# APPENDIX

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 17-4092**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISHMAEL BAITH FORD-BEY,

Defendant - Appellant.

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Appeal from the United States District Court for the District of Maryland, at Greenbelt. Deborah K. Chasanow, Senior District Judge. (8:13-cr-00492-DKC-2)

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Submitted: November 16, 2017 Decided: November 29, 2017

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Before DUNCAN, DIAZ, and FLOYD, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Steven M. Klepper, KRAMON & GRAHAM, P.A., Baltimore, Maryland, for Appellant. Stephen M. Schenning, Acting United States Attorney, David Metcalf, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ishmael Baith Ford-Bey appeals from his 360-month sentence imposed on remand for resentencing. On appeal, Ford-Bey contends that his sentence was both substantively and procedurally unreasonable because the district court failed to properly consider the evidence of Ford-Bey's rehabilitation and change of character. We affirm.

The Supreme Court held in *Pepper v. United States*, 562 U.S. 476, 490 (2011), that "when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range." The Court noted that post-sentencing rehabilitation "provides the most up-to-date picture of [a defendant's] 'history and characteristics'" and "sheds light on the likelihood that he will engage in future criminal conduct, a central factor that district courts must assess when imposing sentence." *Id.* at 492. However, the Court made clear that district courts are not required to reduce a defendant's sentence, even after a showing of relevant rehabilitation. *Id.* at 505 n.17.

A substantive reasonableness review entails taking into account the totality of the circumstances. *United States v. Pauley*, 511 F.3d 468, 473 (4th Cir. 2007). A sentence within the correctly calculated Guidelines range is presumptively reasonable. *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014). Such a presumption can only be rebutted by a showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) (2012) factors. *Id.*

"When rendering a sentence, the district court must make an individualized assessment based on the facts presented." *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009) (internal quotation marks omitted). Accordingly, a sentencing court must apply the relevant § 3553(a) factors to the particular facts presented and must "state in open court" the particular reasons that support its chosen sentence. *Id.* Stating in open court the particular reasons for a chosen sentence requires the district court to set forth enough to satisfy this court that the district court has a reasoned basis for its decision and has considered the parties' arguments. *Id.* *Carter*, though, does not require a sentencing court to "robotically tick through" otherwise irrelevant subsections of § 3553(a). *See United States v. Johnson*, 445 F.3d 339, 345 (4th Cir. 2006).

Regarding Ford-Bey's claim that the district court provided an insufficient explanation for his sentence, we conclude that the district court's reasoning was appropriate. The court noted the reduction of Ford-Bey's Guidelines range on resentencing, the unrelated nature of the firearm,[*] and Ford-Bey's leadership role in an extraordinarily wide-ranging drug conspiracy. The court also considered Ford-Bey's previous incarceration and the failure of that sentence to deter him from the instant conduct. The court heard from Ford-Bey regarding his rehabilitation and changed attitude and explicitly considered that evidence. We hold the court set forth sufficient reasoning supporting the within-Guidelines sentence. *See United States v. Helton*, 782

[*] In Ford-Bey's initial appeal, we found the district court's enhancement for possession of a firearm in relation to a drug trafficking crime was clearly erroneous. *United States v. Ford-Bey*, 657 F. App'x 219 (4th Cir. 2016) (No. 15-4347).

F.3d 148, 154 (4th Cir. 2015) ("To require more explanation would unnecessarily intrude upon the district court's primary and unique role in the sentencing process.").

Turning to the substantive reasonableness of Ford-Bey's sentence, he contends that his mitigating arguments sufficiently rebutted the presumptive reasonableness of the within-Guidelines sentence. However, a defendant who protests his within-Guidelines sentence on this ground must adduce "fairly powerful mitigating reasons" and persuade this court that the district court was unreasonable in balancing the pros and cons. *United States v. Medina-Villegas*, 700 F.3d 580, 584 (1st Cir. 2012). While the court might have imposed a lower sentence given the mitigating circumstances cited by Ford-Bey, the mere fact that the court did not consider the mitigating circumstances worthy of a greater reduction does not render the sentence unreasonable. Because there is a range of permissible outcomes for any given case, an appellate court must resist the temptation to "pick and choose" among possible sentences and rather must "defer to the district court's judgment so long as it falls within the realm of these rationally available choices." *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007); *see also United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011) (observing that "district courts have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors") (citation omitted); *United States v. Carter*, 538 F.3d 784, 790 (7th Cir. 2008) (noting substantive reasonableness "contemplates a range, not a point"). Accordingly, we find no abuse of discretion because the district court considered the arguments by both parties and rationally found that a 360-month sentence was appropriate.

Thus, we affirm Ford-Bey's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

So I thank you for your time and any consideration on my behalf.

THE COURT: Thank you.

Okay. Mr. Ford-Bey is, as we have stated, before the Court for resentencing on a number of counts: One, Two, Three, Four, Five, Eight, and Nine of the superseding indictment.

Count One is conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine.

Count Two is the communications facility use on November 26th, 2011.

Count Three is the telecommunications facility use on December 8th.

Count Four is possession with intent to distribute cocaine.

Count Five is possession with intent to distribute five kilograms or more of cocaine.

And Count Eight is the money laundering conspiracy.

And Count Nine is money laundering.

The guideline adjustment reduces the guidelines to a 42 and a III. Mr. Miller suggests it should be a 41 and a III, I guess for three levels rather than four on the role.

For guideline purposes, it doesn't make much difference as a Criminal History Category of III, it's still 360 to life.

I note, however, that I don't find the record to be significantly changed with regard to Mr. Ford-Bey's role.

While I certainly have heard more evidence than I had at the time I first sentenced Mr. Ford-Bey, in the sense that there has been a trial, it does not, in my view, alter the view I had of -- of his role.

The guidelines distinguish leadership and organization from mere management or supervision based upon decision-making authority, nature of participation, recruitment of accomplices, the claimed right to a larger share of the fruits, the degree of participation and planning and organizing, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

As I noted at the original sentencing, there can be more than one person who qualifies as a leader or organizer. There certainly can be more than one manager as well.

And regardless of the degree of control over the truck driver by "Big Reese" doesn't change the fact that Mr. Ford-Bey exercised a similar nature of control in part over the driver, but, more importantly, perhaps, over those who were at this end of -- of this conspiracy. And he certainly controlled the driver when he was at this end of the conspiracy.

The Fourth Circuit had no difficulty, it said, Taking the record as a whole, there is ample evidence to support my determination that Mr. Ford-Bey was a leader or organizer of a criminal enterprise consisting of five or more people.

I don't see the facts as -- as altered in that regard.

So, I'm declining to change officially any guidelines at this juncture with regard to role.

Nevertheless, I take sentencing as of today in terms of the history and characteristics of the person and all of the other factors.

I don't go back and decide what would I have done back then had the guidelines been calculated differently. So, I have read, with interest, the letter, and learned what Mr. Ford-Bey is doing in prison. I have read his letter, and, while I have seen some very insightful letters, this one is certainly among the most in that regard. And I thank you for taking the time to write it and to try to explain to me what you have come to view as your path in life at the moment.

I also have, of course, the other information that was submitted indicating to me some of the programs that you have participated in and the view others have of you within the Bureau of Prisons facility.

I still need to consider the seriousness of the conduct. I have to consider how to protect the public, if necessary, from you, deter you, punish, deter others, avoid unwarranted disparity. I have to take all of those same things into consideration.

And I recognize that I erred in concluding that the firearm in the residence was in furtherance of the drug trafficking, but it still was there.

And while Mr. Miller is correct, there was no gun-related charge in your indictment, you were not a first offender, so any possession of a firearm clearly was improper.

But be that as it may, I am setting aside consideration of any use of a firearm, or possession of a firearm, I should have said, in furtherance or in connection with a drug trafficking crime.

As I commented before, and I think as Ms. Johnston has just reemphasized, this amount of cocaine is almost unfathomable. It's the largest seizure that I am aware of. One thing that has changed is that because of the trial of a codefendant, I have now seen the cocaine here in a courtroom, which I could only have seen photos of.

I am not even sure I did -- I saw the photos of the back of the truck, but I have now seen much more. And it did not diminish the view I have of the quantity that was involved, seized on that one occasion, multiplied by the number of trips that I found reliable evidence of before that one.

And that is a -- a paramount consideration, in my view, is that this was no small effort undertaken by you and the -- and the others.

What I am going to do, Mr. Ford-Bey, is reduce the 33-year sentence down to 30, 360 months concurrent on Counts One and Five.

The same sentences on the others, which is 48 months on

Two and Three, and 240 months on Four, Eight, and Nine, all to run concurrently.

We will follow the incarceration again with supervised release of ten years on Counts One and Five, one year on Two and Three, and three years on Four, Eight, and Nine, all, again, to run concurrently.

The same special condition, which is substance abuse treatment, will be added to all of the regular conditions.

I don't know if the special assessment remains unpaid, but it's $100 per count for $700.

No fine.

And the order of forfeiture will remain in place for $108 million.

I assume Fairton is where you are placed and that you will return there.

Is there any different request for recommendations?

THE DEFENDANT: No. No.

THE COURT: No? Okay. So that's what will happen.

You have the right to appeal. If you want to appeal, it must be noted in writing within two weeks of the entry of this amended judgment on the record of the court.

Please talk it over promptly with Mr. Miller because he would help you by filing a notice of appeal if that's what you decide to do.

Is there anything further that we need to talk about

**SENTENCE**

THE COURT: Mr. Ford-Bey is before the Court now for sentencing on seven counts. Count one is the conspiracy to distribute and possess with intent to distribute controlled substances. In this case, it was significant quantities of cocaine.

Count two is the use of a telecommunications facility.

Count three is a similar use of a telecommunications facility in facilitating narcotics conspiracy.

Count four is possession with intent to distribute controlled substances.

Count five is the second count of possession with intent to distribute controlled substances, and this deals with the quantity of cocaine found on August 17, 2012.

Count eight is participation in a money-laundering conspiracy.

And count nine is actual money laundering.

This conspiracy, both of them, that Mr. Ford-Bey participated in occurred in 2011 and 2012. The indictment alleges that it continued up until September -- that the conspiracy continued until September of 2013. He, of course, was arrested on August 16, 2013.

We didn't have a trial. Instead, we had a guilty plea proceeding and then information provided to me, some in evidentiary form for sentencing purposes, to enable me to

understand a little better what those words on an indictment mean.

I do remember when we took the guilty plea and I see this order of forfeiture that I signed, agreeing to a money judgment in the amount of $108 million. That signifies to me, and should to Mr. Ford-Bey, the extraordinary nature of what I'm seeing he participated in.

The guidelines top out drug quantity at anything over 450 kilos of cocaine. That should tell us that in the experience of the federal courts, that's about the worst that we usually see.

Here, I have found, based on what I concluded to be reliable evidence, that Mr. Ford-Bey was responsible for distribution of significantly more quantity than that. That is, he's off the top of the chart for cocaine distribution.

As Ms. Johnston pointed out, the statute, where Congress has told us how serious this kind of misconduct is, provides a mandatory five-year sentence for a first offender who distributes five kilograms.

Am I right about that, of cocaine?

MS. JOHNSTON: Your Honor, it's 10 years.

THE COURT: I'm sorry, I got that backward. A 10-year mandatory minimum for somebody who distributes five kilos, for a first offender. The second offender, it's a minimum of 20 years.

But Congress didn't consider higher quantities. I mean, that is serious all by itself to get either a 10-year or a 20-year -- depending on your criminal history -- sentence because Congress thinks that level of distributing cocaine merits it.

And what we have here is significantly more than that quantity. It's simply not possible to overstate the seriousness of this drug dealing. It's just not. The quantities involved just stagger the imagination.

The value of those drugs, based upon the expert testimony that I've seen, also staggers the imagination. Thirty thousand dollars a kilo. Over three million, close to four million dollars of value in that delivery that was interdicted.

Now, I know you didn't make that kind of money. That's not what they're saying this is. That's the value of it. How you managed to negotiate and to be able to purchase that amount of cocaine for redistribution in our community is not revealed anywhere, except to understand that this drug dealing had gone on for a while and had been building up.

And you were brazen. Just brazen. When you should have known that the jig was up, you fled and successfully, for a year, evaded capture.

I believe you were still involved with the others who were still dealing drugs. But even if you weren't, you had successfully evaded responsibility for that additional year.

The guidelines in this case don't take into account, as it turns out, the money laundering. That is the also important legal offense of taking drug money and doing things with it so as to hide the source and nature of the funds. And that was also significant. And as I already mentioned during today's colloquy, you did acknowledge doing that even before the telephone records show that you were recently in contact with that truck driver.

In some sense, the quantities, Mr. Ford-Bey, are so large that they really don't sink in. I mean, I looked at some of the pictures. If we'd had a trial, I don't know what they would have shown to the jury. But it's huge. It's larger than anything, certainly, I've dealt with.

I did some research. The median drug quantity for people who get life sentences in federal court is 85 pounds or a little bit more than 38 kilograms. In the year 2013, according to the federal United States Sentencing Commission, that people are serving a life sentence for distributing that amount. And that's median. Some a little less, some more.

And you, even with your own acknowledgment, start at 127 kilos. There aren't many who are serving life sentences in the federal prison, and certainly not all of them are for drug dealing. There's some other types of activity that also justify life sentences.

So by rights, based upon that kind of information, what

the Congress has said, what the guidelines say, what I know is the experience in the federal courts, that's what you should be facing.

The sentencing commission also has told us that they consider any sentence 470 months or higher to be a life sentence, the equivalent of a life sentence, because of life expectancy, etc. But that's not what I'm saying. The people I'm talking about, who had 38 kilos of cocaine and got a life sentence, got a life sentence.

But the Bureau of Prisons also has told me that for their assessment purposes for certain people, something just under 40 years they consider to be a life sentence; particularly, I would think, for someone your age.

So the government really is seeking a life sentence. I understand that. They may not call it life, but that's what they truly are asking. And I have to decide whether that's, in fact, what you deserve or whether something less is appropriate. And I've thought about it. I've read what everybody did send me, and I've listened carefully today.

For guideline purposes, I am going to give you the acceptance of responsibility downward adjustment, but not because you truly, fully deserve it. The government is right. The probation officer is right. I don't think you have truthfully acknowledged your full participation.

On the other hand, it took quite a lot, I think, to come

into court and plead straight up, knowing it was at least a 20 year mandatory minimum, and you have grudgingly somewhat accepted, frankly, what they clearly had you responsible for.

The guidelines tell me that just pleading guilty does not get you an acceptance of responsibility. What we're looking for is something you really talked about, redemption. Somebody who's seen the light. And I'm not a hundred percent sure, but I'm going to give it to you because I think it took quite a lot to decide to come in and plead to that and try for something less than a life sentence.

You didn't just have financial hardship in your trucking business and decide, well, maybe I'll sell some drugs until I can get back on my feet. That's not what this business was.

You and whoever else was involved were large-scale businessmen who made a lot of money. There was money found. There's cars that were forfeited. There's jewelry that was forfeited. There was a lot of money that was made. This was not simply a stopgap, let's make the next mortgage payment. This was your line of work, it was your business, and how you slipped back into it, I don't know.

You didn't just fail to keep the straight and narrow. You went wholesale into this, into this business, after serving, as you just said, seven and a half years for a much smaller quantity. So you had to know that if you got caught, the sentence was going to be much, much worse. A hundred and

twenty-four grams of crack was what you got seven years -- you did seven years for. And here we have hundreds, if not thousands of kilograms of cocaine powder.

So we didn't deter you with a 96-month sentence. Didn't get your attention. Congress hoped that putting these mandatory minimums on the books would deter people like you. I guess it's too lucrative, unfortunately.

Of course, you are not just the drug dealer. You have family, you have friends. You're talking really nice now. You're telling me that you think you can help other people avoid what you did. Well, why weren't you doing that in 2011? 2012? Why do you see that now and you didn't before? Because you didn't. Maybe you were telling people that, who didn't know you were drug dealing, but you were out there accepting deliveries of 127 kilograms of cocaine, giving money back to buy the next delivery and then distributing that poison in our community.

And we really haven't talked about what cocaine addiction does to people, how it can ruin lives and does. It's illegal for a good reason.

So the seriousness of what you did, obviously, is very important and, in some sense, paramount.

I see that you are not just that drug dealer, as I've said, and it is always heartening to me to see people in courtrooms and to read letters such as I have seen.

I have to try to deter you. I have to protect the public from you, frankly. I have to consider the kinds of sentences available. Obviously, this is a prison sentence and nothing else. I have to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. And sometimes restitution is an issue. It is not an issue here.

We are talking, obviously, huge number of years in anyone's life. I understand that. And I don't undertake any sentencing lightly and certainly not in this circumstance.

But I think to a large extent, Mr. Ford-Bey, you forfeited your right to be in free society by the conduct you undertook as part of this conspiracy. But like the government, I am not going to impose it as a life sentence. I am not going to give you the 40 years that they want. But nowhere am I going to go down to the mandatory minimum. And I have to decide where, within the sentences available to me, is the appropriate punishment to promote respect for law under these circumstances.

I'm going to give you 33 years, 396 months, on count one and count five.

Count two and three are 48 months concurrent. That's the maximum, four years.

Count four is 20 years, 240 months, concurrent, as are counts eight and nine.

We will follow the incarceration with supervised release. Ten years on counts one and five, one year on counts two and three and three years on counts four, eight and nine, all to run concurrently.

The normal conditions will apply and, in addition, I will ask the probation office to evaluate whether there should be any treatment program for substance and/or alcohol abuse. Although the defendant doesn't have a significant history, there's always -- well, there is some indication that he might benefit from that.

I am not going to put in place any other special conditions of supervised release at this time. There will be no fine, but there is a special assessment of $100 on each count, for a total of $700.

Do you need to talk to counsel or do you want to --

MR. MCDANIEL: Your Honor, just one brief second.

THE COURT: Okay.

MR. MCDANIEL: Thank you, Your Honor.

THE COURT: The money that is a special assessment, Mr. Ford-Bey, goes into a fund to help people who are victims of crime and, for that reason, have financial problems of their own that they didn't otherwise have. So it is a requirement of law that I impose it, and I do so.

In addition, we've already entered the preliminary order of forfeiture, but that forfeiture will become final as to

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**No. 15-4347**

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UNITED STATES OF AMERICA,

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v.

ISHMAEL BAITH FORD-BEY, a/k/a Jason Green,

Defendant - Appellant.

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Appeal from the United States District Court for the District of Maryland, at Greenbelt. Deborah K. Chasanow, Senior District Judge. (8:13-cr-00492-DKC-2)

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Submitted: September 15, 2016 Decided: October 12, 2016

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Before DUNCAN and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

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Affirmed in part; vacated and remanded in part by unpublished per curiam opinion.

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Marvin D. Miller, LAW OFFICES OF MARVIN D. MILLER, Alexandria, Virginia, for Appellant. Rod J. Rosenstein, United States Attorney, Deborah A. Johnston, Thomas P. Windom, Assistant United States Attorneys, Greenbelt, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ishmael Baith Ford-Bey appeals his 396-month sentence imposed pursuant to his guilty plea to various drug and money laundering charges. On appeal, Ford-Bey challenges his leadership role enhancement, his firearm enhancement, and the drug quantity attributed to him. We conclude that the district did not err in applying an enhancement for Ford-Bey's role in the offense or in calculating the applicable drug quantity. However, we find that the firearm enhancement was improper, and thus, we vacate Ford-Bey's sentence and remand for resentencing.

I.

We review sentencing adjustments based on a defendant's role in the offense for clear error. United States v. Sayles, 296 F.3d 219, 224 (2002). In addition, we may affirm a sentence enhancement for any reason appearing in the record. United States v. Garnett, 243 F.3d 824, 830 (4th Cir. 2001) (appellate courts may "affirm [sentence enhancements] on the basis of 'any conduct [in the record] that independently and properly should result in an increase in the offense level' by virtue of the enhancement") (citation omitted). A defendant's offense level is to be increased by four levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants." U.S. Sentencing Guidelines Manual

§ 3B1.1(a) (2014). The following factors should be considered in determining whether a role adjustment is warranted:

> (1) the exercise of decision making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or organizing the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority exercised over others.

See United States v. Kellam, 568 F.3d 125, 148 (4th Cir. 2009) (citing USSG § 3B1.1 cmt. 4).

However, a defendant need only exercise control over one other participant in order to be deemed a leader or organizer. USSG § 3B1.1 cmt. 2. This is "not a particularly onerous showing," requiring "only a conclusion that [the defendant] supervised at least one . . . participant," and it "does not require the court to identify specific examples." See United States v. Hamilton, 587 F.3d 1199, 1222 (10th Cir. 2009) (citations omitted). Moreover, once the court has determined that the defendant exercised some control over at least one participant, it need look no further into whether or not the defendant exercised control over others. Id. at 1223.

Taking the record as a whole, there is ample evidence to support the district court's determination that Ford-Bey was a leader or organizer of a criminal enterprise consisting of five or more people. First, it is undisputed that the organization

consisted of five or more people. As for the level of control Ford-Bey had over his cohorts, the evidence presented at sentencing clearly established that Ford-Bey was a leader and/or organizer of his group. In addition to being the top of the supply stream for tens of millions of dollars worth of cocaine, Ford-Bey received large, monthly drug shipments from January 2011 until August 2012. Ford-Bey directed the truck driver to the particular location for delivery of the shipment. In addition, Ford-Bey sent his "brother" to meet the truck driver on at least one occasion and directed the truck driver to give the shipment to the brother. Ford-Bey paid the truck driver to take money back to his supplier. The evidence also shows that Ford-Bey retained the authority to decide whether money would be going back with the truck driver. In addition, the evidence showed that at least one co-conspirator sold drugs he received from Ford-Bey and collected payments that he delivered to Ford-Bey.

While Ford-Bey asserts that the evidence merely shows buyer-seller relationships between him and his supplier and those to whom he sold drugs, we have never held that a criminal enterprise must have a rigid structure or be the only criminal enterprise its members are a part of before conspiratorial criminal liability can attach. Cf. United States v. Burgos, 94 F.3d 849, 858 (4th Cir. 1996) (en banc) ("[W]hile many

conspiracies are executed with precision, the fact that a conspiracy is loosely-knit, haphazard, or ill-conceived does not render it any less a conspiracy — or any less unlawful."). As stated above, under § 3B1.1, the Government need only establish that a defendant exercised control over one of his co-conspirators, not that he exercised rigid or exclusive control over any of them. Moreover, the selling of drugs on consignment does not create a wall between a seller and his downstream co-conspirators. In fact, a dealer who "fronts" drugs to a lower-level dealer with the expectation that the drugs will be sold and he will be repaid from the proceeds of those sales "overstep[s] a mere seller's role," and assumes a control position. See United States v. Pena, 67 F.3d 153, 156 (8th Cir. 1995); United States v. Atkinson, 85 F.3d 376, 378 (8th Cir. 1996).

Where a defendant "retain[s] the financial risk of a distribution by fronting or consigning the drugs," to another dealer, he remains invested in the ultimate distribution of those drugs to their end-users and retains a certain measure of control over those drugs and/or the dealer he has tasked with selling them. See generally Pena, 67 F.3d at 156-157. Thus, Ford-Bey cannot hide behind the technical structure of his arrangements with his coconspirators to insulate himself from leadership liability in this conspiracy. Accordingly, the

district court did not commit clear error in giving Ford-Bey a four-level adjustment for his role in the conspiracy.

II.

Section 2D1.1(b)(1) of the Guidelines directs a district court to increase a defendant's offense level by two levels "[i]f a dangerous weapon (including a firearm) was possessed." The enhancement is proper when the weapon at issue "was possessed in connection with drug activity that was part of the same course of conduct or common scheme as the offense of conviction," United States v. Manigan, 592 F.3d 621, 628-29 (4th Cir. 2010) (internal quotation marks omitted), even in the absence of "proof of precisely concurrent acts, for example, gun in hand while in the act of storing drugs, drugs in hand while in the act of retrieving a gun." United States v. Harris, 128 F.3d 850, 852 (4th Cir. 1997) (internal quotation marks omitted). Nonetheless, the Government has the burden of establishing by a preponderance of the evidence "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." United States v. Romans, 823 F.3d 299, 317 (5th Cir. 2016), petition for cert. filed, (July 6, 2016). Under this standard, "the Government must show that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred." Id. Once the Government has met its

burden, the defendant can avoid the enhancement by showing that "it is clearly improbable that the weapon was connected with the offense." Harris, 128 F.3d at 852.

The district court ruled that a handgun was found in Ford-Bey's residence at a time when he was significantly involved in drug trafficking and that Ford-Bey attempted to go back to his residence after a drug delivery went bad. Ford-Bey contends that the Government failed to connect the firearm to any activity or place where drug dealing occurred and notes that no drugs or drug paraphernalia were found at his home.

The only even marginally drug-related items found in Ford-Bey's home were many luxury items that were presumably purchased with drug proceeds and were forfeited as such. However, the Government does not cite any case law supporting the conclusion that a firearm found in close proximity to items purchased with drug proceeds satisfies the nexus requirement of USSG § 2D1.1. Although the proceeds are circumstantial evidence of Ford-Bey's drug dealing, their presence in his home does not establish that any drug transactions took place there. See Romans, 823 F.3d at 318-19. Further, there is no evidence that Ford-Bey ever carried a gun with him during his drug dealings. Given the absence of evidence that the weapon was in the same location as drugs or drug paraphernalia or that the weapon was where any part of any drug transaction took place, the

Government has failed to meet its burden of showing the necessary nexus. Thus, the district court's enhancement was clearly erroneous. Accordingly, we vacate Ford-Bey's sentence and remand for resentencing.

III.

A defendant convicted of conspiring to distribute controlled substances is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were in furtherance of the joint criminal conduct and were reasonably foreseeable to the defendant. USSG § 1B1.3 cmt. n.3. The Government must prove the drug quantity attributable to the defendant by a preponderance of the evidence. United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002). A district court's findings on drug quantity are generally factual in nature and therefore, are reviewed by this court for clear error. Id.

The district court noted that the threshold amount for the highest offense level was 450 kilograms of cocaine. The court reasoned that, between March and August 2012, there were seven clusters of calls between the truck driver and Ford-Bey. The court ruled that "there's not reason for Mr. Ford-Bey to be talking to this truck driver except when this truck driver is here delivering the cocaine." Although the court did not do any

specific calculations, it determined that, "with just the truck driver," the amount seized from the last delivery, and the telephone records, the amount is well over 450 kilograms. Ford-Bey contends that the district court's finding is strictly speculation and that the prior deliveries could well have been marijuana, as the driver believed.

We conclude that the district court's calculations were properly based on the truck driver's testimony and the corroborating phone records. While the truck driver initially believed that he was hauling marijuana, he realized later that he had been transporting cocaine. The appearance of the boxes and the procedure never changed, and the record provides no support for the conclusion that the contents of the boxes had been altered. Ford-Bey has come forward with no evidence that he was trafficking in marijuana up until the last shipment, and in fact, he pled guilty to a cocaine conspiracy covering several years.

Moreover, the court's calculations did not include any of the laundered money. The record reveals more than $500,000 in cash deposited into Ford-Bey's bank accounts during the relevant time period and the court ordered the forfeiture of more than $108,000,000 in cash and other items. The record reveals that a kilogram of cocaine cost could gross $80,000, when sold by the gram. Thus, the forfeited funds represent the sale of three

times the drug amount required for the offense level adopted by the district court. Given the truck deliveries and the evidence regarding the drug proceeds, there is no clear error in the district court's ruling on drug quantity.

Accordingly, we affirm the district court's rulings regarding drug quantity and Ford-Bey's role in the offense. Because the firearm enhancement was clearly erroneous, we vacate Ford-Bey's sentence and remand for resentencing. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART;
VACATED AND REMANDED IN PART