No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MARCUS TERMAINE DARDEN,
PETITIONER.

VS.

UNITED STATES OF AMERICA,
RESPONDANT,

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

I. DID THE SIXTH CIRCUIT COURT OF APPEALS ERR BY HOLDING THE DISTRICT COURT'S ERRORS IN ADMITTING POLICE "GANG EXPERT" AND OTHER HEARSAY TESTIMONY WERE HARMLESS?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

19-6393 (6th Cir.) – *United States v. Derrick Kilgore*

19-6394 (6th Cir.) – *United States v. Decarlos Tittington*

19-6390 (6th Cir.) – *United States v. Elance Lucas*

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

STATUTORY AND CONSTITUTIONAL

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I. OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit was not recommended for publication. The Memorandum Opinion and the judgment of conviction in the United States District Court for the Middle District of Tennessee at Nashville are attached to this petition as the Appendix.

II. JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the petitioner having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves alleged violations of the Sixth Amendment of United States Constitution, and criminal charges under 18 U.S.C. Sec. 1961 et seq., and 21 U.S.C. Sec. 841.

IV. STATEMENT OF THE CASE

1. The "RICO" Indictment and Trial

On June 29, 2017, eleven and a half years after the first of the criminal acts alleged in the conspiracy, the government obtained a multi-count indictment against Petitioner, Marcus Darden, and eleven (11) codefendants. Mr. Darden and four (4) co-defendants were tried jointly on RICO and drug conspiracy charges. R. 831, Page ID# 5968.

Count One of the Third Superseding Indictment alleged Mr. Darden and others committed offenses while members of the Clarksville (Tennessee) "Gangster Disciples" in violation of the Racketeer Influence Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a).

Count Two alleged under 21 USC § 841 and 846 that Mr. Darden and others conspired to distribute five kilograms or more of cocaine, 280 grams or more of crack cocaine, and other drugs. (Id., Page ID # 5978–79).

Count Twelve, the acquitted charge, alleged that Mr. Darden assaulted one Malcolm Wright , in aid of racketeering, on the same night that Mr. Wright was killed. (Id., Page ID # 5985).

Counts 15 and 21 alleged Mr. Darden distributed and possessed cocaine with intent to distribute. (Id., Page ID #). Count 23 alleged Mr. Darden distributed and possessed with intent to distribute 28 grams or more of cocaine base (crack). These last three counts were based on three small, street-level drug sales between Mr. Darden and a Government confidential informant, during which the informant never saw Mr. Darden armed with a weapon. R. 1659, Page ID # 19315.

The trial commenced on March 1, 2019. The Government presented eighty-three (83) witnesses during its case-in-chief.

The government's proof at trial sought to link the Clarksville GD's to a national group but that connection was very weak. (Trial Tr., Vol. 5, R. 1645, Page ID # 15730–31, Vol. 22, R 1662, Page ID # 20184–85, 20213). Indeed, Gator Wallace Bradley, a 67-year-old former member of the original Gangster Disciples of Chicago

testified that the Gangster Disciples no longer exist as a "national organization." R. 1664, Page ID# 20367.

Members of the GD's wear blue and black, use signs like a six-pointed star or a three-tined pitch fork, and use the number 74 symbolizing the letters in the alphabet for "G" and "D." R. 1651, Page ID # 17267-69, See Mem. Opinion, R. 1460, Page ID # 11784-89. The six points of the star, starting from the top and working clockwise, are said to be "Love," "Life," "Loyalty," "Knowledge," "Wisdom," and "Understanding." *Id.*

Members use nicknames proceeded by "Mac". They share literature setting forth gang beliefs and rules, such as the "17 Laws" that required silence and secrecy, exercise, and mutual assistance and aid, but prohibited stealing, rape, littering, and the use of drugs, among other things. *Id.*

They use special handshakes. (Trial Tr., Vol. 5, R. 1645, Page ID # 15718 (creed) Page ID # 15722-29) (rules) Page ID #15580-81) (use of nicknames and handshakes)

Positions of authority in the GD's included such things as Secretary, Treasurer, Chief Enforcer, Chief of Security, and Coordinator. While there was great deal of testimony about members holding these POA's, there also was quite a lot of confusion among the cooperators about who held which position and when. The GD's monthly membership dues were paid sporadically, at best. R. 1645, Page ID # 3.

On April 29, 2019, the jury acquitted Mr. Darden on a charge of assault in aid of racketeering but found him guilty under the RICO and drug conspiracy statutes. As part of a special jury finding on the verdict form, the jury also found that Mr. Darden's RICO offenses included acts of murder. *See Apprendi v New Jersey*, 530 U.S. 466 (2000). The special finding, however, did not specify which of many murders put into proof by the Government the jury relied on to reach its verdict. Verdict, R. 1360, Page ID # 10398.

The district court sentenced Mr. Darden to 480 months in the Bureau of Prisons. Judgment, R. 1592, Page ID # 14310.

The most harmful of many errors committed by the district court was to confuse the standard for admission of "expert" testimony and allow the Government to introduce reams of surprise expert testimony against Mr. Darden in the guise of lay testimony. The district court failed to fulfill its gatekeeping function by allowing this testimony. Indeed, the first witness on the first day of trial was a veteran Clarksville (Tennessee) police officer whom the Government used as a virtual "gang expert" improperly to paint a picture of Marcus Darden's guilt. R. 1643, Page ID # 14915-15077.

Over Mr. Darden's repeated objections, Clarksville Police Officer Gregory Beebe offered unproven, untested and unfounded hearsay evidence about the Clarksville area "GDs," gangs and gang members, their crimes and membership generally. *Id.*

These erroneous evidentiary rulings violated Mr. Darden's rights under the Confrontation Clause of the United States Constitution and had a damning cumulative effect, as will be further explained below.

2. *The Impermissible Expert Testimony*

Over and again, Appellant Marcus Darden sought to exclude the testimony of numerous law enforcement agents who in essence testified as experts under Fed. R. Evid. 702 even though these witnesses were not disclosed before trial to the defense under Rule 16 of the Federal Rules of Criminal Procedure. See R.757, Government's Notice of Experts, Page ID # 5230-55. Upon defense counsel's follow-up inquiry as to any anticipated "gang experts," the Government by email denied any intention to call such an expert at trial. *See Id.*

Yet the Government called just such an expert in the person of Clarksville Police Sargent Gregory Beebe. Over and again, the district court overruled Mr. Darden's objections to this and other expert testimony, holding that the Government's proffered testimony was not "expert" in nature. These errors were not harmless.

Rule 701 of the Federal Rules of Evidence provides that

> [i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

Rule 702 of the Federal Rules of Evidence States:

> 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.

Fed. R. Evid. 702.

Throughout the trial, the Government - and the district judge - appear to have mistakenly narrowed the definition of "expert" as a witness who renders only opinions. The notes of the Advisory Committee on Federal Rule 702, however, make clear that the assumption that "experts" testify only in the form of opinions "is logically unfounded." The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts."

A 17-year veteran of the Clarksville Police Department, Sargent Beebe gave an improper exegesis on the "615" Gangster Disciples (GD's) and other gangs operating in the Clarksville area. The defense objected that the Government had not disclosed Beebe as an expert prior to trial, as it was obligated to do under Federal Rule of Criminal Procedure 16(a)(1)(G), but rather surprised the defense with testimony that clearly was "expert." The district court overruled this objection. R. 1643, Page ID # 14915-15077.

Sargent Beebe was the Government's "chronicler of the recent past." *United States v. Rios*, 830 F.3d 403, 414 (6th Cir. 2016).

At the onset of Beebe's testimony, Mr. Darden's counsel urged the district court to be "vigilant" against the government's improper use of Sargent Beebe as a gang expert. *See Id.*; R. 1643, Page ID # 14290. Unfortunately, the district court disregarded this defense request and allowed Sargent Beebe to run amok.

Over objection, Beebe identified Marcus Darden and his co-defendants and stated unequivocally that they were members of the Gangster Disciples. *Id.* Page ID # 14925-33. Later, pressed by defense counsel's objection based on lack of foundation, Beebe summed up how he had drawn the conclusion that one individual was a member of the GDs thus: "I would say based upon the associations that he had, the areas of town that he hung out within, that we encountered him most frequently, like Lincoln Homes. Through interviews I was told at one point he was the literature coordinator for the Gangster Disciples." Id., Page ID # 14968.

Beebe also testified that "victims" of gang-related crimes generally "are not willing to cooperate with the police" and that his agency lacked "the capabilities of protecting them as much as a federal organization would." *Id.*, Page ID # 14919-20. This insinuation that victims and witnesses needed protection, i.e., that Mr. Darden and his co-defendants were violent was improper. It was meant to scare the jury. A police officer's opinion regarding what is "a common criminal modus operandi" does not fall into the category of proper lay opinion; rather, it is expert opinion. *United States v. Figueroa-Lopez*, 125 F.3d 1241 at 1244 (9th Cir. 1997).

Prompted by Mr. Darden's objection that the Government had failed to lay any foundation for this testimony, Beebe ticked off his *bona fides* for the jury. He stated he had participated in "[t]he Regional Counter-Drug Academy training in Meridian, Mississippi," and,

> I've been part of the gang intelligence unit on two separate occasions, once as a supervisor. I've been involved in numerous state and federal gang investigations.
> I've actually attended outlaw motorcycle gang training, and I'm also a member of the Tennessee Gang Investigators Association and have been for over four years.

R. 1643, Page ID # 14922.

Beebe went on to identify a photograph of Larry Hoover, an inmate at the Colorado Supermax prison, calling him the "founder" of the Gangster Disciples in Chicago, Illinois. *Id.*, Page ID # 14921. Beebe related that the Gangster Disciples "use certain things like numerology. For example, the seventh letter of the alphabet would be G. The fourth letter of the alphabet is D, which would be an easy way of, like, spray painting somewhere 7-4, meaning Gangster Disciples." *Id.* The Government offered no foundation for this testimony, other than Beebe's "gang training." *Id.*, Page ID # 14922. Beebe admitted to having had no personal encounter with or personal knowledge of Larry Hoover. Beebe explained that he knew Hoover "[t]hrough my gang courses I've attended, through the basic identification courses, and through my own research." *Id.* Still, the district court did not find this testimony to be "expert" in nature.

The Government elicited from Beebe testimony about the gang positions and titles, such as the "literature coordinator," who, Beebe testified, was "someone that

has the rules -- for example, rules and regulations of the Gangster Disciples, and they hand it out to people for them to memorize." *Id.*, Page ID # 14969.

The following sample of Sargent Beebe's testimony demonstrates how poorly sourced was the foundation for his expertise:

Government:	Based on the information that you have in this investigation, do you know if Mr. Brodie was a member of a street gang?
Sargent Beebe:	I don't know if he was a member.
Government:	I believe the question I asked you whether or not he was associated with a street gang in Clarksville, correct?
Sargent Beebe:	Correct.
Government:	And you said yes?
Sargent Beebe:	Yes.
Government:	What makes you think that he was associated with a street gang?
Sargent Beebe:	Based upon the area of town he went to and who he met with, I would say he was associated with those individuals.
Government:	The area of town he met with, what was that?
Sargent Beebe:	It was Guthrie, Kentucky, which is called the Squig and New Jack City.
Government:	And have you encountered the area called the Squig and New Jack City in your investigation of Gangster Disciples?
Sargent Beebe:	Yes.
Government:	So what is it about that area that makes you think that it's associated with Gangster Disciples?

Sargent Beebe:	I have personally driven through that area in a vehicle that was not a police car, and I was immediately followed as soon as I got into the area.
Government"	Do you know if you were followed by Gangster Disciples?
Sargent Beebe:	The vehicle that followed me I recognized as being associated with the Gangster Disciples.
Government:	Were members or people who you believed were members of Gangster Disciples -- did they frequent that area?
Sargent Beebe:	Yes.

R. 1643, Page ID # 14948-50

Beebe gave the jurors a lengthy and frightening narrative about the GD's in Clarksville and elsewhere. Beebe recounted the GD's feuds with other Clarksville gangs and criminal activities, including murders, that had occurred in Clarksville, Tennessee over the preceding 13 or so years. Beebe recounted that in 2006 a blood feud between the GD's and another Clarksville gang, the Nine Trey Bloods, began with the murder of a GD member, Sylvester Hockett, aka "Mac Chicken." This murder, Beebe held forth, triggered a retaliation that resulted in the shooting death of a member of the Nine Trey Bloods, Jesse Hairston, by co-defendant Rex Whitlock. Beebe then recounted yet another killing of another GD named Shannon Fairley, aka Mac Juve, who was shot by the Nine Trey Bloods, presumably in retaliation. *Id.*, Page ID # 14915-15077. He identified the victims of the charged double homicide, stating that the double murder was "part of this investigation." Id., Page ID# 14994.

Almost all of Beebe's conclusions were based on second-hand information (hearsay) in violation of the Confrontation Clause of the Sixth Amendment of the U.S. Constitution. This narrative should have been the responsibility of the Government's fact witnesses, not Sargent Beebe.

Beebe further insinuated drug trafficking on the part of Mr. Darden and his co-defendants with absolutely no specifics. *Id.*, Page ID # 14948. He ascribed motivations for and made inferences about murders without the jury's having heard from a single fact witness with personal knowledge of the events. Beebe corroborated as-yet-unheard testimony of several Government cooperators, whose credibility would be hotly challenged. Beebe's testimony lurched back and forth between fact and opinion and helped the government "connect the dots" in proving up the elements of RICO, such as the existence of an "enterprise" and a "pattern of racketeering."

Finally, the Government used Beebe's "expertise" to frighten a jury by suggesting the defendants would retaliate against victims or witnesses. This would not be the last time the Government sought to instill fear in the jurors of the exclusively African-American, young men sitting across the room from them.

The district court failed in its gatekeeping role in that it did not rule that Beebe's opinion testimony was admissible or that it was a permissible expert opinion. Nor did the district court conduct a *Daubert* inquiry or qualify Beebe as an expert under Rule 104(a) of the Federal Rules of Evidence. That is, the district court allowed the expert testimony without establishing it was admissible as expert

testimony, without qualifying the witness as an expert, and without instructing the jury regarding such expert testimony. *See United States v. Figueroa-Lopez,* 125 F. 3d 1241, 1246 (9th Cir. 1997). Finally, the district court allowed the Government to substitute Beebe's expert opinions for factual evidence.

The Sixth Circuit Court in *Rios* warned, "[an increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or to explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence." *Id.* at 414 (Citing *United State v. Mejia,* 545 F.3d 179, 191-92 (2nd Cir. 2008)). For these reasons, the Sixth Circuit Court in *Rios* cautioned district courts to "remain vigilant to ensure that all of a law-enforcement expert's testimony relates to issues that are 'beyond the ken of the average juror.'" *Rios* at 414.

Otherwise,

> [i]f the officer expert strays beyond the bounds of appropriately 'expert' matters, that officer becomes, rather than a sociologist describing the inner workings of a closed community, a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt. As the officer's purported expertise narrows from 'organized crime' to 'this particular gang,' from the meaning of 'capo' to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them. The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt.

Id. (citing *Mejia,* 545 F.3d 190-91.)

3. *The Impermissible "Co-Conspirator" Testimony*

The district court committed the same abuse of discretion under Rule 801 by allowing another witness and GD member, Johnny Austin, to testify about statements made to him by another unindicted co-conspirator, "Mac T" about a beating that Mac T received by other GD members including Darden.

Government:	And can you describe what happened at that meeting?
Austin:	He didn't want to be a part of the Nashville deck no more. He said he will pay dues and -- and he don't care if they came on -- on -- on his premises; he just didn't want nothing to do with them. He didn't want to come to no meetings or nothing no more.
Government:	Who is "he"?
Austin:	Mac T.
Government:	All right. Did he say why he didn't want to come to any meetings?
Austin:	He said because MD had ordered him a six-minute [beating] no coverup.
Government:	Let me back up just a little bit.
Defense Counsel:	Your Honor. Objection.
The Court:	Do you want to approach? (Bench conference outside the hearing of the jury.)
Defense Counsel:	That's hearsay, lack of personal knowledge. ...

R. 1655, Page ID # 18331.

Over this objection, Austin continued to recount the story he was told by Mac T about having received a severe beating from members of the GD's upon the Petitioner's orders. "He got beat up read bad. "

Government:	Were you able to observe any kind of injuries on him?
Austin:	Yes, sir. He was swoled up real bad.
Government:	Swoled up in what way?
Austin:	Like, his face.
Government:	Any other physical manifestation of his injuries? Anything else he was doing?
Austin:	He was leaning against LG to stand up.
Government:	Who is LG?
Austin:	Another brother.

Id., Page ID # 18344.

There can be little doubt about the damning effect of this testimony on Petitioner. But that begs the question: how could the out-of-court statement of Mac T, who had clearly expressed a desire to leave the GDs , i.e., the conspiracy, and was subsequently beaten for it, serve to "further" the purposes of the GDs? Could Mac T really be called a "co-conspirator" under these circumstances? The jury should not have heard this damning testimony.

In order for an out-of-court statement of a co-conspirator to come in under 801(d)(2)(E), "it must first be determined that the conspiracy existed, that the defendant was a member of the conspiracy, and that the co-conspirator's statements

were made in furtherance of the conspiracy." *United States v. Gessa*, 971 F.2d 1257, 1261 (6th Cir.1992) (*en banc*) (internal quotation marks omitted).

The Sixth Circuit admonished in *United States v. Darwich*[1]:

> A statement is considered to be in furtherance of the conspiracy "if it is intended to promote the objectives of the conspiracy." United States v. Monus, 128 F.3d 376, 392 (6th Cir.1997) (quotation omitted); Hamilton, 689 F.2d at 1270; see also United States v. Doerr, 886 F.2d 944, 951 (7th Cir.1989) ("We recently emphasized that the in furtherance requirement of Rule 801(d)(2)(E) is a limitation on the admissibility of coconspirators' statements that is *meant to be taken seriously*." (internal quotation marks omitted)).

Darwich at (emphasis added).

Applying the test of *Gessa*, the Darwich found the lower court committed error by letting casual statements recounting past events in as an exception to the hearsay rule under 801.

The damning testimony complained of here fell more closely under the heading of "casual chatter" or "mere recounting" than the statements in *Conrad*.

4. The Sixth Circuit Court's Opinion Affirming the Convictions

The Sixth Circuit Court of Appeals agreed with Petitioner that the use of the police officer "gang expert" was in error. (Memorandum Opinion, Sixth Circuit, No. 19-6390, at p. 34), The court of appeals agreed also that the admission of the foregoing testimony of Johnny Austin was in error. Despite these significant errors at trial, the Sixth Circuit concluded that Petitioner had suffered no harm. (Id. At p. 36)

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[1] 337 F.3d 645 (6th Cir. 2003)

This conclusion was based on the erroneous assertion by the court of appeals that Petitioner had not "claim[ed] any error depriving him of constitutional rights." (Memorandum Opinion, p. 26). The Sixth Circuit Court opinion stated,

> We review error in admitting testimony for harmlessness. United States v. Young, 847 F.3d 328, 349 (6th Cir. 2017) (citing Fed. R. Crim. P. 52(a)); see also Fed. R. Evid. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party . . . ."). Because Mr. Darden does not claim any error depriving him of constitutional rights, the government need only "show by a preponderance of the evidence that the error did not materially affect the verdict" for us to disregard that error. *Young*, 847 F.3d at 349–50. We "must take account of what the error meant to the jury, not singled out and standing alone, but in relation to all else that happened." *United States v. Davis*, 577 F.3d 660, 670 (6th Cir. 2009) (quoting *United States v. Gibbs*, 506 F.3d 479, 485 (6th Cir. 2007)).

Id.

V. REASONS FOR GRANTING THE PETITION

Petitioner submits that this matter involves a deprivation of the Petitioner's Sixth Amendment rights. The Sixth Circuit Court of Appeals committed error when it failed to reverse and vacate the judgment of the trial court below. Pursuant to Rule 10 of the United State Supreme Court, this case involves the liberty interest of the Petitioner and a question of federal and constitutional law, to wit the Sixth Amendment, of the utmost importance.

Simply put, the Sixth Circuit Court of Appeals got it wrong. The appellate court concluded that Petitioner had not raised Petitioner's Sixth Amendment claims regarding the numerous erroneous and harmful evidentiary rulings in the trial court. Yet Petitioner's appellate brief specifically and repeatedly complained that the trial court's evidentiary errors constituted violations of the Petitioner's right under the

Sixth Amendment right to confront witnesses against him. (See R. 21, P. 18, 25) In any case, Petitioner submits that the offending evidence was "testimonial hearsay," which necessarily implicates a criminal defendant's right to confront witnesses against him in open court. *See Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed.2d 177, 541 U.S. 36 (2004).

The Sixth Circuit Courts of Appeal's decision to uphold the trial court's evidentiary rulings so far departs "from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." (See Rule 10, Rules of the United States Supreme Court).

As a consequence of this error, the Sixth Circuit held the government to an erroneous and lower standard -- "preponderance of the evidence" - when deciding whether the Government had demonstrated that the district court's evidentiary error had not materially affected the verdict. The proper standard for such review should have been whether the government had proved "beyond a reasonable doubt" that the trial court's errors did not materially affect the verdict.

As this Court wrote in *Crawford*,

> [t]he Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions.

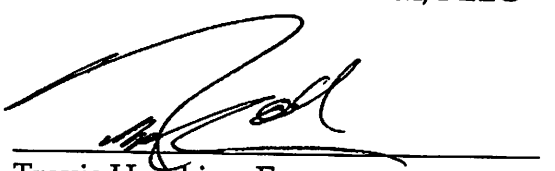
Id. At 42 (citations omitted).

The cumulative harm done by the impermissible "testimonial hearsay" did injury to Petitioner's "bedrock" procedural right to confront witnesses against him.

CONCLUSION

For the foregoing reasons, Petitioner Marcus Darden respectfully prays that this Court grant this petition for a writ of certiorari.

Respectfully submitted,
THE HAWKINS LAW FIRM, PLLC



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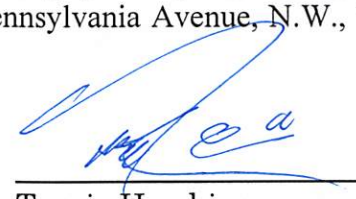
CERTIFICATE OF SERVICE

I certify that the foregoing petition for writ of certiorari has been served via electronic means and first-class mail upon counsel for the Respondent, Mr. Ben Schrader, United States Attorney's Office for the Middle District of Tennessee at Chattanooga, 1110 Market Street, Suite 515, Chattanooga, TN 37402, and Ms. Elizabeth Prelogar, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, this 8th day of December, 2021.



Travis Hawkins

APPENDIX A

ruUNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case Nos. 19-6390/19-6392/19-6393/19-6394, *USA v. Elance Lucas*
Originating Case No. : 3:17-cr-00124

Dear Counsel,

The Court issued the enclosed opinion today in these cases.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. Lynda M. Hill

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0426n.06

Nos. 19-6390/6392/6393/6394

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELANCE JUSTIN LUCAS (19-6390); MARCUS TERMAINE DARDEN (19-6392); DERRICK LAMAR KILGORE (19-6393); DECARLOS TITINGTON (19-6394),

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: BOGGS, MOORE, and LARSEN, Circuit Judges.

BOGGS, Circuit Judge. Four members of the Gangster Disciples street gang appeal their convictions for crimes committed during a decade-long racketeering conspiracy. Those crimes include a separate drug-trafficking conspiracy and a score of substantive drug, firearms, and violent offenses (including assault and attempted murder). For the reasons that follow, their appeals are generally without merit. Aside from one procedural error during Mr. Lucas's sentencing, the district court committed no harmful error. Thus, we vacate the district court's sentence of Mr. Lucas and remand for resentencing. We affirm his conviction and all of the judgments as to the other appellants.

I. BACKGROUND

A. The Gangster Disciples, Generally

The Gangster Disciples (or "GDs") are a national street and prison gang founded in Chicago in the late 1960s from the merger of David Barksdale's and Larry Hoover's two respective gangs. This case grew out of an investigation of the gang's activities in Middle Tennessee.

The gang organizes itself hierarchically. Nationally, it is governed by a board of directors, on which Larry Hoover continues to sit as chairman despite serving a federal life sentence. The board appoints a "governor" in charge of each state and a "governor of governors" to supervise the governors in geographical groupings of states (for example, the governor of Tennessee also has responsibility over the governors of North Carolina, Kentucky, and other states). The gang divides states into regions, often named after the corresponding area codes, each of which a "regent" leads. For example, the "615" region, which this case concerns, contains Clarksville, Nashville, and Murfreesboro, among other cities in Middle Tennessee.

Generally, each city in a region has its own "deck," the gang's smallest organizational unit, which too is headed by a regent. A deck might claim members in nearby smaller cities (as Clarksville did Guthrie, a small town on the Kentucky side of the Tennessee–Kentucky border), and some larger cities have more than one deck. Each deck, region, or state has other "positions of authority" such as chief of security, enforcer, treasurer, secretary, and literature coordinator. And other members are secretly part of elite "blackout squads" called on to assassinate nonmembers or members of opposing gangs—or to execute fellow Gangster Disciples.

Each deck in good standing with the national gang has monthly meetings and collects monthly dues from each member. Dues are a flat fee that goes into the deck's "box," a metaphor for the deck's cash-on-hand. The deck in turn sends funds to the regional and state boxes. The box

is, in part, a kind of social welfare: funds might be used to help members who needed food, were behind on personal bills, or needed to make bail. Monies might also go onto incarcerated members' commissary accounts. But the box also helped the gang perpetuate and attain its criminal objectives—through helping fugitive members, buying firearms, or investing in drugs to resell at a profit.

Membership in the Gangster Disciples has perks beyond access to box funds. Some members could be fronted drugs to sell (especially in return for the risk of transporting drugs by car) or given discounts by other members. Members can sell drugs in GD-controlled territory under the protection of the local deck, with territorial monopolies enforced against nonmembers through violence. Members have access to trap houses where guns and drugs can be stored. And members in good standing get reference numbers to prove their membership—and access these benefits—anywhere in the country.

The gang's literature consists of "the teachings of the honorable chairman," Mr. Hoover, and other elements such as the "I Pledge," the "We Pledge," the "Creed," and the "17 Laws." The gang purportedly adopted a new "720 concept" focused on "growth and development" in place of an older, more violent "360 concept." Indeed, much of the 720 literature espouses virtues such as love, self-sacrifice, and integrity.

But "things still stayed the same way that they was," as one member testified: "Still violence, still drug selling, still all of the same things that were going on under 360." The rules still emphasize "silence and secrecy" foremost—never to talk about gang business with outsiders, especially law enforcement. Members must "report all incidents, major and minor" to the deck—whether activity by rival gangs or law enforcement or violations by other members. And members must "aid and assist" other members "in all righteous endeavors," which might include attacks on

other gangs or shielding fellow members from detection or arrest. The gang also forbids certain personal conduct, such as stealing from other Gangster Disciples, sex between two men, and the use of "addictive drugs" such as heroin, cocaine, or crack. (Marijuana use, however, is permissible, so long as it is not excessive.)

Violations of the gang's rules go through an internal analog of criminal procedure. If a member accused of a violation does not appear for a hearing on the matter, an officer may issue an order for that member's "GD arrest." A member may appeal a violation by requesting a "GD trial," complete with a prosecutor, defense lawyer, judge, and jury. There are even potential appeals to regional and state officers. Penalties for violations include fines paid to the box and "smashings": beatings that vary in severity by duration, number of assailants, and whether the member being smashed may "cover up" (defend himself). A member guilty of a severe violation might also be "smashed off" (beaten and expelled from the gang) or "eradicated" (put to death).

B. The Clarksville Deck

In the mid-2000s, the Clarksville deck was trying to establish its stature and reputation in the 615 region. Marcus Darden, already in a position of some authority in the deck, had ambitious goals for himself and for the Gangster Disciples in the region. In January 2006, several Gangster Disciples saw William Miller, a member of the rival Crips gang, "throwing down the pitchforks," a sign of disrespect toward one of the Gangster Disciples' symbols, the pitchfork. Mr. Darden saw this as the perfect opportunity to put his deck—and himself—"on the map."

The next day, Mr. Darden and Rex Whitlock, another member of the Clarksville deck, saw Mr. Miller. They confronted and shot him. In the words of Tray Galbreath, a deck member who helped conceal the firearms used to shoot Mr. Miller, that shooting "[l]et the streets know that GD

is a power to be reckoned" with. And gang violence in Clarksville escalated "starting from that point on."

Even so, the deck continued to cycle through booms and busts, often corresponding with its leaders' respective freedom or custody. For example, Mr. Whitlock and Mr. Galbreath were the main suppliers of cocaine for the deck, running kilos up from Atlanta. When they were arrested in 2008, the cocaine supply in the 615 region dried up for some time. Because most members did not have legitimate jobs, they drew their income primarily from drug sales. So Mr. Whitlock's arrest ended the deck's times of plenty, at least temporarily.

Things changed when Danyon Dowlen assumed leadership of the deck. He had joined the Gangster Disciples in the late 1990s while in custody, and he was in and out of prison several times up through 2010. That December, when Mr. Dowlen was released from prison, he found the Clarksville deck scattered from a lack of structure and leadership. He received a call from the regent for the 615 region, asking for help getting the Clarksville deck back "on count" (in good standing).

Mr. Dowlen agreed, and in mid-2011, he called a meeting of about thirty Clarksville-area Gangster Disciples. At that meeting, the deck elected its officers. Mr. Dowlen became the head of the deck. Elance Lucas, Derrick Kilgore, and DeCarlos Titington were also at that meeting, and Mr. Titington too took on a position of authority. Mr. Darden, who had previously served as the deck's enforcer because he was "prone to violence," was not at the meeting because he was in prison. But after his release, he became Mr. Dowlen's second-in-command. Together, Mr. Dowlen and Mr. Darden tried "to get everything organized" and take the deck "to bigger heights" than before.

Mr. Darden succeeded Mr. Dowlen as the head of the Clarksville deck and eventually rose to the 615 regency. His continued goal was to "raise the stature of [the gang], to have the street fame of it, [and] to be revered as a power to be reckoned with." He "ran [the deck] with an iron fist," purging weak members—and potential police cooperators—instead surrounding himself with loyal allies whom he could trust to do the gang's business.

The violence only grew with Mr. Darden's rise to power. There were smashings and eradications, especially for cooperation with law enforcement, no matter how slight; the murder of Malcolm Wright, a Blood, in response to the Bloods' killing of a Gangster Disciple, *see United States v. Burks*, 974 F.3d 622, 624–25 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1722 (2021) (mem.); and a retaliatory drive-by shooting against the Vice Lords, with Mr. Kilgore driving. One particularly violent member, Brandon Hardison, murdered Derrick Sherden in cold blood over a drug debt and for breaking a solemn oath to repay it, and then he murdered Mr. Sherden's girlfriend Amanda Weyand to prevent her from being a witness. For bringing "undue heat" upon the gang, he was brought before regional and state leadership for sentencing. They were initially inclined to eradicate him, but Mr. Dowlen convinced the tribunal not to execute him. Indeed, Mr. Hardison's standing in the deck increased, and he earned a place in the deck's blackout squad.

C. Procedural Summary

A grand jury in the Middle District of Tennessee indicted the four appellants in June 2017. By November 2018, the government had obtained a third superseding indictment—the one in effect at the appellants' trial—charging twelve Gangster Disciples with 45 counts. Those counts included conspiracy under the Racketeer-Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. § 1962(d); conspiracy to traffic drugs, in violation of 21 U.S.C. § 846;

murder, attempted murder, and other violent crimes; substantive drug-trafficking charges; and firearms offenses.

The four appellants went to trial along with a fifth defendant, Maurice Burks. Trial lasted nearly two months: voir dire began March 1, 2019, and the jury returned its verdicts on April 29, after six-and-a-half days of deliberation. Before sentencing, the district court granted Mr. Burks's motion for a new trial on four counts related to Malcolm Wright's murder, but we reversed that order upon the government's appeal. *Burks*, 974 F.3d 622. The district court denied the four appellants' motions under Federal Rules of Criminal Procedure 29 and 33 and sentenced them to prison terms of 240 months (Mr. Lucas), 480 months (Mr. Darden), 420 months (Mr. Kilgore), and 270 months (Mr. Titington).

The appellants filed timely notices of appeal, and we now exercise jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

II. ELANCE LUCAS

A. The Jury Unanimously Found a Pattern of Racketeering Activity

A defendant has a Sixth Amendment right to a unanimous verdict on each element of a crime. One element of RICO conspiracy is that the defendant must agree "that either he or another conspirator would engage in a pattern of racketeering activity." *United States v. Nicholson*, 716 F. App'x 400, 405 (6th Cir. 2017). A "pattern of racketeering activity requires a minimum of two predicate acts." *United States v. Fowler*, 535 F.3d 408, 419 (6th Cir. 2008); 18 U.S.C. § 1961(5).

Mr. Lucas argues that the jury did not unanimously find the predicate acts for his RICO conviction. His first premise is that the jury "unanimously found that the defendants agreed to two underlying racketeering activities: murder and drug trafficking." His second premise is that the district court "removed" one of those predicate acts by finding that the government had not proved

by a preponderance that Mr. Lucas was part of a planned (but aborted) shooting at a nightclub. Both premises are flawed.

First, he misunderstands the purpose of count one's special-verdict questions.[1] They did not ask the jury to identify which predicate acts underlay the conspiracy. Rather, the questions are required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in order to justify an increase in Mr. Lucas's statutory penalty. The statutory maximum sentence for a bare RICO conviction is 20 years but increases to life imprisonment "if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." 18 U.S.C. § 1963(a). The special-verdict questions corresponded to a racketeering activity for which the maximum penalty includes life imprisonment. Because the jury found "yes" on at least one (in fact, on all three) of the questions, the higher maximum of life applies to Mr. Lucas. Thus, even if there *were* insufficient evidence

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[1] For the reader's reference, we reproduce Mr. Lucas's verdict form for count one here:

> With respect to Count One of the Indictment, which charges RICO Conspiracy, we, the Jury, unanimously find the Defendant, **Elance Justin Lucas** (check one):
> Guilty ✓ Not Guilty ____
>
> ***If you find the Defendant guilty of Count One, proceed to the questions below.***
>
> ***If you find the Defendant not guilty of Count One, skip these questions and proceed to the next count.***
>
> (1) We, the Jury, having found the Defendant guilty of the offense charged in Count One, further unanimously find that as part of that offense the Defendant conspired to distribute and possess with intent to distribute cocaine hydrochloride and cocaine base and that it was reasonably foreseeable to the Defendant that the conspiracy involved the distribution of and possession with intent to distribute the following:
> (a) five kilograms or more of cocaine hydrochloride (cocaine):
> Yes ✓ No ____
> (b) 280 grams or more of cocaine base (crack cocaine)
> Yes ✓ No ____
>
> (2) We, the Jury, having found the Defendant guilty of the offense charged in Count One, further unanimously find that from at least in or about 2005 through on or about November 7, 2018, the Defendant agreed to conduct and participate in the conduct of the affairs of the Gangster's [sic] Disciples enterprise through a pattern of racketeering activity that included acts involving murder, as alleged in the Indictment.
> Yes ✓ No ____

that the gang engaged in acts involving murder, Mr. Lucas would still be guilty of RICO conspiracy and subject to a maximum sentence of life.

Second, Mr. Lucas misunderstands the legal effect of the district court's ruling on his sentencing objection. Although the PSR found him accountable under the Guidelines for conspiracy to commit murder at the Plush nightclub, the district court sustained his objection to that finding. The only factual basis for that allegation came from testimony by Mr. Dowlen, whom the district court had found to be unreliable in some respects. But that refusal to hold Mr. Lucas accountable for conspiracy to commit murder for *sentencing* purposes does not negate the *jury's* finding that he had agreed to "participate in the conduct of the affairs of [the conspiracy] through a pattern of racketeering activity that included acts involving murder." The evidence showed that the Clarksville deck was responsible for multiple murders, attempted murders, and conspiracies to commit murder—of William Miller, Jesse Hairston, Darius Wilridge, Derrick Sherden, Amanda Weyand, and Malcolm Wright, to name just a few—in furtherance of the gang's goal of greater power and reputation. The jury could reasonably have found that the RICO conspiracy's pattern of racketeering activity included those acts. So the court's ruling on the sentencing objection was consistent with the jury's affirmative answer to special-verdict question two.

Thus, Mr. Lucas has not shown a lack of unanimity on count one's predicate acts.

B. The RICO Conviction Was Not Otherwise Defective

Mr. Lucas next challenges his RICO conviction for what he calls a lack of an "individualized verdict based on sufficient evidence." He presents a variety of claims in support. Beyond the unanimity challenge dispatched above, he argues that the discrepancies between the special-verdict findings on counts one and two show that the jury did not find him individually responsible for the higher quantities in count one; that there was insufficient evidence to prove that

the Clarksville deck was a jointly undertaken criminal enterprise; and that Mr. Dowlen's testimony was insufficiently credible to support the verdict. We tackle two of these claims in turn.[2]

1. We Will Not Review the Purportedly Inconsistent Special-Verdict Findings

In general, inconsistent jury verdicts in a criminal case are unreviewable. *United States v. Randolph*, 794 F.3d 602, 610 (6th Cir. 2015). But there are two exceptions, creating circumstances in which we will review them. First, a verdict that is "marked by such inconsistency as to indicate arbitrariness or irrationality" may warrant relief. *Ibid.* (quoting *United States v. Lawrence*, 555 F.3d 254, 263 (6th Cir. 2009)). Second, if a "guilty verdict on one count necessarily excludes a finding of guilt on another," we may review a defendant's convictions of those mutually exclusive offenses. *Id.* at 610–11 (quoting *United States v. Ruiz*, 386 F. App'x 530, 533 (6th Cir. 2010)). But this latter exception is narrow: it is limited to "a situation in which a defendant receives two *guilty* verdicts that are logically inconsistent," such as "both larceny and embezzlement based on the same underlying conduct." *Ruiz*, 386 F. App'x at 533 (emphasis added) (citing *United States v. Powell*, 469 U.S. 57, 69 n.8 (1984)).

Because Mr. Lucas did not raise a verdict-inconsistency challenge below, we review his claim for plain error. Fed. R. Crim. P. 52(b).

The inconsistency here—if any—does not necessarily indicate either arbitrariness or irrationality. The jury found that it was reasonably foreseeable to Mr. Lucas that the *RICO* conspiracy in count one "involved" at least five kilograms of cocaine and at least 280 grams of crack. And it found that it was reasonably foreseeable to Mr. Lucas that the *drug-trafficking* conspiracy in count two "involved" no powder cocaine and at least 28 and fewer than 280 grams of crack.

[2] The third, challenging Mr. Dowlen's credibility, is not sufficient grounds for relief on its own, as discussed below.

The explanation is simple: the jury found that there were two separate conspiracies. One focused on increasing the power and stature of the Gangster Disciples in Clarksville, and the other was a relatively smaller venture with the less ambitious aim of just making money. The differing amounts make sense, too. Mr. Lucas could reasonably foresee that increasing the deck's power and stature would involve distributing a large quantity of both powder and crack cocaine. After all, most of the deck's primary source of income was from drug sales, and the deck's funding came exclusively from its members.

The indictment and jury instructions support this distinction. The two conspiracies were charged separately. Count two made no mention of the Gangster Disciples as the organizing framework of the drug-trafficking conspiracy, and it included substances (marijuana and opioids) absent from the notice of enhanced sentencing factors listed in count one. The court instructed the jury that the conspiracies in counts one and two need not be the same even though they started on the same date. Some defendants even argued that there had been multiple conspiracies.

Thus, because the evidence permits this view of the facts, the jury's different findings on counts one and two are not necessarily inconsistent, let alone arbitrary or irrational. And for that same reason, the special-verdict findings on counts one and two are not mutually exclusive in the sense that both larceny and embezzlement for the same act are. Thus, neither of the two exceptions applies, and the verdicts' purported inconsistency is unreviewable.

2. *Sufficient Evidence Supports That the Clarksville Deck Was an "Enterprise"*

There is insufficient evidence to support a conviction only if no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Washington*, 702 F.3d 886, 891 (6th Cir. 2012). In making that determination, we "do not weigh the evidence presented, consider the credibility of witnesses, or substitute our judgment for that of

the jury." *United States v. M/G Transp. Servs., Inc.*, 173 F.3d 584, 588–89 (6th Cir. 1999). We must view the evidence in the "light most favorable to the Government" and make all "reasonable inferences and resolutions of credibility" in favor of the jury's verdict. *Washington*, 702 F.3d at 891.[3] "Circumstantial evidence alone" is sufficient to uphold a conviction. *Ibid.* And so is "the uncorroborated testimony of an accomplice." *United States v. Scott*, 716 F. App'x 477, 485 (6th Cir. 2017) (quoting *United States v. Frost*, 914 F.2d 756, 762 (6th Cir. 1990)).

Under RICO, "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" must not "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). A conspiracy to violate that provision is also illegal. *Id.* § 1962(d).

An "enterprise" for purposes of RICO "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). The definition is "obviously broad, encompassing '*any* . . . group of individuals associated in fact.'" *Boyle v. United States*, 556 U.S. 938, 944 (2009) (quoting 18 U.S.C. § 1961(4)). The statute additionally directs that "its terms are to be 'liberally construed to effectuate its remedial purposes.'" *Ibid.* (quoting 18 U.S.C. § 1961 note). Thus, "RICO reaches 'a group of persons associated together for a common purpose of engaging in a course of conduct'" and may be "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 944–45 (quoting *United States v. Turkette*, 452 U.S. 576, 580, 583 (1981)). The dissent in *Boyle* advocated for a narrower definition: one that "demands evidence of a certain quantum of businesslike organization—*i.e.*, a system of processes, dealings, or other affairs that can be 'directed.'" *Id.* at 954 (Stevens, J., dissenting).

[3] Thus, Mr. Dowlen's supposed lack of credibility is not a reason for relief.

Even under the dissent's stricter definition, there was sufficient evidence for a jury to find that the Clarksville deck formed an enterprise. The deck had an organizational hierarchy and established leadership roles with defined duties. It had a framework for making decisions. It had internal discipline mechanisms, including monetary and physical punishments. It had regular meetings, usually on the sixteenth of the month. And it had a practice of reinvesting proceeds from the enterprise to promote and expand it: members would pay monthly dues to the deck's box, often from drug-sale proceeds, and those funds were used to help fugitives, bail out members from jail, and buy firearms and drugs. The deck used these processes to perpetuate itself and expand its power and influence. Thus, the jury could find that the deck was an "association-in-fact" enterprise. *See Boyle*, 556 U.S. at 948. It is no response that members could keep virtually all of their drug-sale profits, as Mr. Lucas contends. Even granting that, the deck would still remain an association-in-fact enterprise.

It therefore sufficed that the government proved that Mr. Lucas agreed to further the gang's expansion of power through a pattern of racketeering activity. Mr. Lucas's long-term association with the gang and his contributions through dues were enough for a reasonable juror to so find.

C. No Cumulative Trial Error Violated Mr. Lucas's Due-Process Rights

Mr. Lucas contends that, besides the errors listed above, there were others during trial that, even if individually harmless, overall unfairly prejudiced the proceedings against him. Individually harmless errors may indeed have a "cumulative effect" warranting a new trial. *United States v. Adams*, 722 F.3d 788, 832 (6th Cir. 2013) (quoting *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012)). But the errors' combined effect must be "so prejudicial as to render his trial fundamentally unfair." *United States v. Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004). And they must

truly be errors: nonerrors don't count. *United States v. Underwood*, 859 F.3d 386, 395 (6th Cir. 2017).

Mr. Lucas presents several unpreserved claims of trial error in addition to his claims above. We review each in turn.

1. Failure to Sever

An indictment may charge multiple defendants who "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). But "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

In general, defendants indicted together "should be tried together." *United States v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008) (quoting *United States v. Causey*, 834 F.2d 1277, 1287 (6th Cir. 1987)). The Supreme Court has set a high standard for Rule 14 severance: "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). "[L]ess drastic measures, such as limiting instructions," are preferred and "often will suffice to cure any risk of prejudice." *Ibid.* And severance is inappropriate "if a jury can properly compartmentalize the evidence as it relates to the appropriate defendants." *Driver*, 535 F.3d at 427 (quoting *Causey*, 834 F.2d at 1287).

Mr. Lucas concedes that he did not move to sever his trial below. We review for plain error. Fed. R. Crim. P. 52(b); *United States v. Soto*, 794 F.3d 635, 656 (6th Cir. 2015).[4] To show error, he

[4] The government argues that our decisions are "conflicting" on whether such a failure to move "constitutes waiver or forfeiture," citing *United States v. Sherrill*, 972 F.3d 752, 762 (6th Cir. 2020) (collecting cases). As *Sherrill* notes, in *United States v. Swift*, 809 F.2d 320, 323 (6th Cir. 1987), we prospectively ruled that, for cases tried after January 1,

"must show 'compelling, specific, and actual prejudice'" from the lack of severance. *Driver*, 535 F.3d at 427 (quoting *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005)). That means "evidence that the jury was not able to heed the district court's instruction to consider separately the evidence against each defendant" or that "a specific trial right was compromised as a result of the joint trial." *Id.* at 427–28.

Here, he has not shown the jury's inability to consider the evidence against him separately from that against other defendants. The district court instructed the jury to consider separately the evidence against each defendant, and there is no indication that the jury could not. To the contrary, the district court observed during sentencing that the jury was "diligent in following the instructions" because "they found not guilty" for some defendants "and changed the drug amounts on others. They were . . . pretty thorough." That observation "strongly suggests that the jury was not confused by the testimony adduced at trial" and "was able to attribute to each appellant evidence pertinent to that particular party." *United States v. Gallo*, 763 F.2d 1504, 1526 (6th Cir. 1985). Although Mr. Lucas argues that the jury was improperly influenced by evidence against others because its "special verdict finding the amount of drugs at issue in the RICO conspiracy . . . differed vastly from their finding in the drug trafficking charge . . . ," he does not explain how the findings indicate prejudice rather than, as discussed above, a deliberate finding that different types and amounts of drugs were foreseeably involved in two separate conspiracies.

1987, a defendant waives a Rule 14 objection on appeal if he moves for severance during trial but does not renew that motion after the close of evidence.

But the *Swift* line of cases does not apply here because Mr. Lucas never raised Rule 14 before trial. In *Soto*, 794 F.3d at 656, we interpreted the revised Federal Rule of Criminal Procedure 12 to mean that a defendant who did not move under Rule 14 before trial could raise the issue on appeal under plain-error review. Although it seems anomalous to punish a defendant with waiver for failing to renew an objection that he has already made but to punish him only with forfeiture for failing to raise the issue at all, that is the law under *Swift* and *Soto*.

And he identifies no specific right that the joint trial compromised. He gestures at potential prejudice in that, because "[t]he defendants, all black, were required to sit behind their attorneys at trial," there was a "'back of the bus' appearance." But even if the seating arrangements had "bad optics," as his trial counsel put it, he does not explain how they caused him actual prejudice.

Because Mr. Lucas has not shown compelling, specific evidence of actual prejudice from his joint trial with the other defendants, permitting a joint trial was not plain error.

2. *Alleged* Brady *Violation*

Mr. Lucas alleges that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding a pretrial preparation report concerning Mr. Dowlen. Mr. Dowlen testified that, when Mr. Burks told him that he had murdered Malcolm Wright, Mr. Burks was wearing a .45-caliber pistol on his hip, calling it the "twin" to the weapon he had shot Mr. Wright with. But, some weeks before trial, Mr. Dowlen had said during a preparation session with the government that the handgun may have been either a .40- or a .45-caliber gun. The government did not disclose Mr. Dowlen's more ambivalent description of the pistol until several months after the trial ended. Mr. Lucas argues that, because Mr. Dowlen was the "only witness linking [him] to murder, one of the two predicate acts found unanimously by the jury" and "one of only two witnesses linking [him] to drug trafficking," it was crucial for him to challenge Mr. Dowlen's credibility.

Even though the government disclosed the pretrial notes before appeal, Mr. Lucas did not challenge his conviction on *Brady* grounds in the district court, so we review his claim for plain error. Fed. R. Crim. P. 52(b).

To prove a *Brady* violation, a defendant must show that the undisclosed evidence is both "favorable" to the defendant—meaning either "exculpatory" or "impeaching," *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)—and "material either to guilt or to punishment." *Brady*, 373 U.S. at

87. "Evidence is material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *France v. Lucas*, 836 F.3d 612, 630 (6th Cir. 2016) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995)). And a "'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome'" of the proceeding. *Ibid.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Here, although the undisclosed report could have been used to impeach Mr. Dowlen, it is not material to Mr. Lucas's guilt. Mr. Dowlen's testimony on the abortive Plush nightclub shooting is not reasonably related to his recall of Mr. Burks's gun caliber. And Mr. Lucas does not challenge the evidence of other acts involving murder, noted above, committed by the Clarksville deck in furtherance of its goals. So it is unlikely that the jury would have changed its verdict with respect to Mr. Lucas had the pretrial report been timely disclosed.

Nor was that report material to Mr. Lucas's punishment. Even had the jury answered special question two under count one in the negative, its findings on special question one would still have exposed him to the same statutory minimum and maximum punishments. Moreover, even before the government disclosed the impeachment material on Mr. Dowlen, the district court had already determined not to hold Mr. Lucas accountable under the Guidelines for any acts involving murder. It struck the PSR's finding that Mr. Lucas was accountable for conspiracy to commit murder at the Plush nightclub, the only part of his PSR holding him responsible for acts involving murder. Thus, Mr. Dowlen's testimony about Mr. Wright's murder could not have affected Mr. Lucas's sentence, so there is no reasonable probability that disclosing the report would have changed the outcome of Mr. Lucas's sentencing hearing.

Because the undisclosed evidence was immaterial to Mr. Lucas's guilt or punishment, the government did not violate his rights under *Brady*.

3. Juror Misconduct

After the jury retired to deliberate, one juror sent the district court a note stating that another juror had behaved disrespectfully during deliberations. After consulting with all parties' counsel, the district court brought the jury into the courtroom and summarized the contents of the note. The court identified neither the juror who had made the allegations nor the allegedly disrespectful juror. It admonished the jury as a whole to behave respectfully toward one another and listen to one another. Mr. Lucas did not object to this course of action or request a mistrial, and there were no further complaints about juror conduct during the remainder of deliberations.

Mr. Lucas now argues that the juror's alleged misconduct "should have resulted in a mistrial." He argues that "there was pressure on jurors to convict the defendants and to not consider the defendants individually" and that the juror's alleged conduct "was clearly prejudicial to Mr. Lucas' defense, especially because the evidence against him was weaker than that against his co-defendants."

Because Mr. Lucas did not request a mistrial in the district court, we review for plain error. Fed. R. Crim. P. 52(b).

In line with the objectives of the Double Jeopardy Clause—"the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions"—even if there is prejudicial error because of "judicial or prosecutorial error," a criminal defendant has the right to take his case "to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States v. Dinitz*, 424 U.S. 600, 608 (1976) (quoting *United States v. Jorn*, 400 U.S. 470, 484 (1971)). Thus, when the defendant has not requested a mistrial, "the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option" to stick with the first jury "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice

would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485 (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)).

Here, there was no "manifest necessity" to declare a mistrial in the absence of any defense motion. After the district court admonished the jurors to treat one another with respect, there were no further complaints about juror conduct. The jurors finished deliberations and reached verdicts on all counts. And the jury did not make blanket findings of guilt for each defendant—as noted above, the jurors were "diligent in following the instructions" because "they found not guilty" for some defendants "and changed the drug amounts on others. They were . . . pretty thorough." All these facts show that the past disrespectful conduct by one juror did not render the jury incapable of discharging its factfinding duty. To the contrary, the district court's admonition had its intended effect.

Because there was no manifest necessity for a mistrial in this case, it was not error—let alone plain error—for the district court to allow deliberations to continue.

* * *

Because Mr. Lucas has shown no trial error, his cumulative-error claim necessarily fails.

D. The District Court Erred Procedurally in Sentencing Mr. Lucas

Mr. Lucas argues that his sentence is both procedurally and substantively unreasonable. "Procedural reasonableness requires the court to 'properly calculate the guidelines range, treat that range as advisory, consider the sentencing factors in 18 U.S.C. § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence." *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir.), *cert. denied,* 140 S. Ct. 44 (2019) (quoting *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018)). Substantive reasonableness concerns "whether a 'sentence is too long (if a defendant

appeals) or too short (if the government appeals)" to accomplish the congressional goals codified in 18 U.S.C. § 3553(a)—the essential claim is that "the court placed too much weight on some of the § 3553(a) factors and too little on others." *Ibid.* (quoting *Rayyan*, 885 F.3d at 442).

We review preserved claims of both procedural and substantive unreasonableness for an abuse of discretion, with underlying factual findings reviewed for clear error and legal conclusions reviewed de novo. *Ibid.* Unpreserved claims—generally, claims not raised during the sentencing hearing—receive plain-error review. *Id.* at 1048.

1. Mr. Lucas's Sentencing

The offense level for a conviction under 18 U.S.C. § 1962 is calculated using USSG § 2E1.1, which provides for a base level of 19 unless "the offense level applicable to the underlying racketeering activity" is greater. USSG § 2E1.1(a). Offense levels for underlying activities are computed as though they were separate counts of conviction. *Id.* § 2E1.1(a), comment. (n.1).

The PSR held Mr. Lucas accountable for three kinds of underlying racketeering activity: conspiracy to commit murder, drug trafficking, and interstate travel or transportation in aid of racketeering. As noted above, the district court did not consider conspiracy to commit murder for sentencing purposes because it was not supported by a preponderance of evidence. The remaining two activities were grouped together per USSG § 3D1.2(d), and their grouped offense level was computed under USSG § 2D1.1. The PSR held Mr. Lucas accountable for five kilograms of cocaine and 280 grams of crack cocaine based on the jury's special-verdict findings on count one. Combined, those quantities equate to 1999.88 kilograms of converted drug weight, USSG § 2D1.1, comment. (n.8(D)), which corresponds to a base offense level of 30, *id.* § 2D1.1(a)(5), (c)(5).

Mr. Lucas objected that the quantities in the jury findings on count one were not relevant conduct for purposes of the Guidelines. But the district court believed that it was bound to use the

jury's findings on count one because of *United States v. Cockett*, 330 F.3d 706, 711 (6th Cir. 2003) ("[W]hen sentencing a defendant under the guidelines, [a court] cannot rely on a finding that directly conflicts with the jury's verdict."). The district court did sustain other objections by Mr. Lucas, striking enhancements under USSG §§ 2D1.1(b)(12) and 3B1.1(b), but it overruled his objection to a two-level enhancement for possessing a dangerous weapon under USSG § 2D1.1(b)(1). That resulted in an offense level of 32 for count one.

For count two, the district court first sustained Mr. Lucas's objection to the PSR's finding of 168.05 grams of crack cocaine, reducing the quantity to 97.17 grams. That amount corresponds to a base offense level of 24. USSG § 2D1.1(a)(5), (c)(8). Applying the two-level dangerous-weapon enhancement under USSG § 2D1.1(b)(1), the district court computed a total offense level of 26 for count two.

Because counts one and two were grouped together under USSG § 3D1.2(b), the higher of the offense levels for those counts, 32, became his offense level. With 10 criminal history points, his criminal history category was V. His advisory Guidelines range was therefore 188 to 235 months of imprisonment.

The district court heard allocution from Mr. Lucas and testimony from witnesses attesting to his rough upbringing and generous character. After hearing argument on the § 3553(a) factors and asking additional questions of the defendant, the district court explained its findings on the § 3553(a) factors and imposed a sentence of 240 months of imprisonment and 10 years of supervised release. The district court concluded: if its "calculation of the guidelines [wa]s wrong, then the Court would have imposed the same sentence applying all of the 3553(a) factors as a whole."

2. *Not Making Findings for Drug Types and Quantities on Count One Was Procedural Error*

Mr. Lucas argues that the district court improperly relied on the jury's special-verdict findings of at least five kilograms of cocaine and at least 280 grams of crack cocaine on count one in assigning a base level of 30 to that count in sentencing. He is correct—the district court erred.

The district court misapplied *Cockett*. There, it actually had been "possible to reconcile" the jury's verdict and the district court's finding of diminished capacity, resulting in a Guidelines departure. *Cockett*, 330 F.3d at 711. The government had argued that the guilty verdict on a tax charge, which required a "willful" mens rea, foreclosed any finding of diminished capacity. *Id.* at 712–13. But we found that the defendant's willful—meaning intentional and voluntary—violation of tax laws did not necessarily mean that she was "[un]impaired in her ability to exercise the power of reason," that is, had a diminished capacity; thus, the two findings were not necessarily contradictory. *Id.* at 713–14.

Likewise here. The jury's finding of *criminal liability* for 280 grams of crack and five kilograms of powder cocaine does not compel *sentencing accountability* for the same types and amounts. We have consistently noted that "the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy." *United States v. Swiney*, 203 F.3d 397, 402 (6th Cir. 2000) (quoting *United States v. Okayfor*, 996 F.2d 116, 120 (6th Cir. 1993)). Only *relevant* conduct, as defined in USSG § 1B1.3, may be used to compute an offense level.

Under the Guidelines, a base offense level "shall be determined" from "all acts and omissions of others that were[] (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity." USSG § 1B1.3(a)(1)(B); *see also id.* § 1B1.3, comment. (n.3(B)).

Thus, the Guidelines "limit a defendant's vicarious liability for the acts of her coconspirators . . . by instructing district courts to distinguish between each coconspirator's jointly undertaken activity." *United States v. McReynolds*, 964 F.3d 555, 563 (6th Cir. 2020). To enforce that limitation, we have required that the district court "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." *Ibid.* (quoting *United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002)); *see also id.* at 564 ("In short, our case law instructs that a district court cannot hold a defendant to the entire conspiracy-wide drug amounts at sentencing . . . without any particularized findings as to why it is doing so.").

That rule makes sense because there are different factual predicates for liability under 21 U.S.C. § 841(b)(1) and USSG § 1B1.3(a)(1)(B). A defendant is *criminally* liable for all types and quantities of drugs "involv[ed]" in a drug-trafficking conspiracy so long as he could have reasonably foreseen that involvement—there is no requirement that he individually agree to help make or sell those specific drugs or quantities. But the defendant's individual "agreement to jointly undertake the particular criminal activity" is essential for *sentencing accountability* under the Guidelines. USSG § 1B1.3, comment. (n.3(B)).

Here, the jury's special verdict on count one implies only criminal liability, not sentencing accountability. There was no finding about the scope of Mr. Lucas's individual agreement in the RICO conspiracy. And the district court's factual findings at the sentencing hearing support only that Mr. Lucas was personally accountable for about 97 grams of crack and no powder cocaine—in a different conspiracy. Thus, without a finding by the district court that at least five kilograms of cocaine and at least 280 grams of crack cocaine were within the scope of Mr. Lucas's agreement on count one, assigning a base offense level of 30 for that count was error.

3. The Procedural Error Was Harmful

Harmless-error review applies to sentencing errors. Sentencing error is harmless if "a reasonable probability of prejudice does not exist." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). If that is the case, we need not remand for resentencing. *United States v. Duckro*, 466 F.3d 438, 446 (6th Cir. 2006) ("[W]e are required to remand for resentencing unless we are certain that any such error was harmless—i.e. any such error did not affect the district court's selection of the sentence imposed."). One point in favor of harmlessness is that "the [district] court recognized the potential error in applying" a Guidelines provision. *United States v. Montgomery*, 815 F. App'x 962, 964 (6th Cir.), *reh'g denied,* 969 F.3d 582 (6th Cir. 2020). Another is that the depth of the district court's discussion of an issue in the record indicates that it had that potential error in mind while contemplating a final sentence. *Ibid.* In such circumstances, a district court's declaration that the error would not have affected its ultimate sentence has justified a finding of harmlessness. *Ibid.* (collecting cases).

Even so, it should not be the norm that Guidelines-calculation errors are harmless. Even though it is now advisory, the Guidelines range must still be considered in passing sentence. 18 U.S.C. § 3553(a)(4). And the Supreme Court has stressed that "[i]n *most cases* a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Molina-Martinez*, 136 S. Ct. at 1346 (emphasis added); *see also id.* at 1347 ("Absent unusual circumstances," a "defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder."). That is because "there is 'considerable empirical evidence indicating that the Sentencing Guidelines have the intended

effect of influencing the sentences imposed by judges.'" *Id.* at 1346 (quoting *Peugh v. United States*, 569 U.S. 530, 543 (2013)).

Indeed, there is some evidence here that the district court was influenced by the Guidelines range. The district court varied only five months above the top of Mr. Lucas's computed range. Likewise for Mr. Titington: his range was 168 to 210 months of imprisonment plus a mandatory consecutive five years for his conviction on count forty-two. He ended up with 270 months of imprisonment, exactly the sum of 210 months and five years. The anchoring influence of the Guidelines was also evidenced by the contrasting sentences for Mr. Kilgore and Mr. Darden. The district court computed their Guidelines ranges to each be life imprisonment (plus a consecutive 10 years for Mr. Kilgore). And they accordingly got much higher sentences: 420 months for Mr. Kilgore (300 months plus the mandatory consecutive 10 years), 175% of Mr. Lucas's sentence; and 480 months for Mr. Darden, fully twice Mr. Lucas's sentence.

And although the district court's thorough analysis of the § 3553(a) factors weighs in favor of harmlessness, here, the district court's analysis did not consider the potentially large variance should Mr. Lucas be accountable only for 97 grams of crack cocaine. If that be the case, his total offense level would be 26, yielding a Guidelines range of 110 to 137 months. The top of that range is 98 months lower than the top of his current range. If the district court were to impose the same sentence under that lower Guidelines range, which a finding of harmless error would imply, then it would have to justify an upward variance of 103 months—75%.

Last, while the district court did state that it would have imposed the same sentence despite any error in its Guidelines calculations, we are not persuaded by that statement here. The purpose of harmless-error analysis, "to avoid the efficiency cost of resentencing in cases where we are absolutely certain that the district court would have announced the same sentence had it not erred,"

is thwarted by a "standard-issue pledge that the district court would have come to the same result under the § 3553(a) factors had it calculated the Guidelines range correctly." *Montgomery*, 969 F.3d at 583. We count such pledges "a point in favor of harmless error," *ibid.*, chiefly when they go beyond unadorned boilerplate to explain how the district court's properly invoked discretion reasonably arrives at the same sentence. For example, the district court might recognize that it had some doubt in applying a specific enhancement yet give reasons why the final sentence would be the same with or without it. *See, e.g.*, *United States v. Morrison*, 852 F.3d 488, 492 & n.2 (6th Cir. 2017). Or the district court might recognize that, regardless of its finding on some enhancement, its ultimate sentence would be within the resulting Guidelines ranges with and without the enhancement. *See, e.g.*, *United States v. McCarty*, 628 F.3d 284, 294 (6th Cir. 2010).

By contrast, a bare statement that the district court would impose the same sentence regardless of any difference in the Guidelines range, even one invoking all the sentencing factors as a whole, does not aid our review. If the statement is unconnected to a specific provision under consideration, there is little to guarantee that the district court would actually impose the same sentence. A district court might well reconsider its sentence if it learned that it had overstated the Guidelines range by ten or twenty years. And it should. A statement that *any* difference in the Guidelines range would be immaterial to the sentence is evidence that the district court in fact failed to consider one of the § 3553(a) factors—the Guidelines range itself. 18 U.S.C. § 3553(a)(4).

Here, the district court buttressed Mr. Lucas's sentence with such a bare statement. And the district court recited the same caveat at each of the sentencing hearings for the defendants in this appeal. In fact, it did so at the same point in each hearing—right after the *Bostic* question.[5] None

[5] *See generally United States v. Bostic*, 371 F.3d 865, 872–73 (6th Cir. 2004).

of those statements was connected to controversies over specific Guidelines provisions. Instead, the district court's language was general, being nearly identical as to each defendant.

Because the district court appeared to use the Guidelines ranges as anchor points in sentencing each defendant, because of the potential 98-month discrepancy in Mr. Lucas's computed Guidelines range, and because the district court's pledge to give the same sentence despite any Guidelines errors appears to be boilerplate, we hold that the district court's procedural error was harmful. We therefore vacate Mr. Lucas's sentence and remand for his resentencing. At the new sentencing hearing, the government may introduce evidence about the scope of Mr. Lucas's individual agreement in the RICO conspiracy, and the district court should make any appropriate factual findings.

4. Imposing the Two-Level Dangerous-Weapon Enhancement Was Not Clear Error

Mr. Lucas also challenges the two-level enhancement for possessing a dangerous weapon under USSG § 2D1.1(b)(1). This challenge fails because there was no clear error in the district court's factual finding that "[t]here's sufficient evidence to conclude by a preponderance that Mr. Lucas had possession of a firearm." The district court pointed to his conviction for unlawfully carrying or possession of a weapon in 2008, in which he "crashed his vehicle and fled on foot before being apprehended" and "[a] search of his vehicle revealed four loaded handguns." Because counts one and two extended from at least as early as 2005 onward, that firearm possession occurred during the course of each conspiracy. There was also trial testimony that during a March 2012 traffic stop of Mr. Lucas, police found a gun under the passenger seat of the car along with $2,600 on Mr. Lucas's person. Although Mr. Darden was a passenger in the car, the district court could permissibly have found by a preponderance of the evidence that Mr. Lucas possessed the firearm jointly with him. Because he possessed those firearms during the conspiracies charged in

the two counts, there was a presumption that the firearm was possessed in connection with the drug-trafficking activity in those counts. *United States v. Darwich*, 337 F.3d 645, 665 (6th Cir. 2003). The district court could permissibly find that Mr. Lucas did not rebut that presumption. Thus, there was no clear error in assigning this enhancement.[6]

III. MARCUS DARDEN

Mr. Darden challenges the admissibility of two classes of testimony from government witnesses: (1) what he characterizes as expert testimony by witnesses who were not so qualified and (2) out-of-court statements by two coconspirator declarants.

We review preserved evidentiary claims for abuse of discretion. *United States v. Bartholomew*, 310 F.3d 912, 920 (6th Cir. 2002). That means that we "will leave rulings about admissibility of evidence undisturbed unless" the district court "improperly applie[d] the law or use[d] an erroneous legal standard" or we are "left with the definite and firm conviction" that the district court "committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Ibid.* (quoting *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002)). Unpreserved evidentiary claims are reviewed for plain error. *Cf. Haywood*, 280 F.3d at 725; Fed. R. Evid. 103(e); Fed. R. Crim. P. 52(b). A party preserves a claim that evidence was erroneously admitted only if that party makes a timely objection or motion to strike and states the ground for the objection with specificity (unless the ground was apparent from context). Fed. R. Evid. 103(a)(1).

[6] Because we remand for his resentencing, we need not address Mr. Lucas's challenges to the adequacy of the district court's explanation for its five-month upward variance and to the substantive reasonableness of his sentence.

A. Expert-Testimony Challenges

The first class of challenged testimony comes from four law-enforcement officers who Mr. Darden alleges were not properly qualified to give expert opinion testimony.[7]

Except for expert testimony under Rule 703, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A witness not qualified as an expert under Federal Rule of Evidence 702 may give "testimony in the form of an opinion" only if it is "rationally based on the witness's perception," "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. The purpose of the third requirement is to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 advisory committee's note (2000).

We determine whether a lay witness's opinion testimony constitutes impermissible expert opinion testimony by examining the kind of reasoning the witness used. *See generally United States v. White*, 492 F.3d 380, 400–04 (6th Cir. 2007). Explicating the state-court case whose reasoning was incorporated into Rule 701 by the advisory committee, *White* characterized lay-opinion testimony as "result[ing] from a process of reasoning familiar in everyday life" and expert testimony as "result[ing] from a process of reasoning which can be mastered only by specialists in the field." *Id.* at 401 (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)). The prototypical examples of permissible lay-opinion testimony are that "a footprint in snow looked like someone

[7] Mr. Darden also complains that the government did not disclose the purported expert witnesses under Federal Rule of Criminal Procedure 16(a)(1)(G), but he does not present analysis of the issue or specifically request relief for that error. Rather, he uses the failure to disclose as a reason that the error in admitting the testimony was harmful. Thus, he has waived Rule 16(a)(1)(G) as a standalone ground for relief because he failed to brief it sufficiently. *See Bard v. Brown Cnty.*, 970 F.3d 738, 765–66 (6th Cir. 2020) (opinion of Siler, J., for the court).

had slipped, or that a substance appeared to be blood." *Ibid.* (quoting *Brown*, 836 S.W.2d at 550). By contrast, the prototypical example of opinion testimony that only an expert could give is "testimony that skull trauma caused the bruises on a victim's face" because making such an inference would require "specialized skill or expertise." *Ibid.* (quoting *Brown*, 836 S.W.2d at 550).

We have applied this doctrine to testimony by forensic specialists about data extracted from electronic devices. *United States v. Ganier*, 468 F.3d 920, 924 (6th Cir. 2006). In *Ganier*, the government argued that a computer specialist would offer lay testimony because all the specialist would do is "run[] commercially-available software, obtain[] results, and recit[e] them," which it characterized as "facts . . . that could be observed by any person reasonably proficient in the use of commonly used computer software, such as Microsoft Word and Microsoft Outlook." *Id.* at 925–26. But after examining the reports generated by the software, which consisted of contents of the operating system registry whose meaning the lay person could only guess at, we disagreed. *Id.* at 926 ("Software programs such as Microsoft Word and Outlook may be as commonly used as home medical thermometers, but the forensic tests [the specialist] ran are more akin to specialized medical tests run by physicians.").

As for gang-expert witnesses, we have recognized that the inner workings of organized crime are "a proper subject of expert opinion because such matters are 'generally beyond the understanding of the average layman.'" *United States v. Rios*, 830 F.3d 403, 413 (6th Cir. 2016) (quoting *United States v. Tocco*, 200 F.3d 401, 419 (6th Cir. 2000)). We gave the example of an FBI agent's testimony "on the structure, the organization, [and] the rules" of an organized-crime entity as a proper subject for expert testimony. *Ibid.* (alteration in original) (quoting *Tocco*, 200 F.3d at 418). But such an officer should not become "a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt" rather than

"a sociologist describing the inner workings of a closed community." *Id.* at 414 (quoting *United States v. Mejia*, 545 F.3d 179, 190 (2d Cir. 2008)). In other words, the gang-expert officer should not give "a summary of the facts" but rather be an aid to the factfinder in understanding them. *Ibid.*

United States v. Freeman, 730 F.3d 590 (6th Cir. 2013), provides some additional guidance regarding law-enforcement witnesses who offer lay opinion testimony. There, we held that an officer cannot "repeatedly substantiate[] his responses and inferences with generic information and references to the investigation as a whole." *Id.* at 596. "[*P*]*ersonal* experiences that led him to obtain his information are required." *Ibid.* Otherwise the jury has "no way of verifying his inferences or of independently assessing the logical steps he had taken." *Id.* at 597. Instead, the officer's testimony "can convey the impression that evidence not presented to the jury, but known to the [prosecutor], supports the charges," and that impression "jeopardize[s] the defendant's right to be [tried] solely on the basis of the evidence presented to the jury." *Id.* at 599 (quoting *United States v. Hampton*, 718 F.3d 978, 983 (D.C. Cir. 2013)).

Last, on the topic of whether an expert witness has been appropriately qualified, we have held that, if "a witness's qualifications are obvious," then "there is no need to formally qualify him as an expert." *United States v. Nixon*, 694 F.3d 623, 629 (6th Cir. 2012) (quoting *United States v. Cobb*, 397 F. App'x 128, 139 (6th Cir. 2010)); *see also United States v. Lopez-Medina*, 461 F.3d 724, 743 (6th Cir. 2006). For example, we have held that DEA agents with at least six years of employment with the agency were obviously qualified to testify that a defendant who was riding a bicycle around a neighborhood "was engaging in counter-surveillance" for drug-traffickers against police and that "certain scraps of paper were drug ledgers and the numbers contained therein corresponded to kilograms of cocaine and dollar amounts." *Lopez-Medina*, 461 F.3d at 742. In another case, a witness, who opined that the defendant had stolen money and forged signatures,

had become an FBI agent just four months before working on the case. *Nixon*, 694 F.3d at 629, 631. But because he had a "background and training in the field of financial investigations" and had handled 20 to 30 cases, including as an auditor for a national accounting firm, we held that any weaknesses in the witness's qualifications went to "the weight rather than the admissibility of his opinion testimony." *Id.* at 629–30.

1. Any of Sergeant Beebe's Testimony That Was Erroneously Admitted Was Harmless

Gregory Beebe is a sergeant with the Clarksville Police Department and a member of a task force with ATF. He supervises the department's narcotics section, has been part of the gang-intelligence unit since 2006 or 2007, and started investigating the Gangster Disciples in 2013 or 2014.

The government described him at trial as "sort of an intro witness" because much of his testimony identified photographs of persons, including the defendants, and places figuring into the testimony that later witnesses developed. But he also made other factual claims about these persons (such as nicknames, gang associations, and who was involved in certain offenses) and places (primarily what events, such as shootings, had occurred where). He recited background facts about the Gangster Disciples, including their founder Larry Hoover and their symbology. He also stated at one point early in his testimony that one obstacle to his investigation had been that "[v]ictims [we]re not willing to cooperate with the police" because the local department did not have the resources to protect them "as much as a federal organization would." (No defendant objected to this statement.)

Mr. Darden objected to Sgt. Beebe's testimony several times on a few different bases. He objected to the background testimony about the Gangster Disciples—for example, Larry Hoover and his significance to the gang as its founder, and the symbols that gang members use and their

significance. Mr. Darden argued that "the government ha[d] not identified Detective Beebe as an expert on gangs" and that there had been no foundation for his testimony. The district court overruled the objections because the government was not offering the sergeant as an expert.

Another objection came after Sgt. Beebe testified that Mr. Darden was a member of a street gang—namely the Gangster Disciples—and had the nicknames "MD" and "Mac Tuff." That objection was for lack of foundation. The district court overruled that objection too. The government did not ask Sgt. Beebe to explain how he knew that Mr. Darden was a member of the Gangster Disciples or knew these were his nicknames.

After Sgt. Beebe identified a score of other persons and testified to their nicknames and gang associations, Mr. Darden again objected for lack of foundation. And when Sgt. Beebe testified that he knew someone to be a member of the Gangster Disciples because that person "was associated with" Mr. Darden and Mr. Lucas, Mr. Darden yet again objected: "He's saying they're gang members because they know my client, who is a gang member. It's a circle." Still, the district court overruled his objections.

a. The District Court Admitted Some of Sergeant Beebe's Testimony in Error

Mr. Darden challenges Sgt. Beebe's testimony on appeal for several reasons. He argues that Sgt. Beebe improperly testified to facts for which he provided no foundation. He also contends that the government improperly used Sgt. Beebe to introduce expert testimony on gangs without being qualified as an expert. And he also complains that the comment that the Clarksville police were unable to provide protection to victims was an improper insinuation that Mr. Darden and his codefendants were violent.[8]

[8] Mr. Darden further asserts that Sgt. Beebe's testimony violated the Confrontation Clause. But he does not give analysis or present supporting case law, so he has forfeited any confrontation claim. *See Bard v. Brown Cnty.*, 970 F.3d 738, 765–66 (6th Cir. 2020) (opinion of Siler, J., for the court).

The district court erred in admitting Sgt. Beebe's testimony to case-specific facts without having sufficient foundation. Mr. Darden rightly objects that Sgt. Beebe acted as "a chronicler of the recent past," *Rios*, 830 F.3d at 414. For example, Sgt. Beebe identified no "*personal* experiences that led him to obtain his information," *Freeman*, 730 F.3d at 596, that Mr. Darden went by "MD" or "Mac Tuff," that he was a member of the Gangster Disciples, or that he was a member of any street gang at all. He merely asserted those propositions as fact. After Mr. Darden's repeated objections, the government began to elicit more specifics of Sgt. Beebe's specific sources of knowledge for the facts he testified to. But it did not circle back to ask how Sgt. Beebe knew these particular facts about Mr. Darden—there was no testimony that he saw Mr. Darden's name or nickname on any membership lists or in any photographs of Gangster Disciples meetings.

The next category of challenged testimony is Sgt. Beebe's testimony about the founder of the Gangster Disciples and signs and symbols. His testimony as to these facts was impermissible as lay testimony. *See* Fed. R. Evid. 602. Sgt. Beebe gave little specific foundation for his personal knowledge of the facts about the gang. He said that he had "encountered Gangster Disciples" through "part of his duties" in the Clarksville Police Department "[t]hrough arrests, through interviews, through surveillance." He offered that he had received "training on gangs and gang investigations," that he had "been involved in numerous state and federal gang investigations," that he had "attended outlaw motorcycle gang training," and that he was "a member of the Tennessee Gang Investigators Association" for "over four years." Asked to describe indicators of membership in the Clarksville deck, "based on what [he] know[s] of Clarksville Gangster Disciples," Sgt. Beebe noted that he had seen "dues rosters where dues are paid," "books of knowledge," "photographs where they have traveled to Memphis, Tennessee, to celebrate Larry Hoover's G-day, his birthday," and "numerous documentations" including "violation reports." He

concluded by noting that he had "had contact with people that have tattoos of six-pointed stars on their body that [we]re members of the Gangster Disciples."

But we have recognized that testimony about the "history, organization, and unique terminology or symbols" of a gang is "within the appropriate scope of gang-expert testimony." *Rios*, 830 F.3d at 415. It is possible that Sgt. Beebe's qualifications were "obvious" enough, as in *Nixon*, 694 F.3d at 629, for him to give expert testimony on the Gangster Disciples. But we are not certain that is the case here. He stated broadly that he had had training about gangs and "outlaw motorcycle gang[s]," but he did not testify that he had been trained specifically on the Gangster Disciples—which is *not* a motorcycle gang. He certainly had qualifications in *investigating* gangs, but it is not explained how proficiency in gang-investigation techniques translates into prowess with a particular gang's arcana. And his testimony that he had merely "seen" the gang's "books of knowledge" does not show that he was well-versed in their contents.

And even had Sgt. Beebe been qualified as a Gangster Disciples expert, his testimony as to facts about the gang's history and symbology remain inadmissible except to the extent that he personally observed them. He was not asked to give an expert opinion under Rule 703, so his testimony as to facts, even specialized facts, must be grounded in personal knowledge. Fed. R. Evid. 602 ("This rule does not apply to a witness's expert testimony *under Rule 703*." (emphasis added)); *United States v. Langan*, 263 F.3d 613, 623–24 (6th Cir. 2001); *see also* 27 Victor J. Gold, *Wright and Miller's Federal Practice and Procedure* § 6025 (2d ed. 2021) ("When experts testify as to facts and not opinions, Rule 703's exemption from the personal knowledge requirement does not apply."). Likewise, because he was not giving an opinion, he could not give his impressions of the significance of Larry Hoover and the Gangster Disciples symbols to gang members, nor could the government sneak in the underlying facts through his testimony using Rule 705.

But because the admission of Sgt. Beebe's testimony was ultimately harmless, as we discuss below, we do not sift through the record to identify every item the district court should have excluded.

Last, we consider Sgt. Beebe's statement that victims do not often cooperate because they fear retaliation and because the local police cannot protect witnesses as well as federal agencies. Mr. Darden did not object at trial to that statement, so his claim on appeal receives only plain-error review. And the statement's admission was not plainly erroneous. It does not take specialized training or knowledge to infer that victims of street-gang crime are hesitant to cooperate because of a fear of retaliation. Nor that local police typically have fewer resources than federal agencies and are therefore less able to provide witness protection. And to the extent that Mr. Darden appears to argue that the statement was significantly more unfairly prejudicial than probative, he has forfeited that argument by failing to brief it adequately. *See Bard v. Brown Cnty.*, 970 F.3d 738, 765–66 (6th Cir. 2020) (opinion of Siler, J., for the court).

b. But the Error Was Harmless

We review error in admitting testimony for harmlessness. *United States v. Young*, 847 F.3d 328, 349 (6th Cir. 2017) (citing Fed. R. Crim. P. 52(a)); *see also* Fed. R. Evid. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party . . . ."). Because Mr. Darden does not claim any error depriving him of constitutional rights, the government need only "show by a preponderance of the evidence that the error did not materially affect the verdict" for us to disregard that error. *Young*, 847 F.3d at 349–50. We "must take account of what the error meant to the jury, not singled out and standing alone, but in relation to all else that happened." *United States v. Davis*, 577 F.3d 660, 670 (6th Cir. 2009) (quoting *United States v. Gibbs*, 506 F.3d 479, 485 (6th Cir. 2007)). To assess harmlessness, we have considered

whether the testimony is "separately confirmed by witnesses who testified to the same or very similar facts," *see Rios*, 830 F.3d at 416; whether its "force and importance" was relatively light compared to other evidence against the defendant, *see United States v. Lovett*, 764 F. App'x 450, 455–56 (6th Cir. 2019); and whether there was "overwhelming evidence" of guilt beyond the erroneously admitted testimony, *see Gibbs*, 506 F.3d at 485. (Though intertwined, these considerations are not identical.)

Mr. Darden asserts that the testimony was harmful error because, without it, "the evidence was insufficient to convict on any of the charged counts." That is an overstatement. Other witnesses, including members or former members of the Gangster Disciples, testified to the history and organization of the gang and its signs, symbols, and rules and their significance. There was also testimony that Mr. Darden was a member of the Gangster Disciples and a leader of the Clarksville deck. His monikers "MD" and "Mac Tuff" came in through other witnesses as well. And Sgt. Beebe's testimony was of limited importance to the government's overall case. The government aptly described him as an "intro witness" (even though it was error to use him in this way). After he testified, the government presented ample evidence of Mr. Darden's racketeering activity, including both drug-related and violent crimes. It is unlikely the jury's verdict would have changed absent Sgt. Beebe's testimony.

Mr. Darden also argues that the error in admitting Sgt. Beebe's testimony was compounded by the "primacy effect," a phenomenon in which a person tends to weigh information received first more heavily than that received later. He cites S.E. Asch, *Forming Impressions of Personality*, 41 J. Abnormal & Soc. Psych. 258 (1946), for that proposition. But the Asch study's focus, as the article's title indicates, was not impressions of guilt or innocence based on evidence but rather impressions of a person's personality based on descriptive adjectives. In other research, we have

found at least some evidence of a potentially stronger *recency* effect in criminal trials; that is, of heavier weight given to evidence of guilt presented later in the proceedings. *See* Christoph Engel et al., *Coherence-Based Reasoning and Order Effects in Legal Judgments*, 26 Psych., Pub. Pol'y, & L. 333, 340–44 (2020). In any event, Mr. Darden cites no precedent for the proposition that a primacy effect increases the harmfulness of a legal error,[9] and he has not persuaded us to graft it onto our case law.

Mr. Darden last argues that the error was harmful because the government unfairly surprised him by failing to disclose Sgt. Beebe's expert-witness testimony under Rule 16(a)(1)(G). In his reply brief, he suggests that the case might have had a different outcome had he been aware of it beforehand: "the Appellant's defense team certainly would have engaged its own 'gang expert' long before trial to refute much of what Beebe was allowed to say unchecked." Maybe so. But Sgt. Beebe's improper expert testimony on the gang's origins and symbology was sparse. Former gang members, such as Mr. Dowlen and Mr. Galbreath, discussed those topics in greater depth, and Mr. Darden *did* have advance notice of *their* testimony on the topics through the government's witness list. And the fact remains that these points were not the linchpins of the government's case. The government relied on eyewitness testimony and records of Mr. Darden's actions. There was plenty of that to convict him.

Because Sgt. Beebe's erroneously admitted testimony was harmless, it entitles Mr. Darden to no relief.

[9] A Westlaw search uncovers only one case in the Sixth Circuit containing the phrase "primacy effect": a district-court opinion in an elections case. *Green Party of Tenn. v. Hargett*, 953 F. Supp. 2d 816 (M.D. Tenn. 2013), *rev'd and remanded*, 767 F.3d 533 (6th Cir. 2014).

2. It Was Proper to Admit Special Agent Harrell's Testimony

ATF Special Agent John Harrell is assigned to the "crime gun intelligence center" in Nashville, where he works "[p]rimarily" as a "digital forensic examiner." He has had that job since about 2010, has "done well over a thousand" data extractions, "constantly" undergoes training in his field, and is "certified as a computer forensic examiner from the International Society of Computer Forensics" and as proficient in the tools he uses.

Special Agent Harrell testified that he received two cell phones and a warrant authorizing him to extract data from them. He attempted to do so, but they were both locked by passcodes. So he sent the phones to Cellebrite, a government contractor that offers phone-unlocking services. Cellebrite sent back the passcodes to unlock the phones as well as hard drives containing the phones' data. Special Agent Harrell then used Cellebrite's "Physical Analyzer" software to parse the extracted data and generate reports from it. At trial, he described the report he generated from one cell phone, explaining the meaning of some of the items on it. It included mundane fields such as the phone's passcode as well as technical fields such as IMEI, ECID, and UDID (all types of unique device identifiers).

Special Agent Harrell then related excerpts of textual data extracted from the phone. For example, "favorites" and other contacts from Facebook, Facebook Messenger, and Instagram, the contents of several items created using Apple's "Notes" app, and messages sent using iMessage. Mr. Darden objected for lack of chain of custody, for lack of relevance, and for unfair prejudice, but the district court overruled his objections.

Special Agent Harrell testified to the same process for the second phone and described similar contents, including contacts, notes, and messages. Mr. Darden objected to the admission of the report for the second phone on the same grounds as he had for the first phone, and he also

included the "additional grounds" that Special Agent Harrell had not been "qualified [under Rule 702] to attest to the reliability or authenticity of this scientific evidence, and he's not been disclosed as an expert." The district court overruled the objections. Mr. Darden renewed his expert-testimony objection when Special Agent Harrell began explaining what "activation time" meant in the report. His objection was again overruled.

On cross-examination, Special Agent Harrell explained that he "spot-check[s] contacts, call logs, text messages," and photographs to verify that the extracted data matches what is present on phones. And he testified on redirect examination that he was unaware of any incident in which Cellebrite had altered evidence. He further offered that if Cellebrite were ever to tamper with the contents of a device, ATF would never contract with the company again.

Mr. Darden challenges Special Agent Harrell's testimony on the grounds that there was no proper foundation or authentication for "the admission of a report that was created by someone other than Agent Harrell." He also challenges Special Agent Harrell's "interpret[ation of] thousands of pages of data extracted from the phones" because he was not qualified as having the "'expertise' and special knowledge the testimony required." Because Mr. Darden waited until the government offered the second phone's report into evidence to object on the expert-testimony ground, he preserved that claim only as to the second phone. We review the claim as to the first phone for plain error only.

Special Agent Harrell's testimony explaining the significance of technical terms on the reports generated by the Physical Analyzer was indeed expert testimony. Those explanations, although not presenting an opinion, required reasoning not available to a layperson. It is comparable to interpreting the registry report in *Ganier*, 468 F.3d at 926 n.4.

But it was not error to admit that expert testimony. Special Agent Harrell testified to his qualifications, and Mr. Darden did not object to them. Those qualifications were far stronger than those of the FBI special agent in *Nixon*, more on par with those of the veteran DEA agents in *Lopez-Medina*. So his qualifications were obvious, and the district court did not need to make a formal finding that he was an expert in data extraction.

By contrast, merely reading off the contents of the extracted data (such as contact information, notes, and messages) requires no specialized reasoning. After Special Agent Harrell extracted the data from the phones, it was available in printable format that the jury could read—in fact, at the district court's request, the government printed out the data to make hard copies so that the jury could follow along during testimony. So Special Agent Harrell's specialized training was not necessary to introduce the contents of the phone. All he did was recite the text that the extraction and report-generation process had already produced.

Thus, there was no error in admitting Special Agent Harrell's testimony.

3. *Mr. Darden Has Forfeited Any Challenge to Mr. Patterson's Testimony*

Mr. Darden's opening brief quotes a colloquy between the district court and counsel about James Howard Patterson. Mr. Patterson is a former assistant special-agent-in-charge at the Tennessee Bureau of Investigation's digital-forensics section. Mr. Darden cites this colloquy as an example of the district court's purported errors in its expert-testimony rulings. But aside from quoting that colloquy, he does not "cite any cases, provide any analysis, or develop any argument" explaining why Mr. Patterson's testimony was inadmissible, so he has forfeited any challenge to it on appeal. *See Bard*, 970 F.3d at 765–66.

4. It Was Proper to Admit Officer Atkins's Testimony

James Atkins, an officer in the Clarksville Police Department's traffic unit and a federal crash investigator, had worked there for eight years at the time of trial. He uses LIDAR (meaning "light detection and ranging") technology in the regular course of his duties to determine distances. He has been certified since 2010 to operate LIDAR devices and since 2015 to instruct others in operating them. Those certifications are valid for life.

Officer Atkins explained the basic physics for how LIDAR works. He then described his process for measuring the distances between a barber shop where Mr. Darden had allegedly sold drugs and Austin Peay State University. (This measurement is relevant to count fifteen, which charged Mr. Darden with distribution and possession with intent to distribute cocaine within a thousand feet of a public university.) He reported that the measurements were all less than a thousand feet. Mr. Darden objected that Officer Atkins's testimony was impermissible expert testimony by a lay witness, but the district court overruled the objection.

On appeal, Mr. Darden continues to challenge Officer Atkins's testimony as improper expert testimony. But no specialized reasoning beyond the ken of a layperson is necessary to understand Officer Atkins's process for measuring distances using LIDAR. He identified the points between which he took measurements and the distances he measured between each. And he used two distinct brands of LIDAR equipment to perform each measurement. Thus, the jury could "verify[] his inferences" and "independently assess[] the logical steps he had taken" in making the measurements. *Freeman*, 730 F.3d at 597. And to the extent that Officer Atkins's brief description of how LIDAR functions[10] required specialized knowledge, his several years of user and instructor

[10] The full extent of the explanation was: "It's an electronic unit that emits an infrared beam of light that's reflected off a solid object and returned to the unit. The unit divides the time that it takes that light to travel out and back in half and multiplies that by the speed of light to calculate the distance traveled."

certification and his regular use of the device at work was enough to make his qualifications on that point obvious.[11]

B. Coconspirator-Statement Challenges

Mr. Darden next appeals the admission of two out-of-court statements as coconspirator statements under Federal Rule of Evidence 801(d)(2)(E). The proponent of a statement under Rule 801(d)(2)(E) must show by a preponderance of the evidence that: (1) a conspiracy existed, (2) the party against whom the statement is offered was part of that conspiracy, (3) the declarant was part of that same conspiracy at the time the statement was made (that is, the statement was made "in the course" of the conspiracy), and (4) the statement was made "in furtherance of the conspiracy." *United States v. Kelsor*, 665 F.3d 684, 693 (6th Cir. 2011).

We review the district court's findings on these factual prerequisites for clear error. *United States v. Gessa*, 971 F.2d 1257, 1260–61 (6th Cir. 1992) (en banc). A finding of fact is clearly erroneous only if, after a review of the entire record, "the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed." *Mahoney v. United States*, 831 F.2d 641, 645 (6th Cir. 1987) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). And if "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 645–46 (quoting *Bessemer City*, 470 U.S. at 574).

A statement is "in furtherance of a conspiracy if it was intended to promote conspiratorial objectives." *United States v. Maliszewski*, 161 F.3d 992, 1008 (6th Cir. 1998) (quoting *United States v. Carter*, 14 F.3d 1150, 1155 (6th Cir. 1994)). Although "idle chatter or casual conversation about past events" is not admissible through Rule 801(d)(2)(E), statements "keeping

[11] At trial, Mr. Darden also raised a challenge to the reliability of LIDAR technology overall. It is unclear whether he intended to maintain that challenge on appeal, but he has forfeited it by not sufficiently briefing it. *See Bard*, 970 F.3d at 765–66.

coconspirators advised" or "concealing aspects of the scheme" are properly in furtherance of the conspiracy. *Tocco*, 200 F.3d at 419 (quoting *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994)); *see also United States v. Martinez*, 430 F.3d 317, 327 (6th Cir. 2005) (statements made "to apprise a coconspirator of the progress of the conspiracy, to induce his continued participation, or to allay his fears" were in furtherance of the conspiracy, as was a warning letter "providing information relating to the government's ongoing investigation, warning that some of its members could no longer be trusted, and advising caution in future dealings"). And a statement's purpose need not be "exclusively, or even primarily" to further the conspiracy for it to be admissible through Rule 801(d)(2)(E). *Tocco*, 200 F.3d at 419 (quoting *Shores*, 33 F.3d at 444).

1. It Was Proper to Admit Mr. Whitlock's Statement to Mr. Galbreath

Tray Galbreath, a former Gangster Disciple, testified about events following the 2006 shooting of William Miller, also known as Lil Will. Over objection from Mr. Darden, he testified that he had learned of Mr. Miller's shooting through a conversation with Mr. Whitlock. Mr. Whitlock and Mr. Darden were both in a car that pulled up to a porch where Mr. Galbreath had been sitting. Mr. Whitlock rolled down his window and motioned for Mr. Galbreath to come to the car. Saying, "Here, bruh. Take this," Mr. Whitlock gave Mr. Galbreath a hoodie with "at least" a couple of handguns bundled inside. The guns were "hot—still warm." Messrs. Whitlock and Darden seemed "kind of panicky," "anxious," and "real jittery," and Mr. Galbreath remembered hearing sirens at the time. The two in the car drove off shortly after Mr. Galbreath got the guns.

Mr. Galbreath kept the guns in hiding for "maybe a day or two" until Mr. Whitlock came to pick them up. Then, while Mr. Galbreath was in a car with Mr. Whitlock, Mr. Whitlock told him that "they had shot Lil Will" and "that's why they needed [Mr. Galbreath] to keep the guns." Mr. Whitlock did not expressly say whom the pronoun "they" referred to, but Mr. Galbreath assumed

it meant Mr. Whitlock and Mr. Darden "because they were the ones that pulled up together when they gave [him] the guns." Mr. Whitlock also told Mr. Galbreath why they had shot Mr. Miller—"[t]o put GD on the map," which Mr. Galbreath interpreted to mean "[l]et the streets know that GD is a power to be reckoned" with. And "a lot of the violence started, from that point on" because the shooting had put Messrs. Whitlock and Darden "on the map, and then GD followed with that." It is these statements that Mr. Darden challenges on appeal. He contends that Mr. Whitlock did not make them in furtherance of the conspiracy but rather only as a recounting of past events.

The district court did not clearly err in finding that the statements made by Mr. Whitlock to Mr. Galbreath were in furtherance of the Clarksville deck's conspiracy. It is a permissible view of the evidence that Mr. Whitlock intended his statements to inform Mr. Galbreath about the status of the conspiracy. The shooting of Lil Will was a significant event in the deck's history: it "[l]et the streets know that GD [wa]s a power to be reckoned" with. That was Mr. Darden's stated goal for the deck: to "[b]low its stature up" and "[i]ncrease its reputation." The district court could therefore permissibly infer that at least part of the purpose of Mr. Whitlock's statements was to let Mr. Galbreath know that the conspiracy had begun to accomplish its objectives in earnest. And implicating Mr. Darden was necessary for that purpose—putting Mr. Darden, a high-ranking member, on the map ensured that the deck too would increase in stature.

2. *It Was Harmless Error to Admit Mac T's Statement to Mr. Austin*

Johnny Austin is another former member of the Gangster Disciples who testified for the government. Among other events, he described what had transpired at a January 2014 meeting at the All Is One Car Wash, owned by another member, Mac T.

Mac T used to have a position of authority in the Gangster Disciples. But, after leaving office to focus on his car wash, he violated the gang's rules and got a "six-minute no coverup"

smashing, the most brutal smashing permitted for a violation. Mr. Austin recounted that, at the January 2014 meeting, Mac T's face was "swoled up real bad" and he was limping and needed to lean against another gang member to stand up. Mac T complained that he should have gotten some leniency because of his previous position in the gang, and he thought that "other brothers were trying to be hard on him" because he had "stepped down so he c[ould] take care of his car wash." Because of what he felt was an excessive punishment, he did not want to participate in any more Gangster Disciples meetings. Mr. Austin testified that others at the meeting "just gave [Mac] T what he wanted": "as long as he paid dues and they" could continue to meet at the All Is One, he could have a "grace period" to pull himself together.

Over objection, Mr. Austin also testified that Mac T had said that Mr. Darden had ordered the smashing. The district court admitted the testimony under Rule 801(d)(2)(E). Mr. Darden disputes now, as he did below, both the finding that Mac T was part of the conspiracy when he made those statements and the finding that the statements were in furtherance of the conspiracy.

The district court did not clearly err in finding that Mac T was part of the conspiracy when he made the statement inculpating Mr. Darden. At that time, Mac T had promised to continue providing support to the deck through dues and the use of his car wash for meetings. And the other members at the meeting allowed him to take a grace period—connoting a temporary break—from participating so long as he followed through on his promises. From these facts, the district court could permissibly infer that Mac T had not yet renounced membership as of January 2014, even though it turned out that he would end up not coming to any further meetings.

But there is no view of the evidence permitting a finding that Mac T's statement that Mr. Darden had ordered his smashing was in furtherance of the conspiracy. The only reasonable interpretation of the record is that Mac T was angry about his perceived mistreatment and wanted

to reduce his involvement with the deck in response. If anything, he would be sowing discord within the deck by separating himself from it. As Mr. Austin testified, some gang members found that sort of separation repugnant to the gang's fundamental principles—"it's death before dishonor. You supposed to be there until you die." Moreover, losing the loyalty of a former deck leader would be a signal to other gangs that the deck was weakening. That would threaten the deck's overall goal of increasing its power and stature.

The government's argument that Mac T "furthered the conspiracy by explaining to fellow members that even a former gang leader could be severely punished for violating gang rules" fails for two reasons. First, unlike with identifying Mr. Darden as a participant in Lil Will's shooting, there was no need for Mac T to identify Mr. Darden as having ordered the smashing to accomplish the government's hypothesized furtherance of the conspiracy. Second, it is clear from Mr. Austin's testimony that Mac T had been complaining about his mistreatment and trying to reduce his involvement with the deck. He had no intention of instructing his fellow gang members about the consequences of his violation. Even if the statement may have incidentally provided some benefit to the conspiracy, it is *intent* to promote conspiratorial objectives that is required for admissibility under Rule 801(d)(2)(E). *Maliszewski*, 161 F.3d at 1008; *see also United States v. Warman*, 578 F.3d 320, 338 (6th Cir. 2009) (holding that whether a statement is in furtherance of a conspiracy turns on two facts—the context in which the statement was made and the declarant's intent in making it); *United States v. Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982) ("Rule 801(d)(2)(E) explicitly says statements need be 'in furtherance of the conspiracy,' not that they 'further the conspiracy.'").

But, although the statement was erroneously admitted, the error was harmless. Mac T's smashing was in Clarksville, the base of Mr. Darden's zone of control within the gang. Mr. Austin

also testified that Mr. Darden had run Clarksville "with an iron fist." And another witness testified to Mr. Darden's apparent oversight of Mac T's smashing.[12] So there was ample evidence to infer that he had in fact ordered Mac T's smashing. And, as the government notes, Mac T's smashing did not underlie any of Mr. Darden's substantive convictions. It is unlikely that removing that one act from consideration would have affected the jury's verdict on the RICO conspiracy. Thus, the error was harmless.

IV. DERRICK KILGORE

A. Sufficient Evidence Supports That Mr. Kilgore Was in a Drug-Trafficking Conspiracy

Mr. Kilgore first challenges the sufficiency of the evidence for his conviction on count two, drug-trafficking conspiracy. A conviction under 21 U.S.C. § 846 "requires an agreement to violate the drug laws, the defendant's knowledge of the agreement, and the defendant's decision to voluntarily join (or 'participate in') it." *United States v. Potter*, 927 F.3d 446, 453 (6th Cir. 2019). Here, there was sufficient evidence that Mr. Kilgore sold drugs, and he does not dispute that fact. He instead argues that the government produced no evidence that his sales had been part of a conspiracy. He also argues that, even if there had been a conspiracy, it necessarily ended in 2008 after Mr. Whitlock, the former primary supplier of cocaine for the Clarksville deck, had been arrested.

But there is a reasonable view of the evidence under which the defendants had formed a single conspiracy originating before Mr. Whitlock's arrest and surviving that shock to their supply chain. Mr. Dowlen, who testified that he had known Mr. Kilgore "[s]ince he was a kid," testified

[12] In a phone call, Mr. Darden told the witness, the deck's former treasurer, that he and other members had "served a violation" on Mac T. Mr. Darden had told the members beating Mac T not to get too close to the flimsy wall at the venue of the smashing, but they got too close to the wall anyway and knocked Mac T completely through it. The purpose of the call was to direct the treasurer to release funds from the box to pay the venue's owner for the damage.

that Mr. Kilgore had become a member of the Gangster Disciples in 2007. He testified that Mr. Kilgore had sold powder and crack cocaine from 2007 to 2013 "numerous times" and that he never knew Mr. Kilgore "to have a legitimate job." And he also testified that, around that time, Mr. Whitlock "was a steady source of supply [of drugs] for the Gangster Disciples," so much so that the members of the deck were "doing good"—they were making money and "throwing parties" and "had a rap group."

Even though the gang's drug supply "[k]ind of fell off" after Mr. Whitlock was arrested, they were still able to get drugs, albeit from "scattered" sources. Several messages on Mr. Kilgore's flip phones bolster the conclusion that he continued to work with others to make and distribute drugs after Mr. Whitlock's arrest. There was a text message on one of his cell phones about manufacturing crack cocaine. Another message on one of Mr. Kilgore's phones, from 2017, well after Mr. Whitlock's arrest, asked for a notification when someone received "soft" (that is, powder cocaine). Those were just two out of several texts on his phone referring to drug trafficking. He also made calls from jail, using coded language, directing someone to look for hidden drugs and money. And there is evidence that he cooked powder cocaine into crack before his arrest. At his mother's house, where he stayed, police found a Pyrex jar containing a measuring cup with an "off-white residue." Witnesses testified that the jar likely had been used to cook crack cocaine.

From this evidence, the jury could have reasonably found that Mr. Kilgore was working with others to traffic drugs in a single conspiracy lasting from 2005 up through 2017. So there was sufficient evidence for his conviction.

B. Sufficient Evidence Supports That Mr. Kilgore Was in a RICO Conspiracy

Mr. Kilgore's second challenge is to the sufficiency of the evidence for his RICO conviction. As Mr. Lucas did, he argues that the Clarksville deck did not form an "enterprise" for RICO purposes. Our analysis above refutes his argument.

In his reply brief, Mr. Kilgore adds a new theory to support his claim—that the deck was not involved in a pattern of racketeering activity. He contends that, "[f]or there to be a pattern of racketeering activity, the violence had to be connected to drug trafficking."

He is wrong. Predicate racketeering acts "do not necessarily need to be directly interrelated." *United States v. Corrado*, 227 F.3d 543, 554 (6th Cir. 2000). A pattern exists so long as the predicate acts are "connected to the affairs and operations of the criminal enterprise." *Ibid.* And there was sufficient evidence for a rational juror to find the acts so connected. The acts involving murder were directly responsible for increasing the deck's stature, and drug trafficking and travel in interstate commerce financially supported the deck's members, who contributed back to the deck through their dues.

V. DECARLOS TITINGTON

A. Sufficient Evidence Supports the Convictions on Counts Forty and Forty-Two

Mr. Titington first challenges his conviction on counts forty and forty-two as unsupported by sufficient evidence.[13] The only element of count forty (possession with intent to distribute cocaine) that he disputes is intent to distribute the cocaine found in his car. He contends that, because his conviction on count forty-two (possession of a firearm in furtherance of drug-

[13] Mr. Titington further complains that the district court did not provide a sufficient analysis of the evidence in response to his Rule 29 motion. Because we review the entire record to determine whether the evidence was sufficient for conviction, *see Jackson*, 443 U.S. at 319, and do not defer to the district court's denial of his Rule 29 motions, our present review cures any defect below.

trafficking) is premised on his conviction on count forty, the conviction on count forty-two necessarily falls if the conviction on count forty does.

The relevant record evidence is as follows. On February 15, 2016, the day after Valentine's Day, Mr. Titington was found unconscious behind the wheel of a car that had crashed into a tree. After finding him, police searched the car and found a loaded Glock 9-millimeter pistol and a baggie containing 7.66 grams of cocaine sitting on top of roses. Those were all on the driver's side. There was also $743 in cash and a phone on his person. It turned out that the Glock was the same gun that Mr. Titington had used six weeks earlier to shoot at two members of a rival gang who had attacked him at a convenience store.

That evidence is sufficient for a rational juror to find beyond a reasonable doubt that Mr. Titington had an intent to distribute the cocaine. First, it is reasonable to infer from Mr. Titington's membership in the Gangster Disciples that he did not intend to use the cocaine because it would violate the gang's rules. Given the deck's "report everything" code and the harsh punishments associated with violations, it is reasonable to expect that Mr. Titington would have followed those rules. Without any intent to use the cocaine personally, the only reasonable inference is that he intended to give or sell it to someone else.

The Glock and the large amount of cash also allow a reasonable inference of intent to distribute. *See Haywood*, 280 F.3d at 722; *United States v. Mackey*, 265 F.3d 457, 462–63 (6th Cir. 2001) (holding it reasonable for a juror to find that the purpose of a firearm near drugs "was to provide defense or deterrence in furtherance of . . . drug trafficking; defendant also possessed "a large sum of cash"). That Mr. Titington used the Glock a few weeks beforehand to shoot at rival gang members, whether he initiated that shooting or not, supports that the gun's purpose was "to provide defense or deterrence." *Mackey*, 265 F.3d at 462–63. And its closeness to the cocaine

further supports that any intended defense or deterrence was in furtherance of drug trafficking. *Id.* at 463.[14] Not to mention testimony that the cocaine found with Mr. Titington had a high street value (an eighth-ounce of powder cocaine cost about $300 to $350, meaning the quarter-ounce Mr. Titington was found with had a street value of $600 to $700) and that a buyer from Mr. Titington had used only a gram of cocaine per day.

Mr. Titington cites cases in which he says that larger amounts of drugs were found insufficient for proof of intent to distribute. *See Turner v. United States*, 396 U.S. 398, 422–24 (1970); *United States v. Latham*, 874 F.2d 852, 863 (1st Cir. 1989). But those cases do not help him.

Although binding on us, *Turner* does not apply here. It resolved a different question: the validity of former 26 U.S.C. § 4704(a), "which authorize[d] an inference of guilt from the fact of possession of narcotic drugs." *Turner*, 396 U.S. at 400.[15] The Court found that statutory presumption "infirm" because possessing 14.68 grams of a cocaine-and-sugar mixture *could* have been consistent with personal use rather than intent to distribute. *Id.* at 423. But that holding does not prevent a jury from reasonably inferring intent to distribute based on additional facts. And, as noted above, such facts are present here.

And in *Latham*, the defendant had been convicted of possession with intent to distribute one ounce (about 28 grams) of cocaine, and there was "no question" that he had in fact possessed it. *Latham*, 874 F.2d at 862. But the First Circuit noted the absence of evidence of the defendant's

[14] Although Mr. Titington argues that the text messages found on his phone are either irrelevant, stale, or only show that others may have offered to give *him* drugs, we need not rely on those messages to find sufficient evidence for a conviction.

[15] The full statement of former 26 U.S.C. § 4704(a) was: "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." *Turner*, 396 U.S. at 402 n.2.

actual or constructive possession of any other amount of drugs. *Ibid.* It also noted that, unlike other cases in which it had upheld a finding of intent, there was no evidence to support such a finding here. *Ibid.* The court further noted that the facts did not support "bring[ing] into play the doctrine that possession of large quantities of drugs justifies the inference that the drugs are for distribution and not personal use." *Ibid.*

Mr. Titington does not persuade us to apply *Latham* here. Besides its nonbinding character, the case is also distinguishable. First of all, the issue presented was one of statutory interpretation: whether it was plain error for the district court to instruct the jury "that it could find Latham guilty . . . if he had the intent to distribute some unspecified amount of cocaine, that he did not currently possess, at some unspecified time in the future." *Id.* at 861. The subsequent analysis about whether there was sufficient evidence to find that the defendant had actually or constructively possessed any cocaine that he intended to distribute was relevant to the question presented only insofar as it showed that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" because the defendant might have been actually innocent, *United States v. Olano*, 507 U.S. 725, 736 (1993).

Second, in coming to its conclusion that "[b]oth the record and the case law counsel that an inference of intent to distribute is not warranted from the possession of one ounce of cocaine," *Latham* misconstrues *Turner* the same way that Mr. Titington does. *Id.* at 863. It parenthetically cites *Turner*'s holding as "possession of 14 grams of cocaine was not sufficient to conclude defendant was distributing," rather than understanding that holding in light of the statutory presumption that *Turner* was overturning. *Id.* at 862.

And third, *Latham*'s facts are distinguishable. There, a police sergeant testified that the defendant and a coconspirator "had specifically said that the one ounce was not for sale, that it was

for their . . . own personal use." *Ibid.* Nor was it "contended by the government that Latham [had] participated in the distribution of drugs prior to his arrest." *Ibid.* But here, Mr. Titington was part of a gang whose rules prohibited him from partaking in cocaine. The street value of the cocaine was larger than the amount typically possessed for personal use. And he had money and a gun with him. The facts here support an inference of intent far better than the facts did in *Latham*.

As for count forty-two in its own right, Mr. Titington argues (verbatim) in his reply brief that there was insufficient evidence of a "'specific nexus between the gun and the [drug-trafficking] crime charged.' *United States v. Cantrell*, 807 F. App'x 428, 433 (6th Cir. 2020) . . . ." It is true that "possession of a firearm on the same premises as a drug transaction [does] not, without a showing of a connection between the two, sustain a § 924(c) conviction." *Mackey*, 265 F.3d at 462. The gun must be "strategically located so that it is quickly and easily available for use." *Ibid.* Other relevant factors include (1) "whether the gun was loaded," (2) "the type of weapon," (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." *Ibid.*

But here, most of these factors support a finding that the gun was sufficiently connected to Mr. Titington's intended cocaine distribution. The gun was loaded, making it easier for him to shoot someone if a deal went sour. As a handgun, its purpose was primarily for self-protection, not sport-shooting or hunting—Mr. Titington's use of the gun for defense in the shooting several weeks before the crash exemplifies that fact. He did not legally possess the gun because he was a convicted felon. And the gun was found under Mr. Titington, making it reasonable to infer that he intended to bring the gun with him in any distribution of the drugs in his car. So it is reasonable to find that Mr. Titington possessed the gun in furtherance of his drug-trafficking offense.

Sufficient evidence therefore supports Mr. Titington's convictions on both counts forty and forty-two.

B. Sufficient Evidence Supports the Jury's Special-Verdict Findings for Mr. Titington

Mr. Titington also raises a sufficiency challenge to the jury's findings that he is liable for at least five kilograms of powder cocaine and at least 280 grams of crack cocaine through the RICO conspiracy.[16] He argues that "while there was some evidence that [he] sold small quantities of cocaine in the Lincoln Holmes neighborhood, there was no evidence that he knew of or agreed to sell five kilograms or more of cocaine or 280 grams or more of crack cocaine." He further argues that he "was not present at transactions involving large quantities of drugs, did not facilitate transactions involving large quantities of drugs, and was not hired to protect large quantities of drugs." So, he concludes, "even if the jury found that [he] was a member of the Gangster Disciples and that he joined a conspiracy by gang members to sell drugs in and around Clarksville, there was no showing that [he] joined an agreement involving the quantities alleged in Count [One]."

His argument relies on a faulty view of the law. There is no requirement that a defendant *know* what types and quantities of drugs are involved in drug-trafficking activity for the penalty provisions in 21 U.S.C. § 841(b)(1) to apply. Those types and quantities merely need be "involved." He is criminally liable for the types and quantities of drugs that he could reasonably foresee that others in the conspiracy would traffic.

[16] Mr. Titington's brief misstates the count on which the jury made these findings. Although he purports to challenge count two, the jury found fewer than 500 grams of powder cocaine and no crack cocaine on that count. His argument therefore makes sense only as to count one. And because the government did not raise the error in its brief or at argument, instead responding as though the challenge were to count one, we discern no unfair prejudice to the government from our overlooking the mistake. We therefore treat Mr. Titington's sufficiency challenge as to count one, not count two.

And there is sufficient evidence from which a rational jury could find beyond a reasonable doubt that Mr. Titington could reasonably foresee that others in the conspiracy would distribute those quantities of cocaine and crack.

Consider Mr. Galbreath's testimony about the scope of the deck's drug-dealing operations. He had started dealing at age 14 because of "[p]eer pressure." That is evidence that others in the gang encouraged him to sell, from which a reasonable juror could find that members of the deck could reasonably foresee other members' sales. He also testified that he sold drugs "more or less continuously between about 2006 and 2008," in amounts ranging up to ounces (that is, units of about 28 grams) of crack cocaine. In fact, he sold about "four and a half ounces" a couple of times. And just ten ounces is enough to reach the 280-gram threshold.

Consider also Mr. Whitlock, who sold drugs out of a car wash "at least weekly" during 2007 and 2008. And Mr. Darden, who sold cocaine in quantities of "[a]nywhere from 4 1/2 to 36 ounces" and sometimes handled "kilogram quantities of cocaine" that he got from Mr. Whitlock. Between May and August 2008, at least five or six kilograms of powder cocaine passed through Mr. Darden's hands. Not to mention that Mr. Galbreath himself and Mr. Whitlock were arrested in August 2008 driving more than eight kilograms of powder cocaine up from Atlanta.

From all this evidence, a rational juror could have found that Mr. Titington reasonably foresaw that other members of the Clarksville deck would traffic the types and quantities of drugs found by the jury on count one.

C. The District Court Correctly Instructed the Jury on the Mens Rea for 21 U.S.C. § 841(b)

It is a federal crime to "knowingly or intentionally" "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" except as authorized by statute. 21 U.S.C. § 841(a), (a)(1). In § 841(b)(1)(A) and (B), there is a schedule of

minimum and maximum penalties for specific types and quantities of drugs "involv[ed]" in a violation of § 841(a).

Mr. Titington claims that the jury instruction on the special-verdict findings—that the jury "need not find that the defendant knew that his offense involved [a particular] quantity of drugs"—was erroneous. He tells us that this instruction is inconsistent with the Supreme Court's recent observation that, "[a]s 'a matter of ordinary English grammar,' we normally read the statutory term '"knowingly" as applying to all the subsequently listed elements of the crime.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009)). Reading the penalty provisions of § 841(b)(1) as separate elements of crimes under *Apprendi*, 530 U.S. 466, and *Alleyne v. United States*, 570 U.S. 99 (2013), he contends that the "knowingly" mens rea in § 841(a) therefore applies to the penalty provisions of § 841(b)(1).

He did not preserve his claim below, so we review for plain error. And we find none because we have already considered and rejected his argument. *United States v. Mahaffey*, 983 F.3d 238, 242–45 (6th Cir. 2020) (holding that *Rehaif* did not change the rule that there is "strict liability as to the type and quantity of the drugs involved in a § 841(a) offense" under § 841(b)(1) (quoting *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014))).

D. We Will Not Review the District Court's Refusal to Depart Downward by 52 Months

A special rule applies in computing the Guidelines sentence of a defendant who, at the time of sentencing, is serving a prison term from another offense that is "relevant conduct" under USSG § 1B1.3(a). The district court "shall adjust" the Guidelines sentence for the current conviction to account for the portion of the other sentence that the defendant has already served (unless the Bureau of Prisons will credit that sentence to the federal sentence), and the adjusted sentence "shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment."

USSG § 5G1.3(b). But the district court need not make that adjustment for defendants who have already finished serving a sentence for relevant conduct. Rather, a "downward departure *may* be appropriate" for a defendant who would have received a downward adjustment under USSG § 5G1.3 had the defendant's "completed term of imprisonment been undischarged at the time of sentencing for the instant offense." *Id.* § 5K2.23, p.s. (emphasis added). The district court should fashion any departure it does make under § 5K2.23 "to achieve a reasonable punishment for the instant offense." *Ibid.*

We do not review a district court's refusal to depart downward "unless the record shows that the district court was unaware of, or did not understand, its discretion to make such a departure." *United States v. Santillana*, 540 F.3d 428, 431 (6th Cir. 2008). The district court need not expressly state its awareness of that discretion on the record—"we presume that the district court understood its discretion, absent clear evidence to the contrary." *Ibid.*

Mr. Titington requested a downward departure under USSG § 5K2.23 of about 52 months because he had completed a state prison sentence of that length for conduct relevant to his federal convictions. The PSR noted that the district court had the authority to make that adjustment but did not make a recommendation either way. During sentencing, the district court requested argument from both parties on whether it should grant the requested departure. After hearing argument, the court denied the request, finding a departure "inappropriate and not justified" under the Guidelines.

There is no clear record evidence demonstrating that the district court believed it could not depart downwards. To the contrary, both the defendant and the PSR put the court on notice of its authority to depart downward. And the court considered and ruled on the issue, making no statement clearly indicating that it failed to comprehend its discretion. All Mr. Titington can muster

is the court's reasoning that a departure was "not justified by the guidelines." But that statement, in context, most likely meant that the court thought that a 52-month departure would not "achieve a reasonable punishment for the instant offense." USSG § 5K2.23, p.s. That is not clear evidence that the court did not know of or did not understand its discretion to depart. Thus, we will not review the district court's decision.

E. Precedent Forecloses Mr. Titington's Constitutional Challenges to the Guidelines

Last, Mr. Titington claims that the Guidelines' less defendant-friendly treatment of undischarged sentences under USSG § 5K2.23 violates the Equal Protection Clause and the substantive Due Process Clause. He concedes that he did not preserve these claims, so we review for plain error. Fed. R. Crim. P. 52(b). He further concedes that binding precedent forecloses his argument. *See United States v. Dunham*, 295 F.3d 605, 610–11 (6th Cir. 2002) (finding a rational basis for the different treatment of undischarged and discharged sentences); *see also United States v. White*, 617 F. App'x 545, 552 (6th Cir. 2015) (declining to revisit *Dunham* after USSG § 5G1.3's amendment). We therefore find no plain error.

VI. CONCLUSION

For the reasons above, we affirm the district court's judgments as to Mr. Darden, Mr. Kilgore, and Mr. Titington. And we affirm the conviction, but vacate the sentence, of Mr. Lucas, remanding for his resentencing.

APPENDIX B

UNITED STATES DISTRICT COURT

Middle District of Tennessee

UNITED STATES OF AMERICA
v.
Marcus Termaine Darden

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:17CR00124-001

USM Number: 25326-075

George Travis Hawkins
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☑ was found guilty on count(s) 1, 2, 15, 21, and 23 of the Third Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(d)	Conspiracy to Participate in Racketeering Activity	6/29/2017	1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 12 of the Third Superseding Indictment

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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.

11/27/2019
Date of Imposition of Judgment

Waverly D. Crenshaw, Jr.
Signature of Judge

Waverly D. Crenshaw, Jr., Chief U.S. District Court Judge
Name and Title of Judge

12/4/2019
Date

DEFENDANT: Marcus Termaine Darden
CASE NUMBER: 3:17CR00124-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to Distribute and Possess With Intent to Distribute Cocaine	6/29/2017	2
21 U.S.C. §§ 841(a)(1) & 860	Distribution and Possession with Intent to Distribute Cocaine Within 1,000 Feet of a Public University	1/24/2014	15
21 U.S.C. § 841(a)(1)	Distribution and Possession with Intent to Distribute Cocaine	4/4/2014	21
21 U.S.C. § 841(a)(1)	Distribution and Possession with Intent to Distribute 28 Grams or More of Crack Cocaine	6/17/2014	23

DEFENDANT: Marcus Termaine Darden
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IMPRISONMENT

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

480 months, consisting of (a) Counts 1, 2, 15, and 23: 480 months and (b) Count 21: 240 months, concurrent

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

Defendant be housed at a facility as close to Clarksville, TN as his security designation allows.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Marcus Termaine Darden
CASE NUMBER: 3:17CR00124-001

SUPERVISED RELEASE

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

Life, consisting of
Count 1: 5 years and
Counts 2, 15, 21, and 23: Life, each count, all concurrent

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 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. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ 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. ☐ 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.

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 shall participate in a program of drug testing and substance abuse treatment which may include a 30-day inpatient treatment program followed by up to 90 days in a community correction center at the direction of the United States Probation Office. You shall pay all or part of the cost for substance abuse treatment if the United States Probation Office determines you have the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

2. You shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.

3. You must not communicate, or otherwise interact, with any known gang member, without first obtaining the permission of the probation officer.

4. You must not communicate, or otherwise interact, with William Miller, Darius Wilridge, the family of Malcolm Wright, Taylor Barger, Lacey McIntire, Donovan Smith, or Dylan Felts, either directly or through someone else, without first obtaining the permission of the probation officer. You must also not communicate either directly or indirectly with any witnesses who testified at trial or their families. Such persons include the families of Jesse Hairston, Derrick Sherden, and Amanda Weyand; or John Clark, Carlos Jordan, Danyon Dowlen, Tray Galbreath, Lawrence Mitchell, Johnny Austin, Crystal Allen, Kristine Gaskin, Errika Stephens, and Natia Lynch.

5. You must not possess, receive, or disseminate any gang paraphernalia, literature, video, or other gang-related materials while on supervised release.

DEFENDANT: Marcus Termaine Darden
CASE NUMBER: 3:17CR00124-001

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 500.00	$	$	$

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

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** 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.

DEFENDANT: Marcus Termaine Darden
CASE NUMBER: 3:17CR00124-001

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 $ _____ 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 _____ *(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 ☐ 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 ☐ 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 ☐ Special instructions regarding the payment of criminal monetary penalties:

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.

☐ 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.

DEFENDANT: Marcus Termaine Darden
CASE NUMBER: 3:17CR00124-001

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

DENIAL OF FEDERAL BENEFITS

(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of _____ .

☐ ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

OR

☐ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____ .

☐ be ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

☐ Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk of court is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531

APPENDIX C

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 USC Sec. 1962 (RICO)

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b)

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d)

It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.
(Added Pub. L. 91–452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942; amended Pub. L. 100–690, title VII, § 7033, Nov. 18, 1988, 102 Stat. 4398.)