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Nos. 22-5142/5162

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MARCUS BENNETT (22-5142); ERIC BENNETT (22-5162), Defendants - Appellants.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY OPINION

Before: GRIFFIN, BUSH, and READLER, Circuit Judges

GRIFFIN, J., delivered the opinion of the court in which BUSH and READLER, JJ., joined. READLER, J. (pp. 18–19), delivered a separate concurring opinion, in which BUSH, J., joined.

GRIFFIN, Circuit Judge.

A confidential informant for the United States Postal Inspection Service purchased heroin from defendants Marcus and Eric Bennett during eleven controlled buys, but the CI died before their trial. The evidence admitted at trial included testimony from a postal inspector about statements the deceased CI made to law enforcement, as well as the inspector's interpretations of communications between defendants and the CI. A jury ultimately convicted Marcus and Eric of conspiracy to distribute heroin and Eric of related firearms offenses. On appeal, defendants raise issues concerning the admission of the CI's statements and the inspector's testimony, as well as the district court's sentencing determinations. We affirm.

I.

The Postal Inspection Service began investigating brothers Marcus and Eric Bennett following the non-fatal shooting of postal carrier Da'Ron Lester. Lester believed that Eric shot him at Marcus's direction—apparently Marcus was supposed to receive a package of narcotics in the mail and suspected that Lester kept the package.

Postal Inspector Aaron Mehall led the investigation into the Bennetts. Investigators tapped and tracked Marcus's phone, which revealed several calls to the USPS help line for tracking parcels. Those parcels came from known drug-source states, contained fictitious return addresses, and carried large sums of money. Phone calls also revealed that Marcus was in contact with known narcotics traffickers.

Though the investigation into the Bennetts initially focused on Lester's shooting, it morphed into a narcotics-trafficking investigation after Quanta Malone offered to become a CI and purchase heroin from defendants. Malone ultimately helped law enforcement conduct eleven controlled buys with the Bennetts over the course of several months, all of which Malone captured in audio and video recordings. Inspectors also documented most communications between Malone and the Bennetts leading up to their meetings. Malone purchased heroin from Eric at the first five controlled buys, and from Marcus at the remaining six.

In addition to the controlled buys, law enforcement executed search warrants at the Victory Lane Bar & Grill ("the Victory Lane"), from which Marcus sold drugs; a home on Gilligan Street next to the Victory Lane, where Marcus's then-girlfriend, Juliyah Young, resided; and Marcus's home. The searches yielded 418.65 grams of heroin at the Gilligan Street house, but law enforcement did not find any drugs at the other locations. Following a vehicle chase by law enforcement, Eric was arrested on the same day as the searches. Law enforcement detained Eric

and searched his vehicle, where they found a loaded firearm in the glove box and retraced Eric's path to find two packages of heroin that he had thrown out of his vehicle's window. Marcus was arrested a few months later after he had sold drugs to Malone on two additional occasions.

A grand jury indicted Marcus and Eric for conspiracy to distribute heroin, conspiracy to murder a federal employee, attempted murder of a federal employee, and forcible assault of a federal employee. It indicted only Eric for discharge of a firearm during a violent crime, possession of a firearm by a convicted felon, and the use or possession of a firearm in furtherance of a drug-trafficking crime.

Malone died before trial began, so Marcus and Eric moved to exclude all recordings of the controlled buys that Malone had captured as inadmissible hearsay and violative of the Confrontation Clause. Following a hearing, the district court denied the motion.

Marcus and Eric proceeded to trial. The jury convicted Marcus and Eric of conspiring to distribute heroin, and it convicted Eric of being a felon in possession of a firearm and possessing a firearm in furtherance of a drug-trafficking crime. The district court sentenced Marcus to 168 months in prison and Eric to 200 months in prison. Defendants timely appealed.

II.

Marcus and Eric appeal their convictions, arguing that the district court erred by admitting at trial certain testimony given by Inspector Mehall. They assert that Mehall's testimony about Malone stating he could buy heroin from defendants violated their Confrontation Clause rights. Marcus separately challenges Mehall's testimony interpreting "plain English" statements made by Malone as contrary to Federal Rule of Evidence 701. We consider these arguments in turn.

A.

Marcus and Eric first raise the same Confrontation Clause challenge. Mehall twice testified that Malone stated to law enforcement that he believed he could purchase heroin from the Bennetts. This testimony, defendants argue, violated the Confrontation Clause because Mehall testified as to testimonial out-of-court statements that were offered for the truth of the matter and made by Malone, whom the Bennetts could not cross examine. Neither Marcus nor Eric contemporaneously objected to this testimony.

We review preserved Confrontation Clause arguments de novo, *United States v. Powers*, 500 F.3d 500, 505 (6th Cir. 2007), and unpreserved ones for plain error, *United States v. Collins*, 799 F.3d 554, 576 (6th Cir. 2015); *United States v. Hadley*, 431 F.3d 484, 498 (6th Cir. 2005). Because defendants failed to preserve this issue for appeal, we would normally review their Confrontation Clause argument for plain error.[1] However, the government must ask for plain error review, and it did not do so here. We therefore review defendants' Confrontation Clause argument de novo, *see, e.g.*, *United States v. Williams*, 641 F.3d 758, 763–64 (6th Cir. 2011), subjecting any violations to a harmless-error analysis, *United States v. McGee*, 529 F.3d 691, 697 (6th Cir. 2008).

[1]Below, defendants argued the admission of the recordings violated the Confrontation Clause. But their appeals focus on the issue of Malone's statements to law enforcement, which they did not raise below (let alone contemporaneously object to) and thus is unpreserved. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009) (raising an issue for the first time on appeal); *United States v. Ford*, 761 F.3d 641, 653 (6th Cir. 2014) (contemporaneous objection requirement).

Further, although Eric contended at oral argument that his appellate brief marginally challenged the district court's admission of the recordings, it did not and instead raised an authentication issue with one of the recordings. This authentication argument, which Eric raised for the first time on appeal, also was not properly preserved and is arguably abandoned because he failed to fully develop it. *See, e.g.*, *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063 (6th Cir. 2014). In any event, the admission of the recordings was proper under both the Sixth Amendment and the Federal Rules of Evidence. *See, e.g.*, *United States v. Harrison*, 54 F.4th 884, 887–88 (6th Cir. 2022).

Whatever lens we use to review this argument is immaterial because any error the district court may have committed in admitting Mehall's testimony regarding Malone's statements was harmless.

The Confrontation Clause guarantees every criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Consequently, defendants are permitted to cross-examine the government's witnesses at trial. *See Delaware v. Fensterer*, 474 U.S. 15, 18 (1985) (per curiam). "[W]hen a witness can't testify at trial and hasn't been cross-examined, the Confrontation Clause forbids entry of the witness's statements that are: (1) testimonial and (2) hearsay." *United States v. Harrison*, 54 F.4th 884, 887 (6th Cir. 2022).

Mehall's testimony about Malone's inculpatory statements is undoubtedly problematic. Malone's out-of-court statements were testimonial, *see Crawford v. Washington*, 541 U.S. 36, 51–52 (2004); *United States v. Cromer*, 389 F.3d 662, 670–71, 675 (6th Cir. 2004), and used for the truth of the matter asserted (to prove that he could buy heroin from the Bennetts), *see United States v. Deitz*, 577 F.3d 672, 683 (6th Cir. 2009). However, any purported Confrontation Clause violation does not warrant reversal because any such error was harmless. *See McGee*, 529 F.3d at 697. Defendants engaged in eleven controlled buys, all of which were captured on audio and video recordings; numerous witnesses testified about the Bennetts' criminal enterprise; the Bennetts' phone records revealed drug-trafficking activity; law enforcement recovered a distribution-level quantity of heroin at the Gilligan Street house; and the Lester shooting was a speculated consequence of the Bennetts' drug trafficking. *See id.*; *Powers*, 500 F.3d at 510. Defendants take issue with only two words (i.e., "Yes" and "Correct") of Inspector Mehall's dayslong testimony, which was a minuscule portion of the evidence provided over the course of the six-day trial.

The evidence at trial overwhelmingly implicated the Bennetts in a conspiracy to distribute heroin, so they are not entitled to relief despite the alleged error.

B.

Next, Marcus challenges additional portions of Inspector Mehall's testimony. He argues that when Mehall—who testified only as a lay witness—interpreted Malone's "plain English" text messages and phone calls, he violated Federal Rule of Evidence 701. Because Marcus failed to object at trial to the testimony he challenges on appeal, we review his evidentiary argument for plain error.[2] *See United States v. Young*, 847 F.3d 328, 349 (6th Cir. 2017). To establish plain error, Marcus must demonstrate that "(1) an error occurred; (2) the error was obvious or clear; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Mayberry*, 540 F.3d 506, 512 (6th Cir. 2008) (citation omitted).

Rule 701 allows lay witnesses to give opinion testimony if the opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining 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. The party offering testimony under this rule bears the burden of establishing all three requirements. *United States v. Freeman*, 730 F.3d 590, 595–96 (6th Cir. 2013). "The function of lay opinion testimony is to describe something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a

[2]Marcus contends that we should review his evidentiary claim for abuse of discretion based on defendants' objection at trial to "anything" Malone said. But as explained above, defendants objected to the recordings, not Mehall's testimony. So we review this claim for plain error. *Cf. United States v. Poulsen*, 655 F.3d 492, 510 n.6 (6th Cir. 2011); *Ford*, 761 F.3d at 653.

particular event." *United States v. Kilpatrick*, 798 F.3d 365, 379 (6th Cir. 2015) (internal quotation marks and brackets omitted).

In the context of a law enforcement officer testifying under Rule 701, his lay opinion is admissible only if the officer "is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." *Id.* (citation omitted). Although officers may "interpret intercepted messages in which they neither participated nor observed first-hand," "[a]n officer's lay testimony goes too far when it includes vague statements about the investigation, repeatedly relies on the general knowledge of the entire department or agency, or otherwise fails to limit the testimony to personal experience." *United States v. Honeysucker*, 2023 WL 142265, at *6 (6th Cir. Jan. 10, 2023) (citing *Kilpatrick*, 798 F.3d at 379; *Freeman*, 730 F.3d at 596–97).

Marcus appeals the admission of much of Mehall's testimony under Rule 701(b), arguing that the testimony at issue was not necessary to help the jury because it interpreted "plain English" communications. For example, texts and phone calls between Malone and Marcus revealed statements such as "Can't get ahold of little bra. Trying to get right," "I done backed up for real," "I'm about to get back in the flow of things," "Just one. Just one. One whole," and "Need ya." Mehall interpreted such statements to mean that Malone arranged to buy heroin from Marcus.

On one hand, much of Mehall's testimony did not violate Rule 701 because several of Malone and Marcus's communications were cryptic (e.g., "I done backed up for real," "I went on and finessed me a little play, man. Got a little something popping, man," and "Just one. Just one. One whole"), and Mehall's interpretation of these statements certainly could have aided the jury. *See Kilpatrick*, 798 F.3d at 380 ("When it comes to interpreting language from intercepted communications, an agent can be helpful when she uses her personal knowledge of the case to

interpret cryptic language."); *see also Young*, 847 F.3d at 350 ("We hold that the district court did not plainly err in admitting Agent Whitsett's testimony because, as the district court noted during trial, '[t]here was enough slang and jargon used that [Agent Whitsett's] testimony as to what they were talking about was necessary and will be helpful to the jury.'" (brackets in original)). Such testimony was therefore properly admitted. *See Young*, 847 F.3d at 350–51 (finding no plain error in a law enforcement officer's testimony opining that "quarter" means a "quarter ounce of crack cocaine").

On the other, a jury likely could have interpreted some of these communications without Mehall's assistance. For example, phrases like "I'm gonna need you tomorrow, if that's cool," "I was handling it right now," and "I'm about to get back in the flow of things" are not slang or jargon that require translation. By "interpreting even ordinary English language," Mehall "spoon-fed his interpretations of the phone calls [and text messages] and the government's theory of the case to the jury." *Freeman*, 730 F.3d at 597. Thus, the admission of Mehall's commentary regarding these ordinary, plain communications violated Rule 701. *See Kilpatrick*, 798 F.3d at 381 ("[A] case agent testifying as a lay witness may not explain to a jury what inferences to draw from recorded conversations involving ordinary language because this crosses the line from evidence to argument." (internal quotation marks omitted)).

But once again, the district court's error does not require reversal given the overwhelming evidence of defendants' drug trafficking. Further, the communications at issue here all preceded controlled buys. A rational jury could consult the text messages and transcripts of phone calls and reasonably conclude on its own that "Need ya," for example, means that Malone was seeking to purchase heroin, especially given that he did, in fact, purchase heroin soon after these communications. Although some of Mehall's testimony violated Rule 701, the admission of this

testimony did not affect Marcus's substantial rights or the outcome of the trial, barring any relief. *See Honeysucker*, 2023 WL 142265, at *8.

III.

Defendants additionally appeal their sentences. Marcus challenges the district court's imposition of the Guidelines' drug-house enhancement, and Eric challenges the adequacy of the government's 21 U.S.C. § 851 notice and the district court's relevant-conduct findings concerning drug weight attributable to him.

A.

Marcus argues the district court erred in applying to his sentence the two-level drug-house enhancement under U.S.S.G. § 2D1.1(b)(12). The government bears the burden of establishing by a preponderance of the evidence that a sentencing enhancement applies. *United States v. Byrd*, 689 F.3d 636, 640 (6th Cir. 2012). "Whether a district court properly applied a sentencing enhancement is a matter of procedural reasonableness." *United States v. Taylor*, 85 F.4th 386, 388 (6th Cir. 2023). When evaluating procedural reasonableness, "we review the district court's interpretation of the Guidelines de novo, and its factual findings for clear error." *Id.* "Under clear-error review, we affirm a district court's finding of fact so long as the finding is plausible in light of the record viewed in its entirety." *United States v. Grant*, 15 F.4th 452, 457 (6th Cir. 2021) (internal quotation marks and brackets omitted). There exists an intra-circuit split, however, over the proper standard to apply when reviewing mixed questions of law and fact concerning sentencing enhancements. *See United States v. Bell*, 766 F.3d 634, 636 (6th Cir. 2014). Here, because the application of the drug-house enhancement was not erroneous under either standard, we need not resolve the split.

Section 2D1.1(b)(12) of the Sentencing Guidelines provides for a two-level enhancement for drug crimes if the defendant "maintained a premises for the purpose of manufacturing or distributing a controlled substance." *United States v. Johnson*, 737 F.3d 444, 447 (6th Cir. 2013) ("[T]he drug-house enhancement applies to anyone who (1) knowingly (2) opens or maintains any place (3) for the purpose of manufacturing or distributing a controlled substance."). With respect to the "maintaining" element, the only element at issue here, we must consider "whether the defendant held a possessory interest in . . . the premises" and "the extent to which the defendant controlled access to, or activities at, the premises." U.S.S.G. § 2D1.1 cmt. n.17. "If a defendant does not have a legal interest in the premises, the enhancement may still apply if the government makes a sufficient showing of de facto control." *United States v. Hernandez*, 721 F. App'x 479, 484 (6th Cir. 2018). De facto control, however, requires "something more than the act of distribution from the premises." *Id.* Notably, "[m]anufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained," but it must be "one of the defendant's primary or principal uses for the premises." U.S.S.G. § 2D1.1 cmt. n.17.

After the district court applied, over Marcus's objection, the two-level drug-house enhancement, it sentenced Marcus to 168 months' imprisonment—a term at the bottom of his Guidelines range. Marcus now appeals the district court's finding that he "maintained" the Gilligan Street house—where over 400 grams of heroin were found in the ceiling over the water heater. Marcus did not hold a legal or possessory interest in the Gilligan Street house; rather, Juliyah Young (Marcus's then-girlfriend) resided at the Gilligan Street house during the relevant time. As such, he presumably argues that he was merely a "casual visitor" at the house, which is insufficient for the drug-house enhancement to apply. *See Hernandez*, 721 F. App'x at 484.

At trial, Young testified that the heroin found at her home was not hers and that she did not know it was located there. Young never explicitly testified that the heroin found in the Gilligan Street home belonged to Marcus or that he "allowed" her to stay at the home, although the district court erroneously stated the contrary at sentencing.

Even though the district court misstated Young's trial testimony at sentencing, it did not err in imposing the drug-house enhancement because the record supported the application of the enhancement. *See id.* (explaining that other actions like "supervising," "protecting," and "[maintaining] continuity [at]" a location can constitute "maintenance" under § 2D1.1(b)(12) (first alteration in original) (quoting *United States v. Russell*, 595 F.3d 633, 644 (6th Cir. 2010))). The government proved by a preponderance of the evidence that the heroin found at the Gilligan Street house was Marcus's and that he stored it there prior to distribution on one of the many occasions he visited the home to sell drugs in the alley between the Victory Lane and the Gilligan Street house. Indeed, the day after law enforcement searched the home, Marcus called the cousin with whom he operated the Victory Lane and said, "They got her, but they missed me, dude. They missed me." Mehall testified that this statement meant that law enforcement found Marcus's heroin at the Gilligan Street (i.e., "her" or Young's) house, but they failed to find his heroin at the Victory Lane. Law enforcement also found additional indicia of drug trafficking at the house: a "powdery substance" packaged in little plastic baggies and a duffel bag with a press and mixer in it. The government sufficiently showed Marcus's de facto control of the Gilligan Street house for the purpose of storing heroin prior to distribution, and thus, the district court did not err in applying the drug-house enhancement.

B.

Eric also challenges his sentence. He first takes issue with the adequacy of the government's § 851 information and notice of his four prior felony drug convictions following a change in the law triggering an enhanced sentence under this statute. Although Eric originally argued in his appellate brief that we review this argument de novo, he conceded at oral argument that plain error review applies, given his failure to raise the issue before the district court. *See United States v. Brooks*, 628 F.3d 791, 796 (6th Cir. 2011).

To increase Eric's statutory mandatory-minimum sentence for his conspiracy conviction, the government filed an information and notice of his four prior felony drug convictions pursuant to §§ 851 and 841(b)(1)(B)(i). After the government filed the § 851 notice and before the Bennetts' trial, Congress passed the First Step Act of 2018, which, in part, amended the requirements to impose an enhanced sentence for this type of conviction. *See United States v. Fields*, 53 F.4th 1027, 1031 (6th Cir. 2022). Following the First Step Act's enactment, a defendant is eligible for an enhanced drug-conspiracy sentence if he has at least one prior conviction for a "serious drug felony," not a "felony drug offense," as previously required. *Id.*; 21 U.S.C. § 841(b)(1)(B)(i). Relevant here, a "serious drug felony" does not encompass mere possession offenses, unlike a "felony drug offense." *Compare* 21 U.S.C. § 802(57), *with* § 802(44). *See also* 18 U.S.C. § 924(e)(2)(A). After this definitional change, three of Eric's four prior offenses—which were merely possession offenses—no longer triggered an enhanced mandatory-minimum sentence for his conspiracy conviction. Yet, the government did not amend the § 851 notice to reflect the change in the law.

Eric argues that the government's failure to amend the § 851 notice means it failed to meet its burden to prove that he was previously convicted of a "serious drug felony," so the district court

improperly increased his mandatory-minimum sentence from five to ten years. *See* 21 U.S.C. § 841(b)(1)(B)(i). Notwithstanding, Eric's Guidelines range was 140–175 months on the conspiracy-to-traffic-heroin and felon-in-possession convictions, plus a mandatory 60-month consecutive sentence for his conviction for possessing a firearm in furtherance of drug trafficking. The district court ultimately sentenced Eric to 200 months' total imprisonment (140 months on the conspiracy and felon-in-possession offenses and 60 months on the remaining offense), which was at the bottom of the Guidelines range.

There was no error in calculating Eric's mandatory-minimum sentence. Despite the government's failure to amend the § 851 notice, Eric still had one previous conviction that constituted a serious drug felony: trafficking cocaine in Jefferson County, Kentucky. At sentencing, the government explained why Eric's mandatory-minimum sentence under §§ 841(b)(1)(B)(i) and 851 was ten years due to his prior drug-trafficking conviction. Thus, the district court did not err in calculating Eric's mandatory-minimum sentence for his conspiracy conviction.[3]

In any event, even if the district court erred, such error did not affect Eric's substantial rights because the district court imposed a sentence greater than a five- or ten-year mandatory

[3]Eric argues that the district court further erred under § 851(b), which gives defendants the opportunity to "affirm[] or den[y]" that they have previously been convicted of the offenses alleged in a § 851 notice. 21 U.S.C. § 851(b). He complains that the district court never gave him the opportunity to dispute his alleged prior offenses, especially given the purported deficiencies in the government's notice. But the district court did not err because Eric was precluded from challenging the validity of his prior serious drug felony, which "occurred more than five years before the date of the information alleging such prior conviction." 21 U.S.C. § 851(e). Moreover, even if the district court erred, any such error was harmless. *See United States v. Hill*, 142 F.3d 305, 313 (6th Cir. 1998) (holding that the district court's failure to engage in a § 851(b) colloquy was harmless because the defendant never filed a § 851(c)(1) response challenging his prior convictions: "there is no reason for a district court to conduct a hearing on the validity of the prior convictions when a defendant fails to first meet the requirements of 21 U.S.C. [§] 851(c), which requires that a defendant give advance notice concerning the basis of his challenge").

minimum on the conspiracy conviction. Nothing in the record indicates that the district court felt constrained by the ten-year mandatory minimum or that it would have imposed a lesser sentence had it found the five-year mandatory minimum appropriate. *See United States v. Haque*, 315 F. App'x 510, 529 (6th Cir. 2009) (noting that the district court "did not feel bound by any statutory minima," so any error was harmless).

C.

Eric raises one final challenge to his sentence: that it is procedurally unreasonable because the district court attributed certain drug weight to him that was not relevant conduct. We review the district court's factual determination regarding the quantity of drugs involved in an offense for clear error.[4] *United States v. McReynolds*, 964 F.3d 555, 563 (6th Cir. 2020). "A factual finding is clearly erroneous where, although there is evidence to support that finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Russell*, 595 F.3d at 646 (internal quotation marks omitted).

Both Eric and Marcus were found guilty of conspiracy to possess with intent to distribute between 100 and 1000 grams of heroin. Eric's base offense level was calculated based on a total of 742.52 grams of heroin, which accounts for the heroin recovered from the Gilligan Street house search; from Eric's arrest, where he discarded the two packages of heroin out of his car's window; and from all eleven controlled buys—only five of which Eric directly participated in. Over Eric's objection that he should be held responsible for only the amount of heroin he directly sold to Malone, the district court found all 742.52 grams to be relevant conduct based on defendants' conspiracy. On appeal, Eric argues that the drugs recovered from the Gilligan Street house and

[4]Framing his argument as one challenging procedural reasonableness, both Eric and the government contend that our review is for abuse of discretion. But because his argument is more appropriately framed as a factual challenge to relevant conduct, our review is for clear error.

the amount of drugs Marcus directly sold—especially during buys that occurred after Eric was arrested and incarcerated—should not have been considered relevant conduct under U.S.S.G. § 1B1.3. Thus, Eric contends his sentence is procedurally unreasonable.

"For defendants convicted of drug crimes, the base offense level at sentencing depends upon the amount of drugs involved in the offense." *McReynolds*, 964 F.3d at 562 (citation omitted). A defendant's base offense level is derived from his "relevant conduct," as defined under U.S.S.G. § 1B1.3. *Id.* "Relevant conduct" includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," as well as actions jointly undertaken by co-conspirators if such actions were "[(1)] within the scope of the jointly undertaken criminal activity, [(2)] in furtherance of that criminal activity, and [(3)] reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1). Relevant conduct need not be charged, *United States v. Gill*, 348 F.3d 147, 151 (6th Cir. 2003), and it can even include acquitted conduct, *United States v. White*, 551 F.3d 381, 385 (6th Cir. 2008) (en banc).

For conspiracies, "the scope of relevant conduct with regard to the drug amounts involved in a conspiracy under § 1B1.3(a)(1)(B) is 'significantly narrower' than the conduct needed to obtain a conspiracy conviction." *McReynolds*, 964 F.3d at 563 (citation omitted). But "in order to hold a defendant accountable for the acts of others [under § 1B1.3(a)(1)(B)], a district court must make two particularized findings: (1) that the acts were within the scope of the defendant's agreement; and (2) that they were foreseeable to the defendant." *Id.* (brackets in original). At

sentencing, the government must prove by a preponderance of the evidence that a certain drug quantity is attributable to the defendant as relevant conduct. *Id.*; *Gill*, 348 F.3d at 151.

Eric argues that his relevant conduct includes only the drugs that he directly sold to Malone plus the drugs recovered during his arrest: 267.84 grams of heroin. This argument erroneously narrows the scope of U.S.S.G. § 1B1.3(a)(1). True, Eric directly sold heroin to Malone during only five of the eleven controlled buys, but Eric was still a member of the conspiracy, and Marcus's sales were reasonably foreseeable in connection with their heroin-trafficking scheme. Law enforcement obtained tracker and tracer warrants for both defendants' phones, and communications from their phones, as well as surveillance of defendants, revealed evidence of joint heroin trafficking. And during the beginning of Malone's time as a CI, Marcus referred Malone to Eric to buy heroin. Although Marcus continued to sell heroin to Malone after Eric's arrest, the record does not show that Eric ever withdrew from the conspiracy. With respect to the heroin found at the Gilligan Street house, on the day that Eric was arrested, Marcus and Eric had a cryptic phone conversation while Marcus was at the Gilligan Street house immediately before Marcus and Eric met at Marcus's house. At that meeting, Eric presumably obtained from Marcus the packages of heroin that Eric discarded during his arrest later that day. Based on the evidence at trial, the government proved by a preponderance of the evidence that the heroin recovered from the Gilligan Street house and from Marcus's sales should be included in Eric's relevant conduct.

To be certain, the district court made particularized findings at sentencing that all 742.52 grams of heroin were attributable to Eric. The district court consulted two examples in the application notes of § 1B1.3 where a defendant's relevant conduct was limited, despite being in a conspiracy, and the court explained why Eric's case was distinguishable from those examples. *See* U.S.S.G. § 1B1.3 cmt. n.4(C)(v), (vii). Unlike in the application-note examples, the district court

here opined that "there's no evidence that Eric only agreed to distribute a certain number of grams or only complete one delivery" or that Eric ever withdrew from the conspiracy. The district court was not clearly wrong in its relevant conduct determination, especially considering that Eric was found guilty beyond a reasonable doubt of conspiring to distribute between 100 and 1000 grams of heroin. Our precedent allows sentencing courts to consider acquitted conduct as relevant conduct, so it certainly was not clear error for the district court to consider as Eric's relevant conduct a total drug quantity that he had been convicted of conspiring to distribute. *See White*, 551 F.3d at 385.

IV.

We affirm the judgment of the district court.

CHAD A. READLER, Circuit Judge, concurring. I join today's opinion in full. I write separately to draw attention to a line of precedent that deserves revisiting.

As the Court correctly notes, in criminal cases, we ordinarily review unpreserved errors using the plain-error test. *See, e.g.*, *United States v. Powers*, 500 F.3d 500, 505 (6th Cir. 2007). That is so for many reasons. Start with the fact that doing so is mandated by Federal Rule of Criminal Procedure 52(b). But there are other justifications. For example, this practice encourages defendants to raise issues in a timely manner, which allows for their fulsome development at trial and prevents delays caused by multiple appeals and remands. It also honors the district court's threshold role in resolving disputed issues. *See also United States v. del Carpio Frescas*, 932 F.3d 324, 333–44 (5th Cir. 2019) (Oldham, J., concurring) (outlining the history and purposes of plain-error review). As the plain-error standard recognizes, it would be unfair to hold a district court to the same standard when an issue "was not brought to the court's attention." Fed. R. Crim. P. 52(b).

Yet despite these many commendable goals, we deviate from our customary standard of review when the government fails to ask for this more forgiving standard. *United States v. Williams*, 641 F.3d 758, 763–64 (6th Cir. 2011). It is difficult to understand why. Over a decade ago, then-District Judge Thapar questioned this practice. *See id.* at 770–73 (Thapar, J., concurring). Still today, I find his reasoning persuasive. As he explained, our approach conflicts with the plain text of Federal Rule of Criminal Procedure 52(b)—reason enough to raise deep suspicions. *Id.* at 771. But Judge Thapar went further. Drawing on his experience in the district court, he noted that our modified approach leads us to evaluate the district court's judgment as if it had considered and ruled on an issue—when in fact it has not, due to no fault of its own. *Id.* at 770–71. That is hardly fair to our colleagues on the trial court. In the end, the lone party to benefit is the defendant, who receives a more generous standard of review, despite his own inattention.

True, the government sometimes is similarly inattentive, as in this instance, by failing to raise with us Bennett's omission in the district court. But that should not deprive the appeals court of affording the district court the deference it is owed. How to evaluate the district court proceedings is a decision more appropriately within the province of the court than the parties. *See K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996) ("The parties, however, cannot determine this court's standard of review by agreement. Such a determination remains for this court to make for itself."); *United States v. Bain*, 586 F.3d 634, 639 n.4 (8th Cir. 2009) ("A party's concession on the standard of review does not bind the court."). We would not, for instance, review a grant of summary judgment for an abuse of discretion merely because the parties, for whatever reason, asked for it. *See United States v. Murguia-Rodriguez*, 815 F.3d 566, 579 (9th Cir. 2016) (Callahan, J., dissenting). The government, in other words, may not tinker with the standard of review, intentionally or unwittingly, by failing to highlight a defendant's forfeiture. That does not mean the government's hands are tied should it believe a miscarriage of justice occurred in the district court. In that case, the government may concede error, thereby putting a thumb on the scale for us as we consider the issue.

These concerns notwithstanding, this practice remains the law in our Circuit, one we are bound to follow. As the circuits are not all of one mind on the matter, further review, either by our en banc court or the Supreme Court, would be welcomed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-5142/5162

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS BENNETT (22-5142); ERIC BENNETT (22-5162),

Defendants - Appellants.

FILED
Mar 06, 2024
KELLY L. STEPHENS, Clerk

Before: GRIFFIN, BUSH, and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States District Court

Western District of Kentucky

LOUISVILLE DIVISION

UNITED STATES OF AMERICA
V.
Marcus Bennett

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:17-CR-32-2-TBR
US Marshal No: 18263-033
Counsel for Defendant: **Scott C. Cox, Retained Counsel**
Counsel for the United States: **Marisa J. Ford, Asst. U.S. Atty.**
Court Reporter: **Terri Turner**

THE DEFENDANT:

☐ Pursuant to plea agreement

☐ Pleaded guilty to count(s)

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

☒ **Defendant Marcus Bennett was found guilty by jury trial to the lesser included charge of Count 1 on June 29, 2021 in the Superseding Indictment.**

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title / Section and Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 8 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)

☐ Count() are dismissed.

IT IS ORDERED that the defendant shall 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 shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

2/18/2022
Date of Imposition of Judgment

February 18, 2022

Thomas B. Russell

Thomas B. Russell, Senior Judge
United States District Court

DEFENDANT: **Bennett , Marcus**
CASE NUMBER: **3:17-CR-32-2-TBR**

COUNTS OF CONVICTION

Title / Section and Nature of Offense	Date Offense Concluded	Count
21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(B)-and subject to enhanced penalties under 18 U.S.C. § 851 - CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE HEROIN, a Class A Felony	4/19/2017	1s

DEFENDANT: **Bennett , Marcus**
CASE NUMBER: **3:17-CR-32-2-TBR**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **168 months as to Count 1 in the Superseding Indictment.**

☒ **The Court makes the following recommendations to the Bureau of Prisons:**

The Defendant be placed in a facility wherein he may participate in a Residential Drug Abuse Treatment Program (RDAP) for treatment of narcotic addiction and/or drug/alcohol abuse and be placed in a facility that is near his family.

☒ **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 2:00 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

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 U.S. Marshal

DEFENDANT: **Bennett , Marcus**
CASE NUMBER: **3:17-CR-32-2-TBR**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years as to Count 1.**

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.
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.**
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 which you reside, work, are a student, or were convicted of a qualifying offense.
7. ☐ You must participate in an approved program for domestic violence.

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

DEFENDANT: **Bennett , Marcus**
CASE NUMBER: **3:17-CR-32-2-TBR**

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.

DEFENDANT: **Bennett , Marcus**
CASE NUMBER: **3:17-CR-32-2-TBR**

SPECIAL CONDITIONS OF SUPERVISION

14.The defendant must participate in a cognitive behavioral treatment program and follow the rules and regulations of that program. Such programs may include group sessions led by a counselor or participation in a program administered by the Probation Office. The defendant shall contribute to the Probation Office's costs of service rendered based upon his/her ability to pay as reflected in his/her monthly cash flow as it relates to the court approved sliding fee scale.

15.The defendant must submit to testing to determine if he/she has used a prohibited substance. The defendant shall contribute to the Probation Office's costs of service rendered based upon his/her ability to pay as it relates to the court approved sliding fee scale. The defendant must not attempt to obstruct or tamper with the testing methods.

16.The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office to a search conducted by the United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of their release and that the areas to be searched may contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

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.

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

DEFENDANT: **Bennett , Marcus**
CASE NUMBER: **3:17-CR-32-2-TBR**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 100.00**		

☒ **The fine and the costs of investigation, prosecution, incarceration and supervision are waived due to the defendant's inability to pay.**

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

☒ **Restitution is not an issue in this case.**

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

Criminal debt may be paid by check or money order or may be paid online at www.kywd.uscourts.gov (See Online Payments for Criminal Debt). 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 in full prior to the United States receiving payment.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order Or Percentage Of Payment

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be Subject to penalties for default and delinquency 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 and/or ☐ Restitution

☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

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

DEFENDANT: **Bennett , Marcus**
CASE NUMBER: **3:17-CR-32-2-TBR**

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ Due immediately, balance due
☐ not later than , or
☐ in accordance with C, D, or E below); or

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

C ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after The date of this judgment, or

D ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after Release from imprisonment to a term of supervision; or

E ☒ Special instructions regarding the payment of criminal monetary penalties:

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least $60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be 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 to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

☒ **The defendant shall forfeit the defendant's interest in the following property to the United States:**
Forfeiture shall be addressed by a separate order from the Court.

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA,	)	Case No. 3:17-CR-32-TBR
Plaintiff,	)	
vs.	)	
MARCUS BENNETT,	)	
	)	February 18, 2022
Defendant.	)	Louisville, Kentucky

****
TRANSCRIPT OF SENTENCING HEARING
BEFORE HONORABLE THOMAS B. RUSSELL
UNITED STATES SENIOR DISTRICT JUDGE
****

APPEARANCES:

For United States: Marisa J. Ford
U.S. Attorney's Office
717 West Broadway
Louisville, KY 40202

For Defendant: Scott C. Cox
Cox & Mazzoli, PLLC
600 West Main Street, Suite 300
Louisville, KY 40202

[Defendant present.]

Terri L. Turner, RMR, CRR
Official Court Reporter
133 U.S. Courthouse
501 Broadway
Paducah, KY 42001

Proceedings recorded by mechanical stenography, transcript produced by computer.

(Begin proceedings in open court at 10:06 a.m.)

THE COURT: Good morning. We're here today on two cases. The first case we will call will be *United States of America vs. Marcus Bennett*.

Who's present for the United States?

MS. FORD: Marisa Ford for the United States, Your Honor.

THE COURT: In regard to Mr. Marcus Bennett?

MR. COX: Scott Cox, Your Honor. Good morning.

THE COURT: Good morning.

Are you-all ready to proceed?

MR. COX: Yes, sir.

MS. FORD: Yes, sir.

THE COURT: As I mentioned earlier, we're here for sentencing. You-all have filed briefings on this matter, we've had telephonic conferences where you've argued matters in this also, but I look forward to hearing any additional statements that you wish to make today.

In looking at this, I will tell you the things I think that you may want to address for sure. That would be the quantity of drugs, the two-level enhancement for maintaining a premises to distribute heroin, acceptance of responsibility, and the downward departure motions -- objections that defendant has argued in this matter -- not objections. They want a downward departure. There's a motion for a downward departure.

Having said that, I'll be glad to call upon Mr. Cox.

MR. COX: Your Honor, Mr. Eggert and I drew straws, and I got the short one. And he's asked me -- and I'm fine -- to go first, if that's okay with the Court and the government.

THE COURT: That's fine, yes.

MR. COX: Thank you. Would you be okay with me sitting here?

THE COURT: However works best for you. I have no reason to -- any way you want to do it.

MR. COX: Thank you. And I can --

THE COURT: Yes, sir. When you're talking, you may remove your mask.

MR. COX: Thank you very much, Judge.

First, just let me note the objections that we have to the presentence investigation report, Your Honor.

Your Honor, on page 20 of the report, paragraph 77, the probation office found that the minimum term of imprisonment with regard to Mr. Marcus Bennett is ten years, and we believe the correct mandatory minimum is five years. And it's an interesting issue, and the probation office put quite a few reasons in the report that are accurate for why it's a five-year mandatory minimum, Your Honor.

First of all, Judge, the reason why she initially put a ten-year mandatory minimum is because the United States, when another prosecutor was on the case, filed an 851 notice, Your

Honor, and the 851 notice charged three different possession of narcotics convictions. One was possession and trafficking over in state court, but all three were possession.

And as you well know, as everyone well knows, because of the age of this case, the First Step Act and the *Havis* case and other things have had dramatic effect on these guidelines. So first of all, the three predicate offenses that Former AUSA Scott Davis filed, Your Honor, do not apply as enhancers.

THE COURT: Yeah, I think the First Step Act does affect that.

MR. COX: Yes.

THE COURT: And I think it would be a minimum sentence of 5 years up to 40 years.

MS. FORD: Judge, we don't disagree. That's correct. I think that was just a --

THE COURT: I think it just didn't carry over. The documentation I have in front of me, that's what I -- from the probation office, they agreed with that.

MS. FORD: Yes, sir. And she describes in paragraphs 11 and 12 of the presentence report why those prior convictions which would have been enhancers -- felony offenses before no longer apply after the First Step Act.

THE COURT: I think that's accurate also.

MS. FORD: Yes, sir. We don't disagree with that.

MR. COX: Just briefly, let me say, I can't tell you

how much we appreciate your probation officer's expertise, you know, just kind of guiding all of us through this. She really is kind of -- her knowledge is state of the art in terms of being current on everything, Your Honor. So that gives us a five-year mandatory minimum sentence.

And, Judge, with regard to acceptance of responsibility, this is a case where the proof of narcotics trafficking is overwhelming, and the other counts involving allegations of violence and so forth, both defendants were acquitted on those. And this is a situation where Mr. Bennett authorized me to see if we could work out a plea agreement that would just involve the drug trafficking, and the government, I know, considered it and declined to do that, which is a hundred percent within their discretion. We totally understand that.

But I don't even know that we barely contested, really, the drugs. I mean, we cross-examined the witnesses and so forth, but there was nothing said in my memory in opening or closing about, you know, not guilty of the drug trafficking.

And I would just proffer to the Court that he would have pled guilty if he could have pled guilty just to the drugs. You might say, "Well, he could have pled, then, to the drugs and just gone to trial on the violence," but I don't think that would be a smart thing to do strategically. But he was always prepared, Your Honor, I will tell you, and it was even brought up during the trial, and the government exercised their

discretion not to agree to that, which we understand.

The 3E1.1, Your Honor, it's Note 2, which just says, you know, it's rare for a defendant to get a reduction for acceptance after they put the government to its proof. "Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations, a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial."

And they give an example about a challenge, maybe, to a statute. And I've seen it done, I believe, when there are search warrant issues and things like that that a defendant wants to contest.

And it says, "In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily on pretrial statements and conduct."

That really doesn't apply here. But I know Mr. Eggert will agree and I know the government will agree, this is something we discussed, and they declined to offer that, which is their right.

Certainly, he's not entitled to have the third point reduced because the government was -- did have to prepare and try the case and really try the doggone thing twice, but we believe he's deserving of a two-level reduction under the guidelines on one of these rare circumstances for acceptance.

THE COURT: Yes, sir. I'll address all these at the end of your arguments in various matters.

MR. COX: Okay. And, really, the last substantive one is -- well, let's talk quantity real quick. The probation office found that he would be responsible for 742 grams of heroin, and we agree with that, that that was correctly calculated, Your Honor. And that was comprised of all the controlled buys both from Eric and Marcus as co-conspirators, which is appropriate, in addition to the heroin that was found when Eric Bennett was initially arrested and finally the heroin that was found at the Gilligan Street residence. All that adds up to 742 grams of heroin.

This is very important, in my view, to point out: As we all know, this jury received instructions that included, basically, a special interrogatory, and this jury concluded after deliberating for a long time that they should be held responsible for more than 100 grams of heroin, which triggers the five-year mandatory minimum, but they agreed unanimously that it was less than 1,000 grams, which triggers the ten-year mandatory minimum.

And I believe -- I know this sounds maybe hokey, but in the United States of America, we ought to follow what the jury -- the jury findings and we ought not punish someone for conduct that they were not convicted of or the jury did not find. And this is a situation where their finding -- their clear,

unanimous finding -- only triggered the five-year mandatory minimum, which is -- where 742 grams is right in the sweet spot for that, which is what the probation office determined, Your Honor.

The Sixth Circuit in many, many cases has held that sentencing courts, when determining quantity, when quantity is contested, that you should use conservative estimates. Not aggressive, but conservative estimates.

We have conduct here that the government has put forward for the Court to increase the quantity. We've got jailhouse talk, Your Honor. And if you were to include that and make some sort of estimate as to how much that was and tack it onto the 742 grams, Your Honor, you would have to engage in speculation as to what illegal substance they were talking about, you would have to speculate as to what the quantity was they were talking about, you would have to extrapolate something about an alleged price and try to determine the quantity and the substance they were talking about, and there's just no reason for you to engage in that speculation where you have a jury verdict which puts you right between 100 and 1,000 and we agree that it's 742.

So we would ask that you use the quantity that was derived from the solid, beyond a reasonable doubt proof in this case.

I also believe that the government has correctly cited the relevant conduct provisions, Chapter 1 of the guidelines, and cases that permit you to go outside of that. And I honestly

believe if we ever get a Sentencing Commission working again and a reasonably well-functioning Congress, they're going to do away with that, Judge. That's just not appropriate to hold people responsible and sentence them for things they were not found guilty of.

THE COURT: These last matters you're talking about have to do with the government's argument that these are relevant conduct, as I understand it.

MR. COX: Yes, sir.

And, Judge, that's really all I have to say about that unless you have any questions related to that.

THE COURT: No, sir.

MR. COX: And then -- just the Court's indulgence. Just one quick second.

(Counsel and defendant conferred off the record.)

MR. COX: And then, Judge, finally, the probation office has concluded, over our objection, that Mr. Bennett should receive a two-level upward adjustment for maintaining a premises, Your Honor, and this is a situation that's very much fact based. And we have this house which was next door to the bar on Gilligan, and the proof was and is a fact that he didn't have a key to that residence. He and Mr. Crenshaw jointly owned that property and they leased it out, Your Honor, and he did not have a key. He was not able to come and go any time that he wanted, Your Honor.

The case law in the Sixth Circuit talks about -- and I'm reading from the *United States vs. Bell* case, Your Honor, which is 766 F.3d 634, and it just talks about it need only -- as for the third element, the application note explains the drug trade need not be the sole purpose for maintaining the premises.

We appreciate that. And the fact this is a legitimate residence for this woman does not mean that the Court cannot give this two-level adjustment, but it needs to be the primary or the principal use as opposed to an incidental or collateral use. Well, that's just not the case here. There's no proof that that was the primary or principal use of that property. That was a woman's residence, Your Honor, again, that he didn't even have a key to.

And if you'll give me just one second.

Okay. Perfect.

And we did locate a case, Your Honor, *United States vs. Rich*, that was decided in the Sixth Circuit last September, and I think I have an ethical obligation to tell the Court if I find something --

THE COURT: I've read the case.

MR. COX: Okay. Good.

And I would just say to the Court that the facts of that case are very different from our facts, and all that really says in my opinion is a Court can hold a defendant responsible for a co-defendant maintaining a drug premises.

THE COURT: Yeah. I think the basis was that they were -- they were holding -- on the basis of other conduct [sic] who were part of the conspiracy were involved in it and that that testimony -- that could come in for the Court to judge whether or not it applies or not, even though the defendant himself may not -- since he was a part of that conspiracy and other co-conspirators were involved in it and that was within the scope of his participation, that that would come in. That's how I understood it, but I may be wrong.

MR. COX: You're right. I'm certain of that.

And I would suggest to the Court or argue to the Court that if you took Ms. Young and you took Eric Bennett and you took Marcus Bennett's -- all of their conduct combined, you still should not find that that home on Gilligan was maintained as a drug premises, like a trap house or a crack house.

THE COURT: I guess on behalf of the government, when they're involved in this, if you have proof, evidence, or argument regarding what conduct you think other than from this defendant would apply to that, it would be helpful, as I understand it.

As I understand the *Rich* case, that's what it based it on. It came from a co-conspirator, the conduct, that made it a premises, essentially, and it was within the scope is what their argument -- I think, but I'll be glad to hear from you later on on that.

MS. FORD: Okay.

MR. COX: And, Your Honor, I know that you're going to give us an opportunity to argue the 3553(a) factors later.

THE COURT: Yes.

MR. COX: But that's all I have to say about the topics that you mentioned, and that's all I have to say about objections to the PSR.

THE COURT: All right. Ms. Ford.

MS. FORD: Judge, I'm going to start with Mr. Cox's last argument and go in reverse order.

With respect to whether the premises at Gilligan Street would qualify for the two-level enhancement for maintaining a premises, you know, primarily for purposes of narcotics trafficking, with all due respect, I don't think there's any evidence in the record at all in this case that Mr. Bennett did not have a key to that residence. In fact, he co-owned it as a corporate entity with James Crenshaw, his friend, who testified.

My recollection of Ms. Young's testimony was that she was in an intimate relationship with Mr. Bennett; she was 18 years old at the time that he was, I believe, 38; and that he allowed her to stay there from time to time. I don't think it's fair to say that she was residing at that Gilligan Street address. She also testified that the large quantity of heroin, which I believe was over 400 grams, that was found in the ceiling belonged to Mr. Bennett, not that it was hers.

There also was evidence introduced that he would direct her -- Mr. Bennett would direct her to meet him there from time to time, but there's no evidence at all in this record that he couldn't access that -- the premises on his own.

And the Court should recall from the photos that were introduced into evidence, it essentially was a closet-sized --

THE COURT: It was up there.

MS. FORD: It was very, very small. I mean, there was room for a bed, basically. And the heroin -- large quantity of heroin was hidden above the hot water heater in the closet.

So with that respect, I think -- you know, we have to go from the evidence which actually is in the record, which was Ms. Young's testimony that Mr. Bennett is the one who allowed her to stay there from time to time and it was his heroin that was there in the ceiling of the premises.

With respect to the quantity for which Mr. Bennett should be held accountable, the quantity of heroin, I want to start with Mr. Cox's statement that if we ever get a functioning Sentencing Commission again, they'll do away with the ability of the Court to hold the defendant responsible for relevant conduct for which he may have been acquitted. You know, all we can do today is get this presentence report right and apply the law as it exists today. Not the law that existed when these defendants were charged, when we all agree they qualified as career offenders. The law's changed. They no longer are career offenders under

the law. But we can't apply the law that we think is going to exist two years from now.

The United States could have argued that these defendants should be held responsible under principles of relevant conduct for the shooting of Da'Ron Lester. We didn't make that argument. The only argument I have made is that Marcus Bennett should be held responsible for in excess of a kilogram of cocaine -- or of heroin, and I understand that I presented that evidence to the jury and they apparently rejected it. I presented that information to the probation office as part of the offense conduct. They apparently were not persuaded by it.

But the Court heard the evidence at trial, and the Court is not required in this case to engage in some wild or aggressive speculation about what the drug was or extrapolate a price. The evidence that was presented at trial was that on the day that the search warrant was executed at Marcus Bennett's bar, they had a wiretap on his phone. He was speaking on the phone to his friend James Crenshaw, who testified at trial, and this is quoted in the presentence report in, I believe, paragraphs 24, 25, and 26.

He told his friend James Crenshaw, "They're there, man. It's all -- they in the bar, man. It's all bad for me."

Inspector Mehall testified at trial they didn't find any narcotics in the bar. The conversation that was picked up between Marcus Bennett and James Crenshaw on February 27th while

agents were executing the warrant would suggest that Mr. Bennett thought they were going to find something in the bar.

And the day after the warrant was executed, on February 28th of 2017, Mr. Bennett was -- a communication was intercepted where he made another telephone call to James Crenshaw and said, "They missed it."

We introduced photos at trial that Marcus Bennett could be seen coming out of the back of the bar the day after the warrant was executed holding something down at his waist level that appears to be white. It does not appear to be a big bag of weed. It looks like a chunk of something that he's holding.

And he tells James Crenshaw, "You've got to take this for me."

James Crenshaw testified at trial that he came and he took a bag from Marcus -- Marcus Bennett brought him a bag. It's true that James Crenshaw didn't look in the bag, he didn't look to see what it was, but he secreted it in a garage that Marcus Bennett had access to and the bag was gone a few days later.

After Marcus Bennett was arrested, a letter was found in which he -- based on telephone calls that he was having with another woman with whom he has children, Mydra Watkins, who also testified at trial. The conversation was, "Ant's shorting you. How much money has Ant brought you? He's shorting you. I'm going to write you a letter and tell you what he owes."

We introduced that letter at trial, and it's detailed in

paragraph 26 of the presentence report. Marcus Bennett does a computation in the letter, 27 times 25, and he said, "He owes you $67,000." I believe she even testified that she was collecting money for Marcus Bennett from narcotics sales.

You don't have to speculate about price or what the drug was, because conveniently the $2,500 is what Marcus Bennett sold every ounce of heroin in this case that he sold to Quante Malone. So it's not an aggressive calculation. It's not wild speculation. I'd submit the Court can consider it not even by a preponderance of the evidence.

I believe in the jury system, but sometimes they get it wrong. And I submit to the Court there's clear and convincing evidence in this case that Marcus Bennett was responsible for more than a kilogram of cocaine -- of heroin, I'm sorry, and that would raise his guideline calculation by two levels.

The probation office used 2D1.1(c)(5) of the sentencing table, and they should have used (c)(6). It would raise his guideline under the drug table from a 28 to a 30. It would add two levels to that calculation.

You know, Mr. Cox talks about, you know, the cases say you have to use a conservative estimate, don't be aggressive in your estimate. We're not even talking about the 15 parcels that we introduced into evidence at trial that appeared, based on profiling, to contain some kind of narcotics. That would be speculative, for me to submit to you that there were 15 parcels

that were sent from California to this defendant and they all contained heroin. I don't know that. Some of them probably did. Some of them probably had marijuana in them.

But the best evidence and the compelling evidence I have that he's responsible for more than a kilogram was what we put before the jury at the trial of this case.

THE COURT: When you say it would be 30, also it would be two points on top of that to a total offense level of 32 if the premises argument remains --

MS. FORD: Correct.

THE COURT: -- was involved.

MS. FORD: Yes, sir.

MR. COX: May I?

MS. FORD: Let me just say --

THE COURT: Let her finish up first.

MR. COX: Of course.

MS. FORD: There's nothing about this case that warrants a reduction for acceptance of responsibility. Mr. Cox is correct. They could have come in and pled open to the narcotics trafficking. They didn't.

And unless you sentence them to something like time served today, I fully expect that they will appeal Judge Walker's denial of the motion to suppress the recordings that were made by Quante Malone, who was deceased and not available to testify at trial. They still don't accept responsibility for those drug

transactions.

THE COURT: Yes, sir, Mr. Cox.

MR. COX: Just real briefly, Your Honor.

Ms. Ford has said that there was no evidence that Mr. Marcus Bennett did not have a key to the Gilligan residence. There was a taped call where he called his friend, Ms. Young, and said, "You need to get over here and let me in. You need to come over here and let me in." He did not have a key. There's no proof he had a key to that place or the ability to get in and out, Your Honor.

Secondly, she said that she had -- in terms of using her conduct as a co-conspirator and kind of holding him responsible, she said she didn't have any idea that that was in the ceiling when she testified. Her driver's license listed Gilligan as her residence, Your Honor. That really was her residence, and he didn't have a key to it.

As far as the quantity is concerned, Ms. Ford says, well, he came out of the Victory Bar, you know, a couple days later and he had something in his hand that looked like it was white. I think she may have said it was chunky or -- if I'm wrong about that, I apologize. But James Crenshaw testified at the trial, and he said he didn't know what was in that package. He didn't say it was white or chunky or anything else. He said he never looked, he just put it away at his request, Judge.

Ms. Ford arguing that, hey, you know, you can give them this

weight and increase their sentences, we're not even talking about the 15 packages that were sent here from California to Louisville, and said, you know, I don't know what was in there, I'm guessing some of it could have been heroin, some of it marijuana, there was one package intercepted and opened and tested, and it was marijuana. So only one package out of that 15 was ever intercepted or looked at, and it was marijuana.

And those are the kind of facts -- when you say apply a conservative estimate to this stuff, you should assume all that's marijuana, Your Honor, of those 15 packages. You shouldn't speculate that it was heroin.

I mean, we're not trying to get real clever here or cute with the Court at all. I mean, we'd be in here arguing it's sentencing entrapment. They could have arrested him and his brother the first time they sold an ounce of heroin to their informant or the second time or the third time, but they did, what, 11 different buys, Your Honor, to get these guidelines up as high as they could.

And we're not arguing that you shouldn't apply that. We're just saying hold him responsible for what he actually sold to the informant, what his brother sold to the informant, what was located when his brother was arrested, and what was in that one property, Your Honor. And that -- those are quantities you can just be confident in. And, finally, those are the quantities we believe pretty clearly the jury found them responsible for.

THE COURT: Anything further in that regard, Ms. Ford?

MS. FORD: Yeah. I can't even believe he would suggest the possibility of sentencing entrapment in here in this case. These buys that were made do not get the guidelines above -- what generates the guideline in this case is the chunk of heroin that was found at Gilligan, not these individual buys that were made by Quante Malone.

MR. COX: We don't know that was heroin. The jury didn't accept that.

MS. FORD: No. The heroin that was found in Gilligan was tested and introduced at trial. That was heroin.

And you can argue that, well, one box was intercepted and it had marijuana in it, but what he sold and what we found was all heroin. So I don't know where it was coming from. I guess not through the mail. That was all weed.

THE COURT: All right. I think we've -- I think we've covered that issue.

I'll be glad to hear any argument -- your concerns about 3553 issues.

MR. COX: Yes, sir. If the Court will just give me a quick second.

THE COURT: Yes.

MR. COX: Judge, with regard to the 3553(a) factors, as you know, as you've heard a thousand times, the Court shall impose a sentence sufficient, but not greater than necessary, to

comply with the purposes set forth in this section.

The first thing the Court is to consider is the nature and circumstances of the offense. Let's talk about that. This is a 740-something-gram heroin case, Your Honor, where there were more than ten instances where he or his brother sold one ounce of heroin. That clearly is a case that would be more than appropriate to bring here in federal court, but that's not a big case. And that's not why the case was brought here, obviously.

But that's what he was found guilty of, is a quantity -- of conspiring to traffic in a quantity of heroin that would trigger a five-year mandatory minimum sentence. That's the nature of the offense that he was convicted of, Your Honor.

In addition to that, in the very same sentence, you're to consider the history and the characteristics of the defendant, Your Honor.

First of all -- let me shift gears here just real quick and say that the guidelines in this case are 168 to 210 months. I think we all are in agreement that the mandatory minimum sentence is 60 months.

And let me make this argument to the Court: Since November of 1987, the Sentencing Commission has always endeavored to keep the guidelines consistent with the mandatory minimums. So if you have a kilogram of heroin, it starts off generally at a 32. If you have five kilograms of cocaine, it starts off at a 32. They try to keep them consistent. You don't want -- they don't

want the guidelines to call for a sentence of, say, four years when the mandatory minimum is ten.

So *Havis* and the First Step Act have essentially not been addressed by the Sentencing Commission. If they had been -- and when they do, they'll lower them to track the mandatory minimum. They've never in the history of the Sentencing Commission, since 1987, done anything different. They've never done that. So these guidelines are artificially high when you consider he's looking at a five-year mandatory minimum sentence, Your Honor. And if they could get a quorum and do their job, we wouldn't even be asking for a variance today.

The next thing you're to consider, the history and characteristics of Mr. Bennett. He's a 44-year-old man. He's lived here in Louisville almost his entire life, Your Honor. And, you know, unfortunately, you know, he's had a really rough time in his life. His parents split up when he was four years old. His mother was the main custodial parent who raised him, and she was a drug addict, Your Honor. She struggled with addiction her whole life.

His older brother Larry was the only father figure in his life, and that was until Larry was imprisoned, and then he didn't have a father figure. That's when he and Eric became close and kind of cleaved onto each other because they didn't have much family left, Your Honor, and looked out for each other.

He has four children. He has helped raise another child, so he really considers that he has five children. And he doesn't owe any child support or anything. He's worked to try to take care of his children.

He suffers, as you can see from the PSR, from depression and anxiety. And he needs help for that, and I'm hoping he gets that when he's incarcerated.

His own personal history with -- and this should be no surprise to anyone. He started abusing drugs when he was 14, with marijuana and Valium and Xanax. Later, he started abusing codeine syrup, Your Honor, which is really terrible for you, which will just kill your stomach, and it's a tough addiction to beat.

He earned his GED while he was in prison, which speaks well of him. He attended and got his degree from a barber college in 2014. He was cutting hair in his basement, and he can earn a legitimate income if he puts his mind to it.

I would ask the Court to consider this also: He's looking at a five-year mandatory minimum. He has been in jail for 57 months. This April, he will have been in jail for five years. We've had multiple judges in this case, multiple prosecutors that delayed things. His brother Eric has been evaluated, you know, for psychological -- for competency issues and things that caused the case to be delayed a lot. And then, of course, COVID is one of the big reasons it got delayed for as long as it has.

He's been in three different jails, but I think this is true of all three of them. There will be about 20 men in a pod with one bathroom, and when -- for instance, in Oldham County, when they have COVID issues, they're locked down. They can't get out and do anything. They take their food to them. They eat their food. They clean their own bathroom that they have to share. And he's been in prison, as you know, Your Honor, and probably some rough ones, but there's been nothing to compare to this.

To the extent -- you know, one of the criteria or one of the goals of sentencing is punishment. He's been punished severely from being in that environment for almost five years now, Your Honor.

We would ask you, Judge, to impose a sentence of double the mandatory minimum. That would be a sentence of 120 months. That means that he would still serve more years in custody before he would be released. It would also be good for everyone that he be released in sort of a normal fashion into the halfway house, where he is spending the night in the halfway house, and then he would be transferred to a probation officer. We would ask you to impose eight years of supervised release for him to be supervised and drug tested and monitored, Your Honor.

And we think that sentence, Judge, which is twice the mandatory minimum, is a reasonable sentence.

THE COURT: Thank you.

Ms. Ford.

MS. FORD: Yes, Your Honor.

You know, once again, Mr. Cox has made an argument about what the Sentencing Commission is going to do at some point in the future when they have a quorum again, and if we're going to speculate -- and he always speculates that it will be in his client's favor, but we could just as easily speculate that when the Sentencing Commission next has a quorum, they will say, "You know, this *Havis* case is a disaster. We never intended that a conspiracy to distribute 700 grams of heroin would not be considered a controlled substance offense, but a substantive charge of selling one ounce of heroin to an undercover, that is a controlled substance offense." That's nonsensical. It doesn't make any sense.

But, again -- and we talked about on the conference call, *Havis* is the law that we have now, and the law that we have now is that this defendant is subject to a mandatory minimum sentence of not less than 5 years and a statutory maximum sentence of up to 40.

The guideline range in this case whether the Court accepts the PSR of 168 to 210 months or if the Court accepts the government's argument that this defendant should be held responsible for a kilo -- more than a kilogram of heroin, with a total offense level of 32, he'd be looking at a guideline range of 210 to 262 months. Both of those sentencing ranges are well within the statute in this case.

So to speculate that sometime in the future the Sentencing Commission is going to bring the guidelines back down in some way, I ask the Court to reject that argument.

THE COURT: Thank you.

Does your client wish to make any comments or statement, Mr. Cox?

MR. COX: Your Honor, thank you very much. I've talked to him about that. We don't know what we're going to do, if there's going to be an appeal or not, but we're going to assume that there will be. And I don't think it's in his interest to make a statement, and he agrees with that.

THE COURT: I have no problem if he doesn't wish to make a comment.

MR. COX: Thank you, Judge.

THE COURT: Let me take about a five- or ten-minute break, and I'll be back.

MS. FORD: Judge, could I say one more thing?

THE COURT: Yes, ma'am.

MS. FORD: I'd just ask the Court -- Mr. Cox argued for a variance under the 3553 factors. There are some prosecutors in my office who will always ask for the maximum penalty in a case, and I think the Court knows me well enough to know I'm not one of them. I'm not asking you to impose a sentence at the highest end of the guideline in this case, but I am asking you to impose a guideline sentence.

THE COURT: All right. Thank you.

(Recess at 10:45 a.m. until 11:09 p.m.)

THE COURT: Just give me a second.

Let me address one other issue before we get into the matters that we discussed earlier this morning. That has to do with paragraph 8 of the presentence investigation report indicating that a notice of forfeiture has been filed in this case. I don't know what the status of that is. I don't think there's been a preliminary motion filed in that regard. I'm just not sure exactly what the status is and what the parties -- where you are on that issue.

MR. COX: I think Ms. Ford can speak to that better than I.

MS. FORD: Yes, sir, I can address that.

We did file a motion for a preliminary order of forfeiture with respect to some currency, and I anticipate that is the only motion for an order of forfeiture that's going to be filed in this case. The original notice sought the forfeiture, for example, of some real estate in this case that's no longer owned by Marcus Bennett. It's been -- it was jointly owned. It's been -- that property's been foreclosed on. There are some cars. I think arrangements have been made either to return vehicles or -- but I think that to the extent that there's any other notice given, if we need to withdraw that, but I think we filed the only motion we're going to file.

THE COURT: How do we need to proceed with that after today? I don't know.

Mr. Cox?

MR. COX: No. I'll get together with the postal inspector, and we'll make arrangements. I don't think there's anything for you.

THE COURT: Nothing at issue before the Court; is that correct?

MR. COX: I don't think so.

MS. FORD: I don't think so. I mean, as in any case, there's some evidence to be returned, and some of the items that we gave notice to forfeit never came into the government's possession.

THE COURT: All right. Thank you.

I want to say this again, but I'm probably being redundant. Defendant agrees that the quantity involved was 742.52 grams of heroin; is that correct?

MR. COX: Yes, sir.

THE COURT: Okay. In addressing your other issues that were brought up this morning -- I'm going to go into some background about relevant conduct just so the parties will understand I'm addressing the issues that are concerned with the relevant conduct.

I would note that the Victory Bar & Grill is owned by Marcus's friend. Marcus also operated the bar, and some of the

controlled buys occurred there. Officers executed a search warrant at the bar, at the Gilligan Street address, and some other places. This is when the undercover -- they uncovered about 400-plus grams at the Gilligan Street house. The Gilligan Street house was owned by the same friend that owned the bar and was being rented to a female co-defendant, Juliyah Young.

However, officers apparently failed to uncover some drugs at the bar, as evidenced by a telephone call made around the time of the search. In that call, Marcus told the other person, quote, They missed me. They missed it, closed quote; and, quote, They got her, but they missed me, dude, closed quote.

Marcus then established the location of the other person and says, quote, All right. Here I come, man. I need you to take this from me, closed quote. Pole cameras then showed him at the bar appearing to hold something down towards his waist.

Surveillance continued, and the officers conducted a couple more controlled buys over the next month. Mr. Marcus was ultimately arrested. While in custody, Mr. Marcus corresponded with a female, quote, significant other, closed quote, indicating that a man called Ant, A-n-t, closed quote, was financing her with little payments -- finessing her with little payments.

He made comments that, quote, they were 25 apiece, closed quote, presumably meaning $2,500 per ounce of heroin. At least the government's argued that, as that was the price per ounce

during the controlled buys. You multiply 25 by 27, so presume that 27 ounces to sell. Girlfriend tells Marcus that she has continued to collect payments for him.

One ounce equals 28.35 grams. Twenty-five [sic] ounces times 28.35 grams per ounce is 765.45 grams. If you assume from the call that Marcus has twenty-five seven [sic] ounces of heroin to sell, then he had approximately 765 grams of heroin. However, the PSR only holds Mr. Marcus accountable for 742.52 grams, the same as Eric, for the heroin obtained during the controlled buys and found at Eric's initial arrest and at the Gilligan Street address.

The United States has argued today and has indicated before that it disagrees with this guideline calculation in the PSR for Marcus and believes that Marcus should be held accountable for 765 grams referenced in the jail call as well as the 742.52 grams actually obtained during the investigation, for a total of 1,507.52 grams. This would bring his base level up from a 28 of at least -- to a 30 in this case.

The United States acknowledges that Marcus was found guilty of conspiring to possess with intent to distribute or to distribute more than 100 grams but less than 1,000 grams. However, the United States argues that the jury's finding on quantity does not limit the Court's ability to consider other relevant conduct, namely the other 765 grams of heroin. The United States argues that Marcus gave these drugs to a friend

and Ant sold it to Marcus on behalf of -- Marcus's behalf and gave the money to Marcus's fiancée.

The United States -- as the United States points out in its brief, relevant conduct can include uncharged conduct, conduct underlying dismissed charges, and conduct of which the trier of fact has acquitted the defendant, citing *United States vs. Watts,* 519 US 148, a 1997 case. Somewhere in the brief, I think the United States argues that preponderance of the evidence applies and maybe even clear and convincing, although I think it's clear precedent in the Sixth Circuit now on more recent cases that it's clearly clear and convincing -- it's clearly preponderance of the evidence standard that applies.

During one of the last conversations that we had with all the parties and the briefing today and the argument today, the United States argued there is enough circumstantial evidence to conclude not only by preponderance of the evidence but by clear and convincing evidence that Marcus is responsible for the 765 grams referenced in the jail call in addition to the other 742.52 grams obtained during the investigation. Basically, the United States argues that one can infer that drugs, specifically heroin, were missed during the search of the bar, Marcus then gave those to a friend to sell, and that friend then sold the drugs to Marcus [sic] and gave the money to Marcus's fiancée.

The United States has also pointed out to a letter from Marcus to Mydra Watkins, his then fiancée, with calculations of

what Ant owed to -- for the missing drugs, with the price per ounce being the same price that defendant sold heroin for in the controlled buys. From this, the United States argues you can infer that what was being sold was heroin, not marijuana.

The United States also explained in the phone call conference we had with all counsel and today that it is not making the argument that Marcus should be held accountable for 15 packages filled with heroin. Rather, the United States argues that Marcus took heroin from the bar, gave it to his friend to sell for him, and he collected the funds while he was in prison. In other words, it was sold on his behalf and he should be held accountable for those drugs.

The jury was presented with all this evidence of the jail call and et cetera, all that I've talked about, and the United States argued that strongly at the time of trial, but the jury chose not to hold Marcus accountable for that amount. In other words, the jury found that the United States had not proven the amount beyond a reasonable doubt, and they clearly indicated so on the special verdict form by checking the line for, quote, 100 grams or more but less than 1 kilogram, which equals 100 grams.

Now, even though the jury has already decided what quantity Marcus should be held liable for, the United States has an opportunity to seek a higher sentence, which they've done in this case. The government has every right to make this argument, and I can understand why they would.

However, the Court has the discretion to consider all the evidence in this case from the jail as relevant conduct and all other matters that the prosecutor mentioned as relevant conduct if I so desire. While I could say this is relevant conduct and should apply, that does not mean that I should say that it should apply in this case. Whether the standard is preponderance of the evidence or clear and convincing evidence, I have problems with this. I believe justice leads me to accept the unanimous decision of the jury.

I understand the government's argument. I understand the strength of the government's argument. I understand her feeling of her -- how strong she feels that cases should be decided by a jury. I carry that same consideration as a lawyer and then as a judge. I've tried lots of jury trials, and some I've won and some I've lost when I was practicing. But I found that -- I have faith in the jury, and I still -- from my experience, I still carry that faith.

I find it difficult not to accept -- not to -- let me say that again. I find it -- when I say justice leads me to accept the unanimous decision of the jury, I'm really saying I find it very difficult to find otherwise in this case. I'm not prepared to ignore the jury's decision, even though I may have the power to do so. And that is my finding in this case in regard to the relevant conduct.

The other issue before the Court has to do with the specific

offense characteristic set forth in paragraph 33 of the presentence investigation report. The defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance; therefore, two levels are added pursuant to United States Sentencing Guideline 2D1(b)(12) [sic]. The defendant had access to the Gilligan Street address, all of which was not occupied, and heroin was found at the location during the execution of the search warrant.

Defense counsel has argued that Marcus should not receive this two-point enhancement. Among other things, he's argued that he did not have the key to the Gilligan Street home and could only enter it if tenant, co-defendant Young, allowed him in. He also denies any knowledge of the heroin found in the home.

Application Note 17 to the Guideline 2D1.1 provides some guidance on resolving this issue. It explains that "subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of controlled substance for the purpose of distribution." In determining whether defendant maintained the premises, the Court should consider (a) whether the defendant held a possessory interest, owned, or rented the premises; (b) the extent to which the defendant controlled the access to or activities at the premises. That's set forth in Application

Note 17, as I noted.

Further, while manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, it must be one of the defendant's primary or principal uses for the premises rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the Court could consider -- should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance, how frequently the premises was used by the defendant for lawful purpose.

In the present case, Marcus was not the owner nor tenant of Gilligan Street residence, and it has been inferred that he did not have a key to enter the home, although there seem to be some conflict in that. Rather, he entered only when permitted by the tenant, co-defendant Young. There's no evidence to suggest that he ever lived there, and I don't know of any evidence that showed any personal clothing or anything like that was found.

Considering all the evidence, much of which was recited by Ms. Ford today and my memory of the testimony in this case, Ms. Young testified in the case that she was 18 years old when she was the girlfriend of Mr. Bennett. He allowed her to stay there from time to time. She said -- she testified that the heroin in the facility belonged to Marcus Bennett.

That -- the Court finds that that evidence and the evidence

along with other testimony is clearly sufficient to establish that the enhancement should apply, so I overrule the defendant's objection to that.

In regard to acceptance of responsibility, under United States Guideline 3E1.1(a), the offense level may be decreased by two levels if the defendant clearly demonstrates acceptance of responsibility.

Defense counsel argues that Marcus is entitled to a two-point reduction for his acceptance of responsibility. Defendant counsel -- defense counsel notes that Marcus considered pleading to the count involving drug distribution but ultimately elected to go to trial, where barely contested the counts other than the quantity and unreliability of the government's informant.

As an initial matter, the Court notes that Marcus's decision to exercise his right to a jury trial does not automatically preclude an acceptance of responsibility reduction.

United States Code Guidelines -- Sentencing Guideline 3E1.1, Application Note 2, because -- that Application Note 2 explains there are rare circumstances in which a defendant may exercise his right to trial while also clearly demonstrating an acceptance of responsibility for his criminal conduct. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt, such as making constitutional challenges or to -- to a statute or to a

challenge on applicable statute to his conduct. However, a determination a defendant has accepted responsibility would be based primarily upon pretrial statements and conduct, as set forth -- as noted in Guideline 3E1.1, Application Note 2.

Further, in considering whether 3E1.1(a) applies, the Court may consider the following non-exhaustive list of factors as outlined in Application Note 1:

> (A) truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or falsely denying [sic] any additional relevant conduct for which the defendant is accountable under 1B1.3, relevant conduct. Note that a defendant is not required to volunteer or affirmatively admit relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this section. A defendant who falsely denies, or frivolously contests, relevant conduct that the Court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact a defendant's challenge is unsuccessful does not necessarily establish that

it was either false denial or frivolous;

(B) voluntary termination or withdrawal from criminal conduct or association;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

This case is not one of the rare situations where a defendant proceeded to trial to assert and preserve issues unrelated to his factual guilt, as Marcus did not proceed to trial to make a constitutional challenge or to a statute or to challenge a statute's applicability.

Further, after considering the factors listed in the application note, the Court finds that a reduction for acceptance of responsibility would not be appropriate in this

case. For example, Marcus continued to argue that he should not be held responsible for any drugs -- let me take that back. He made strong arguments he should not be held responsible for the relevant conduct.

I did give him the benefit of that. There is a strong case that it is relevant conduct. And I did it because I don't feel comfortable because the jury found differently, but it doesn't mean I cannot consider that, that same evidence, in making this decision in this case.

And for all those reasons, I think 3E1.1 in this matter -- that he does not -- should not receive that reduction that you -- I overrule your motion in that regard.

Defendant also made an objection to 4A1.3(b), overrepresentation of the seriousness of the criminal case [sic]. I have reviewed that. Under that section, a downward departure may be warranted "if reliable information indicates that the defendant's criminal history category substantially overrepresents the seriousness of defendant's criminal history or the likelihood that defendant will commit other crimes." For example, "A downward departure from defendant's criminal history category may be warranted if the defendant had two prior minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period." That's shown in Application Note 3 of that guideline.

In the present case, defendant's counsel does not object to Marcus's criminal history of 17 but argues that he's entitled to a downward departure of at least one level, from a Level VI to a Level V, under United States Guideline 4A1.3(b)(1). Defense counsel notes, among other things, that eight of Marcus's criminal history points stem from crimes committed over 21 years ago. He received another eight points for a plea agreement relating to minor offenses. Defense counsel also voiced his concerns over the way Kentucky aggregates sentences.

The Court has reviewed Marcus's criminal history and the arguments of defense counsel and finds that Marcus's criminal history is not substantially overrepresented. While several of Marcus's prior crimes were committed in 1997 and 1998, his record also indicates more recent crimes. For example, in 2013, 2014, and 2016, Marcus committed several drug-related misdemeanors and felonies.

Simply stated, this is not the type of case in which a defendant has only two minor misdemeanor convictions from ten or more years prior to the instant offense with no other evidence of criminal activity. Instead, Marcus has a lengthy criminal history, as 17 points come to a criminal history category of VI, and many of his convictions are drug related. Accordingly, the Court will not depart downward from a criminal history category of VI.

Defense counsel went through the 3553(a) factors the Court

must consider. I will not read those again. We all know them. I have considered each of those, and they're all a part of my reasoning today in the sentence that's going to be imposed.

The Court has considered the advisory sentencing guidelines and 18, United States Code, 3553(a) and imposes the following sentence:

It is the judgment of the Court that defendant is committed to the custody of Bureau of Prisons for a term of 168 months as to Count 1 of the superseding indictment.

Upon release from imprisonment, defendant shall be placed on supervised release for a term of five years as to Count 1. While on supervised release, the defendant shall abide by standard conditions of supervision adopted by the Court as well as special conditions that have been detailed in Part G of the presentence report. These special conditions include participation in the cognitive behavioral program, drug testing, and being subject to searches. The United States Probation Office will answer any questions the defendant may have regarding the requirements of these conditions.

The defendant is required to pay a special penalty assessment fee of $100 as to each count of conviction, for a total of $100.

Restitution is not an issue in this case. A fine and cost of investigation, prosecution, incarceration, and supervision are waived due to defendant's inability to pay.

Any financial sanctions imposed shall be paid in accordance with the schedule of payments page contained in this judgment.

Having considered 18, United States Code, 3553(a) and the advisory guidelines, which produce a total offense level of 30 and a criminal history category of VI, the advisory guideline range would be 168 months' to 210 months' custody and a fine of $30,000 to $5 million and 4 to 5 years of supervised release. The Court believes a sentence of 168 months' custody, followed by 5 years' supervised release, falls within the advisory guideline ranges and is sufficient, but not greater than necessary, to comply with the purposes set forth in Section 3553(a)(2) and satisfies any statutory provisions.

Defendant may appeal this sentence if he wishes to do so. If he wishes to file an appeal, he needs to file that within 14 days after the order [sic] enters a judgment concerning this sentence, and if he cannot afford an appeal, the Court can waive any filing fee in that regard.

Anything further on behalf of the United States?

MS. FORD: No. Thank you, Judge.

THE COURT: Anything further on behalf of the defendant?

MR. COX: Yes, Your Honor. Just two things briefly, please.

In the judgment and commitment order, we would ask you to recommend to the Bureau of Prisons that Mr. Bennett be permitted

to participate in the RDAP program. He is not eligible, in my opinion, to get time off for successfully completing RDAP because of some of the nature of his priors; however, he would benefit from participating in it.

THE COURT: I agree with that. If he so qualifies and is able to get in it, I think he should be held -- he should be incarcerated in a facility that will provide that program to him. And, also, I think he should be, if possible, incarcerated in a facility that's as close to his family as possible.

MR. COX: That was the second thing I was going to request. Thank you, Judge.

THE COURT: Anything further on behalf of the United States?

MS. FORD: No. Thank you, Judge.

THE COURT: Anything further on behalf of the defendant?

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

THE COURT: Thank you.

MR. COX: Judge, do you have any objection excusing me?

THE COURT: No, sir.

MR. COX: Thank you, Judge.

(Proceedings concluded at 11:38 a.m.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/Terri L. Turner — April 25, 2022

Terri L. Turner, RMR, CRR — Date

Official Court Reporter