NO.
SUPREME COURT OF THE UNITED STATES

LAMAR THORNTON	)
Petitioner	)
- VS. -	)
UNITED STATES OF AMERICA	)
Respondent.	)

On Petition For Writ Of Certiorari To

The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS
Pursuant to the Criminal Justice Act and Supreme Court Rule 39

Pursuant to Title 18, United States Code §3006A(d)(6) and Rule 39 of this Court, Petitioner asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of fees or costs and to proceed In Forma Pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code §3006, the Criminal Justice Act, on appeal to the United States Court of Appeals for the Sixth Circuit and at trial before the United States District Court for the Eastern District of Kentucky.

Respectfully submitted,

/s *Michael Losavio*

Michael M. Losavio
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Counsel of Record for Petitioner

CERTIFICATE

I hereby certify that a copy of this Motion was deposited in the U.S. Mail, first-class postage prepaid, or by Federal Express private service properly addressed to Hon. Noel Francisco, Office of the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001 this ___ day of September, 2020

/s Michael Losavo
Michael M. Losavio

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

/s Michael Losavio
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Counsel of Record for Petitioner
Lamar Thornton

QUESTION PRESENTED FOR REVIEW

Question I. Was there sufficient proof of Thornton being in this conspiracy, as he was, at worst, a vendor, such that Thornton's judgment of acquittal should have been granted?

Question II – Should Thornton's motions for the suppression of the evidence have been granted, as they were based on cell site location information (GPS) results obtained in violation of the Constitution of the United States and without a warrant?

Question III – Should Thornton's motion to dismiss for violation of his Speedy Trial rights, filed almost two years after his arrest, have been granted?

Question IV. Was Thornton's sentence substantively and procedurally unreasonable as rendered given the district court punished him for an incorrect amount of contraband, a firearm in relation to the offense, obstruction of justice and an aggravating role?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT
WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Lamar Thornton, Appellant, Petitioner

United States of America, Appellee, Respondent

,

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OPINIONS AND ORDERS BELOW

The opinion below of the United States Court of Appeals for the Sixth Circuit was rendered in *United States v. Lamar Thornton*, Case number 19-5903; that opinion affirmed the judgment of the United States District Court for the Eastern District of Kentucky in case number 17-CR-000026 KKC where the original sentence committed Thornton to the custody of the Bureau of Prisons to a total term of 292 months imprisonment.

JURISDICTION

i. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 4, 2020; pursuant to Rule 13.1 of the rules of this Court, the Petition is timely filed.

ii. A petition for a rehearing was filed in this matter and denied September 2, 2020; no extension of time within which to file a petition for a writ of certiorari has been made.

iii. This is not a cross-Petition pursuant to Rule 12.5.

iv. The statutory provision conferring jurisdiction upon this Court to review upon a writ of certiorari the judgment or order in question is 28 U.S.C. §1254.

Constitutional Provisions And Other Authorities Involved In This Case

Fourth Amendment to the Constitution of the United States

STATEMENT OF THE CASE

Jurisdiction in the First Instance

Subject matter jurisdiction vested in the U.S. District Court for the Eastern District of Kentucky pursuant to 18 U.S.C. §3231; Thornton was indicted for offenses against the laws of the United States and was convicted after trial within that district .

Appellate jurisdiction vested in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1291 and 28 U.S.C. §1294.

Presentation of Issues in the Courts Below and Facts

At trial Agent Sullivan detailed an investigation in Kentucky that led to the arrest of Doolin, and ultimately led to the arrest of Thornton in Detroit. He continued describing the search of Thornton's residence and finding a lockbox with drugs.

Laboratory analysis found 99.6 grams of carfentanyl, a Schedule II controlled substance in Exhibit 2 and 114.7 grams of carfentanyl, heroin, a Schedule I controlled substance and Benadryl, and was so stipulated and admitted the laboratory reports as Exhibits 45 and 46.

Thornton's phone allegedly had a contact for Jerrod with Jerrod Doolin's phone number assigned to it, (859) 559-605 Sullivan noted that the that the SIM card shows the phone number for that phone was the phone they were pinging and tracking, the 616 number, from Kentucky via Jerrod Doolin; a phone with a number associated with Doolin was also found with Thornton, but it was not active although there were indicia Doolin had used it.

Agent Sullivan discussed Thomas Lehmann, who had overdosed while in possession of drugs and identified Thornton from a picture.

Yet, despite all this, Sullivan admitted that:

> Q. So the bottom line is we're pretty sure that he [Thornton] is not in this area the three days that -- three or four days that we've heard about in your testimony, the 8th, the 9th, the 10th and probably the 11th, correct?
>
> A. Correct.

Officer Steele of Lexington Police described finding Thomas Lehmann drug intoxicated in his car, which contained bags of heroin and carfentanyl. St

Cheyenne Brock, Doolin's ex-girlfriend whom Doolin would provide drugs, admitting her felony conviction and drug use, identified Thornton as "Juice" but said she never got drugs

from him directly, just from "Little Bro;" he did tell her he had some drugs in 2016 and to "hit me up," though she did not buy from "Juice," claiming he told her to call Little Bro. She claimed Doolin got his drugs, 30 grams once or twice a week over three months, from "Juice."

Thomas Lehmann then testified for the government, noting his addictions and his relationship with Lamar Thornton, connecting via FaceBook and purchasing drugs from him in November, 2016; he was told to purchase via Little Bro, amounts from 2 grams to 32 grams for 1 ½ to 2 months. Lehmann acknowledged that the day of his overdose and arrest he had 32 grams of heroin he had just got from Shaw, 47 grams of meth, a half ounce of marijuana, 32 Xanaxes, some suboxones; he admitted to pleading guilty to conspiracy with Thornton and possessing narcotics with the intent to distribute and hoped to be sentenced to reduced prison time from a current estimate of 11 to 14 years for testifying.

Addict and convict Brian Wylie admitted he helped his friend Lehmann distribute heroin as well as did it himself. The seller was named "Little Bro"

Analyst Houtz of the DEA described receiving target cell tower information on a set of phones, including one associated with Thornton: "We had several cell phones as well as cell site information for those phones. We also had call detail records, which are the calls that those phones made." The phone number associated with a "source of supply" and later associated with Thornton was the target of GPS pinging and routinely at the Dickerson Avenue address of Thornton in Detroit; that phone was found on Thornton when he was arrested, and other phone numbers were associated with Lehmann, Jerrod Doolin and Shaw. He noted ten calls between phones associated with Shaw and Lehmann, and texts and calls between Doolin and Shaw. Houtz reviewed cell site tower mapping with the phones of Doolin and Shaw, and connection data of phones associated with Thornton and Brock and Wylie.

The government rested its case and Thornton moved for a Rule 29 judgment of acquittal due to insufficient evidence; this was denied by the district court.

The jury returned a verdict of guilty as to Count 1 of the second superseding indictment, Conspiracy to Distribute 10 grams or more of a mixture or substance containing Heroin and Carfentanyl.

At sentencing Thornton's counsel made an impassioned plea for him:

> I refuse to believe that Lamar Thornton cannot be a better person. I refuse to believe that Lamar Thornton can't do something to make himself have a more productive life.
>
> And I do believe with the greatest of respect that even 292 months is over the top of what is necessary.
>
> He must be personally deterred. I must say I think general deterrence when it comes to these drug offenses, I have some significant questions about whether that really is effective. But there's no question, locking Lamar Thornton up for however many years, that is absolutely going to deter him. That is absolutely going to deter him. And I realize that is a factor that Your Honor must take into consideration….
>
> It just seems like it's such a waste. It seems to me as though he has wasted so much of his life, but he is young enough, he can still get it together.
>
> And I -- I just -- I think that these young men that come in front of you, and they tend to be young men, not always. But some of the -- there are people who were witnesses in this case who were not men. They were young women, or a young woman, she actually herself was effectively an unindicted co-conspirator. More people could have been charged.
>
> I don't think -- thinking you live in that world of poverty and educational neglect and family problems, I really think once you step into what I might term our n't think you get it, and I'm not sure that Mr. Thornton even today gets it.
>
> And I'm not sure -- in fact, I know that Mr. Thornton continues to believe that the attorneys who have represented him really don't have his best interest at heart. I get that. It's not about me. It's not about Jaron Blandford. It's not about Ms. Rieker or Mr. Bradbury, Agent Sullivan. It's really about justice and about doing what's right. And I do get this.
>
> But I just -- 292 months, however many months, we have to give him hope.
>
> And I can conclude by saying this. This recent high profile death by hanging that has

gotten so much focus, what really -- I was telling my husband, I said, really it doesn't matter about that guy. If he did what he is accused of doing, he did dreadful crimes, ongoing crimes that have devastated the lives of all of these young women.

But what we really need to be thinking about is why are we putting people, no matter what they've done in a situation, that is less than humane, and it drives them to despair.

There is nowhere in 3553 that says the sentence must give hope. The sentence -- there are few people who are so horrible that they need to be locked up for so many years that they see no light at the end of the tunnel.

I ask for a downward variance. I ask you for a sentence that complies with all of those statutory factors.

But I ask you for a sentence for Lamar Thornton that gives him light at the end of that tunnel, that makes him everyday look deeply into his own soul and figure out what changes have to be made, but I hope that he will have -- he's surrounded by people that actually care about him and want to have the programs that will help him. He needs mental health treatment.

And the last thing I'll say is I went back the last couple of months, and I read the Bail Reform Act analysis that then Magistrate Wier did, and I had forgotten, if I'd ever remembered, about his initial drug test when he came into federal custody. He was -- his system had more than just a little marijuana in it. So this is not only a trafficker, this is a user.

And I don't know what more to say. I didn't mean to say this much, but I started to sit down and looking at this, and I started thinking about Lamar Thornton. He's the one person here that went to trial.

He bears dreadful consequences. These are serious crimes but I don't want -- I want him to feel that he is not forgotten.

Thereafter Mr. Thornton was sentenced to 292 months of imprisonment.

He appealed this conviction. The Court of Appeals affirmed, as to all issues raised.

The Court of Appeals found that the affirmation in support of the warrant application established probable cause and there was not error.

The Court of Appeals acknowledged the delay of over a year in bringing the case to trial required extended analysis. In that analysis it held Thornton responsible for the delay due to his

pretrial motions. It found Thornton's assertion of his right to a speedy trial came 21 months after the case had begun and no prejudice was established by the delay; thus, there was no violation of Thornton's right to a Speedy Trial.

The Court of Appeals found that Thornton engaged in more than a buyer-seller relationship and were standardized as to Doolin and Lehmann's regular purchases. With the quantities involved, this was adequate to support the sufficiency of the evidence of Thornton's conviction.

Lastly, as to the reasonableness of his sentence, the Court of Appeals found the trial court did not abuse its discretion and did not commit clear error in fact finding in setting Thornton's offense level, in adding the firearm enhancement, in adding the aggravating role enhancement and in penalizing him for obstruction of justice.

This Petition follows.

REASONS FOR GRANTING THE WRIT

Question I. Was there sufficient proof of Thornton being in this conspiracy, as he was, at worst, a vendor, such that Thornton's judgment of acquittal should have been granted?

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) this Court held that any fact that penalizes a defendant in some way must be submitted to the jury and proved beyond a reasonable doubt, other than the fact of a prior conviction. The prosecution must separately prove a defendant's intention to join each objective of the conspiracy.

There is insufficient evidence beyond a reasonable doubt that this is a conspiracy involving Mr. Thornton, an agreement by him to engage in coordinated directed misconduct. These were only buy-sell relationships, and nothing more.

The elements needed to establish conspiracy to possess controlled substances with the intent to distribute, 21 USC §846, are:

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

The elements of the conspiracy component are:

> (1) That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the Indictment, i.e., to possess and distribute [controlled substances]; and
> (2) That the defendant knowingly and willfully became a member of such conspiracy.

Thornton was never shown to have agreed to join the conspiracy with any of these people and there was insufficient foundation introduced of his specific intent to do so. He had nothing more than the relationship of a seller to a buyer. Thornton bought from one person and gave to

another person, without any wider conspiracy. Their actions together and telephonic calls and texts do not establish anything more than this mere association

As only a buyer-seller relationship is shown here between Thornton and Doolin, Shaw, Lehmann and Ruggiero, not agreement(s) to join the alleged conspiracy, there was no conspiracy. Thornton was off on his own.

His judgment of acquittal should have been granted on Count I. Fed. R. Crim. Proc. 42

Thornton never knew the mixture contained carfentanil.

The government did not prove that Thornton knew the substance he distributed was carfentanil.

Here, as needed to establish guilt under Count 1, the government never showed any alleged member of the conspiracy, much less Thornton, knew the substance was deadly carfentanil. All anyone thought was that this substance was heroin; as Lehmann noted, "Everyone says it's heroin" even though you might end up with fentanyl. Failing this, Thornton's judgment of acquittal should have been granted.

His motion for a judgment of acquittal on Count 1should have been granted.

Question II – Should Thornton's motions for the suppression of the evidence have been granted, as they were based on cell site location information (GPS) results obtained in violation of the Constitution of the United States and without a warrant?

Thornton's Motions to Suppress the results and fruits the GPS tracking order should have been granted per *United States v. Carpenter*, 585 U.S. ___ 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). The improperly obtained cell site location information (CSLI) (styled GPS information in government affidavits) and the fruits of that information – the evidence from its improper use to secure a search warrant of Thornton's home that found evidence used to convict him at trial – should have been suppressed. That direct and derivative evidence should not have been used against him in violation of his rights under the Fourth Amendment to our the U.S. Constitution.

Carpenter holds that cell site location information (CSLI) is a Fourth Amendment search and that probable cause for a search warrant is needed to access it; production pursuant to 18 U. S. C. §2703(d) order for the information, as was obtained here, is inadequate to meet Fourth Amendment requirements.

Special Agent Jared Sullivan describe the inception of this investigation out of Nicholasville, Kentucky as to carfentanil involving Ruggerio, York and Doolin. He subsequently described his investigation and interaction with Mr. Thornton, whom he had tracked via Thornton's cell phone and then arrested in a vehicle stop.

Pursuant to a government application pursuant to 18 U.S.C. Sec 2703(c), the District Court, in response to "In Matter Of The Application States Of America Authorization To Obtain Location Data Concerning A Cellular Telephone Find A Phone Number Issued An Order Finding Probable Cause To Acquire The Requested Information And To Track The Target Telephone Sign Telephone Number (616) 377-6125 Service Provided By Metro PCS/T-Mobile" – ordered provision of cell site location data under the provisions of Rule 41 and 18 U.S.C. Sec

2703(c), finding probable cause to believe that the Requested Information will constitute or lead to evidence of violations of 21 U.S.C. §346 and 21 U.S.C. § 841

This conflates the different standards between probable cause required for Fourth amendment search warrant in an order of production pursuant to18 U. S. C. §2703(d). There was no way to tell if the district court relied on the proper standard.

This Court on remand determined that, nonetheless, the good faith exception applied in this case and the evidence need not be suppressed as the government agents relied in good faith on the cited Stored Communications Act. *United States v. Carpenter,* ___ F.3d ____ (6th Cir. 2019), File No. 19a0126p.06 (*Carpenter II*)

But *Carpenter II's* reasoning is inapposite. First, the repeated references to "probable cause" by the applicant evidences knowledge that, indeed, probable cause and a 4th Amendment warrant are needed, thus vitiating the "good faith" exception. And as Thornton noted the good faith exception was inapplicable and the warrant was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable" because the affidavit did not contain a minimally sufficient nexus between the illegal activity and the place to be searched.

Thornton asserted that the affidavit and affirmation additionally contained knowing and reckless, false statement. and that the good faith exception was inapplicable with the warrant "so lacking in indicia of probable cause as to render official belief in its existence unreasonable" because the affidavit did not contain a minimally sufficient nexus between the illegal activity and the place to be searched.

Special Agent Sullivan of the DEA secured and executed an arrest warrant for Thornton after tracking/pinging his cellular telephone. The subsequent search at Dickerson produced "approximately 175 grams of fentanyl, approximately 189 grams of heroin, 69 grams of crack

cocaine, and 57 of Ecstasy."

The cell site location information and the subsequent evidence obtained from it should have all been suppressed. Thornton's judgment and sentence should be vacated and this matter remanded for further proceedings before the District Court.

Question III – Should Thornton's motion to dismiss for violation of his Speedy Trial rights, filed almost two years after his arrest, have been granted?

Thornton timely moved to Dismiss asking the Court to dismiss his case based on Speedy Trial Act violations. The Sixth Amendment guarantees a criminal defendant the right to a speedy trial. U.S. Const. Amend. VI. The United States Supreme Court has developed a four-factor test used to evaluate Sixth Amendment speedy trial claims. The Court must evaluate a claim based upon (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker v. Wingo,* 407 U.S. 514, 530 (1972). No one factor is determinative, and instead, all factors are considered collectively with any other circumstances that may be relevant.

Thornton timely asserted his right through his motion to dismiss for violation of the Speedy Trial Act on December 27, 2018, long after the first indictment on February 9, 2017 and the third and final indictment on September 7, 2017 . The government objected that neither the Sixth Amendment nor the Speedy Trial act had not been violated, noting Thornton's motion to continue due to discovery, the addition of Lehmann as a defendant, the need for a competency hearing for Thornton, the addition of Shaw as a defendant, Thornton's motion to suppress, other continuance motions by co-defendants, Thornton's motion to sever per *Bruton*, Thornton's request for new counsel, Thornton's subsequent motion to suppress and motion to dismiss for

Speedy Trial violation. It asserted these were all valid reasons for a legal delay in proceeding to trial against Thornton.

A delay beyond one year is presumptively prejudicial.

In asserting his rights and this violation of his Sixth Amendment right to a Speedy Trial, Thornton observed that the government's fault in the delays, as well as that of continuing's motions by codefendants.

Thornton noted the extreme prejudice of oppressive pretrial incarceration where he had been locked away for almost 2 years, since January 19, 2017 and that the length of delay related to his codefendants taking pleas and the government's failure to respond to his motions and requests delaying resolution of this case timely manner.

Only five motions were filed by Thornton and do not justify a two-year delay from Thornton's arrest is trial. Indeed, as Thornton noted in his motion to dismiss, his motion to sever would have expedited this case. Given the extensiveness of this delay of over a year, it is presumptively prejudicial and that prejudice was not overcome. Thornton has been prejudiced and suffered isolation and separation from his family and friends in society for nearly 2 years. He has been unable to properly prepare for his defense given his incarceration.

Thornton's judgment and sentence must be reversed and vacated this matter remanded for dismissal of the indictment against him.

Question IV. Was Thornton's sentence substantively and procedurally unreasonable as rendered given the district court punished him for an incorrect amount of contraband, a firearm in relation to the offense, obstruction of justice and an aggravating role?

Pursuant to *United States v. Booker* 543 U.S. 220 (2005) this Court reviews a criminal sentence for both procedural and substantial reasonableness under an abuse of discretion

standard. The Supreme Court in *Gall v. United States*, 128 S. Ct. 558 (2007) and *Kimbrough v. United States*, 128 S. Ct. 558 (2007) carefully expanded on the advisory nature of the Guidelines. Plain error review applies to assertions of error where no objection was made. The District Court record must adequately explain the chosen sentence to allow for "meaningful appellate review" or it will be procedurally unreasonable such that "a remand is warranted to reduce confusion and ensure correctness." *Gall v. United States*, 552 U.S. 38, 50 (2007).

If procedurally sound the Court reviews the substantive reasonableness of the sentence under an abuse of discretion standard. See *Rita v. United States* 127 S.Ct. 2456, 2465 (2007). *Thornton was improperly punished for an aggravating role in this matter.*

Thornton objected to this sentencing enhancement, noting there was no evidence that he ever "directed" anyone to do anything. The evidence did not show he led anyone, as was noted in the Sentencing Hearing. As Thornton noted:

> DEFENDANT THORNTON: Your Honor, the enhancement for the aggravating role is the enhancement that is used in insignificant evidence, originally -- the first original statement was not that I introduced him to Shaw. His original statement was that I provided him with 64 grams and 2 ounces of meth on a daily basis. And then later on he made an additional statement, four months later from that, stating that he only received two-and-a-half grams from me, and that I introduced him to Shaw. Also, on that same interview with the United States and Special Agent Sullivan, he had stated that I was his initial source, but also that he said that I gave him two-and-a-half grams to try. The evidence is insignificant, and he hasn't do anything to build any credibility. Only thing he proved was to be a dishonest law enforcement.

The Presentence Report stated:

> 50. Adjustment for Role in the Offense: The defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; therefore, four levels are added. USSG §3B1.1(a) +4

Thornton objected to this adjustment:

> Paragraphs 43 and 51: Thornton objects to being awarded an aggravating role as to the conduct of Shaw, Carothers, and others. He first opines that there is no evidence that he ever "directed" anyone to do anything. U.S. v. Walker, 160 F.3d 1078, 50 Fed. R.

Evidence § 936, 60 Fed. R. Evid. § 936 (6th Cir. 1998).

Thornton noted that the fundamentals of a leadership role were not met, especially as to the number of people led. USSG Section 3B1.1(c) provides that a defendant's offense level is to be increased "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity." The government bears the burden of proving by a preponderance of the evidence the facts necessary to establish the applicability of this enhancement.

Yet here the evidence, at worst, only shows that Thornton provided contraband to other drug dealers and he did not direct or manage them. And he certainly not direct required number of people qualify for the organizer or leader role; neither was he a manager or supervisor of a criminal activity involving five or more people. These are required by USSG section 3B1.1 There was no showing that he recruited people, claimed a larger share of the fruits of the crime, controlled others or exercised authority over them., These are required by USSG section 3B1.1 as detailed in note.

It was procedurally unreasonable punish Thornton with this leadership role; his sentence should be vacated in this matter remanded for a correct punishment.

Thornton was improperly punished for obstruction of justice in this matter.

Standard of Review – The standard of review is a mix of clearly erroneous and *de novo* review. Factual findings made by the district court in applying the enhancement of obstruction of justice is for clear error, the district court's determination as to whether the facts constitute an obstruction of justice, which is a mixed question of law and fact reviewed *de novo* and the actual imposition of the enhancement is reviewed *de novo*.

Over Thornton’s objection, he was penalized in his sentence calculus with an obstruction

of justice enhancement of two points per U.S.S.G. § 3C1.1.

As noted in Thornton's objections, the alleged obstruction in this case could only be applicable to the investigation or prosecution of the instant offense of conviction. § 3C1.1(1). But § 3C1.1 Application Note 4(D) tells us that "if said conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it should not, standing alone, be sufficient to warrant an adjustment for obstruction. Thornton restated this at sentencing.

As to the testimony of Agent Sullivan of recordation in the car during *detention***,** the PSR states**:**

> *Adjustment for Obstruction of Justice*
> *44. The defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice when the defendant directed Carothers to discard and impair evidence, specifically drugs and cell phones, during the execution of a search warrant. Per USSG §3C1.1, application note #4(D), destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation is indicative of obstructive conduct.*
>
> *51. Adjustment for Obstruction of Justice: 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 the obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or a closely related offense; therefore, two levels are added. USSG §3C1.1. +2*

Thornton responded with his objection that:

> Paragraphs 45 and 52 –…Said alleged obstruction in this case could only be applicable to the investigation or prosecution of the instant offense of conviction.
>
> § 3C1.1(1). But § 3C1.1 Application Note 4(D) tells us that "if said conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it should not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense."
>
> …, Thornton's alleged obstructive conduct did occur contemporaneously with his own arrest. Had he had contraband on his own person, and destroyed or attempted to destroy it himself, it would have been unlikely that the Court would award the enhancement, unless, of course, it found said evidence destruction somehow resulted in an investigatory

> or prosecutorial hindrance. Here, Thornton maintains that rather than hinder, his monitored statements to others actually strengthened the case against him, and laid at least a potential foundation for the case against Shaw.

Thus it was procedural error to punish Thornton for obstruction of justice and his case must be remanded for resentencing.

Thornton was punished for an incorrect amount of contraband

Per the Presentence Investigation Report, Thorton was given an enhanced base offense level of 30 due to an over calculation of the amount of contraband attributable to him

> 47. Base Offense Level: The guideline for 21 U.S.C. § 846 offenses is found in USSG §2D1.1 of the guidelines. This section provides that an offense involving 1,286.8575 kilograms of converted drug weight sets a base offense level of 30, pursuant to USSG §2D1.1(c)(5).

The presentence report was amended to reflect the government's even greater asserted amount of over 2000 kilograms of converted drug weight to marijuana, although this did not impact the base offense level.

This failed to reflect the lack of credibility of the assessments against Thornton via unreliable witnesses. Thornton noted that the witnesses against him consistently gave inconsistent statements as to his involvement. (R 405, PSR Objections, PageID 2519)

The testimony of these self-interested, self-preserving witnesses must be discounted and the amount of contraband reduced as to lower the sentencing level; Thornton given a correct sentence based on the proper amount of contraband for which he can be held accountable.

It was procedurally unreasonable to enhance Thornton's punishment by asserting there was a firearm possessed in relation to this offense.

Thornton had his punishment increased due to the possession of a firearm in relation to the offense. The Presentence Report stated

> 48. Specific Offense Characteristics: Pursuant to USSG §2D1.1(b)(1), the base offense

level is increased by 2 levels as the defendant possessed a firearm. +2

But this was found in someone else's home and should not be attributed to Thornton. (R 405, PSR Objections, PageID 2519) Thornton simply living in a room of this home and government only stated " The firearm was found on a shelf on a mantle area on top of a number of pills. It was in close proximity to the room in which there was manufacturing and drug paraphernalia all associated with drug trafficking.… This was a small residence.)" and noting other references to firearms. Thornton objected that none of the criteria relating to attributing this to him were met. USSG §2D1.1(b)(1) Thornton was not in the house when the gun was found, he didn't know the gun was there, it wasn't in his name, no fingerprints were on it, so there was nothing to associate firearm with him. It was procedural error to punish Thornton for this and his sentence should be vacated for a reduced sentence upon a correct calculation upon remand.

It is respectfully requested that Thornton's sentence should be vacated and this matter remanded for a resentencing at a reduced sentence.

CONCLUSION

The judgment and sentence were erroneous and this Petition for Writ of Certiorari should be granted and Mr. Thornton given the relief he has argued for herein.

Respectfully submitted,

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Petitioner Lamar Thornton

Certification of Word Count and Petition Length

The undersigned certifies that this Petition for a Writ of Certiorari does not exceed 6000 words nor 28 pages in length, not counting the appendix materials, and is in compliance with the length rules of Supreme Court Rule 33.

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Counsel of Record for Petitioner
pursuant to the Criminal Justice Act

Certificate of Service

A copy of the foregoing Petition for a Writ of Certiorari has been served this day by U.S. Postal Mail or via a private expedited service on Noel Francisco, Solicitor General of the United States, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

This _____ day of September 2020

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Statutes Involved in this Petition

Fourth Amendment to the Constitution of the United States

21 USC §846- Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Speedy Trial Act

.....

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0459n.06

No. 19-5953

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LAMAR THORNTON, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY OPINION

Before: SUHRHEINRICH, GIBBONS, and BUSH, Circuit Judges.

JOHN K. BUSH, Circuit Judge. Lamar Thornton was convicted of conspiracy to distribute ten grams or more of heroin and carfentanyl, in violation of 21 U.S.C. § 846. He was sentenced to 292 months' imprisonment. He now appeals his conviction and sentence. For the reasons stated below, we **AFFIRM** the judgment of the district court.

I.

This is a case about the unlawful distribution of heroin and carfentanyl. The latter is a drug designed for use as an elephant tranquilizer but also abused for human consumption, utilized on its own or mixed with heroin. Defendant Lamar Thornton oversaw distribution of these drugs into Lexington, Kentucky and the surrounding area.

The story of Thornton's arrest and prosecution centers around two main characters. The first is Thomas Lehmann, who overdosed after consuming carfentanyl on January 8, 2017. Authorities found Lehmann in his car, along with "all kinds of drugs": 32 grams of what Lehmann

believed to be heroin, 47 grams of methamphetamine, a half-ounce of marijuana, 32 Xanax pills, and "some suboxones." Lehmann was taken into custody and later pleaded guilty to conspiring to distribute drugs with Thornton.

Lehmann testified at trial that he first met Thornton at a Dollar Tree store in Lexington, Kentucky. There, Thornton gave Lehmann two grams of heroin for free. (The typical user amount for a single dose of heroin ranges from a tenth to a quarter of a gram.) At the time, Lehmann was consuming between two and three grams of heroin a day. Thornton brought his associate Darmon Shaw with him to the meeting. Thornton "directed" Lehmann to contact "Little Bro," as Thornton called Shaw, for any future transactions. Thereafter, Lehmann regularly purchased heroin from Shaw both for himself and to sell to his customers. Lehmann also testified that after he was incarcerated, he referred a customer, Brian Wylie, to Thornton for his heroin while Lehmann was in prison. Thornton then called Wylie and invited him to Detroit so they "could start doing business."

The second main character is Jerrod Doolin. In January 2017, Jared Sullivan, a special agent with the Drug Enforcement Administration, received a call that one of Doolin's drug customers had overdosed. Agent Sullivan eventually obtained a warrant to search Doolin's residence, and upon executing the warrant, authorities found heroin, carfentanyl, and other items indicative of drug trafficking. Doolin was not present during the search, but Jeff Ruggiero, a fellow drug trafficker, was there. Sullivan used Ruggiero to locate Doolin. Eventually, Sullivan and other officials performed a traffic stop of Doolin's vehicle, where they found cash and drug paraphernalia. While interviewing Doolin at the police station, Sullivan looked through Doolin's phone and found "text messages indicative of drug trafficking." A number of those messages came from an out-of-state phone number associated with Thornton. Doolin also identified Thornton,

known to him by Thornton's street name "Juice," as his drug supplier. Like Lehmann, Doolin purchased heroin and carfentanyl from Thornton but principally transacted with Shaw, whom Doolin also knew as Little Bro. During a three-month period between the end of 2016 and January 2017, Doolin purchased 30 grams of heroin or carfentanyl from Thornton and Shaw once or twice a week.

Based on this information from Doolin, Sullivan applied for an authorization order to obtain GPS location information for Thornton's out-of-state phone number. In his sworn affirmation in support of the application, Sullivan stated that Doolin had identified the phone number as belonging to Thornton, that Thornton had called Doolin from the number while Doolin was being interviewed by police, that local police knew Juice to be Thornton's street name, and that Doolin had identified Thornton as Juice in a photo lineup. The magistrate judge agreed that locating the cell phone would lead to evidence of controlled-substance offenses and granted authorization to obtain the location information.

According to the GPS data, the phone was consistently located at a residence in Detroit that matched the address on Thornton's driver's license. Authorities obtained a search warrant for the residence and an arrest warrant for Thornton, whom they took into custody after he left his residence in a vehicle with Shaw on January 19, 2017. Sullivan confiscated four cell phones from Thornton, one of which matched the cell phone number described in the authorization order. The officers then placed Thornton and Shaw in the back of a police cruiser where, unbeknownst to the arrestees, Sullivan was recording. The audio captured Thornton's voice as he used Shaw's cell phone to call his girlfriend and instruct her to tell her father to "get the guns out of the house," "flush" items in a backpack, and contact T-Mobile to ask whether "they could remotely wipe his phones."

At Thornton's residence, authorities found evidence that the house was being used to "cut or process drugs." Authorities also found a handgun, prescription pills, 99.6 grams of carfentanyl and 114.7 grams of a mixture of carfentanyl, heroin, and allergy medication—altogether equal to roughly 2,000 individual-use doses. In an interview following his arrest, Thornton admitted that those drugs belonged to him.

Before trial, Thornton filed a motion to suppress the evidence found at his residence and a motion to dismiss the indictment based on an alleged violation of his Sixth Amendment right to a speedy trial. The district court denied both motions.

A jury convicted Thornton of conspiracy to distribute a mixture or substance containing heroin and carfentanyl in violation of 21 U.S.C. § 846. Thornton's Presentence Report calculated his base offense level to be 30 for a drug offense involving the equivalent of more than 1,000 but less than 3,000 kilograms of marijuana, with a two-level sentence enhancement for possession of a firearm, four-level sentence enhancement for being the organizer or leader of a criminal activity involving five or more participants, and a two-level sentence enhancement for obstruction of justice. With Thornton's adjusted offense level and his criminal history, the probation office recommended a Guidelines range of 292–365 months. The district court agreed with the Presentence Report and, after considering the factors under 18 U.S.C. § 3553(a), sentenced Thornton to 292 months' imprisonment.

II.

Thornton raises four arguments on appeal. First, he argues that the court order authorizing collection of location data from his cell phone violated the Fourth Amendment. Second, he argues that his Sixth Amendment right to a speedy trial was violated. Third, he argues that the government

did not proffer sufficient evidence to sustain his conviction. Fourth, he argues that his sentence was procedurally and substantively unreasonable. We address each in turn.

A.

Under the Fourth Amendment, "a search warrant may be issued only 'upon probable cause supported by an oath or affirmation, and particularly describing the place to be searched, and the things to be seized.'" *Peffer v. Stephens*, 880 F.3d 256, 263 (6th Cir. 2018) (quoting U.S. Const. amend. IV).

Thornton contends that the court order authorizing the collection of location data from his cell phone violated the Fourth Amendment because it was supported by an "affirmation," rather than an affidavit, and that affirmation did not establish probable cause. We review these claims for plain error because Thornton failed to lodge these specific objections below. *See United States v. Buchanon*, 72 F.3d 1217, 1226–27 (6th Cir. 1995). Under that standard, Thornton must show (1) an "error," (2) that was "clear or obvious," (3) "affect[ed] [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation" of judicial proceedings. *United States v. Ramer*, 883 F.3d 659, 677 (6th Cir. 2018) (quotations omitted).

Thornton has not shown any error, let alone plain error. First, the government was free to support its application for a warrant by an "affirmation," rather than an affidavit. *United States v. Hang Le-Thy Tran*, 433 F.3d 472, 482 (6th Cir. 2006) ("The Fourth Amendment does not require that the basis for probable cause be established in a written affidavit; it merely requires that the information be given by 'Oath or affirmation' before a judicial officer.").

Second, the affirmation established probable cause. In assessing whether there is probable cause to issue a search warrant, the task of the issuing magistrate is to determine whether "there is a 'fair probability,' given the totality of the circumstances, that contraband or evidence of a crime

will be found in a particular place." *Id.* (quoting *United States v. Shields*, 978 F.2d 943, 946 (6th Cir. 1992)). To establish probable cause, a nexus must exist between the place to be searched and the sought-after evidence. *See United States v. Laughton*, 409 F.3d 744, 747 (6th Cir. 2005). Here, the affirmation stated that authorities stopped Jerrod Doolin, who had been identified as a heroin dealer and who had a distribution amount of heroin in his possession. Doolin, in turn, identified his supplier as an individual known to him as Juice. When questioned about a phone number in his cell phone, Doolin identified the phone number in question as one that Juice had used for three or four weeks. Local police knew Juice to be Thornton and had previously arrested him with 96 grams of heroin in his possession. Doolin confirmed that identification when he identified Thornton as Juice in a photo lineup. And while Doolin was being interviewed, Thornton called him and said that he had "150" for Doolin, which Doolin interpreted to mean that Thornton had 150 grams of heroin for him to sell. This evidence was more than sufficient to establish a nexus between Thornton's cellphone location data and drug trafficking offenses.

B.

Thornton also claims that his Sixth Amendment right to a speedy trial was violated. The Sixth Amendment guarantees in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. "The purpose of the speedy-trial guarantee is to protect the accused against oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that evidence will be lost or memories diminished." *Brown v. Romanowski*, 845 F.3d 703, 712 (6th Cir. 2017) (collecting cases). We review "questions of law related to speedy-trial violations de novo and questions of fact for clear error." *United States v. Sutton*, 862 F.3d 547, 554 (6th Cir. 2017) (citing *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994)).

In *Barker v. Wingo*, the Supreme Court established a four-factor test for determining whether a defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. 407 U.S. 514, 530 (1972). "[N]one of the four factors [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533. And even if all four *Barker* factors are satisfied, a court is not required to conclude that a defendant's speedy trial right has been violated. *Id.*

1. Length of the Delay

The first *Barker* factor—the length of the pre-trial delay—functions both as a triggering mechanism and as a measure of the severity of the prejudice suffered by an accused. First, the delay must be lengthy enough to warrant a constitutional analysis at all, "since, by definition, [a defendant] cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness." *Doggett v. United States*, 505 U.S. 647, 651–52 (1992) (citing *Barker*, 407 U.S. at 530–31). Delays of over a year "generally" satisfy the lengthiness requirement, thereby calling for the full *Barker* analysis. *Id.* at 652 n.1.

Here, the delay extended well beyond one year, as Thornton was indicted on February 9, 2017, and his trial began on February 25, 2019. Accordingly, we proceed to the other factors.

2. The Reason for the Delay

"In assessing the second factor, the reason for the delay, the court considers who is most at fault—the government or the defendant." *Romanowski*, 845 F.3d at 714. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government," while a "more neutral reason such as negligence or overcrowded courts should be weighted less

heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531.

Here, the overwhelming majority of delays were due to several pre-trial motions filed by Thornton, and no delays were solely attributable to the United States. This factor thus weighs in the government's favor. *See United States v. Taylor*, 489 F. App'x 34, 47 (6th Cir. 2012) (noting that, when a delay is caused by the actions of the defendant and his counsel by filing numerous motions, this factor weighs in favor of concluding that a defendant's speedy-trial rights were not violated).

3. Thornton's Assertion of his Right

The third *Barker* factor, the defendant's assertion of his right to a speedy trial, "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531–32. "Although a defendant does not waive the right to a speedy trial by failing to assert it, the degree to which the defendant has asserted the right is one of the factors to be considered in the balance." *United States v. Brown*, 169 F.3d 344, 350 (6th Cir. 1999) (citing *Barker*, 407 U.S. at 531–32). This factor is a measure of how quickly the defendant asserted his right to a speedy trial "in the context of the overall delay." *United States v. Watford*, 468 F.3d 891, 907 (6th Cir. 2006).

Thornton first referenced his right to a speedy trial on October 19, 2018, twenty-one months after his indictment. In the interim, he filed a host of motions requiring delay of his trial. Thornton's belated assertion "'cast[s] doubt on the sincerity of the demand' and weigh[s] in favor of the government." *Sutton*, 862 F.3d at 561 (quoting *United States v. Flowers*, 476 F. App'x 55, 63 (6th Cir. 2012)).

4. Prejudice to Thornton

The last *Barker* factor is concerned with the prejudice suffered by the defendant. "A defendant must show that 'substantial prejudice' has resulted from the delay." *United States v. Schreane*, 331 F.3d 548, 557 (6th Cir. 2003) (quoting *United States v. White*, 985 F.2d 271, 276 (6th Cir. 1993)). "[P]rejudice[] should be assessed 'in the light of' three interests: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern due to unresolved criminal charges, and (3) to minimize damage to the defense." *Sutton*, 862 F.3d at 561–62 (6th Cir. 2017) (quoting *Barker*, 407 U.S. at 532). Damage to the defense is the "most serious," *Barker*, 407 U.S. at 532, and the defendant must demonstrate "how his defense was prejudiced *with specificity*," *United States v. Young*, 657 F.3d 408, 418 (6th Cir. 2011) (emphasis in original) (quoting *United States v. Howard*, 218 F.3d 556, 564 (6th Cir. 2000)). When the defendant fails to "articulate the harm caused by delay, the reason for the delay (factor 2) will be used to determine whether the defendant was presumptively prejudiced." *United States v. Williams*, 753 F.3d 626, 634 (6th Cir. 2014) (quoting United *States v. Mundt*, 29 F.3d 233, 236 (6th Cir. 1994)).

Thornton vaguely asserts that he has been unable to properly prepare for his defense given his incarceration. But he provides no specifics. Because Thornton's filing several motions was the primary reason for the delay in his case, and there is no evidence that the government acted in bad faith or negligently to cause the delay, Thornton's Sixth Amendment claim must fail.

C.

We next consider the sufficiency of the evidence to support Thornton's conviction. We apply de novo review. *See United States v. Collins*, 799 F.3d 554, 589 (6th Cir. 2015). "A defendant challenging the sufficiency of the evidence 'bears a very heavy burden.'" *Id.* (quoting *United States v. Davis*, 397 F.3d 340, 344 (6th Cir. 2005)). In evaluating a sufficiency

challenge, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We "neither independently weigh[] the evidence, nor judge[] the credibility of witnesses who testified at trial." *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999).

Thornton was convicted of conspiring to distribute a controlled substance, in violation of 21 U.S.C. § 846. To establish a conspiracy under § 846, "the government must prove [1] the existence of an agreement to violate the drug laws and [2] that each conspirator knew of, intended to join, and participated in the conspiracy." *United States v. Volkman*, 797 F.3d 377, 390 (6th Cir. 2015) (quoting *United States v. Conrad*, 507 F.3d 424, 432 (6th Cir. 2007)). "The connection between a defendant and the conspiracy need only be slight," *id.* (quoting *United States v. Craft*, 495 F.3d 259, 265 (6th Cir. 2007)), and a "conspiracy may be inferred from circumstantial evidence which may reasonably be interpreted as participation in a common plan," *Conrad*, 507 F.3d at 432.

The government produced sufficient evidence to convict Thornton of violating 21 U.S.C. § 846. The evidence showed that Thornton developed business relationships with Jerrod Doolin and Thomas Lehmann, who then distributed drugs in the Lexington area. Thornton then directed them to work through another associate, Darmon Shaw, whom they knew as "Little Bro." For much of late 2016 and early 2017, Doolin purchased heroin several times a week from Shaw, who had received the heroin from Thornton. Doolin then turned around and sold the drugs to his own customers.

Thornton also supplied heroin to Lehmann, who in turn sold to his own clients around Lexington. Lehmann purchased his drugs from Shaw, as Thornton had directed. Thornton and

Shaw "fronted" some of the drugs that they provided to Lehmann, meaning that Lehmann paid only part of the purchase price when he obtained the drugs, and paid the balance back when he had sold drugs to his own customers. Lehmann purchased heroin from Thornton, through Shaw, for two months. In the weeks leading up to his arrest, Lehmann purchased between thirty and thirty-two grams at a time, several times per week.

On the day he was arrested, Lehmann purchased 32 grams (approximately 320 doses) of carfentanyl from Shaw. Also, after his arrest, Lehmann called Thornton from jail to suggest that Lehmann's associate Brian Wylie take over for Lehmann while the latter was in prison. Thornton then called Wylie to invite him to Detroit to join in his scheme, but Wylie refused to go. Both Doolin and Lehmann cooperated against Thornton, describing to law enforcement how they purchased heroin in Lexington from Shaw, who was supplied in Detroit by Thornton.

After his arrest, Thornton called his girlfriend demanding that she destroy evidence. A search of Thornton's vehicle revealed more than $900 in cash and four cell phones. A search of his residence revealed drug paraphernalia, nearly 100 grams of heroin mixed with carfentanyl, and approximately 114 grams of carfentanyl. The quantity of drugs represented over 2,000 individual doses with a street value of more than $20,000.

From this evidence, a rational factfinder could conclude beyond a reasonable doubt that there existed an agreement between Thornton and others to distribute drugs and that Thornton was an active participant in the scheme. Thornton regularly communicated with Doolin and Lehmann. He was arrested with Shaw in his vehicle. Both Doolin and Lehmann obtained their drugs from Shaw, who acted as Thornton's middleman.

Thornton claims that he was not engaged in a larger conspiracy, but rather he engaged in nothing more than a few individual drug transactions. To be sure, a "buyer-seller relationship

alone is insufficient to tie a buyer to a conspiracy." *United States v. Deitz*, 577 F.3d 672, 680 (6th Cir. 2009) (quotations omitted). But, we have "often upheld conspiracy convictions where there was additional evidence . . . from which the knowledge of the conspiracy could be inferred." *Id.* We have identified four factors in determining whether a series of drug transactions comprise part of a larger conspiracy: "(1) the length of the relationship; (2) the established method of payment; (3) the extent to which transactions are standardized; and (4) the level of mutual trust between the buyer and the seller." *Id.* at 681 (citation omitted).

Here, the evidence established far more than a simple buyer-seller relationship. Thornton was not a buyer, but rather a seller to, at a minimum, two buyers—Doolin and Lehmann. Thornton's relationship with those individuals lasted for several months, and at least as to Lehmann, involved sales on credit. *See United States v. Lopez-Medina*, 461 F.3d 724, 747 (6th Cir. 2006) (noting that "fronting" drugs to a buyer may demonstrate more than a mere buyer-seller relationship). Those sales were standardized, as Doolin and Lehmann regularly purchased 30 grams of heroin and carfentanyl multiple times a week through Thornton's middleman, Shaw. Evidence of repeated purchases involving large quantities of drugs is evidence of a conspiracy rather than a buyer-seller relationship. *United States v. Martinez*, 430 F.3d 317, 332–33 (6th Cir. 2005). Over the course of the conspiracy, Lehmann and Doolin received hundreds of grams of heroin and carfentanyl, which translated to thousands of individual doses. And there was significant trust between Doolin, Lehmann and Thornton. Both Doolin and Lehmann warned Thornton to be careful after they had been arrested, and Lehmann tried to find a replacement to take over his distribution ring while he was in custody.[1]

[1] Thornton briefly argues that the evidence is insufficient to sustain his conviction because the government failed to prove that he knew he was distributing carfentanyl rather than heroin. That argument has no merit because the government only had to prove that Thornton knew "that the substance he [was] dealing with [was] some unspecified substance listed on the federal drug schedules." *McFadden v. United States*, 576 U.S. 186, 191 (2015).

D.

Finally, Thornton challenges the procedural reasonableness of his sentence.[2] We review the reasonableness of a sentence for abuse of discretion. *United States v. Dunnican*, 961 F.3d 859, 880 (6th Cir. 2020) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). Any factual findings made at sentencing are reviewed for clear error. *United States v. West*, 962 F.3d 183, 187 (6th Cir. 2020). A procedural reasonableness challenge "requires us to ensure that the district court: (1) properly calculated the applicable advisory Guidelines range; (2) considered the other 18 U.S.C. § 3553(a) factors as well as [arguments for a sentence outside the range]; and (3) adequately articulated its reasoning for imposing the particular sentence chosen." *Id.* (quotation omitted) (alteration in original). Thornton challenges his base offense level and three enhancements that the district court imposed. We review each in turn.

D Base Offense Level

Thornton first challenges his base offense level of 30. "For defendants convicted of drug crimes, the base offense level at sentencing depends on the amount of drugs involved in the offense." *United States v. Averill*, 636 F. App'x 312, 315 (6th Cir. 2016) (citing U.S.S.G. D2D1.1(c)). The district court's drug-quantity determination is reviewed for clear error. *United States v. Rios*, 830 F.3d 403, 436 (6th Cir. 2016). In reaching that determination, "[t]he district court may rely on any competent evidence in the record." *United States v. Hough*, 276 F.3d 884, 891 (6th Cir. 2002).

[§] Thornton mentions, in a heading, that he is also challenging the substantive reasonableness of his sentence. However, he has failed to present any arguments as to why his 292-month sentence—which is at the very bottom of the Guideline recommendation—was substantively unreasonable. He has therefore forfeited his substantive reasonableness challenge. *See McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (first and third alterations in original) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed [forfeited]. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." (citations omitted)).

The district court held Thornton accountable for 672 grams of heroin and 32 grams of carfentanyl that Thornton distributed to Lehmann and 215 grams of carfentanyl that was found in Thornton's residence after his arrest. Those amounts, under the Guidelines, are equivalent to 1,286.8575 kilograms of marijuana, which sets a base offense level of 30. U.S.S.G. §2D1.1(c)(5), cmt. n.8.

Thornton contends that he should not be held accountable for the 672 grams of heroin and 32 grams of carfentanyl that were in Lehmann's possession. Under the Guidelines, a defendant's base level can be enhanced based on the acts of others within a conspiracy. *See* U.S.S.G.

A. 1B1.3(a)(1)(B). "[I]n order to hold a defendant accountable for the acts of others [under

B. 1B1.3(a)(1)(B)], a district court must make two particularized findings: (1) that the acts were

within the scope of the defendant's agreement; and (2) that they were foreseeable to the defendant." *United States v. Campbell*, 279 F.3d 392, 399–400 (6th Cir. 2002) (quotation omitted).

The district court made both requisite findings. The district court found that Thornton and Lehmann agreed to an arrangement whereby Thornton would traffic drugs from Detroit to Central Kentucky, where the drugs would then be distributed by other people. The district court then found that, because Lehmann contacted Thornton to be a distributor in Kentucky, it was reasonably foreseeable that Lehmann would possess Thornton's drugs.

Thornton contends that Lehman was an "unreliable witness" and thus lacked credibility. But, the district court concluded that Lehmann's testimony was credible. The district court heard evidence from Doolin and Lehmann that confirmed the drug quantity and heard other corroborating evidence that supported the drug quantity. We find no error in Thornton's base offense level.

B. Firearm Enhancement

Thornton next challenges his enhancement for a drug offense that involved a firearm. *See* U.S.S.G. § 2D1.1(b)(1). The enhancement applies "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 cmt. n.11(A). The government must establish by a preponderance of the evidence that a defendant possessed the firearm during the drug trafficking crime. *United States v. Miggins*, 302 F.3d 384, 390–91 (6th Cir. 2002).

Here, officers found a loaded .380 caliber handgun on a shelf on a mantel on top of several pills. It was in close proximity to the room where there was drug manufacturing equipment, drug paraphernalia, and over 200 grams of heroin and carfentanyl. And, when Thornton was in the back of the police cruiser after being arrested, he called his girlfriend to tell her father to get rid of the guns that Thornton had stored in his home. The district court did not clearly err in determining that the handgun found alongside several pills and in close proximity to heroin, carfentanyl, manufacturing materials, and paraphernalia, was used during the commission of the offense. Likewise, it was not "clearly improbable that the weapon was connected with the offense." U.S.S.G. §2D1.1 cmt. n.11(A).

§ **Aggravating-Role Enhancement**

Thornton next challenges his aggravating-role enhancement. The enhancement applies when a defendant was an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a)(1). "We review the factual findings of the district court on this issue for clear error and accord deference to the legal conclusion that a person is an organizer or leader under Section 3B1.1. *United States v. Olive*, 804 F.3d 747, 759 (6th Cir. 2015) (citing *United States v. Washington*, 715 F.3d 975, 983 (6th Cir. 2013)). Relevant

factors include "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1 cmt. n.4. In addition, a defendant need only have led "one . . . other participant[]." *Id.* § 3B1.1 cmt. n.2.

The district court did not err in imposing this enhancement. Thornton contends that the crime did not involve five people, but the district court found otherwise. Thornton's drug-distribution scheme involved, at a minimum, himself, Shaw, Lehmann, Doolin, and Ruggiero. There was also Wylie, who watched over Lehmann's drug supply and nearly took over Lehmann's role in the conspiracy, as well as several unidentified participants who were noted at trial. Testimony also showed that Thornton exercised a great deal of authority over his co-conspirators, that he actively participated in recruiting dealers, and that he sold drugs himself. The district court did not clearly err in imposing this enhancement.

A. Obstruction-of-Justice Enhancement

Finally, Thornton challenges the obstruction-of-justice enhancement. We review the district court's factual findings for clear error and its determination of the enhancement's applicability de novo. *See United States v. Watkins*, 691 F.3d 841, 851 (6th Cir. 2012). The enhancement applies where a defendant "willfully obstructed or impeded, or attempted to obstruct or impede . . . the investigation" that resulted in the defendant's conviction. U.S.S.G. § 3C1.1(1). Obstruction under the Guidelines includes "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation . . . or attempting to do so." *Id.* § 3C1.1 cmt. n.4(D). Where "such conduct occurred contemporaneously

with arrest," the enhancement applies if that conduct "resulted in a material hindrance to the official investigation or prosecution." *Id.*; *see United States v. Lineberry*, 7 F. App'x 520, 524–25 (6th Cir. 2001) (per curiam) ("Concealing evidence material to an official investigation or judicial proceeding, or directing or procuring another person to do so, or attempting to do so, will trigger an enhancement for obstruction of justice.").

The district court did not err in imposing this enhancement. After his arrest, Thornton made two phone calls to his girlfriend, in which he directed her to tell her father to dispose of the guns in his home, to flush contraband, and to erase Thornton's phones, among other things. In a third call, the girlfriend confirmed that her father did what Thornton had asked. Because Thornton attempted to "destroy[] or conceal[] or procur[e] another person to destroy or conceal evidence," U.S.S.G. § 3C1.1 cmt. n.4(D), which likely resulted in a material hindrance to the investigation, the district court did not err in imposing an obstruction-of-justice enhancement.

III.

For the reasons discussed above, we **AFFIRM** Thornton's conviction and sentence.

AO 245B (Rev. 12/18) Judgment in a Criminal Case Sheet I

Eastern District of Kentucky

FILED

AUG 21 2019

AT LEXINGTON

ROBERT R. CARR

CLERK U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

Eastern District of Kentucky - Central Division at Lexington

UNITED STATES OF AMERICA

v.

Lamar Chaves Thornton, a/k/a Juice

JUDGMENT IN A CRIMINAL CASE

Case Number: 5: 17-CR-26-SS-KKC-3

USM Number: 55325-039

Pam Ledgewood
Defendant's Attorney

THE DEFENDANT:

• pleaded guilty to count(s)

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

~ was found guilty on count(s) _l~ (Dg 65] after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & **Section**	**Nature of Offense**	**Offense Ended**	**Count**
21:846, 84l(b)(l)(B) & 851	Conspiracy to Distribute 10 Grams or More of a Mixture or Substance Containing Heroin and Carfentanyl, an Analogue ofFentanyl	January 19, 2017	lss

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

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

~ Count(s) Underlying Indictments [DE 9, DE 29] Dis IZI are dismissed on the motion of the United States.

1. - -

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

h t1_gg_s_t 15 , 2 0 1.2_ _
Dat:~ofIposition of Judgment
- . *011JA0_* / ~ -
Signa re fJudg/t

Honorable Karen K. Caldwe_ll_,_

Chi~f_Q.~._Di§.trictJuci_ge
Name and Title of Judge

8/a[J_llf- - -
Date

DEFENDANT: Lamar Chaves Thornton, a/k/a Juice
CASE NUMBER: 5: l 7-CR-26-SS-KKC-3

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Two Hundred Ninety-Two (292) Months

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

It is recommended the defendant participate in the 500-Hour RDAP Program.
It is recommended the defendant participate in a mental health program.
It is recommended the defendant participate in a job skills and/or vocational training program.
It is recommended the defendant be designated to a facility closest to his home in Detroit, Michigan, such as FCI Milan.

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

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

D at D a.m. D p.m. on

D as notified by the United States Marshal.

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

D before 2 p.m. on

D as notified by the United States Marshal.

D as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on to

at ___ ___ ____ __ ___ __ _ ___ _ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By

---- -- --- -

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Lamar Chaves Thornton, a/k/a Juice

CASE NUMBER: 5: 17-CR-26-SS-KKC-3

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Eight (8) Years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   D The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. D You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. IZI You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. D You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. D You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Lamar Chaves Thornton, a/k/a Juice

CASE NUMBER: 5: 17-CR-26-SS-KKC-3

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware ofa change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview ofProbation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature Date _____

DEFENDANT: Lamar Chaves Thornton, a/k/a Juice

CASE NUMBER: 5: l 7-CR-26-SS-KKC-3

SPECIAL CONDITIONS OF SUPERVISION

1. You must abstain from the use of alcohol.

2. You must not purchase, possess, use, distribute or administer any controlled substance or paraphernalia related to controlled substances, except as prescribed by a physician, and must not frequent places where controlled substances are illegally sold, used, distributed or administered.

3. You must refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing which is required as a condition of release.

4. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(l), but including other devices excluded from this definition), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search will be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

AO 245B (Re-v. 02/18) Judgment in a Criminal Case
Sheet 5 - Criminal Monetary Penalties

DEFENDANT: Lamar Chaves Thornton, a/k/a Juice
CASE NUMBER: 5:17-CR-26-SS-KKC-3

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVT A Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ *NIA*	$ Waived	$ Community Waived

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

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

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

$ $

D Restitution amount ordered pursuant to plea agreement $

D The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is

paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U .S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

D The court determined that the defendant does not have the ability to pay interest and it is ordered that:

D the interest requirement is waived for the D fin e D restitution.

- the interest requirement for the D fin e D restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount oflosses are required under Chapters 109A, 110, 1 lOA, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (R~v. 02/18) • Judgment in a Criminal Case
Sheet 7 - Denial of Federal Benefits

DEFENDANT: Lamar Chaves Thornton, a/k/a Juice
CASE NUMBER: 5: 17-CR-26-SS-KKC-3

SCHEDULE OF PAYMENTS

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

A ~ Lump sum payment of $ 100.00 due immediately, balance due

• not later than , or
IZI in accordance with • C, • D • E, or IZI F below; or

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

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

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

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

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

Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
101 Barr Street, Room 206, Lexington **KY** 40507

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

D Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number),* Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

D The defendant shall pay the cost of prosecution.

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

D The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,
(5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Case No. 19-5953

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LAMAR CHAVES THORNTON

Defendant - Appellant

BEFORE: SUHRHEINRICH, Circuit Judge; GIBBONS, Circuit Judge; BUSH, Circuit Judge;

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: September 02, 2020

Michael Martin Losavio

Attorney-at-Law
1642 Jaeger Avenue
Louisville, Kentucky 40205
Telephone (502) 417.4970
e-mail losavio@losavio.win.net

September 26, 2020

Clerk
Supreme Court of the United States
One First Street N.W.
Washington, D.C. 20543.

Re: On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit in Opinion Affirming United States v. Lamar Thornton, Case # 19-5903

Appeal from the Judgment of the U.S. District Court for the Eastern District of Kentucky,United States v. Lamar Thornton, Case # 17-CR- 000026

Filing of Motion to Proceed In Forma Pauperis Certiorari

Filing of Petition for Writ of Certiorari

Dear Clerk,

Enclosed is the **Motion to Proceed In Forma Pauperis** and the **Petition for Writ of Certiorari to the** U.S. Court of Appeals for the Sixth Circuit Case in the above-referenced case, and 10 copies of the same.

I am counsel of record for the Petitioner in the above-referenced case.

Thank you for your time with this.

Very truly yours,

Michael M. Losavio

C: Noel Francisco, Solicitor General.
Office of the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001this