50 grams or more of actual methamphetamine X

The attempted possession with intent to distribute involved between 5 and 50 grams of actual methamphetamine

The attempted possession with intent to distribute involved less than 5 grams of actual methamphetamine

COUNT 11: POSSESSION WITH INTENT TO DISTRBUTE CONTROLLED SUBSTANCES

With respect to the charge of possession with intent to distribute controlled substances, in violation of Title 21, United States Code, Section 841(a)(l), as described in the Indictment, we, the jury, unanimously find the

Defendant, MICHAEL O'BANNON, as follows [Check one]:

Guilty X

Not Guilty

If you find the defendant MICHAEL O'BANNON guilty of Count 11, you must determine the quantity of methamphetamine involved in the offense. You must answer that question by checking the applicable line.

We, the jury, find that the following has been proven beyond a reasonable doubt [Check one]:

The defendant possessed with intent to distribute between 5 and 50 grams of actual methamphetamine X

The defendant possessed with intent to distribute less than 5 grams of actual methamphetamine

COUNT 12: POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME

With respect to the charge of possession of a firearm in furtherance of a drug trafficking crime, in violation of Title 18, United States Code, Section 924(c), as described in the Indictment, we the jury, unanimously find the Defendant, MICHAEL O'BANNON, as follows [Check one]:

Guilty

Not Guilty X

COUNT 13: POSSESSION OF A FIREARM AS A PREVIOUSLY CONVICTED FELON With respect to the charge of being a Felon in Possession of a Firearm, in violation of Title 18, United States Code, Section 922(g), as described in the Indictment, we the jury, unanimously find the Defendant, MICHAEL O'BANNON, as follows [Check one]:

Guilty X

Not Guilty

COUNT 14: POSSESSION WITH INTENT TO DISTRBUTE CONTROLLED SUBSTANCES

With respect to the charge of possession with intent to distribute controlled substances, in violation of Title 21, United States Code, Section 841(a)(l), as described in the Indictment, we, the jury, unanimously find the Defendant, MICHAEL JONES, as follows [Check one]:

Guilty X

Not Guilty

If you find the defendant MICHAEL JONES guilty of Count 14, you must determine the quantity of methamphetamine involved in the offense. You must answer that question by checking the applicable line.

We, the jury, find that the following has been proven beyond a reasonable doubt [Check one]:

The defendant possessed with intent to distribute between 5 and 50 grams of actual methamphetamine X

The defendant possessed with intent to distribute less than 5 grams of actual methamphetamine

COUNT 15: POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME

With respect to the charge of possession of a firearm in furtherance of a drug trafficking crime, in violation of Title 18, United States Code, Section 924(c), as described in the Indictment, we the jury, unanimously find the Defendant, MICHAEL JONES, as follows [Check one]:

Guilty

Not Guilty X

COUNT 16: POSSESSION OF A FIREARM AS A PREVIOUSLY CONVICTED FELON

With respect to the charge of being a Felon in Possession of a Firearm, in violation of Title 18, United States Code, Section 922(g), as described in the Indictment, we the jury, unanimously find the Defendant, MICHAEL JONES, as follows [Check one]:

Guilty X

Not Guilty

COUNT 20: LAUNDERING OF MONETARY INSTRUMENTS

With respect to the charge of conspiracy to launder monetary instruments, in violation of Title 18, United

States Code, Section 1956, as described in the Indictment, we the jury, unanimously find the Defendant, MICHAEL JONES, as follows [Check one]:

Guilty X

Not Guilty

This 14 day of November, 2019

[REDACTED]

FOREPERSON

[REDACTED]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, V. MICHAEL O'BANNON, ET AL., DEFENDANTS

CAUSE NO. 1:18-CR-00116-JRS-MJD

Indianapolis, Indiana

July 30, 2020

9:00 a.m.

REDACTED

BEFORE THE HONORABLE JAMES R. SWEENEY II

OFFICIAL REPORTER'S TRANSCRIPT OF SENTENCING HEARING

Court Reporter: Cathy Easley Jones, RDR, FCRR

Official Court Reporter

46 East Ohio Street, Room 290

Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND COMPUTER-AIDED TRANSCRIPTION

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(In open court)

THE COURT: We're on the record in United States versus Michael O'Bannon, which is Cause 1:18-cr-116; and we're here for a sentencing hearing.

Mr. O'Bannon, welcome to you, sir. There's a microphone there on the wall that you have to hold in your hand.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you.

And on behalf of Mr. O'Bannon, Mr. Edgar, welcome to you, sir.

MR. EDGAR: Good morning, Judge.

THE COURT: On behalf of the United States, Assistant U.S. Attorney Michelle Brady. Welcome to you, ma'am.

MS. BRADY: Good morning, Your Honor.

THE COURT: Good morning. I understand that Mr. Morris is here in Courtroom 243; is that right?

MS. BRADY: That's my understanding, Your Honor.

THE COURT: Anybody with you today, Mr. Edgar?

MR. EDGAR: I believe we have several family members who have dialed in.

THE COURT: Okay. I'll get to that, but anybody in 243?

MR. EDGAR: No, Judge.

THE COURT: And then Special Agent from the DEA, Erik Collins, is he in 243 as well?

MS. BRADY: He is, Your Honor.

THE COURT: Welcome, Mr. Morris and Agent Collins.

Probation officer -- well, that doesn't look like Brittany Neat there. Is that the probation officer there? Who's sitting at the bench there? I can't see.

PROBATION OFFICER IVIE: Hi, Your Honor. It's Stephanie Ivie.

THE COURT: Hi, Ms. Ivie.

PROBATION OFFICER IVIE: Good morning.

THE COURT: Welcome to you.

Then our court reporter is Cathy Jones.

So we are in what we call the C courtroom. One of the reasons that we are in the C courtroom today is due to the -- oh, the nature of COVID and the Marion County lockup. So we're here so that we can protect Mr. O'Bannon, make sure that none of us infect him and take it back and vice versa.

Because of that, this is a small courtroom; and we have as few -- or as many people as we can have in here and still have social distancing. As Mr. Edgar alluded to, we also have members of the public as well as I think the press even who have called in and were

afforded that opportunity; and so they are participating by phone. I believe that includes some of Mr. O'Bannon's family members. Certainly, I think your mother is on the phone; and so we thank them all for being here.

In this secure courtroom, we do have social separation here. With respect to the wearing of masks, whatever you think that you need to do to do your best advocacy, you can do. So you can keep your mask on or you can take them off. Same with you, Mr. O'Bannon; and of course, you've got your own little room there; but for those who can't see, it is glass-enclosed so that each of the attorneys can see Mr. O'Bannon. I can see Mr. O'Bannon. Mr. O'Bannon can see me and vice versa.

We then have a TV screen wherein people in the courtroom in 243 can see me and where we can see who is there. So in this case, again, we see the probation officer. If there's any need for any witnesses -- and maybe I should ask today or ask at this point if we're going to have any witnesses today. I know we have a bunch of objections. Do you plan on having any witnesses today, Ms. Brady?

MS. BRADY: I do, Your Honor. I would call Agent Collins.

THE COURT: Okay. Mr. Edgar, how about you?

MR. EDGAR: No, Your Honor.

THE COURT: So at that time, that camera will be panned to Agent Collins so that you can see him, Mr. O'Bannon.

With respect to Room 243, as well as with respect to this C courtroom, they are both cleaned. Enhanced cleaning is taking place. So we're taking all those precautions.

In addition, the microphones up in 243 have covers that go over the microphones; and those are replaced. In addition to the cleaning, those are replaced after each person uses them.

With respect to decorum, we can dispense with the normal decorum of standing; but if you want to stand, that's fine. Just make sure that you're projecting down into that microphone so that the court reporter can hear you.

Now, Mr. O'Bannon, if at any time you need to speak to me or to your attorney, I think you've got a sign there that you can hold up to get my attention. That's it, right?

THE DEFENDANT: Yes, sir.

THE COURT: You also have that microphone. So if for some reason I don't see it or something, just try to get my attention, okay?

THE DEFENDANT: Okay.

THE COURT: That should cover all the preliminaries.

The defendant, Mr. O'Bannon, having been adjudged guilty of Count 6, 11, and 13 of the fifth superseding indictment, we will now proceed to sentencing; and what we're going to do this morning, Mr. O'Bannon, is we will go over your presentence investigation report,

which appears at ECF No. 1326, along with an addendum. And then we will talk about the advisory guidelines -- federal sentencing guidelines and the advisory guidelines calculation, and then -- let me back up.

When we're talking about that PSR, the presentence investigation report we will sometimes call the PSR for short. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Maybe even the presentence report. As I said, there are some objections to that. So we will be talking about those objections as well.

Then we will have statements and arguments from the parties, and then I'll pronounce sentence. Any questions about that?

THE DEFENDANT: No, sir.

THE COURT: Any victims today, Ms. Brady?

MS. BRADY: There are not, Your Honor.

THE COURT: That PSR -- do you have a copy of that PSR there, Mr. O'Bannon?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: And that's dated July 23rd, 2020. So that must have the updates in here. Do you recall when you first had a copy of the PSR in your hands?

THE DEFENDANT: No, sir. I don't recall when I got it, but it was a few months ago.

THE COURT: So more than 35 days ago?

THE DEFENDANT: Yes, sir.

THE COURT: What are the changes in this 1326 vis-a-vis the one that he got several months ago? Do you know, Mr. Edgar? Is it just the responses from the probation officer?

MR. EDGAR: There was one additional paragraph. I think it was No. 17, which were in the government -- mentioning the government's intention to dismiss the 851 enhancement, which the government has since done.

THE COURT: Okay.

MR. EDGAR: I believe there was an eight-page addendum to the end of it.

THE COURT: The probation officer response?

MR. EDGAR: In the final PSIR, yes, Judge, the probation officer's response.

I do think that they agreed with me in paragraphs 82 -- forgive me if I'm wrong, but there was a criminal history issue that I pointed out that Mr. O'Bannon had discovered that used two offenses separately that should have been combined. I don't think they mentioned that. I don't think the PSR writer mentioned that in their response, but they did seem to correct those paragraphs.

THE COURT: So the initial PSR came out. You objected to that criminal history. It was corrected in

this one, so it's not reflected in the addendum as any response because they credited it; is that it?

MR. EDGAR: I don't believe so, Judge.

THE COURT: I'm sorry. You don't believe so what?

MR. EDGAR: I don't believe that that correction is mentioned specifically in the addendum.

THE COURT: Because it was credited and the correction made in the actual report?

MR. EDGAR: Correct.

THE COURT: So you have no objection – standing objection to that? It's correct now in your mind?

MR. EDGAR: Yes, Your Honor.

THE COURT: So it sounds like I don't have to worry about that one if it's in here correctly. Is that a fair statement?

MR. EDGAR: I think you're right, Judge. The way I read the PSI, I won that objection. I'm using air quotes for the record; but I think that's been conceded by probation and, by extension, the government probably.

THE COURT: Okay. Ms. Ivie, anything on that?

PROBATION OFFICER IVIE: Your Honor, that is correct. It was initially posed as an objection, and then the probation officer corrected the report. So it is not reflected in the addendum.

We would also point out that the revised presentence report does not reflect the penalties for the 21 851 enhancement.

THE COURT: Okay. So in addition to adding that paragraph that it was withdrawn, it also was removed from any calculations with respect to the statutory penalty, I take it?

PROBATION OFFICER IVIE: Correct.

THE COURT: Okay. All right. So any changes in this newer one certainly benefit Mr. O'Bannon. They are changes, nonetheless, even though he's had the bulk of the report since more than 35 days ago. There appear to be some changes in his favor, and so he has a right to have those in his hand 35 days prior to proceeding to sentencing. Does he waive that right? Have you talked about that?

MR. EDGAR: He does waive the right, Judge. He has signed what I think we referred to as "the green sheet." He has signed that. I may tender it to the Court at the appropriate time.

THE COURT: Well, so you have that there.

Let me just ask you, Mr. O'Bannon, do you knowingly and voluntarily waive the Rule 32(e)(2) requirement that the probation officer give you the presentence report at least 35 days before sentencing?

THE DEFENDANT: Yes, sir, I do.

THE COURT: So I find that that is a knowing and voluntary waiver, and we also have the written waiver from Mr. O'Bannon.

Now, I have reviewed that presentence report with addendum. Again, it appears at 1326. I've reviewed the defendant's objections to the PSR, which appears at ECF-1289. I have reviewed the government's sentencing memorandum and accompanying exhibits that appear at ECF-1348, and then defendant's sentencing memorandum and exhibits that appear at ECF-1346, as well as letters in support of Mr. O'Bannon that appear at ECF-1346-1; and those are from Pastor Anderson; Ashley Guynn; G-U-Y-N-N; Reverend Hill; Reverend McNeal; Chante O'Bannon; Tonye, T-O-N-Y-E, Malone; Bobby Clark; Juawanna, J-U-A-W-A-N-N-A Smiley; and Alonzo Smith.

Any additional documents for the Court today, Ms. Brady?

MS. BRADY: Your Honor, we filed -- at 1362, there were two sealed exhibits that were referenced and discussed in our sentencing memorandum. One was the grand jury testimony.

THE COURT: I have those.

MS. BRADY: I'm sorry, Your Honor. I didn't hear the docket.

THE COURT: Those are the exhibits. I just said with exhibits, so there were a number of exhibits. Let me go over those for you.

MS. BRADY: That was the only -- those were the only two exhibits filed.

THE COURT: 1348-1 is his testimony, I believe; and then that sealed exhibit is 1362-1.

MS. BRADY: Yes, Your Honor.

THE COURT: Is that it?

MS. BRADY: Yes, Your Honor, dash 1 and dash 2, Your Honor, are the two sealed exhibits.

THE COURT: Oh, I see. Yes, yes. Right, right.

Okay. Anything else from the government today?

MS. BRADY: No, thank you, Your Honor.

THE COURT: Anything from the defendant?

MR. EDGAR: No, Judge.

THE COURT: Mr. Edgar, have you and Mr. O'Bannon read and discussed carefully that presentence investigation report?

MR. EDGAR: We have, Judge.

THE COURT: Were you afforded an opportunity to provide information to the PSR?

MR. EDGAR: Yes, Judge.

THE COURT: Now, as I said, you've got a few objections. We'll get to those here shortly; but with respect to those proposed conditions of supervised

release found in the PSR, have you reviewed those carefully with Mr. O'Bannon?

MR. EDGAR: Yes, Your Honor.

THE COURT: Are there any objections to the proposed conditions of supervised release? I know you had one, which had to do with paragraph -- I don't know, like 135Q or something like that.

MR. EDGAR: Somewhere in that range.

THE COURT: I'll get to that. Any other objections?

MR. EDGAR: No other objections, Judge.

THE COURT: Mr. O'Bannon, have you reviewed those proposed conditions of supervised release carefully?

THE DEFENDANT: Yes, sir, I have.

THE COURT: The probation officer has included the reasons why she's recommending those conditions, and I agree with those reasons. Do you understand them?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: All right. You have the right to have me read each of those conditions to you as I pronounce sentence; or if you believe that you do understand them and why they're being imposed, you can waive reading.

Do you wish for me to read those conditions as I pronounce sentence or do you waive reading?

THE DEFENDANT: No, sir. That won't be necessary. I'll waive.

THE COURT: Very well. I find the defendant has waived formal reading, and I accept the waiver.

Turning now to the objections, first of all, Mr. Edgar, have you reviewed the probation officer's responses to your objections and do those responses in any way alter your objections?

MR. EDGAR: Yes, I have had an opportunity to review the responses; and no, they do not change in any way the nature and legal aspect behind our objections.

THE COURT: All right. So let's go through them, and I think the first objections have to do with paragraphs 9 and 12. I think these have to do with maybe some conduct events in Henderson County detention.

I think in the one instance, it was an entire block of inmates; and you object that there was never a hearing or write-up process. That was on September 21st, 2018.

And then in paragraph 12, it says that Mr. O'Bannon was found guilty on April 9th, 2019, of violating rules at Henderson by making unreasonable noise, and that for both of those, Mr. O'Bannon denies any involvement.

Actually, I guess that event actually took place on April 8th, 2019; and there was a disciplinary hearing on April 9th, and that disciplinary hearing states that the defendant and one other inmate, Buster Hernandez, were the only ones involved.

So if you say that he was not found -- well, if this disciplinary hearing found him guilty of that, what is the argument, Mr. Edgar?

MR. EDGAR: I'm sorry, I missed that last part, Judge.

THE COURT: I guess there was a disciplinary hearing, at least on the April 9th one; and there was a finding in that hearing. I understand that Mr. O'Bannon denies that; but presumably, he denied it at that hearing as well.

MR. EDGAR: If I may just speak sort of generally about this point, Mr. O'Bannon does deny that. This is – I don't know how much weight the Court is going to give this type of behavior, first of all. So I don't know how much it's going to actually factor into the final sentence.

THE COURT: Let me say that I don't think this ruling is even necessary here because it doesn't affect sentencing, but go ahead.

MR. EDGAR: Knowing that, I can kind of shortcut my argument.

My concern with this type of allegation is I'm not provided any type of documentation at all. I feel fairly strongly that if it were to be given weight by the Court, that we, as a defense, be given an opportunity well in advance to review that documentation so that we can prepare or even know whether it's a valid objection. So that would be my only additional comment for the record, Judge.

THE COURT: Okay. As a general proposition, I can rely on any information in the PSR that's well supported and appears reliable; and the only time a defendant's objection does create real doubt as to the reliability of the information in the PSR, does the government then have a burden of independently demonstrating the accuracy of the information. Quite apart from that here, you're saying that you can't because you weren't provided any documents. Is that my understanding?

MR. EDGAR: Correct, Judge, the easy answer. The other theme that you might hear from me during this meeting --and in all candor, I've discussed this with probation in advance. I believe that a lot of this information in the PSR was provided by the government, perhaps even including this. I don't know from reading this document. I don't know where it came from.

And if it does come from the government -- and I can't see Ms. Brady --

THE COURT: You can if you kind of go this way – if you kind of go that way, you can kind of look through the window there.

MR. EDGAR: I just want to make sure she can see my face when I say how much I respect her and the United States government, but this is not the way I prefer to have a client sentenced. If the government is providing information to probation and probation is simply relaying that without naming the source, I don't think it should be given any more level of reliability than any other bit of evidence; and I think it completely strips the Court of any ability -- maybe

not on this issue but on other issues here -- completely strips the Court of the ability to determine that reliability.

So I think in this case in particular, one of the issues that I'm hoping to highlight diplomatically is that if this is simply the government's version of events, it is not entitled to any greater reliability than any other evidence; and it certainly should not be given the stamp of approval as it's coming somehow from some independent investigation by probation.

THE COURT: Okay. I understand.

Now, on the one hand, the information, for example, comes from -- well, for example, a conviction or whatever, if the government says he was convicted on this, this, and this, then that's certainly coming from the government.

So in addition, as you and I had our little colloquy, you too were offered the opportunity to provide information to the PSR; and so presumably -- and you have plenty of objections. So presumably, any information that you thought was contrary to what was in here, you provided that or objected to it.

Now, in this case, as an example, the probation officer has responded, as she did to all these objections, to say where the information came from. So you have that information, I think, in front of you. In this case, she talks about a disciplinary hearing. So I would imagine that she's got a disciplinary -- has some record of that disciplinary hearing.

Now, if that came from the government, that doesn't make it any less reliable than if they had gotten it directly from Henderson. It's an official report that certainly they can rely on, I can rely on.

Ms. Ivie, do you know where this report came from? Do you have a copy of this report?

PROBATION OFFICER IVIE: Your Honor, I do. I have the copies of the incident reports from the Henderson County Detention Center. I don't know if these reports came directly from Henderson County or if they were funneled through another source, but I do have the incident reports.

THE COURT: As I said, it makes no difference who it was funneled through or if it came from them directly. Again, it doesn't matter in this case; but since we're talking generally, you certainly could have asked for that report. You could have asked Henderson for it. You could have asked the probation officer for it. You could have asked the government for it.

MS. BRADY: And just to clarify the record, Your Honor, these events from paragraph 9 and paragraph 12, those did not come, to be clear, from the government. That was probation's independent investigation.

I was aware -- made aware of separate disciplinary action. That was the one involving the attempt to smuggle cell phones into Henderson. That was -- I was made aware of that because that was a federal offense. Potentially, they wanted to know if we were interested in charging that crime. So that's how I became aware of that additional offense.

The records that were submitted on that offense are contained at Exhibit 1362-2. It's pretty unusual for the government to have these types of records. Again, in that particular case --

THE COURT: I'm sorry, "these types of records" being the ones referenced in 9 and 12?

MS. BRADY: The jail, yes, Your Honor. We, as a matter of course, don't have them. Generally, the first I learn of them generally is this -- is when I read about them in the PSR, the exception being the records that I did submit because they were in my possession; and again, that was a bit unusual since that was a federal offense in and of itself.

But just to clarify that record, these -- again, I would agree. It's kind of irrelevant; but the information in this case as to paragraphs 9 and 12 -- and as a general course, when these documents are written, those are based on probation's investigation, just so there's a little more clarity in the record.

THE COURT: Okay. So certainly under U.S. v Heckel 570 F.3rd 791, 795 to '96, which is Seventh Circuit 2009, I do find that this information is supported and is reliable so that I would overrule the objection.

That being said, as I said, it doesn't make any difference here. It won't affect my sentencing at all. I think it was instructive, since we have so many objections, to get some of this stuff out of the way here.

MR. EDGAR: I appreciate the Court's explanation. I certainly don't mean to belabor this. I just see this

particular case as perhaps an opportunity to open up some dialogue moving forward.

I understand what the Court is saying, that I could go and pursue these records; but in my humble opinion, in my experience, if probation is going to be perceived from our side as advocating for a certain position or siding with the government on so many issues, they should be held to the same discovery standards as the rest of us. When I file a memo, it has exhibits. When the government files a memo, it has exhibits.

My hope is that I'm expressing this less as a rant and more as a diplomatic proposal that either probation take more of a neutral ground; or if they are going to advocate for these positions as if they were a party, that they be held to the same standard by providing those documents.

THE COURT: Well, I can tell you they're not a party. They work for me. They work for the court; and they do an independent investigation, as was just relayed here.

They go to the jail, and they found this out. It didn't come from the government, and they rely on both sides.

Again, I had that discussion with you. Did you have the opportunity to provide information? And whatever information that you provide, whatever information that the government provides, it's up to the probation officer to sift through that and give me what they believe is just objective facts. Then it's up to you all to object to those and bring those to my attention, as you have in spades here.

Ms. Ivie, is there anything you want to add to that?

PROBATION OFFICER IVIE: No, Your Honor, there's not.

THE COURT: I mean, I have found them to be quite thorough, quite objective; and again, they work for me. They don't work for either party here, to include having interviews with Mr. O'Bannon. Whenever they have interviews with him, they try to corroborate that with a records search, with interviews, with family members, with the -- they're very thorough on those things.

MR. EDGAR: I think -- well, I know this is the first sentencing hearing I've done in federal court in the over 15 years where I have had anything less than super stellar things to say about probation.

And again, I highly respect the office. Ms. Ivie and I have a long history of collaboration and cooperation. I think they're great, but I do hope --

THE COURT: Let me make sure of one thing. Can you all hear him in the courtroom? I see her shaking her head. I just want to make sure.

MR. EDGAR: I sound very loud in my head, Judge.

THE COURT: That microphone is down there. They say they can hear you, so that's fine.

MR. EDGAR: I just want to make sure that A, that I'm preserving the issues properly for Mr. O'Bannon.

THE COURT: Sure.

MR. EDGAR: And that especially when a case has gone to trial and you as the judge, Your Honor, has heard the evidence, my fear is that eight, ten months later, so much of this PSI, I mean, the government concedes in their memo comes from the government. The facts were provided by the government.

So then when this PSI sort of becomes sort of a standard, then not only did Mr. O'Bannon and I have to sort of tackle all this stuff at trial; but then we have to tackle it again and try and maybe take on a burden of proof, which I think would be inappropriate to shift to us to say, not only were the allegations at trial unproven or unfounded or not unreliable; but now, we're seeing so many of the same allegations in the PSIR. Again, he and I are facing this sort of uphill fight to say, well, now, we have to disprove this stuff all over again.

My only hope here today is to, A, preserve that issue for Mr. O'Bannon; and B, perhaps bring this as diplomatically to the attention of us, that especially after a trial where we hotly contest so many of these facts and issues, that it doesn't serve us well, especially the defense, to have a PSI that seems to be adopted so heavily from the government's version of events.

I appreciate the Court giving me an opportunity to be heard on that. The Court has always been great and very patient with these sort of for-the-record type of arguments. It's appreciated.

THE COURT: I appreciate it. As you said, I sat through the trial. I saw the evidence. I got my version. I judged the credibility of the witnesses, to include Mr.

O'Bannon; and I can assure you I don't take anybody's version of the facts unless I think that they're proven.

Now, as you know, I've got a totally different burden here. I've got a preponderance-of-the-evidence burden here at sentencing, not beyond a reasonable doubt. So you well know that.

But we will go through these objections; and I beg of you, if you think that there's something else that we don't go over that's in this PSR that you think is somehow wrong or biased, then please let me know. But again, I don't -- I have not seen, and you have I think attested that in your 15 years you have not seen the probation office do anything but professional work and so -- but if we find something, let me know, okay?

MR. EDGAR: Will do, Judge. Thank you.

THE COURT: All right. Let me also say they do such a good job that oftentimes objections seem to go not in the defendant's favor, not because they have any undue sway or whatever but because they know their stuff. They know the law. But that's not to say that from time to time, I find something different; and so we will see how this goes here today.

So let's move then to the objections to paragraphs 18 through 43 and 46. And your objection there is they do not detail conduct -- or that they detail -- excuse me – conduct that is not relevant, that was not proven at trial and/or was not charged.

Now, I asked you if you looked at the probation officer's responses. I don't know if that was directly in response to this one. It's certainly later where they put

out the whole rule under what constitutes relevant conduct under guideline section 1B1.3A; and of course, it includes not only conduct of which the defendant is convicted, but also uncharged, acquitted conduct. And so, for example, relevant conduct can include conduct not formally charged in the indictment under U.S. v Salyers, 160 F.3rd 1152, 1164, Seventh Circuit, 1998.

It may include crimes where the charges have been dismissed and for crimes for which the defendant has been acquitted, United States versus Kroledge, 201 F.3rd 900, 908 Seventh Circuit 2000, as well as United States versus Valenti, 121 F.3rd 327, 334 Seventh Circuit 1997; United States versus Edwards, 105 F.3rd 1179, 1180 through '81, Seventh Circuit 1997; and then, of course, under sentencing guideline section 1B1.3A, where it sets out what relevant conduct is.

So clearly, it can be acquitted conduct. It can be uncharged conduct; and not only does it set that forth in the law and in the guidelines, as we discussed. It's also a different standard. It's a preponderance-of-the-evidence standard as opposed to a beyond-a-reasonable-doubt standard, which in part helps to explain why even acquitted conduct can be taken into account.

So with that said, let's look at these paragraphs. And I'm guessing that this is probably the bulk of what you're talking about as far as their version of the facts, 18 through 43.

So with that backdrop that I just gave you of the guidelines, what the guidelines hold as relevant

conduct as supported by the supporting case law, are there any of these that you can specifically point to, number one, that you think wouldn't even meet the preponderance standard; and number two, if we can, let's talk about ones that would affect sentencing, so, for example, if it's the basis of an enhancement or base offense level or something like that.

But I'm happy to go through all of them if you want to; but with that backdrop, I'll turn it over to you, Mr. Edgar.

MR. EDGAR: Just for the record, Judge, I've done to the best of my ability, to document everything so that if the Court is not inclined to go through each one independently, I'm comfortable with that.

THE COURT: Okay.

MR. EDGAR: My responses to many inquiries, I think, would be I rest on my brief and the prior objections.

I probably do need to point out for the record that the probation officer's addendum, those paragraphs have since been renumbered. So for purposes of the record --

THE COURT: Yeah, I noticed some of those, yeah.

MR. EDGAR: When we talk about paragraph numbers, we are referring to, I think, the initial PSIR. Now, they're off by at least one number in the new -- the final PSI report.

As you know from my brief, Judge, I did spend quite a bit of time, extra time, trying to draw attention to the

-- what I perceive as the outcry, particularly against the use of acquitted conduct and even --

THE COURT: Do you have any authority to the contrary of what I just cited to you, that acquitted conduct is perfectly appropriate at sentencing and is often taken into account at sentencing?

MR. EDGAR: So there's no case law that has sort of bubbled up through the United States Supreme Court. I think the latest attempt was in U.S. v Jones, which is cited in my brief, where there was a strongly worded -- I guess you would call it a dissent to the denial of certiorari. The U.S. Supreme Court denied cert on that case. I think it was Scalia that wrote the dissent to that denial of cert saying in very strong terms that this is wrong. Use of acquitted conduct especially is simply wrong, and using the words of other authors and not necessarily my words, is repugnant to notions of justice and several of the amendments to the U.S. Constitution.

But I think going to the Court's question, it's an uphill fight for me to say here's a case to say what I need it to say. There were a couple district court cases out of Ohio. I think I've cited them. I can provide those, but they didn't make it up to the Courts of Appeals levels.

THE COURT: Well, even the Jones case, do you have the facts -- I mean, does that dispute, for example, that here, in addition to such things as the Rules of Evidence not applying as they do at court, at trial, but the fact that my standard is a preponderance-of-the-evidence standard as opposed to -- which again, is in part why acquitted conduct can be used.

So I don't know what the dissent was -- and it's a dissent for cert, so it's not even an opinion of the Court, much less a binding opinion on this Court or any Court for that matter; but the fact that you -- do you dispute at all here that my standard here is a preponderance of the evidence?

MR. EDGAR: I can't. The legal standard is -- well, I guess I can. I feel --

THE COURT: I'm not talking personal. I'm talking under the law, my standard at sentencing of any defendant is a preponderance of the evidence, right?

MR. EDGAR: And that's the way the Court's going to proceed.

THE COURT: Well, no, no, no. That's my -- that's how I am required to proceed, right, under the binding precedent that governs this Court?

MR. EDGAR: I say this -- and it's going to sound maybe slightly sarcastic; but I firmly believe this is going to be the case that changes all that, where we make the record. We draw the attention of the courts to this issue to say this is not the place to double my client's sentence that he would have gotten if we just went with the conduct that was proven by the government at trial. This is not the case to do that, because literally what's about to happen in this case, if we honor that preponderance of the evidence standard --

THE COURT: Let me just interject one thing. If you know what the sentence is, then you're doing better than me. So I don't know how you know it's going to

be doubled because I don't know what the sentence is yet.

MR. EDGAR: Point well-taken, Judge. I don't mean to predetermine either. I think I can say this. I find this Court to be imminently fair. The trial in this case was one of the most pleasant and organized and well thought out experiences that I've had in any court. So I know the Court will give us a fair shot. I know that.

But I know that the case law is stacked against us, and that's really the battle that I'm trying to fight here, diplomatically, is that this isn't appropriate. This is not only contrary to the United States Constitution, so many of the amendments that I'm citing, because it literally undoes not just the trial, but our ability legitimately to battle it because we're not subject to the same protection of the rules of hearsay. We don't benefit from the same limited protection that we get in terms of discovery. It's a true uphill fight.

I think I can say that a lot of it is so compressed in time with disclosures -- late disclosures in the process that it's virtually impossible to fight; and that not only does it violate the United States Constitution, but I think it sort of degrades -- I think currently there's this question in society, "Do we trust the system? Do we trust the police? Do we trust the courts?" I think there's an extension there.

I think many of the problems that we experienced in Ferguson, Missouri, if you do the -- sort of the Google research, there's a distrust of the Court system. Why would we have a court system that has a jury trial where a person fights by the rules, contests things that need to be contested, wins significant portions of

that jury trial, concedes what is appropriate because that's what he did -- concedes those points, and then come back on sentencing and say, well, now, it's a lesser standard, fewer protections. We're not going to truly, you know, lend credence to these constitutional protections because now it's just sentencing, and then take his guideline score and virtually double it, to take it from somewhere in the low 20s up to 50 based on evidence that wasn't presented at trial that we could have contested, that we strongly believe is unreliable. I think that's the other prong of the test here. Not only does it have to be connected or related to the crime of conviction, which I don't think many of these paragraphs are related to the crime of conviction; but it has to be reliable.

In this case, we have Jalen Coleman, who appeared on the government's witness list but was never called as a witness. From his own reports is completely unreliable. The numbers that he puts in as far as trying to help himself get out of trouble -- the numbers that he puts in for Mr. O'Bannon are wildly, wildly out of all proportion to the evidence that was presented in this case.

You know, 20, $30 million in profit based on what he relayed to the government in his proffers? The simple math, A, that he's proposing doesn't add up when you have Mr. O'Bannon, who throughout the entire evidence of the case has no assets.

THE COURT: Let me stop you there. First of all, when you said it's almost impossible to contest and so on and so forth, certainly both during trial and here in your writings and your argument here -- and I look forward to seeing you argue this at the Supreme

Court, which you're doing very eloquently. You're doing a great job. So Mr. O'Bannon is certainly lucky to have you.

With respect to this testimony of millions of dollars, why does that matter? Is that anyplace in the PSR with respect to the calculations?

MR. EDGAR: Here's where it fits --

THE COURT: No, I'm asking if it fits in the calculations? Anything that matters with respect to his offense level?

MR. EDGAR: It disproves the government's allegation that Mr. O'Bannon is responsible for 73,000 grams or 73 kilograms. It disproves that.

THE COURT: So let's go to that. That's what I was asking for. Are there any of these that actually go to sentencing factors? So, for example, paragraph 39 with respect to alleged lying; paragraph 42, with respect to false testimony about Don Juan; paragraph 55 and 43, especially with respect to the drug weights, those are the things that certainly have to do with some of the things we're talking about, right, with respect to the base offense level, with respect to obstruction of justice, with respect to being a leader or organizer, those are the kinds of things we've got to talk about today.

I understand that you have a fight ahead of you that you would like to fight, but you have conceded that that law right now as it stands is against you. So let's talk about the things -- because we could be here a

long time. Let's talk about the things that matter for sentencing.

So those at least are some that jump out at me, and you're right to have the government respond to those and have me then decide that.

So are there any of those that you can pick out that, again -- in my term -- that matter here today?

MR. EDGAR: Definitely as to the drug weights, Judge, the calculation provided by the --

THE COURT: So this is -- this would be paragraphs 43 and 55; is that right?

MR. EDGAR: Of the final PSIR?

THE COURT: Well, as you say, the paragraphs may have changed. They're certainly in that area, right, 43 and 55? Let's see.

MR. EDGAR: I guess --

THE COURT: So drug amounts would be 44. Looks like they're now 44, and then the base offense level -- so it would be 44 and 46 [sic]. Looks like they all go up by one.

MR. EDGAR: I think that's correct, Judge.

THE COURT: So 44 and 56. I think that probably your argument is -- and I don't know. We will hear from you and we will hear from Ms. Brady -- is that Mr. O'Bannon was only -- only admitted to or convicted of certain amounts; and he was not convicted of the conspiracy and that maybe the rest of these amounts

are from the conspiracy, and so that shouldn't be relevant conduct. Would that be a fair statement or --

MR. EDGAR: Yes, it is, Judge. I would extend that to say that not only are these unrelated to the offenses of conviction, which I think is the standard under the guideline; but they're based on unreliable evidence in two ways. One is the evidence itself, the testimony, you heard it. You saw it. The Court is going to determine what parts of that trial, what parts of that evidence was compelling; but the big parts that are missing, there's no basis for reliability, which is the other prong of this relevant conduct-acquitted conduct test is the reliability. Is this coming from a reliable source? This is why I'm dwelling on Jalen Coleman and others to say A, they're not reliable sources; and B, probably more importantly, they don't provide the simple math numbers to come up with this total.

THE COURT: "They" being the probation officer?

MR. EDGAR: No, Jalen Coleman or what have you.

THE COURT: I want to say Jalen Rose. I apologize to Jalen Rose but Jalen Coleman. Go ahead.

MR. EDGAR: What we would need -- and I'm sure we will talk about this eventually; but under the Acosta case, we need concrete numbers so we don't end up with fuzzy math. We need to know how many trips per week. We need to know how many trips per month. We need to know what exact amounts there were per trip. We need actual data to make a reliable conclusion as to the total, and that's part of what's missing under this relevant and acquitted conduct is that's simply not there.

THE COURT: And so what amount do you think that

Mr. O'Bannon should be -- should form his base offense level?

MR. EDGAR: If I can refer to my --

THE COURT: And by the way, as it says and as I've said, but as it says in Section 1B1.3(a)(1)(A), "Base offense levels and specific offense characteristics are determined based on all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant."

"Relevant conduct can include conduct not formally charged," as I said, "in the indictment and crimes for which the defendant has been acquitted as long as the government can prove it by a preponderance."

In addition, that definition right there in the guidelines, which I don't think that part I just went over included -- or excuse me -- in the response from the probation officer, in the case of jointly undertaken criminal; activity -- so again, it's all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant.

In the case of a jointly undertaken criminal activity, "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." So it doesn't even have to be a conspiracy. So if the argument is that he was acquitted of the conspiracy charge, that doesn't even apply here.

Moreover, I'm going to tell you that my view of the evidence at trial indicates to me, crediting the testimony of the witnesses, to include Mr. O'Bannon, who I thought was a compelling witness, but I also thought that there were untruths that he told; and I think that by at least a preponderance, he was part of the conspiracy with at least Mr. Balentine and Mr. Perry Jones, if not Mr. Jalen Coleman.

But leaving out Mr. Coleman -- we don't need him -- and leaving out the conspiracy, as it says here, "relevant conduct, whether or not charged as a conspiracy." So if there's jointly undertaken activity, he can be held responsible for that, whether or not there was a conspiracy even charged, much less acquitted. And certainly, even if acquitted, if that weren't the standard, that a conspiracy didn't need to be charged, I could find that there was a conspiracy if I find by at least a preponderance, which I would; and that may come up later.

With that in mind, we know that there's jointly undertaken activity here. We know that Reggie Balentine had an amount of drugs. We know that Perry Jones had an amount of drugs. We know that Mr. O'Bannon had an amount of drugs.

So if the argument here is going to be just what Mr. O'Bannon did, I don't think that that's going to fly; and we'll see where these numbers came from. So with that backdrop, go ahead.

MR. EDGAR: Thanks, Judge. So the Court initially asked what my proposed drug weight was. I had to look, because it's actually a converted drug weight; and it is in my sentencing memorandum.

THE COURT: Yes. So this is --

MR. EDGAR: I think I put him at a base offense level 24.

THE COURT: Yes, you did.

And so you said -- but here's my question. The jury specifically convicted O'Bannon of possessing with intent to deliver between 5 and 50 grams of actual methamphetamine, but I don't see where -- the actual drug weights that you come up with.

MR. EDGAR: It's on page 5, Judge.

THE COURT: I'm here. I'm on page 5.

MR. EDGAR: Top third. It says, "The converted drug weight subtotal is 165.28 kilograms pursuant to Section 2D1.1(c)(8)." That base offense level would be 24.

THE COURT: What paragraph is that?

MR. EDGAR: It is page 5 -- you can see at the top of page 5, paragraph 11, numbered 11.

THE COURT: Oh, never mind. I'm on the wrong one here. I'm on your objections. So let me go to the sentencing memorandum. As I said, you have ably provided me with a bunch of stuff. So here. Okay.

All right. So you say that it should be 165.28 grams; and you talked here about these ten specific transactions and come up with that base offense level of 165.28 grams converted, right?

So again, as I said, if you're going to argue, which you have here, that it's just those ten transactions and has nothing to do with what Reggie Balentine did and nothing to do with what Perry Jones did, that's not the standard, is it?

MR. EDGAR: It depends on where you put the stress in the sentence.

THE COURT: Which sentence? Jointly undertaken activity?

MR. EDGAR: Correct, in relation to the offense of conviction is where I would put the stress. So if you just look at the possession with intent from the date that he was encountered by the police in his home, which I think was May 1st or May 2nd, 2018, that's the offense of conviction that we're focused on here now, not the conspiracy but the possession with intent; and there's no connection -- there's no proven connection between -- beyond those transactions with anything else that occurred during the conspiracy.

And then -- even assuming arguendo that we could sort of surmount that problem, which I don't think we can, we still have the direct problem of under the Acosta case, we need specific numbers, specific dates. We need a high degree of specificity to determine this drug weight. The government's proposal simply doesn't and cannot provide that.

And if I may, Judge, in Acosta, there was a similar situation where a drug weight was calculated by the Court based on informant testimony; and the Court made their best estimate, it appears, as to what that drug weight was; went up on appeal, and the appellate

court said, "No, you can't do that." It has to be specific numbers, hard math, my reading of the case; and it has to come from a reliable source. It can't just be an informant never subject to cross-examination, never subject to any test of reliability that we recognize in the criminal justice system.

THE COURT: All right. Ms. Brady, any response?

MS. BRADY: Yes, Your Honor. I believe that a large amount of kind of a disagreement in the application of the sentencing guidelines is a disagreement on the application -- is more a legal disagreement; but as -- certainly we would agree with Mr. Edgar to the extent that this Court does need an evidentiary basis -- a reliable basis for determining the offense level.

We would ask to supplement the record at this time and briefly call Agent Collins to provide some further information regarding -- and evidence, I should say, regarding the figures that are set forth in the PSR, Your Honor.

THE COURT: All right. Well, why don't we do this. Let's continue on with some of these other ones, because I suspect he's going to have to testify about other things. So we might as well get him up there once.

* * *

theory for threats of violence.

COURT REPORTER: Excuse me, Mr. Edgar. Could you repeat that, please?

MR. EDGAR: I'm going from memory here, but I can't recall specifically. I think in probation's addendum to the PSR, they were still attempting to use a --

THE COURT: Oh, that January 3rd, 2017 --

MR. EDGAR: Correct.

THE COURT: So you object to that portion?

MR. EDGAR: I do.

THE COURT: I'll take that out for sure. Sounds like you're not objecting to the portion that has to do with the murder-for-hire scheme though, that that's some indication that the defendant directed the use of violence.

MR. EDGAR: Only to the extent that if it's used under the guidelines here and sentences are run concurrent, I think it becomes a nonissue. If the sentences are run consecutively, I do think it should not be used in both – it shouldn't be used here because Mr. O'Bannon -- we would be suffering a separate and different penalty for that behavior.

THE COURT: Okay. Any response, Ms. Brady? Sounds like it's not going to be an issue but go ahead.

MS. BRADY: Then I would stand on -- I would submit to the Court's discretion.

THE COURT: Well, having considered again the responses or the arguments and the submissions of the parties, as well as the probation officer, the Court finds by a preponderance of the evidence that the defendant directed the use of violence at least by

hiring two men to murder Individual 1 as set forth in Count 6 of the fifth superseding indictment, which the defendant has been found guilty of.

And then the defendant objects to enhancement under paragraph 61 for being a leader or organizer in the criminal activity.

MR. EDGAR: Correct, Judge. I think this is really -- I could incorporate the arguments previously made. I think this -- and if I may sort of incorporate the livelihood, I think they're all sort of intertwined. The analysis is very similar. I think we have --

THE COURT: So that would be the objection to the enhancement in paragraph 59, which is for committing the offense as part of a pattern of criminal conduct, right?

MR. EDGAR: Correct, Judge. In the final PSIR, the adjustment for role, A, I think those two are connected in and of themselves to find a pattern. I think the Court has to find that he was a leader or organizer -- I've lost the thread, but I think those two are interconnected.

Again, to offer further argument I think would be very repetitive; and I would incorporate all the prior arguments. This is based on acquitted conduct, and it's evidence or proposed findings of fact injected into the PSR directly from the government and would rest on my briefing and prior objections.

THE COURT: Okay. Let me give a preview. It looks like we've got -- so we're handling two right now, and then we have the objection to using a -- possessing a

firearm in connection with another felony and then that objection to the supervised release. So what I would like to do is finish those up, and then we'll take a break; and then we'll come back and put Agent Collins on to talk about the first objection, which -- maybe not the first but the objection having to do with the drug quantities. Can everybody hold off for that long? I don't think there's going to be much more for this.

Mr. O'Bannon, you doing okay?

THE DEFENDANT: Yes, sir, I'm fine.

THE COURT: I will say that I'm somewhat troubled by this leader or organizer as opposed to manager or supervisor. As I've already found a number of times by a preponderance, I do think that Mr. O'Bannon was in a conspiracy to distribute controlled substances, at least between defendant Reggie Balentine and Perry Jones and perhaps others, such as Jalen Coleman or maybe even others; but -- and then that overall conspiracy had many others, certainly five, if you take into account Mr. Riley and Mr. Michael Jones and Mr. Thomas Jones and so on and so forth.

So Ms. Brady, I'm curious as to why -- what your thoughts are -- and maybe we'll hear from Ms. Ivie, too, on why leader or organizer as opposed to manager or supervisor might be appropriate here.

MS. BRADY: Your concern is well taken, Your Honor. I think, as I've set forth in my sentencing memo, there was this huge amount of methamphetamine trafficking by Mr. O'Bannon's statements and omission -- and admissions at trial, that these kilos of

methamphetamine were coming in from Atlanta at his direction separate and apart from the methamphetamine that was coming in at Mr. Balentine's direction.

I think similar to Mr. Balentine, the information and evidence that the government has is that Mr. O'Bannon was the guy in Kokomo, as far as that kind of second stream that was coming from Kourvoiser Frazier as opposed to where Balentine was getting it -- that Mr. O'Bannon very similar to -- I'm sorry -- Mr. O'Bannon, similar to Mr. Balentine, was the one directing when it was going to come in, was the one in charge of the couriers and that type of thing.

It's a fair point, Your Honor, I think that one of the reasons we strongly believed Mr. Balentine should get that fourth level was because of the nature of the relationship between the source, Mr. Riley, and Mr. Balentine, meaning they were on a par; that even though Mr. Riley was closer -- closest to the source of supply, really, Balentine and Riley were partners. They were equal. They shared the losses equally.

Frankly, Your Honor, I don't know enough about the relationship between Mr. O'Bannon and his source, Kourvoiser Frazier, to say with any reasonable degree of certainty that it's the same level of partnership. I don't know.

So in hindsight, looking at why Balentine received that fourth level when he was kind of -- there was someone clearly above him, I think it's a fair point, Your Honor, that -- I don't know that that same logic applies to Mr. O'Bannon, just because there is so

much unknown about -- we never went and intercepted Mr. O'Bannon's phone.

So for that reason, Your Honor, I think a leadership enhancement absolutely applies; but your question about whether it's the leader or manager, that's -- that point is well taken, Your Honor.

THE COURT: All right. Any follow-up on that,

Mr. Edgar?

MR. EDGAR: No, I don't think so, Judge. The Court has indulged me patiently with the prior arguments related to the legality of the -- once he's acquitted of the conspiracy, using that same conduct to impose all these enhancements. He was convicted of possession with intent to deal the drugs found in his home. I think it was May 1st and that's -- applying any other enhancements for leadership or what have you simply goes far beyond that offense.

THE COURT: Okay.

All right. Again, I've considered the submissions of the parties, the arguments here today to include the ones incorporated, because we've had extensive arguments. I just ruled again moments ago my findings that though acquitted at trial, that Mr. O'Bannon was by a preponderance part of a conspiracy to distribute controlled substances at least between him, Mr. Balentine, and Mr. Perry Jones, and perhaps others, as I said.

I do not think, however -- so I'm going to grant the objection with respect to the enhancement under

3B1.1(a). I don't believe that Mr. O'Bannon was a leader or organizer of that criminal activity that involved five or more participants. He could have been a leader or organizer with respect to the murder for hire. I'm not sure that we can find that that was five or more but maybe so; but I think the more appropriate enhancement here would be under 3B1.1(b) by a preponderance, which is that he's a manager or supervisor but not an organizer or leader; and the criminal activity involved five or more participants or was otherwise extensive. So it's granted to the extent that that four-level enhancement will be a three-level enhancement.

* * *

case agent in the investigation that brings us here today; is that correct?

A Yes.

Q Are you familiar with Jalen Coleman?

A Yes.

Q How did Jalen Coleman come to your attention in relevance to this investigation?

A Jalen Coleman's name was heard during the investigation as a close associate of Michael O'Bannon; but it really didn't come to full circle, I guess, until after our roundup on May 1st of 2018.

A couple months later, Jalen Coleman was arrested in Tennessee in possession of 2 pounds of methamphetamine. Those arresting officers also

worked closely with DEA Nashville; and when they ran Jalen Coleman's name in DEA databases, they reached out to me regarding the investigation.

Q Was that 2 pounds of methamphetamine arrest -- did that occur in September 2018?

A Yes.

Q As a result of this communication from DEA in Tennessee telling you that Mr. Coleman had been arrested, did you ever speak with Mr. Coleman?

A Yes. I have spoken to Jalen Coleman multiple times.

Q Was the -- he was pending charges at that point; is that correct?

A Yes.

Q So it was a proffer, so to speak; is that accurate?

A That is correct. Jalen Coleman traveled here to Indianapolis, as well as his Tennessee defense attorney came into town as well; and we first all sat down together.

Q You have seen the DEA 6, that is, the report of investigation that was attached to Mr. Edgar's sentencing memorandum; is that correct?

A Yes.

Q It's a report regarding proffer interview of Jalen Coleman on October 11th, 2018?

A Yes.

Q Did you write that report?

A Yes, I am the author.

Q And is this a summary of the relevant portions of Mr. Coleman's statements the first time that you interviewed him?

A Yes.

Q This DEA 6 report -- does that accurately reflect to the best of your knowledge the -- again, the relevant portions of that interview from 2018?

A Yes.

Q Did Mr. Coleman tell you on -- when you first proffered him, that is, October 11th, 2018, how he first got started transporting methamphetamine?

A Yes. He said he often worked with or he was a close associate of Michael O'Bannon and over the course of the last couple of years has tooken [sic] multiple trips to the Atlanta, Georgia, area with Michael O'Bannon for drug-trafficking purposes.

Q Do you know whether there's a familial relationship between Mr. Coleman and Mr. O'Bannon?

A Yes.

Q What's your understanding of that family relationship?

A I believe they're cousins.

Q Now, based on your investigation and including -- primarily, I mean your interview with Mr. Coleman -- was -- you indicated that Mr. Coleman and Mr. O'Bannon were going to Atlanta for purposes of drug trafficking; is that correct?

A Yes.

Q Was -- were either of them, to your knowledge, physically bringing the methamphetamine back with them as a result of these trips?

A No. They typically used various couriers.

Q Who used couriers?

A Michael O'Bannon would utilize couriers to get the drugs from Atlanta, Georgia, to the Kokomo, Indiana, area.

Q Did you discuss with Mr. Coleman how he first came to physically transport the methamphetamine himself?

A And then Jalen decided after the May 1st arrest of Michael O'Bannon -- he had a conversation with Michael O'Bannon approximately a week after his arrest; and during that call, there was a discussion about Jalen Coleman going to Atlanta, Georgia, on his own and doing his own thing with the use of Michael O'Bannon's source.

Q So up until May 1st, 2018, did Jalen Coleman have that type of relationship with the Atlanta source or was it O'Bannon who had the relationship with the Atlanta source?

A Only O'Bannon.

Q I believe your testimony was that it was a phone call between Mr. Coleman and Mr. O'Bannon that caused Mr. Coleman to make the trip on his own; is that correct?

A Yes.

Q Did you ever independently determine -- aside from what Mr. Coleman told you, did you ever corroborate that this phone call actually happened?

A Yes. I located two jail phone calls, one of them being on May 6th, 2018, and the second one on May 9th, 2018; and during these phone calls, Michael O'Bannon and Jalen Coleman were discussing the -- going to Atlanta to get additional methamphetamine.

Q I believe it might be mentioned in Mr. Edgar's sentencing memo; but certainly, it appears in your report that Mr. Coleman told agents that, "You guys had it all wrong."

Through your discussions with Mr. Coleman, what was Mr. Coleman's belief as far as what you had wrong?

A Mr. Coleman believed -- was very adamant that Michael O'Bannon was not getting drugs all the time from Reggie Balentine; that, in fact, that Michael O'Bannon had his own source; and he, with Michael O'Bannon, sometimes would provide drugs to Reggie Balentine. So pretty much Michael O'Bannon had his own little organization, and Reggie Balentine and Pierre Riley had a different organization.

Q Did Jalen Coleman know the identity of O'Bannon's primary source that he said was separate from Mr. Balentine?

A Yes. He knew him by Kourvoiser Frazier.

Q Did you ever independently corroborate that claim in any way, Agent?

A Jalen Coleman had phone contacts with Kourvoiser Frazier.

Q Let me ask this. Were there any -- and I believe there was testimony at trial of this; but for the record, did you corroborate phone contacts during the course -- prior to May 1st, 2018, phone contacts between Mr. O'Bannon and Kourvoiser Frazier?

A Yes. We didn't know at the time; but after our takedown, after I could put all the puzzle pieces together and as I sit here today and from my trial testimony, there definitely was contacts between Michael O'Bannon and Kourvoiser Frazier during the wire; and that was corroborated by phone calls that we've -- I guess has also been discussed here today amongst you attorneys.

Q Through your investigation, for example, were there ever intercepts that were presented at trial between, for example, Mr. Balentine and Mr. Riley, where those two individuals discuss that O'Bannon kind of needed to start -- I believe there was a quote something to the effect of start eating at the table with them, meaning Riley and Balentine, rather than O'Bannon's uncle?

A Yes, that's correct. There's at least a phone call or two where Riley and Balentine are aware of Mr. O'Bannon's drug trafficking with Uncle Kourvoiser Frazier but that they believe Michael O'Bannon would do better if they worked – if the three of them worked together, Michael O'Bannon, Reggie Balentine, and Pierre Riley.

Q To your knowledge, has Kourvoiser Frazier ever -- has DEA or any other agency ever corroborated the claim that Kourvoiser Frazier is, in fact, a drug trafficker?

A Yes. I have assisted DEA Atlanta with the Kourvoiser Frazier investigation; and late last year, he was convicted for 16 years on a drug-trafficking offense in the Northern District of Georgia.

Q Have you -- as of yesterday, Agent, have you had an opportunity to review paragraphs 18 through 44 of the final pretrial services report at docket 1326?

A Yes, I have.

Q Based on your involvement as the case agent in this investigation, to the best of your knowledge, are those paragraphs true and accurate?

A Yes.

Q I'm looking at paragraph 21 of the PSR. It states that, "During a two-year period leading up to May 1st, 2018, Jalen Coleman would travel with O'Bannon to Atlanta, Georgia, so that O'Bannon could obtain kilograms of methamphetamine."

Was that your understanding and the accuracy of that statement -- was that based in part upon your conversations with Mr. Coleman?

A Yes.

Q Was that based as well in part on other evidence introduced at trial, some of which we've discussed today?

A Yes.

Q I would like you to -- what is your -- and I understand Mr. Coleman didn't have precise dates or times that he went to Atlanta; is that correct?

A Correct.

Q Did he know how many times a month he went to Atlanta with Mr. O'Bannon so Mr. O'Bannon could conduct his drug business?

A He estimated it being anywhere from two times up to five times per month.

Q So with the most conservative estimate then being – the most conservative amount being two times per month, correct?

A Correct.

Q Did Mr. Coleman know the amounts that Mr. O'Bannon was getting on these trips to Atlanta?

A Yes.

Q What was Mr. Coleman's understanding of the amounts that were being obtained by Mr. O'Bannon to be then sent home via courier?

A Mr. Coleman said it could be anywhere from just 2 pounds up to 8 pounds when they -- per trip.

Q So the lowest amount would be 2 pounds on any given trip, correct?

A Correct.

Q Just a couple more questions.

Agent, just moving away from questions that are pertinent to the base offense level that we're determining here today, I would like to ask you a few brief questions.

Individual No. 1 was discussed at length at trial, and the defendant believed Individual 1 was responsible for the home invasion. Have you ever spoken to Individual 1 yourself?

A Yes.

Q Was he -- he was a informant, correct?

A Yes.

Q To your knowledge, based on investigation, was there -- what was your understanding of whether any drug relationship existed between Mr. O'Bannon and Individual 1?

A Individual 1 obtained drugs from Mr. O'Bannon.

MS. BRADY: I have nothing further. Thank you, Agent.

THE COURT: Let me ask a question, Ms. Brady; and maybe you can ask Agent Collins, maybe not.

So this total amount, 153,856 is based on what, do you know?

MS. BRADY: I'm sorry, Your Honor?

THE COURT: In paragraph 56, this total amount of 153,856 is based on what?

MS. BRADY: Your Honor, that would be based on – if we look at paragraph 44, which kind of breaks it down by year and then -- it's based on a number of things, Your Honor, which are all contained within the PSR. Certainly, we have the testimony that we've heard today from --

THE COURT: Let me ask you this. Does any of that have to do with the amount from -- anything from Jalen Coleman?

MS. BRADY: Yes, Your Honor.

THE COURT: Okay.

MS. BRADY: That is certainly part of the corroboration, as well as other pieces of evidence. For example --

THE COURT: Okay. Corroboration of what?

MS. BRADY: The fact that Mr. O'Bannon, as early as at least June 29th of 2016, was distributing at minimum pound quantities of methamphetamine.

So for example, Your Honor received into evidence Government Exhibit 154, which was that text message between Mr. Balentine and Mr. O'Bannon. Mr. Balentine asking, "What's a bow of ice cream go for"; and Mr. O'Bannon's response on June 29th, 2016, is that, "You set the price. I get them at 5,500. Been hitting Lee at 6,500." So there is -- that is information contained within the PSR.

There is additional evidence. For example, Government Exhibit 2064 was a phone call between Mr. Balentine, Riley, and O'Bannon. The relevant portion of that phone call that I believe is referenced in the PSR at page 3, Riley and Balentine are laughing about O'Bannon being upset at having to pay a travel fee, an increased price to help pay to get methamphetamine there, the relevant portion being Balentine telling Riley at page 3 -- he's relaying to Riley this conversation, this argument that he and O'Bannon had; and Balentine says, "I said," meaning "I said to O'Bannon" -- "I said," again to O'Bannon, "You taking the exact same stance I took when you," meaning O'Bannon, "was bringing back 2 bows for Don Juan and 2 bows for you, and I was getting half of it but I had to pay half of the thing."

So that's a reference to when Mr. O'Bannon was getting 4 pounds of methamphetamine per trip, and Mr. Balentine in that instance didn't -- thought it was unfair that he had to pay travel fee to get methamphetamine from O'Bannon.

Also referenced in the PSR is the conversation at Government Exhibit 2143. That's from April 21st. At page 13 of that transcript, there is O'Bannon discussing -- he's upset with Balentine in this portion of the phone call; and he says at page 13 to Balentine, "I mean that when stuff was good, that's because Don Juan was doing a book every week; and I was making 35, 4500 just off of him." That's referenced in the PSR. This was Don Tharp getting a kilogram of methamphetamine from Mr. O'Bannon every week.

THE COURT: Let me cut you off for a second. So there in paragraph 44 and then going forward to paragraph 56, is any of that not attributable to the conspiracy between Mr. Balentine, Mr. Jones?

MS. BRADY: Yes, Your Honor. I think this is -- this was evidence, Your Honor, that was not really discussed at trial. What really we heard from at trial was all the methamphetamine that was funneled in through Balentine, whereas what's contained -- some of what's contained in the PSR specifically, the information that was obtained from Jalen Coleman, as corroborated by a number of phone calls that were introduced at trial, that is all additional methamphetamine --

THE COURT: So there's some overlap here, but there's additional?

MS. BRADY: Yes, Your Honor.

THE COURT: Let me ask you a question with respect to -- so Mr. Balentine was credited with a base offense level of 38 based on 157,517.87 kilograms, which is a converted weight of greater than 90,000.

If, as I have found, by a preponderance that there was a conspiracy between them, could that all be counted?

MS. BRADY: Your Honor, I think it certainly could.

Certainly, under the law, it absolutely could; and I would say in this case particularly --

THE COURT: And by the way, I've already found that amount attributable to Mr. Balentine, as well as

32,301 kilograms to Mr. Perry Jones, who I've also found Mr. Balentine was in the conspiracy with, right?

MS. BRADY: Yes, Your Honor.

THE COURT: So that was between 30,000 and 90,000 for a base offense level of 36. So go ahead.

MS. BRADY: Your Honor, I think it absolutely could be attributed.

I think if you just look at, for example, the last load from late April 2018, in looking at that -- those – the two portions of that load, I think it is certainly relevant -- I mean, Agent Collins at trial testified there were three people that had pre-contributed money to that load. It was Balentine's money, Perry Jones's money and Shaun Myers' money. Certainly, other conspirators were going to get the benefit of that load.

I would invite the Court's attention to two phone calls particularly that would indicate not just that that load was readily foreseeable to Mr. O'Bannon; but certainly, he knew about it.

THE COURT: He gave money for that, right?

MS. BRADY: Your Honor, I don't --

THE COURT: Or just discussed it?

MS. BRADY: Right, Your Honor. 2157, this was after the first seizure with Melissa Baird; very short call where Mr. Balentine says, "Hey, man, I need somebody to go into the projects, man, into Melissa's apartment, get the moon rock out of her GD refrigerator. They got the bus."

O'Bannon says, "Melissa who?"

Balentine clarifies, "White girl. White girl Melissa. They got the bus."

O'Bannon says, "Okay." And he agrees to go over there. He does go over to Balentine's house. I believe the testimony at trial from Agent Collins was that in the interim, Perry Jones was able to do it quicker.

So I don't believe Mr. Balentine actually had to, as he had been requested, to go assist with the group with making sure no further damage got done; but he certainly knew – all he had to be told was, "White girl Melissa, they got the bus." O'Bannon knew exactly what that meant.

And then when the second load got hit -- this was Exhibit 2175-T, very similar, Your Honor. This was already admitted at trial; but Balentine says, "MF'er got bumped, got bumped driving."

O'Bannon says, "Both?"

Balentine says, "Yeah. The second one just got bumped."

So it appears from these phone calls, not just readily -- foreseeability, but Mr. O'Bannon had a good deal of information about what was going on with these loads. And certainly, as we heard from the evidence at trial, he stood to benefit from those loads coming through.

THE COURT: How much was that again?

MS. BRADY: Your Honor, that was -- the exact amount that was seized -- there was 3900.6 grams of methamphetamine in the first load and the second load, the one that Ms. Hamilton -- Kashey Hamilton got caught with was 1,327 grams, Your Honor.

THE COURT: So just to make sure I understand, in paragraph 44, some of that overlaps with Mr. Balentine and the conspiracy; but there is additional stuff there, as corroborated by Mr. Coleman and Agent Collins' testimony and these exhibits; is that right, or is it all -- and also, of course, the amount that is set forth in defendant's memo, which comes to -- which is directly in the defendant's argument attributed to the defendant, in pages 4 through 24. That's 165.28 kilograms converted drug weight. Do you understand my question?

MS. BRADY: I do, Your Honor. I don't want to speak for probation, as my math is terrible.

THE COURT: Ms. Ivie, do you know?

PROBATION OFFICER IVIE: Your Honor, I didn't quite understand the question.

THE COURT: So the amount in paragraph 44, do you know where that all came from?

PROBATION OFFICER IVIE: Specifically, I do not have that information. I know it was obtained from the government's investigation; but at this moment right now, I don't know which exactly it came from. I would need to go through everything and look again.

THE COURT: All right. Thank you.

I cut you off, Ms. Brady.

MS. BRADY: No, Your Honor. I think -- what we just heard from Agent Collins and what I think is if we really are going to drill down to what is the most conservative reliable amount that should be attributed to Mr. O'Bannon, in addition to these seizures that occurred at the end of April, I believe, Your Honor, if my math is correct, on -- from Agent Collins' testimony, we're looking at a two-year period for which at a very bare minimum -- this is the most conservative -- that 2 pounds -- not kilograms -- 2 pounds of methamphetamine was coming per trip that was made, and there were a minimum of two trips per month.

I think clearly, the evidence is there was additional -- that is the bare bones absolute minimum if we're going to give every benefit of the doubt to the defendant --

THE COURT: So you're saying 48 pounds?

MS. BRADY: Yes, Your Honor. I come up with -- if I leave it at grams, I come up with 21,832 grams. So yes, roughly -- so if there's 454 grams in a pound, I believe your math is correct, Your Honor.

THE COURT: So where does that 21,832 grams come into this 143,816?

MS. BRADY: Where, Your Honor?

THE COURT: Let's go back to paragraph 44. Using that 21,000, at paragraph 44 -- and that was between when and when?

MS. BRADY: This is for the -- so if you look at paragraph 44, when you add up the 23,000 in 2016, 36,000 in the 2017, and then the first half of 2018 until their arrest, those are the numbers that probation has listed as being calculated from these paragraphs within the PSR.

I would -- your Honor, again, I think we're undercutting our own case; but I think in terms of if we are going to be incredibly -- the absolute most conservative amount that will be accurately and reliably relied upon, I think Coleman's information is reliable, because it's been corroborated thoroughly by Agent Collins' investigation, as well as by Mr. O'Bannon's own words. He was very clear at trial that he had been getting kilograms of methamphetamine at a particular price for some time.

So what I would submit, Your Honor, is that at a very -- at the bare minimum, this 48 pounds of methamphetamine has been thoroughly corroborated as being O'Bannon's own -- what he is personally

responsible for distributing. That's the bare minimum that he's personally before you even get into --

THE COURT: The conspiracy?

MS. BRADY: Yes, Your Honor.

THE COURT: From Kourvoiser?

MS. BRADY: Yes, Your Honor.

THE COURT: What's that converted amount?

While you're looking at that, Mr. Edgar, you talk about on your page 4 at the sentencing memo a converted amount of 165.28 kilograms, right?

MR. EDGAR: I believe that's correct, Judge.

THE COURT: Does any of that include this amount that she's talking about? It clearly doesn't because it talks about heroin. It talks about cocaine. It talks about -- so I think I know the answer, but does it include this 48 pounds that she's talking about?

MR. EDGAR: No, Judge.

MS. BRADY: So Your Honor, the bare minimum of methamphetamine that is reliably attributed to Mr. O'Bannon would convert to --

THE COURT: Directly, without any conspiracy with Mr. Balentine --

MS. BRADY: Yes, Your Honor. And it's simply the methamphetamine, leaving out the heroin, leaving out the cocaine we know he was also involved in -- the

equivalent would be 43,664 kilograms of marijuana; 36 --

THE COURT: That was marijuana?

MS. BRADY: No, Your Honor, that's methamphetamine.

So when you go to the sentencing --

THE COURT: Converted drug weight?

MS. BRADY: It converts to 43,664 kilograms of marijuana, which is a base offense level of 36.

THE COURT: Ms. Ivie?

PROBATION OFFICER IVIE: Yes, Your Honor.

THE COURT: Do you agree with that?

PROBATION OFFICER IVIE: So, I would agree -- and

I've got my computer up. So I've got a little cheat sheet. So if it's 48 pounds of methamphetamine, if that's all we're looking at, we don't need to use the converted drug weight. Forty-eight pounds is equivalent to 21.77 kilograms of methamphetamine. And so that is a 36.

If you did want to convert it just for consistency with everyone else, that does equate to 43,545.6 kilograms of converted drug weight, which is a 36.

THE COURT: So not marijuana, converted drug weight?

PROBATION OFFICER IVIE: It's converted drug weight now. We used to convert it to marijuana, but now they just call it converted drug weight. It's the same number.

THE COURT: She's just trying to confuse me, Ms. Ivie.

PROBATION OFFICER IVIE: I'm sorry.

THE COURT: No, not you, Ms. Brady. She's trying to confuse me.

So whether it's 43,545.6 kilograms converted drug weight or I think you said 21.77 pounds of methamphetamine, it's a level --

PROBATION OFFICER IVIE: Kilograms.

THE COURT: Excuse me -- kilograms, that's a level 36; is that right?

PROBATION OFFICER IVIE: Correct.

THE COURT: And then that does not include this amount, Ms. Brady, that's on page 4 of the defendant's memo, which again is the -- there's some meth; but there's heroin, cocaine, so on and so forth, which is an additional 165 kilograms of converted drug weight?

MS. BRADY: Correct, Your Honor.

THE COURT: Again, I want to make sue I have it correct, Ms. Ivie: 43,545.6-kilograms converted drug weight?

PROBATION OFFICER IVIE: Correct.

THE COURT: And then we would add to that the 165.28 in the defendant's memo.

PROBATION OFFICER IVIE: And we have 43,710.88 kilograms of converted drug weight.

THE COURT: Okay. And I have the same thing. Does that change it from a 36 or does that keep it at a 36?

PROBATION OFFICER IVIE: That keeps it at a 36.

THE COURT: All right. Okay. Thank you.

PROBATION OFFICER IVIE: You're welcome.

THE COURT: So having looked at the PSR – having looked at the defendant's sentencing memorandum and the government's sentencing memorandum, and specifically, on the defendant's where he suggests that his conduct is responsible for 165.28 kilograms of converted drug weight, and then further taking into account the evidence -- for example, Exhibit 154, Exhibit 2064, Exhibit 2143, Exhibit 2157, Exhibit 2175-T, as well as agent -- the DEA 6 -- the agent's testimony, so on and so forth, I find that the -- that the drug amount attributable just to Mr. Balentine -- or excuse me -- Mr. O'Bannon would be this 43,710.88 kilograms, which would be a base offense level of 36.

MS. BRADY: And I apologize, Your Honor. I believe I cut Mr. Edgar off from cross-examination. I apologize. That was -- I think I began to argue before it was appropriate. I apologize, Your Honor.

THE COURT: That's my fault.

And that's where I'm at right now, Mr. Edgar. So you can proceed with cross-examination.

Now, what I would further find, depending on the cross-examination, is that that is the amount that appears by a preponderance to be based on what I've reviewed thus far -- to be attributable to Mr. O'Bannon.

As I alluded to in my questioning, and so I want to say this so that you have an opportunity to examine this if you need to, Mr. Edgar -- is that having found by a preponderance this conspiracy, that none of that includes the amount that was attributable to Mr. Balentine, which is 157,517.87 kilograms, or Mr. Perry Jones, which was 32,301 kilograms, the former qualifying for a base offense level of 38; the latter, Mr. Perry Jones, for a base offense level of 36.

I think that I can find that by a preponderance. I don't think I need to since it's not being argued here; but it seems as though to be conservative, that I would make that finding, depending on your cross-examination, that would grant your objection to the extent that the amount would warrant a -- a base offense level of 36.

But go ahead with your cross-examination, with all of that in mind.

MR. EDGAR: Thank you, Judge.

CROSS-EXAMINATION

BY MR. EDGAR:

Q Mr. Coleman was not present at trial, correct?

A Correct.

Q He was listed as a government witness but not called?

A Correct.

Q And he is not here to testify at this hearing today, correct?

A That is correct.

Q Mr. O'Bannon was not charged with any of these transactions involving Jalen Coleman, correct?

A Correct.

Q And for these transactions involving Mr. O'Bannon, you say Mr. Frazier got 16 years?

A Yes.

Q Regarding --

A I should say -- let me correct myself. It wasn't specifically for Mr. O'Bannon. They had a completely different investigation down there. So what he was exactly

* * *

sentenced for had nothing to do with Mr. O'Bannon.

Q You assisted them with their investigation?

A Just providing names of who was, telephone numbers, that type of stuff.

Q And you let them know that Mr. O'Bannon was involved in these transactions?

A I let them know that Mr. O'Bannon was a drug trafficker up there. They had no clue who Michael O'Bannon was in Atlanta.

Q So you're saying you assisted with the investigation of Kourvoiser Frazier, and Mr. O'Bannon had a lengthy and protracted relationship with Mr. Frazier; but you never mentioned Mr. O'Bannon to the authorities in Georgia?

A Their investigation was pretty much complete. So when I say "assisted," it was on the back end of their investigation. They had already had a full-fledged investigation of Kourvoiser Frazier, and it was kind of -- their investigation was complete, and they were putting the puzzle pieces together; and I actually had them come up and also talk to Jalen Coleman about his interactions with Kourvoiser Frazier.

Q So Jalen would have told them about the two or three trips per week -- two to five trips per week [sic]?

A Yes, but he was already charged in some completely -- Kourvoiser Frazier was not charged with any drugs that came to the state of Indiana. It was a completely separate investigation down there.

Q But Jalen Coleman met with the authorities down there, correct?

A Jalen Coleman met with DEA Atlanta up here.

Q And he let them know that there were two to five trips to Georgia per month, right?

A Yes.

Q Just like he told you?

A Correct. The DEA 6 maybe that you're looking at or whatever that he was part of that -- he was in that same conference room.

Q The agent from Georgia, from Atlanta?

A Yes.

Q So that agent's actually hearing this information?

A Yes, he's hearing it, correct.

Q And so during that interview, Jalen Coleman talks about for each of these two to five trips per month, they brought 7 to 8 kilograms each time, referring to page 2. Do you recall that?

A Yes.

Q And that for each of these trips -- I'm sorry -- each of these kilograms that were brought back, there was a profit of $30,000 to be made according to page 7, right?

A I don't know what the numbers are, but I do also know that the kilograms -- and I fixed it on a separate report. It should be 7 to 8 pounds of meth each trip, not kilograms.

Q So if on page 7 it says 40 -- a -- according to Coleman, a kilogram of methamphetamine in Kokomo sells for $40,000 per kilogram, that should say "pound"?

A Yeah. And that number is not accurate whatsoever. Unless you're talking breaking it down to gram levels, then maybe I guess a kilogram of meth could be that. But based off the numbers that we had at trial and other things, $40,000 per kilogram wholesale, no way.

Q And yet, that was what Jalen Coleman told you?

A That is what he said that day, yes.

Q And that information you knew to be unreliable?

A That particular statement -- I didn't expand on it further. Like I said, the only way -- if you're breaking it down into .1 grams or user amounts, then yes, you're going to get to that figure; but I'm more averse [sic] to wholesale distributors.

Q So in the immediately preceding paragraph, you say that methamphetamine was purchased at the cost of $10,000 per kilogram. That should say "per pound," correct?

A About $10,000 a kilogram was about the rate. That's what we heard over the phone calls. Nine to 10,000 per kilogram, 5,000 a pound.

Q The cost was $10,000 per kilogram?

A Yes.

Q So in this paragraph, it says, "Coleman stated that kilograms and not pounds of methamphetamine often

are used to describe methamphetamine, and the cost is $10,000 per kilogram." Should that say "$10,000 per pound"?

A No. That should be $10,000 per kilogram.

Q And then immediately after that, "Coleman stated a kilogram of methamphetamine in Kokomo is currently 40,000 per kilogram"?

A Correct, that's what he said.

Q And he didn't distinguish between breaking it down or selling it by dose or anything like that, correct?

A Correct.

Q So was he trying to lead you to believe that Mr. O'Bannon was profiting $30,000 per pound of methamphetamine?

A I don't know what his belief was.

Q If he made two to five trips per month with 7 to 8 kilograms or pounds, $30,000 profit, that would be close to half a million dollars at least per month, right?

A It could add up.

Q Maybe as much as a million dollars a month?

A We don't know what he was charging. We don't know the cost, the overhead, as any business has overhead, travel costs.

Q And as you say, you determined Jared [sic] not to be reliable -- Jalen, sorry. I said, "Jared." You determined Mr. Coleman not to be reliable?

A That's not accurate. I believed Jalen Coleman.

Q You did? Why didn't you call him as a witness at trial?

MS. BRADY: Objection. I don't believe that was Agent's Collins' determination to make.

MR. EDGAR: It's his sentencing and if he knows --

THE COURT: He can't call somebody at trial. I ask you if you have witnesses. I ask her if she's got witnesses. I don't ask Agent Collins if he has witnesses. Sustained.

BY MR. EDGAR:

Q To your knowledge, if you know, was Jalen Coleman omitted at trial because he was considered to be unreliable?

A No.

THE COURT: "No" what, no, you don't know -- that's not why he wasn't called or no, you don't know?

THE WITNESS: No, that's not why he wasn't called.

BY MR. EDGAR:

Q What type of crime is he facing prosecution for?

A Jalen Coleman that is?

Q Correct.

A A methamphetamine charge in the state of Tennessee.

Q For the 2 pounds?

A Yes.

Q And for the behavior that he's admitted to here, is he being charged for this?

A No.

Q And he is currently out of custody, correct?

A To the best of my knowledge, yes.

Q And he is unlikely to face prison time for any of this, correct?

A I do not know what Tennessee's thoughts are.

Q Mr. O'Bannon drove a pickup truck from the 1990s. You're aware of that?

A Yes.

Q His house is valued at around $50,000. Were you aware of that?

A No, I was not aware of his house.

Q It's a small house, correct?

A Which one? He is part owner in multiple houses.

THE COURT: Let's just get to the amount here. If you want to make argument later, you can do that.

MR. EDGAR: This goes to the credibility of not just this witness, Agent Collins, but the credibility of Jalen Coleman, which is the centerpiece of our argument.

THE COURT: Okay.

BY MR. EDGAR:

Q At any rate Mr. O'Bannon did not live a lifestyle consistent with profiting half a million dollars a month on drug sales, correct?

A Not that I seen, no.

Q Mr. O'Bannon frequently on the phone calls had to borrow money. You recall that?

A No, I don't.

Q The money that he was found with for the murder for hire, the $7,000, that was borrowed from Reggie Balentine, correct?

A I don't know if that was borrowed or if that's Reggie Balentine's portion of the -- to complete the murder for hire.

Q And then we heard numerous phone calls about borrowing $3,000 for a marijuana deal between O'Bannon and Coleman. That was borrowed from Balentine as well, correct?

A Not for sure, once again, if it's borrowed or if it was payment to chip in on the marijuana.

Q Mr. O'Bannon was never charged with marijuana, correct?

A Correct.

Q And there is phone call evidence, wiretap evidence that Mr. O'Bannon had to borrow $1,200 from Mr. Riley for a transmission. Do you recall that?

A No, I don't recall that.

Q Regarding the paragraphs from the PSIR that you say that you've reviewed and you find to be accurate, did you help prepare those paragraphs?

A My investigation did. I mean, I didn't write them. I guess I'm confused by the question.

Q Did you help write them I guess would be a better question?

A No.

Q But they are based predominantly on evidence the government presented at trial, correct?

A Correct.

Q And at least in part, evidence that was rejected by the jury found Mr. O'Bannon not guilty on certain counts, correct?

A Yes.

Q Specifically, paragraphs 33 through 38 of the PSR appear to relate to what I call Megabus trips to Georgia? Do you recall those paragraphs?

A Yes.

Q And it was your testimony at trial that Mr. O'Bannon was not directly involved in those transactions, correct?

A Correct. He did not contribute money towards those transactions.

MR. EDGAR: That's all the questions I have, Judge.

Thank you.

THE COURT: All right. Any redirect?

MS. BRADY: No, thank you, Your Honor.

THE COURT: Thank you, Agent Collins. You may step down.

(Witness excused.)

THE COURT: So as I started to say, the defendant's objection is granted to the extent that I find that the base offense level should be 36; and that's based on the evidence, the arguments, the testimony that by a preponderance of the evidence, the defendant's relevant conduct included a drug quantity of at least 43,710.88 kilograms; and I detailed before what that was. That was the amount that we heard in testimony today, as well as the amount from the testimony in -- testimony and exhibits today as well as the amount set forth -- the 165.28 set forth in the defendant's sentencing memorandum.

And -- are you having problems hearing me?

THE DEFENDANT: Just a little, Your Honor, because of the background noise; but it went away.

THE COURT: So based on those, at least that amount. As I said, I think that I could also find based on the preponderance of finding a conspiracy, that I could also find the amount attributable to Mr. Balentine and Mr. Perry Jones, so at least on the level of 157,000 plus, which would be over 90,000, which would be a 38; but in this instance, I'm going to make this specific finding, as I just said, of 43,710.88 kilograms attributable for the purposes of this sentencing. Then that makes a base offense level of 36, as I said, rather than 38.

In addition, based on the submissions of the parties, the arguments today, I do find that with respect to the objection to the enhancement at paragraph 59, I'm going to overrule that. I do find that from the totality of the circumstances, it shows that Mr. O'Bannon's --

Well, let me say, I guess, first that by a preponderance of the evidence, the defendant derived income from a pattern of criminal activity; namely, distribution of methamphetamine and heroin. Certainly, from the defendant's memo, I think cocaine as well, in the amount of at least $14,600 between February 23rd, 2018, and April 27th, 2018. I suspect it's much more based on what I've heard today but at least 14,600.

The Court also finds by a preponderance of the evidence that the distribution of methamphetamine was defendant's primary occupation during this time period, as evidenced by the fact that defendant was terminated from Caravan Facilities Management on July 19th, 2017, and no apparent gainful employment

for 40 weeks during 2017. I understand there's some argument made for seasonal lawn care work, but that would not -- certainly even that wouldn't be this 40 weeks, but the fact that there were no -- there was no indication, no indicia whatsoever of any proceeds from that, I do find that the primary occupation during this time period was through this distribution of methamphetamine.

So now, I think you've had a chance to check me out, Mr. Edgar. Have I missed any objections or does that cover it?

MR. EDGAR: There was another, Judge, that related to the paragraph 49 of the original initial PSIR, which probably is paragraph 50.

THE COURT: Is that the base offense level?

MR. EDGAR: For the murder for hire? The argument there -- I understand this is probably not one that's going to generate a lot of discussion over case law and theory, but I think it's worth pointing out at least for review on appeal that paragraph 50 of the final PSIR does indicate that the base offense level for murder for hire is the 32. I don't think that that can be legally rational or reasonable because the maximum penalty on that charge, the murder for hire, is 10 years. Base offense level, level 32, cannot result in a sentence less than ten years based on even being a category 1 under the guidelines. So it allows for no gradation, no variation under the guidelines whatsoever. So it appears, in my humble opinion, to be an abdication by the Guidelines Commission to actually determining the culpability or any effort to balance the factors that would go into determining a sentence.

If you just automatically recommend the top end of the statutory range no matter what, then it can't be sort of a independent or reliable or empirical review of the purposes behind sentencing.

THE COURT: Well, is that something that you're just bringing up now or is there something that I should refer to for that?

MR. EDGAR: It is mentioned specifically in the document that I filed to note these objections.

THE COURT: So the probation officer maybe missed it or am I missing it?

MR. EDGAR: I don't know that they addressed it.

THE COURT: Ms. Ivie?

PROBATION OFFICER IVIE: Your Honor, it's included in paragraph -- I'm sorry -- on page 36 of the final presentence report. It was included with the objection No. 3, offense level computations about halfway down the page.

THE COURT: Okay.

PROBATION OFFICER IVIE: Starts about paragraph 50.

THE COURT: Yep, I got it. Is there a response there though?

PROBATION OFFICER IVIE: No, Your Honor. The first sentence in the response is just that the guidelines were applied correctly for that count. There's no response

necessary by the probation office because it's a Sentencing Commission issue with the guideline manual.

THE COURT: I think I understand your argument, Mr. Edgar. Of course, they are advisory, number one. Number two, does it make a difference here since the higher offense level is Count 11? As you say, there's nothing I can do about it anyway. It is what it is, unless you think that that was the incorrect number. And as the probation officer just said and as it states in the response, it is the correct offense level under the guidelines; and I think that you agree with that. You just think that that's not -- shouldn't be it; is that right?

MR. EDGAR: I concede nothing, Judge.

THE COURT: Well, I think that's what you said. I think you started off by saying, "I know this isn't going to go anyplace legally. I think this is what it says, but I think that the Sentencing Commission is abdicating their responsibility." So that says that you can't dispute this 32.

It's what's set forth in the guidelines, right?

MR. EDGAR: I think there's two questions there --

THE COURT: Why don't you just answer that question first. Is that the correct number set forth in the guidelines?

MR. EDGAR: That is what the guidelines say.

THE COURT: Okay. So there's nothing I can do about that?

MR. EDGAR: No. And it really only would become important if the Court had found a lower guideline on the drugs and then this would become the higher guideline. So it's probably going to be interpreted as some sort of harmless error or not --

THE COURT: Well, it's not an error at all. The

Sentencing Commission can't be held in error, right? That's what it is. That's the law right now is that number. So there's nothing you or I can do about that, but I appreciate your argument.

MR. EDGAR: Okay, Judge. Thank you.

THE COURT: Maybe they will take note and change that.

So we've covered that one. Anything else?

MR. EDGAR: Not as far as objections. We do have 3553(a) factors and so forth and allocution.

THE COURT: So with that, the Court accepts the presentence report as its findings of fact and accepts the presentence report for the record under seal. Just to be clear, to the extent that there were any of those omnibus sorts of objections that you had at the beginning that I said that we would address if there was a specific one that had to do with sentencing, I think we've covered all of those.

To the extent that there are other ones in here that you objected to that don't affect the sentencing, I don't

need to decide them. So we don't need the take the time to go into those if we haven't already covered them. I think we've covered them but just in case.

So again, accept the presentence report for the record under seal. In the event of any appeal, counsel on appeal will have access to the sealed report but not to the recommendation portion, which shall remain confidential.

And the following -- and everybody listen up. We've had a lot of rulings here, so let's listen up here, make sure I get this right. The following are the Court's conclusions as to the appropriate offense level and criminal history category.

The Court finds that the offense level for Count 6 is 32. The offense level for Count 11 is 47, which takes into account a base offense level of 36, a two-level enhancement for possession of firearms under Guideline Section 2D1.1(b)(1); a two-level enhancement for using or directing the use of violence under Guideline Section 2D1.1(b)(2); a two-level enhancement for committing the offense as part of a pattern of criminal conduct under Section 2D1.1(b)(16)(E); and a three-level enhancement for being a manager or supervisor that involved five or more participants under Guideline Section 3B1.1(b); and a two-level enhancement for obstructing justice under Guideline Section 3C1.1.

The offense level for Count 13 is 24. This takes into account a base offense level of 20 and that four-level

enhancement for using or possessing a firearm and ammunition in connection with another felony offense under guideline Section 2K2.1.

The greater of the offense levels is 47. Pursuant to Chapter 5, part A though, when the total offense level is calculated in excess of 43, the offense level will be treated as 43. The applicable criminal history category is IV. This yields a guidelines range -- guideline sentence of life imprisonment, a fine range of 50,000 to $5 million, a term of supervised release of no less than four years and a special assessment of $300.

Now, before I ask counsel if they have any objection, Ms. Ivie, did I get that all right?

PROBATION OFFICER IVIE: Your Honor, the only correction that I would have is the guideline range is life imprisonment. However, because each count of conviction has a fixed statutory maximum penalty, he's limited at 60 years or 720 months. So that becomes the guideline range.

THE COURT: So the guidelines range is 720 months?

PROBATION OFFICER IVIE: Correct.

THE COURT: So this yields a guidelines sentence of life; but by statute, the maximum is 720 months, and that's the guideline range?

PROBATION OFFICER IVIE: Correct.

THE COURT: Okay. So 720 months.

Does counsel have any objection or response to the Court's calculation as to the offense level or criminal history category, Ms. Brady?

MS. BRADY: No, Your Honor.

THE COURT: Mr. Edgar, other than your ongoing objections?

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA,

V.

MICHAEL O'BANNON A/K/A LUNCHY

JUDGMENT IN A CRIMINAL CASE

CASE NO. 1:18CR00116-003

USM NUMBER: 16375-028

James A. Edgar, Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to counts

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

☒ was found guilty on counts 6, 11, and 13 after a plea of not guilty

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18 §1958	Conspiracy to Use Interstate Commerce in the Commission of Murder-for-Hire	3/2/2018	6
21 §841(a)(1)	Possession with Intent to Distribute Between 5 and 50 Grams of Methamphetamine (Actual)	5/1/2018	11
18 §922(g)(1)	Possession of a Firearm as a Previously Convicted Felon	5/1/2018	13

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the

Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on counts 1 and 12

☐ Count(s) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

7/30/2020

Date of Imposition of Sentence:

JAMES R. SWEENEY II, JUDGE

United States District Court

Southern District of Indiana

Date: 7/31/2020

DEFENDANT: Michael O'Bannon, a/k/a Lunchy

CASE NUMBER: 1:18CR00116-003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 450 months on Count 11, and 120 months on each of Counts 6 and 13, all to be served concurrently.

☒The Court makes the following recommendations to the Bureau of Prisons: Substance abuse evaluation/treatment, including RDAP; educational programming; parenting classes; Prison Industries; vocational training in automotive technology; Life Connections; and placement at FCI Terre Haute, Indiana, at the lowest security level.

☒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

☐ 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 was delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

BY: _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Michael O'Bannon, a/k/a Lunchy

CASE NUMBER: 1:18CR00116-003

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years on Count 11, and 2

years on each of Counts 6 and 13, all 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 least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of

future substance abuse. (check if applicable)

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence

of restitution. (check if applicable)

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et

seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location

where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)

7. ☐ You must participate in an approved program for domestic violence. (check if applicable)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in

accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below.

CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the federal judicial district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.

2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.

4. You shall not knowingly leave the federal judicial district where you are being supervised without the permission of the supervising court/probation officer.

5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.

6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to be convicted felons to your probation officer within 72 hours of the contact.

7. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in who lives there, job positions, job responsibilities). When prior

notification is not possible, you shall notify the probation officer within 72 hours of the change.

8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.

9. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.

10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.

11. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.

12. You shall not use or possess any controlled substances prohibited by applicable state or federal law, unless authorized to do so by a valid prescription from a licensed medical practitioner. You shall follow the prescription instructions regarding frequency and dosage.

13. You shall submit to substance abuse testing to determine if you have used a prohibited substance or to determine compliance with substance abuse treatment. Testing may include no more than 8 drug tests per month. You shall not attempt to obstruct or tamper with the testing methods.

14. You shall not knowingly purchase, possess, distribute, administer, or otherwise use any

psychoactive substances (e.g., synthetic marijuana, bath salts, Spice, glue, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption.

15. You shall provide the probation officer access to any requested financial information and shall authorize the release of that information to the U.S. Attorney's Office for use in connection with the collection of any outstanding fines and/or restitution.

16. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation

of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant Date

U.S. Probation Officer/Designated Witness Date

DEFENDANT: Michael O'Bannon, a/k/a Lunchy

CASE NUMBER: 1:18CR00116-003

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$300.00		$1,500.00		

☐ The determination of restitution is deferred until. An Amended Judgment in a Criminal Case (AO245C) 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.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
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: Michael O'Bannon, a/k/a Lunchy

CASE NUMBER: 1:18CR00116-003

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 $ _____ 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, ☐ F or ☐ G 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 ☐ If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee

☐ 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.