No. 14-3113

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Kyle Lunnin, Defendant-Appellant.	)	Appeal from the United States District Court for the District of Kansas No. 13-40039-JAR The Honorable Julie A. Robinson

APPELLANT'S OPENING BRIEF

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle St., Suite 2600
Chicago, Illinois 60603
(312) 648-6164
Attorney for Appellant Kyle Lunnin

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STATEMENT OF PRIOR OR RELATED APPEALS

There are none.

JURISDICTIONAL STATEMENT

Defendant-Appellant Kyle Lunnin was charged with conspiracy to possess with intent to distribute more than 500 grams of methamphetamine and at least 68 kilograms of marijuana, along with witness tampering. (Doc. 1, 111).[1] The district court's jurisdiction was based on 18 U.S.C. § 3231, which gives the district courts of the United States original jurisdiction of all offenses against the laws of the United States. A jury found Lunnin guilty on January 10, 2014. (Doc. 172). On May 28, 2014, he was sentenced to 168 months in prison. (Doc. 222).

On May 30, 2014, Lunnin filed a timely notice of appeal. (Doc. 227). This Court's jurisdiction is based on 28 U.S.C. § 1291, which bestows jurisdiction of appeals from final decisions of district courts, and 18 U.S.C. § 3742(a), which provides appellate courts with jurisdiction of appeals of sentences.

[1] References are to the district court docket, designated as "Doc." followed by the docket number and page number.

STATEMENT OF THE ISSUES

I. Kyle never sold, bought, held, or transported drugs. His role in the conspiracy consisted of a single loan of $5000 which gained him no profit and was never repaid. That loan barely financed 1% of the total drugs purchased during the conspiracy. An unindicted conspirator also said he once saw Kyle collecting and counting money.

Was the evidence sufficient to convict Kyle of conspiracy?

II. Unindicted conspirator Ray Hinderliter told the jury he once saw Kyle collecting and counting money. He further testified he relayed this information to law enforcement in two separate interviews. Case agent Rupert admitted Hinderliter's trial testimony was false. The prosecution did nothing to distance itself from this testimony and the court relied on it to deny Kyle's motion to dismiss the indictment.

Did Hinderliter's false, or at least misleading, testimony affect the jury's judgment, in violation of Kyle's due process rights?

III. Kyle swore at Ray Hinderliter and said he would kill him during a random encounter at a welfare office. It was later brought to

the court's attention that Hinderliter was not on a subsequent witness list sent by the prosecution after the incident.

Did Kyle's remark constitute witness tampering?

IV. Individuals implicated in dealing, holding, and moving the 50 pounds of methamphetamine and 200 pounds of marijuana either got off scot-free or received sentences far shorter than Kyle, whose role was nonexistent.

Should Kyle have received a minor role adjustment?

Should Kyle have been given an obstruction of justice enhancement?

Was the amount of drugs ascribed to Kyle correct?

Was Kyle's sentence unreasonable, erroneous, or disproportionately greater than the co-Defendants who spawned and ran the drug ring?

STATEMENT OF THE CASE

Kyle Lunnin, the last man on a seven-defendant indictment for conspiracy to distribute methamphetamine and marijuana, was the only one to go to trial. (Doc. 1, 111). A jury convicted him of conspiracy and witness tampering. (Doc. 172). He was sentenced to 14 years. (Attachment B; Doc. 222). Co-Defendants Blaine Smith, Carlos Espinoza, Dustin Lunnin, and David Wayne Clovis pled guilty and received sentences ranging from three to eight years. Co-Defendant Alex Garay cooperated and awaits sentencing. Co-Defendant Shawn Smith committed suicide in jail.

A Father-Son Drug Business

At the heart of this conspiracy are Shawn Smith and his son Blaine Smith. (Doc. 250 at 83). Blaine's sentence was reduced from 84 to 60 months for testifying. (Doc. 250 at 122). Blaine acknowledged his father's "very extensive" criminal record. (Doc. 250 at 83-84). Following in his father's footsteps, Blaine sold marijuana with Carlos Espinoza. (Doc. 250 at 84). Blaine and Espinoza had marijuana picked up in Colorado and California and brought to Kansas. (Doc. 250 at 85). Blaine then distributed his share to five dealers in Iowa, where he attended school. (Doc. 250 at 83, 89-90). Every few weeks for a year, Blaine and Espinoza smuggled two to three pounds of marijuana into

Kansas. (Doc. 250 at 86-87). This changed when Blaine's father left jail and joined the business. (*Id.*).

Shawn Smith's involvement meant increasing inventory and diversifying. (*Id.* at 87-90, 93-94). Shawn and his son went to Colorado and picked up pounds of methamphetamine. (*Id.*). On one occasion, they bought two and one-half pounds of methamphetamine from Bryan Carver. (Doc. 250 at 91-92; Doc. 251 at 335). The trips added up, and from February 2012 through January 2013, the Smiths moved 50 pounds of methamphetamine and 200 pounds of marijuana. (Doc. 250 at 166; Doc. 251 at 329-30).

They did not accomplish this alone. Blaine said co-Defendant Carlos Espinoza helped finance the operation and had dealers working for him. (Doc. 250 at 86, 94). Espinoza loathed transporting the drugs and "always paid extra money so he didn't have to go." (Doc. 250 at 85). Espinoza usually had Jonathan Weeks or another individual named Zane bring the marijuana from Colorado. (Doc. 250 at 85-86).

Blaine said co-Defendant Alex Garay dealt for Espinoza. (Doc. 250 at 94-95). Garay also sold methamphetamine for Shawn. (*Id.*). Shawn and Blaine would divide the drugs and give Garay his share. (Doc. 250 at 96). The drugs were split at either Garay or Mike Ebinger's home. (Doc. 250 at 97).

Finally, Kyle's brother, co-Defendant Dustin Lunnin, sold methamphetamine for Shawn. (Doc. 250 at 98-99). Blaine saw Dustin pick up drugs from Shawn and deliver money to him multiple times. (Doc. 250 at 100).

The Colorado trips were not singular in purpose. Blaine said that Shawn bought stereo equipment there "all the time." (Doc. 250 at 117). Shawn "would get it really cheap and sell it, make money on it also." (Doc. 250 at 123). Shawn bought stereo equipment for himself and others, including Kyle. (Doc. 250 at 117). Kyle paid Shawn for the equipment. (*Id.*).

Kyle's Involvement

Blaine never met Kyle. (Doc. 250 at 101). He saw Kyle only "once in my life before all of our court stuff started." (*Id.*). On that single occasion, Blaine saw Kyle at his father's friend's house, where Kyle was arranging car stereo equipment. (*Id.*). Blaine did not know Kyle was Dustin's brother. (Doc. 250 at 99). Blaine admitted Kyle never got drugs from his father. (*Id.*). In fact, Blaine had no personal knowledge of any drug activity by Kyle. (Doc. 250 at 101, 116). It was only through Espinoza that Blaine heard "Kyle was just throwing down money. Basically, he was throwing down $5000 and just expecting to get $7500 in return." (Doc. 250 at 102). Other than the loan Espinoza mentioned,

Kyle had zero involvement in the operation. (Doc. 250 at 102-03). Finally, Blaine did not personally know if Kyle gave his father money. (Doc. 250 at 149-50).

Ray Hinderliter

Hinderliter was an unindicted conspirator who bought drugs from Shawn. (Doc. 250 at 192-94). He got two ounces of methamphetamine, twice a week, paying Shawn $1,000 per ounce. (Doc. 250 at 195). Hinderliter then distributed it to his cadre of dealers. (Doc. 250 at 194). This went on for five months. (Doc. 250 at 195). Hinderliter picked up drugs from both Shawn and Espinoza. (Doc. 250 at 198). He also gave money to Espinoza. (*Id.*).

Hinderliter did not have to look far for customers—his first clients were his children. Between February and December 2012, Hinderliter purchased at least five pounds of methamphetamine and distributed it to dealers, including his children. (Doc. 250 at 194-95, 224). He also began using methamphetamine again, and his children also used and sold the drug. (Doc. 250 at 196-97, 224-25).

Hinderliter's direct dealings with Kyle were limited. He claimed Kyle used methamphetamine in his garage once, collected Shawn Smith's money on another occasion, and traded a small amount of methamphetamine for a tattoo on a third. (Doc. 250 at 200-01). Kyle did

not give drugs to Hinderliter on any other occasion. (Doc. 250 at 201). Hinderliter claimed that Kyle helped Shane Smith count a large amount of money at Hinderliter's house. (Doc. 250 at 203). On January 17, 2013, Hinderliter agreed to cooperate with law enforcement to bring down Shawn Smith's distribution operation (Doc. 250 at 207).

Alexander Garay

Garay admitted moving 20 pounds of marijuana during the course of the operation. (Doc. 250 at 155). He had three people selling for him. (*Id*.).

Just before Shawn was arrested, Garay picked up nine pounds of marijuana with Shawn. (Doc. 250 at 143). Of that batch, Garay got one pound and Carlos took the rest. (*Id*.). Carlos then delivered his share, with Garay in tow, to Jerry Lee Robinson. (Doc. 250 at 145). In the weeks following Shawn's arrest, Garay went to Colorado twice for Espinoza. (Doc. 250 at 150-51). The first time he bought three pounds of marijuana for $8000. (Doc. 250 at 152). The second time he bought six pounds of marijuana. (Doc. 250 at 153). Garay went to Colorado alone. (*Id*.).

Garay did not know of any role Kyle had in the operation. (Doc. 250 at 149). Shawn never said anything to Garay about Kyle. (Doc. 250

at 150). Nor did anyone else in the operation say anything to him about Kyle. (*Id.*). Garay only knew Kyle from high school. (Doc. 250 at 130).

David Wayne Clovis

Clovis bought a "large amount" of methamphetamine from Shawn for personal use. (Doc. 250 at 164). Clovis then got involved in the business, driving Shawn to Colorado three times. (Doc. 250 at 165). Clovis also held large amounts of drugs for Shawn. (Doc. 250 at 106).

Clovis saw Kyle once, in a motel room with Shawn. (Doc. 250 at 168-69). Kyle was only present to pick up his brother. (*Id.*). When Kyle was present, no money or drugs were exchanged. (Doc. 250 at 169). Nor did Clovis receive any drugs when Kyle was there. (*Id.*). Shawn never spoke about Kyle to Clovis. (Doc. 250 at 179).

The Conspiracy Unravels

Shawn was arrested December 3, 2012. (Doc. 250 at 90). Shawn's iPhone was seized and the police eventually recovered the data on it. (Doc. 250 at 250). The police found pictures, messages, and other miscellaneous data. (Doc. 250 at 252). "Owe sheets" were also recovered, listing the names and amounts of people who owed Shawn. (*Id.*). The names listed included Red, Brent, Zane, Ray, Alex, Rhi, Wes, Mike, and XXX. (Doc. 250 at 253).

The operation briefly hobbled on after Shawn's arrest. (Doc. 250 at 143-44, 150). This included Garay and Blaine delivering six pounds of marijuana to Jerry Lee Robinson. (Doc. 250 at 108-09, Doc. 251 at 304). Robinson gave Shawn the money for the marijuana portion of Shawn's last trip. (Doc. 250 at 120, Doc. 251 at 304). Additionally, as mentioned above, Garay went to Colorado twice for Espinoza. (Doc. 250 at 150-51).

Blaine was arrested a short time after his father, on December 22, 2012. (Doc. 250 at 111). Blaine ceased dealing after his arrest. (Doc. 250 at 104). Blaine also did not know if anyone went to Colorado for drugs after his arrest. (Doc. 250 at 104).

The Correctional Conversations

The prosecution introduced a number of tape-recorded jailhouse conversations between Shawn and others. Shawn made a flurry of calls the week of December 12, 2012. Calls between Shawn and Espinoza referenced a number of names, including Kyle's. (Doc. 251 at 296-97). Shawn called Tara Goodwin and her boyfriend to discuss drug sales. (Doc. 250 at 288). Hinderliter visited Shawn that week to discuss Rhiannon Gremmel, a drug dealer Hinderliter knew. (Doc. 251 at 298-99; Doc. 250 at 191). Shawn also called Nicole Lehman about dealing methamphetamine. (Doc. 251 at 300). The following week, Shawn made

additional calls to Espinoza and Lehman. (Doc. 251 at 302-06). Shawn also spoke with Gremmel. (Doc. 251 at 300).

On January 2, 2013, Kyle visited Shawn. (Doc. 251 at 309). They discussed Kyle's $5000 loan, and that he would get his money back, plus $2500. (Doc. 251 at 310). Shawn told Kyle that Espinoza would be going to Colorado, enabling Shawn to repay Kyle. (Doc. 251 at 310). A few hours later, Shawn called Kyle, reassuring him about repayment. (Doc. 251 at 310-11).

The following day, Shawn spoke to Dustin Lunnin. (Doc. 251 at 311). Shawn told Dustin he should "pow wow" with Kyle and Lehman. (Doc. 251 at 312). A couple weeks later, Shawn again spoke to Lehman about going to Colorado. (Doc. 251 at 316). Shawn asked Lehman to call Dustin to see if he and his brother would go to Colorado. (Doc. 251 at 316-17).

Brent Rupert is a Salina police officer and the case agent for the entire investigation. (Doc. 251 at 338). He knew the identities of Blaine, Dustin, and Hinderliter. (Doc. 250 at 277). But as for Kyle: "I never had any contact with him until this investigation." (*Id*.). Rupert admitted the jailhouse calls referencing Kyle amounted only to Shawn's aspirations. (Doc. 251 at 338-39). Shawn's requests to Lehman, or those concerning Espinoza, were not followed through. (Doc. 251 at 338).

Thus, there was no evidence Lehman talked to Kyle about going to Colorado or that he went. (Doc. 251 at 339). Similarly, there was no evidence Kyle was in a "pow wow" with Lehman. (Doc. 251 at 339).

Rupert also conceded there was no evidence that Kyle was repaid his money. (Doc. 251 at 340). Nor did Kyle sell drugs. (Doc. 251 at 343-44). Kyle never handled any methamphetamine except for the single occasion Hinderliter claimed he smoked it at his tattoo parlor. (Doc. 251 at 344-45). Rupert surmised the $5000 Kyle loaned Shawn would buy eight ounces of methamphetamine, although it was never proven if the money was actually spent. (Doc. 251 at 343). Finally, Rupert admitted Espinoza never went to Colorado after Shawn's arrest. (Doc. 251 at 340).

Espinoza's Arrest

On February 11, 2013, Salina police arrested Espinoza during a traffic stop. The smell of marijuana permeating the car, Espinoza was in the backseat. (Doc. 251 at 321-23). Espinoza had $3,000 in currency, drug paraphernalia, scales, and drugs. (Doc. 251 at 322-23). His iPad was also seized. The iPad was a trove, containing numerous names, with drug weights and dollar amounts next to them. (Doc. 251 at 324-27). Various text messages discussing drug buys were also downloaded.

(Doc. 251 at 326-27). Espinoza's iPad had two references to Kyle about his loan to Shawn. (Doc. 251 at 341-42).

The same day Espinoza was arrested, Shawn Smith was being transferred to a federal facility. (Doc. 251 at 331). During the move, (and before Shawn began cooperating) some papers were found with his belongings. (*Id.*). One sheet had 43 names, including Kyle's. (Doc. 251 at 332-33). The second sheet listed 25 names, including an entry for "Rich in SanFran […] Kyle Red, 4 pounds." (Doc. 251 at 334-35).

Hinderliter's Trial Testimony

During trial, Agent Rupert acknowledged on cross-examination the fabrications of Hinderliter's trial testimony. First, Hinderliter's testimony that he told Rupert and other investigators during the January 17, 2013 interview that Kyle was counting money from a Tupperware. (Doc. 251 at 346-48). Rupert wrote the report from the January 17th interview. (Doc. 251 at 346). The report's sole reference to Kyle is:

> I showed Ray a photo of Kyle Lunnin, and he identified him as [Dustin's] brother. Ray advised that Kyle had a bunch of methamphetamine on him and when he came to get a tattoo, Ray witnessed Kyle remove some and step out back of his residence to smoke some.

(Doc. 251 at 347).

Rupert acknowledged Hinderliter told him during the interview about the money in the Tupperware. (Doc. 251 at 346-47). But the only people he placed at the scene were Shawn Smith and Erica Trimble. (Doc. 251 at 347). Rupert thus admitted Hinderliter's trial testimony was false:

> Q. So when [Hinderliter] says that he told you that Kyle Lunnin was there, that is incorrect?
>
> A. That is incorrect.

(Doc. 251 at 347-48).

Additionally, Rupert was present during Hinderliter's second interview on December 17, 2013. (Doc. 251 at 348). Rupert said that in the second interview Hinderliter again described the money counting incident, placing Shawn at the scene and again making "no mention of Kyle Lunnin." (*Id*.).

> Q. And so when [Hinderliter] told us yesterday that he had told you in December that Kyle Lunnin was there counting money, that was incorrect, wasn't it?
>
> A. That was not-- yeah, that was incorrect.

(Doc. 251 at 348-49).

Rupert's cross-examination then finished, and the prosecution had "no further questions on direct or re-cross." (Doc. 251 at 349).

The Witness Tampering Events

On the afternoon of August 29, 2013, Bobbi Moore was at a welfare office getting medical coverage for her granddaughter. (Doc. 250 at 65-67). While in the waiting room, Moore saw Kyle approach Hinderliter and swear at him. (Doc. 250 at 67). Specifically, Kyle called him a "pussy ass bitch" and that "he was the feds and that he would fucking kill him." (*Id.*). Moore said Kyle's tone was not angry or loud. (Doc. 250 at 71). Kyle made no gestures at Hinderliter nor did anything else to threaten him. (*Id.*). After the five-second encounter, Kyle walked out. (Doc. 250 at 68). Moore said Hinderliter was "embarrassed." (Doc. 250 at 68). Hinderliter eventually called the police. (Doc. 249 at 48).

Elizabeth Deatherage, who worked in the welfare office waiting room, never heard or saw any argument between Kyle and Hinderliter. (Doc. 249 at 28-29). Nor did Hinderliter complain to Deatherage. (Doc. 249 at 30). Kyle, like Moore and Hinderliter, was applying for assistance. Deatherage was with Kyle for a few minutes and said he "seemed fine" and non-threatening. (Doc. 249 at 32).

Moore was accompanied to the welfare office by her mother-in-law Ruth Kitson. (Doc. 250 at 63-65). Kitson was in the parking lot

when Kyle swore at her. Kitson then went into the office and recounted her experience. (Doc. 249 at 30-31). Deatherage suggested that Kitson call the police if she needed. (Doc. 249 at 22). Kitson did so and officer Chad McCary responded. (Doc. 249 at 39-40). Kitson, Moore, and Hinderliter told McCary a man had been swearing. (Doc. 249 at 44-45). Based on the description, McCary entered the welfare office and conferred with Deatherage, who checked the visitor's log and pulled Kyle's ID. (*Id*.).

Video surveillance of the lobby was later obtained. It lacked audio, and simply showed Kyle walk past Hinderliter. (Doc. 251 at 358). After the exchange, Hinderliter stayed seated for two minutes before he left. (Doc. 251 at 359). Ultimately, McCary made a police report, but never followed up or spoke with Hinderliter again. (Doc. 249 at 49). After McCary made one unsuccessful attempt to locate Kyle at his home, the matter was dropped. (Doc. 249 at 50).

The *James* Hearing

On September 2, 2013, Kyle requested a *James* hearing to determine the admissibility of co-conspirator statements. (Doc. 75). *See United States v. James*, 590 F.2d 575 (5th Cir. 1979). The district court granted the request.

The Court framed the issue as "whether the conspiracy existed at the time and whether the persons were members of the conspiracy." (Doc. 248 at 152). The court found by a preponderance of the evidence that the conspiracy continued at least until January 17, 2013, when Hinderliter began cooperating. (Doc. 248 at 151). The court further found the conspiracy included the seven defendants. (Doc. 248 at 154).

The court admitted Clovis' hearsay statements regarding Shawn and Espinoza; Hinderliter's hearsay statements regarding Shawn, Dustin, Espinoza and Garay; Blaine's hearsay statements regarding all the alleged conspirators; and Garay's hearsay statements regarding Shawn. (Doc. 248 at 25-61, 66-90, 131-46, 166, 181-82). The court did not find any of their testimony was outside Rule 801(d)(2)(E). (Doc. 248 at 182-83).

Subsequently, on the morning of trial, the district court ruled the January 20, 2013 conversations involving Shawn Smith were within the scope of the conspiracy. The court reasoned that his efforts to further the conspiracy continued after Hinderliter signed the cooperation agreement on January 17, 2013. The recorded jail calls were thus admissible under Rule 801(d)(2)(E). (Doc. 249 at 3-4).

Motion to Dismiss

After the prosecution rested, Kyle moved to dismiss the indictment. (Doc. 251 at 362-63). He cited the paltry evidence on the conspiracy charge and Hinderliter's nonplussed reaction on the witness tampering charge. (Doc. 251 at 364-65). The prosecution countered that Kyle knew Hinderliter was cooperating with federal agents and emphasized Bobbi Moore's testimony. (Doc. 251 at 368). As for the conspiracy count, the prosecution conceded "it's absolutely true that the evidence in this case is not as strong against Kyle Lunnin as it is against other people involved in this conspiracy." (Doc. 251 at 369).

The district court ruled that a jury could find beyond a reasonable doubt on the tampering count. (Attachment A; Doc. 251 at 372). It found similarly on the conspiracy charge, emphasizing Hinderliter's testimony that Kyle was counting money for Shawn Smith. (Attachment A; Doc. 251 at 375). Specifically:

> If the jury chooses to believe, and I think they could believe, that Mr. Hinderliter did in fact see the Lunnin brothers sitting on the floor with Shawn Smith counting money, even though Ray Hinderliter apparently didn't say that to the officer, that doesn't necessarily mean it didn't happen.

(*Id*.).

The Witness List

Kyle did not present any evidence. (Doc. 251 at 380). After both parties rested, Kyle's counsel told the court he had a strategy disagreement with his client. (Doc. 251 at 388). Kyle volunteered to the court that he sought admission of a witness list the prosecution had earlier provided to Kyle's counsel. (Doc. 251 at 388-89). Kyle's counsel told the court that Kyle thought the list was pertinent because Hinderliter's name was not on it. (Doc. 251 at 389). The list was sent to defense counsel on October 21, 2013, after the August 29th welfare office incident. (Doc. 251 at 390-93). Kyle's counsel did not believe it was admissible evidence after discussing the document with the prosecution. (Doc. 251 at 390). The district court ruled the list was inadmissible because it was incomplete and not an official witness list. (Doc. 251 at 392).

The jury found Kyle guilty on both counts. (Doc. 252 at 419; Doc. 170).

Kyle's Sentence

Kyle's total offense level was 37 and a category 1 criminal history. (Doc. 215 at 15-16). Count 1 had a mandatory minimum of 10 years, and a maximum of life. Count 2 had a maximum of 20 years. (Doc. 215

at 19). The guideline range on Count 1 was 210 to 262 months and 210 to 240 months on Count 2. (*Id.*). The court sentenced Kyle to 144 months on each count, to run concurrent, plus 24 months consecutive, pursuant to 18 U.S.C. § 3147, for a controlling term of 168 months. (Attachment B; Doc. 253 at 10; Doc. 222).

The Co-Defendants' Sentences

Espinoza was sentenced to 57 months. (*United States v. Espinoza*, 5:13-40039-JAR 2, Doc. 239 at 1 (D. Kan. 2013)). Clovis was sentenced to 35 months. (*United States v. Clovis*, 5:13-40039-JAR 3, Doc. 213 at 2 (D. Kan. 2013)). Blaine Smith was sentenced to 60 months. (*United States v. Blaine Smith*, 5:13-40039-JAR 4, Doc. 231 at 2 (D. Kan. 2013)). Dustin Lunnin was sentenced to 96 months. (*United States v. Dustin Lunnin*, 5:13-40039-JAR 6, Doc. 243 at 2 (D. Kan. 2013)). Shawn Smith was not sentenced as he committed suicide while in prison. (*United States v. Shawn Smith*, 5:13-40039-JAR 1, Doc. 125 at 1 (D. Kan. 2013)). Garay is awaiting his sentence. (*United States v. Garay*, 5:13-40039-JAR 2, Doc. 184 (D. Kan. 2013)).

This appeal follows.

SUMMARY OF THE ARGUMENT

I. Most drug conspiracy prosecutions rely on bit players to ensnare the major dealers. The opposite occurred here. In a wide-ranging conspiracy implicating at least 50 people, 50 pounds of methamphetamine, and 200 pounds of marijuana, seven individuals were indicted. Of those seven, six cooperated. The last man standing was Kyle Lunnin. But Kyle was not the kingpin. He was not even a foot soldier. His involvement was a loan of $5000 to Shawn Smith, for which he was never repaid.

Recognizing the evidence was thin, the prosecution resorted to the testimony of drug-addled Ray Hinderliter, who told the jury he once saw Kyle counting large amounts of money. Case agent Brent Rupert, on the investigation from its inception, conceded Hinderliter was wrong. In two interviews Hinderliter never said anything to Rupert about this. Yet the prosecution used Hinderliter's false testimony, trampling over Kyle's due process rights in the process.

Even accepting Hinderliter's falsehoods, Kyle's conduct is minor—one loan and an instance of collecting and counting money. More importantly, conspiracy is a specific intent crime, and Kyle's knowledge of the objective and scope of the conspiracy is never established. In some ways, the prosecution is a victim of its own success.

The prosecution had a central dealer turn state's evidence; recovered reams of electronic data from the biggest players' electronic devices; recorded scores of incriminating conversations; and got most Defendants to cooperate. But other than one loan, the best the prosecution can dredge up is the fabricated testimony of an unindicted conspirator who dealt methamphetamine to his children.

Reversing for insufficient evidence is not done lightly. But this case compels it. "The tactic of charging many defendants with a single massive conspiracy is fraught with the potential for abuse." *United States v. Evans*, 970 F.2d 663, 674 (10th Cir. 1992). That abuse is personified by the prosecution's crudely constructed case against Kyle.

II. Kyle's prosecution for witness tampering was no more justified. Witness tampering under the charging statute requires a true threat aimed at affecting a witness's testimony. The evidence does not support this charge. Rather, it reflects a spontaneous statement made out of frustration.

The prosecution relied on the same questionable witness, Hinderliter, to establish that he was a victim of witness tampering. But Hinderliter was not initially fazed by the encounter. No other witness, not even the responding officer, considered Kyle's words a true threat. Kyle also did not expect that Hinderliter would testify at trial,

or that his words would have any effect on Hinderliter's future acts. Despite these deficiencies, the jury convicted Kyle.

III. The 14-year sentence the court saddled Kyle with was unreasonable and erroneous. The reasons for resentencing are fourfold. First, Kyle should have received a minor role adjustment. Second, he should not have received an obstruction enhancement. Third, the amount of drugs attributed to Kyle was erroneous. Fourth, his sentence was disproportionately higher than his co-Defendants who were inveterate drug users entrenched in the drug trade.

It is acknowledged that individuals who plead guilty are entitled to a lesser sentence than an individual who maintains his innocence and is found guilty. But a jury trial is a right, not a millstone. And while individuals who assist the prosecution should reap the benefit of their plea bargains, the disparity between Kyle's 14-year sentence and his co-Defendants, who were given three to eight years, is an abuse of discretion and a manifest injustice.

ARGUMENT

I. The Conspiracy Evidence Was Insufficient As a Matter of Law Because It Was Premised On Isolated, Minor Conduct.

A. Standard of review.

The Court reviews a sufficiency of evidence claim *de novo*. *United States v. Stiger*, 413 F.3d 1185, 1194 (10th Cir. 2005). While considered in a light favorable to the prosecution, the evidence supporting the conviction must be substantial and do more than raise a suspicion of guilt. *United States v. McKissick*, 204 F.3d 1282, 1289 (10th Cir. 2000). The Court has warned against conspiracy convictions steeped in speculation. *United States v. Dunmire*, 403 F.3d 722, 724 (10th Cir. 2005); *United States v. Jones*, 44 F.3d 860, 865 (10th Cir. 1995). This case implicates that concern.

B. Kyle's conviction defies conspiracy tenets because there was no shared criminal objective.

A conspiracy in violation of 21 U.S.C. § 846 must include: (1) an agreement with another person to violate the law; (2) knowledge of the essential objectives of the conspiracy; (3) knowing and voluntary involvement; and (4) interdependence among the alleged conspirators. *United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992). Satisfying these elements is arduous. A single conspiracy does not exist because many individuals deal with one central player. *Id.* at 670.

"What is required is a *shared,* single criminal objective, not just similar or parallel objectives between similarly situated people." *Id.* (emphasis in original). While a defendant need only play a minor role in the conspiracy, the prosecution must prove the defendant knew at least the essential objectives of the conspiracy, and the defendant knowingly became part of it. *United States v. Mendoza-Salgado,* 964 F.2d 993, 1005 (10th Cir. 1992).

The instant case resembles those decisions where the Court found inferences too attenuated to support a conspiracy. Indeed, the following sections addressing the four elements of conspiracy demonstrate the defendants' conduct in those decisions was more pronounced than Kyle's.

1. There was no agreement to violate the law because association with conspirators does not create an agreement.

One who purchases drugs or property for personal use from a member of a conspiracy does not agree to become a member of the conspiracy. *United States v. Powell*, 982 F.2d 1422, 1446 (10th Cir. 1992). Nor is one a conspirator merely by associating with conspirators known to be involved in crime. *Id*. Guilt must depend on individual conduct, not mere association. *Id.*; *Kotteakos v. United States*, 328 U.S. 750, 773 (1946). Kyle's conviction depends on just such an association,

and even then, that association is dubious.

The prosecution need not offer direct proof of an express agreement. *United States v. Pulido-Jacobo,* 377 F.3d 1124, 1129 (10th Cir. 2004). Still, no witness testified about an agreement between Kyle and any co-Defendant. For good reason: Blaine had no personal knowledge of any drug activity by Kyle. (Doc. 250 at 101, 116). Garay did not know of any role Kyle had. (Doc. 250 at 149). Shawn never said anything to Clovis about Kyle. (Doc. 250 at 179). Perhaps most telling, the sea of damning electronic data in Espinoza's iPad revealed Kyle's name only mentioned concerning the $5000 loan. (Doc. 251 at 341-42).

a. *United States v. Dunmire* warrants reversal.

The defendant in *Dunmire* was convicted of conspiracy to knowingly distribute over five grams of cocaine. 403 F.3d 722 (10th Cir. 2005). The Court reversed the jury's finding because there was insufficient evidence of an agreement.

Detectives in *Dunmire* set up a controlled buy of five grams of cocaine from the target. *Id.* at 723. There was considerable evidence of other cocaine deals involving the target. But when the confidential informant made the purchase, the defendant, who was not the target of the investigation, delivered the drugs (about three grams). *Id.* Additionally, before the controlled buy occurred, an officer watched the

defendant walk from the porch to another car that had arrived, stop at the car, and then return to the porch. Following that encounter, the officer watched the controlled buy involving the defendant. *Id.* at 723-24. The Court determined this evidence was too thin, and noted the informant had never contacted the defendant for a drug buy nor saw the defendant before the controlled buy. *Id.* at 725. As such, there was no evidence from which the jury could infer the defendant agreed to distribute more than five grams. *Id.* at 727.

If participating in one drug deal, and possibly another, was not enough to demonstrate conspiracy in *Dunmire*, Kyle's minor brushes with the Smiths' drug operation are not enough. Moreover, the loan was like a drug buy for personal use, it cannot bind the participants to a conspiracy. It was a one-time investment, made on the cusp of Shawn's arrest, that went nowhere.

b. *United States v. Evans* warrants reversal.

In *Evans*, the Court affirmed conspiracy convictions for three co-defendants, but reversed that of the fourth, Diana Brice. 970 F.2d at 673. Brice's co-defendants participated in drug meetings, drug conversations, and sales. *Id.* at 671-73. Meanwhile, Brice bought drugs from a co-defendant and lent scales to conspiracy members, knowing they were for drugs. *Id.* at 673.

The Court observed that loaning the scales was an isolated incident. Knowing about illegal activity and participating in a small part of the conspiracy did not establish an agreement to join. Further, Brice was not aware of the scope of the conspiracy because there was no evidence she attended any meetings. *Id*. at 673. When the prosecution brings many individuals under the umbrella of a single conspiracy, "[t]he risk is that a jury will be so overwhelmed with evidence of wrongdoing by other alleged coconspirators that it will fail to differentiate among particular defendants." *Id*. at 674.

That fear is realized here. Transporting, distributing, and selling 50 pounds of methamphetamine and 200 pounds of marijuana consumed the trial. The baffling array of drug dealing by the Smiths, Espinoza, Hinderliter, Garay, and Clovis was so overwhelming that Kyle was inevitably sullied. But Kyle, like the defendant in *Evans*, never agreed to possess with intent to distribute. Both engaged in questionable acts in the shadows of major criminalities by others. The wrongdoing of men Kyle never met or barely knew was extrapolated to him, rendering his individual guilt an abstraction.

2. Kyle did not know the conspiracy's essential objective.

A defendant lacks the requisite criminal intent if he does not know the conspiracy's objective. *United States v. Jones,* 808 F.2d 754

(10th Cir. 1987). There must be a meeting of the minds in the common design, purpose, or objects of the conspiracy. *United States v. Peveto,* 881 F.2d 844, 856 (10th Cir. 1989). Thus, the prosecution had to show by clear and unequivocal evidence that Kyle knew the object of the conspiracy was the distribution of drugs, and his agreement to cooperate in achieving that objective. *See United States v. Austin,* 786 F.2d 986, 988 (10th Cir. 1986).

a. *United States v. Austin* warrants reversal.

In *United States v. Austin,* the Court reversed a conviction for conspiracy to distribute marijuana where the defendant, a ranch owner, sold a portion of his property used as a landing strip by marijuana smugglers. 786 F.2d at 988. The Court held the defendant did not know the essential objectives of the conspiracy. Although the defendant suspected something illegal when he noticed airplane tracks, suspicion was not enough because there was no evidence the defendant "knew the focus of the conspiracy was the distribution of marijuana, rather than the distribution of other contraband, or the aiding of illegal aliens, or other equally speculative illegal conduct, or even clandestine activity that did not violate the law." *Id.* at 989. *See also United States v. Thomas,* 114 F.3d 403, 405 (3d Cir. 1997) (while the evidence showed defendant knew he was involved in criminality, it did not show the

"essential element that he knew that the purpose of the agreement was the specific unlawful purpose charged in the indictment.").

Like *Austin* and *Thomas*, there is no definitive evidence what the $5000 loan was for. Nor was there evidence Kyle knew what the loan would accomplish. And like *Austin* and *Thomas*, the fact that there was a likelihood the money would be used for nefarious purposes is not enough. Moreover, there is a benign reason for the money—stereo equipment. Shawn bought stereo equipment in Colorado "all the time" and made money off it. (Doc. 250 at 117). He bought the equipment for himself and others, including Kyle, who paid Shawn. (Doc. 250 at 117).

In sum, the specific purpose of the loan was never proven beyond a reasonable doubt. Shawn could have used the money however he wanted, paying back loan, buying stereo equipment, or retaining counsel. Failure to prove the purpose of the money, especially when its use was never determined, negates the second element of conspiracy.

3. There was no knowing and voluntary involvement by Kyle because specific intent was never demonstrated.

Conspiracy charges require two levels of intent: the specific intent to further the object of the conspiracy, and the intent of the underlying crime. *United States v. Bedford*, 536 F.3d 1148, 1155 (10th Cir. 2008). Thus, to secure a conviction for possession of a controlled

substance with intent to distribute, the prosecution must prove the defendant's knowing possession of the substance accompanied by the specific intent to distribute it. *United States v. Rahseparian*, 231 F.3d 1257, 1261 (10th Cir. 2000); *United States v. Hager*, 969 F.2d 883, 888 (10th Cir. 1992). If Kyle lacked the intent to commit the substantive charges, he *de jure* lacked the intent to be convicted of conspiracy.

a. *United States v. Rahseparian* warrants reversal.

In *Rahseparian*, the defendant was convicted of conspiracy to commit mail fraud for performing administrative tasks for a fraudulent telemarketing firm operated by his sons. 231 F.3d at 1259-60. The prosecution argued that the defendant knew he was engaged in mail fraud because he was the contact person for the company's mailbox (which was unrelated to the defendant or his businesses); conducted the company's banking via his personal business accounts, making it difficult to trace the funds; and made false exculpatory statements regarding the company's funds. 231 F.3d at 1263. The Court held this evidence did not demonstrate the defendant knew the company was unlawful. *Id*. At most, it showed that he conducted some banking and administrative work for the company. *Id*.

Similarly, Kyle's involvement was limited to a single loan, and there was no evidence that he was knowingly participated in drug

distribution, nor knew what Shawn would use the money for. Further, Agent Rupert surmised the $5000 Kyle loaned Shawn could have purchased eight ounces of methamphetamine, which translates to 1% of the 50 pounds of methamphetamine the operation moved. (Doc. 250 at 166; Doc. 251 329-30, 343).

b. *United States v. Anderson* warrants reversal.

The defendant in *Anderson* was seen at the doorway of a targeted drug house twice. *United States v. Anderson,* 981 F.2d 1560, 1563 (10th Cir. 1992). The second time occurred immediately prior to his meeting with a buyer and giving him marijuana. *Id*. A picture of the defendant with two conspirators was also found in the targeted house. *Id*. There was additional evidence a person in the house contacted the defendant. *Id*. Almost 2,000 pounds of marijuana were in the targeted house.

The Court reversed the conviction because the defendant's one transaction did not show he knew of the essential objectives or the scope of the conspiracy, or knowingly became a part of it. *Id*. at 1564-65. The Court explained the best way to assess a defendant's intended involvement in a conspiracy is to examine the conspiracy from the defendant's point of view: "What exactly did the defendant think he was joining?" *Id.* at 1565, citing *Evans*, 970 F.2d at 674.

The defendant's one transaction in *Anderson* could not establish he knew the scope of the conspiracy. Similarly, the single loan and one instance of collecting and counting money does not translate to a knowing and voluntary awareness by Kyle. The level of involvement by Hinderliter and the six co-Defendants, compared with Kyle, is not a gap but a chasm. Most of the Defendants had daily, if not weekly, contact with buyers, sellers, or distributors. Kyle had none. He made no trips to Colorado, and never bought, held, or sold drugs. (Doc. 251 at 343-44). Finally, there was no evidence how, if at all, the $5000 was used.

The prosecution concedes "it's absolutely true that the evidence in this case is not as strong against Kyle Lunnin as it is against other people involved in this conspiracy." (Doc. 251 at 369). As it must. Kyle never handled any methamphetamine except for the single occasion Hinderliter claimed he smoked it at his tattoo parlor and traded him a small amount for a tattoo. (Doc. 251 at 344). In the multitude of electronic data recovered from Espinoza's iPad, the only two references to Kyle concerned his loan to Shawn. (Doc. 251 at 341-42). Kyle was similarly absent in Shawn's iPhone. (Doc. 250 at 250-53).

4. Interdependence is lacking.

Interdependence exists where each co-conspirator's actions constitute essential steps toward the realization of a common, illicit

goal. *Pulido-Jacobo,* 377 F.3d at 1131. Interdependence must be shown among all co-conspirators. "What is needed is proof that they intended to act together for their shared mutual benefit within the scope of the conspiracy charged." *United States v. Caldwell*, 589 F.3d 1323 (10th Cir. 2009). In *Caldwell*, the Court found separate conspiracies among the co-defendants, but a single tripartite conspiracy had not been proved. The convictions were upheld but the sentences remanded. *Id.* at 1332.

To distinguish a casual transaction from an act demonstrating interdependence, the Court considers the circumstances surrounding the transaction. 589 F.3d at 1331-32. *Caldwell* held that introducing a common supplier, "made by one drug dealer to another," is insufficient to create a single conspiracy between all the dealers. *Id.* at 1332. Per *Caldwell*, a one-time loan does not establish a conspiracy. That loan was between Kyle and Shawn, never impacting the other conspirators, especially since there was no evidence the money was used. This was an isolated transaction not demonstrably linked to the conspiracy. *See United States v. Horn*, 946 F.2d 738, 743 (10th Cir. 1991).

a. *United States v. McIntyre* warrants reversal.

In *United States v. McIntyre*, the Court reversed a conspiracy conviction because the evidence did not establish the defendant shared a common goal to possess and distribute cocaine. 836 F.2d 467, 471-72

(10th Cir. 1987). The prosecution relied on the defendant's conversation with an informant in which he disclosed that his former sources in Tulsa were unavailable, that he had a source in Oklahoma City; that defendant used $75 of his money and $300 the informant gave him for a drug buy; and that the defendant split the cocaine with the informant. *Id*. at 469, 472. There was also evidence of two other instances in which the defendant purchased cocaine from different sources and shared it with the informant and others. *Id*. at 471.

The Court held that the evidence did not reveal that the conspiracy to distribute drugs depended on any of the drug transactions the defendant engaged in. 836 F.2d at 472. Thus, a common goal with the other conspirators was lacking, warranting reversal.

The conduct in *McIntyre* was greater than Kyle's. *McIntyre* demonstrates that an individual's illegal behavior in the vicinity of a conspiracy of similar illegality is not interdependence.

b. What the Court considers a "close" conspiracy case.

In *United States v. Arras*, the Court determined the evidence presented a "close case" but ultimately affirmed. 373 F. 3d 1071 (10th Cir. 2004). The evidence presented by the prosecution established: (1) the defendants hired an individual to take drugs to Denver by car from Mexico on four occasions; (2) each time the defendants insisted the

driver check the tire pressure regularly; (3) the driver was paid $4000 for the trips; (4) the driver was arrested during the fourth trip, resulting in the discovery of 39 kilograms of marijuana in the car's tires. *Id.* at 1073-74. While categorizing this as a "close case," the Court held the evidence was sufficient. *Id.* at 1074.

Like *McIntyre*, the conduct in *Arras* is more involved than the instant facts. The evidence that Kyle was a co-conspirator is thin, even in a light favorable to the prosecution. Despite the substantial evidence regarding drug distribution and sales by the conspirators, there was no actual evidence Kyle knew, or was aware of, their common purpose, or sought to advance the purpose of the conspiracy. Kyle wanted to make $2500, and how Shawn accomplished that was his business.

Kyle's insignificance is best embodied by Blaine's testimony. Blaine knew everyone, and everyone's role, yet he never met Kyle. (Doc. 250 at 101, 116). Similarly, despite evidence occasionally placing Kyle in the presence of others who purchased, sold, used, and transported drugs, it establishes nothing other than that Kyle counted money once and associated with individuals in the drug trade. Thus, not only is there no evidence Kyle knew the goal of the conspiracy, there is no evidence he benefitted from the conspiracy. To the contrary, he lost $5000. (Doc. 251 at 340).

C. Summation

"In a case such as this one, involving numerous defendants, multiple transactions, and varying degrees of participation, the task of sifting the evidence relating to each defendant becomes particularly difficult, and a special danger exists that the degree of proof required for conviction might be relaxed." *United States v. Butler*, 494 F.2d 1246, 1254 (10th Cir. 1974). The facts of this case remove it from the purview of the conspiracy doctrine. The Court should reverse.

II. The Co-Conspirator Statements Were Wrongly Admitted Because The Evidence Was Insufficient To Show Kyle Was in The Conspiracy, or That The Statements Furthered The Conspiracy.

The co-Defendants' hearsay statements were wrongfully admitted because, as discussed above, the evidence did not establish Kyle was a member of the conspiracy in the first instance.

A. Standard of review.

So long as there is an objection at trial, the Court reviews evidentiary rulings for abuse of discretion. *United States v. Commanche*, 577 F.3d 1261, 1270 (10th Cir. 2009). Findings of fact supporting the admission of hearsay statements are reviewed for clear error, including those rendering statements non-hearsay under Rule 801(d). *United States v. Williamson*, 53 F.3d 1500, 1517 (10th Cir. 1995). When

reviewing for clear error, the evidence is viewed in the light most favorable to the district court's ruling. *United States v. Santistevan*, 701 F.3d 1289, 1292 (10th Cir. 2012).

B. The statements were not made during the course of the conspiracy.

Rule of Evidence 801 admits statements by co-conspirators as non-hearsay if (1) a conspiracy existed; (2) the declarant and the defendant were both members of the conspiracy; and (3) the statements were made in the course of and in furtherance of the conspiracy. *United States v. Urena,* 27 F.3d 1487, 1490 (10th Cir. 1994). The prosecution must prove each element by a preponderance of the evidence. *United States v. Owens,* 70 F.3d 1118, 1123 (10th Cir. 1995). The Court may consider the co-conspirator statements at issue as evidence of the conspiracy. *United States v. Lopez-Gutierrez,* 83 F.3d 1235, 1242 (10th Cir. 1996).

Here, the district court conducted a *James* hearing that addressed the admissibility of co-conspirator statements under Rule 801(d)(2)(E). *See United States v. James*, 590 F. 2d 575 (5th Cir. 1979). A *James* hearing protects the defendants from admitting prejudicial hearsay "on the basis of threadbare evidence of conspiracy." *United States v. Caldwell*, 771 F.2d 1485, 1487 (11th Cir. 1985). The court

must determine whether the evidence linking the defendant to the conspiracy is substantial. *Id.* However, there must be some independent evidence linking the defendant to the conspiracy. *United States v. Martinez,* 825 F.2d 1451, 1453 (10th Cir. 1987). The Court defines "independent evidence" as something other than the proffered co-conspirator statements themselves. *Id.* at 1451.

The Court has no talismanic formula for ascertaining when a conspirator's statements further the conspiracy. *United States v. Davis*, 766 F.2d 1452, 1458 (10th Cir. 1985). To be considered co-conspirator statements under Rule 801(d)(2)(E), such statements must be intended to promote the conspiratorial objectives. *United States v. Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982).

As set forth above, there was insufficient evidence demonstrating Kyle was a member of the conspiracy because there was no evidence he knew of the conspiracy or joined in its objective. Without this predicate finding, the co-conspirator statements are barred. Even assuming such a conspiracy existed and Kyle was a member, there is no evidence the statements by the co-Defendants about Kyle, whether the business was still functioning, and other details about the conspiracy furthered the conspiracy, or promoted the conspiratorial objectives. The objectionable

statements made by the co-Defendants, even if true, only establish Kyle used methamphetamine and was outside of the conspiracy.

The court admitted Clovis' statements regarding Shawn and Espinoza; Hinderliter's statements regarding Shawn, Dustin, Espinoza, and Garay; Blaine's statements regarding all the alleged conspirators; and Garay's statements regarding Shawn. (Doc. 248 at 25-61, 66-90, 131-46, 166, 181-82). These statements do not address the conspiracy with which the prosecution alleges Kyle is involved, let alone furthers it. They were either not made during the course of the conspiracy, or alternatively, not in furtherance of the conspiracy. Finally, most of the statements concern past occurrences.

The district court thus erred in not barring the statements.

III. The Prosecution Violated Kyle's Right to Due Process by Relying on Hinderliter's False Testimony.

Deceiving jurors with false evidence is unjust. *Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009). "The same result obtains when the [government], although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*

A. Standard of review.

Kyle must establish the presentation of false evidence, which the Court reviews *de novo*. *Smith v. Gibson*, 197 F.3d 454, 458 (10th Cir.

1999). A conviction obtained via perjured testimony violates due process if (1) the prosecution knowingly solicited the testimony or (2) the prosecution failed to correct testimony it knew was perjured. *Fleming v. Evans*, 481 F.3d 1249, 1259 (10th Cir. 2007). If there is a reasonable likelihood the prosecution relied on perjury to obtain a guilty verdict, reversal is required. *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006).

B. False and misleading testimony corrupts the truth-finding process.

The due process clause protects against convictions based on testimony that the prosecutor knew or should have known was false. *White v. Ragen*, 324 U.S. 760, 764 (1945); *Hysler v. Florida*, 315 U.S. 411, 413 (1942). In *Giglio v. United States*, the Supreme Court recognized the prosecution's failure to correct false testimony could violate due process even if no one acting for the government knew the testimony was false. 405 U.S. 150, 153-54 (1972). The defendant's accomplice testified against him at trial, and on cross-examination denied receiving assurances from the government for testifying. *Id.* at 151-52. In reality, the accomplice had been promised that he would not be prosecuted. *Id.* at 152. Although the prosecutor trying the case may

have been unaware of the agreement, the Court held the failure to correct the false testimony violated due process. *Id*. at 153.

A defendant need not establish perjury to prevail in a false testimony case. *Alcorta v. Texas*, 355 U.S. 28 (1957). Testimony that is misleading may violate due process. In *Alcorta*, the prosecutor knowingly fostered a false impression in examining a key prosecution witness. *Id.* at 31. Due process was violated because the witness conveyed a false impression, despite the testimony not being clearly false. *Id*. at 30-31. That misleading testimony strengthened the prosecution's case, and more truthful testimony would have undercut the witness' credibility. *Id*. at 31-32.

Further instructive is *Napue v. Illinois*, which granted relief based on false testimony relevant to impeachment. 360 U.S. 264, 269 (1959). Although the prosecutor trying the case promised the accomplice he would ask for a reduced sentence, the accomplice denied such a promise, and the prosecutor did not correct the testimony. *Id*. at 265. The Court held the prosecution may not use false testimony whether the evidence is substantive or impeachment, and without regard to whether the witness is impeached on the topic. *Id.* at 269-70.

In short, any false or misleading statement may encourage the jury to overestimate a witness' credibility. *Ventura v. Attorney General*,

419 F.3d 1269, 1272-76 (11th Cir. 2005). Such false testimony permits the prosecution to strengthen the argument in support of a witness' credibility, actively misleads the jury, and increases the likelihood of conviction. *See Douglas*, 560 F.3d at 1163.

C. Hinderliter's testimony was false, if not misleading.

Ray Hinderliter dealt significant amounts of drugs, used methamphetamine for decades, and supplied his children. It was Hinderliter who claimed he once saw Kyle collect and count money. The usual credibility concerns of an unindicted conspirator aside, Hinderliter had another motivation to malign Kyle—Kyle had threatened him.

Agent Rupert acknowledged Hinderliter told him during the interview about the money in the Tupperware. (Doc. 251 at 346-47). But the only people he placed at the scene were Shawn Smith and Erica Trimble. (Doc. 251 at 347). Rupert thus admitted Hinderliter's trial testimony was false:

> Q. So when [Hinderliter] says that he told you that Kyle Lunnin was there, that is incorrect?
>
> A. That is incorrect.

(Doc. 251 at 347-48).

Rupert was also present during Hinderliter's second interview on December 17, 2013. (Doc. 251 at 348). Rupert said that in the second interview Hinderliter again described the money counting incident, placing Shawn at the scene and again making "no mention of Kyle Lunnin." (*Id*.).

> Q. And so when [Hinderliter] told us yesterday that he had told you in December that Kyle Lunnin was there counting money, that was incorrect, wasn't it?
>
> A. That was not-- yeah, that was incorrect.

(Doc. 251 at 348-49).

Rupert's cross-examination then finished, and the prosecution had "no further questions on direct or re-cross." (Doc. 251 at 349).

The clash between the two prosecution witnesses is clear. And given the fact that Rupert had documentary evidence supporting his testimony and undermining Hinderliter's, Hinderliter's lies were clear.

D. Claiming Kyle counted drug profits impacted the outcome.

A defendant who demonstrates that false testimony was improperly used at trial need only show a reasonable likelihood the falsity impacted the outcome. *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985). Kyle satisfies that standard, as established by the

district court's rationale in denying the motion to dismiss the indictment:

> If the jury chooses to believe, and I think they could believe, that Mr. Hinderliter did in fact see the Lunnin brothers sitting on the floor with Shawn Smith counting money, even though Ray Hinderliter apparently didn't say that to the officer, that doesn't necessarily mean it didn't happen.

(Attachment A; Doc. 251 at 375).

The prosecution's failure to correct false testimony violated Kyle's due process rights and is grounds for a new trial because it "could have affected the judgment of the jury." *See Fleming*, 481 F.3d at 1259.

IV. The Witness Tampering Evidence Was Insufficient As a Matter of Law Because Kyle's Remarks Were Not a True Threat.

A. Standard of review.

As set forth above, the Court reviews sufficiency of the evidence *de novo*. *Stiger*, 413 F.3d at 1194.

B. The witness tampering elements cannot be met.

Kyle was prosecuted under 18 U.S.C. § 1512(a)(2)(A), which provides:

> Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--
>
> (A) influence, delay, or prevent the testimony of any person in an

official proceeding…

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, a reasonable trier of fact could have found Kyle guilty beyond a reasonable doubt of both elements of the crime. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

C. Kyle did not communicate a true threat to Hinderliter during their chance encounter.

The prosecution did not argue that Kyle used physical force against Hinderliter. Thus, to sustain a conviction under § 1512(a)(2)(A), the evidence must show beyond a reasonable doubt that Kyle used or attempted to use a threat of physical force against Hinderliter.

To threaten is to "express an intent to inflict injury on another through physical force." *United States. v. England*, 507 F.3d 581, 589 (7th Cir. 2007). The witness tampering statute punishes only "true threats," i.e. those which a reasonable person would conclude the intended recipient would take as a threat. *Id*. Whether a statement constitutes a "true threat" is a fact-intensive inquiry, in which the language, the context, and the recipient's response are dispositive. *Nielander v. Board of County Com'rs*, 582 F.3d 1155, 1167-68 (10th Cir. 2009). In *United States v. DeStefano*, the Seventh Circuit recognized that testimony about the slang used in criminal organizations could

lead to the conclusion that "Done any fishing lately?" was intended as a threat. 476 F.2d 324, 327, 332 (7th Cir. 1973).

The language Kyle used could be interpreted as a threat. But the tone, demeanor, and context prove otherwise. The exchange between Kyle and Hinderliter at the welfare office was brief, lasting five seconds at most. (Doc. 250 at 68, 71, 240). Elizabeth Deatherage, who was employed at the office, said Kyle did not speak loudly or angrily. (Doc. 249 at 39). Kyle did not raise his voice or make any threatening gestures. (Doc 250 at 71, 240). Further, Hinderliter's reaction belies a true threat. He did not immediately show any concern or fear. Instead, he looked confused and embarrassed. (Doc. 250 at 68). Bobbi Moore, the only other witness to testify to Kyle's statement, had a similar reaction. She was surprised to hear Kyle refer to Hinderliter, an apparent welfare recipient, as a "fed." (Doc. 250 at 67-68). Moore did not indicate that she took Kyle's remarks seriously.

Hinderliter suggested Kyle did not simply speak to him, and threatened him in some other way. (Doc. 250 at 240). The prosecution did not elicit any testimony on this point, which is troubling given Hinderliter's false testimony on other matters. (Doc 250 at 212). And while Hinderliter eventually called the police, he did not recount any subjective sensation of fear about the exchange. (Doc. 250 at 213).

Officer Chad McCary, who arrived about ten minutes after the incident, described Hinderliter as "upset" and "agitated." (Doc. 249 at 44). McCary learned that Kyle was suspected of criminal involvement, and that Hinderliter had acted as an informant. (Doc. 249 at 42-44). None of this left an impression on McCary, or the rest of the Salina Police Department. McCary never followed up with Hinderliter, and made only one attempt to contact Kyle. (Doc. 249 at 49-50). There is also no record of a subsequent investigation or arrest by other officers, or Hinderliter demanding the police take action.

The recipient, the witness, the responding officer, and the Salinas Police Department did not indicate they took Kyle's rant seriously. Where only the bare words are threatening, it is not reasonable to find a true threat.

D. Kyle did not intend to affect Hinderliter's testimony.

Even if a jury could find a true threat, it could not reasonably conclude Kyle intended to affect Hinderliter's testimony. There was no evidence that Hinderliter or Kyle knew on August 29, 2013 that Hinderliter would be a witness in this case. Kyle thus had no reason to believe that Hinderliter would testify. Most telling, the prosecution sent Kyle's counsel a witness list that excluded Hinderliter on October 21, 2013—after the encounter. Kyle did not condition his statement on

Hinderliter's behavior. Further, Kyle knew he had no hope of influencing Hinderliter's behavior. This was an utterance made in aggravation, not aggression.

The intent elements of §§ 1512 and 1513 offenses are highly specific. The Fifth Circuit explained the specificity of the § 1512(a)(1)(c) intent requirement in *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999). There, the defendant police officer killed a witness to his crimes. 185 F.3d at 422. The evidence only showed intent to interfere with a local investigation into the defendant. *Id*. The witness had spoken only to local police, and the defendant did not believe the witness ever spoke to a federal agent. *Id*. at 423. Likewise, the defendant had no reason to anticipate a federal investigation. *Id*. The court held that this could not support a conviction under 18 U.S.C. § 1512(a)(1)(c), which requires intent to interfere with federal investigations or federal criminal proceedings. 185 F.3d at 422-23. In light of this, the intent element in § 1512(a)(2)(A) should be interpreted stringently. The defendant must intend to affect the victim's testimony in an official proceeding. Intent to interfere for cooperation in a related investigation is distinct, and cannot support a conviction for tampering under this subsection.

Kyle's language was not intended as a threat concerning Hinderliter's testimony, but rather anger over Hinderliter's past

cooperation. The Court noted in *United States v. Smalls* that the killing of an informant committed in part as retaliation could also support a witness tampering charge under 18 U.S.C. § 1512(a)(1)(A). *Smalls*, 752 F.3d 1227, 1249 (10th Cir. 2014). The victim in *Smalls* was a known government informant in an ongoing investigation, and the prevention of his participation in a federal criminal matter was a probable consequence of the killing. *Id.* The Court thus upheld the defendant's conviction.

In contrast to *Smalls*, the incident here occurred post-investigation, and shortly before trial. Kyle was aware that Hinderliter cooperated with the investigation, but did not tell him to stop or not testify. In *United States v. Murphy*, the defendant was convicted under 18 U.S.C. § 1512(a)(2)(A). 406 F.3d 857, 861-62 (7th Cir. 2005). The district court set aside the guilty verdict, and the Seventh Circuit affirmed. *Id.* There was evidence that the defendant knew the victim was beaten because she was an informer. *Id.* The defendant knew a woman named Hayden was the informant; a co-defendant made calls to assist in assaulting the informant; the defendant in fact assisted in the assault; and the defendant later remarked the informant should not have been left alive. *Id.* The Seventh Circuit determined there was no

evidence the defendant knew Hayden was an informant at the time of the assault. *Id.* at 462.

Similarly, there is no evidence here that Kyle thought Hinderliter would testify. The incident at the welfare office occurred in the course of a chance meeting, with no premeditation. (Doc. 250 at 67-71). Under these circumstances, Kyle could not have intended to affect any future event by speaking to Hinderliter. This does not meet the intent requirement for witness tampering.

Finally, Kyle lacked intent under the looser "natural and probable consequence" standard of *Smalls*, 752 F.3d at 1249. On August 29, 2013, Kyle was out on bail and many of his associates had been indicted. This, as Hinderliter knew, prevented him from seeing any threat to completion. Kyle knew that Hinderliter, who spent 28 of his 49 years incarcerated or on parole, was familiar with the criminal justice system. (Doc. 250 at 231). Any threat by Kyle rings hollow in these circumstances, and an effect on the trial was neither a natural or probable consequence.

E. Summation.

No jury reasonable jury could find Kyle the requisite intent to affect a future investigation or proceeding required by § 1512(a)(2)(A). The Court should reverse.

V. Improper Admission of Evidence and a Conviction Contrary to the Evidence Constitute Cumulative Error.

The confluence of errors briefed above constitute a trial plagued by speculation and prejudice and demonstrate Kyle was denied his constitutional right to a fair trial. He should thus be acquitted as a matter of law due to the lack of evidence against him, or granted a new trial free from improper evidence.

A. Standard of review.

Multiple errors, even if they are harmless in themselves, have a cumulative effect that compromises the constitutional right to a fair trial. *Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003). Cumulative error analysis is an extension of harmless error analysis that focuses on the underlying fairness of the trial. *Id.* at 1018. This review is *de novo*. *Id.*

B. Kyle suffered multiple errors precluding a fair trial.

The errors described in the sections above constitute reversible error as the jury was given false, misleading, and inadmissible evidence until the trial was so unfair that Kyle was convicted of a crime requiring specific intent unsupported by the evidence. Further, the prosecution's failure to correct false, or at least misleading, testimony violated Kyle's due process rights and warrants a new trial since the

testimony could have affected the jury's judgment. *See Fleming*, 481 F.3d at 1249.

Kyle should receive a new trial for any charges of which he is not acquitted as a matter of law. *See Darks*, 327 F.3d at 1017.

VI. Kyle's 14-Year Sentence Is Flawed, Warranting Remand.

A. Standard of review.

In evaluating the application of a Guidelines enhancement, the Court reviews factual findings for clear error. *United States v. Scott*, 529 F.3d 1290, 1300 (10th Cir. 2008). The Court will reverse a decision to apply an enhancement if it lacks factual support in the record. *United States v. Beaulieu*, 900 F.2d 1537, 1540 (10th Cir. 1990). Thus, the factual findings necessary to support a sentencing enhancement must be supported by a preponderance of the evidence. *United States v. Gambino-Zavala*, 539 F.3d 1221, 1228 (10th Cir. 2008).

B. The sentence.

Kyle's total offense level was 37 and a criminal history category of 1. (Doc. 215 at 14-15). The Court sentenced Kyle to 144 months on Counts 1 and 2, plus a consecutive 24 months, pursuant to 18 U.S.C. § 3147, for a controlling sentence of 168 months. (Doc. 253 at 10-11). This was less than the recommended guideline range of 210 to 262 months on one count and 210 to 240 months on the other. (Doc. 253 at 10). The

sentence is followed by five years of supervised release on Count 1 and three years on Count 2, to run concurrent. (Doc. 253 at 15-16).

C. The obstruction of justice enhancement was improper.

The court imposed a two-level enhancement for obstruction of justice based upon Kyle's denial of his role in the conspiracy. (Doc. 215 at 14-15; Doc. 253 at 9). This enhancement was error. Section 3C1.1 of the Guidelines allows a court to increase a defendant's offense level for attempting to obstruct the administration of justice with respect to the offense of which he is accused, and provides as follows:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

The only obstructive act the prosecution alleged was witness tampering. But as discussed above, the evidence does not support the tampering charge. For the reasons set forth above, the obstruction of evidence enhancement fails.

D. A minimal role reduction was proper.

Kyle further argued he should receive a 4-point deduction from his offense level for exercising a minimal role. (Doc. 219 at 3).

Governing is USSG § 3B1.2. "A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline." Application Note 3 (A). This guideline allows for a 4-point reduction for minimal role. Whether a defendant is entitled to a minor role adjustment is "heavily dependent upon the facts of the particular case." *United States v. Martinez*, 512 F.3d 1268, 1275 (10th Cir. 2008). In *Martinez*, the Court held that section 3B1.2(b) would apply to a defendant who acts as a minor participant and plays a part in committing the offense that makes him substantially less culpable than the average participant. *Martinez*, 512 F.3d at 1275.

To the extent that there was any evidence linking Kyle to the conspiracy, it was consistent and clear that he played, at most, a minor role. There were no allegations he was the source of the narcotics, that he participated in negotiations involving price or quantity, that he purchased the narcotics, or that he sold them. In fact, the evidence

established Kyle was not reaping the benefits of a high-level narcotics player, nor profited a cent from the conspiracy.

Further, the spotty evidence that did exist came from others who had been charged with the same conspiracy, and had entered pleas whereby they agreed to provide testimony against Kyle. That his role was described as minor by those individuals who had every incentive to attribute more culpability to him further proves Kyle was insignificant. Because the evidence was undisputed as to Kyle's nonexistent role, the court should have granted a downward role adjustment.

The Probation Office objected to a minimal role designation, arguing that "a defendant's testimony that others were more heavily involved in a criminal scheme will not suffice to prove his minor or minimal participation, even if uncontradicted by other evidence." (Doc. 215 at 25). In support, it cited *United States v. Onheiber*, 173 F.3d 1254, 1258 (10th Cir. 1999). But *Onheiber* held that a two-level reduction as a minor participant was not called for given the fact that defendant handled a large sum of cash, was responsible for transporting cocaine, and arranged a major drug purchase. *Onheiber* is inapt, and the district court erred in denying the reduction.

E. The drug amounts attributed to Kyle were incorrect.

Kyle objected to the excess drug amounts in paragraph

37 of the PSIR. (Doc. 219 at 3). The Probation Department responded that it made no difference because they were not used to determine relevant conduct. While true, the larger issue is whether Kyle could be responsible for the total the jury ascribed to him (at least 500 grams of methamphetamine and 50 kilograms of marijuana). The PSIR noted that the $5,000, if Smith actually intended to spend it on methamphetamine, "accounts for 177.2 grams of methamphetamine." (Doc. 215 at 13). This amount is all for which Kyle should be held liable.

The district court's determination of drug quantity, though based on the jury's verdict, is nevertheless a factual finding that must be supported by a preponderance of the evidence. *United States v. Zapata*, 546 F.3d 1179,1192 (10th Cir. 2008). It is reviewed for clear error. *Id.*

For purposes of calculating the sentencing guidelines, the district court accepted the jury's finding that Kyle's conspiracy involved at least 50 kilograms of marijuana and 500 grams of methamphetamine. That was error. The figure included methamphetamine for which Kyle was not responsible. The district judge's acceptance of the erroneous quantity finding produced an attendant mistake in calculating the quantity-driven drug guideline. For the prosecution in fact proved only that Kyle was involved in 177.2 grams of methamphetamine, far less than the district court's and jury's attributions. It follows that Kyle be

resentenced on the basis of the drug quantity actually proven to be within the scope of the $5,000 loan, that is, 177.2 grams.

The evidence permits only Kyle's conviction on the lesser-included offense under subsection (b)(1)(C) of the same statute, the un-quantified portion of the drug-trafficking statute. That section of the statute, unlike the aggravated-quantity section, contains no mandatory minimum sentence. The jury's finding subjected Kyle to a mandatory minimum sentence of ten years in prison, a penalty that was imposed only because the imputed amount, satisfied the drug-quantity threshold contained in the aggravated subsection of the charged offense, 21 U.S.C. § 841(b)(1)(B)(vii).

Because this is a drug-conspiracy case, the drugs attributable to Kyle for sentencing purposes is that amount stemming from transactions "in furtherance of the jointly undertaken criminal activity" in which he participated and which was "reasonably foreseeable in connection with that criminal activity." *See* U.S.S.G. § 1B1.3, comment n. 2. Put differently, Kyle "is accountable for that drug quantity which was within the scope of the agreement and reasonably foreseeable to [him]." *United States v. Johnson*, 146 F.3d 785, 795 (10th Cir. 1998).

The district judge made two sentencing errors, both of which rise to clear error. First, by accepting the jury's drug quantity

finding—a finding that rested on amounts involved outside Kyle's conspiracy—and by attributing that full amount to Kyle, the court held him responsible for drug quantities outside the scope of his criminal activity. Second, the district judge failed to make the findings required by U.S.S.G. § 1B1.3, which compelled "the district court to . . . make particularized findings about the scope of the specific agreement [that Kyle] joined." *United States v. Melton*, 131 F.3d 1400, 1404 (10th Cir. 1997). The result is an unreasonable sentence, because the evidence does not support the district court's drug-quantity attribution. *See United States v. Collins*, 267 Fed. Appx. 744, 750 (10th Cir. 2008) (recognizing that an insufficient amount of proof regarding a drug-quantity attribution constitutes a procedurally unreasonable sentence).

On remand, the district judge should attribute 177.2 grams of methamphetamine to Kyle.

VII. Kyle's 14-Year Sentence is Unreasonable.

A. Standard of review.

The Court reviews the reasonableness of a sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38 (2007). In imposing an appropriate sentence, the sentencing court must consider the factors set out in 18 U.S.C. §3553(a), including the nature of the offense and characteristics of the defendant, as well as the need for the sentence to

reflect the seriousness of the crime, to provide adequate deterrence, to protect the public, and to provide the defendant with needed training or treatment, 18 U.S.C. § 3553(a)(1)-(2); *United States v. Munoz-Nava*, 524 F.3d 1137, 1146 (10th Cir. 2008). The court's reasonableness review is guided by the factors set forth in 18 U.S.C. § 3553(a). In addition to the factors enumerated in §3553, the court is required to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of the guideline statute. 18 U.S.C. § 3553(a).

B. Unwarranted sentence disparities abound.

The Sentencing Guidelines are advisory. As such, the sentencing court need not apply the Guidelines in determining the sentence. *United States v. Booker*, 543 U.S. 220 (2005). Further, 18 U.S.C. § 3553 instructs that courts consider the evil of unwarranted sentence disparities among defendants with similar records who are guilty of similar conduct. 18 U.S.C. § 3553(a)(6).

Disparate sentences are permissible when the disparity stems from the facts of the case. *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1223 (10th Cir. 2008). The facts here do not warrant such a disparity. Kyle's sentence dwarfs those of his more culpable co-Defendants. While Kyle's co-Defendants were embroiled in the drug business, Kyle was not. The court observed that the other participants

received lighter sentences than Kyle because they cooperated and plead guilty. (Doc. 253 at 12). Admittedly, the co-Defendants' guilty pleas explain some variance in punishment, but not multiple years. The contrast of 14 years with nothing for Hinderliter and the scores of other individuals implicated by the evidence epitomizes an unwarranted sentence disparity. A sentencing court can consider an individual's guilty plea when sentencing that individual and sentencing a defendant who goes to trial. However, the disparity here between the sentences of central players and a person who barely assists in the scheme creates a greater disparity than merely reward and punishment.

In sum, although Kyle's decision to exercise his right to trial precluded him from receiving the same benefits as his co-Defendants, that choice cannot be used to deny him the right to receive a reasonable sentence. Instead, Kyle received a disproportionate sentence, that ignored his limited role in the conspiracy, a disparity exceeding that warranted by the choices of those Defendants who cooperated.

C. Kyle's 14-year sentence violates the parsimony provision.

Kyle's sentence also implicates § 3553's parsimony provision, which requires that a sentence be "'sufficient, but not greater than necessary' to accomplish the goals of sentencing." *Kimbrough v. United States*, 552 U.S. 87, 101 (2007) (quoting 18 U.S.C. § 3553(a)). The

failure to achieve this aim again becomes clear when Kyle's sentence is compared to the co-Defendants. Kyle was given 14 years for crimes of a non-violent nature.

CONCLUSION

Twelve years of Kyle Lunnin's life will be whittled away in a federal prison because he loaned Shawn Smith $5000. On such slender evidence was so weighty a verdict reached. The elements needed to prove conspiracy are lacking. Kyle's conspiracy conviction should thus be reversed and dismissed. The same fate should befall the witness tampering charge. Finally, and in the alternative, resentencing is warranted.

Respectfully submitted,

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle St., Suite 2600
Chicago, Illinois 60603
(312) 648-6164

Attorney for Appellant Kyle Lunnin

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the novel issues presented, namely the slim evidence and lengthy sentence, counsel respectfully suggests oral argument will assist the Court with its decision.

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 12,643 words. I relied on my word processor to obtain the count and it is Microsoft Word 2011. I certify that the information on this form is true and correct to the best of my knowledge and belief after a reasonable inquiry.

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle St., Suite 2600
Chicago, Illinois 60603
(312) 648-6164

Attorney for Appellant Kyle Lunnin

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellant's Opening Brief, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses and is free of viruses.

Additionally, there are no required privacy redactions in this brief or attachments.

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE LAW GROUP, LLC
115 South LaSalle St., Suite 2600
Chicago, Illinois 60603
(312) 648-6164

Attorney for Appellant Kyle Lunnin

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 6th day of November, 2014, the Appellant's Opening Brief was served by depositing a true and correct copy of the same in the United States mail, postage prepaid, addressed to:

Clerk of the Court
Tenth Circuit Court of Appeals
1823 Stout Street
Denver, CO 80257
(Original and 7 copies also sent via first class mail)

James Brown
United States Attorney's Office
290 U.S. Courthouse
444 S.E. Quincy Street
Topeka, KS 66683

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle St., Suite 2600
Chicago, Illinois 60603
(312) 648-6164

Attorney for Appellant Kyle
Lunnin