

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

<b>UNITED STATES OF AMERICA,</b>	)	No. 3:08-CR-52-WHR
	)	
<b>Plaintiff,</b>	)	<b>PLEA AGREEMENT</b>
	)	
<b>v.</b>	)	
	)	
<b>COLBURN L. KINZER a/k/a "BUTCH",</b>	)	
	)	
<b>Defendant</b>	)	

Defendant **COLBURN L. KINZER** ("Defendant") individually and through his attorney, Kevin Schad, Esq., and the United States Attorney's Office for the Southern District of Ohio ("USAO"), by and through the undersigned Assistant United States Attorney, (collectively, "the parties"), hereby agree as follows:

PLEA

1. Defendant agrees to plead guilty to Counts Two, Three, Five, Six, Eight, and Sixteen of the Indictment in this case. Counts Two and Six charge "Distribution of Dihydrocodeinone," in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D); Counts Three and Five charge "Distribution of Oxycodone," in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); Count Eight charges "Distribution of Oxycodone Near a School," in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 860; and Count Sixteen charges "Possession of a Firearm by Convicted Felon," in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Defendant admits that

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he is, in fact, guilty of the offenses charged in Counts Two, Three, Five, Six, Eight, and Sixteen of the Indictment (the "Counts of Conviction"), and that the Statement of Facts, which is attached hereto as "Exhibit A" and incorporated herein by this reference as though set forth in full, is true and correct.

WAIVER OF RIGHTS

2. Defendant understands that he has the following rights:
- to plead not guilty, or having already so pleaded, to persist in that plea;
  - to a jury trial;
  - to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
  - at trial, to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses.

Defendant further understands that if the court accepts his plea pursuant to this plea agreement, there will be no trial and he waives these trial rights.

STATUTORY PENALTIES AND SENTENCING

3. The statutory maximum sentence that the Court can impose for each violation of:
- (a) Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D) (Counts Two and Six) is up to 5 years in prison; at least 2 years up to a lifetime of supervised release; a fine up to \$250,000; and a mandatory special assessment of \$100;
  - (b) Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C) (Counts

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Three and Five) is up 20 years in prison; at least 3 years up to a lifetime of supervised release; a fine up to \$1,000,000; and a mandatory special assessment of \$100;

- (c) Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C) and 860 (Count Eight) is up to 40 years in prison with a mandatory minimum sentence of at least 1 year in prison; at least 6 years up to a lifetime of supervised release; a fine up to \$2,000,000; and a mandatory special assessment of \$100;
- (d) Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) (Count Sixteen) is up to 10 years in prison; up to 3 years of supervised release; a fine up to \$250,000; and a mandatory special assessment of \$100.

Therefore, the total maximum sentence for all offenses to which Defendant is pleading guilty is: at least 1 year minimum mandatory up 100 years in prison; up to a lifetime of supervised release; a fine of up to \$4,750,000 dollars; and mandatory special assessments totaling \$600.

4. Defendant understands that the Court is required to consider the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") among other factors in determining Defendant's sentence. Defendant further understands that the U.S. Probation Office ("Probation Office") will conduct a pre-sentence investigation and will recommend to the Court an advisory Sentencing Guidelines range. For the purpose of calculating an advisory Sentencing Guidelines range, the parties specifically stipulate:

- (a) pursuant to U.S.S.G. § 1B1.2(c) that Defendant committed, in addition to

the offenses charged in the Counts of Conviction, the following offenses (collectively, the "Stipulated Counts"):

- (i) the offenses charged in Counts One, Four, Seven, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen of the Indictment; and,
  - (ii) uncharged offenses occurring between August 16, 2007 through November 8, 2007, during which times Defendant knowingly and intentionally possessed with intent to distribute and distributed to another (namely, a person identified herein as "D.P.") approximately five hundred and forty (540) Methadone tablets, a Schedule II controlled substance, approximately seven hundred and ten (710) 40mg strength Oxycontin pills, a Schedule II controlled substance, and approximately three hundred and sixty (360) 80mg strength Oxycontin pills, a Schedule II controlled substance, all in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C);
- (b) that all counts included within the Counts of Conviction and the Stipulated Counts constitute a single Group of Closely Related Counts pursuant to U.S.S.G. § 1B1.3 (Relevant Conduct as described in the attached Statement of Facts) and U.S.S.G. § 3D1.2(d); and,
- (c) that the offense level applicable to this single Group of Closely Related Counts Count is at least **Level 29**, prior to any reduction pursuant to U.S.S.G. § 3E1.1, based on the following:

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- (i) a Base Offense Level of 29, pursuant to U.S.S.G. § 1B1.3 (Relevant Conduct as described in the attached Statement of Facts), U.S.S.G. § 2D1.2(a)(2) (Base Offense Level of 1 plus the offense level from U.S.S.G. § 2D1.1 applicable to the total quantity of controlled substance involved in the offense), and U.S.S.G. § 2D1.1(c)(6) (offense level of 28, equivalent after conversion to 400 KG to 700 KG of Marijuana), and
- (ii) application of U.S.S.G. § 3D1.3(b).

Subject to the foregoing stipulations, the parties reserve the right to argue for and offer evidence regarding the Sentencing Guidelines, including additional specific offense characteristics, adjustments and departures, as well as to offer evidence and argument relating to the sentencing factors set forth in 18 U.S.C. § 3553(a), although the parties agree that the provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 (commonly collectively known as "Safety Valve") do not apply as to Defendant in this case. Additionally, the parties specifically reserve the right to argue and offer evidence regarding the applicability of a Specific Offense Characteristic of +2, pursuant to U.S.S.G. § 2D1.1(b)(1) (Possession and Presence of Dangerous Weapon, Namely, a Firearm, in Connection with Offense). Defendant understands that the Probation Office's recommendations do not bind the Court, and that the parties' recommendations and agreements do not bind the Court or the Probation Office. Defendant understands that if the Court does not follow any of the parties' recommendations or agreements, he does not have the right to withdraw his plea of guilty. Defendant understands that the Sentencing Guidelines are advisory, that he could receive a sentence up to the maximum

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authorized penalties, and that he will receive a sentence of at least the mandatory minimum penalties.

DEFENDANT'S ADDITIONAL OBLIGATIONS

5. Defendant agrees that he will pay the applicable special assessments at or before the time of sentencing.

6. Defendant further agrees that he is not a prevailing party as defined by the Hyde Amendment, Public Law 105-119, Title VI, Nov. 26, 1997 (set forth as a statutory note under 18 U.S.C. § 3006A) and hereby expressly waives filing any suit or asserting any claim against the United States, including its agents and employees, under this or any other provision.

7. Defendant agrees to voluntarily surrender for forfeiture and/or to abandon to the United States all of his right, title, and interest in the following firearms and ammunition seized by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") on December 7, 2007, namely:

- (a) Lorcin model L380, .380 caliber semiautomatic pistol, bearing serial number 440591 and seven unfired .380 caliber cartridges;
- (b) Springfield (Savage Arms) model 187N, .22 caliber rifle and two unfired .22 caliber cartridges;
- (c) EIG model E15, .22 caliber LR revolver.

Defendant waives any right he may have to notice and hearing regarding said forfeiture and/or abandonment and waives any deadline for notice or institution of such action provided by law. Defendant agrees that the ATF shall retain possession and control of the subject property and shall dispose of said property in accordance with law. Defendant agrees that, as provided in 28 U.S.C. § 2465, the United States and any participating state and local agency and their agents

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and employees had reasonable cause for the seizure of the subject property described above. Defendant for himself and his heirs, successors, and assigns; releases and forever holds harmless the United States and any participating state and local agency and their agents and employees, their heirs, successors, and assigns, from any and all actions, causes of action, proceedings, judgments, damages, claims, and demands whatsoever in law or equity which the defendant and his heirs, successors, and assigns now have or may have in connection with the seizure, detention, forfeiture, and/or abandonment of the subject property.

8. Defendant acknowledges that he received service of the civil judicial forfeiture, United States v. 1216 Kehm Street, Miamisburg, Ohio 45342, Case No. 3:08CV078 (the "Civil Action"), seeking the forfeiture of the real property known as 1216 Kehm Street, Miamisburg, Ohio, 45342, pursuant to 21U.S.C. § 881(a)(6) and (7). Defendant agrees to and hereby WITHDRAWS and WAIVES any and all claims he may have, or has filed, to the property, and Defendant hereby consents to the civil judicial forfeiture, pursuant to 21 U.S.C. § 881(a)(6) and (7), of the real property known as 1216 Kehm Street, Miamisburg, Ohio, 45342, having the following legal description:

Situate in the City of Miamisburg, County of Montgomery, State of Ohio, being lot numbered Four Thousand One Hundred Sixty Nine (4169) of the consecutive lot numbers of the City of Miamisburg, Ohio.

Parcel ID: K46 00902 0001

The parties further agree, that the real property known as 1216 Kehm Street, will not be forfeited, if no later than August 29, 2008, the Defendant provides a cashiers or bank check made payable to the United States Marshal's Service, in the amount of Thirty Three Thousand One Hundred Twenty dollars (\$33,120.00), which amount is 80% of the Montgomery County, Ohio Auditor tax assessed value of Forty One Thousand Four Hundred dollars (\$41,400.00); and if

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such check is presented to the United States Attorney's Office no later than August 29, 2008, then the Thirty Three Thousand One Hundred Twenty dollars (\$33,120.00) will be forfeited in lieu of the real property through the civil forfeiture action. In the event the Defendant seeks to refinance the property to provide the \$33,120.00 for forfeiture in lieu of the real property, the United States shall provide to the title company an executed Release of Lis Pendens in exchange for the \$33,120.00 check made payable to the United States Marshal Service. The parties agree that the Defendant's failure and/or inability to obtain financing and a cashiers check in the amount of \$33,120.00 not later than August 29, 2008, shall not release the Defendant from his agreement to forfeit the real property known as 1216 Kehm Street.

The parties agree that regardless of whether the real property known as 1216 Kehm Street, or the Thirty Three Thousand One Hundred Twenty dollars (\$33,120.00) in lieu of 1216 Kehm Street is forfeited through the civil case:

(a) each side shall bear their own costs, including any and all attorney fees, court costs or other expenses which might have been incurred in connection with the civil action;

(b) Defendant hereby releases any and all claims which he may have against the United States, its agencies, and their employees, arising out of the facts giving rise to the Civil Action; and,

(c) Defendant agrees to take all steps as requested by the United States to pass clear title to the real property, or the funds in lieu of the real property, to the United States, including assisting in resolving the rightful owner of property, and testifying truthfully in any judicial forfeiture proceeding.

Defendant agrees that the forfeiture of the real property known as 1216 Kehm Street, or the Thirty Three Thousand One Hundred Twenty dollars (\$33,120.00) forfeited in lieu of the real property, shall not be applied to, or treated as the satisfaction of any fine, restitution, cost of imprisonment, special assessment, or any other penalty the Court may impose on Defendant.

THE USAO'S OBLIGATIONS

9. If Defendant complies fully with all his obligations under this agreement, the USAO agrees:

- (a) Not to file additional criminal charges against Defendant for violations both occurring in the Southern District of Ohio during the time period charged in the Indictment and arising out of the facts set forth in the attached Statement of Facts, including but not limited to criminal charges for the stipulated violations described in ¶ 4(a)(ii) of this plea agreement and for any possession, use, carrying or brandishing of a firearm during, in relation to, or in furtherance of such violations.
- (b) At the time of sentencing, to move to dismiss Counts One, Four, Seven, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen of the Indictment in this action. Defendant understands that the Court may consider dismissed counts and uncharged conduct in determining the applicable Sentencing Guidelines range, where the sentence should fall within that range, the propriety and extent of any departure from that range, and the sentence to be imposed after consideration of the sentencing guidelines and all other relevant factors. Defendant further understands that the parties have stipulated in this plea agreement to his

commission of the offenses charged in these counts for purposes of determining the applicable Sentencing Guidelines range;

- (c) At the time of sentencing, provided that Defendant demonstrates an acceptance of responsibility for the offenses charged both in the Counts of Conviction and Stipulated Counts up to and including the time of sentencing, to recommend a two-level reduction in the applicable sentencing guideline offense level, pursuant to U.S.S.G. § 3E1.1, and to recommend and, if necessary, move for an additional one-level reduction if available under that section.

NO OTHER AGREEMENTS

10. Except as set forth herein, there are no promises, understandings or agreements between the USAO and Defendant or Defendant's counsel. This agreement binds only the USAO and does not bind any other federal, state or local prosecuting authority.

DEFENDANT'S ACKNOWLEDGMENT

11. By signing this agreement, the Defendant acknowledges that he has read this agreement, that he has carefully discussed the terms of this agreement with his attorney, and that he understands and accepts those terms voluntarily, without duress or coercion, and of his own free will, because he is, in fact, guilty of the offenses to which he is agreeing to plead guilty pursuant to this plea agreement. Defendant further agrees that he is fully satisfied with the representation, advice, and other services of his attorney in this matter.

GREGORY G. LOCKHART  
United States Attorney

*Andrew J. Hunt*

ANDREW J. HUNT  
Assistant United States Attorney

*7/21/08*

Date

*Colburn L. Kinzer Jr*

COLBURN L. KINZER  
Defendant

*7-21-08*

Date

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KEVIN SCHAD, ESQ.  
Attorney for COLBURN L. KINZER

*7/21/08*

Date

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Exhibit A

**STATEMENT OF FACTS FOR COLBURN L. KINZER**

Defendant, **Colburn L. Kinzer** (“Defendant”), sold various controlled substances to an undercover police officer (“UC”) over a period of several months, and was in possession of additional controlled substances, which he intended to later distribute, at the time a search warrant was executed by law enforcement officers on December 7, 2007.

Specifically, on August 16, 2007, Defendant met with the UC at his home located at 5847 Farmersville-Union Road, within the territorial boundaries of the Southern District of Ohio. During this meeting, Defendant sold the UC twenty-six (26) Vicodin (a.k.a. Dihydrocodeinone) pills for \$50 cash.

On August 30, 2007, Defendant met with the UC at another one of his homes, namely, his home located at 1216 Kehm Street, Miamisburg, Ohio (“Kehm St. Home”), which is also located within the Southern District of Ohio, and sold the UC thirteen (13) Vicodin pills and ten (10) 20mg strength Oxycontin pills. In exchange, Defendant was given an Electronic Benefits Transfer Card (“EBT card”) with \$280 in cash value assigned to the card. Defendant produced the pills from a van parked outside the residence, and the transaction occurred in front of the home. During the meeting, Defendant was renovating the home. When the UC asked how the Defendant was paying for all the renovations to the Kehm St. Home, Defendant indicated “off them pills,” referring to proceeds from the controlled substances he was illegally selling. Defendant also told the UC he made approximately \$500 or more a week selling controlled substances.

On September 7, 2007, Defendant met with the UC at his home located at 5847 Farmersville-Union Rd., and sold six (6) 80mg strength Oxycontin pills to the UC for \$300 cash.

On September 26, 2007, Defendant met with the UC at his home located at the Kehm St. Home, and sold the UC thirty (30) 80mg strength Oxycontin pills and sixty-four (64) Vicodin pills of various strengths, for \$1500 cash and an EBT card containing a balance of \$280. This transaction occurred inside the Kehm St. Home. Defendant produced the pills from a blue bag inside the residence, and during the course of his interaction with the UC inside the Kehm St. Home, Defendant also conducted an illegal drug sale of Vicodin with a third party in the presence of the UC.

On October 5, 2007, Defendant and the UC spoke by phone, and Defendant agreed to sell the UC Oxycontin. Defendant directed the UC to meet him at the Save-A-Lot located at 110 E. Sixth St. in Franklin, Ohio, also within the Southern District of Ohio. While parked in front of the store at approximately 12:40 p.m., Defendant sold the UC ten (10) 80mg strength Oxycontin pills for \$500 cash. Franklin Junior High, a public secondary school, was within 1000 feet of the sale location. When measured by police using a measuring wheel, the distance from the sale location to the school property line was approximately 71 feet, 4 inches, and the distance from the sale location to the school building itself was 337 feet, 7 inches.

On October 26, 2007, Defendant met the UC at 5847 Farmersville-Union Rd., and sold the UC two (2) 80mg strength Oxycontin pills for \$50 cash and a Lowe's gift card containing a balance of \$95.85.

On December 7, 2007, agents of the ATF and the Ohio Organized Crime Investigation Commission ("OOCIC") served a search warrant at Defendant's home located at 5847 Farmersville-Union Rd. Inside, the following controlled substances were recovered:

- a) 84 Methadone pills weighing 97.29 grams;
- b) Four (4) 30mg strength Oxycontin pills;

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- c) Five (5) 40mg strength Oxycontin pills;
- d) 157 Vicodin pills;
- e) 233 Xanax pills (a.k.a. Alprozalam);
- f) 27 Clonazepam pills;
- g) 80 Valium pills (a.k.a. Diazepam).

Defendant possessed these pills with the intention of distributing them to others. Additionally, agents found and seized the following three firearms and ammunition inside the residence where the pills were located, and from where Defendant had made previous sales of controlled substances, which Defendant possessed in connection with the above-described drug trafficking:

- a) Lorcin model L380, .380 caliber semiautomatic pistol, bearing serial number 440591 and seven unfired .380 caliber cartridges;
- b) Springfield (Savage Arms) model 187N, .22 caliber rifle and two unfired .22 caliber cartridges;
- c) EIG model E15, .22 caliber LR revolver

Each of these firearms was manufactured outside the state of Ohio, and thus traveled in interstate commerce to Ohio. Furthermore, Defendant was previously convicted of a crime punishable by greater than a year in prison, specifically on or about October 11, 1999, in Warren County, Ohio Common Pleas Court, Case Number 99CR18255 of Burglary, in violation of Ohio Revised Code Section 2911.12(A)(4). During his September 26, 2007 meeting with the UC, Defendant acknowledged this conviction and told the UC that he could not legally possess a firearm.

As the search warrant was being executed on December 7, agents located Defendant the same day at his brother's home in Warren County, also the subject of a concurrent state search warrant. Upon arresting Defendant, he was found to be in possession of twenty-nine (29) 80mg strength Oxycontin pills and thirty-six (36) 40mg strength Oxycontin pills. Defendant likewise

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possessed these pills with the intent to distribute them.

During the course of his dealings with the UC, Defendant was also selling controlled substances to "D.P.", an individual from the Hazard, Kentucky area. Defendant discussed his sales to D.P. during meetings with the UC. D.P. traveled to Ohio to obtain controlled substances from Defendant on multiple occasions, starting in August 2007 and until D.P.'s arrest by Kentucky police on November 8, 2007. At the time of his arrest, D.P. had thirty (30) 40 mg strength Oxycontin pills, twenty (20) 80 mg strength Oxycontin pills, and thirty (30) 40 mg strength Methadone tablets, which D.P. had purchased the same day from Defendant. During the course of their dealings, Defendant sold D.P. additional 40 mg strength Oxycontin pills, 80 mg strength Oxycontin pills, and 40 mg strength Methadone tablets.

To summarize, the Defendant distributed/possessed with intent to distribute the following controlled substances, amounts, and corresponding marijuana equivalency under the Sentencing Guidelines:

- a) 97 pills of Oxycontin, 80 mg strength = 51.99 kg of marijuana;
- b) 71 pills of Oxycontin, 40 mg strength = 19 kg of marijuana;
- c) 10 pills of Oxycontin, 20 mg strength = 1.34 kg of marijuana;
- d) 4 pills of Oxycontin, 30 mg strength = 800 grams of marijuana;
- e) 260 pills of Vicodin = 260 grams of marijuana;
- f) 80 pills of Diazepam (Valium) = 5 grams of marijuana;
- g) 233 pills of Alprozelam (Xanax) = 14.56 grams of marijuana;
- h) 27 pills of Clonazepam = 1.6875 grams of marijuana;
- i) 97.29 grams of Methadone recovered on 12/7/07 = 48.65 kg of marijuana;

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- j) 30 tablets of Methadone, 40 mg strength, sold by Defendant to D.P. on 11/8/07 (using an estimated weight of 1.64 grams per tablet based on the previous weight by the Miami Valley Crime Laboratory of a known quantity of fifty-five, 40 mg strength Methadone tablets seized from Defendant on 12/7/07) = 24.6 kg of marijuana;
- k) Additional amounts of 40 mg strength Methadone, 40 mg strength Oxycontin pills, and 80 mg strength Oxycontin pills sold by Defendant to D.P. between 8/16/07 and 11/8/07, which Defendant acknowledges, when combined with the other controlled substances listed in (a) - (j) above, would place him into the marijuana equivalency range of between 400-700 kg of marijuana under U.S.S.G. §2D1.1(c)(6).

Thus, Defendant acknowledges responsibility for distribution/possession with intent to distribute controlled substances with an equivalent weight of between 400-700 kg of marijuana when converted pursuant to U.S.S.G. §2D1.1.

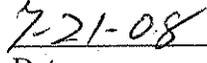
For the Court's information:

- a) Oxycontin contains Oxycodone, a Schedule II controlled substance;
- b) Vicodin (a.k.a. Dihydrocodeinone) is a Schedule III controlled substance;
- c) Methadone is a Schedule II controlled substance;
- d) Clonazepam is a Schedule IV controlled substance;
- e) Valium (a.k.a. Diazepam) is a Schedule IV controlled substance;
- f) Xanax (a.k.a. Alprozalolam) is a Schedule IV controlled substance

AGREED AND ACCEPTED:

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\_\_\_\_\_  
COLBURN L. KINZER  
Defendant

  
\_\_\_\_\_  
Date