No. _____

In The
Supreme Court of the United States

KURT ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

PARRISH KRUIDENIER DUNN
BOLES GRIBBLE GENTRY
& FISHER, L.L.P.
ALFREDO PARRISH
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Phone: (515) 284-5737
Fax: (515) 284-1704
Email: Aparrish@parrishlaw.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Because the Supreme Court has found the Sentencing Guidelines are "the lodestone of sentencing," and they anchor both the district court's discretion and the appellate review process, is there a Sixth Amendment violation when jury-found facts authorize a Guideline sentencing range of 168-210 months, but judge-found facts, based on the directive to follow the Guidelines, create a dramatically harsh Guideline sentencing range of 324-405 months, and the judge imposes a Guideline sentence of 324 months?

2. With the Court's recent admonition to appellate courts to anchor their review to the Guidelines, does an appellate presumption of reasonableness apply to a sentence within a Guideline range that is based on judge-found facts, where the defendant was sentenced within a Guideline range that was almost 10 years greater than the facts found by the jury, and where the judge's fact findings were clearly erroneous?

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The opinion of the United States Court of Appeals for the Eighth Circuit is included in the Appendix and is published as *United States v. Alexander*, 714 F.3d 1085 (8th Cir. 2013). App. 1.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. §3231. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to 18 U.S.C. §3742(a) and 28 U.S.C. §1291. The court of appeals issued its opinion May 16, 2013. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

These are included in the appendix beginning at App. 41.

STATEMENT OF THE CASE

I. Introduction

The United States District Court for the Northern District of Iowa imposes sentences well above the

National average.[1] In 2012, for a drug trafficking offense, the National median sentence was 57 months, and the mean sentence was 72 months. U.S. Sent'g Comm'n, *Statistical Information Packet Fiscal Year 2012, Northern District of Iowa,* p. 10 Table 7. In the Northern District of Iowa the median sentence was 96 months, and the mean sentence was 118 months. *Id*.

Consistent with this harsh practice, David Alexander, a 57-year-old, non-violent addict, was sentenced, based on facts not reflected in the jury verdict or admitted to by him, to a shocking 324-months' imprisonment.[2] That is 27 years, and effectively life.[3] With good-time credit of 15%, he can get out when he is

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[1] This is not the first time the Court has been asked to review a harsh sentence from this specific district court. *See* Brief for 86 former Attorneys General, Senior Department of Justice Officials, United States Attorneys, and Federal Judges as Amici Curiae Supporting Petitioner at 2-3, 18-23, *Rubashkin v. United States*, ___ U.S. ___, 133 S.Ct. 106, 184 L. Ed. 2d 233 (2012) (No. 11-1203).

[2] This case involved a methamphetamine-addicted defendant (Alexander) selling methamphetamine to friends, and the friends of friends. There was no violence, or use of weapons for protection. Alexander led a pedestrian life, worked through a union from 1990 through his 2011 retirement, and had worked as a millwright since 1985. Presentence Investigation Report (PSR) 16, Aug. 8, 2012. He established a retirement fund and pension. PSR 17.

[3] A white male age 57 has an expectation of 23 years of life. *See* Donna L. Hoyert, Ph.D. & Jiaquan Xu, M.D., *Deaths: Preliminary Data for 2011*, National Vital Statistics Reports, Vol. 61, Number 6, p. 26 Table 6 (October 10, 2012).

80.[4] For Fiscal Year 2012, the average length of imprisonment for a methamphetamine offense was 92 months. U.S. Sent'g Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, Figure J.

With the advent of statutory minimum and maximum sentences, and the Federal Sentencing Guidelines, the Supreme Court, focusing on the Sixth Amendment, has been careful to explain through its opinions what type of fact finding – through judge, jury, or admission by a defendant – can make a defendant legally eligible for a more severe sentencing penalty. And, in *United States v. Gall*, Justice Scalia recognized, "The door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." 552 U.S. 38, 60 (2007) (Scalia, J., concurring).

Here, the Court must close this door and recognize a Sixth Amendment violation when judicial findings of fact aggravate a defendant's sentence more than 100 months beyond that which is supported by the jury-found facts or facts admitted to by the defendant.

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[4] *See* 18 U.S.C. §3624(b)(1) as interpreted by *Barber v. Thomas*, 130 S.Ct. 2499, 2503-04 (2010).

II. Proceedings Below

A. Indictment

On February 7, 2012, Kurt Alexander and Timothy Otis were charged by indictment. App. 72. Count 1 charged Alexander and Otis with conspiracy to distribute, and possess and distribute 50 grams or more of a mixture of methamphetamine and 5 grams or more of actual (pure) methamphetamine within 1,000 feet of a park, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(B), 846 and 860. Counts 2 through 4 charged only Otis with knowingly and intentionally distributing a mixture of methamphetamine on three separate dates in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(C).

Following Alexander's arrest he was placed on pretrial release. At his detention hearing, the court expressed concern with his addiction to methamphetamine but determined he was reliable enough to appear for court and that he posed no danger to the community. Detention Hearing Tr. (DH) 41-46, Feb. 12, 2012. Otis, on the other hand, was ordered detained pending trial, due in large part to his criminal record. DH 34-41. A month later, Otis entered a guilty plea to Count 1.

B. Superseding Indictment

Following Otis' guilty plea, on April 3, 2012, a four-count superseding indictment was filed *only* against Alexander. App. 67. Count 1 charged Alexander with conspiracy to distribute, and possess and distribute

500 (*up from 50*) grams or more of a mixture of methamphetamine and 50 (*up from 5*) grams or more of actual (pure) methamphetamine within 1,000 feet of a park, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(A), 846 and 860. Counts 2 through 4, previously applicable to Otis only, now charged Alexander with knowingly and intentionally distributing a mixture of methamphetamine on three separate dates within 1,000 feet of a park, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(C) and 860.

C. Pretrial Conference

During the final pretrial conference, all parties and the judge seemed dumbfounded at Alexander's unwillingness to enter into a plea agreement in such a straightforward drug case. The judge explained to Alexander the pitfalls of going to trial and being found guilty:[5]

> The Court prefers to be in trial rather than doing things in my chambers, but there are some ups and downs about going to trial. In the event of conviction, you would not be eligible in all likelihood for a reduction in sentence for acceptance of responsibility. In addition, were you to testify and if the Court found you testified falsely, you could draw a longer sentence. Because if the Court finds

[5] When reading the colloquies between the court and the parties, the court's sentencing analysis in the event of a guilty verdict is anchored to the Guidelines.

> that you perjured yourself during trial, that would be taken into consideration at the time of sentencing. I tell you that not to suggest anything other than to make you aware that there are some downsides to putting the government to its proof in the event that a defendant was, in fact, guilty and accepted that fact. So that's the only reason I mention that.

Final Pretrial Conference Tr. (FPT) 3-4, May 16, 2012. At the judge's request, the prosecutor explained his case against Alexander. FPT 4-7. The judge queried whether Alexander had an extensive criminal history, to which the prosecutor replied:

> He does not, Your Honor. In fact, he would have probably been safety valve eligible had he pled. And we actually – in our plea agreement, we agreed to basically waive the protected location and let him plead to a lesser included because, as the Court's aware, the protected location would make him ineligible for safety valve, but we had agreed to offer that to him so that he would be safety valve eligible, which is a point I wanted to bring up today. Given – I believe there's a wide disparity between what he may get if he's convicted and what he would have gotten under the plea, even more so than in most federal cases. And I know with the recent Supreme Court case about ineffective assistance of counsel at the plea stage – and I'm certainly not even implying that there's any ineffective assistance of counsel.

> But I don't know how the Court wants to handle that, if that's something ex parte the Court would like to talk with defense counsel about so it's on the record, or if that's something that we just wait in case there ever is a 2255 to deal with then, but I wanted to just bring that up to the Court.

FPT 7-8.[6] The judge remained perplexed by Alexander's refusal to accept a plea bargain, and engaged in the following colloquy with defense counsel:

> COURT: Well, of course, the Court can't make decisions about the strength of the evidence based on the recitation of the United States at a pretrial conference, but just based on what I hear, it sounds like the government has substantial evidence against Mr. Alexander. Obviously, there may be portions that are impeachable. I don't know. But my goodness, to give up safety valve eligibility and go to trial? I don't know.
>
> Mr. Lane, you've been in this game a long time, so I assume that you've had some very frank talks with Mr. Alexander about these plea agreements and what happens if he's convicted and there isn't the plea agreements?
>
> MR. LANE: I have, Your Honor, as to all those things.

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[6] With such a plea agreement, Alexander was looking at a Guideline sentence of 70-87 months' imprisonment. *See* U.S.S.G. §§2D1.1(c)(4) and (b)(16), 3E1.1, and 5C1.2.

COURT: Yeah.

MR. LANE: I have worked hard explaining the various plea agreement offers by the government, maybe to the point where Mr. Alexander and I were going to start bumping heads, meaning he would simply lose confidence. I got as close to that line as I could possibly get with him still believing in me, Number 1. 2, it's a huge disparity. And Mr. Alexander knows, you know, without fine tuning, crunching, 5, 6, 7 years, maybe all the way to 20. Mr. Alexander tells me he knows that. Finally, I took the case over from Mike Lahammer, and he stayed on the case for the limited purpose, as protected by the attorney-client privilege, to give his own opinion about the value of the government's proposed plea agreement. So I might disagree with his decision because of how much danger there is afoot, but I've got my marching orders now to do my very best for him, and I plan on trying to do that Monday, Your Honor.

COURT: And I understand, and you always give your best, Mr. Lane. I have no question about that.

It just is – I've been on the bench here about 10 years and about 9 years as a state court judge, and when a case is presented in summary form as the government has done here, suggesting to this Court that the evidence is very strong, because you have a cooperator, you've got a CI, you've got surveillance, you have controlled buys – and, you know, you

can impeach to a degree cooperators, but where you've got those other aspects of the case that are less impeachable, it's a strong case, Mr. Alexander. And it's your – it's your call totally whether you want to go to trial or not, but you better think this through pretty carefully, because being safety valve eligible in a case like this could really result in a significantly lower sentence. You go to trial, you lose safety valve, you probably won't get acceptance, and you could get obstruction of justice. You better think about it very, very carefully.

And Mr. Lane has an obligation to explain to you what the various scenarios are: If you go to trial, what is the worst case scenario; if you plead, what's the worst case scenario; and guessing between those 2 parameters what the – what other outcomes there could be. He's done that for you, as he always does. If you want to go to trial, he will do a bang-up job. He always does. And in the case of conviction, it's you who will suffer the consequences. Not Mr. Lane. Not the government. Not me. So it has to be your call, but I would urge you strongly to really continue to think about what the best – the best thing is for you. And I'm just going to assume that we're going to go to trial because we've gotten this far. We're ready to go, and we will go on Monday.

So I assume, Mr. Lane, your defense is general denial?

MR. LANE: That's right, Your Honor.

FPT 8-11.

Jury trial began May 22 and ended May 24, 2012, with guilty verdicts on all counts. App. 28-39. On September 27, 2012, Alexander was sentenced to 324 months in prison and ordered to pay a personal money judgment of $47,009. App. 14-27.

D. Trial Facts

The main witnesses were one cooperating witness and nine cooperating defendants.[7] The court of appeals set out facts sufficient for this petition:

> While investigating drug trafficking in Cedar Rapids, law enforcement officers received information that Kurt Alexander and Timothy Otis were working together to distribute methamphetamine in the area. They arranged a controlled buy from Otis on September 20, 2011. Under surveillance a confidential informant went to Otis' house with $600 to purchase a quarter ounce of methamphetamine. Otis asked the informant to wait while he went "[t]o Kurt's house," drove to Alexander's residence where they met in the garage, and then returned with a baggy of methamphetamine for the informant. Testing

[7] The character of the witnesses is not surprising. "Criminals caught in our system understand they can mitigate their own problems with the law by becoming a witness against someone else. Some of these informants will stop at nothing to maneuver themselves into a position where they have something to sell." *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993).

revealed that the baggy contained 5.7 grams of 73.3% pure methamphetamine. Six days later officers executed simultaneous search warrants at the residences of Alexander and Otis. In Alexander's garage they found 1.8 grams of 79.1% pure methamphetamine, $3,800 in cash, a digital scale, baggies with twist ties commonly used to package narcotics, and other drug paraphernalia. They however failed to discover at that time two other pounds of methamphetamine which were hidden on his property.

Even after the searches, Alexander and Otis continued selling methamphetamine. Law enforcement executed further controlled buys on November 10 and December 7. Each followed the same basic sequence. The confidential informant went to Otis' house, Otis drove to Alexander's garage to pick up the methamphetamine, and Otis returned to his house to sell the drugs to the informant. The second buy involved 6.3 grams of methamphetamine and the third 5.4 grams; each amount of methamphetamine was 48.8% pure. Officers tried to arrange two more controlled buys from Otis the following month, but each attempt failed for Alexander was not available.

Alexander and Otis were arrested in February 2012. After Otis agreed to plead guilty and cooperate with the government, Alexander was charged in a superseding indictment. . . .

At trial Otis testified that he first received methamphetamine from Alexander in 2008 and soon began buying personal use quantities from him about three times each week. Otis resold small amounts of his methamphetamine, but he would "go right to Kurt" if others wanted larger quantities. Otis' distribution had increased by 2010 when Alexander was supplying him two or three times a week with half ounce quantities of methamphetamine at a price of $1,000 per half ounce. In late 2010 after Otis was released from jail on a different charge, Alexander deposited about $80,000 for him in a bank. Over time Alexander subtracted from that total to account for Otis' drug debt, keeping a ledger to log the transactions. As Otis became more involved in Alexander's operations, he learned that Alexander typically bought pound quantities of methamphetamine from a source in DeWitt, Iowa for $28,000 per pound. In late summer 2011, Otis arranged a transaction in which Alexander sold a third party one ounce of methamphetamine for a number of firearms. Otis described the firearms as "numerous shotguns and one Japanese 7-millimeter with a bayonet, antique gun." Otis and Alexander continued distributing methamphetamine until their arrest.

Law enforcement officers testified about their investigation of Alexander's drug trafficking operations, and the government introduced evidence of the three controlled buys and items seized from Alexander's residence.

> The confidential informant and eight other individuals testified about buying methamphetamine from Alexander and Otis, describing the quantities and prices of drugs they purchased. These customers explained that Otis often served as the middle man between buyers and Alexander. The jury convicted Alexander on all charges.

App. 2-5.

E. Informers

Because the quantity of methamphetamine attributed to Alexander ballooned at trial well beyond the quantity actually seized, and ballooned at sentencing beyond even the quantity ultimately determined by jurors, it is important to assess the witnesses – informers, accessories, accomplices and false friends – who testified in relation to quantity and on whose testimony the court relied in sentencing. Such dubious character has not gone unnoticed by this Court: "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). The court relied on the following informants – mainly Tim Otis – to sentence Alexander to 324 months' imprisonment.

1. Ashley Carrillo, age 30, received a government target letter advising she was being investigated for distributing drugs. Trial Tr. (TT) 78. To avoid indictment, she agreed to make three controlled

buys from Tim Otis, from whom she had bought in the past. TT 28, 78, 79, 96. She did not know Alexander when she made the agreement. TT 79, 95.

2. The government's key witness, 51-year-old Tim Otis, was in federal custody, and had pled guilty to conspiracy to distribute methamphetamine. He was testifying to get a lighter sentence. TT 112, 163-66. When Otis was interviewed during the search at his home on September 26, 2011, he told police his source was "Old Boy." TT 169-70. He did not mention Alexander during this first interview. TT 170.

3. Ryan Vick, 36, had three prior drug felonies involving methamphetamine. TT 176-77. He was in federal custody, serving 235 months for distribution of 500 grams of methamphetamine. TT 176, 185. He testified against Alexander based on his cooperation agreement.[8] TT 176-77, 185. He admitted he was untruthful to police during his proffer interview (TT 188-89), and said he was untruthful at the behest of his attorney. TT 189.

4. Joey Loesel, 41, had convictions for willful injury and three OWIs, and was in federal custody for conspiracy to manufacture methamphetamine. He hoped his testimony against Alexander would get him a lighter sentence. TT 193, 204, 208.

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[8] While Vick was waiting to testify against Alexander, he was in the very same jail cell as witnesses Otis, Joey Loesel, and Andrew Falco. TT 184-85.

5. April Tobeck, 27, worked as a paid informant to save herself and her boyfriend, Andrew Falco. TT 213-14, 220-21.

6. Andrew Falco, 43, had a prior cocaine charge (TT 225-26), was in federal custody for manufacturing methamphetamine and faced 20 years. He testified against Alexander and gave information regarding 26 people, to get a lesser sentence. TT 234-36.

7. Leigh Ann Wessels, 28, was in federal custody for conspiracy to manufacture methamphetamine, and testified against Alexander to get a lesser sentence. TT 238, 246-48.

8. Stacey Shanahan, age 32, was in federal custody for conspiracy to manufacture methamphetamine, had a cooperation agreement, and hoped to get credit for testifying. TT 250, 253. In many of her first interviews with police she never mentioned Alexander as a seller of methamphetamine. TT 255-57. Shanahan identified 61 people in interviews. TT 258.

9. Brenda Junge, 50, was in federal custody for conspiracy to manufacture methamphetamine and hoped for a lighter sentence for testifying against Alexander. TT 268-69. During her first interview, she never mentioned Alexander; she identified about 30 people. TT 270-71.

10. Travis Dolan, 38, had pending state charges for second-degree robbery, fourth-degree theft, and criminal mischief, all stemming from stealing methamphetamine supplies. TT 278-79. He was on state

probation when he committed the robbery. TT 286-87. Dolan testified against Alexander because he had received a target letter and hoped to avoid federal charges. TT 277, 288. His state charges were all delayed pending his federal cooperation. TT 276-78, 286.

F. Sentencing Facts Found by Jury

The jury found Alexander guilty on all counts (App. 28-39), and made specific drug quantity findings for the conspiracy (Count 1) only. Through interrogatory, the jury determined Alexander conspired to distribute "500 grams or more of a mixture or substance containing a detectable amount of methamphetamine," and "50 grams or more of pure methamphetamine." App. 30-31. They also determined the offenses occurred within 1,000 feet of a playground.[9] App. 32, 34-37, 39.

Based on the jury's findings for Count 1, Alexander faced a statutory minimum term of imprisonment of 10 years and a maximum of life, a $20,000,000 fine, and 10 years supervised release. 21 U.S.C. §§841(b)(1)(A), 846, and 860. On Counts 2 through 4, he faced a minimum of one year and maximum of 40

[9] During trial, the parties stipulated that Alexander's residence was within 1,000 feet of a playground. TT 174-75. There was no evidence Alexander sold drugs at the playground or to children. This enhancement is based solely on the circumstance of his domicile.

years, a $2,000,000 fine, and 6 years supervised release. *Id*. at §§841(b)(1)(C) and 860.

Based on the jury's finding that Alexander conspired to distribute 500 grams or more of a mixture of methamphetamine, and 50 grams or more of pure methamphetamine (App. 30-31), Alexander's base offense level was 32.[10] Because the offenses occurred near a protected location, two points were added under U.S.S.G. §2D1.2(a)(1). This equals a total offense level of 34. Alexander's Guideline imprisonment range based on the jury's findings was 168-210 months (Criminal History Category of II (PSR 13)).

G. Sentencing Facts Found by Judge

The sentencing judge disregarded the jury's facts and found her own. Application of the Guidelines to those facts resulted in a sentence *vastly more* aggravated than that based on the jury's facts – 324 months versus 168-210.

The presentence investigation report determined Alexander was responsible for 5.5 grams of actual methamphetamine and 937.55 grams of a methamphetamine mixture, for a marijuana equivalency of 1,985.1 kilograms of marijuana, which is a base

[10] Under the Guidelines, when an offense involves two different drugs, each drug must be converted into its marijuana equivalency. U.S.S.G. §2D1.1, comment (n.10).

offense level of 32 (U.S.S.G. §2D1.1(c)(4)).[11] PSR 10. Because the offenses occurred near a protected location, two points were added under U.S.S.G. §2D1.2(a)(1). PSR 10.

Overruling Alexander's quantity objections, the court accepted the government's assertion that Alexander was responsible for 4 pounds, or 1.8 kilograms, of a methamphetamine mixture, and assigned Alexander a base offense level of 34. Sentencing Hearing Tr. (SH) 7-8, Sept. 27, 2012. Two points were added for proximity to a playground. SH 7-8. Over Alexander's objection, the court relied on Otis' testimony that Alexander possessed a dangerous weapon, and added two points under U.S.S.G. §2D1.1(b)(1). SH 8-9. Over Alexander's objection, based on evidence from trial and "Otis," the court added two more points for Alexander's role under U.S.S.G. §3B1.1(c).[12] SH 9-10. This resulted in a total offense level of 40, and with a Criminal History Category II, Alexander's Guideline

[11] When arriving at the base offense level drug quantity, the probation officer was concerned about double counting the quantities from the cooperating witnesses and the uncertainty of the amounts. PSR 7-8.

[12] The court emphasized Otis' trial testimony: "Beginning on an unknown date but at least as early as 2008 Mr. Alexander was involved with drug dealing. One of his conspirators was Timothy Otis, who appeared and testified against him. I did believe the testimony of Timothy Otis. I didn't receive that in a vacuum. I looked at other indicia of credibility and determined him to be credible. I also found the evidence regarding the trading of firearms for methamphetamine to be credible evidence." SH 21.

imprisonment range became 324-405 months.[13] SH 10.

The government requested a sentence within the Guideline range. SH 11. Alexander requested a downward variance base on his older age, his minor criminal history (PSR 11-13), his decades of gainful employment as a millwright (PSR 15, 16), his marriage and two children (PSR 14), his need for drug treatment (PSR 15), and the need to avoid unwarranted sentencing disparities among the defendants.[14] SH 13-15.

The court rejected all variance requests and stated:

> The Circuit requires . . . that the Court have good reason for doing so and state that reasoning on the record. I have nothing here that I would base a variance on.
>
> In terms of his age, drug dealers come in all age groups, from the very young to people

[13] Comparing the Guideline range based on jury-found facts (168-210 months) to that based on judicial-found facts (324-405 months), the difference between the bottoms and tops of those ranges is 156-195 months.

[14] Empirical research supports these requests. The Sentencing Commission confirms that several of Alexander's individual characteristics predict a greatly reduced risk of recidivism. His age, his education and vocational skills (PSR 15), his stable employment (PSR 16), and his marriage (PSR 14) predict a reduced risk of recidivism. U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & exh. 10 (May 2004).

even older than Mr. Alexander. Some are employed. Some are not employed. Some are handicapped. You can't really define a profile of a drug dealer. They're just – they're very different. And as far as gainful employment, some are employed, some aren't employed. Mr. Alexander was. I don't think that that is anything to base a variance on, especially when there are aggravating factors.

Any argument for a variance is offset by a large number of aggravating factors. Namely, the large quantity of methamphetamine with which Mr. Alexander was involved in dealing, his significant unscored criminal history, the fact that the conspiracy went on for a number of years, the fact that he was a leader in that conspiracy, and also the fact that even on pretrial release he couldn't behave himself and do what the Court ordered.

He is not a typical criminal history category II. He's been involved in the criminal justice system throughout his life, from the early twenties on and off. So after considering all the statutory factors, even though I may not have dictated them into the record, I've considered them. The Court finds the sentence that is sufficient but not greater than necessary to achieve the goals of sentencing is a 324-month sentence.

SH 24-25.

The court of appeals affirmed the sentencing court's findings of sentencing facts and application of the Guidelines.

> [T]he district court did not clearly err in its drug quantity findings. Witness testimony established that Alexander regularly possessed pound quantities of methamphetamine. One pound of methamphetamine mixture is the equivalent of approximately 450 grams, and Otis' testimony provided support for finding 1.5 kilograms of methamphetamine. As the district court noted, finding Alexander responsible for between 1.5 and 5 kilograms of methamphetamine was probably "conservative" based on all the trial evidence. We are satisfied that the district court did not clearly err. . . .
>
> [T]he district court did not clearly err in finding that Alexander qualified for [a two-level role] enhancement. Law enforcement officers could successfully arrange controlled buys from Otis only when Alexander was available to supply the drugs. After Otis was released from a brief time in jail, Alexander deposited about $80,000 for him in a bank. Alexander received pound quantities of methamphetamine from his source in DeWitt and redistributed the narcotics in Cedar Rapids. At Alexander's residence officers found a digital scale, baggies with twist ties, and other drug paraphernalia commonly used to distribute methamphetamine. These facts supports a finding that Alexander was an "organizer, leader, manager, or supervisor" of criminal

> activity. The district court did not err in this regard. . . .
>
> Otis testified that he arranged a transaction in late summer 2011 in which Alexander sold an ounce of methamphetamine in exchange for a number of firearms. Our precedent is clear that the "trade of a firearm for drugs warrants" this enhancement. While Alexander claims that Otis' testimony was unreliable, the district court determined that the enhancement was appropriate based on all the evidence. After reviewing the record, we conclude the district court did not clearly err in finding that Alexander traded methamphetamine for firearms and properly applied this enhancement.

App. 9-11 (internal citations omitted).

The court of appeals affirmed the 324-month sentence:

> Alexander also claims that his 324 month sentence was substantively unreasonable. We review the reasonableness of a sentence for abuse of discretion, applying a presumption of reasonableness where, as here, the defendant was sentenced within his guideline range. Alexander argues that he should have been sentenced below his guideline range because of his age, limited criminal history, family circumstances, and need for drug treatment. He also contends that his 324 month sentence is disproportionate when compared to the 52 months Otis

> received. The district court considered each of these arguments in the context of all the 18 U.S.C. §3553(a) sentencing factors. It explained that Alexander did not deserve a below guideline sentence because of the large quantities of methamphetamine involved, the duration of his trafficking operations, the serious nature of his offenses within 1,000 feet of a playground, and his criminal history. We conclude that the district court did not abuse its discretion in sentencing Alexander to 324 months, the bottom of his guideline range.

App. 11-12.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. BECAUSE THE SUPREME COURT HAS FOUND THE SENTENCING GUIDELINES ARE "THE LODESTONE OF SENTENCING," AND THEY ANCHOR BOTH THE DISTRICT COURT'S DISCRETION AND THE APPELLATE REVIEW PROCESS, THERE IS A SIXTH AMENDMENT VIOLATION WHEN JURY-FOUND FACTS AUTHORIZE A GUIDELINE SENTENCING RANGE OF 168-210 MONTHS, BUT JUDGE-FOUND FACTS, BASED ON THE DIRECTIVE TO FOLLOW THE GUIDELINES, CREATE A DRAMATICALLY HARSH GUIDELINE SENTENCING RANGE OF 324-405 MONTHS, AND THE JUDGE IMPOSES A GUIDELINE SENTENCE OF 324 MONTHS.

Here, the sentencing court's mandatory reliance on the Guidelines and the court of appeals' presumption of reasonableness to the Guideline sentence put the "thumb on the scales" in favor of a Guidelines sentence, and curtailed the purpose of the Sixth Amendment. *See Kimbrough v. United States,* 552 U.S. 85, 113-14 (2007) (Scalia, J., concurring) ("[T]he district court is free to make its own reasonable application of the §3553(a) factors, and to reject (after due consideration) the advice of the Guidelines. If there is any thumb on the scales; if the Guidelines must be followed even where the district court's application of the §3553(a) factors is entirely reasonable; then the "advisory" Guidelines would, over a

large expanse of their application, entitle the defendant to a lesser sentence but for the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.").

Since 2000, this Court has been attentive to the facts and elements a federal court may use during sentencing without violating the Sixth Amendment, and how the federal appellate courts are to review such sentences. In *Apprendi v. New Jersey*, the Court found that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. 466, 476 (2000).

The Court took this principle further in two later cases. In *Blakely v. Washington*, the Court found:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. *When a judge inflicts punishment that the jury's verdict alone does not allow, the jury*

> *has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.*

542 U.S. 296, 303-04 (2004) (emphasis added) (internal citations omitted). In *United States v. Booker*, the Court addressed "[w]hether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." 543 U.S. 220, 229 (2005). Reaffirming *Apprendi*, the Court found that mandatory Guidelines run afoul of the Sixth Amendment by allowing judges to find facts that increased the penalty for a crime beyond "the maximum authorized by the facts established by a plea of guilty or a jury verdict." *Id*. at 226-27, 244. The Court then severed and excised the provisions of the federal sentencing statutes that made the Guidelines mandatory, 18 U.S.C. §§3553(b)(1) and 3742(e), and made the Guidelines advisory. *Id*. at 245, 259. This required a sentencing court to consider Guidelines ranges, *see* 18 U.S.C. §3553(a)(4), but permitted the court to tailor the sentence in light of other statutory concerns as well, *see* §3553(a). *Id*. at 245-46.

Booker also established appellate review of sentencing decisions. Instead of a *de novo* standard of review, the appellate courts were "to determine whether the sentence 'is unreasonable' with regard to §3553(a). Section 3553(a) . . . sets forth numerous factors that guide sentencing. Those factors in turn will guide

appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Id*. at 261.

The Court remarked further on appellate review in two later cases. In *Rita v. United States*, the Court addressed "whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines." 551 U.S. 338, 347 (2007). The Court concluded it could. *Id*. at 347, 351. In *Gall v. United States*, when addressing the reasonableness of sentences imposed by district judges, the Court held that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard." 552 U.S. 38, 41 (2007).

Just recently, the Court addressed the powerful effect the Guidelines and judicial fact-finding have on the severity of a defendant's sentence and punishment. In *Peugh v. United States*, the Court recognized that "the Guidelines [are] the lodestone of sentencing," 133 S.Ct. 2072, 2084 (2013), and "anchor both the district court's discretion and the appellate review process. . . ." *Id*. at 2087. The Court explained, reiterated, and confirmed the powerful role the Guidelines play in sentencing procedures and decisions, both at the district court level and when sentences are reviewed on appeal, *id.* at 2079-81, and that the

"post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Id.* at 2083.

In *Descamps v. United States*, 133 S.Ct. 2276 (2013), the Court explained the proper approach for determining whether a prior conviction is a violent offense under the Armed Career Criminal Act. The Court recognized the importance of the Sixth Amendment and jury findings when it comes to sentencing a defendant. When addressing judicial fact-finding regarding a prior conviction and the defendant's underlying conduct, the Court wrote that "[t]he Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances." *Id*. at 2288.

In *Alleyne v. United States*, the Court overruled *Harris v. United States*, 536 U.S. 545 (2002), and found:

> *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and with the original meaning of the Sixth

> Amendment. Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. *See id.,* at 483, n. 10, 490. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, *Harris* is overruled.

Alleyne, 133 S.Ct. 2151, 2155 (2013). Justice Thomas, writing for the Court, consistently emphasized the importance of basing sentences on jury-found facts, and the pitfalls of lowering that standard of proof. The Court recognized that "[f]rom . . . widely recognized principles followed a well established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment." *Id*. at 2159.

Here, the contrast between the sentence that jury-found facts authorized and the judge-found facts authorized is enormous. This type of harsh sentence and punishment, based on a lesser standard of proof, has troubled the Court. *See United States v. Watts*, 519 U.S. 148, 156 (1997) ("We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence."); *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (Pennsylvania statute "[gave] no impression of having been tailored . . .

to be a tail which wags the dog of the substantive offense.").

Based on her own fact finding (reliant largely, if not exclusively, on Otis' testimony), and contrary to the jury's findings, the judge increased the amount of methamphetamine Alexander was responsible for, found he played an aggravating role, and determined a dangerous weapon was traded for drugs, resulting in a total offense level of 40 and an imprisonment range of 324-405 months. These facts determined by the judge were not elements of the offense, and so we cannot be sure then that the jury found them. The judge found Alexander had no redeeming qualities and sentenced him to 324 months[15] – based on the testimony of a codefendant who named a different source in his initial police interview, never mentioning Alexander, and who conceded he was now testifying against Alexander to get a lighter sentence.

The sentencing court's reliance on the Guidelines and its mandatory approach to them, *see* SH 24 ("[t]he Circuit requires . . . that the Court have good reason for [granting a variance] and state that reasoning on the record. I have nothing here that I would base a variance on[ ]"), and the court of appeals' presumption of reasonableness clearly put the "thumb on

[15] This sentence is *four* times greater than the sentence Alexander would have received if he had accepted the plea agreement and not exercised his right to a jury trial. *See supra* p. 7, n. 5.

the scales" in favor of a Guidelines sentence, and curtailed the purpose of the Sixth Amendment. *See Kimbrough,* 552 U.S. at 113-14 (Scalia, J., concurring). The Supreme Court should grant certiorari and hold that there is a Sixth Amendment violation when judicial findings of fact greatly aggravate a defendant's sentence beyond that supported by the facts found by the jury.

II. BECAUSE OF THE COURT'S RECENT ADMONITION TO APPELLATE COURTS TO ANCHOR THEIR REVIEW TO THE GUIDELINES, THERE SHOULD NOT BE AN APPELLATE PRESUMPTION OF REASONABLENESS TO A SENTENCE WITHIN A GUIDELINE RANGE THAT IS BASED ON JUDGE-FOUND FACTS, WHERE THE DEFENDANT WAS SENTENCED WITHIN A GUIDELINE RANGE THAT WAS ALMOST 10 YEARS GREATER THAN THE FACTS FOUND BY THE JURY, AND WHERE THE JUDGE'S FACT FINDINGS WERE CLEARLY ERRONEOUS.

The court of appeals, applying a presumption of reasonableness to the sentencing court's 324-month Guideline sentence, found that the court considered "all the 18 U.S.C. §3553(a) sentencing factors" and "explained that Alexander did not deserve a below guideline sentence because of the large quantities of methamphetamine involved, the duration of his trafficking operations, the serious nature of his offenses

within 1,000 feet of a playground, and his criminal history," and "did not abuse its discretion in sentencing Alexander to 324 months, the bottom of his guideline range." App. 12. This finding clearly buttresses the de facto mandatory nature in which the sentencing court treated the Guidelines, and lessens the standard of review of Guideline sentences.

Where a difference of over 100 months exists between a defendant's sentence based on jury-found facts and that based on judge-found facts, an appellate presumption of reasonableness applied to a sentence within the Guideline range (1) diminishes the principle that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt[,]" *see Alleyne*, 133 S.Ct. at 2155; (2) diminishes the importance of Sixth Amendment jury-found facts that can warrant the finding of a greater sentence; and (3) highlights the perils of aggravating a sentence based on a lower standard of proof than that to which juries are held. The *Rita* appellate presumption of reasonableness was not meant to apply to a Guideline sentence over 100 months greater than one based on jury-found facts.

When a court dramatically aggravates a sentence based on its reliance on the Guidelines and its lower standard of proof, and ignores the clear findings of the jury, or makes findings the jury did not, the appellate court errs to presume its sentence was reasonable. The jury here found specific amounts of drugs involved, and the court decided on its own that

those amounts were too low. The jury made no findings regarding role or a gun, so the court made its own findings.

The sentencing court's statements of "reasons for its imposition of the particular sentence," *see* 18 U.S.C. §3553(c),[16] were clearly erroneous, *see* 18 U.S.C. §3742(e) ("The court of appeals . . . shall accept the findings of fact of the district court unless they are clearly erroneous . . . "), and should not be afforded an appellate presumption of reasonableness because they were simply not supported by the record. The court did everything it could to justify the Guideline sentence, thus showing the mandatory nature of the directive to follow the Guidelines.

First, the sentencing and the appellate courts placed great reliance on the trial testimony of cooperating defendant Otis to justify Alexander's Guideline sentence. Otis' trial testimony, and the courts' reliance on it, increased the Guideline offense total from 34 to 40. Otis was recognized three times during Alexander's sentencing as providing credible testimony (SH 9, 10, 21), but the court failed to explain *why* it found Otis credible. SH 8-10, 21. The court's total

[16] *See Rita*, 551 U.S. at 356 ("The statute does call for the judge to 'state' his 'reasons.' . . . Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.").

deference to Otis' testimony was inexplicable, and was clearly erroneous for these reasons:

1. Otis lied to the court and jury when he said he did not manufacture methamphetamine. TT 166-67. Two witnesses said he did. TT 187, 232-33.

2. Otis' lies to the court and jury were consistent with his background and character: Otis had an "extensive prior record," starting at age 25 (DH 30, 34), including many vehicle offenses, seven OWI offenses, larceny, an outstanding warrant from Michigan, fraud, criminal mischief, intoxication offenses, fifteen failures to appear, theft, and many probation violations. He should have been in jail at the time of the current offenses. DH 35-40. Otis was dangerous and unreliable enough to be detained pending trial. DH 41.

3. When Otis got out of jail he gave his retirement check of $87,000 to Alexander because he wanted to hide his money from collection for outstanding debts, garnishments, child support, and unpaid court costs and fines. TT 158-61.

4. Otis owned cars, but registered them using other people's names. TT 161.

5. When Otis was first interviewed by police, he said that "Old Boy" was his

source. TT 169-70. At trial, Otis said this was a lie. TT 170.

6. Otis had other suppliers of methamphetamine. TT 169, 180.

7. Otis agreed to cooperate against Alexander to lower his sentence. TT 165-66.

8. Otis was mad at Alexander because he believed Alexander wrongfully kept some of his retirement check. TT 162-63.

Second, the court abused its discretion and committed error when it found Alexander had a "substantial criminal history," (SH 22), and was not a "typical criminal history II." SH 23, 25. The sentencing court's findings, in fact, were contrary to Alexander's criminal history presented during his detention hearing. There, the prosecutor recognized that Alexander's "criminal history is certainly not extensive, as far as the typical drug defendant that we get." DH 27.

In finding Alexander was not a "typical criminal history II," the sentencing court placed unwarranted weight on his harassment of his ex-wife (SH 22-23, 25), and his *30-year-old* OWI offenses, about which the court stated:

> These are extremely serious offenses because of the risks they pose to the public. Innocent people are killed every year by drunk drivers, not only drivers, but pedestrians and law enforcement officers who are out on the

> roads trying to protect us from people like Mr. Alexander who drive drunk.

SH 22. According to the PSR, Alexander's OWIs were in 1981 and 1982. PSR 11. The factual circumstances of those offenses were not provided.

The magistrate court, during Alexander's detention hearing, put Alexander's criminal history in perspective:

> With respect to the defendant's prior criminal record, he received a deferred judgment back in 1977 at the age of 22 for breaking and entering; and then in 1981 and 1982, at the ages of 26 and 27, the defendant has 2 convictions for operating while intoxicated. Now, those convictions occurred approximately 30 years ago. The defendant then had no criminal record until 2005, and it would appear from the Pretrial Services report that the defendant had a bad stretch between November of 2005 and October of 2006, about a year period of time. He was initially charged with domestic abuse/assault causing bodily injury. He pled guilty to Count 2, which was disorderly conduct. However, he was 4 times found in violation of a protective order during the balance of 2005 and the early part of 2006 and was found in contempt of court on 4 occasions for violating the protective order. In addition, in October of 2006, he was convicted of 2 counts of harassment in the third degree. Now, I'm advised that that was about the time the defendant was divorcing his second wife, and that's the –

> what that was mostly about. And then in December of 2009, the defendant has a simple misdemeanor conviction for theft in the fifth degree, and I haven't been provided with any information regarding that.
>
> So with respect to defendant's prior criminal record, in the last 30 years, his only convictions have been related to this domestic situation – and I'm not excusing that behavior at all, but that's what it appears to be related to – and this theft in the fifth degree, whatever that was in 2009. The defendant was not on any probation, parole, or other pretrial release at the time of these events in 2010 and 2011.

DH 42-44. The court then determined Alexander was reliable enough to appear for court and posed no danger to the community if released. DH 41-46.

Alexander's criminal history, for the most part, is exceptionally old, and provides insufficient grounds to support a 324-month sentence. While a defendant's past may be taken to indicate his present purposes and tendencies, and to suggest the period of restraint and the kind of discipline that ought to be imposed upon him, *see Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55 (1937), Alexander's past – 30 years past – is not such an indicator.

Third, the 324-month sentence, and the presumption of reasonableness, also ignored the unwarranted disparity among defendants. *See* 18 U.S.C. §3553(a)(6).

1. Alexander: Age 57. 324 months (27 years) and Criminal History Category II. No prior drug offenses.

2. Carrillo: Age 30. Not indicted. TT 78.

3. Otis: Age 51. Guideline sentence 5 to 80 years; hoping for a sentence below 5 years. TT 165-66. Has an *extensive criminal background*.

4. Vick: Age 36. Sentenced to 235 months based on distribution of 500 grams of methamphetamine. TT 176, 185. *Had three prior drug felonies*, involving methamphetamine. TT 176-77.

5. Loesel: Age 41. Believed he was facing 30 years to life, but was hoping for a lighter sentence based on his cooperation. TT 193-94, 204, 208-09. Prior convictions for willful injury, and three OWIs. TT 194, 208.

6. Tobeck: Age 27. Worked as a paid confidential informant to save herself and Andy Falco. TT 213-14, 220-21.

7. Falco: Age 43. Faced 20 years. Testified against Alexander and gave information on 26 people, hoping for a lesser sentence. TT 234-36. Had a prior cocaine charge. TT 225-26.

8. Wessels: Age 28. Received 10 years. TT 246. Testified against Alexander hoping for a lesser sentence. TT 238, 246-48.

9. Dolan: Age 38. Testified against Alexander, because he received a target letter, to avoid federal prosecution. TT 277, 288. Had pending state charges for second-degree robbery, fourth-degree theft, and criminal mischief. TT 276-78, 286. State charges stemmed from stealing methamphetamine supplies. TT 278-79, 286. On state probation when he committed robbery. TT 286-87.

10. Shanahan: Age 32. Sentenced to 210 months, had a cooperation agreement with the government and hoped for credit for her testimony. TT 250, 253.

The court, through its reliance on the Guidelines, tried to justify the difference between Otis' and Alexander's sentences, stating:

> [I]t is difficult to compare Mr. Otis and Mr. Alexander on all fronts, but I draw your attention to the fact that Mr. Otis did not go to trial, and, therefore, he received a break at sentencing as the guidelines permit. He did not have a gun enhancement. He did not have a leadership assessment. And he did testify at trial and fully cooperate with the United States. His involvement with the drugs was slightly different as well. And so I do not think that the sentence that I am going to impose today will result in any unwarranted sentence disparity, which is a discouraged factor.

SH 23-24.

But, during the detention hearing, the prosecutor recognized that Otis had a "more extensive" criminal history than Alexander. DH 30. The detention court also recognized Otis' "extensive prior record," starting at age 25, *see* DH 34, and emphasized (1) his motor vehicle and seven OWI offenses, (2) his larceny, (3) his outstanding warrant from Michigan, (4) his fraud, (5) his criminal mischief, (6) his intoxication offenses, (7) his fifteen failures to appear for court, (8) his theft, (9) his many probation violations, and (10) that he should have been in jail at the time of his conduct that resulted in the charges he currently faced. DH 35-40. The court determined that Otis was dangerous and unreliable enough to detain pending trial. DH 41.

The sentencing disparity between Alexander and the younger defendants, some like Otis with extensive criminal histories, is unwarranted. After the statutory minimum sentence of ten years, Alexander, at 67, would not be a danger to the community.

Finally, the court focused on the "offense," *see* 18 U.S.C. §3553(a)(1) and (a)(2)(A), and ignored other factors under §3553(a)(1) (history and characteristics of defendant) and (a)(2)(D) (rehabilitation). SH 21-22. A district court abuses its discretion and makes an error in judgment if it exclusively relies on only the nature of the offense when exercising its sentencing discretion, while ignoring the other equally important factors under §3553(a). *Williams v. New York*, 337 U.S. 241, 248 (1949) (the punishment should fit the offender and not merely the crime, the belief no longer prevails that every offense in a like legal

category calls for an identical punishment without regard to the past life and habits of a particular offender). The sentencing court abused its discretion when it discounted Alexander's variance requests and found that his favorable history and characteristics amounted to nothing.

Here, the sentence of 324 months, based on judge-found facts, was unreasonable and shocks the conscience. *See United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009) ("The . . . substantive unreasonableness standard[] in appellate review . . . provide[s] a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law."); *United States v. Feemster*, 572 F.3d 455, 468 (8th Cir. 2009) (substantive reasonableness review endures so there must be at least a "shocks the conscience" sort of constraint on district judges).

The Supreme Court should grant certiorari and hold that the appellate presumption of reasonableness does not apply to clearly erroneous findings of fact made during sentencing, and used to justify a Guideline sentence over 100 months greater than a sentence based on facts found by the jury.

———♦———

CONCLUSION

The Petitioner respectfully requests this Court grant his petition for writ of certiorari, vacate the Eighth Circuit's opinion, and remand his case with instructions to vacate his sentence and resentence.

Respectfully submitted,

PARRISH KRUIDENIER DUNN
BOLES GRIBBLE GENTRY &
FISHER, L.L.P.
ALFREDO PARRISH
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Phone: (515) 284-5737
Fax: (515) 284-1704
Email: Aparrish@parrishlaw.com

Counsel for Petitioner

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United States of America, Plaintiff-Appellee v. Kurt Alexander, Defendant-Appellant

No. 12-3386

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

714 F.3d 1085*; *2013 U.S. App. LEXIS 9792

April 10, 2013, Submitted
May 16, 2013, Filed

COUNSEL: For United States of America, Plaintiff-Appellee: Justin A. Lightfoot, Assistant U.S. Attorney, Martin Joseph McLaughlin, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Northern District of Iowa, Cedar Rapids, IA.

Kurt Alexander, Defendant-Appellant, Pro se, Greenville, IL.

For Kurt Alexander, Defendant-Appellant: Alfredo G. Parrish, PARRISH LAW FIRM, Des Moines, IA.

JUDGES: Before WOLLMAN, BEAM, and MURPHY, Circuit Judges.

OPINION BY: MURPHY

OPINION

MURPHY, Circuit Judge.

Kurt Alexander was convicted of one count of conspiring to distribute and possess with intent to distribute methamphetamine and three counts of

distributing methamphetamine. The district court[1] sentenced him to 324 months imprisonment and ordered entry of a personal money judgment in the amount of $47,009. Alexander appeals his conviction on the conspiracy count, his sentence, and the money judgment. We affirm in all respects.

I.

While investigating drug trafficking in Cedar Rapids, law enforcement officers received information that Kurt Alexander and Timothy Otis were working together to distribute methamphetamine in the area. They arranged a controlled buy from Otis on September 20, 2011. Under surveillance a confidential informant went to Otis' house with $600 to purchase a quarter ounce of methamphetamine. Otis asked the informant to wait while he went "[t]o Kurt's house," drove to Alexander's residence where they met in the garage, and then returned with a baggy of methamphetamine for the informant. Testing revealed that the baggy contained 5.7 grams of 73.3% pure methamphetamine. Six days later officers executed simultaneous search warrants at the residences of Alexander and Otis. In Alexander's garage they found 1.8 grams of 79.1% pure methamphetamine, $3,800 in cash, a digital scale, baggies with twist ties commonly used to package narcotics, and other drug

[1] The Honorable Linda R. Reade, Chief Judge, United States District Court for the Northern District of Iowa.

paraphernalia. They however failed to discover at that time two other pounds of methamphetamine which were hidden on his property.

Even after the searches, Alexander and Otis continued selling methamphetamine. Law enforcement executed further controlled buys on November 10 and December 7. Each followed the same basic sequence. The confidential informant went to Otis' house, Otis drove to Alexander's garage to pick up the methamphetamine, and Otis returned to his house to sell the drugs to the informant. The second buy involved 6.3 grams of methamphetamine and the third 5.4 grams; each amount of methamphetamine was 48.8% pure. Officers tried to arrange two more controlled buys from Otis the following month, but each attempt failed for Alexander was not available.

Alexander and Otis were arrested in February 2012. After Otis agreed to plead guilty and cooperate with the government, Alexander was charged in a superseding indictment. Count one charged Alexander with conspiracy to distribute and possess with intent to distribute at least 500 grams of methamphetamine mixture and at least 50 grams of pure methamphetamine within 1,000 feet of a playground, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 860. Counts two through four were based on the three controlled buys and charged Alexander with the distribution of methamphetamine within 1,000 feet of a playground, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860. The government

also sought a $50,000 money judgment against Alexander based on his drug trafficking proceeds.

At trial Otis testified that he first received methamphetamine from Alexander in 2008 and soon began buying personal use quantities from him about three times each week. Otis resold small amounts of his methamphetamine, but he would "go right to Kurt" if others wanted larger quantities. Otis' distribution had increased by 2010 when Alexander was supplying him two or three times a week with half ounce quantities of methamphetamine at a price of $1,000 per half ounce. In late 2010 after Otis was released from jail on a different charge, Alexander deposited about $80,000 for him in a bank. Over time Alexander subtracted from that total to account for Otis' drug debt, keeping a ledger to log the transactions. As Otis became more involved in Alexander's operations, he learned that Alexander typically bought pound quantities of methamphetamine from a source in DeWitt, Iowa for $28,000 per pound. In late summer 2011, Otis arranged a transaction in which Alexander sold a third party one ounce of methamphetamine for a number of firearms. Otis described the firearms as "numerous shotguns and one Japanese 7-millimeter with a bayonet, antique gun." Otis and Alexander continued distributing methamphetamine until their arrest.

Law enforcement officers testified about their investigation of Alexander's drug trafficking operations, and the government introduced evidence of the three controlled buys and items seized from Alexander's

residence. The confidential informant and eight other individuals testified about buying methamphetamine from Alexander and Otis, describing the quantities and prices of drugs they purchased. These customers explained that Otis often served as the middle man between buyers and Alexander. The jury convicted Alexander on all charges.

Alexander's presentence investigation report (PSR) recommended a total offense level of 38. It started with an offense level of 32 based on Alexander's responsibility for less than 1.5 kilograms of methamphetamine, then added two levels for drug sales near a protected location; two levels for being an organizer, leader, manager, or supervisor of criminal activity; and two levels for possessing a dangerous weapon in connection with drug sales. Alexander objected to all of these recommendations except for the protected location enhancement. The government objected to the PSR's drug quantity calculation, arguing that the trial evidence supported a finding substantially higher than 1.5 kilograms of methamphetamine.

The district court agreed with the government's argument on drug quantity, finding that Alexander was responsible for between 1.5 and 5 kilograms of methamphetamine mixture, which led to an offense level of 34. The district court also found that Alexander was an organizer, leader, manager, or supervisor of criminal activity and that he had possessed a dangerous weapon in connection with his offenses. Ultimately Alexander's total offense level of 40 and

criminal history category II resulted in a guideline range of 324 to 405 months. The district court sentenced him to 324 months imprisonment and ordered a personal money judgment of $47,009. That amount was made up of the $50,000 the government sought in the superseding indictment minus the $2,991 seized on Alexander's arrest. Alexander now appeals his conviction on the conspiracy charge, his sentence, and the money judgment.

II.

Alexander first challenges the jury's decision that he conspired to distribute and possess with intent to distribute methamphetamine. He argues that the evidence was insufficient to convict him on this count. We review the sufficiency of evidence de novo and will affirm the jury's verdict "if, taking all facts in the light most favorable to the verdict, a reasonable juror could have found the defendant guilty of the charged conduct beyond a reasonable doubt." *United States v. Clark,* 668 F.3d 568, 572 (8th Cir. 2012) (citation omitted). We do not weigh the evidence or witness credibility because the jury has "the sole responsibility to resolve conflicts or contradictions in testimony." *United States v. Wiest,* 596 F.3d 906, 910 (8th Cir. 2010). The jury's credibility determinations "are virtually unreviewable on appeal." *Id.* at 911.

To convict Alexander of the conspiracy charge in the superseding indictment, the government had to prove that (1) he and one or more persons reached an

agreement to distribute or possess with intent to distribute methamphetamine, (2) he voluntarily and intentionally joined the agreement, (3) he understood the essential purpose of the agreement at that time, and (4) the conspiracy involved at least 500 grams of methamphetamine mixture and 50 grams of pure methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846; *United States v. Walker,* 688 F.3d 416, 421 (8th Cir. 2012).

Alexander argues that the government did not prove he reached an agreement to distribute methamphetamine with Otis or anyone else. He asserts that the trial evidence showed nothing more than buyer seller relationships which are insufficient to establish a conspiracy. We disagree. A true individual buyer seller case involves evidence of only "a single transient sales agreement and small amounts of drugs consistent with personal use." *United States v. Huggans,* 650 F.3d 1210, 1222 (8th Cir. 2011) (citation omitted). In contrast, the purchase of wholesale drug quantities on numerous occasions "raises an inference of knowledge of a drug distribution venture that goes beyond an isolated buyer-seller transaction." *Id*.

In this case the government presented evidence of multiple transactions between Alexander and Otis involving wholesale quantities of methamphetamine. The three controlled buys that law enforcement executed in late 2011 establish more than a buyer seller relationship between Alexander and Otis. Moreover, Otis and a number of other witnesses testified about Alexander's extensive methamphetamine

trafficking. Alexander attacks the character of many of these people, but credibility issues are for the jury. *See Wiest,* 596 F.3d at 910-11. We conclude that there was sufficient evidence for a reasonable jury to find that Alexander was party to an agreement to distribute methamphetamine.

Alexander next contends there was insufficient evidence that the conspiracy involved 50 grams of pure methamphetamine, emphasizing that law enforcement seized only about 11 grams of pure methamphetamine. In determining whether Alexander's conspiracy involved the requisite drug quantity, the jury was not limited to the amount directly seized. *See United States v. Jones,* 559 F.3d 831, 835-36 (8th Cir. 2009). The jury could properly consider witness testimony and other corroborating evidence to extrapolate from the amount and purity of narcotics actually seized. *See id*. (discussing *United States v. Buckley,* 525 F.3d 629, 631-33 (8th Cir. 2008); *United States v. Velazquez,* 410 F.3d 1011, 1013-16 (8th Cir. 2005)). The government presented evidence of the quantities and purity levels of methamphetamine seized during the three controlled buys and the search of Alexander's residence, as well as voluminous witness testimony about the quantities and prices of narcotics that Alexander trafficked. The jury was entitled to consider all of this evidence in reaching its drug quantity finding. *See id*. Viewing the facts in a light most favorable to the verdict, a reasonable jury could determine that Alexander's conspiracy involved at least 50 grams of pure methamphetamine.

III.

We now turn to Alexander's sentence. Here, we must first ensure that the district court committed no significant procedural error. *United States v. Dengler,* 695 F.3d 736, 739 (8th Cir. 2012). We review findings of fact for clear error and the district court's application of the guidelines to those facts de novo. *Id*.

Alexander first argues that the district court erred in finding that he was responsible for between 1.5 and 5 kilograms of methamphetamine mixture. That finding resulted in an offense level of 34 under U.S.S.G. § 2D1.1(c)(3). Alexander highlights the uncertainties and variations in witness estimates of how much methamphetamine he sold, and he argues that certain quantities were improperly double counted. In making its drug quantity findings, the sentencing court may consider the amount of drugs directly seized, all transactions known or reasonably foreseeable by the defendant, witness testimony, and any other relevant information bearing sufficient indicia of reliability to support its probable accuracy. *See Walker,* 688 F.3d at 421 (citations omitted).

On this record the district court did not clearly err in its drug quantity findings. Witness testimony established that Alexander regularly possessed pound quantities of methamphetamine. One pound of methamphetamine mixture is the equivalent of approximately 450 grams, and Otis' testimony provided support for finding 1.5 kilograms of methamphetamine. As the district court noted, finding Alexander

responsible for between 1.5 and 5 kilograms of methamphetamine was probably "conservative" based on all the trial evidence. We are satisfied that the district court did not clearly err.

Alexander next challenges his two level enhancement under U.S.S.G. § 3B1.1(c) for being "an organizer, leader, manager, or supervisor in any criminal activity." We "broadly construe" the definition of an organizer, leader, manager, or supervisor. *United States v. Brown*, 539 F.3d 835, 838 (8th Cir. 2008). Under application note 4 to this guideline, we consider such factors as "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1 cmt. n.4.

We conclude that the district court did not clearly err in finding that Alexander qualified for this enhancement. Law enforcement officers could successfully arrange controlled buys from Otis only when Alexander was available to supply the drugs. After Otis was released from a brief time in jail, Alexander deposited about $80,000 for him in a bank. Alexander received pound quantities of methamphetamine from his source in DeWitt and redistributed the narcotics in Cedar Rapids. At Alexander's residence officers found a digital scale, baggies with twist ties, and other drug paraphernalia commonly used to distribute

methamphetamine. These facts supports a finding that Alexander was an "organizer, leader, manager, or supervisor" of criminal activity. The district court did not err in this regard.

Alexander further asserts that the district court erred in imposing an enhancement for possession of a dangerous weapon. The guidelines provide for a two level enhancement if "a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). This enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *Id*. cmt. n.11(A). Otis testified that he arranged a transaction in late summer 2011 in which Alexander sold an ounce of methamphetamine in exchange for a number of firearms. Our precedent is clear that the "trade of a firearm for drugs warrants" this enhancement. *United States v. Martinez,* 557 F.3d 597, 600 (8th Cir. 2009). While Alexander claims that Otis' testimony was unreliable, the district court determined that the enhancement was appropriate based on all the evidence. After reviewing the record, we conclude the district court did not clearly err in finding that Alexander traded methamphetamine for firearms and properly applied this enhancement.

Alexander also claims that his 324 month sentence was substantively unreasonable. We review the reasonableness of a sentence for abuse of discretion, applying a presumption of reasonableness where, as here, the defendant was sentenced within his guideline range. *Dengler,* 695 F.3d at 740. Alexander argues

that he should have been sentenced below his guideline range because of his age, limited criminal history, family circumstances, and need for drug treatment. He also contends that his 324 month sentence is disproportionate when compared to the 52 months Otis received. The district court considered each of these arguments in the context of all the 18 U.S.C. § 3553(a) sentencing factors. It explained that Alexander did not deserve a below guideline sentence because of the large quantities of methamphetamine involved, the duration of his trafficking operations, the serious nature of his offenses within 1,000 feet of a playground, and his criminal history. We conclude that the district court did not abuse its discretion in sentencing Alexander to 324 months, the bottom of his guideline range.

We finally consider the personal money judgment against Alexander. We review findings of fact for clear error and whether those facts render a particular asset subject to forfeiture de novo. *United States v. Van Nguyen,* 602 F.3d 886, 903 (8th Cir. 2010). An asset is subject to forfeiture if it "is 'property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a drug crime]' (proceeds prong) or was 'used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, such violation' (facilitation prong)." *Id*. (citing 21 U.S.C. § 853) (alteration in original). In this case, the district court ordered a personal money judgment in the amount of $47,009. In the superseding indictment the government sought

$50,000, but $2,991 in cash had been seized at the time Alexander was arrested and later deducted from the amount due.

According to Alexander, there was insufficient evidence to support the money judgment because it could only have been based on Otis' unreliable testimony. This argument lacks merit. Not only did the district court find Otis credible, but many other witnesses testified about the quantities and prices of methamphetamine that Alexander was trafficking. The government also presented other evidence to corroborate the extensive witness testimony. Given the totality of evidence regarding the quantities and prices of drugs sold, the frequency of sales, and the length of the conspiracy, the district court did not err in finding that Alexander's drug trafficking involved at least $50,000 in proceeds. The money judgment should be upheld.

IV.

Accordingly, we affirm Alexander's convictions, sentence, and money judgment.

United States District Court

NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: **CR 12-4-1-LRR**
KURT ALEXANDER	USM Number: **11920-029**
	John L. Lane Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

■ was found guilty on count(s) **1, 2, 3, and 4 of the Superseding Indictment filed on April 3, 2012** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(b)(1)(A), 846, and 860	**Conspiracy to Distribute and to Possess With Intent to Distribute 500 Grams or More of a Mixture or Substance Containing a Detectable Amount of Methamphetamine,**	**February 2012**	**1**

and 50 Grams or More of Actual (Pure) Methamphetamine, Within1,000 Feet of a Playground

Cont'd on next page

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

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

☐ Count(s) _____ is/are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in economic circumstances.

September 27, 2012
Date of Imposition of Judgment

/s/ Linda R. Reade
Signature of Judicial Officer

Linda R. Reade
Chief U.S. District Court Judge
Name and Title of Judicial Officer

9/28/12
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(b)(1)(C) and 860	**Distribution of Methamphetamine Within 1,000 Feet of a Playground**	**09/20/2011**	**2**
21 U.S.C. §§ 841(b)(1)(C) and 860	**Distribution of Methamphetamine Within 1,000 Feet of a Playground**	**11/10/2011**	**3**
21 U.S.C. §§ 841(b)(1)(C) and 860	**Distribution of Methamphetamine Within 1,000 Feet of a Playground**	**12/07/2011**	**4**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **324 months. This term of imprisonment consists of a 324-month term imposed on each of Counts 1, 2, 3, and 4 of the Superseding Indictment, to be served concurrently.**

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

That the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate

with the defendant's security and custody classification needs. That the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program. That the defendant participate in a Bureau of Prisons' Vocational Training Program.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **10 years. This term of supervised release consists of a 10-year term imposed on Count 1 and a 6-year term imposed on each of Counts 2, 3, and 4 of the Superseding Indictment, to be served concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two

periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall 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 standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the U.S. Probation Office:

1) The defendant must participate in and successfully complete a program of testing and treatment for substance abuse.

2) The defendant is prohibited from the use of alcohol and is prohibited from entering

bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

3) **The defendant must participate in the Remote Alcohol Testing Program during any period of the defendant's supervision. The defendant must abide by all rules and regulations of the Remote Alcohol Testing Program. The defendant is responsible for the cost of the Remote Alcohol Testing Program.**

4) **The defendant must pay any financial penalty that is imposed by this judgment.**

5) **The defendant must provide the U.S. Probation Office with access to any requested financial information.**

6) **The defendant must not incur new credit charges or open additional lines of credit without the approval of the U.S. Probation Office unless the defendant is in compliance with the installment payment schedule.**

7) **The defendant shall submit to a search of the defendant's person, residence, adjacent structures, office or vehicle, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the residence or vehicle may be subject to**

searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

Upon a finding of a violation of supervision, I understand 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.

Defendant	Date
U.S. Probation Officer/ Designated Witness	Date

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	**$ 400 (paid)**	**$ 0**	**$ 0**

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

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

If the defendant makes a partial payment, each payee shall receive an approximately proportional 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 or 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).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ 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:

SCHEDULE OF PAYMENTS

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

A ■ Lump sum payment of $ **400** due immediately, balance due

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

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

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

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

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

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

The $400 special assessment was paid on July 26, 2012, receipt #IAN110009142.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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 Codefendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

- The defendant shall forfeit the defendant's interest in the following property to the United States: **As set forth in the Amended Preliminary Order of Forfeiture filed on June 27, 2012, Document No. 95. The defendant is given credit for $2,991 for a total money judgment of $47,009.**

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

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **VERDICT FORM COUNT 1**

We the Jury, unanimously find the defendant, KURT ALEXANDER, Guilty (Not Guilty/Guilty) of the crime charged in Count 1 of the indictment.

NOTE: If you unanimously find the defendant not guilty of the above crime, have your foreperson write "not guilty" in the above blank space and sign and date this Verdict Form. Then go on to answer the Verdict Form for Count 2.

If you unanimously and beyond a reasonable doubt find the defendant guilty of the above crime, have your foreperson write "guilty" in the above blank space and sign and date this Verdict Form. Then go on to answer the Interrogatory Forms for Count 1.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **INTERROGATORY FORM 1 COUNT 1**

If you find the defendant, KURT ALEXANDER, guilty of the crime charged in Count 1 of the Indictment, please answer the following questions and then have your foreperson sign and date this Interrogatory Form.

QUESTION 1: Answer this question by placing a check mark (✓) on ***each*** of the following spaces that you find the government proved beyond a reasonable doubt. We, the Jury, unanimously and beyond a

reasonable doubt find that the object of the conspiracy was to:

✓	distribute some quantity of a mixture or substance containing a detectable amount of methamphetamine
	possess with intent to distribute some quantity of a mixture or substance containing a detectable amount of methamphetamine
✓	distribute some quantity of pure methamphetamine
✓	possess with intent to distribute some quantity of pure methamphetamine

QUESTION 2: If you unanimously and beyond a reasonable doubt find that one of the objects of the conspiracy was to distribute or to possess with intent to distribute some quantity of a mixture or substance containing a detectable amount of methamphetamine, answer this question by placing a check mark (✓) on ***one*** of the following spaces. We, the Jury, unanimously and beyond a reasonable doubt find that the conspiracy involved:

✓	500 grams or more of a mixture or substance containing a detectable amount of methamphetamine
	50 grams or more, but less than 500 grams, of a mixture or substance containing a detectable amount of methamphetamine
	less than 50 grams of a mixture or substance containing a detectable amount of methamphetamine

QUESTION 3: If you unanimously and beyond a reasonable doubt find that one of the objects of the conspiracy was to distribute or to possess with intent to distribute some quantity of pure methamphetamine, answer this question by placing a check mark (✓) on ***one*** of the following spaces. We, the Jury, unanimously and beyond a reasonable doubt find that the conspiracy involved:

✓	50 grams or more of pure methamphetamine
	5 grams or more, but less than 50 grams, of pure methamphetamine
	less than 5 grams of pure methamphetamine

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **INTERROGATORY FORM 2 COUNT 1**

If you find the defendant, KURT ALEXANDER, guilty of the crime charged in Count 1 of the Indictment, please answer the following question and then have your foreperson sign and date this Interrogatory Form.

We the Jury, unanimously find that some activity in furtherance of the conspiracy did (did/did not) take place within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **VERDICT FORM COUNT 2**

We the Jury, unanimously find the defendant, KURT ALEXANDER, Guilty (Not Guilty/Guilty) of the crime charged in Count 2 of the indictment.

NOTE: If you unanimously find the defendant not guilty of the above crime, have your foreperson write "not guilty" in the above blank space and sign and date this Verdict Form. Then go on to answer the Verdict Form for Count 3.

If you unanimously and beyond a reasonable doubt find the defendant guilty of the above crime, have your foreperson write "guilty" in the above blank space and sign and date this Verdict Form. Then go on to answer the Interrogatory Form for Count 2.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **INTERROGATORY FORM COUNT 2**

If you find the defendant, KURT ALEXANDER, guilty of the crime charged in Count 2 of the Indictment, please answer the following question and then have your foreperson sign and date this Interrogatory Form.

We the Jury, unanimously find that the distribution of methamphetamine did (did/did not) take place within 1,000 feet of the real property comprising a

playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **VERDICT FORM COUNT 3**

We the Jury, unanimously find the defendant, KURT ALEXANDER, Guilty (Not Guilty/Guilty) of the crime charged in Count 3 of the indictment.

NOTE: If you unanimously find the defendant not guilty of the above crime, have your foreperson write "not guilty" in the above blank space and sign and date this Verdict

Form. Then go on to answer the Verdict Form for Count 4.

If you unanimously and beyond a reasonable doubt find the defendant guilty of the above crime, have your foreperson write "guilty" in the above blank space and sign and date this Verdict Form. Then go on to answer the Interrogatory Form for Count 3.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **INTERROGATORY FORM COUNT 3**

If you find the defendant, KURT ALEXANDER, guilty of the crime charged in Count 3 of the Indictment,

please answer the following question and then have your foreperson sign and date this Interrogatory Form.

We the Jury, unanimously find that the distribution of methamphetamine did (did/did not) take place within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **VERDICT FORM COUNT 4**

We the Jury, unanimously find the defendant, KURT ALEXANDER, Guilty (Not Guilty/Guilty) of the crime charged in Count 4 of the indictment.

NOTE: If you unanimously find the defendant not guilty of the above crime, have your foreperson write "not guilty" in the above blank space and sign and date this Verdict Form.

If you unanimously and beyond a reasonable doubt find the defendant guilty of the above crime, have your foreperson write "guilty" in the above blank space and sign and date this Verdict Form. Then go on to answer the Interrogatory Form for Count 4.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. KURT ALEXANDER, Defendant	No. 12-CR-04-LRR **INTERROGATORY FORM COUNT 4**

If you find the defendant, KURT ALEXANDER, guilty of the crime charged in Count 4 of the Indictment, please answer the following question and then have your foreperson sign and date this Interrogatory Form.

We the Jury, unanimously find that the distribution of methamphetamine did (did/did not) take place within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa.

/s/Foreperson

[Redacted]
FOREPERSON

5/24/12
DATE

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

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18 U.S.C. § 3553(a)

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

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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18 U.S.C. § 3553(c)

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for

the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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18 U.S.C. § 3742(a)

(a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

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18 U.S.C. § 3742(e)

(e) Consideration Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and (A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b) or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

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21 U.S.C. § 841(a)

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

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21 U.S.C. § 841(b)(1)(A)

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more

than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 10,000,000 if the defendant is an individual or $ 50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 20,000,000 if the defendant is an individual or $ 75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment.

Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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21 U.S.C. § 841(b)(1)(B)

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420, any person who violates subsection (a) of this section shall be sentenced as follows: . . .

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not

more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 5,000,000 if the defendant is an individual or $ 25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be

eligible for parole during the term of imprisonment imposed therein.

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21 U.S.C. § 841(b)(1)(C)

In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant

is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

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21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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21 U.S.C. § 860

(a) Penalty. Any person who violates section 401(a)(1) or section 416 by distributing, possessing with intent to distribute, or manufacturing a controlled substance

in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b)) subject to (1) twice the maximum punishment authorized by section 401(b), and (2) at least twice any term of supervised release authorized by section 401(b) for a first offense. A fine up to twice that authorized by section 401(b) may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 401(b), a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

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28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

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28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

FEDERAL SENTENCING GUIDELINE PROVISIONS

U.S.S.G. § 2D1.1

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense

of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in § 3B1.2(a), decrease to level 32.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.

(3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the

resulting offense level is less than level 26, increase to level 26.

(4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(6) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.

(7) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.

(8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

(9) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

(10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.

(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.

(13) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(C) If –

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than life described in subdivision (D); or (II) the

environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(14) If the defendant receives an adjustment under § 3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A)(i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood, increase by 2 levels.

(15) If the defendant receives the 4-level ("minimal participant") reduction in § 3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise, decrease by 2 levels.

(16) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels

(c) Drug Quantity Table

. . .

(3) Level 34

At least 3 KG but less than 10 KG of Heroin;

At least 15 KG but less than 50 KG of Cocaine;

At least 840 G but less than 2.8 KG of Cocaine Base;

At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);

At least 1.5 G but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";

At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);

At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 1.2 KG but less than 4 KG of Fentanyl;

At least 300 G but less than 1 KG of a Fentanyl Analogue;

At least 3,000 KG but less than 10,000 KG of Marihuana;

At least 600 KG but less than 2,000 KG of Hashish; At least 60 KG but less than 200 KG of Hashish Oil;

At least 3,000,000 but less than 10,000,000 units of Ketamine;

At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;

At least 187,500 but less than 625,000 units of Flunitrazepam.

(4) Level 32

At least 1 KG but less than 3 KG of Heroin;

At least 5 KG but less than 15 KG of Cocaine;

At least 280 G but less than 840 G of Cocaine Base;

At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);

At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";

At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);

At least 10 G but less than 30 G of LSD;

At least 400 G but less than 1.2 KG of Fentanyl;

At least 100 G but less than 300 G of a Fentanyl Analogue;

At least 1,000 KG but less than 3,000 KG of Marihuana;

At least 200 KG but less than 600 KG of Hashish;

At least 20 KG but less than 60 KG of Hashish Oil;

At least 1,000,000 but less than 3,000,000 units of Ketamine;

At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;

At least 62,500 but less than 187,500 units of Flunitrazepam.

U.S.S.G. § 2D1.2

§ 2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 2 plus the offense level from § 2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or

(2) 1 plus the offense level from § 2D1.1 applicable to the total quantity of controlled substances involved in the offense; or

(3) 26, if the offense involved a person less than eighteen years of age; or

(4) 13, otherwise.

U.S.S.G. § 3B1.1

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

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KURT ALEXANDER, Defendant.	)	No. CR 12-004(1) **COUNT 1** 21 U.S.C. § 846 21 U.S.C. § 841(a)(1) 21 U.S.C. § 860 Conspiracy to Distribute and to Possess with Intent to Distribute Methamphetamine in a Protected Location **COUNTS 2-4** 21 U.S.C. § 841(a)(1) 21 U.S.C. § 860 Distribution of Methamphetamine in a Protected Location **FORFEITURE**

SUPERSEDING INDICTMENT

(Filed Apr. 3, 2012)

The Grand Jury Charges:

COUNT 1

Beginning on a date unknown, but at least as early as about Summer 2008 and continuing through about February 2012, in the Northern District of Iowa, and elsewhere, defendant KURT ALEXANDER

did knowingly and unlawfully combine, conspire, confederate and agree with other persons, known and unknown to the Grand Jury, to distribute and to possess with intent to distribute, 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, and 50 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance, within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 860.

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

COUNT 2

On or about September 20, 2011, in the Northern District of Iowa, defendant KURT ALEXANDER did knowingly and intentionally distribute a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa.

This in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 860.

COUNT 3

On or about November 10, 2011, in the Northern District of Iowa, defendant KURT ALEXANDER did knowingly and intentionally distribute a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa.

This in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 860.

COUNT 4

On or about December 7, 2011, in the Northern District of Iowa, defendant KURT ALEXANDER did knowingly and intentionally distribute a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa.

This in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 860.

FORFEITURE ALLEGATION

Upon conviction of the controlled substance offenses alleged in Counts 1 through 4 of this Indictment, defendant KURT ALEXANDER shall forfeit to the United States, pursuant to 21 U.S.C. § 853, any

property constituting, or derived from, proceeds obtained, directly or indirectly, as a result of the said violations and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the said violation. The property forfeited includes but is not limited to the following:

CURRENCY

1. Three Thousand Eight Hundred Dollars ($3,800.00 in United States Currency) seized from the residence of KURT ALEXANDER on September 26, 2011.

MONEY JUDGMENT

2. A Money Judgment to the United States in the amount of $50,000, which represents the proceeds KURT ALEXANDER obtained, directly or indirectly, as a result of the violations alleged in Counts 1-4 of this Indictment.

SUBSTITUTE ASSETS

Pursuant to Title 21, United States Code, Section 853(p), each defendant shall forfeit substitute property, up to the value of the amount described above, if, by any act or omission of the defendants, the property described above, or any portion thereof,

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred, sold to or deposited with a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty.

All in accordance with Title 21, United States Code, Section 853(p) and Rule 32.2(a), Federal Rules of Criminal Procedure.

A TRUE BILL

s/ [Redacted]
Foreperson

4-3-12
Date

STEPHANIE M. ROSE
United States Attorney

/s/ Justin Lightfoot
JUSTIN LIGHTFOOT
Special Assistant United
States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KURT ALEXANDER and TIMOTHY OTIS, Defendants.	No. CR 12-04 **COUNT 1** 21 U.S.C. § 846 21 U.S.C. § 841(a)(1) 21 U.S.C. § 860 Conspiracy to Distribute and to Possess with Intent to Distribute Methamphetamine in a Protected Location **COUNTS 2-4** 21 U.S.C. § 841(a)(2) [sic] 21 U.S.C. § 860 Distribution,of Methamphetamine **FORFEITURE**

INDICTMENT

(Filed Feb. 7, 2012)

The Grand Jury Charges:

COUNT 1

Beginning on a date unknown, but at least as early as about Summer 2010 and continuing through about December 2011, in the Northern District of Iowa, and elsewhere, defendants KURT ALEXANDER and

TIMOTHY OTIS, did knowingly and unlawfully combine, conspire, confederate and agree with other persons, known and unknown to the Grand Jury, to distribute and to possess with intent to distribute 50 grams or more of a mixture on substance containing a detectable amount of methamphetamine, and 5 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance, within 1,000 feet of the real property comprising a playground, to wit: Alandale Park located at 13th Street and 22nd Avenue SW, Cedar Rapids, Iowa, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B), and 860.

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

COUNT 2

On or about September 20, 2011, in the Northern District of Iowa, defendant TIMOTHY OTIS did knowingly and intentionally distribute a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance.

This in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT 3

On or about November 10, 2011, in the Northern District of Iowa, defendant TIMOTHY OTIS did knowingly and intentionally distribute a mixture or

substance containing a detectable amount of methamphetamine, a Schedule II controlled substance.

This in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT 4

On or about December 7, 2011, in the Northern District of Iowa, defendant TIMOTHY OTIS did knowingly and intentionally distribute a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance.

This in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

FORFEITURE ALLEGATION

Upon conviction of the controlled substance offenses alleged in Counts 1 through 4 of this Indictment, defendants KURT ALEXANDER and TIMOTHY OTIS shall forfeit to the United States, pursuant to 21 U.S.C. § 853, any property constituting, or derived from, proceeds obtained, directly or indirectly, as a result of the said violations and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the said violation. The property forfeited includes but is not limited to the following:

CURRENCY

1. Three Thousand Eight Hundred Dollars ($3,800.00 in United States Currency) seized from the residence of KURT ALEXANDER on September 26, 2011.

MONEY JUDGMENT

2. A Money Judgment to the United States in the amount of $50,000, which represents the proceeds KURT ALEXANDER and TIMOTHY OTIS obtained, directly or indirectly, as a result of the violations alleged in Counts 1-4 of this Indictment.

SUBSTITUTE ASSETS

Pursuant to Title 21, United States Code, Section 853(p), each defendant shall forfeit substitute property, up to the value of the amount described above, if, by any act or omission of the defendants, the property described above, or any portion thereof,

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred, sold to or deposited with a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty.

All in accordance with Title 21, United States Code, Section 853(p) and Rule 32.2(a), Federal Rules of Criminal Procedure.

A TRUE BILL

/s/ [Redacted]
Foreperson

2-7-12
Date

STEPHANIE M. ROSE
United States Attorney

/s/ Justin Lightfoot
JUSTIN LIGHTFOOT
Special Assistant United
States Attorney