No. 18-2576

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REX A. HOPPER,
Defendant-Appellant.

Appeal from The United States District Court
For the Southern District of Illinois
Case No. 17-CR-40034
The Honorable J. Phil Gilbert

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT REX A. HOPPER

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Rex Hopper, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Rex A. Hopper

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah Schrup (attorney of record), Anne Hudson, Thomas Leahy, and Emily Roznowski (senior law students) of the Bluhm Legal Clinic at the Northwestern Pritzker School of Law.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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Dated: November 30, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Illinois had jurisdiction over Appellant Rex A. Hopper's federal criminal prosecution pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a single-count indictment charging Mr. Hopper with a conspiracy to violate 21 U.S.C. § 841(a)(1).

The government initially indicted Mr. Hopper on June 6, 2017, (R.1),[1] and followed with a superseding indictment on January 4, 2018, (A.1). A jury found Mr. Hopper guilty after a three-day trial in February 2018. (Tr. 122.) The district court sentenced Mr. Hopper on July 17, 2018, (7/17/2018, Sent. Hr'g 1), and entered final judgment on July 18, 2018. (A.36). Mr. Hopper filed his timely notice of appeal on July 18, 2018. (R.104.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction over "all final decisions of the district courts of the United States" to its courts of appeal, and 18 U.S.C. § 3742, which provides review of the sentence imposed.

[1] References to the sequentially paginated trial transcript are denoted as (Tr. __). References to the detention hearing are denoted as ([Date], Detention Hr'g. ___), to the pre-trial conference as ([Date], Pre-Tr. Conf. ___), and the sentencing as ([Date], Sent. Hr'g. ___). All other references to the Record are denoted with the appropriate docket number as (R.__). References to material in the Appendix shall be denoted as (A. __).

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion when it failed to consider Federal Rule of Criminal Procedure 16, which requires disclosure of documents within the government's possession when the document is "material to preparing the defense," as an independent basis for disclosure of the proffer letters between the government and its cooperating witnesses.

II. Whether the government failed to provide sufficient evidence of a single, overarching conspiracy or whether the defendant suffered a fatal variance when the government alleged a broad overarching conspiracy, but at trial proved instead a series of buyer-seller relationships that caused juror confusion, hindered the defendant's ability to prepare his defense, and increased his sentence.

III. Whether the district court erred at sentencing by impermissibly double counting drug quantities identified by two trial witnesses who were most likely describing the same set of drugs and by incorrectly applying a sentencing enhancement for maintaining a drug premises when the testimony related to drug activity at the home was vague and inconsistent, and when the defendant had voluntarily ceased any drug activity in the home more than six months before the end of the charged conspiracy.

STATEMENT OF THE CASE

Mr. Rex Hopper, like many Americans, struggles with drug addiction—here, methamphetamine. Methamphetamine is incredibly addictive and, unlike for opioids, there is no government-approved medication to help treat this addiction. Frank Morris, *Methamphetamine Roils Rural Towns Again Across the U.S.*, NPR (Oct. 25, 2018), https://www.npr.org/sections/health-shots/2018/10/25/656192849/methamphetamine-roils-rural-towns-again-across-the-u-s/. Before his arrest, Mr. Hopper's addiction controlled every aspect of his life. He sold methamphetamine to feed his addiction. He spent his time almost exclusively with a group of people who bought methamphetamine from and sold methamphetamine to each other. But Mr. Hopper was not always in debt to his addiction. Before he began using drugs, Mr. Hopper spent 20 years of his life as a law-abiding citizen of Southern Illinois. After some trouble in his youth, Mr. Hopper had only one arrest and conviction during a twenty-year span of his adulthood. (6/13/2017, Detention Hr'g 3.) During this time Mr. Hopper held a variety of jobs—managing a restaurant, working for an oil-drilling rig, and laboring in a coal mine, until he was injured on the job and could not return to work. (6/13/2017, Detention Hr'g. 4); (7/17/2018, Sent. Hr'g 49). He is a man with "a good heart," who did "a lot of nice things for people." (7/17/2018, Sent. Hr'g 15.)

The methamphetamine community in Southern Illinois was vast and Mr. Hopper intersected with different people in it in three primary capacities. First, Mr. Hopper sometimes bought methamphetamine with others. For example, he went

with (or provided money for) Lucas Holland, Randall Riley, and Robert "Boog" Weir to purchase methamphetamine over an indeterminate period of time between late 2015 and early 2016. *See* (Tr. 121–23) (sales were over a one-month period); (Tr. 154) (sales occurred from December 2015 to February 2016); (Tr. 192) ("[Government]: Now, I want to direct your attention to around the end of 2015, beginning of 2016. Did you come to meet Rex Hopper around then?; [Riley]: "Yes, sir, I did."). On another occasion, Mr. Hopper and Weir shopped for methamphetamine with a man named Blake Gordon and a woman named Shara Peyton. (Tr. 116.) Afterwards, these quartets split the drugs among themselves and then went "their separate ways." (Tr. 153.)

The second capacity in which Mr. Hopper interfaced with the drug community was as a user. Seven of the government's witnesses at trial stated they used methamphetamine with Mr. Hopper or saw him use it with others. (Tr. 94) (used methamphetamine in front of Brooke Peyton); (Tr. 113) (used with Weir); (Tr. 153–54) (used in front of Holland); (Tr. 198) (used in front of Riley); (Tr. 241) (used in front of Ronelle Kondoudis); (Tr. 286) (used with Erin Wright, his girlfriend at the time); (Tr. 404) (used with Kevin Shuman). Finally, from about mid-2015 to around mid-2016 (when he decided he "wanted out of the dope game") (Tr. 67), Mr. Hopper also sold methamphetamine to support his habit, (Tr. 296). But, as Erin Wright confirmed at sentencing, by the end of their relationship in Spring 2017, Mr. Hopper "wasn't selling it" at all anymore. (7/17/2018, Sent. Hr'g 24.)

Unfortunately, just as he sought to disentangle himself from this lifestyle and end his criminal activity, Mr. Hopper became the target of a federal, state, and local law enforcement investigation. In June 2016, officers arrested Mr. Hopper, interviewed him, sought his cooperation, and then released him without charging him. (Tr. 417–18.) In Fall 2016, law enforcement officers tried once again, recruiting one of their cooperators—Jericha White—to carry out a controlled buy of methamphetamine from Mr. Hopper. (Tr. 347.) Mr. Hopper, however, did not sell White any drugs. (Tr. 347.) Several months later, on April 12, 2017, the police executed a search warrant regarding a non-drug-related matter on Mr. Hopper's home in Creal Springs, Illinois. (Tr. 418.) Upon observing drugs in the home in plain view, the police obtained a second search warrant for controlled substances and paraphernalia. (Tr. 418.) The subsequent search recovered only about 3.5 grams of methamphetamine—an amount consistent with personal use. (Tr. 329.)

On June 6, 2017, a grand jury returned an indictment for Mr. Hopper alleging that he engaged in a conspiracy to distribute methamphetamine in Williamson County, Illinois between January 2016 and May 31, 2017. (R.1.) The indictment did not name any co-conspirators or describe any specific actions he had taken in furtherance of the alleged conspiracy. (R.1.) Mr. Hopper was detained pending trial. (R.19.) The government filed a superseding indictment on January 4, 2018, which expanded the alleged conspiracy's time frame and geographic scope. (A.1.) The superseding indictment alleged that the conspiracy began in January 2015 and that it also took place in Franklin County, Illinois. (A.1.) Like the original

indictment, the superseding indictment did not name any co-conspirators and it did not enumerate any specific acts that Mr. Hopper performed in the furtherance of the alleged conspiracy. (A.1.)

Although none were named in the indictment, other members of the methamphetamine community in Southern Illinois were also charged in other indictments with conspiring to distribute methamphetamine, including Gordon, Wright, Holland, and Riley. *See* (Tr. 221) (Gordon); (Tr. 281) (Wright); (Tr. 144) (Holland); (Tr. 188) (Riley). All four pled guilty to those charges, and each testified against Mr. Hopper at trial. *See* (Tr. 222) (Gordon); (Tr. 282) (Wright); (Tr. 145) (Holland); (Tr. 189) (Riley). At the final pre-trial conference, just twelve days before trial, Mr. Hopper remained in the dark as to which of the "30 potential cooperating witnesses" were going to testify. (02/14/17, Pre-Tr. Conf. 8.) Defense counsel mentioned that he would be seeking the proffer letters of the government's cooperating witnesses, noting that he had "always gotten them in the past." (02/14/17, Pre-Tr. Conf. 8.) The government acknowledged that it might have a "little dispute" over whether those could be used at trial, and indicated that it was going to do some research. (02/14/17, Pre-Tr. Conf. 7.) Defense counsel asked the court to put a deadline on the government's motion in limine to bar the proffer letters "because it's time to really get ready for this and it's made difficult by the fact [that he didn't] have a lot of materials" from the government. (02/14/17, Pre-Tr. Conf. 8.) The issues surrounding the proffer letters were not resolved before the first day of trial. That day, the court and counsel revisited the issue. (Tr. 4.) The

government, relying on an unpublished opinion from the Seventh Circuit, asserted that it did not need to turn over the letters because they were not *Giglio* material. (A.3.) The government insisted that it did not "know how much more clearer the Seventh Circuit could be that the plea agreement . . . supersede[s] the proffer letter, and that's the document which the defendant is entitled to." (A.8–9.) The Court adopted the government's position over Mr. Hopper's objection, stating "I think it is pretty clear that [] you are not going to get the documents." (A.3.) The court, by request of the government, limited the extent to which Mr. Hopper could inquire into the proffer agreements in cross-examination. (A.10–11) ("You can ask whether they've entered into a proffer agreement, but going into the terms of it that are superceded [sic] by the plea agreement, I'm not going to let you do.").

Trial began in late February 2017. There, the government presented twenty-five witnesses, including six cooperating witnesses, who almost uniformly testified to receiving promises of sentencing leniency in exchange for their testimony against Mr. Hopper. *See, e.g.*, (Tr. 159–61) (Lucas Holland confirming that the benefits of cooperation he may receive depends on his testimony at Mr. Hopper's trial); (Tr. 188–90) (Randall Riley discussing the "Cooperation Addendum" in his plea agreement); (Tr. 283) (same for Erin Wright); *see also* Gov't Exs. 12, 13, 15, 17, 18, 30 (plea agreements for Riley, Holland, Shuman, Kondoudis, Wright, and Craig). The testimony of these cooperating witnesses mostly focused on times when they pooled their money in various combinations with Mr. Hopper to purchase methamphetamine.

In addition to the six witnesses testifying pursuant to plea agreements, nine other witnesses who testified over the course of the three-day trial were people involved in the drug community in Southern Illinois, many of whom were in state custody for other drug offenses. *See, e.g.*, (Tr. 56–57) (Dameon Williams). These witnesses merely purchased drugs from Mr. Hopper on occasion or observed similar drug transactions. *See, e.g.*, (Tr. 383) (Thomas Gonzalez testifying to purchasing "small amounts" of methamphetamine from Mr. Hopper); (Tr. 334) (Chelsea McCormack testifying to same); (Tr. 262) (Larry Shube testifying to same). After the government rested its case, Mr. Hopper's counsel moved for a judgment of acquittal. (A.14.) Following the denial of that motion, Mr. Hopper decided not to testify, and his counsel called no other witnesses. (Tr. 429.)

During deliberations, the jury sent a note to the court, reading: "Pages 17 and 21 are confusing as to the definition of conspiracy." (A.22.) Page 17 was the pattern jury instruction for the definition of conspiracy, and Page 21 was the pattern jury instruction for a buyer/seller relationship. (A.20–21.) The court read this note aloud on the record. After conferring with the government and defense counsel, the court sent back the following response: "All instructions should be read together. I cannot give you any more instructions other than what you have been given." (Tr. 509.) The jury convicted Mr. Hopper of conspiracy to distribute methamphetamine in a quantity greater than 50 grams. (Tr. 511.)

The case proceeded to sentencing, where defense counsel highlighted Mr. Hopper's exemplary behavior since his arrest. For example, Mr. Hopper—

voluntarily and without seeking any benefit—reported to jail officials another inmate's planned escape from prison. (7/17/2018, Sent. Hr'g 47–48.) In addition, although the original PSR included a two-point reduction for "accepting responsibility," Mr. Hopper objected to this: He did not claim responsibility for the charged conduct even though that increased his sentence. (R.82.)

Without this two-point reduction, Mr. Hopper's offense level in the revised PSR was 36. The government objected to this offense level, arguing that an additional enhancement of two offense levels should have been applied for a "maintain[ing] a premise for the purpose of manufacturing or distributing a controlled substance." The probation officer agreed and adopted this enhancement into its third and final PSR with a new offense level of 38 and a Guideline range of 235–293 months' imprisonment. (A.29.)

At the sentencing hearing, the district court also adopted the Probation Officer's recommendation regarding relevant drug quantity. It found Mr. Hopper responsible for the distribution of 1.968 kilograms of "ice" methamphetamine. (A.29.) This drug quantity resulted in an offense level of 36—as opposed to 34, which accompanies an amount under 1.5 kilograms.

At Mr. Hopper's sentencing hearing, the government called Erin Wright, Hopper's ex-girlfriend. Wright testified that she lived with Hopper from October 2015 until his arrest in May of 2017. (7/17/2018, Sent. Hr'g 7.) On direct-examination she testified that during that time, Hopper would bring methamphetamine to the home and would use his residence to sell it. (7/17/2018,

Sent. Hr'g 8.) She said that "each week there was some sort of activity going on." (7/17/2018, Sent. Hr'g 9.) And that "from time to time" there would be drug scales, and other paraphernalia, at the residence. (7/17/2018, Sent. Hr'g 9.) She also testified that there were time periods where there was nothing at the residence. (7/17/2018, Sent. Hr'g 10.) At no point on direct did she give any specific instances of distribution, people to whom it was sold, or amounts that were sold, notwithstanding her affirmative response to the claim that "at least a majority of the time" methamphetamine was stored and distributed from the residence. (7/17/2018, Sent. Hr'g 10.) On cross-examination, however, she acknowledged that Mr. Hopper would leave the house and meet people for drug transactions. (7/17/2018, Sent. Hr'g 23.) In response to questions from the court, she admitted that the use of the house for drug activity diminished over time and then ceased for the last several months before his arrest. (7/17/2018, Sent. Hr'g 33.) The district court credited Wright's testimony, and imposed the two-level enhancement, which brought Mr. Hopper's offense level to 38.

The individuals who accepted pleas and testified against Mr. Hopper received sentences of 188 months or less, subject to further reduction for their cooperation. (7/17/2018, Sent. Hr'g 49.) For example, Randall Riley, who provided methamphetamine to Mr. Hopper and had a criminal history score of three, received a sentence of 188 months. (7/17/2018, Sent. Hr'g 49.) A search of Riley's house revealed bags of individually wrapped methamphetamine, multiple scales,

surveillance cameras, and a drug ledger. (7/17/2018, Sent. Hr'g 37.) The district court sentenced Mr. Hopper to 235 months' imprisonment. (A.32.)

SUMMARY OF THE ARGUMENT

The government failed to prove the single, overarching conspiracy that it alleged or that Mr. Hopper was a part of it. The government's evidence instead coalesced around several buyer-seller relationships, which was sufficiently confusing to induce the jury into convicting Mr. Hopper anyway. What is more, the government set up unnecessary roadblocks to Mr. Hopper's defense by refusing to hand over relevant evidence. It did the same with his sentence, by asking for enhancements based on misinformation and misapplications of the law.

First, the government, with the blessing of the district court, failed to turn over proffer letters of cooperating trial witnesses. These proffer letters were material to the defense and the district court abused its discretion by holding that the government was not required to disclose them. Second, the government failed to meet its burden in proving beyond a reasonable doubt that Mr. Hopper engaged in the conspiracy it alleged. The government alleged Mr. Hopper was involved in a single, overarching conspiracy to distribute methamphetamine in Southern Illinois. But at trial, the government showed only a series of buyer-seller relationships or, at most, a sub-conspiracy or two. Neither is sufficient to sustain the crime charged in the indictment.

Beyond the insufficiency of evidence, this variance between what was alleged and what was proven at trial prejudiced Mr. Hopper both at trial and at sentencing. At trial, he was ill-prepared to present a defense because he was surprised by the variance at trial. The lack of specificity in the indictment and proof could potentially

expose Mr. Hopper to double jeopardy. During deliberations, the jury sent a note that presents irrefutable evidence of its confusion and, thus, the distinct possibility that Mr. Hopper's verdict arose from that confusion. Finally, at sentencing, Mr. Hopper was prejudiced by the variance because the unproven larger conspiracy increased the quantity of drugs attributed to him, which in turn improperly increased his sentence.

In addition to the sentencing impact of the prejudicial variance, the district court miscalculated Mr. Hopper's Guideline range. First, the district court double-counted drug amounts because two witnesses seemingly referred to the same methamphetamine. The district court also improperly enhanced Mr. Hopper's sentence for maintaining a drug premises. Not only was the drug activity in the home insufficiently pervasive, the district court failed to account for the fact that Mr. Hopper discontinued using his home for such purposes well before the end of the charged conspiracy period.

ARGUMENT

I. The district court abused its discretion when it ruled that the government did not need to disclose all cooperating witnesses' proffer letters to Mr. Hopper.

The district court erred when it held that the government need not disclose the cooperating witnesses' proffer letters to Mr. Hopper. Discovery decisions are reviewed for an abuse of discretion, which, as relevant here, occurs when the decision is based on an erroneous conclusion of law or the decision appears arbitrary. *Walker v. Sheahan*, 526 F.3d 973, 978 (7th Cir. 2008). First, the district court erroneously assumed that *Brady* and *Giglio* were the sole bases of the letters' discoverability, when in fact Rule 16 was an independent—and more expansive—ground for turning them over to the defense. Second, the district court erred in presuming that proffer letters are never *Brady*/*Giglio* material; as demonstrated below, the unpublished case on which the court relied is easily distinguished. At a minimum, the district court's decision is arbitrary. The court gave no rationale for its decision before asserting that "I think it is pretty clear that, you know, you are not going to get the documents." (A.3.)

Turning first to the errors of law, the district court based its decision solely on *Brady* and *Giglio*, and thus did not recognize that Rule 16 is an independent and more expansive basis for disclosure of proffer letters. Rule 16(a)(1) requires the government to disclose, upon the defendant's request, a document within the government's possession, custody, or control if that item is material to preparing the defense. Fed. R. Crim. P. 16(a)(1). A document is material to preparing the defense if it is exculpatory or helpful for impeachment. *United States v. Baker*, 453 F.3d

419, 425 (7th Cir. 2006); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (evidence is material under Rule 16(a)(1) if it will "play an important role in . . . assisting impeachment or rebuttal.") (internal citations omitted). *But see United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975) (evidence is material if there is indication that disclosure would have enabled the defendant to "significantly alter the quantum of proof in his favor.").

Proffer letters are always material under Rule 16(a)(1). A proffer letter—sometimes referred to as a "Queen for a Day" agreement—constitutes an agreement between a witness and the government setting forth the terms under which the witness will provide information to the government. *See* 1 Fed. Trial Handbook: Crim. § 31.3 (2017). Generally, a proffer letter delineates the circumstances under which a witness's statements during the proffer interview may be used against him or her. *Id.* The letter typically protects the witness against the government's use of her incriminating statements at her own trial. *Id.* Proffer letters are also often a preliminary step to a plea agreement: The witness may "advance plea negotiations by providing information that may otherwise be used directly against [him]," and the government considers this information "in assessing whether to enter into a plea agreement or other sentencing agreement" with the witness. *United States v. Schuster*, 706 F.3d 800, 804–05 (7th Cir. 2013). Thus, the proffer directly impacts a witness's credibility. This Court has recognized the importance of proffer agreements. *See id.* at 804. A defendant may use a proffer letter to show the jury that a witness is self-interested and may not be telling the truth. Because proffer

letters are helpful for impeachment, they are material under Rule 16(a)(1). *Baker*, 453 F.3d at 425.

Rule 16 has a much larger scope than *Brady*/*Giglio*. *Brady* mandates the disclosure of exculpatory material, and *Giglio* extends this requirement to impeachment material. *Giglio v. United States*, 405 U.S. 150, 154–55 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Rule 16 requires the disclosure of much more: inculpatory and impeachment material. *See Baker*, 453 F.3d at 425. And although *Brady* is bound by the limits of due process, Rule 16 mandates disclosure of all material information in the government's possession. *See id.* at 424. Thus, even if proffer letters are not *Brady* material, they must be disclosed under Rule 16.

Second, the district court erred in presuming that proffer letters are never *Brady*/*Giglio* material. This Court has never held in a published opinion that proffer letters are not discoverable under *Brady/Giglio*. Although the district court did not articulate a precise rationale for its ruling, to the extent that it relied upon *United States v. Weidenburner*, that was wrong. In *Weidenburner*, the government was unable to locate the proffer letters, and their wholesale absence was integral to this Court's holding that there was no *Brady/Giglio* violation: The government cannot fail to disclose documents that are not in its possession. *United States v. Weidenburner*, 550 F. App'x 298, 304 (7th Cir. 2013). By contrast, in Mr. Hopper's case, the government possessed the proffer letters and simply failed to hand them over when defense counsel asked. Furthermore, in *Weidenburner* one co-defendant confirmed that his proffer letter was identical to that of another co-defendant. *Id.* In

this case, the government never represented that the cooperating witnesses' proffer letters were identical to Mr. Hopper's. The substance of these letters remains unknown.

At a minimum, the district court's decision was arbitrary. The district court gave no reasons for denying disclosure of the proffers, and just flatly stated "you are not going to get the documents." (A.3.) Furthermore, the district court did not conduct an in-camera review to assess the documents' materiality; had it done so, it could have reached but one conclusion—the letters, which set the parameters for a witness's off-the-record discussions with the government, should have been turned over because they necessarily bore impeachment value. Without any explanation for the denial and without in-camera review, the district court acted arbitrarily in refusing to require government disclosure.

II. The government failed to prove the conspiracy it charged and, in any event, Mr. Hopper suffered prejudice at trial and sentencing due to the variance between the single, overarching conspiracy the government alleged and the various relationships the government showed at trial.

The government alleged a single, large-scale conspiracy against Mr. Hopper, but failed to prove that it existed or that Mr. Hopper joined it. The evidence it presented instead indicated that he was in a series of buyer-seller relationships. Thus, the government failed to meet its burden of proving conspiracy beyond a reasonable doubt. Even if the government did present evidence of some conspiratorial activities as to some of the alleged co-conspirators, vacatur is nonetheless required because of the variance between the indictment (alleging a single, overarching conspiracy) and the proof at trial (showing, at most, smaller sub-

conspiracies), which prejudiced Mr. Hopper. *See infra* Section II.B. Both inquiries, insufficiency and variance, center on the evidence presented at trial. *United States v. Avila*, 557 F.3d 809, 815 (7th Cir. 2009) (explaining that a claim of variance from a charged conspiracy is treated as a challenge to the sufficiency of the evidence). Whether framed as a pure insufficiency challenge or a variance claim, Mr. Hopper must establish that the evidence at trial was insufficient to support a jury's finding of a single conspiracy or that he knowingly and intentionally joined the conspiracy alleged in the indictment. *Id.* at 814. In drug conspiracy cases, if "the plausibility of a mere buyer-seller arrangement is the same as the plausibility of a drug-distribution conspiracy," this Court will overturn the conviction. *United States v. Pulgar*, 789 F.3d 807, 812 (7th Cir. 2015) (citing *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010)). In the variance analysis, after Mr. Hopper establishes a disparity between the charge against him and the proof at trial, he must also show that it prejudiced him at either sentencing or trial. *United States v. Stigler*, 413 F.3d 588, 592 (7th Cir. 2005). Even if this Court were to find that Mr. Hopper arguably joined smaller, more limited conspiracies, these arrangements were unrelated to each other and certainly fell well short of the two-year, multi-member conspiracy the government alleged in its indictment and promised during trial.

Although these buyer-seller relationships are discussed in more detail below, the fundamental flaw in the government's case was the lack of interconnectedness among the players and a failure to prove *any* agreement whatsoever to engage in further distribution of the drugs. Testimony at trial mentioned more than twenty

individuals who were involved in the methamphetamine community in Southern Illinois who also had some knowledge of Mr. Hopper. Of those, a distinct subset had merely episodic interactions with him—either purchasing drugs from Mr. Hopper, using drugs use alongside Mr. Hopper, or simply seeing Mr. Hopper with drugs in his possession. *See, e.g.*, (Tr. 240–42) (Kondoudis describing limited nature of interactions) *and* (Tr. 383) (Thomas Gonzalez testimony showing only that he "purchased a few little amounts from [Mr. Hopper]"). These incidents lacked any overarching connection or concerted action; they were simply representative of the widespread drug usage in the area. The government did present a few instances of concerted action but those fail the conspiracy threshold for a different reason: They lacked any evidence of agreement for further distribution. *See, e.g.*, (Tr. 119) (describing Riley, Holland, Hopper and "Boog" [Weir] pooling money for a drug run); (Tr. 116–17) (same with respect to "Boog" [Weir], Gordon, Shara Peyton, and Hopper). These groups of individuals may have pooled money to obtain drugs, but the evidence at trial showed that after they divvied up their purchases, they went "their separate ways," (Tr. 153), which is not enough to establish a conspiracy. *See United States v. Haywood*, 324 F.3d 514, 517 (7th Cir. 2003). This disparity between the charge and the evidence presented at trial amounts to a prejudicial variance.

A. The government's evidence shows that Mr. Hopper merely engaged in a series of buyer-seller relationships, not a conspiracy.

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. Even if a seller knows that the buyer intends to resell the controlled substance, no conspiracy is formed without a joint criminal objective and an agreement to further the distribution to others. *United States v. Bustamante*, 493 F.3d 879, 886 (7th Cir. 2007); *see also United States v. Maggard*, 865 F.3d 960, 975 (7th Cir. 2017), *cert. denied sub nom. Bell v. United States*, 138 S. Ct. 2014 (2018). To be a co-conspirator, one must have "a stake in the venture" and "informed and interested cooperation." *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (internal quotation marks omitted). Mere knowledge of an individual's intention to distribute a controlled substance is not sufficient. *Bustamante*, 493 F.3d at 886.

This Court looks to the totality of the circumstances when distinguishing between a buyer-seller relationship and a drug-distribution conspiracy. *United States v. Brown*, 726 F.3d 993, 1002 (7th Cir. 2013). The circumstances may include the nature of the relationship between the parties, the nature and frequency of the transactions, indicators of a shared common purpose, or actions that show cooperation and a shared stake in the distribution. *Id.* This Court has fleshed out these more general circumstances with specific examples of what weighs in favor of a conspiracy rather than a buyer-seller relationship: "[S]ales on credit or consignment, an agreement to look for other customers, a payment of commission on sales, an indication that one party advised the other on the conduct of the other's

business, or an agreement to warn of future threats to each other's business stemming from competitors or law-enforcement authorities." *Johnson*, 592 F.3d at 755–56.[2]

As is relevant to this appeal, sales on credit can serve as evidence of a conspiracy when they happen with sufficient frequency or quantities to permit an inference of a shared stake in the enterprise. *Brown*, 726 F.3d at 1002. Credit transactions, standing alone, are insufficient evidence of "an agreement for [the defendant] to be a distributor." *United States v. Kozinski*, 16 F.3d 795, 809 (7th Cir. 1994); *United States v. Neal*, 907 F.3d 511, 516 (7th Cir. 2018) ("'[O]ccasional' sales on credit are consistent with an ordinary buyer-seller relationship.") (quoting *United States v. Cruse*, 805 F.3d 795, 815 (7th Cir. 2015)). Nor does a series of regular transactions on standardized terms over an extended period of time rise to an inference of a conspiracy, even when the seller knows the buyer plans to sell those drugs to others. *United States v. Colon*, 549 F.3d 565, 567 (7th Cir. 2008) (in which the Court stated that it was "mystif[ied]" how standardized and regular drug transactions between parties, without more, could give rise to an inference of conspiracy); *see also Brown*, 726 F.3d at 99 ("[T]ransactions, despite exhibiting

[2] Prior to *Johnson*, the Court relied on a different set of factors, which it discarded after "recogniz[ing] that most of the factors did not actually distinguish conspiracies from buyer-seller relationships." *Brown*, 726 F.3d at 998–99 (noting that these faulty factors included: (1) large quantities of drugs; (2) standardized business practices; (3) sales on credit or consignment; (4) continuing relationships; (5) a seller's financial stake in the buyer's resale; and (6) an understanding that the goods would be resold.). Notably, the government relied on these outmoded factors and argued them to the jury, thus increasing the jury's confusion. *See, e.g.*, (Tr. 504) (prosecutor stating conspiracy can be inferred from ongoing transactions); (A.17–18) (prosecutor arguing that buying in bulk is a sign of conspiracy).

frequency, regularity, and standardization, do not evince the substantial relationship entailed in a conspiracy.").

The extent to which alleged conspirators cooperate or are in competition with each other can also influence whether a conspiracy existed. *Johnson*, 592 F.3d at 755 (noting that a conspiracy is more likely when the parties jointly drum up business or warn of common threats). The inverse is also true; individuals working at cross-purposes are not as likely to be co-conspirators. *United States v. Townsend*, 924 F.2d 1385, 1393 (7th Cir. 1991). Finally, the mere fact of buyers pooling money to purchase drugs together, when unaccompanied by evidence that these buyers obtained some price benefit, does not suffice to show a conspiracy. *Haywood*, 324 F.3d at 517 ("The existence of a simple agreement of two persons to pool their money and to buy drugs together, without more, is not sufficient to establish a conspiracy, even where each buyer intends to resell cocaine."); *cf. United States v. Harris*, 567 F.3d 846, 851 (7th Cir. 2009) (conspiracy found when pooling was done over a long period of time indicating a stake in future success).

At trial, the government at times implied that all of its non-law-enforcement witnesses were part of the conspiracy. (Tr. 35) (government remarking during opening statement that Mr. Hopper's associates "[were] all involved in this distribution -- all involved in this conspiracy to distribute drugs."). When the government added specifics by cataloguing the members of the conspiracy, its list changed repeatedly over the course of both opening statement and closing arguments. *Compare* (A.12–13) (government's opening statement naming Robert

Weir, Randall Riley, Lucas Holland, and Dameon Williams as co-conspirators), *with* (A.16) (government's closing argument adding the allegation that Blake Gordon and William Karnes were part of the same conspiracy), *and* (A.19) (government's closing argument now excluding Blake Gordon from list of co-conspirators), *and* (Tr. 481) (bringing Kevin Shuman into the conspiracy) *and* (Tr. 504) (government's rebuttal listing Weir, Riley, Holland, Gordon, and Williams as co-conspirators). The contours of the government's conspiracy shifted four times during the 30 minutes it spent before the jury in closing arguments. (Tr. 457) (allocating "20 and 10" to the government for closing and rebuttal). Thus, the government itself showed that its trial evidence did not support its charged conspiracy. At the end, the jury was left with a confusing morass of evidence—mostly of buyer-seller relationships—and perhaps an abiding concern that Mr. Hopper had not agreed to *any* joint distribution with the individuals on which the government so heavily relied. This Court should reject such a scattershot, see-what-sticks approach.

Lucas Holland and Randall Riley

Although Messrs. Holland and Riley may have been in a conspiracy with each other, the government failed to prove that Mr. Hopper shared their common criminal purpose and that he therefore knowingly and intentionally joined them. The evidence showed that Holland and Riley went on drug runs for a group of people, which often included Mr. Hopper. Holland and Riley were the individuals with access to the source of these drugs, not Mr. Hopper. (Tr. 194.) Mr. Hopper's purchase of methamphetamine from Holland and Riley was for some period of time

between December 2015 and March 2016;[3] however, this fact does not show that that they shared the joint intent to further distribute—an essential component of conspiracy. Significantly, Holland and Riley made their money from Mr. Hopper at the point of sale—not on credit. (Tr. 122, 195) (explaining that Mr. Hopper always paid in cash); *see United States v. Thomas*, 284 F.3d 746, 753 (7th Cir. 2002) (explaining that a seller making his profit at the point of sale rather than afterwards supports a buyer-seller relationship). Thus, they had no continued stake in his later distribution, even though they all may have known that such distribution was likely to happen. *See Bustamante*, 493 F.3d at 886.

Likewise, no record evidence indicates that the parties courted customers for each other or paid commission on sales. In fact, government witnesses indicated that there was no shared interest in further sales. (Tr. 153) (Holland testifying "[w]e would give them their methamphetamine, we would all get high, split it up, *and then we would go our separate ways*.") (emphasis added); (Tr. 198) (Riley describing how they would each purchase specific amounts and divide it by what they each paid). Mr. Hopper never advised Holland and Riley on the conduct of their business, and they did not work together to avoid competition between themselves or to avoid law enforcement. In fact, their relationships were often fraught with discord, which shows that they were only concerned with their own interests rather than any

[3] The time period and frequency of the transactions is also unclear. *Compare* (Tr. 123–24) (Robert Weir testifying that he and Mr. Hopper purchased from Holland and Riley 2-3 times a week) *with* (Tr. 195) (Randall Riley testifying that Mr. Hopper purchased "every day") and (Tr. 154) (Lucas Holland testifying that Mr. Hopper purchased from him and Riley from December to March).

shared purpose. For example, on one occasion Mr. Hopper and Weir had attempted to purchase drugs from Holland. (Tr. 157.) Weir and Mr. Hopper paid Holland to provide them with drugs, but Holland stole the money and ran off with it. (Tr. 157.) Stealing from one another is inconsistent with an agreement, shared goals, and mutual stake in success. *See Townsend*, 924 F.2d at 1393 (noting that "[t]hose in the market to sell or buy large quantities (for distribution) are just as likely, if not more, to be competitors as collaborators").

The government relied heavily on the argument that pooling money is evidence of a conspiracy. *See, e.g.*, (A.17–18.) But this mischaracterizes the nature of the transactions between Mr. Hopper on the one hand and Holland and Riley on the other. Regardless, these transactions were not sufficient to prove a conspiracy, especially in the absence of evidence that the parties obtained drugs at a lower price as a result. *Haywood*, 324 F.3d at 517. These transactions instead support a finding that Holland and Riley were suppliers to Mr. Hopper and, sometimes, Weir. Normally, Mr. Hopper or Weir would bring cash to Holland and Riley to purchase drugs. (Tr. 121.) Once they left, Holland and Riley would go and obtain the drugs that Mr. Hopper and Weir had already paid for. (Tr. 121.) Holland and Riley circled back with them after they had acquired the requested drugs so that Mr. Hopper and Weir could pick them up. (Tr. 122.) Nothing in the course of these transactions suggested any degree of commitment between Mr. Hopper and Messrs. Holland and Riley, especially because Mr. Hopper was still free to purchase methamphetamine from other sources, *see Thomas*, 284 F.3d at 753, and, as is reflected below, he often

did. The drug ledger that Riley kept also did not include Mr. Hopper, though it did include both Holland and Weir, suggesting that there was no expectation of further contact or payment after each sale. (Tr. 203–04.) Notably absent from the record is any evidence that the poolers received a discount from these episodes, although the government suggested to the jurors during argument that it should go ahead and so find based on their "common sense." (A.17.) The lack of cooperation after the point of sale, the nature of the sales, and the evidence that Holland stole from Mr. Hopper indicate that Holland and Riley lacked the shared purpose that could have transformed their relationship from buyer-seller to conspiracy.

Robert ("Boog") Weir

The government also did not present evidence that Mr. Hopper and Weir, who witnesses often referred to as "Boog," shared a common interest in any conspiracy to distribute methamphetamine. The government only presented evidence that Weir and Mr. Hopper—at most—purchased drugs from Holland and Riley approximately eight to twelve times over the course of one month. (Tr. 123) (detailing 2–3 purchases a week over the course of one month); *cf., e.g.*, *United States v. Kincannon*, 567 F.3d 893, 897 (7th Cir. 2009) (purchasing drugs with cash fifteen times over a six-week period on standardized terms was insufficient evidence of a conspiracy). The so-called "pooling" discussed above with respect to Riley and Holland applies equally here. Mr. Hopper and Weir gave their money to Riley and Holland for the drug runs; when they returned, Riley and Holland split up the drugs (based on the money each had paid) before calling Mr. Hopper and Weir to

pick up their shares. (Tr. 121–23; 194–96.) They did not jointly sell the methamphetamine or share any of the profits from future sales. There is no evidence from which a jury could find beyond a reasonable doubt that Hopper and Weir received a bulk discount or that Weir's involvement in the transactions furthered any distribution of drugs by Mr. Hopper in any way. *See* (Tr. 194) (explaining that initially Weir was not involved in the transactions/pooling). In fact, Mr. Hopper had an independent source of cheaper methamphetamine outside of his transactions with Holland and Riley. *Compare* (Tr. 361) (explaining that Mr. Hopper had an independent source who could provide methamphetamine for $500 per ounce) *with* (Tr. 195) (explaining that Mr. Hopper and Weir would each pay $1100 per ounce when buying from Holland and Riley), *and* (Tr. 122) (paying $800–$900 per ounce from Holland and Riley).

Even removing Holland and Riley from the calculus, Mr. Hopper and Weir were not distributing drugs together or with a shared purpose. When Mr. Hopper and Weir, together with Blake Gordon and Shara Peyton, purchased drugs on one occasion, they were shorted by the seller and received three ounces instead of the four they had paid for. (Tr. 117.) Rather than dividing the purchased drugs based on the proportion of money each party provided and the drugs received, Mr. Hopper gave from his own portion to ensure that the other individuals got exactly what they paid for. (Tr. 117.) If Mr. Hopper and Weir were in a shared criminal enterprise, it would have been logical for them to split the drugs proportionally; evidence that Mr.

Hopper wanted to ensure that Weir got exactly his share is consistent with a buyer-seller relationship, not a conspiracy.

Finally, the short period of Weir's involvement, the fact that the transactions were never on credit or consignment, and the lack of any additional evidence of an agreement to further distribute the drugs indicates that Weir was not in a conspiracy with Mr. Hopper. Instead, they just happened to have the same drug dealers.

Blake Gordon

The government did not present sufficient evidence from which a jury could infer that Mr. Hopper conspired to distribute methamphetamine with Blake Gordon. Instead, it is "more plausible," *see Pulgar*, 789 F.3d at 812, that Mr. Hopper was in a buyer-seller relationship with Gordon. First, it appears that Gordon in fact ran his own drug business; he sold drugs on his own accord to Mr. Hopper more than ten times. (Tr. 226.) He was the source of methamphetamine for both Mr. Hopper and Weir before either started buying from Holland and Riley. (Tr. 113.) This sort of competition suggests that they lacked the required common purpose.

The government's evidence showed that Mr. Hopper pooled money with Gordon only a single time. (Tr. 226–27.) Just as pooling was not sufficient for the others, the same is true here; it cannot serve as evidence proving a conspiracy. Mr. Hopper and Gordon never purchased methamphetamine from each other on credit.

Most importantly, the record shows that Mr. Hopper and Gordon had a contentious and violent relationship and thus lacked a common purpose. On

September 29, 2015, Mr. Hopper visited Shara Peyton at Gordon's home. (Tr. 229.) Mr. Hopper believed that Peyton had failed to provide him with the proper quantity or quality of methamphetamine he had purchased from her. (Tr. 377–78.) When he arrived to confront Peyton, Mr. Hopper was aggressive with her and with Gordon once he became involved. (Tr. 377–78.) Gordon pulled a knife and used it to intimidate and attack Mr. Hopper, who in turn actually called the police. (Tr. 377–78.) This lack of comity, trust, and reliability alone vitiates a finding of a shared purpose. Had they been co-conspirators, Mr. Hopper never would have jeopardized their business by inviting law enforcement into the mix. Far from having a shared purpose, Gordon and Mr. Hopper viewed each other as enemies or competitors.

Dameon Williams

Mr. Hopper bought from and sold methamphetamine to Williams with no shared purpose for further distribution. (Tr. 297) (Erin Wright testifying that "[s]ometimes he would have the methamphetamine to sell to us and sometimes we had it to sell to him"). Williams testified that he would purchase one to two ounces from Mr. Hopper no more than three times per month (and sometimes as infrequently as once a month), and that he did this "off and on [for] around a year," until his arrest in May 2016. (Tr. 59.) Williams sometimes paid in cash, and sometimes received methamphetamine that he would pay for later. (Tr. 61) ("I would get it on credit, and sometimes I would buy it, just straight up buy it."). The price that Williams paid varied, and Williams always reimbursed Mr. Hopper for any drugs he purchased, (Tr. 61–62), treating them as a "debt" rather than a shared

cost of doing business, (Tr. 77). Although Williams may have believed he was working for Mr. Hopper, (Tr. 64), Mr. Hopper only asked Williams to collect money or drive him when Williams owed him money, (Tr. 77) (Williams acknowledging that he would collect money for Mr. Hopper when "[he] fell behind in [his] payments."). Williams knew that the sale of drugs was Mr. Hopper's "business," not his own. (Tr. 64.) In short, what mattered was Mr. Hopper's intent to conspire with Williams, not the reverse, and Williams never testified that Mr. Hopper agreed to work with him to distribute drugs. The limited number of transactions, some of which were paid for in cash, suggests that a buyer-seller relationship was at least as plausible as a conspiracy, which is not enough to support the government's charge. *Pulgar*, 789 F.3d at 812.

William ("Andy"/"Tiny") Karnes

The government did not provide evidence to show that Karnes and Mr. Hopper had anything other than a buyer-seller relationship. Karnes did not testify at trial, and the other witnesses' brief mentions of him show only that Karnes purchased methamphetamine from Mr. Hopper on credit over an uncertain time period, (Tr. 90) ("through the summer of 2016"), and that Mr. Hopper always expected Karnes to pay his debt, (Tr. 97) ("Q: And [Karnes] always had to pay [Hopper] back? A: "Yes."). The two did not have a trusting relationship, nor did Mr. Hopper believe Karnes to be reliable. (Tr. 65) (Williams testifying that Mr. Hopper believed Karnes had broken into his home and robbed him). In fact, at the government's prompting, Brooke Peyton testified she would sometimes take care of

Karnes and would keep an eye on him and his drug sales for Mr. Hopper. (Tr. 96–97.)

Karnes was unreliable, and Mr. Hopper did not trust him. Again, a buyer-seller relationship was far more plausible than a conspiratorial one.

Kevin Shuman

The government did not prove beyond a reasonable doubt that Mr. Hopper agreed to conspire with Shuman to distribute methamphetamine. Shuman lived out of state for the first ten or eleven months of the conspiracy alleged in the indictment. (Tr. 394.) He then lived with Mr. Hopper from December 2015 to January 2016, (Tr. 395), because they were friends, (Tr. 401). During that time, Shuman purchased small quantities of drugs on credit, (Tr. 396), and twice drove Mr. Hopper to an out-of-state drug deal, again because they were friends and Mr. Hopper gave Shuman drugs for his own use, (Tr. 401) ("I lived with him. I mean, just he would get me high and I'd just drive. We were friends."); (Tr. 399) ("[H]e would give me something for driving."). It was not a joint venture, nor were they pooling money. After Shuman stopped living with Mr. Hopper, he began purchasing drugs in larger quantities, still on temporary credit, but the record does not indicate that they were working together to distribute those drugs. (Tr. 397–98.) Shuman still had to pay Mr. Hopper back for the amounts he owed. (Tr. 397) ("I would call [Mr. Hopper], he would put [the drugs] in the garage. I would show up, go to the garage, get it, [and] put the money in the place where the ice was."). These sales on credit, without some additional evidence that they agreed to further distribute the

methamphetamine together, cannot support a finding of conspiracy. *Kozinski*, 16 F.3d at 809.

Other Witnesses

The government did not offer sufficient evidence that Mr. Hopper was in a conspiracy with the other witnesses, despite its claim that all of his associates were part of the same conspiracy.[4] In its closing argument, the government seemed to concede that some of the individuals who testified were not part of a conspiracy, including "Larry Shupe [*sic*], Chelsea McCormack, Ronelle Kondoudis, and . . . Mark Hopper." (Tr. 484.) Instead, the government implied that these were the conspiracy's consumers. (Tr. 484.) The government never explained the unbridged gulf between Mr. Hopper's purchases of methamphetamine from the so-called conspiratorial associates (namely, Holland, Riley, Gordon, and Weir) and Mr. Hopper's own isolated sales to the assortment of drug users who relied on him to feed their habits. There was ***no*** evidence of profit sharing, of mutual trust, or of coordinated selling. As shown above, more times than not the opposite was true—robberies, assaults, cheating, and mistrust typified these relationships.

[4] Specifically, Brooke Peyton never purchased drugs from Mr. Hopper, (Tr. 100), and neither did Jericha White, (Tr. 347). Erin Wright did not act in support of any overarching conspiracy, and she also purchased drugs on her own. (Tr. 302.) Thomas Gonzalez's testimony showed only that he was a buyer from Mr. Hopper. (Tr. 383.) William Craig's testimony stated that he and Mr. Hopper often provided methamphetamine to each other free of charge, when they had it, and he would only occasionally pay cash for methamphetamine when he wanted it for someone else. (Tr. 357–59.)

Even if this Court were to conclude that a jury could have found some conspiracies, a variance would nonetheless exist. Alleging a single overarching conspiracy but presenting evidence of several smaller conspiracies and buyer-seller relationships is a variance. *Stigler*, 413 F.3d at 592 ("A variance arises when the facts proved by the government at trial differ from those alleged in the indictment."); *see also United States v. Flood*, 965 F.2d 505, 508 (7th Cir. 1992) (recognizing that it is "prejudicial error to charge a person with a single conspiracy, present evidence of several conspiracies, and fail to instruct the jury that evidence of several conspiracies does not constitute proof of the single conspiracy charged.") (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)).

The nature and scope of the agreement to commit a crime determines whether a single conspiracy or several smaller conspiracies exist. *United States v. Sababu,* 891 F.2d 1308, 1322 (7th Cir. 1989). A single conspiracy requires "one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy." *United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969) (finding that several conspiracies existed when various defendants separately conspired with a common conspirator to obtain fraudulent loans). In contrast, a conspirator is part of separate and distinct conspiracies when there is no "overall goal or common purpose." *Id.* (citing *Kotteakos*, 328 U.S. at 771). This is true even if the conspiracies have similar purposes. *United States v. Shorter*, 54 F.3d 1248, 1254 (7th Cir. 1995). In order for the jury to infer an agreement to join a conspiracy that "transcends the scope of a more limited conspiracy, there

must be some additional evidence to justify taking the inference further." *Townsend*, 924 F.2d at 1392–93.

Here, the government failed to tie together the disparate purposes of Mr. Hopper's alleged co-conspirators; it affirmatively failed to establish a common goal, and it failed to show that the timelines of the sales overlapped during the alleged conspiratorial time period. For example, Williams purchased drugs from Mr. Hopper between approximately May 2015 and May 2016. (Tr. 59) (Williams explaining that Mr. Hopper sold to him for about a year). Mr. Hopper, however, did not start buying drugs from Holland and Riley until at least December 2015. (Tr. 154.) Kondoudis also testified to Mr. Hopper's drug-related activities from August or September of 2015, well before the relationship with Holland and Riley that served as a centerpiece of the government's theory. (Tr. 239–40.) In a similar vein, the government's evidence shows that the Shara Peyton/Gordon and Holland/Riley pairs were simply alternative suppliers of methamphetamine, rather than part of the same agreement or group. (Tr. 113) ("At first we were getting it from Blake [Gordon] and Shara [Peyton]"); (Tr. 119) (describing when they began purchasing from Holland and Riley). No evidence of shared purpose existed between Williams, Karnes, or Shuman or with Holland and Riley. The government simply failed to show any agreement between the individuals it alleged as part of this single conspiracy.

B. Mr. Hopper suffered prejudice as a result of the variance.

The variance prejudiced Mr. Hopper in two ways. First, Mr. Hopper faced surprise at trial when forced to confront the government's rapidly shifting theories, ones that did not match up with the indictment. The jurors evinced confusion about the jury instructions,[5] and the imprecision of the government's approach means that Mr. Hopper may be subjected to subsequent prosecutions for the same nebulous conduct. Second, the district court relied directly on the government's flawed proof in attributing drug amounts to Mr. Hopper at sentencing.

1. The variance caused actual prejudice at trial.

The variance between proof and indictment prejudiced Mr. Hopper at trial. When determining prejudice, this Court considers four factors: (1) the surprise to the defendant resulting from the variance; (2) the possibility of subsequent prosecution for the same offense; (3) the likelihood of jury confusion as measured by the number of conspirators charged and the number of separate conspiracies proven; and (4) the likelihood of jury confusion in light of the instructions given the

[5] A threshold error has impeded Mr. Hopper's ability to fully develop this argument on appeal. Appellate counsel requested from the court reporter a transcript of the jury instruction conference referenced at the end of the second day of trial, (Tr. 369), and was told that the conference was not conducted on the record. It also appears that Mr. Hopper himself was not present for this discussion. (Tr. 369) (district court dismissing jury for the day and stating that it "would be meeting with the attorneys going over preliminary jury instructions."). *But see* Fed. R. Crim. P. 43(a) (giving the defendant the right to be present at every stage of the trial). Here, the missing transcripts are material to the jury instruction issues raised on appeal, but it is difficult to establish prejudice without direct knowledge as to what was said or decided during the off-the-record proceeding. *See Bransford v. Brown*, 806 F.2d 83, 86 (6th Cir. 1986). Mr. Hopper seeks to preserve this issue for future appeal and collateral attack and urges this Court to recognize the importance of district courts ensuring that the jury instruction conference is consistently made on the record.

jury limiting or excluding the use of certain evidence not relating to the defendant. *Bustamante*, 493 F.3d at 887 (quoting *Townsend*, 924 F.2d at 1410–11). The third factor does not apply because it is used when multiple co-conspirators are charged with a number of conspiracies. *See United States v. Napue*, 834 F.2d 1311, 1333 (7th Cir. 1987). Each of the remaining three factors show that Mr. Hopper was prejudiced at trial by the variance.

a. Mr. Hopper faced surprise due to the variance.

Mr. Hopper was unable to adequately prepare his defense because the government did not define the scope of the alleged conspiracy until closing arguments. Neither the original nor the superseding indictment named any of Mr. Hopper's alleged co-conspirators. (A.1.) The government made no mention of alleged co-conspirators at the pre-trial conference or pre-trial colloquy. *Cf. United States v. Hach*, 162 F.3d 937, 948 (7th Cir. 1998) (naming unindicted co-conspirator at a pre-trial conference was not unfair surprise). Often, co-conspirators are tried together, which automatically puts the co-defendants on notice as to the scope of the alleged conspiracy.[6] *See, e.g.*, *Bustamante*, 493 F.3d at 881–82, 885 (four co-conspirators charged as "spokes" in relation to a central "hub" co-conspirator). Although the government need not identify all members of a conspiracy, *Townsend*, 924 F.2d at

[6] In fact, that is what happened in several of the government's indictments against others who testified at Mr. Hopper's trial. *See, e.g.*, Superseding Grand Jury Indictment, May 3, 2016, ECF No. 16-40012-JPG (charging Lucas Holland, Randall Riley, and five others with conspiracy to distribute methamphetamine in the Southern District of Illinois from April 2015 to March 2016); Grand Jury Indictment, Feb. 6, 2016, ECF No. 16-400040-SMY (charging Blake Gordon and Shara Peyton with conspiracy to distribute methamphetamine in the Southern District of Illinois from August 2015 to December 15, 2015).

1389–90, here Mr. Hopper was forced to prepare for nearly 30 witnesses without knowing in which capacity the government would use them. As it turned out—and as the government finally recognized in closing—only a handful even arguably qualified for inclusion in the government's two-year, two-county conspiracy charge.

In its opening statement, the government named four individuals in addition to Mr. Hopper as alleged co-conspirators: Robert Weir, Randall Riley, Lucas Holland, and Dameon Williams, (A.12–13), and hinted that there were even more, (Tr. 34) (government advising the jury that these "were only some of the individuals" involved in the conspiracy). Although Mr. Hopper had now been at least informed of some alleged co-conspirators, he remained unequipped to defend himself against the full scope of the alleged conspiracy.

The sheer number of government witnesses did little to clarify the scope. Several witnesses testified only to being Mr. Hopper's customers but shed no light on the contours of the overarching agreement, if any. *See* (Tr. 241–42) (Kondoudis stating that she bought from Mr. Hopper and saw him sell to others); (Tr. 262–63) (Shube testifying he bought from Mr. Hopper); (Tr. 357) (Craig stating same); (Tr. 334–35) (McCormack stating same and that she traveled to buy drugs once with Mr. Hopper); (Tr. 347–48) (White stating she knew Mr. Hopper sold to others). None of these witnesses testified to an agreement to distribute methamphetamine, let alone its scope.

Then, in closing, the government moved the ball again, defining a totally different conspiracy than previewed in its opening. *Compare* (A.16) (closing

argument including Weir, Riley, Holland, Williams, Gordon and Karnes in conspiracy with Mr. Hopper) *with* (A.12–13) (opening statement identifying only Weir, Riley, Holland, and Williams). *Cf. United States v. Hardimon*, 329 F. App'x 660, 665 (7th Cir. 2009) (finding no surprise where government "clearly argued" the participation of all three co-conspirators throughout the course of the trial). The government's failure to consistently define the conspiracy did not give Mr. Hopper sufficient notice of its scope and caused unfair surprise.

b. Mr. Hopper may be prosecuted subsequently for the same offense.

The indictment and the government's arguments at trial were so broad as to make it impossible for Mr. Hopper to invoke his Fifth Amendment right against double jeopardy. In answering this question, this Court looks to the record as a whole. *United States v. Roman*, 728 F.2d 846, 854 (7th Cir. 1984). Here, the record as a whole sheds little light on the parameters of the conspiracy or Mr. Hopper's role in it. Mr. Hopper simply does not know, and the record does not illuminate, with whom the jury convicted him of conspiring. The government offered many different relationships, and then failed to meaningfully tie them together for the jury. For example, at various times Mr. Hopper pooled money to purchase methamphetamine with Holland, Riley, and Weir, (Tr. 151–52), with Gordon, Peyton, and Weir, (Tr. 116), and with Weir alone, (Tr. 115). If this Court were to uphold this conviction on the basis that some sub-conspiracy existed, the government could arguably re-indict Mr. Hopper for any other act within that time frame even though he had already been found guilty by the jury on the charged

indictment. The double-jeopardy implications alone cause sufficient prejudice to warrant reversal due to the variance.

c. The jury was confused by the instructions regarding the scope and definition of a conspiracy in this case.

During deliberations, the jury sent a note expressing its confusion over the conspiracy instruction and the buyer-seller instruction. (A.22) (jury note stating "[p]ages 17 & 21 are confusing us as to the definition of 'conspiracy.'"). In response, the district court wrote: "All instructions should be read together. I cannot give you any more instruction other than what you have been given." (A.22.) A jury evincing fundamental confusion over the law governing the crime at issue in its case went ahead and convicted Mr. Hopper of that very crime. There can be scarcely any clearer evidence of prejudice than this.

2. The variance prejudiced Mr. Hopper at sentencing because his conviction for an overarching conspiracy improperly increased the quantity of methamphetamine attributed to him.

Mr. Hopper also suffered actual prejudice at sentencing because the variance improperly increased the quantity of drugs attributed to him. *Avila*, 557 F.3d at 818 (noting that "a variance may prejudice a defendant both at trial and at sentencing."). This Court has previously held that prejudice can result in sentencing when there is a variance between a larger charged conspiracy and the smaller conspiracy actually proved at trial. *Bustamante*, 493 F.3d at 887–88 (finding prejudice at sentencing when the district court found defendant responsible for 150 kilograms of drugs, the amount involved in the entire conspiracy, where the evidence was insufficient to show he "promoted the larger endeavor's success."); *see*

also Hardimon, 329 F. App'x at 664 (remanding for resentencing when the trial court relied on a conspiracy that was insufficiently proven to impose a statutory minimum sentence).

Although the jury found only that Mr. Hopper was guilty of conspiring to distribute ***50 grams*** of methamphetamine, the district court found his relevant conduct totaled ***1.968 kilograms*** of methamphetamine. (A.29.) This amount was based on the testimony of alleged co-conspirators in a conspiracy that the government failed to prove.

Mr. Hopper received a Base Offense Level of 36,[7] which was later enhanced to 38. A Total Offense Level of 38, with a Criminal History score of one, resulted in a suggested Guideline range of 235–293 months' imprisonment. (A.29.) The district court ultimately imposed a 235-month sentence. (A.32.) Of the 1.968 kilograms attributed to Mr. Hopper, 850 grams were based on an interview with Lucas Holland and 793 kilograms were based on an interview with Randall Riley. (R.94 at 5.) If the evidence was insufficient to support a conspiracy with these two, however, these drug quantities could not be counted against Mr. Hopper at sentencing. Without these two amounts, the relevant drug quantity would have been no more than 325 grams, and Mr. Hopper's base level offense would have dropped to 32. *See* U.S.S.G. §2D1.1(c)(4). Mr. Hopper's Guidelines range would have been 151–188

[7] As noted above, *see supra* page 9, the probation officer originally reduced Mr. Hopper's base offense level by two for acceptance of responsibility. (R.82, First Objection to Presentence Report.) In an extraordinary move, however, Mr. Hopper objected to this reduction. Unsurprisingly, the government agreed with Mr. Hopper, and Probation increased his offense level. Mr. Hopper could not accede to the vast conspiracy the government attributed to him, and then was punished for avoiding responsibility.

months, far below the sentence of 235 months that he received. Federal Sentencing Guidelines Manual § 5A (2016). A sentence based on an incorrect Guideline range constitutes an error affecting substantial rights. *United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008). Mr. Hopper is entitled to resentencing.

III. The district court incorrectly double counted drug quantities and improperly determined that Mr. Hopper maintained a drug premises at sentencing.

The district court sentenced Mr. Hopper to 235 months' imprisonment based on an offense level premised on a flawed drug quantity determination and an improper drug-premises enhancement. This Court reviews a district court's interpretation and application of the Sentencing Guidelines *de novo* and its factual findings, including drug quantity, for clear error. *United States v. Brown*, 822 F.3d 966, 976 (7th Cir. 2016).

A. The district court improperly double counted the drug quantities.

The district court calculated Mr. Hopper's base offense level based on an incorrectly calculated relevant drug quantity of 1.968 kilograms. This number, adopted from the PSR, incorrectly double-counted methamphetamine identified by two individuals who referred to the same drugs. District courts have discretion in determining drug quantities for the purpose of sentencing, which they must find by a preponderance of the evidence. *United States v. Cisneros*, 846 F.3d 972, 977 (7th Cir. 2017). But these drug amounts must bear a "sufficient indicia of reliability," and so courts are encouraged to be conservative in their calculations. *United States v. Miller*, 834 F.3d 737, 741 (7th Cir. 2016) (quoting *United States v. Durham*, 211 F.3d 437, 444 (7th Cir. 2000)). This Court reverses a drug quantity

determination when a review of the record creates "a 'firm and definite conviction that a mistake has been made.'" *Miller*, 834 F.3d at 741 (quoting *United States v. Cooper*, 767 F.3d 721, 730 (7th Cir. 2014)). Such a mistake is apparent here. The majority of the drug quantity assigned to Mr. Hopper came from amounts identified in interviews with Randall Riley and Lucas Holland. The record makes clear, however, that these two amounts are not separate quantities of methamphetamine but actually constitute the same drugs. Absent this error, Mr. Hopper's relevant drug quantity would have been significantly smaller, lowering his base offense level to 34, and his total offense level to 36 (assuming the other enhancements remained the same), thus giving him a Guideline range of 188–235 months.

Collectively, Riley and Holland accounted for 1.643 of the 1.968 kilograms allocated to Mr. Hopper. Randall Riley's interview stated that he "sold one ounce of ice every day to the defendant" during a month-long period. (R.94 at 5.) Lucas Holland's interview summary stated that he informed them that "he received four ounces of ice every day for a month from Randall Riley." From that amount, he would distribute one ounce to Mr. Hopper. (R.94 at 5.) Both identify a similar time period: roughly a month. They refer to the same amount of methamphetamine: one ounce. And they identify the same source for that methamphetamine: Riley. These similarities create a strong inference that Holland and Riley are referring to the same batch of methamphetamine. This inference is bolstered by Riley and Holland's statements at trial. They both testified that they would pool money with Hopper to buy methamphetamine, which they would then divide according to contribution,

and "go [their] separate ways." (Tr. 153.) These pooling transactions would occur as a group—neither Holland nor Riley testified to distributing Mr. Hopper drugs independent of the other. Stated another way, this indicates that Mr. Hopper is being penalized twice for the same conduct.

The clear indication of double-counting lacks the "indicia of reliability" this Court requires for drug quantity findings. This error substantially affected Mr. Hopper's offense level and ultimate sentence, and so this Court should remand for resentencing.

B. The district court incorrectly enhanced Mr. Hopper's sentence for maintaining a drug premises.

The district court increased Mr. Hopper's base offense level by two points because the district court found that he "maintained a premises" for the purpose of distributing methamphetamine. The Sentencing Guidelines instruct courts to increase a defendant's base offense level by two if he "maintained a premises for the purpose of manufacturing or distributing a controlled substance." U.S.S.G. § 2D1.1(b)(12). This enhancement is not meant to apply anytime drugs are found in a defendant's residence, but rather is meant to target high-level offenders.[8] *See United States v. Sanchez*, 710 F.3d 724, 731 (7th Cir. 2013), *vacated on other grounds*, *Sanchez v. United States*, 134 S. Ct. 146 (2013) (acknowledging that

[8] The legislative context of the enhancement sheds light on this purpose. Congress instructed the Sentencing Commission to create this enhancement in the Fair Sentencing Act of 2010. This enhancement directive was included in a section titled "Increased Emphasis on Defendant's Role and Certain Aggravating Factors," and immediately preceded an enhancement for defendant who was "an organizer, leader, manager, or supervisor of drug trafficking activity." Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 6(2), 24 Stat. 2372 (2010).

interpretations of § 856 were relevant in interpreting 2D1.1); *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993) (explaining that § 856(a) "is broadly worded but appears to be aimed, like the drug-kingpin statute, at persons who occupy a *supervisory, managerial, or entrepreneurial role* in a drug enterprise, or who knowingly allow such an enterprise to use their premises to conduct its affairs.") (internal citation omitted). To that end, the commentary accompanying § 2D1.1(b)(12) explains that although the prohibited uses need not be the sole purpose for the building they "must be one of the defendant's primary or principal uses," instead of "incidental or collateral." U.S.S.G. § 2D1.1(b)(12), cmt. 17.

The Sentencing Guidelines operationalize this primary-or-incidental inquiry by instructing courts applying this enhancement to compare "how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance" with how often the premises was used for lawful purposes. *Id.* This test, however, has been modified when the residence at issue is the defendant's home—as it is here. This Court has reasoned that a literal application of this provision would immunize all primary residences from this enhancement, contrary to congressional intent. *Sanchez*, 710 F.3d at 729–30. Rather than merely weighing the amount of legal and illegal activity, the sentencing court should focus on the *scope and frequency* of the illicit activities. *Id.* at 731. Frequency refers to a simple quantitative measure of the number of times home was put to improper uses. Scope, on the other hand, takes a more qualitative approach—evaluating whether the home was an important aspect of a drug enterprise that involved a significant

quantity of drugs. Thus, under scope, courts consider the quantity of drugs in the enterprise, and the degree to which the house was involved—as evidenced by "customer interactions, keeping 'tools of the trade' and business records, and accepting payment" in the home. *United States v. Contreras*, 874 F.3d 280, 284 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1036 (2018) (quoting *United States v. Flores-Olague*, 717 F.3d 526, 533 (7th Cir. 2013)). The evidence presented at trial and sentencing fails to establish that Mr. Hopper's drug activity at his home was frequent or significant enough to warrant the imposition of the enhancement.

1. The district court incorrectly held that the frequency was sufficient to warrant the enhancement.

The district court incorrectly found that the frequency of distribution warranted the application of the enhancement; Erin Wright's vague and inconsistent testimony was not enough, and the district court failed to account for Mr. Hopper's affirmative decision to stop using his home for drug distribution several months before the end of the charged conspiracy.

The district court applied the enhancement because "the frequency was weekly for a large period of time." (A.28.) This finding was based in large part on Erin Wright's testimony at sentencing. *See* (A.28) ("I can't discount the testimony of Ms. Wright."). Although Erin Wright did speak to the frequency of drug distribution at Mr. Hopper's home, her answers were too inconsistent to provide the certainty and clarity required for sentencing. She initially testified that the drug activity was constant or "weekly." (7/17/2018, Sent. Hr'g 10.) Later, she admitted that there were time periods where there was nothing at the residence, but answered affirmatively

that "at least a majority of the time" methamphetamine was stored and distributed from the residence. (7/17/2018, Sent. Hr'g 10.) Throughout her testimony, she does not clearly distinguish between distribution, which is subject to the enhancement, and storage or use of drugs, which is not. *See, e.g.*, (7/17/2018, Sent. Hr'g 9) ("throughout the week, you know, each week there was some sort of activity going on"). The lack of clarity in her testimony on direct and cross led the district court to ask Ms. Wright further questions. In response to questions from the court, she stated that the drug activity diminished over time, and then ceased for the last six months to a year before Mr. Hopper's arrest. (7/17/2018, Sent. Hr'g 33.)

This Court's previous applications of the enhancement to residential locations involved controlled buys or direct evidence of specific drug transactions that could be extrapolated to determine frequency. *See Contreras*, 874 F.3d at 284 (eight specific transactions); *United States v. Winfield*, 846 F.3d 241, 243 (7th Cir. 2011) (four controlled buys); *Flores-Olague*, 717 F.3d at 528 (a series of controlled buys took place at defendant's home). Here there is no such evidence to bolster Ms. Wright's spotty testimony.[9]

Further complicating the issue of frequency is Mr. Hopper's voluntary abandonment of drug distribution generally, and the use of his home for distribution specifically. This presents a new factual scenario for the imposition of this enhancement, one which the district court failed to consider at all. First, this discontinued use raises the question of whether Mr. Hopper "maintained" a

[9] This is not due to lack of effort on the part of law enforcement, who attempted to orchestrate a controlled buy from Mr. Hopper, but did not succeed. (Tr. 244–45.)

residence for improper purposes. *Flores-Olague*, 717 F.3d at 532 ("[A]n individual 'maintains' a drug house if he owns or rents premises, or exercises control over them, and *for a sustained period of time* uses those premises to manufacture, store, or sell drugs, or directs others to those premises to obtain drugs." (emphasis added) (quoting *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008))).

Furthermore, Mr. Hopper's abandonment of distribution in the home is essential to the frequency analysis. In order to determine whether the prohibited use was one of the primary uses of the residence, a court must consider the overall time period during which the number of prohibited uses took place. *See Contreras*, 874 F.3d at 284 (approving of the application of the enhancement based on eight specific transactions in a very short period of time); *Winfield*, 846 F.3d at 243 (four transactions over a period of three months). When Mr. Hopper stopped distributing drugs from his home, the overall frequency calculus likewise diminished. The district court should have accounted for this unique fact.

2. The scope of drug activity at Mr. Hopper's home was insignificant.

The scope of drug activity at Mr. Hopper's home was not significant enough to warrant the enhancement. Scope refers to both the size of the overall drug enterprise, and the amount of activity that occurs in the home. *Flores-Olague*, 717 F.3d at 533. In addition to evidence of drug quantities, courts look at the range of distribution-related activities that occur in the home, including: "customer interactions, keeping tools of the trade and business records, and accepting payment." *Contreras*, 874 F.3d at 284.

Unlike how it approached frequency, the district court did not make any findings regarding the scope of the distribution, or the quantities distributed from Mr. Hopper's home. This is unsurprising given the dearth of specifics regarding scope in the evidence the government offered. Had the court taken the same approach as it did for frequency, primarily relying on Erin Wright's testimony, it would have had even less to rely on. Her testimony gave little detail regarding quantity. She testified that "each week there was some sort of activity going on" and that "from time to time" there would be drug scales at the residence. (7/17/2018, Sent. Hr'g 9.) At no time did she give specifics regarding amounts of drugs involved in these transactions. In fact, at sentencing there were no specific drug quantities mentioned at all, let alone quantities of significant scope. *Cf. Sanchez*, 710 F.3d at 732 (defendant was the largest wholesaler in a conspiracy involving $2.5 million of drug trafficking).

Trial evidence does not provide any more clarity. When authorities searched Mr. Hopper's house on April 12, 2017, they discovered only 3.5 grams of methamphetamine—a quantity consistent with use, not distribution. What is more, officers discovered no other additional drug paraphernalia that would serve as tools of the drug trade or would otherwise indicate an extensive drug business operating out of the home. *Cf. Flores-Olague*, 717 F.3d at 528 (A "search yielded nine grams of cocaine packaged in eleven baggies, $53,620 in cash, four firearms, ammunition, five cellular phones, twenty-one money wire receipts, a concealment safe, and various drug- and gang-related paraphernalia.").

Mr. Hopper's discontinued use of his home provides insight into the other factors relevant to the scope inquiry. It demonstrates that the use of the home for distribution was not important to the overall drug enterprise. *Cf. Contreras*, 874 F.3d at 284 (upholding the enhancement in part because there was evidence that the use of the defendant's residence was "integral" to the distribution of drugs). It also shows that unlike defendants in other cases, Mr. Hopper did not depend on distribution of drugs from his home as his sole source of income. *See Sanchez*, 710 F.3d at 732 (that the defendant's sole source of income was drug trafficking supported the application of the enhancement); *Flores-Olague*, 717 F.3d at 533 (same).

The evidence at sentencing and trial did not establish much in the way of specifics regarding the scope of the distribution activity at Mr. Hopper's home. What is clear, however, is that any such scope was too insignificant to warrant the two-point enhancement. Although the court did make a finding of frequency, it was insufficient to support the enhancement. Without the enhancement, Mr. Hopper's offense level would have been 36, giving him a guideline range of 188–235 months' imprisonment (assuming no other changes to sentencing).

CONCLUSION

For the foregoing reasons, Appellant Rex Hopper respectfully requests that this Court vacate his conviction, reverse and remand for a new trial, or, at a minimum, remand for resentencing.

Dated: November 30, 2018

Respectfully submitted,

Rex A. Hopper
Petitioner

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 13,023 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Rex A. Hopper, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 30, 2018, which will send notice of the filing to counsel of record in the case.

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CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for Defendant-Appellant, Rex A. Hopper, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

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RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**CRIMINAL NO. 17-CR-40034-JPG**
	)	
vs.	)	
	)	
REX A. HOPPER	)	**Title 21, United States Code,**
	)	**Sections 841 and 846**
Defendant.	)	**Title 18, United States Code, Section 2**
	)	

SUPERCEDING INDICTMENT

THE GRAND JURY CHARGES:

Count 1
Conspiracy to Distribute Methamphetamine

From in or about January 2015, through in or about May 31, 2017, in Williamson and Franklin Counties, within the Southern District of Illinois, and elsewhere,

REX A. HOPPER

defendant herein, did knowingly and intentionally combine, conspire, and agree with other persons known and unknown to the Grand Jury, to knowingly and intentionally distribute a mixture and substance containing methamphetamine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B); all in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

The amount of a mixture and substance containing methamphetamine involved in the overall conspiracy exceeds 50 grams.

A TRUE BILL:

[redacted]

FOREPERSON

for DONALD S. BOYCE
United States Attorney

AMANDA A. ROBERTSON
Assistant United States Attorney

Recommended Bond: Detention

don't expect you to give them to me. The Seventh Circuit has ruled that they are not materials that have to be provided. But as long as I'm able to ask about that process, I'm satisfied with the Court's ruling. I just -- I wanted the record to be made that I feel like I should be entitled to these documents, but I understand if the Court doesn't rule that way, because the Seventh Circuit has already ruled. I want to make a record on that front.

THE COURT: Okay.

MR. KUEHN: But I just wanted to make sure that during cross examination, I was able to ask about that process.

THE COURT: Okay.

MR. KUEHN: Thank you, your Honor.

MR. NORWOOD: Well, your Honor, the government misunderstood because I think the Seventh Circuit is clear that the proffer letters don't come in or any information about the proffer because it is a preliminary step in the plea agreement, and then the plea agreement supersedes all that. There are a lot of -- and I have the *Weidenburner*, if you want to read the case, Judge. It's *United States v. Weidenburner*, and it is pretty straightforward that --

THE COURT: I think it is pretty clear that, you know, you are not going to get the documents.

MR. KUEHN: Understood.

MR. NORWOOD: Well, then the government also objects

to asking about the -- the questions about the process. First of all, you are going to be a lot of times invading attorney-client privilege because we are not understanding where the defendant got the information from. Is it from his attorney telling him here's how the proffer works, here's his understanding of how the proffer worked?

THE COURT: Well, can he ask whether or not he entered into a proffer agreement prior to the plea agreement without going into the details of the proffer agreement?

MR. NORWOOD: So the only question would be, did you do a proffer before the plea agreement? I mean, if that's the only question -- but my thing is, he is going to go in -- I mean, although he says he's not going to introduce the document, he's going to go into every paragraph in the document with the witnesses on the stand, which is the exact same thing as putting the letter in the -- putting the proffer letter into evidence.

THE COURT: What are you planning on doing?

MR. KUEHN: Basically, this is what I plan on doing in a nutshell, Judge, and it is going to be very brief. I want them to understand that before you entered this plea agreement, one of the preliminary steps was that you were required to proffer.

THE COURT: And you sat down with the agents.

MR. KUEHN: You sat down with agents and they

explained that you were required to tell the truth and that the government and the agents would decide what the truth was.

MR. NORWOOD: Oh -- well...

MR. KUEHN: Well, I mean, that's what it -- that is the agreement. Now, if they say that wasn't an agreement I had, so be it; although I would want to ask the agents the same thing. It is the basis of what is told to --

THE COURT: So those are the only questions you want to ask these witnesses that entered into plea agreements?

MR. KUEHN: I mean, Judge, you know how this goes. I mean, I don't know -- well, I mean, yes, that is basically -- that lies at the heart of the type of questions that I want to ask them, is that, you know, you were in a room, you sat down with the agents. This was required before you would get a plea agreement. You understood that agents would decide and the prosecutors would decide whether you told the truth, and if they didn't think you told the truth that a plea agreement would not be tendered. That's basically what I want them to.

MR. NORWOOD: Now, you are getting into the workings of the United States attorney and in their brain, whether or not to offer somebody a plea agreement.

And, Judge, I guess --

THE COURT: I agree there.

MR. NORWOOD: -- the government's position is you're going down a slippery slope when he is allowed to ask -- I

mean, we've all seen it so many times. You ask one question and that leads to another question and that leads to another question. No matter how brief he says it is going to be, we are going to be doing -- we are going -- the letter is eventually going to -- all the terms of the letter are going to come in. And that's what the Seventh Circuit says should not happen. I'm not sure if the Court has read the opinion. The Seventh Circuit couldn't be more clearer. It is not *Giglio*, it's not Jencks. The plea agreement supersedes the proffer letter, supersedes as in the superseding indictment gets rid of it, you have a new document that they can cross examine on.

THE COURT: Those things are contained in the plea agreement, aren't they?

MR. KUEHN: They are not. I mean, they are different because the plea agreement wasn't in existence when the defendant -- when the cooperating defendants begin.

THE COURT: But you are going to go through the plea agreement with these witnesses, aren't you?

MR. LIEFER: I'm going to go through the plea agreement, Judge, but here's the thing. This jury is missing a big part of this process. How was it that they got a plea agreement? They wanted to satisfy the government when they sat down in the proffer because if they didn't satisfy the government, they were never going to get that plea agreement.

Now, I've -- I feel like this jury is -- I mean, my

right to confrontation, my right to put on a defense is significantly hampered if this jury does not get to understand that these plea agreements don't come out of thin air. There is a process to getting the plea agreements, and if they don't understand the preliminary steps, they don't have a full idea of how this unfolded. Now, I understand I don't get the plea agreements.

MR. NORWOOD: No. You get the --

THE COURT: You get the plea agreements.

MR. KUEHN: I'm sorry, that I don't get the preliminary agreement that was struck with the witness. But I think their understanding of what they needed to do in order to get a plea agreement is very relevant.

MR. NORWOOD: Your Honor --

THE COURT: And go ahead, Mr. Norwood.

MR. NORWOOD: Your Honor, I provided the Court with the case of *United States v. Weidenburner*. The decision was in the end of 2013 by the Seventh Circuit. In a Headnote 5 -- well, the paragraph above Headnote 5 indicates proffer letters are basically preliminary off-the-record interviews that could lead to plea agreements, and essentially prosecutors want to know what information a defendant possesses before bargaining for his cooperation.

But then when you go to Headnote 5, the whole Weidenburner's motion for a new trial was premised on his

belief that disclosure of the proffer letters was required by *Giglio v. United States* or the Jencks Act. [As read]: In light of the record, a claim of nondisclosure would be factually frivolous, but, more importantly, these letters are not *Giglio* material or Jencks statements. *Giglio* requires disclosure of inducements for a witness' testimony, but the prosecutor fulfilled that obligation by producing the plea agreements, which describe the benefits witnesses Barth and Duffy would receive for cooperating, including by testifying. The proffer letters were preliminary to the resulting plea agreement, and thus *Giglio* was satisfied by the disclosure of the plea agreement.

And then when you see the case cited, the first one is from the Eighth Circuit, concluding that government provided due process by providing -- disclosing plea agreements that superseded proffer agreement. There is another cite to a Seventh Circuit case, *United States v. Thornton*, from 1999, explaining that proffer letter are of scant relevance at trial when a subsequent, superseding plea agreement has been reached. There is another case from the Sixth Circuit from 2010 explaining that plea agreements supersede proffer agreements, and there is a case from Fifth Circuit saying the same thing.

So, I mean, I don't know how much more clearer the Seventh Circuit could be that the plea agreement, which they have all been provided to defense counsel, are the documents

through which they supersede the proffer letter, and that's the document which the defendant is entitled to and entitled to question witnesses about. And I don't know how much more clearer it could be.

THE COURT: Last word.

MR. KUEHN: Judge, a few things. First, I would like to make as an offer of proof -- I'd like these proffer letters introduced into the record by way of -- by way of an offer of proof, in large part, Judge, because I don't think the Seventh Circuit had a copy of this particular proffer letter because in that case, it is my understanding, that the government couldn't find them. And I've always been given them in every other trial I've had. I mean, I get them in discovery on a routine basis, these proffer letters, and I've always been able to ask about them in previous trials.

Again, nothing in that case says that as a matter of being able to confront witnesses that I don't have a right to talk about the fact that there is a process to getting a plea agreement, and that process requires you to proffer with agents and convince agents that you have been completely truthful, and then that occurs behind closed doors. Judge, this is something that the agents explain to people. This is a discussion that takes place. I'm in these proffers. And they -- it's very much stressed, you know, if you are not telling -- if something happens and it's -- and the agents think you are not telling

the truth, what happens? They leave the room, and all of a sudden, you know, you have a chance to come back in and satisfy them that you are telling the truth.

This is an important part of the process because you are never getting to the plea agreement if you don't satisfy the government and their agents at the time of the proffer, Judge. And if I can't talk about that part of the process, I won't even reference the agreement or the rules that are in place; however, the other portion of that agreement, you know, the government is still at liberty to invoke the terms of that agreement. That agreement has terms that talk about what will happen if the defendant testifies contrary to the terms of that proffer letter while they're testifying. And those are not incorporated into the plea agreement.

MR. NORWOOD: And that's in their own case, not in a different case. In their own case --

MR. KUEHN: That's not true.

MR. NORWOOD: If the -- well --

MR. KUEHN: There's a -- there is a paragraph --

MR. NORWOOD: See, we are getting into -- we are going to get into, Judge, a slippery slope. He has plenty of impeachment material with the plea agreement, and you are opening up -- you are truly opening up a can of worms.

THE COURT: This will be an offer of proof -- I'm going to deny your motion. You can ask whether they've entered

into a proffer agreement, but going into the terms of it that are superceded by the plea agreement, I'm not going to let you do.

MR. NORWOOD: If that's -- I don't know if that's the sole question, but, Judge, it is going to -- I'm telling you, it is going to open up a can of worms, even that question.

MR. KUEHN: Judge, will you let me ask just these limited questions --

THE COURT: What? What? What questions?

MR. KUEHN: -- without going into any of these terms?

Well, I would like to ask: Before you entered into a plea agreement you were required to proffer and that a successful proffer was a preliminary step to using --

THE COURT: No. No.

MR. KUEHN: Okay.

THE COURT: You are testifying. You know, they don't know whether it's a preliminary step or not.

MR. NORWOOD: No. And it's a --

THE COURT: That's not a proper -- but you can -- in other cases, I've had questions asked, did you enter into a proffer agreement before the plea agreement, and they moved on to the plea agreement.

MR. NORWOOD: Your Honor, and I'll abide by whatever ruling the Court says, obviously, but all I'm saying is, it is not going to be one question.

see that this agreement, as you can imagine, is not in writing. I mean, whenever you buy a house, you have to sign 50 documents saying you are buying this house. But when individuals get together to come to an agreement to break the law, they don't put that in writing. But you are going to see by their actions and by their words and by their methods of operation that these individuals, along with Rex Hopper, had an agreement to distribute methamphetamine right here in Southern Illinois.

Now, the conspiracy -- you are going to hear the government must show two things at the end of the case. One, that this conspiracy to distribute methamphetamine existed, and that the defendant was a member of that conspiracy -- that is, part of the agreement -- with an intent to further that conspiracy. You are going to hear the defendant doesn't need to join at the beginning of the conspiracy or stay all the way to the end of the conspiracy. He just has to be part of this group of individuals who is involved in the distribution of methamphetamine, and they have this unwritten agreement to do so.

Now, you are going to hear several names, in addition to the defendant's name, of individuals who were involved in this case. You are going to hear the name Robert Weir. He also goes by the name "Boog," that's his nickname. You are going to hear about Randall Riley. You are going to hear about Lucas Holland. You're going to hear about Dameon Williams.

You are going to hear about all these individuals because these were some of the individuals -- and they were only some of the individuals that were involved with this defendant in the distribution of methamphetamine.

And you are going to hear how these individuals -- for example, you are going to hear how Randall Riley and Lucas Holland and the defendant and Robert Weir put money together, pooled their money together, all contributed money so that Randall Riley could go to Cape Girardeau, Missouri, right across the river, and get methamphetamine and bring it back. And then they would distribute it amongst themselves, and then they would sell it on further down to customers. That's what you are going to hear.

You are going to hear about them going -- the defendant had other sources in Cape Girardeau you're going to hear about that he went to and got the methamphetamine and brought it back here to Southern Illinois; went over to Missouri, right across the river, and he brought back here and distributed it. You might even hear about a trip to Kansas City the defendant took. And while the defendant was in Kansas City, he's over there trying to obtain methamphetamine to bring back to Southern Illinois.

Now, the witnesses in this case -- I want you to keep in mind that the evidence is going to show the witnesses in this case, a lot of them are chosen by the defendant. And

(Jury out).

THE CLERK: Please be seated.

THE COURT: Mr. Kuehn?

MR. KUEHN: Yes, Your Honor. Are you expecting a motion?

THE COURT: That's up to you.

MR. KUEHN: No, that's -- I was wondering if that's why you were acknowledging me. But, yes, I would like to make a motion under Rule 29 for judgment, Motion for Judgment of Acquittal.

THE COURT: Okay. The Court has heard the evidence of over 20 witnesses and seen the exhibits that have been admitted into evidence, and the Court finds that the Government has made a prima fascia showing to move this case forward to the Defense and finding -- taking the evidence in the light most favorable to the Government, the prima fascia showing has been made that this Defendant may be guilty of the charge against him. So, the Court's going to deny the motion and proceed with the defense in this case.

We will take a recess now.

Mr. Kuehn, you need to discuss with your client whether or not he's going to testify.

Do you have any other witnesses?

MR. KUEHN: I do not have any witnesses, Your Honor. And one of the things that I'll do is make sure that the

more than 50 grams of a mixture and substance containing methamphetamine?" And you put in either *yes* or *no*. You check *yes* or *no*. And, again, there's a line for the foreperson and the other 11 jurors to sign.

We are now going to begin the closing arguments of counsel. Mr. Norwood has the opportunity to go first and last. At the end of the closing arguments I think you will have food in the jury room that Ms. Gray ordered.

We will now proceed.

Mr. Norwood?

MR. NORWOOD: Thank you, Your Honor. May it please the Court and Brother Counsel.

MR. KUEHN: It does.

MR. NORWOOD: Ladies and gentlemen, I stood before you two days ago and said the Government was going to prove a couple of things: That Defendant, Rex Hopper, was a drug dealer and he was involved with others in the distribution of methamphetamine.

I told you about the conspiracy and I told you then, and I'll repeat, a conspiracy is not some dark and nefarious amoebas form. A conspiracy is simply an agreement between two or more people to commit a crime. That's what the instructions say; an agreement to commit -- or, excuse me, an agreement between two or more persons to commit a crime.

In this case the crime was the distribution of

methamphetamine. And when you decide whether this conspiracy existed, which the Government submits there is proof beyond a reasonable doubt that it does, you have to consider all the circumstances and all the statements and activities of all the participants; not just the Defendant, all the participants.

And this conspiracy is not static. You will see it in instructions. It says people can come and go, people can join at the beginning, join at the end, they don't have to know everybody in the conspiracy.

What you have is this overall illegal goal, and that illegal goal in this case is the distribution of methamphetamine. And you have to show that the Defendant was aware of that goal, and the Government submits proof that he has, and that he joined that group, and the Government submits there's proof beyond a reasonable doubt that he has.

Now, you know who all is in this group already. You have heard the names. Other than the Defendant you have Boog, who's Robert Weir; you have Randall Riley, you have Lucas Holland, you have Dameon Williams, you have Blake Gordon, you have Williams Karnes, who also went by Karnie. You have all these individuals who are involved in the same illegal goal, and that is the distribution of methamphetamine down here in southern Illinois.

And I am not going to go through what every witness said and say, "Well, remember this person said this and this

person said that." I'm going to talk in generalities. And I want you to remember how all the testimony fitted together. Not individually; as a group fitted together.

You have heard about pooling money. Pooling money, putting money together, getting several individuals to put money together. For what purpose? So they can get more methamphetamine.

The drug business works like any other business. If you buy in bulk you get a better price. If you go to Sam's and buy a 30-roll of toilet paper, you get a better price than if you go to Kroger and buy four rolls. You get a better price per roll. That's just common sense. That's what pooling money does. That's what an agreement does with this; putting the money together to go and buy the methamphetamine in bulk, and then split it up and then sell it.

And you have heard how that works, because one of the witnesses -- I am trying to think of the name. I think it was Chelsea McCormack yesterday talked about when she was buying methamphetamine it would cost a hundred dollars a gram. And by now you all know that there are 28 grams in an ounce, so that would be $2,800 if you were paying gram for gram for an entire ounce. But, these guys were paying $1,000,, $900, $1,000, $1,100 an ounce. Why is that? It's because of this agreement, because they are pooling their money, buying from a source and buying in bulk. And that's what I mean by it works

the same way as Sam's does. It's the same economic principle that applies to the drug business.

And, what's important is you are going to hear that there were different groups of people pooling money. You heard about Boog and Rex pooling money and going to a source they had over in Missouri and bringing it back and splitting it up and selling it. Then when Boog and Rex met Randall Riley and Lucas Holland, all of a sudden there was four guys involved and they were pooling their money and going to Cape Girardeau and getting methamphetamine and bringing it back to southern Illinois and selling it on our streets.

And, what's interesting, and I think it's very important, is not only did Randall Riley have a source over in Missouri, the Defendant had a source.

And, this is what I mean by the agreement: There was testimony that, well, sometimes Randall Riley's source wasn't available. And I remember one specific time where he said his source went to a concert, so his source was not available. So, what did the Defendant say? "Come to me. Give your money to me. I have a source over there." And, they went over to that source. And you have heard about where this source is. He lives not in Cape Girardeau, but a little bit outside of Cape Girardeau, somewhere between 30 to 45 minutes or an hour outside of Cape Girardeau. Several witnesses talked about this garage they went to and they would wait for the person to

bring back the dope. That's the Defendant's source. And why is that important? Because it shows this agreement, "If you don't have the dope, your source doesn't, I'll go to mine and get it and bring it back to you, I'll take care of that part of it." Randall Riley had sources, the Defendant had sources, Boog had sources. It all depended on whose source had the methamphetamine at the time and who was putting money into the kitty in order to get the methamphetamine.

But, that's what I mean by this was a group activity and it was an agreement. It wasn't just willy-nilly. And I think you all remember when I talked to you -- when I talked to you on Monday, I said this agreement is not going to be in writing. Rex Hopper and Boog and Randall Riley and Lucas Holland and Dameon Williams and Tiny Karnes, they are all street-savvy enough that they are not going to put in writing, "Here's what we are going to do: We are going to pool our money together and go to Cape Girardeau and get methamphetamine and bring it back and everybody sign." That's not how this works.

As the Judge said in the instructions, you look to the acts of the coconspirators, you look to the statements of the coconspirators, you look to see what they did and what they said, and you can look at what everybody didn't say -- not just what Rex didn't say, what everybody didn't say, and then see was Rex part of that group, was he part of that

To be a member of a conspiracy, the defendant does not need to join it at the beginning, and he does not need to know all of the other members or all of the means by which the illegal goal of the conspiracy was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the illegal goal of the conspiracy and knowingly joined the conspiracy.

A defendant is not a member of a conspiracy just because he knew and/or associated with people who were involved in a conspiracy, knew there was a conspiracy, and/or was present during conspiratorial discussions.

In deciding whether the defendant joined the charged conspiracy, you must base your decision only on what the defendant did or said. To determine what the defendant did or said, you may consider the defendant's own words or acts. You may also use the words or acts of other persons to help you decide what the defendant did or said.

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of a mixture and substance containing methamphetamine do not enter into a conspiracy to distribute a mixture and substance containing methamphetamine simply because the buyer resells the a mixture and substance containing methamphetamine to others, even if the seller knows that the buyer intends to resell the a mixture and substance containing methamphetamine.

To establish that a seller knowingly became a member of a conspiracy with a buyer to distribute a mixture and substance containing methamphetamine, the government must prove that the buyer and seller had the joint criminal objective of distributing a mixture and substance containing methamphetamine to others.

PAGES 17 + 21

ARE CONFUSING AS

TO THE DEFINITION

OF "CONSPIRACY"

All instructions should be read together. I cannot give you any more instruction other than what you have been given.

Judge Gilbert

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**CRIMINAL NO. 17-CR-40034-JPG**
vs.	)	
	)	
REX A. HOPPER,	)	
	)	
Defendant.	)	

VERDICT - COUNT 1

We the jury find the defendant, REX A. HOPPER, Guilty,
(Guilty/Not Guilty)

of the offense of conspiracy to distribute a mixture and substance containing methamphetamine as charged in Count 1 of the Superceding Indictment.

[redacted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**CRIMINAL NO. 17-CR-40034-JPG**
vs.	)	
	)	
REX A. HOPPER,	)	
	)	
Defendant.	)	

SPECIAL VERDICT FORM

If you find the defendant REX A. HOPPER guilty of the conspiracy charged in Count 1 of the Superceding Indictment, please answer the following question:

Do you unanimously agree, by proof beyond a reasonable doubt, that the defendant conspired to distribute more than fifty (50) grams of a mixture and substance containing methamphetamine?

__X__ Yes _____ No

[redacted]

that's just preposterous. We judge each case individually.

With respect to there not being a lot in the house at the time of the search warrant, the search warrant initially was not even for drugs. It was for burglary items they believed the Defendant had stolen. When they were there they came across drugs, and I think they then got a search warrant for drugs after they got there. But the whole purpose of going into the house on that day was not for drugs, it was for burglary items.

The Seventh Circuit says you don't weigh the nondrug use with respect to the drug use, because he might have used the residence 90 percent of the time as a residence. But, that's not how you do it. You don't do it, because the lawful purposes would always outweigh the illegal purposes. But, when you look at the testimony not only of Erin Wright, but when you look at the testimony of all the other people that we have cited that testified at trial, they were getting drugs at the Defendant's residence from the Defendant. This was not incidental, it was a pattern, and the Government believes the enhancement is appropriate. Thank you, Judge.

THE COURT: Okay. The Court has read the presentence report, remembers the evidence from the trial, has read the objections and responses and heard the testimony.

Application note to the 2D1.1(b)12 states that (b)12 applies to a Defendant who knowingly maintains a premises,

i.e., a building, room, or enclosure, for the purpose of -- And, of course, in this case we are not talking about manufacturing, we are just talking about distributing -- a controlled substance, including storage of controlled substance for the purpose of distribution. Among the factors the Court should consider determining whether the Defendant maintained a premises is whether the Defendant held a possessory interest, that is either owned or rented a premise -- And I don't think there's any dispute that Mr. Hopper did at least own or he had possessory interest of the Creal Springs residence -- and, B, the extent to which the Defendant controlled access to or activities at the premises. I don't think there's any question that he controlled the access to and activities at the premises.

Then the application note goes on to further state that manufacturing -- again, we are talking about distributing a controlled substance -- need not be the sole purpose for which the premises was maintained, but maybe one that the Defendant's primary or principal use of the premises, rather than one of Defendant's incidental or collateral use of the premises, and it further states that in making this determination it directs the Court should consider how frequently the premises was used by the Defendant for manufacturing or in this case distributing a controlled substance and how frequently the premises was used by the

Defendant for lawful purposes.

This section can be a gray area for enhancement, and the Court, in assessing the -- this gray area has to take into consideration the evidence and the testimony, including the testimony of Ms. Wright. There's no question that, first of all, based upon the evidence I've heard at trial, also of Ms. Wright, when Mr. Hopper would go purchase this methamphetamine he brought it back to the Creal Springs residence in probably the vast majority of the time. So, therefore, he was storing these drugs at the premises, and there's no question that there were people buying and he was distributing from the residence. Now, was it incidental or collateral, as Defendant argues, or was it just friends coming over and he was just -- Sure, I'm sure some of that happened, I'm sure it did happen, but I can't discount the testimony of Ms. Wright that just in response to my question that the frequency was weekly for a large period of time. That's more than just incidental or collateral.

So, the Court, based upon the testimony I heard at trial, as well as the testimony here, considering the arguments of Defense Counsel, is going to overrule the Defendant's objection and find the two-point enhancement under 2D1.1(B)12 applies, as the Defendant maintained a residence for the purpose of distributing and storing a controlled substance and, therefore, the two-level increase applies.

Therefore, it would be -- and there's no other objections to the report, the Court will be adopting the presentence report and the findings contained therein as the findings of this Court, including that the finding involved between 1.5 and 4.5 kilograms of ice methamphetamine, specifically 1,968 kilograms of ice methamphetamine, having a base-level offense of 36, a two-point enhancement on the contested item that the Court just heard, for an adjusted offense level of 38.

There is one criminal history point, which I find amazing when I read the presentence report with all the allegations of residential burglary, but under the guidelines there is only one criminal history point, with a custody range of five to 40 years, a guideline provision of 235 to 293 months, supervised release range of four years, a fine range of $2,500, and a special assessment of $100.

Based upon the rulings of this Court, any objections to those guideline range findings?

MR. NORWOOD: Not from the Government.

MR. KUEHN: No, Your Honor.

THE COURT: Recommendation from the Government?

MR. NORWOOD: Your Honor, the Government recommends a sentence near or at the high end of the range in this case. And this is based on not only the guideline range, but the 3553(a) factors, and specifically the factors -- not only the nature and circumstances of this offense, but I think more

DEFT. HOPPER: No, sir.

THE COURT: Okay. Mr. Hopper, the Court has read your attorney's sentencing memorandum and its request for 188 months and also heard the Government's recommendation, as well as reviewed your presentence report. And I think you heard the Court mention earlier that I am surprised with the number of residential burglary charges against you and the theft charges that you are still a Criminal History Category 1. The Court realizes a lot of this happened at an early age, although you started back at age 33 with aggravated battery; 42, traffic and suspended license; and then the Court heard testimony that you may have been involved in other activities that you were not charged in.

And the Court acknowledges that you have a drug addiction, that you have a significant history of substance abuse, that you -- I don't think you have ever participated in substance abuse treatment, have you?

DEFT. HOPPER: No, sir.

THE COURT: The guideline range, even 235 to 293, is a pretty hefty range. And the Court acknowledges the arguments of your counsel about the sentencing guidelines and policies and the disparity of sentencing of maybe some other Defendants, but I am looking at you.

When I look at the 3553(a) factors, the history and characteristics of the offense -- And the Court heard the

testimony that you were -- you may not have been the wheel, but you were a spoke in the wheel of drug activity in the Saline County area and elsewhere. You didn't have any other source of income other than your drug business.

The nature and circumstances of the offense and the history and characteristics of you as a Defendant -- As I said earlier, I'm surprised you are just a Criminal History Category 1. And with those charges you even pled guilty -- adjudicated, pled guilty to residential burglary at age 17, and your attorney made a comment just a few minutes ago it's been a long time since you have been in prison. Well, I would think once you've been in prison you wouldn't want to go back to prison. Obviously you didn't learn from that experience.

To afford adequate deterrence to criminal activity, protect the public from further crimes, the testimony and arguments that Mr. Norwood made, the Court is concerned and that you being out the public may not be totally without -- especially the fact that you have this tendency to burglarize places.

The Court, having considered all the information in the presentence report, including arguments of counsel -- And, the Court is considering the fact that you did help out the Franklin County Sheriff in foiling a potential escape, especially in light of the fact that just a few weeks ago you had two escapees from Saline County and then I guess last week

we had three juveniles escape from the Franklin County jail. The Court read that report and the Court's factoring that in, is going to consider that.

The Court, having considered all the information in the presentence report, including guideline computations and factors set forth in 18 U.S.C. 3553(a), including arguments of your counsel, pursuant to the Sentencing Reform Act of 1984, it would be the judgment of this Court the Defendant, Rex A. Hopper, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 235 months. It is ordered you shall pay the United States a special assessment of $100, and the special assessment is payable through the Clerk of the U.S. District Court. It is further ordered you shall pay the United States a fine of $250 payable through the Clerk of the U.S. District Court, and the fine is due immediately. You do not have the ability to pay interest, and interest is waived.

You shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until paid in full. Having assessed your ability to pay, payment of the total criminal monetary penalties shall be paid in equal monthly installments of $10 or ten percent of your net monthly income, whichever is greater, and you shall pay any financial penalty that is imposed by this judgment that remains unpaid at the

commencement of the term of supervised release.

The Court is going to recommend the RDAP program offered through the Bureau of Prisons once you qualify for that program under their guidelines. Upon release from imprisonment you shall be placed on supervised release for a term of four years. Within 72 hours of release from the custody of the Bureau of Prisons you shall report in person to the Probation Office in the district to which you are released. While on supervision you shall be subject to and be required to comply with the conditions of supervision as ordered by this Court.

Have you had a chance to read and review and go over the *Recommended Conditions of Supervised Release* that was attached to your presentence report?

DEFT. HOPPER: Yes, sir, I did.

THE COURT: Do you have any objections to any of those?

DEFT. HOPPER: No, sir.

THE COURT: Mr. Kuehn, any objections?

MR. KUEHN: No, Your Honor.

THE COURT: Is this your signature to the waiver of reading those in open court?

DEFT. HOPPER: Yes, sir.

THE COURT: Did you read and review and go over this with your attorney before you signed it?

DEFT. HOPPER: Yes, sir.

THE COURT: Those conditions will become part of the judgment in this case.

I need to advise you you have a right to appeal your sentence if you believe this sentence is contrary to law, and you also have a right to appeal your conviction. Said appeal must be filed within 14 days after entry of judgment. If you cannot afford the services of an attorney to handle your appeal one will be appointed for you. If you so request, the Clerk of Court will notice an appeal for you at this time. Do you understand you have those rights.

DEFT. HOPPER: Yes, sir.

THE COURT: If you wish to appeal or -- you can discuss that with your attorney. But, if you do not notify this Court now, then I suggest you give your attorney notification in writing so there's no miscommunication.

MR. KUEHN: Yes, Your Honor, we have discussed this, and it is Mr. Hopper's intention to file an appeal and we would very much appreciate it.

THE COURT: We will note the appeal that has been requested by the Defendant, then.

MR. KUEHN: Thank you, Your Honor.

THE CLERK: So, Judge, I will docket the Notice of Appeal?

THE COURT: Right.

THE CLERK: Okay.

THE COURT: Anything further, Mr. Kuehn?

MR. KUEHN: No, Your Honor.

THE COURT: Anything further, Mr. Norwood?

MR. NORWOOD: Your Honor, --

THE COURT: Yes.

MR. NORWOOD: -- just one quick thing. If the Court would be so kind as to inquire of Defense Counsel whether the Court has addressed all of his principal arguments so there's no issue later about whether or not anything was not addressed, and if he needs any further elaboration on anything.

THE COURT: The Court said he considered your mitigation arguments and the guidelines and your disparity. Are there any other arguments I have not considered?

MR. KUEHN: No, Your Honor.

THE COURT: Okay. All right.

MR. NORWOOD: Thank you.

THE COURT: That will be all.

THE CLERK: All rise. Court's adjourned.

AO 245B (SDIL Rev. 04/16) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

Southern District of Illinois

UNITED STATES OF AMERICA

v.

REX A HOPPER

JUDGMENT IN A CRIMINAL CASE

Case Number: **17-CR-40034-JPG-1**
USM Number: **13709-025**

JUSTIN A. KUEHN
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 of the Superseding Indictment 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(a)(1), 841(b)(1)(B) and 846	Conspiracy to Distribute Methamphetamine	5/31/2017	1s

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.

☐ No fine ☐ Forfeiture pursuant to order filed , included herein.

☐ Forfeiture pursuant to Order of the Court. See page for specific property details.

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

Restitution and/or fees may be paid to:
Clerk, U.S. District Court*
750 Missouri Ave.
East St. Louis, IL 62201

*Checks payable to: Clerk, U.S. District Court

July 17, 2018
Date of Imposition of Judgment

Signature of Judge
J. Phil Gilbert, U.S. District Judge
Name and Title of Judge

Date Signed: 7-18-2018

DEFENDANT: Rex A Hopper
CASE NUMBER: 17-cr-40034-JPG-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **235 months on Count 1 of the Superseding Indictment.**

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