No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DEMARIO DESHAWN SIMPSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

APPENDIX

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Case No. 20-1162

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEMARIO DESHAWN SIMPSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: SUHRHEINRICH, CLAY, and DONALD, Circuit Judges.

BERNICE BOUIE DONALD, Circuit Judge. Demario Deshawn Simpson challenges several aspects of his trial and sentencing. Simpson alleges that the district court erred by not accepting his guilty plea, and by allowing an expert witness to testify as to drug trafficking at his trial. Simpson also argues that there was insufficient evidence for the jury to find him guilty of his firearm convictions. Finally, Simpson contends that his sentence was both procedurally and substantively unreasonable. For the reasons set forth below, we AFFIRM the judgment of the district court.

I.

On the night of May 14, 2019, police officers with the Kalamazoo Department of Public Safety ("KDPS") observed a group of individuals congregating close to Krom Street in Kalamazoo, Michigan. The KDPS officers, who were surveilling that area in response to

numerous reports from earlier in the week of shots being fired, also noticed that one of those individuals, Travis Farris, was in possession of a large handgun. Soon after the police began monitoring the activity near Krom Street, Farris, along with Cornell Gordon, Robert Love, and Simpson, entered a maroon Dodge Charger and drove away from the scene. Believing that the firearm possession was sufficient probable cause for an arrest, the officers followed the vehicle and watched the men drive a few blocks before parking on Bush Street. As the police were approaching the Dodge Charger, Sergeant Justin Wonders thought he saw Farris exit the vehicle—a suspicion that he confirmed when he drove past the vehicle a second time and discovered that Farris was no longer in the car. After realizing that Farris departed from the vehicle, Sergeant Wonders picked up Officer Dan Boglitsch and, while driving, witnessed at least three figures in a nearby vacant field who appeared to be using their cell phones to search for something.

Sergeant Wonders, along with Officers Boglitsch and Greg Day, then proceeded to pursue the individuals in the field on foot. Once the police officers entered the vacant lot, two men—Gordon and Love—took off running. Both Gordon[1] and Love were eventually apprehended blocks away from the empty field and arrested by Officers Chad VanderKlok and Alex Marshall, respectively. As it would later be determined, there were actually four people in the empty field, and the other two individuals—Farris and Simpson—did not flee from the officers. Upon reaching the vacant lot, Sergeant Wonders encountered Farris, drew his gun, and instructed Farris not to move. Farris complied with Sergeant Wonders' request and was placed in handcuffs and under arrest. Following Farris' arrest, the police searched him and found $650 as well as a small bag containing 9.01 grams of heroin on his person. A subsequent canine search that transpired within

[1] The police were able to obtain footage from a dashboard camera that shows Gordon removing a handgun from his person and tossing it towards a parked vehicle. The police would later locate this firearm following Gordon's arrest.

close proximity to where Farris was arrested assisted the officers with recovering a Diamondback 9mm semi-automatic pistol, which Officer Boglitsch testified he saw Farris with (through image-stabilizing binoculars) when he was near Krom Street on May 14.

Officer Day was responsible for arresting Simpson. Simpson initially tried to escape, but tripped, giving Officer Day the opportunity to detain and arrest him. Immediately after being apprehended, Simpson said to Officer Day, "I was just looking for my cell phone." Following the detainment, Simpson freely consented to Officer Day searching him. During the pat down, Officer Day felt Simpson clench his buttocks—a typical tactic used to conceal narcotics—and knew from previous experience that Simpson was likely hiding drugs. Officer Day gave Simpson the opportunity to remove the drugs from his buttocks on his own; Simpson obliged, and Officer Day recovered a sandwich bag with 8.52 grams of heroin. Simpson even told the officers, "You caught me red handed with this dope." In addition to the drugs, Officer Day found a cell phone on Simpson's person. Simpson voluntarily allowed Officer Day to search his cell phone (and even gave him his passcode); however, the officer did not find any incriminating evidence on this device.

After Simpson was arrested, the police found two other pieces of evidence near a tree, close to where Simpson fell while trying to flee. The first piece of evidence was another cell phone. Even though Simpson had previously revealed to Officer Day that he was looking for his cell phone, Simpson denied that this second cell phone was his. Simpson ultimately confessed to Officer Day that he owned the second cell phone and gave Officer Day permission (and again, his passcode) to search his other phone. Officer Day testified that Simpson's second device had several messages indicating that he regularly engaged in drug-related activities. The second piece of evidence obtained by the police was a firearm—a Taurus, 9mm semi-automatic pistol. This

gun was located approximately five feet from Simpson's second cell phone. The police did not witness Simpson possess the gun, and neither his DNA nor his fingerprints were on the weapon, but body camera footage captured Simpson, moments before his arrest, trying to escape from the police, and with his right hand towards the ground by the tree.

Based on these events, the government filed an eight-count indictment, charging Farris, Gordon, and Simpson with committing various firearm and drug crimes. Simpson was charged with committing three crimes: possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(C) (count two); felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (count four); and possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (count seven). Although Farris and Gordon pleaded guilty, Simpson proceeded to trial.

Prior to his trial, Simpson attempted to plead guilty to count two of the indictment. The district court, however, denied Simpson's request. The district court reasoned that "the proofs regarding drug distribution, drug possession, and the quantities and the place found and all the rest is germane to the jury's . . . decision on whether or not if they find Mr. Simpson possessed a firearm [and] whether he was possessing it in furtherance of the drug-trafficking crime." The district court further noted, "we're not talking about a case where the charge [Simpson] wants to plead to is unrelated. In fact, I think it's, you know, intertwined completely with what's still got to be tried." As a result of the district court's decision, Simpson faced all three charges at trial.

Simpson filed a motion in limine before trial, seeking to prevent one of the government's expert witnesses, Agent Gregory Pond, from testifying. According to Simpson, Agent Pond was going to testify as a "drug-trafficking expert," discuss code words and lingo related to the drug trade, and explain that drug dealers protect their drugs with firearms. Simpson argued that Agent

Pond did not qualify as an expert and claimed that the jury would not benefit from hearing Agent Pond's testimony. The district court denied Simpson's motion, reasoning that Agent Pond's background made him a qualified expert witness, and that due to the circumstantial evidence pertaining to the firearm charges, Agent Pond's statements might be helpful to the jury.

At the conclusion of his trial, Simpson was found guilty of all three counts. Simpson subsequently filed a Rule 29 motion for acquittal and a Rule 33 motion for a new trial. The district court denied these motions. With those motions resolved, and the case in its sentencing phase, the probation office filed its presentence report. The district court later noticed that the presentence report had an error and corrected it by way of issuing an order to the parties. The probation office accurately grouped counts two and four (and excluded count seven), but mistakenly used the score for the controlled substance conviction as the controlling score for that group. The district court determined that though the base level for count four was 14 and the base level for count two was 12, the probation office should have used the score of 14 for that group, acknowledging that "the highest guideline score normally controls the group." All parties agreed with the district court's resolution.

During sentencing, Simpson's counsel asked the district court to consider a variance, stating "I think instead of making an argument that he is specifically entitled to a two-level reduction based upon his attempt to plead guilty, I think I would fold that into an argument regarding a potential variance in the case." To which the district court responded, "Right. I mean, if he . . . went to trial on just the two firearms charges we would be in exactly the same place on guidelines. Not a good argument for acceptance." Defense counsel agreed with the district court's assessment, then expressed that Simpson had issues with alcohol, and contended that the penalty for the § 924(c) conviction constituted severe punishment. The district court then considered the

§ 3553(a) factors, mentioning that a Guidelines sentence would cause Simpson to face more time in prison than he had experienced before, and indicated that, while incarcerated, Simpson would finally be able to focus on his alcohol addiction problem. The district court also stated:

> I frankly don't see the willingness that Mr. Simpson had to plead to the drug charges [as] a heavy factor bearing on variance, but it is at least a factor. It does tell me that Mr. Simpson was willing to take responsibility for what he felt he unequivocally had to take responsibility for. But since the heart of what the trial was all about, and the heart of what Mr. Simpson was not willing to take responsibility for was the firearm related activity, which elevated the overall seriousness and risks, if that alone were the basis for variance here I probably wouldn't do it, but in the overall mix, I think it adds some weight to the other factors that I described.

Considering all of the aforementioned factors, the district court sentenced Simpson to 24 months' imprisonment on counts two and four (to be served concurrently),[2] and 60 months' imprisonment on count seven. Simpson timely appealed, seeking for this Court to consider challenges related to his trial and sentence.

II.

A. Partial Guilty Plea

We review a district court's decision to reject a guilty plea for an abuse of discretion. *United States v. Doggart*, 906 F.3d 506, 509 (6th Cir. 2018). A criminal defendant does not have an "absolute right to have a guilty plea accepted." *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Cota-Luna*, 891 F.3d 639, 647 (6th Cir. 2018). Courts that decide to reject a guilty plea must exercise "sound judicial discretion" and "articulate a sound reason for rejecting [the] plea." *Santobello*, 404 U.S. at 262; *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990) (citation omitted).

[2] Based on the 14 offense level for counts two and four and Simpson's criminal history of VI, Simpson's Guidelines range for counts two and four was 37 to 46 months' imprisonment.

Simpson argues that the district court erred in denying his request to plead guilty to count two of the indictment. Specifically, Simpson contends that the district court's rejection of his request allowed the government to have the opportunity to present "highly prejudicial evidence" that would have been inadmissible had the court accepted Simpson's partial plea. When the district court denied Simpson's partial plea, it acknowledged that regardless of whether Simpson plead guilty to count two or not, the same evidence pertaining to the drug offense would have been admissible at trial since the government was required to prove that Simpson engaged in drug trafficking for a conviction of count seven. *See* 18 U.S.C. § 924(c)(1)(A)(i). Moreover, the district court explained that it was likely to Simpson's benefit that he be tried on all three charges because that would eliminate the possibility of Simpson making unfavorable admissions under oath during his plea colloquy, which would presumptively be considered admissible evidence. The district court additionally noted that Simpson could have stipulated during his opening statement that he was not contesting his guilt as it pertained to count two. In reaching its determination, the district court did not act in an arbitrary manner, *see Moore*, 916 F.2d at 1136, because it offered Simpson with not only practical, but sound reasons supporting its decision. *See Cota-Luna*, 891 F.3d at 648 (ruling that the district court abused its discretion by arbitrarily rejecting defendants' plea agreement based on its belief that the sentence agreed upon by the defendants and the government was too lenient). Consequently, the district court did not abuse its discretion by denying Simpson's request to accept his partial plea.

B. Admission of Expert Testimony

"This Court reviews for an abuse of discretion whether the district court properly admitted or excluded expert testimony under Federal Rule of Evidence 702." *United States v. Amawi*, 695 F.3d 457, 478 (6th Cir. 2012). Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 affords the district court "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). We have held that the Rule 702 analysis should be performed in three steps. "First, the witness must be qualified by knowledge, skill, experience, training, or education." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008) (quoting Fed. R. Evid. 702) (internal quotation marks omitted). "Second, the testimony must be relevant, meaning that it will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* (quoting Fed. R. Evid. 702) (internal quotation marks omitted). "Third, the testimony must be reliable." *Id.* (quoting Fed. R. Evid. 702).

For several reasons, Simpson asserts that the district court mistakenly allowed Agent Pond to testify as an expert witness. First, Simpson contends that Agent Pond was not qualified to be an expert. The district court found Agent Pond was qualified considering that he worked on criminal investigations as an agent with the Drug Enforcement Administration ("DEA") for 14 years. Before trial, the government pointed out that Agent Pond was involved in numerous investigations while working for the DEA (in Michigan, Missouri, and Afghanistan),[3] and attended multiple drug investigation training courses, which gave him the ability to candidly testify about

[3] Contrary to Simpson's claim that Agent Pond's credentials suggest that he primarily worked overseas, in addition to working in Afghanistan, Agent Pond also gained relevant experience in the United States.

how drug dealers use their firearms to protect their drugs. Furthermore, Agent Pond testified that he had been involved in hundreds of drug investigations, had five years of experience with local law enforcement before he became a DEA agent, and was deemed qualified to testify in another federal court. Based on his experience, the district court did not abuse its discretion in finding that Agent Pond was qualified as an expert. *See United States v. Lopez-Medina*, 461 F.3d 724, 743 (6th Cir. 2006) (finding a DEA agent with six years of relevant experience investigating drug crimes to be qualified as an expert witness).

Second, Simpson argues that Agent Pond's testimony was irrelevant because it would have been obvious to the jury that drug dealers carry firearms. Simpson also contends that it was unnecessary for Agent Pond to define the term "dope sick," which refers to how drug users feel after using heroin, since there are many resources available that explain what this term means. The district court ruled that because the firearm at issue was not found on Simpson's person, the government was going to have to present circumstantial evidence to prove that the gun found on the ground near Simpson in the vacant lot belonged to him. The district court decided that Agent Pond's testimony would assist the jury. Throughout his testimony, Agent Pond opined, *inter alia*, that drug dealers normally possess firearms for protection and intimidation. We have permitted such testimony previously. *See United States v. Swafford*, 385 F.3d 1026, 1030 (6th Cir. 2004) (holding that the district court did not plainly err by allowing an agent to testify that drug dealers carry firearms for intimidation and protection); *United States v. Ham*, 628 F.3d 801, 804–05 (6th Cir. 2011) (same). Our precedent therefore compels us to hold that the district court did not abuse its discretion in finding that Agent Pond's testimony was relevant. With regard to Agent Pond's comments about the term "dope sick," though his statements might not have been particularly germane to Simpson's charges, prior to Agent Pond's testimony, the court instructed the jury to

discretionarily "decide whether to accept some, all, or none of what Mr. Pond [said]" since Agent Pond was only testifying as a fact witness. Nevertheless, Simpson has not sufficiently shown that such testimony affected his substantial rights.[4] *See* Fed. R. Crim. P. 52(a); *see, e.g.*, *United States v. Robinson*, 872 F.3d 760, 780 (6th Cir. 2017).

Third, Simpson contends that the testimony presented by Agent Pond was unreliable because Agent Pond allegedly did not present to the jury a proven methodology demonstrating that his testimony that drug dealers carry weapons was well founded. In support of his argument, Simpson cites to *United States v. Freeman*, 730 F.3d 590 (6th Cir. 2013). In *Freeman*, we held that the testimony of an agent, who was testifying as a lay witness based on his personal knowledge under Federal Rule of Evidence 701, was inadmissible because the agent did not explain the basis of his interpretations of phone conversations, and therefore the government failed to properly lay a foundation under Rule 701. *Id.* at 596. Only after the Court made this finding did we assess whether the agent *might have* qualified as an expert witness. *Id.* at 599. The Court then stated that due to the fact that it was unclear what "methodology" or "guiding principles" he relied on to form his opinions, the district court likely would not have allowed the agent to testify as an expert. *Id.* at 600 (quoting *United States v. Johnson*, 617 F.3d 286, 294 (4th Cir. 2010)). In the instant case, Agent Pond based his testimony on his first-hand experiences deriving from 14 years as a DEA agent, which, as we mentioned above, our Court has deemed constitutes reliable evidence. *See, e.g.*, *Swafford*, 385 F.3d at 1030. Accordingly, the district court did not abuse its discretion as it pertains to the reliability of Agent Pond's testimony.

[4] Simpson claims that the portions of Agent Pond's testimony regarding the connection between drug dealers and firearms were prejudicial because Agent Pond "essentially told the jury that Mr. Simpson carried the gun." Simpson, however, mischaracterizes Agent Pond's testimony. Agent Pond only testified that drug traffickers in general—as opposed to Simpson specifically—are known to possess guns for protection and intimidation purposes.

C. Sufficiency of the Evidence

"We review de novo a challenge to the sufficiency of the evidence supporting a criminal conviction." *United States v. Carson*, 560 F.3d 566, 579 (6th Cir. 2009). Defendants "claiming insufficiency of the evidence bear a heavy burden." *United States v. Maliszewski*, 161 F.3d 992, 1005 (6th Cir. 1998). We evaluate such claims "in the light most favorable to the government and draw all inferences in the government's favor in order to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt." *Id.* (citation omitted). "In making this determination, however, we may not reweigh the evidence, reevaluate the credibility of witnesses, or substitute our judgment for that of the jury." *United States v. Martinez*, 430 F.3d 317, 330 (6th Cir. 2005). Additionally, "[w]e draw all available inferences and resolve all issues of credibility in favor of the jury's verdict, and it is not necessary for us to exclude every reasonable hypothesis but guilt." *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997).

Simpson contends that there was an insufficient amount of evidence presented for a jury to convict him of his firearm-related charges. Simpson alleges that he neither possessed the firearm (Taurus, 9mm semi-automatic pistol)—an element of counts four and seven, *see* 18 U.S.C. §§ 922(g)(1), 924(c)—nor possessed the firearm in furtherance of drug trafficking, *see* § 924(c). In response, the government argues that the circumstantial evidence presented in the case was sufficient for the jury to find Simpson guilty of both charges.

1. Count Four

To prove that Simpson violated 18 U.S.C. § 922(g)(1), the government was required to show that: (1) Simpson knew he had a prior felony conviction; (2) Simpson knowingly possessed the firearm; and (3) the possession was in or affected interstate commerce. *See United States v.*

Davis, 577 F.3d 660, 671 (6th Cir. 2009). Simpson only challenges whether he knowingly possessed the firearm at issue, so we evaluate the facts accordingly. We have said previously that under § 922(g)(1), a defendant "may be convicted based on either actual or constructive possession of a firearm." *United States v. Grubbs*, 506 F.3d 434, 439 (6th Cir. 2007). "Both actual possession and constructive possession may be proved by direct or circumstantial evidence." *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973), *abrogated on other grounds by Scarborough v. United States*, 431 U.S. 563 (1977).

Actual possession exists when a defendant "knowingly has direct physical control over a thing at a given time." *United States v. Bailey*, 553 F.3d 940, 944 (6th Cir. 2009) (quoting *United States v. Frederick*, 406 F.3d 754, 765 (6th Cir. 2005)). Additionally, there must be some evidence that the defendant had "immediate possession or control" of the firearm at issue. *Grubbs*, 506 F.3d at 439 (quotation omitted). Here, there was no actual possession because Simpson was not clearly holding the gun when the police apprehended him, and he was not seen with the firearm prior to his arrest. *See United States v. Workman*, 755 F. App'x 533, 537 (6th Cir. 2018) (citing *Bailey*, 553 F.3d at 944).

The constructive possession of a firearm requires that a person "*knowingly* has the power and the *intention* at a given time to exercise dominion and control over an object, either directly or through others." *Craven*, 478 F.2d at 1333. "[P]resence alone cannot show the requisite knowledge, power, or intention to exercise control over the unregistered firearms." *Bailey*, 553 F.3d at 945 (quoting *United States v. Birmley*, 529 F.2d 103, 107–08 (6th Cir. 1976)). "[O]ther incriminating evidence, coupled with presence is needed to tip the scale in favor of sufficiency." *Grubbs*, 506 F.3d at 439 (quoting *United States v. Arnold*, 486 F.3d 177, 183 (6th Cir. 2007) (en banc)) (internal quotation marks omitted). As we have noted in the past, it is critical

that any theories of constructive possession include facts demonstrating that a defendant had the "specific intent" to possess the firearm. *Bailey*, 553 F.3d at 945 (citing *United States v. Newsom*, 452 F.3d 593, 606 (6th Cir. 2006)).

Here, this is a close case because there is evidence supporting a finding both that Simpson did and did not constructively possess the firearm. However, it cannot be said that *no rational trier of fact* could have found the elements of § 922(g)(1) *beyond a reasonable doubt*. *See Maliszewski*, 161 F.3d at 1005. On the one hand, as the district court admitted, "[t]here's no confession. There was no eyewitness. There were no fingerprints or other evidence linking Mr. Simpson biologically to the firearm." Another important detail is that, in addition to Simpson, there were three other men in the vacant lot where the gun in question was discovered who each were searching for an unidentified object; therefore, the gun could have logically belonged to any of those individuals.

On the other hand, as the government asserts, the gun was found only a couple of feet from where Simpson was arrested. But, as we have previously explained, merely being near a firearm does not definitively prove constructive possession. *See Bailey*, 553 F.3d at 947; *but see Grubbs*, 506 F.3d at 440 ("When the defendant is found in close proximity to a firearm at the time of the arrest, the inference of dominion and control is particularly strong, and thus the incriminating evidence needed to corroborate the conviction is less."). While true, there is other supporting evidence indicating that the firearm discovered by the police was constructively possessed by Simpson. Simpson's second cell phone was positioned approximately five feet from the weapon. Simpson asserts that though his second cell phone was next to the gun, there were no pictures of him on his phone with the firearm (or on any of his social media accounts), but a rational trier of fact could have overlooked the absence of photographic evidence, considering that Simpson and

his cell phone were close to the weapon. Further, while the video footage of Simpson fleeing and potentially reaching for the weapon is inconclusive at best, it could have also led the jury to believe that Simpson constructively possessed the weapon.[5] Simpson is right that there were other men seen in the vacant lot not long before he was apprehended; however, the fact that he was the only one of those men close to the gun when the police arrived—not to mention that two of those men were arrested with firearms on their person[6]—casts doubt on whether anyone besides Simpson constructively possessed the gun.

Accordingly, when viewing the evidence in the light most favorable to the government, a rational trier of fact could have determined that Simpson constructively possessed the firearm. The gun was located next to Simpson's second cell phone, which Simpson admittedly used for drug-dealing purposes. Simpson also had drugs on his person when he was arrested. When those two facts are considered along with Agent Pond's testimony that drug dealers possess weapons for their protection and intimidation, the jury could have rationally concluded that Simpson *knowingly* had the power and *intention* to exercise dominion and control over the firearm beyond a reasonable doubt.[7] *Craven*, 478 F.2d at 1333. Again, the evidence does not directly confirm that Simpson constructively possessed the firearm, but, given the very high bar that Simpson has to

[5] Simpson cites to *Bailey* for the proposition that evidence of an attempt to evade arrest hardly proves that he constructively possessed the firearm. 553 F.3d at 946. This assertion ignores the other evidence mentioned above that *might* have caused the jury to convict Simpson of § 922(g)(1).

[6] We note that we are not in any way expressing that one of the other three men in the field could not have possessed multiple guns, but we only point this fact out to demonstrate that it *could* have influenced the jury's decision-making process.

[7] Simpson asserts that *Bailey* constitutes precedent that forces the Court to reach a different conclusion, but we are not convinced. In *Bailey*, the defendant was accused of possessing a firearm that was found underneath the seat of a car he borrowed. 553 F.3d at 946. But there, the defendant testified at trial that he was not aware the gun was inside the car, and that he did not have a gun on his person when he entered the car. There was also no evidence showing that he constructively possessed the firearm besides the fact that he happened to be in a vehicle where a gun was located. *Id. Bailey* is factually distinguishable from our case because here, the gun was found five feet away from Simpson and his second cell phone, and there is no evidence establishing that Simpson did not have a weapon on his person when he entered the open field. Although *Bailey* might be similar to the present case in some respects, it does not require the Court to conclude that Simpson could not have constructively possessed the firearm.

overcome for a sufficiency of the evidence challenge, we cannot find that there was insufficient evidence for a § 922(g)(1) conviction.

2. Count Seven

As it pertains to the conduct Simpson was accused of committing, the government was required to prove for a conviction of § 924(c) that Simpson "possesse[d] a firearm," "in furtherance of" a "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). Because we have established that Simpson constructively possessed the firearm, the only issue left is whether Simpson possessed the firearm "in furtherance of" a "drug trafficking crime." *Id.* In these instances, we typically turn to the *Mackey* factors to examine whether a defendant possessed a firearm in furtherance of drug trafficking. *See United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2001). These (non-exhaustive) factors include an assessment of: (1) whether the firearm was "strategically located so that it is quickly and easily available for use"; (2) "whether the gun was loaded"; (3) "the legality of its possession"; (4) "the type of drug activity conducted"; and (5) "the time and circumstances under which the firearm was found." *Id.* We have also made it clear that there must be "a specific nexus between the gun and the crime charged." *Id.* With those factors in mind, we turn to the facts of the present case.

When all of the *Mackey* factors are taken under consideration, there was enough evidence for a rational jury to have convicted Simpson of § 924(c). The gun was located within arm's reach of Simpson, giving him easy access to use the weapon. The gun was loaded. The gun was not legally possessed by Simpson. There was testimony at trial explaining that the heroin on Simpson's person was worth thousands of dollars, and he admitted that the drugs were his and that he sold drugs. The gun was recovered next to him and the heroin that he possessed, as well as his cell phone, which he used for drug-dealing transactions. Most importantly, all of these details are

indicative of a specific nexus between Simpson constructively possessing the firearm and Simpson constructively possessing the firearm to "aid[] or further[] a . . . drug-trafficking crime."[8] *United States v. Maya*, 966 F.3d 493, 500 (6th Cir. 2020). Therefore, the evidence was sufficient for a § 924(c) conviction.

D. Procedural and Substantive Reasonableness

A criminal sentence must be both procedurally and substantively reasonable. *United States v. Morgan*, 687 F.3d 688, 693 (6th Cir. 2012). The Court must assess the merits of a procedural reasonableness challenge before examining a substantive reasonableness claim. *Gall v. United States*, 552 U.S. 38, 51 (2007). When reviewing a district court's sentencing determination, the Court examines its reasonableness under a "deferential abuse-of-discretion standard." *United States v. Bolds*, 511 F.3d 568, 578 (6th Cir. 2007) (quoting *Gall*, 552 U.S. at 41).

Regarding procedural reasonableness, a district court abuses its discretion if it "commit[s] [a] significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51.

[8] Simpson cites to *United States v. Ray*, 803 F.3d 244 (6th Cir. 2015) in support of an alternative holding. In *Ray*, we said that the defendant *could not have* possessed *a shotgun* in furtherance of drug trafficking because it was unloaded and was not strategically located within reach to protect drugs that were found in the same room as the gun. *Id.* at 263–64. We also stated in that case that the defendant *could not have* possessed *a rifle* in furtherance of drug trafficking since there were no drugs in the same room where that firearm was found. *Id.* at 264. However, we additionally decided that the defendant *could have* possessed *a handgun* in furtherance of drug trafficking due to the fact that it was recovered in a jacket pocket in the closet that contained another jacket with illicit substances. *Id.* Considering the type of weapon found near Simpson (a handgun), and the proximity between the gun and the heroin found on Simpson's person, *Ray* only confirms that it was rational for a jury to find Simpson was guilty of violating § 924(c).

"A claim that a sentence is substantively unreasonable is a claim that a sentence is too long (if a defendant appeals) or too short (if the government appeals)." *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). The analysis is not whether "the district court failed to consider a factor or considered an inappropriate factor; that's the job of procedural unreasonableness." *Id.* Instead, substantive reasonableness asks whether "the court placed too much weight on some of the [18 U.S.C.] § 3553(a) factors and too little on others in sentencing the individual." *Id.*; *see also United States v. Bailey*, 931 F.3d 558, 562 (6th Cir. 2019). Further, "[t]he fact that [we] might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51.

Simpson argues that his sentence was both procedurally and substantively unreasonable for the same reason: the district court failed to consider his willingness to plead guilty to the drug charge. Regarding procedural reasonableness, Simpson is essentially claiming that the district court erred by "failing to consider the § 3553(a) factors." *See id.* When sentencing Simpson, the district court considered the § 3553(a) factors before deciding that it was appropriate to vary downward from 37 to 46 months' imprisonment to 24 months' imprisonment on counts two and four. As part of its analysis, the district court acknowledged that Simpson did attempt to plead guilty to the drug charge, but ultimately found that his concession did not have much of an effect on Simpson's sentence because he had no choice but to take responsibility for the drug crime due to the evidence that would be presented at trial. Therefore, Simpson's arguments pertaining to procedural reasonableness fail because even though the district court did consider his willingness to plead guilty to count two, the court did not believe his admission should have significantly affected Simpson's ultimate sentence. As for substantive reasonableness, the Court cannot find that the district court did not adequately balance the § 3553(a) factors in a manner that resulted in

Simpson receiving too long of a sentence. The district court fairly balanced all relevant considerations, and after doing so, found that Simpson was entitled to a downward variance. The district court did not abuse its discretion in weighing the § 3553(a) factors. Therefore, Simpson's substantive reasonableness arguments fail as well.

III.

For the foregoing reasons, we AFFIRM the district court's judgment.

UNITED STATES DISTRICT COURT

Western District of Michigan

UNITED STATES OF AMERICA

-vs-

DEMARIO DESHAWN SIMPSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:19-CR-137-02

USM Number: 22594-040

Scott Graham
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to Count(s) _____.

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

☒ was found guilty on Counts 2, 4 and 7 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Offense Ended	Count
21 U.S.C. § 841(a), and (b)(1)(C) Possession with Intent to Distribute Controlled Substances	May 14, 2019	2
18 U.S.C. §§ 922(g)(1), and 924(a)(2) Felon in Possession of a Firearm	May 14, 2019	4
18 U.S.C. § 924(c)(1)(A) Possession of a Firearm in Furtherance of Drug Trafficking	May 14, 2019	7

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

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 the United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: February 18, 2020

DATED: February 19, 2020

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **eighty-four (84) months, consisting of twenty-four (24) months on each of Counts 2 and 4, to be served concurrently; and sixty (60) months on Count 7, to be served consecutively to Counts 2 and 4**.

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

- That the defendant receive a substance abuse assessment and treatment, including the RDAP program.
- That the defendant receive educational and vocational training opportunities.
- That the defendant participate in the Life Connections program.
- That the defendant be placed as close as possible to his family in West Michigan.

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

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

- ☐ at _____ on _____
- ☐ as notified by the United States Marshal.

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

- ☐ before 2:00 P.M. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By:_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **three (3) years on each of Counts 2 and 4, and three (3) years on Count 7, all counts to run concurrently**.

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.

   ☐ 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. ☒ You must cooperate in the collection of DNA as directed by the probation officer.

5. ☐ 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)*

6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

7. ☐ 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)* 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.

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 of a 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 of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and treatment of substance abuse, as directed by the probation officer, and follow the rules and regulations of that program until such time as you are released from the program by the probation officer and must pay at least a portion of the cost according to your ability, as determined by the probation officer.

2. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), 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 may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

   The probation officer may conduct a search under this condition only when a reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

3. You must not use/possess any alcoholic beverages and shall not frequent any establishments whose primary purpose is the sale/serving of alcohol.

4. You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office will share financial information with the U.S. Attorney's Office.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

Assessment	Fine	Restitution
$300.00	**$1,200.00**	**-0-**

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

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

If the defendant makes a partial payment, each payee shall receive an approximately 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
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement.

☐ 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).

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

- ☐ the interest requirement is waived for the fine.
- ☐ the interest requirement is waived for the restitution.
- ☐ the interest requirement for the fine is modified as follows: _____
- ☐ the interest requirement for the restitution is modified as follows: _____

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

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 **$300.00** due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

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

C ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after the date of this judgment; or

D ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

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

F ☒ Special instructions regarding the payment of criminal monetary penalties:
The restitution and/or fine is to be paid in minimum quarterly installments of $25.00 based on IFRP participation, or minimum monthly installments of $20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment. Any balance due upon commencement of supervision shall be paid, during the term of supervision, in minimum monthly installments of $35.00 to commence 60 days after release from imprisonment. The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligations.

Unless the court has expressly ordered otherwise in the special instructions above, 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, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

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

☐ 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.

☐ The defendant shall pay the cost of prosecution.

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

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

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

_____

UNITED STATES OF AMERICA,

Plaintiff,

DOCKET NO. 1:19-cr-137

vs.

DEMARIO DESHAWN SIMPSON,

Defendant.

_____/

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE

GRAND RAPIDS, MICHIGAN

September 24, 2019

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by computer-aided transcription.

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* * * * *

Grand Rapids, Michigan

September 24, 2019

4:17 P.M.

P R O C E E D I N G S

THE COURT: All right. We're here on the case of the United States against Demario Simpson, 1:19-cr-137, for a final pretrial conference.

Let's start with appearances, please.

MS. LANE: Good afternoon, Your Honor, Erin Lane on

behalf of the United States. Seated with me at counsel table is AUSA Steve Baker and ATF Special Agent Ted Westra.

THE COURT: Thank you.

MR. GRAHAM: Good afternoon, Your Honor, Scott Graham on behalf of Mr. Simpson who is also present.

THE COURT: All right. Thank you.

We're here for final pretrial conference, and the thing I really wanted to start with is a little discussion of the issue that I framed. I saw the defense response. I don't know if the government responded -- I didn't see anything -- on potentially having the defendant plead to the drug charge straight up and then go to trial on the two firearms offenses. And I had concerns about that for reasons I alluded to and referenced in earlier cases. Particularly where the things that are going to be tried in that scenario, including possession of a firearm in furtherance of a drug-trafficking crime, it's going to overlap, it seems to me, to some extent with the proofs on this controlled substances offense. And I haven't had a chance to completely read the defense brief challenging the government's proffered expert testimony, but I saw a reference in there suggesting that maybe the defense view is, "Well, if he pleads to the drug charge, we can't have any evidence of the drugs." And I just think that's wrong. You know, so we can talk about that. But it seems to me when we have a standard 924(c) charge, part of what we instruct the

jury on in terms of deciding whether it was possession, first of all, but then if it was in furtherance of a drug-trafficking crime, is the circumstances under which the firearm and the defendant were connected, if the jury finds they were connected. And I know I've given instructions where one of the factors is the proximity to drugs or not. So I'm not sure if that's why the defense was considering that option or may still be considering it, but I want to hash that out. Because if that's the basis for it, I'm not so sure I agree with where the defense would be with the evidentiary restrictions. And if that's the case, maybe the defense doesn't want to do that anyway. That's kind of one overall point.

Second, a related point maybe, I don't understand what the defense gets out of a formal guilty plea with a colloquy that could then be used against Mr. Simpson. I think at least the statements he makes in support of an accepted plea would normally be admissible. Why would you do that? Why doesn't the defense get the same thing by just standing up in opening and saying "We're not contesting the drug charge"? You can do that, and I gave an example in my order of a case where that was done by the defense. So that was a concern.

And then, I guess -- well, that's probably a place -- oh, the last thing was, when I read the trial brief and things and the government's and the parties' joint submissions on instructions, it looked like everything was contested again,

and I didn't know if that was because the defense is no longer interested in evaluating that sort of hybrid approach or whether the parties were just saying, "Well, let's be ready in case the judge doesn't let us go that route for everything."

So let me understand, I guess, first of all, where you are, Mr. Graham, at the defense, and then I'll hear where the government is and we'll go from there.

MR. GRAHAM: Thank you, Your Honor. First, the really easy one is I think the instructions were prepared the way they were just in case you said no plea.

THE COURT: All right.

MR. GRAHAM: That was all. We realized that if the plea was offered, there would have to be some modification to the instructions. I don't think a difficult modification. I think pretty straightforward.

THE COURT: All right.

MR. GRAHAM: On the question of whether Mr. Simpson should be allowed to plead guilty to the drug charge and the reasons why, if I was not clear about what I think the government can do, let me try to be clearer right now.

I've never taken the position or never meant to take the position that if he pled guilty that there could be no evidence whatsoever regarding drugs or the circumstances. I think that's something that, you know, would be -- you'd have to take a look at. The government would have to indicate where

it's going. It doesn't make sense to me that they retry the entire case. But I'm not saying that they can't do that. I'm not saying he'd plead guilty and there could be no evidence from a witness that he was found with drugs or admitted that he had drugs, because there are admissions that are part of the government's listed proof.

This is purely a tactical approach to the case, and it, frankly, comes from, you know, having tried a number of cases where the -- well, it's generally drugs. The drugs are not the subject of a plea and then getting into the awkward -- it just seems more awkward when that issue is hanging at trial. Even if I stand up in opening and say -- even if I stand up in jury selection and somehow telegraph that there's going to be no dispute regarding the drugs.

It seems to me that -- and, frankly, there is a question. He comes in and he admits what he did, but he doesn't want to admit what he didn't do. That's a tactical, I think, approach to the case. That's what my thinking was. Whether or not it, you know, dovetails with the --

THE COURT: How does the -- if that's the tactical approach -- and I get it, that's sort of the tactic that the lawyer used in the one case I cited -- why don't you get the same tactical advantage by standing up at trial and saying, "Hey, you know, we're not going to contest the drug case, but we are contesting the firearms case." I mean, why is that

different than having him swear under oath in advance and be adjudicated guilty of a drug offense? Which, I mean, the other thing I don't even know, if he's adjudicated of an offense before trial and he's convicted later at trial of felon in possession, is the drug offense a predicate for an ACCA because it happened before trial? I mean, those are things I would rather not deal with. I know it wouldn't be a predicate if he's convicted at the same time of the firearms offense, but I don't know if it is if we did it today and a week later he's convicted of a firearms offense. So those are the things I worry about. Particularly if the proofs are going to be functionally so similar as to not tell a difference anyway.

MR. GRAHAM: Well, we've evaluated -- I understand the Court's point. I just wanted you to know that we've evaluated the question of whether or not there is an ACCA predicate issue and we're comfortable with that point. I realize it might lead to other issues. And --

THE COURT: Just so I'm clear, you're comfortable he won't be ACCA-qualified, but what about if he's convicted by guilty plea of a drug offense today and down the road he's convicted of a firearm offense, you're saying that that wouldn't be -- the drug conviction wouldn't be a predicate?

MR. GRAHAM: I don't believe it would be a predicate.

THE COURT: I see.

MR. GRAHAM: I think it would be part of the same

transaction. In fact, there's another question here, and that is, that gets to acceptance of responsibility. In a case -- for example, the worst-case scenario for Mr. Simpson where he pleads guilty or is convicted of the drug offense, if he were to come in and plead, I think he would be entitled to the two-level acceptance reduction on that. And at least for the purpose of a guideline range, I think it would be exactly the same for that count after a trial.

THE COURT: That may be. The guideline issue came up in the other case too, and I think I dealt with it on a variance at that point. But I understand why you might be worried about the guidelines, and that's a fair question.

The other thing, though, just sticking with the tactics, I guess, one of the elements of one of the charges that would be going to the jury for sure, 924(c), is the drug-trafficking crime. So it's not like it's even hard to present an opportunity to the jury to say, you know, here is what we admit and here is what we don't. You know, you'd say don't worry about that element because we're not contesting it. You know, all we're contesting is the possession of the firearm. He never had it or the government hasn't proved he had it, let alone in furtherance of that crime. I mean, I'm trying to grasp, I guess, what tangibly you're getting out of it considering all the things I'm worried about, I guess, of, you know, trying to anticipate all the things that could go

wrong that I haven't thought of by having a defendant who is otherwise protected by the presumption of innocence, you know, partly give that up and partly not. That's what concerns me.

MR. GRAHAM: In all candor, I think there's a certain component that it's just hard to go to trial and admit, you know, you should lose part of it. I mean, that's just an aside. But that maybe doesn't impact. So the thinking is when you've seen the impact of that on juries -- and I know you probably have -- it's something that here caused me to make a decision that tactically we'd want to go forward with the plea.

But -- and I also understand that this is going to be a simple and I think a very short trial. You know, I think we're talking about four government witnesses. And, you know, the way things normally go for the way you run the trial docket or the trial day, that first day, I mean, if we have a jury before the first break, you know, we're going to be plugging into witnesses. So it's going to be simple there as well for the jury. And maybe that makes it easier for them to understand when I say we admit Count 2, we're not contesting Count 2, or whatever words I would choose. But on the whole, it would be my preference still, thinking that any problems can be avoided, it would be my preference to offer the plea of guilty before.

And maybe if -- you know, the other worry that I have is in regard to the government's proofs, if the government's

proofs regarding their noticed expert, the statement that we're really contesting here, as really being the rub, is the statement that this expert is going to say that drug dealers have determined that the police can't protect them, so they carry guns themselves. And I don't want to get into argument on that particular motion, but that's certainly really the piece of evidence that we really contest the most, although we think he's not qualified to begin with. But that's the real rub on that. And if that opens the door to more proof of that type from the government, then certainly tactically I feel very strongly that we would like to tender the plea. If it doesn't have any impact on what evidence is going to be offered on that, then there's probably no benefit to us I would have to admit.

So I know I haven't given you a real probably clear and good answer, but it's a somewhat difficult question. But I do believe that the problems could be -- could be dealt with if he's allowed to offer the plea. So it still would be our request, but I recognize the Court's concerns.

THE COURT: Okay. Thanks.

Let me hear from Ms. Lane on the government's position.

MS. LANE: Thank you, Your Honor. Just to verify, the documents that were filed with the Court do include all counts just in case there was not a plea that was accepted by

the Court today. So we were anticipating preparation for all that might come in trial.

Also, the government's concern, not wanting to get involved in defense strategy, of course, in whether the defendant chooses to plead or not in this case, our real area of focus is, of course, evidentiary restrictions.

As the Court has noted, an element of Count 7, the possession of a firearm in furtherance of drug trafficking, itself contains a reference to Count 2, the possession with intent to distribute heroin. And so an element of that offense is the Count 2 itself. And so the government would request the ability to put on proofs to prove all the elements contained in Count 7. And specifically the possession with the intent to distribute heroin contained in Count 2.

In fact, of course, one of the elements of the government's theory is that the defendant here possessed a firearm because he was distributing a controlled substance. And so in that way the government would like to ensure that we're able to put in proofs, either -- if the plea doesn't go through today to fully explain our case at trial.

THE COURT: So let's say it does go through on the whatever count it is -- 2, I guess -- in your view, what, if any, proofs are off the table for you at trial? Or do you just try the same proofs that you'd otherwise have if all three were in the case?

MS. LANE: I think that Mr. Graham is correct in that this is a very straightforward case, and so I don't necessarily see any proofs as being off the table because the proofs are fairly straightforward. We would need to be able to prove that the defendant possessed a controlled substance with the intention to distribute it in order to fully prove Count 7. And also we'd need to specifically prove that the defendant possessed -- or at least make reference to the defendant's plea of guilt to Count 2 because Count 2 itself is named in Count 7 of the Indictment. And so I think that the government would be able to put on and needs to be able to put on evidence to fully prove all of the elements in 7 that relate back to Count 2.

THE COURT: All right. And does the government have a position one way or the other on whether a person in Mr. Simpson's position can insist on the ability to tender a plea if he wants to?

MS. LANE: The government has completed research on this issue, preliminary research, and found support for the defendant's position in the Seventh Circuit and in the Tenth Circuit, but specific to this case the government doesn't take a position, doesn't want to get involved in the defense strategy necessarily.

THE COURT: All right. Anything else on this issue? And then we can go on.

MR. GRAHAM: Not from me, Your Honor.

THE COURT: Okay.

MS. LANE: Nothing.

THE COURT: Help me get a better sense of what the parties do anticipate by way of proof. And we'll just start with you, Ms. Lane. It sounds like you don't really anticipate the proofs changing much either way from your perspective, so give me an outline of what you expect. And in particular how much time you'll need.

MS. LANE: Your Honor, the one proof that we would need to put on if the defendant wasn't able to plead to Count 2 today, of course, would be a lab technician to prove that the substance that the defendant possessed on the date in the Indictment, date and time -- or date named in the Indictment was in fact heroin as alleged in the Indictment.

THE COURT: All right. Except if the defense stipulates to all of that, you wouldn't need it.

MS. LANE: Potentially, yes, Your Honor.

THE COURT: All right. Okay. So how much time? How many witnesses?

MS. LANE: So at this point the government anticipates four total witnesses.

THE COURT: And that includes the expert that the defense is challenging?

MS. LANE: Correct.

THE COURT: Okay.

MS. LANE: And we would have five total witnesses if we needed to call a lab technician.

THE COURT: Okay.

MS. LANE: We have approximately 13 exhibits. And we anticipate that the trial might be able to be completed in one day but possibly could go into a second day.

THE COURT: All right. Okay. And other than the potential lab tech and the expert that the defense is challenging, Agent Pond, they would be fact witnesses? Other than Agent Pond and potentially the lab tech they would be fact witnesses?

MS. LANE: We are calling three different police officers --

THE COURT: I see.

MS. LANE: -- who will provide factual testimony.

THE COURT: Okay.

MS. LANE: And then the expert who will provide opinion testimony potentially. And then possibly the lab technician who would also be a fact expert.

THE COURT: All right. Thank you.

MS. LANE: Thank you.

THE COURT: From your perspective, Mr. Graham, it's probably too early to say whether the defense plans a case, but if you do have one, how long do you think it extends it? And does the decision depend one way or another on whether or not

Mr. Simpson pleads to the drug count?

MR. GRAHAM: The length of the defense case would not change based upon a plea or no plea. I believe that if there was going to be a defense case, it probably would take a very short amount of time. Less than an hour. Maybe a half-hour. And I don't -- you know, recognizing -- I know the Court recognizes things can happen, but very short, if any, case from the defense is anticipated in regard to that. And there's not going to be a need for a lab technician unless the government wants to call one despite our willingness to stipulate.

THE COURT: Okay. Thank you.

While we're talking about the trial, I know the defense filed a motion on the special agent. I didn't get that until I was on the bench with other things, so all I've had a chance to do is skim through it.

Do you want to highlight your position on that, Mr. Graham, and we'll go from there.

MR. GRAHAM: Well, Your Honor, just to highlight what our position is, because we think we've thoroughly discussed it, so when the Court has a chance to digest. I'm sorry for the late filing, but the notice -- the notice of Agent Pond was very recent.

In the first place, we don't think that he is qualified by experience in terms of what's been proffered to offer an opinion. We're not sure how much time he's spent on

the street. We're not sure how much time he has been immersed in law enforcement creating experience that would allow him to testify.

We're also very concerned, Your Honor, about whether or not Agent Pond would offer an opinion on the ultimate fact. In this case where we have one gun in dispute and one person in dispute, Agent Pond wants to testify apparently that as a general rule, without knowing Mr. Simpson or his case, that people who sell drugs possess guns because they don't trust, I guess, the police to be able to protect them or they'd need the guns for protection.

Here I don't know how a jury escapes the fact that Agent Pond is talking about Mr. Simpson. He's not talking in general. He's talking about this set of facts and this person. Everything is boiled down, is distilled so much that it seems to me that it's very clear he is offering testimony on the ultimate question for the jury to decide.

And then finally, if he's going to say a person who sells drugs might be more likely to have a weapon, that just seems to us to be clearly within the understanding of the jury. I don't think there's anything difficult about what an agent would say, any background needed. Either the person has a gun for protection, there's some evidence of that, or not. So the danger here is extreme. The prejudice would be extreme.

And I guess, Your Honor, in terms of the authority we

rely upon, we think that the Sixth Circuit's decision in Rios, which was a case involving the Holland Latin Kings that, you know, was of some note some time ago, where the Court talked about that very thing, about a law enforcement agent talking beyond -- offering opinions that were inappropriate -- in that case harmless based on the Court's decision -- but offering opinions that really were on items that were within the jury's ability to understand. The question like do people involved in a gang, in a street gang, use what are referred to in that case as "nation guns"? Here it seems to us that the instruction from Rios covers exactly what we're talking about here. And here we in fact think there's a lot more danger because, again, everything is so distilled. One statement about what someone who possesses drugs would do in regard to a weapon and one person sitting here charged. So those are the highlights, if you will, of our position, Your Honor.

THE COURT: Okay. Ms. Lane.

MS. LANE: Thank you, Your Honor. I'll similarly provide the Court with highlights of a response. I also had the chance to skim the motion, and I'm happy to provide further briefing if the Court needs or requests.

But in my first-blush reaction to the motion and in my research following that motion, I'll note that the Sixth Circuit has permitted experienced drug investigators to testify as narcotics experts regarding aspects of drug

transactions. And specifically because this information is unlikely to be within the knowledge of an average juror. And I have a string cite of cases that support this proposition in the Sixth Circuit. A few of most interest are the United States versus List, 200 F. App'x 535, Sixth Circuit (2006), and United States versus Swafford, 385 F.3d. 1026, Sixth Circuit (2004).

In addition, I noted that the Sixth Circuit has long held that expert testimony on specifically the role of firearms, the role that firearms play in drug trafficking, is relevant, admissible evidence. The court held this in Swafford, pin cite 1030. The Court also held this in List, pin cite 545.

The Sixth Circuit has also noted that most courts have taken a very tolerant view of the admissibility of expert testimony which links the presence of a firearm to drug-trafficking activities. The Court stated this again in Swafford and in so doing was quoting the United States versus Thomas, 99 F. App'x 665, Sixth Circuit (2004), which was citing United States versus Allen, 269 F.3d. 842, Seventh Circuit (2001).

And in the United States versus White the Sixth Circuit found that testimony regarding tools of the trade, firearms, has become utterly routine in drug-distribution cases. So that is my reaction to the

government's motion and why I think that the Court should deny the defense motion to limit or deny the expert testimony specifically in this case.

THE COURT: Okay.

MS. LANE: Thank you.

THE COURT: Thank you. Are there other -- I have one thing I need to tell you about, which is an unusual scheduling contingency. Fortunately, given that it's a short trial, I think we'll be able to work around it. So let me put that on the table.

I got summoned to jury duty in Kent County Circuit Court the week of October 7. So I have to call on Friday the 4th after hours to see if they need me Monday. That won't interfere with this trial. The last time I went -- and I've had to go, I guess, within the last few years -- on the first day I -- you know, I could determine whether I was going to be in service or not, and I didn't get drawn.

If that happens, you'll be able to come here on Tuesday and we'd go ahead just as scheduled. If I, you know, have to be there, then I'm going to have to keep you up-to-date, just like me, on when we could actually start. But if we have only that one or maybe two days, hopefully we'll be able to fold it in and work around whatever happens to me in jury duty.

This, of course, will be the time that I'll get

picked because it will be really inconvenient. But I have to think one side or the other is not going to want a judge on the jury, but you never know. So I want you to be aware of that. As we learn things, we'll keep you up-to-date. So plan for now that we'll get to start on time, but please recognize we might have some juggling that week.

Are there other things from the parties' perspective? And then we can talk about the thing we started with first and I'll give you a decision. Anything else from the government?

MS. LANE: The only issue that does come to mind when revisiting the first issue we discussed this afternoon is the potential appellate risk of not allowing the defendant to go forward today on his wish to plead guilty to Count 2 and then if he is convicted of Count 2 at trial he may lose out on guideline acceptance points and that could result in an appellate risk, and I did want to note that for the Court's consideration.

THE COURT: All right. Anything else?

MR. GRAHAM: No, Your Honor. Thank you.

THE COURT: All right. Well, thank you to the parties. As I said in my order asking you to be prepared to talk about this, I've had it come up in two ways. In 12 years that's not much. The one way which the parties were anticipating, more like this group, what I'm calling a hybrid approach, "Hey, what if I plead to some of these and not others

and I plead straight up to the ones that I want to plead to?" And ultimately we went through some hearings on it and I didn't have to make a final decision because the parties structured a deal that avoided it. And then the other being a situation where for tactical reasons the defense at trial wanted not to contest what was in that case a marijuana grow operation charge but did want to focus on the firearms offenses and did that. And nobody asked me in advance for the ability to do a pretrial plea on one thing.

You know, I've looked at the authority too. There isn't a lot of it. Probably because it doesn't come up that often. I would say, 1, I don't think there's a constitutional right to plead guilty. I think your constitutional right is to go to trial. There is, though, some authority, as both sides have indicated, in other circuits to suggest that if a defendant wants to come forward and does come forward and can give a proper factual basis and all the rest, a straight-up plea ought to be accepted and the court at the trial level may not have discretion not to do it. That said, you know, some of the strongest statements appear in cases like the Tenth Circuit case where I think it's really dicta, United States against Martin, for example, because there wasn't a factual basis there. And part of me thinks everybody has a constitutional right to go to trial. And at least in the absence of something forceful and unequivocal from the circuit that says you also

have a right to plead guilty, it seems odd to me that I should be deprived of discretion, I guess, to reject it and say, "Look, we're going to go to trial on the case."

I might think, well, you know, if we're in a situation where the charge the defendant wants to plead to is totally unrelated to the charges that are going to trial, so let's say there's a child pornography charge and then drug possession with the intent to distribute and the person is thinking, "Look, you know, I'm going to take child pornography off the table because nobody is going to be listening to what I have to say about the drug charge," I would be tempted in that case to say maybe. You know, even if there isn't a constitutional right, maybe the rule would be read or could be read or interpreted to say the trial court ought to allow the defendant the opportunity to take that potentially inflammatory prejudicial charge out of play. But here I just don't see it. I see the case shaping up to be pretty much the same case regardless of whether Count 2 is pled out in advance. And that's because I think the proofs regarding drug distribution, drug possession, and the quantities and the place found and all the rest is germane to the jury's, the fact-finder's decision on whether or not if they find Mr. Simpson possessed a firearm whether he was possessing it in furtherance of the drug-trafficking crime. And in fact the drug-trafficking crime is actually one of the elements that the government has to

prove. So it goes against my grain to say that a defendant should have the right pretrial to admit under oath in a plea colloquy, give up the right -- or the presumption of innocence on something that the government has got the burden to prove on a charge that everybody is going to trial on. It just feels wrong.

And, yes, maybe there are appellate risks. There's probably appellate risks here either way. But I think if I analyze appellate risk and I think the defendant is going to get a fair trial, a constitutional -- a constitutionally protected right to trial with a presumption of innocence and all that goes with it, it's hard for me to see any prejudice, at least on this record. Again, we're not talking about a case where the charge he wants to plead to is unrelated. In fact, I think it's, you know, intertwined completely with what's still got to be tried. So under those circumstances, you know, I think the Court does have discretion and should have discretion to say we'll go to trial on the whole natural case unless a defendant wants to give up the presumption completely. And, of course, he doesn't want to do that and for good reason. I don't see how the defendant is harmed in that to the extent there's any tactical value in showing the jury you're ready to admit what you are responsible for in your view and simply contest what you're not.

I think there's multiple ways to deal with that, from

Mr. Graham's standing up in opening, from the parties crafting additional stipulations that can be submitted to the jury so that it's clear to everybody what's being contested and what's not being contested. And by the same token those kinds of things weigh on the eventual questions of acceptance of responsibility or other guideline issues as well if we get to that point in the case and if there are convictions. So I think whatever tactical value there potentially could be is so limited that I really can't see daylight between the tactical value of admitting it in some way at trial or trying to go forward with a plea colloquy. And I do see risks, the risks of the unknown in going forward with the plea colloquy. There are going to be statements that Mr. Simpson makes in support of the plea colloquy. Although I know Mr. Graham will be vigilant, suppose something comes up that he doesn't expect in the course of the plea colloquy. If the plea is accepted, you know, that's presumptively admissible proof. It's something that we don't have to worry about if Mr. Simpson doesn't have to say things under oath today.

It may well be that there's not a realistic risk of the conviction today on a drug offense being a predicate offense for career offender or ACCA or anything else, but potentially things would be different than if all of the convictions happened in front of the same fact-finder on the same -- the same verdict form. I just can't think of all the

permutations of what might go wrong, which is why I feel much more comfortable submitting what I'm calling the whole natural case to a single fact-finder, namely, the jury.

So under those circumstances I am going to go ahead and prepare the case for trial on all three charges. We'll leave it to the parties to decide what, if anything, they want to agree on. Whether it's the quantity and type of drugs, whether it's the whole element of Count 2, the drug-trafficking crime, any of that. Or nothing. We'll let that be up to the parties. I think those are the people who have the best view of managing that.

And then with respect to Special Agent Pond, I'll give the government a few days to submit whatever you want to on that. If you can do it by the weekend, that's great, because I have another trial starting next week, so it would be nice to have it by the weekend.

I'll tell you for planning purposes for both sides, my instinct is to say that the special agent probably will be allowed to testify. The credentialing, whether he's qualified, of course, will have to be a view of the Court, but I've looked at least generally at what was attached to the defense brief in the government's statement of his general credentials, and although Kabul is on there, so is Kalamazoo, St. Louis, and 14 years of work for the DEA. I think the other issues that Mr. Graham raises can and are properly addressed on cross as

opposed to admissibility or not, but that's my instinct at the moment.

I agree that particularly where you've got, you know, the concentrated focus on a single firearm, a single defendant, there's the risk that what the witness has to say in general, not based on experience in this case, could be translated or heard as testimony on the ultimate issue. You know, Defendant Simpson did it. I think that's my job to be vigilant on if I allow the special agent to testify. Make sure the jury instructions, both written and the ones I give orally, make it clear that the testimony is strictly a matter of a general purview of the witness to the extent the jury wants to credit it and nothing else. I think, though, that the instructions can handle that, and, you know, have ordinarily handled it in other cases, though I will wait to make a final call on that until I go back and read Rios and any of the other authority that the defense has cited and see what the government has to say. But for planning purposes, I would want the parties to expect the most likely result to be that the special agent will be allowed to testify.

On that the only other question I had is why it was submitted for restricted-access filing.

MR. GRAHAM: I think -- I'm not sure, but I withdraw the request for restricted-access filing.

THE COURT: Okay. So let's just do it on the public

record, because I didn't see anything in there that wasn't already a matter of public record.

Are there other things that would be helpful to the parties in preparation? I don't know if you have exhibits ready to go yet or if you're still finalizing them.

MS. LANE: Your Honor, you'd just like a summary of what to anticipate?

THE COURT: No, I'm just wondering -- I don't know if there's anything else. Sometimes if the parties have the exhibit book ready, the defense already knows they are going to be challenging the following three or not. Anything that would save time later is what I'm looking for.

MS. LANE: I've shared with the defense the majority of our exhibits just this afternoon. I don't anticipate any challenges, but maybe I'll let the defense speak to that.

MR. GRAHAM: Your Honor, I'm not anticipating anything right now. And also I think that probably most of the exhibits will be admitted without objection. So we'll take a look at that to try to expedite. But I'm not aware of one right now.

The only other thing I would note, just for the purpose of noting it, is we may have an exhibit that would be a drawing, a sketch, if you will, of the scene. Everything happened in one yard. And, you know, it's the usual fences, yards, things of that sort. So we'll attempt to reach

agreement on that. But I'm not aware of anything that you could rule on right now that would --

THE COURT: All right. Okay. Yeah, I did, I read the government's trial brief earlier, so I gather the defense will be saying he never possessed it, that the government doesn't have proof beyond a reasonable doubt that he possessed it, let alone in furtherance of the drug trafficking.

MR. GRAHAM: Yes, Your Honor.

THE COURT: Okay. All right. Anything else from the government that would be useful?

MS. LANE: No, Your Honor. Thank you.

THE COURT: Mr. Graham?

MR. GRAHAM: No, Your Honor. Thank you.

THE COURT: Okay. I'll keep you up-to-date on my own jury duty. It will be interesting. And hopefully everything will go with minimum disruption here. Thank you.

MR. GRAHAM: Thank you.

THE CLERK: Court is adjourned.

(Proceeding concluded at 5:00 PM)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

Date: October 10, 2019

/s/ Glenda Trexler

Glenda Trexler, CSR-1436, RPR, CRR