APPENDIX A

APPENDIX B

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: March 05, 2024

Mr. Patrick F. Nash
Nash Marshall
129 W. Short Street
Lexington, KY 40507

Mr. Andrew H. Trimble
Office of the U.S. Attorney
Eastern District of Kentucky
601 Meyers Baker Road, Suite 200
London, KY 40741

Mr. Charles P. Wisdom Jr.
Office of the U.S. Attorney
Eastern District of Kentucky
260 W. Vine Street, Suite 300
Lexington, KY 40507-1612

Re: Case No. 22-6048, *USA v. Marlon Johnson*
Originating Case No. : 6:18-cr-00065-1

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's published opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Kelly L. Stephens, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Robert R. Carr

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0045p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARLON JERMAINE JOHNSON,

Defendant-Appellant.

No. 22-6048

Appeal from the United States District Court for the Eastern District of Kentucky at London.
No. 6:18-cr-00065-1—Claria Horn Boom, District Judge.

Decided and Filed: March 5, 2024

Before: SILER, MATHIS, and BLOOMEKATZ, Circuit Judges.

COUNSEL

ON BRIEF: Patrick F. Nash, NASH MARSHALL, PLLC, Lexington, Kentucky, for Appellant. Charles P. Wisdom, Jr., UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, Andrew H. Trimble, UNITED STATES ATTORNEY'S OFFICE, London, Kentucky, for Appellee.

OPINION

MATHIS, Circuit Judge. After a jury convicted Marlon Johnson of firearm and drug-trafficking offenses, the district court sentenced him to 300 months' imprisonment. Johnson raises constitutional, statutory, and evidentiary challenges to his convictions. Johnson also argues that his sentence is substantively unreasonable. For the following reasons, we affirm.

I.

In November 2018, an informant advised a deputy sheriff working for the Knox County Sheriff's Department ("KCSD") about nearby drug activity. According to that informant, a black male named "Jake" was at a residence in Corbin, Kentucky, with a large quantity of methamphetamine. Based on this information, the KCSD obtained a search warrant and surveilled the residence. During the surveillance, officers observed a Toyota Corolla nearby.

After the surveillance and prior to executing the search warrant, KCSD officers met at a nearby restaurant parking lot. Officers observed the same Toyota enter the lot, turn into the restaurant's drive-through area, and exit by circling back behind the business. A KCSD officer followed the Toyota in his cruiser and saw that the driver was not wearing a seatbelt. The officer activated his cruiser's lights and sirens. Then, the Toyota sped away, crashed into a fence, and struck another vehicle. Upon identifying Johnson as the driver, officers arrested him and searched the vehicle. During the search, officers uncovered 1,222.21 grams of methamphetamine—over 1,000 grams of that amount was pure—along with a loaded semiautomatic pistol.

A grand jury indicted Johnson for possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), possessing a firearm in furtherance of a prosecutable drug-trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Johnson proceeded to trial. After the first trial concluded in a mistrial, the second trial resulted in guilty verdicts on all counts. The district court sentenced Johnson to 300 months' imprisonment. This timely appeal followed.

II.

Johnson challenges his convictions and sentence on four grounds: (1) the jury venire was not drawn from a fair cross section of the community, in violation of the Sixth Amendment and the Jury Selection and Services Act ("JSSA"), 28 U.S.C. § 1867 *et seq.*; (2) his felon-in-possession conviction violates the Second Amendment; (3) the district court erred in admitting

the testimony of a government witness; and (4) his sentence is substantively unreasonable. We address each argument in turn.

A. Sixth Amendment and JSSA Claim

The U.S. Constitution's Sixth Amendment guarantees a criminal defendant the right to a trial "by an impartial jury." U.S. Const. amend. VI. An "essential component" of this guarantee is the requirement that courts select all grand and petit juries at random from a fair cross section of the community in the judicial district or division where the court convenes. *Taylor v. Louisiana*, 419 U.S. 522, 528–29 (1975); *United States v. Ovalle*, 136 F.3d 1092, 1106 (6th Cir. 1998). This requirement focuses only on the "procedure for selecting juries, and not the outcome of that process." *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012). The Sixth Amendment does not impose a "requirement that petit juries actually chosen must mirror the community." *Taylor*, 419 U.S. at 538; *see Ambrose*, 684 F.3d at 645 ("The Sixth Amendment guarantees only the opportunity for a representative jury, not a representative jury itself." (citation omitted)).

> To establish a prima facie case for a fair-cross-section claim, a defendant must show:
>
> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). Once satisfied, the burden shifts to the government, which "bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Id.* at 368. We use the same analysis for JSSA claims. *Ovalle*, 136 F.3d at 1099; *United States v. Allen*, 160 F.3d 1096, 1102 (6th Cir. 1998) (explaining that the test for JSSA liability is "essentially identical to the *Duren* . . . test used in the Sixth Amendment fair-cross-section analysis"). Whether a violation under the Sixth Amendment or JSSA has occurred is a mixed question of law and fact, which we review de novo. *Allen*, 160 F.3d at 1101.

1.

The Eastern District of Kentucky ("EDKY") promulgated its most recent Plan for the Random Selection and Qualification of Grand and Petit Jurors on June 29, 2018. *See* Plan for the Random Selection and Qualification for Grand Petit Jurors (E.D.K.Y. 2018) (the "Jury Selection Plan").[1] The Jury Selection Plan states that "[i]t is the policy of [the EDKY] that all persons and entities entitled to consideration by a jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the jury division of the district wherein the court convenes," and that "[n]o citizen shall be excluded . . . on account of race, color, religion, sex, national origin or economic status." *Id.* §§ 1.1, 2.1.

The Jury Selection Plan uses a funnel-like system to ensure a fair cross section of the community is selected. This begins with the random selection of individuals across the EDKY, using voter registration lists for each of the EDKY's counties. *Id.* §§ 4.1, 5.1–5.2. The names selected are placed in both the Master Wheel of EDKY, along with the Master Jury Wheel of their respective judicial division.[2] *See id.* §§ 4.1, 5.1–5.2, 6.1–6.2. From the Master Jury Wheel, names are (again) randomly selected to determine whether each person is eligible for placement in their respective division's Qualified Jury Wheel. *Id.* §§ 10.2, 13.1. To qualify for placement, an individual must be: (1) a United States citizen who is at least eighteen years of age and has resided for at least one year in the EDKY; (2) proficient in the English language; and (3) mentally and physically capable of serving as a juror. *Id.* § 8.3(1)–(4). A felony conviction or a pending felony charge disqualifies a person from jury service. *Id.* § 8.3(5).

For the Qualified Jury Wheel, the EDKY obtains eligibility information by delivering questionnaires to potential jurors, which are prepared and executed to conform with 28 U.S.C. § 1864. *Id.* §§ 12.1–12.2. Once a district court determines that it needs to empanel a petit jury, the district court directs the clerk of court to draw enough names to meet the needs of the case. *Id.* § 10.2. The clerk draws those names from the Qualified Jury Wheel of the jury division in

---

[1]The Jury Selection Plan can be accessed at: https://www.kyed.uscourts.gov/sites/kyed/files/Jury_Plan_FILED.pdf.

[2]The EDKY's London Division includes the counties of Bell, Clay, Harlan, Jackson, Knox, Laurel, Leslie, McCreary, Owsley, Perry, Pulaski, Rockcastle, Wayne, and Whitley. Jury Selection Plan § 6.2.

which the petit jury is empaneled. *Id.* If an insufficient number of jurors are selected, the clerk calls additional names until the court reaches a sufficient number of potential jurors. *Id.*

Johnson's first trial began in May 2021. After the jury-selection process failed to summon a single African American juror, Johnson objected. The district court overruled his objection. After that, the jury deadlocked, necessitating a new trial.

Before his second trial, and at Johnson's request, the district court approved the hiring of a jury pool consultant. This consultant requested trial jury data from the EDKY and analyzed those data. Based on the consultant's analysis, Johnson filed a "Motion for a Jury Drawn from a Representative and Fair Cross-Section of the Community or, in the Alternative, Motion to Dismiss." The motion asserted that the London Division's Qualified Jury Wheel "underrepresents black people" at a "statistically significant" rate. R. 352, PageID 2772. More specifically, Johnson claimed that the consultant's comparative disparity analysis showed that "there is as much as a 57.28% under representation of African Americans in the current London Division" Qualified Jury Wheel, and that more than 50% "of the black jurors expected to be in the current" wheel was missing. *Id.* at 2772–73 (emphasis omitted). Johnson contends that the underrepresentation was "not limited to the current London Division;" it also existed at the time of the 2017 and 2019 wheels. *Id.* at 2774.

The district court denied Johnson's motion. It found that Johnson failed to satisfy the third prong of the *Duren* test because (i) "long-standing statistical disparity is not enough to establish systematic exclusion"; and (ii) Johnson failed to point to any other viable source of exclusion in the EDKY's jury-selection procedures. R. 373, PageID 2908–16. The parties did not dispute the first *Duren* prong, and the district court opted not to resolve the second prong. Once the second trial commenced, the jury wheel yet again produced no African American jurors. Johnson renewed his motion and the district court, sticking with its prior decision, denied it.

2.

On appeal, the parties focus their arguments on the third *Duren* prong, and so will we. Johnson makes two main arguments on appeal. First, he maintains that his statistical analysis—

comparative disparity and standard deviation—establishes the per se existence of a systematic exclusion of African Americans in the London Division. Second, and in the alternative, Johnson argues that several procedures that the EDKY used systematically exclude African Americans from jury pools. For the following reasons, we reject Johnson's arguments.

a.

A challenged disparity is considered a "systematic exclusion" if it is "inherent" to the jury-selection process. *Allen*, 160 F.3d at 1104. This ordinarily requires the defendant to show either a large routine discrepancy or identify a specific procedural or operational flaw linked to the underrepresentation of the distinctive group in the jury venire. *See Duren*, 439 U.S. at 366–67. For example, in *Duren*, the Supreme Court found that the low percentage of women available at the final venire stage of jury selection (around 15%) satisfied the third prong and that the defendant's evidence linking fewer women jurors with Missouri's practice of automatically exempting from jury service any women who requested not to serve also led to this conclusion. *Id.* And in *Garcia-Dorantes v. Warren*, we concluded that "a computer glitch in the Kent County software that [] systematically excluded African-Americans from the jury pool from April 2001 through early 2002" satisfied the third prong. 801 F.3d 584, 587, 603 (6th Cir. 2015).

Johnson has not identified a procedural or operational flaw in the Jury Selection Plan that could satisfy the third *Duren* prong. To begin, nonextreme statistical disparities, standing alone, are ordinarily insufficient to satisfy this requirement. *See Bates v. United States*, 473 F. App'x 446, 450 (6th Cir. 2012). However, a routinely "large discrepancy" may "manifestly indicate[] that the cause of the underrepresentation was systematic—that is, inherent in the particular jury selection process utilized." *Duren*, 439 U.S. at 366; *Bates*, 473 F. App'x at 450 ("Indeed, an extreme underrepresentation may be enough to establish a *per se* systematic exclusion."); *Smith v. Berghuis*, 543 F.3d 326, 340 (6th Cir. 2008) ("While this disparity may not rise to the level of demonstrating systematic exclusion *per se*, this persistent disparity combined with Petitioner's evidence . . . was sufficient."), *rev'd on other grounds*, 559 U.S. 314 (2010). But because the size of the distinctive group, relative to the jury-eligible population, is too small to produce a trustworthy comparative disparity, we are hesitant to find a per se systematic exclusion here.

The comparative disparity calculation can help courts measure a distinctive group's underrepresentation in a jury venire. "Comparative disparity measures the decreased likelihood that members of an underrepresented group will be called for jury service, in contrast to what their presence in the community suggests it should be." *Garcia-Dorantes*, 801 F.3d at 601 (quoting *United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998))

Establishing comparative disparity requires some math. To determine comparative disparity, one must divide the absolute disparity of the distinctive group "by that group's percentage in the general population." *Id.* Absolute disparity is the difference between a distinctive group's percentage in the general population and that group's percentage in the qualified jury wheel. *Id.* at 600–01. Although comparative disparity is a "more appropriate measure of underrepresentation" when the overall population of a distinctive group is small, *id.* (quoting *Smith*, 543 F.3d at 338), it can still lead to misleading results where, as here, the distinctive group is also only a small percentage of the community's jury-eligible population, *Smith*, 543 F.3d at 338–39. *See Shinault*, 147 F.3d at 1273 ("[T]he smaller the group is, the more the comparative disparity figure distorts the proportional representation." (alteration in original) (quoting *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984))).

The EDKY's 2021 Master Wheel consisted of 40,020 names, 1,999 of which were randomly selected for potential placement in the London Division's Qualified Jury Wheel. The London Division delivered the same number of jury qualification forms. Of the forms mailed out, 1,356 were completed and returned and 233 were declared undeliverable. Twelve (0.88%) of the forms returned came from individuals who identified as "Black or African American." However, 195 individuals (14.38%) failed to indicate their race. When these "unknowns" were removed, the percentage of African Americans in the London Division's Master Jury Wheel rose to a mere 1.03%.

To compile the Qualified Jury Wheel, the London Division removed 810 names because those individuals were either ineligible or excused from serving. Three of the 810 individuals removed, or 0.37%, identified as "Black or African American." After accounting for those removals, 779 names remained in the Qualified Jury Wheel. Only nine (1.16%) were "Black or African American." According to the EDKY's AO-12 form, 1.7% of the London Division's

citizen population is African American.[3] Thus, using Johnson's data, the London Division's comparative disparity is 32%—a number that probably satisfies the second *Duren* prong. *See Smith*, 543 F.3d at 338 (finding a 34% comparative disparity sufficient to satisfy the second prong).

Nevertheless, with a distinctive group so miniscule, even a small change in the group's share of the qualified jury pool would distort the comparative disparity analysis. For example, if we increase the total number of African Americans in the jury-eligible population from nine to eleven, their share of the Qualified Jury Wheel increases to only 1.4%. But with that figure, the comparative disparity in the London Division plummets from 32% to 17.6%. For this reason, several courts have rejected the usefulness of comparative disparity where, as here, the distinctive group's share of the jury-eligible population is so small. *See United States v. Weaver*, 267 F.3d 231, 243 (3d Cir. 2001) ("Looking first at the comparative disparity figures, we find that they are quite high—40.01% and 72.98%—but that [is] because African-Americans and Hispanics comprise such a small percentage of the population, the results of this analysis are of questionable probative value."); *Shinault*, 147 F.3d at 1273 (finding comparative disparities of 48%, 50%, and almost 60% to be "distorted by the small population of the different minority groups"). We do the same. Comparative disparity cannot, by itself, establish the third *Duren* prong when the size of the distinctive group comprises only 1.16% of the jury-eligible population.

Seemingly recognizing the weaknesses of his comparative disparity analysis, Johnson pivots to a standard deviation analysis that he claims shows the existence of systematic exclusion. Standard deviation measures "the predicted fluctuations from the expected value." *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). The problem for Johnson is that he points

---

[3]An AO-12 form

> provides the following information on the current, non-emptied master jury wheel used by the Division: (1) general information about the master wheel, including identification of the source data and number of names placed in the wheel; (2) data related [to] the sampling of returned questionnaires, including [the] number of forms mailed, returned, returned undeliverable and demographic data concerning the race, ethnicity, and sex of those individuals returning forms; (3) data related to the sampling of the qualified jury wheel including relevant demographic data of the qualified wheel; and (4) a comparison of the jury wheel sample against the population of the jury division.

to evidence that compares apples and oranges. The jury consultant calculated the standard deviation for the comparison between the jury-eligible percentage of African Americans in the EDKY and the percentage of African Americans in the London Division Qualified Jury Wheel. Depending on the year, the comparison ranged from four to six standard deviations below the expected value. Although the data are interesting because they may show a concentration of qualified African Americans outside of the London Division, they do not show a systematic underrepresentation in the London Division's jury-selection process. The relevant community is the division, and not the district. As we have previously held, the drawing of a jury from a fair cross section of the community in *either* a district or a division in which the court convenes, as the JSSA commands, passes constitutional muster. *United States v. Davis*, 27 F. App'x 592, 597 (6th Cir. 2001).

b.

As an alternative to his statistical arguments, Johnson points to the following EDKY procedures which he contends showed the existence of systematic exclusion of African Americans in the EDKY: (i) the exclusive use of voter registration lists as the starting point for the jury-selection process; (ii) the disqualification of all potential jurors who have a felony conviction; and (iii) the removal of potential jurors who did not respond to jury questionnaires or otherwise had their questionnaires declared undeliverable. However, none of these arguments persuades us.

First, this court and other circuits have found that the use of voter registration lists as the exclusive source of jury venire members does not generally constitute systematic exclusion under *Duren*'s third prong. *See, e.g.*, *United States v. Wagoner*, 836 F. App'x 374, 381 (6th Cir. 2020) (finding "no systematic failure" where the petit jury was "selected by randomly draw[ing names] from the voter rolls" (alteration in original) (internal quotation marks omitted)); *United States v. Carmichael*, 560 F.3d 1270, 1279 (11th Cir. 2009); *United States v. Gonzalez-Velez*, 466 F.3d 27, 39 (1st Cir. 2006); *United States v. Morin*, 338 F.3d 838, 844 (8th Cir. 2003); *United States v. Smallwood*, 188 F.3d 905, 914–15 (7th Cir. 1999). And Johnson points to nothing to suggest systematic underrepresentation in the voter registration lists or an operational

flaw in EDKY's use of these lists that may have caused an underrepresentation of African Americans.

Second, the disqualification of felons from the Qualified Jury Wheel is not "inherent" to the EDKY's Jury Selection Plan; rather, federal law requires it. 28 U.S.C. § 1865(b)(5) (mandating the disqualification of any individual from serving on a federal grand or petit jury who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored."). And Johnson does not provide any evidence linking the exclusion of African American jurors from the qualified jury pool because of the felon disqualification rule beyond mere speculation.

Third, the removal of unresponsive jurors from the Qualified Jury Wheel is not an act of systematic exclusion. Nonresponses that are "the result of individual choice" are not a problem "inherent" to EDKY's Jury Selection Plan. *Bates*, 473 F. App'x at 451 (citing *United States v. Cecil*, 836 F.2d 1431, 1447 (4th Cir. 1988)). Here, Johnson put forth no evidence to suggest that potential African American jurors face unique obstacles that prevent them from receiving or returning the questionnaire. And to the extent that Johnson argues that the exclusion of jurors with undeliverable questionnaires produce an unrepresentative cross section, he points to nothing that shows that these jurors were disproportionately African American.

B. Second Amendment Claim

Next, Johnson raises a challenge to his felon-in-possession conviction under the Second Amendment based on *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Johnson specifically argues that 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him. But as Johnson acknowledges, he did not raise this challenge before the district court. Thus, we review it for plain error. *See Greer v. United States*, 593 U.S. 503, 507 (2021) ("If the defendant has 'an opportunity to object' and fails to do so, he forfeits the claim of error. If the defendant later raises the forfeited claim on appeal, [the] plain-error standard applies." (quoting Fed. R. Crim. P. 51(b))). Under plain-error review, a defendant must establish: (1) an error, (2) that was "plain,"

(3) that affected "substantial rights," and (4) that seriously impacted "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 507–08 (citations omitted).

Johnson has failed to show that the district court committed plain error. An error is "plain" if it is "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). In situations "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that the error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468 (1997); *see United States v. White*, 58 F.4th 889, 894 (6th Cir. 2023) ("[P]lain-error review applies '[e]ven where a new rule of law is at issue.'" (quoting *Henderson v. United States*, 568 U.S. 266, 272 (2013))). Reversal is mandated only in "exceptional circumstances." *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006) (quoting *United States v. Carroll*, 26 F.3d 1380, 1383 (6th Cir. 1994)).

After *Bruen*, we have not addressed the constitutionality of § 922(g)(1), *United States v. Bowers*, No. 22-6095, 2024 WL 366247, at *3 (6th Cir. Jan. 31, 2024), but some of our sister circuits have. A circuit split exists regarding the constitutionality of felon-in-possession convictions. The Eighth Circuit held that felon-in-possession convictions do not violate the Second Amendment, opining that "Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons." *United States v. Jackson*, 69 F.4th 495, 505 (8th Cir. 2023). Around that same time, the Third Circuit sustained an as-applied challenge to § 922(g)(1) for a prospective gun owner who had a prior state conviction for making a false statement to obtain federal food stamps. *Range v. Att'y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023) (en banc). As we have previously explained, "[a] circuit split precludes a finding of plain error, for the split is good evidence that the issue is subject to reasonable dispute." *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) (quotation omitted).

This court and our sister circuits have also rejected Second Amendment challenges to § 922(g)(1) under plain-error review. *See Bowers*, 2024 WL 366247, at *3; *United States v. EtchisonBrown*, No. 22-10892, 2023 WL 7381451, at *3 (5th Cir. Nov. 7, 2023) (per curiam) ("Because the constitutionality of § 922(g)(1) after *Bruen* is far from settled and there is no controlling authority, the district court's application of § 922(g)(1) to EtchisonBrown was not plain error."); *United States v. Racliff*, No. 22-10409, 2023 WL 5972049, at *1 (5th Cir. Sept. 14,

2023) (per curiam) ("Because there is no binding precedent explicitly holding that § 922(g)(1) is unconstitutional and because it is not clear that *Bruen* dictates such a result, Racliff is unable to demonstrate an error that is clear or obvious."); *United States v. Garza*, No. 22-51021, 2023 WL 4044442, at *1 (5th Cir. June 15, 2023) (per curiam) ("Because there is no binding precedent explicitly holding that § 922(g)(1) is unconstitutional on its face or as applied and because it is not clear that either *Bruen* or [*United States v.*] *Rahimi*[, 61 F.4th 443 (5th Cir. 2023)] dictate such a result, Garza is unable to demonstrate an error that is clear or obvious."); *United States v. Hill*, No. 22-2400, 2023 WL 2810289, at *2 (7th Cir. Apr. 6, 2023) (order) ("[A]fter *Bruen*, no appellate court has held that § 922(g)(1) violates the Second Amendment . . . . Because the law is unsettled, any error, if there was one, would not be plain.").

Without precedent explicitly holding that § 922(g)(1) is unconstitutional and because it is unclear that *Bruen* dictates such a result, we find that Johnson has not satisfied the plain-error standard.

C. *Res Gestae* Evidence

Generally speaking, Federal Rule of Evidence 404(b) prohibits the admission of evidence of a criminal defendant's prior bad acts unless it is introduced for an acceptable purpose. However, background evidence, often referred to as *res gestae* evidence, lays outside the rule's ambit. *United States v. Clay*, 667 F.3d 689, 697 (6th Cir. 2012). "While [*res gestae* evidence] is an exception . . . it does not allow a party to evade 404(b) by introducing any and all other act evidence." *Id.* (internal citations omitted). "The principle contains severe limitations as to 'temporal proximity, causal relationship, or spatial connections' among the other acts and the charged offense.'" *Id.* (quoting *United States v. Hardy*, 228 F.3d 745, 749 (6th Cir. 2000)). Thus, *res gestae* evidence must be "inextricably intertwined with the charged offense." *United States v. Churn*, 800 F.3d 768, 779 (6th Cir. 2015) (internal quotation marks omitted). More specifically, it "may include evidence that is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of the witness's testimony, or completes the story of the charged offense." *Id.* (citation omitted). We review a trial court's decision to admit testimony as *res gestae* evidence for an abuse of discretion. *See United States v. Pratt*, 704 F. App'x 420, 423 (6th Cir. 2017).

Prior to Johnson's first trial, the government notified Johnson that it intended to introduce the testimony of witness "A" and Joshua Angel.[4] Witness A was a confidential informant for the KCSD who tipped off law enforcement about Johnson's drug-trafficking activities. Angel knew that Johnson stayed in the house where the Toyota was observed nearby and introduced Johnson to the informant in the month prior to the charged conduct. Further, on a "couple of occasions" prior to the charged events, both witness A and Angel sold the same drugs "along with or for" Johnson. R. 396, PageID 3069–70. These drug sales occurred between three to five weeks prior to the charge date. On each occasion, Angel observed Johnson with a firearm.

Johnson moved to exclude Angel's testimony under Federal Rules of Evidence 403 and 404. He argued that any statements relating to his drug-trafficking activities would unfairly prejudice him and would serve only to prove bad character. The district court denied the motion after finding their testimony admissible as *res gestae* evidence. In doing so, the district court noted that Angel's testimony had the potential to "sort of frame the story or complete the story" of Johnson's introduction to Angel, along with "relevant [] background evidence for why [Johnson] was at the house, why he was in town, and ultimately . . . what was the intention with respect to the drugs they found that were located in the vehicle." *Id.* at 3074. The district court therefore found that the government satisfied all "three [] criteria" for the admission of *res gestae* evidence: "the prior acts occurred within a few weeks of [Johnson's] ultimate arrest. There is [a] spa[t]ial relationship; the same county, the same drug, the same residence being used. So we've got the spa[t]ial, temporal, and the causal." *Id.*

We note that the facts of this case are strikingly similar to *United States v. Chalmers*, 554 F. App'x 440 (6th Cir. 2014). There, the defendant was arrested and charged with multiple felonies after the execution of a search warrant recovered 90 grams of marijuana and a firearm at his residence. *Chalmers*, 554 F. App'x at 442–43. Before trial, the government sought to introduce the testimony of a lay witness who was not only present at the time of the search but had visited the same residence on ten prior occasions to buy marijuana from Chalmers. *Id.* at 444. All of these transactions allegedly occurred about two weeks before Chalmers's arrest. *Id.*

[4]The transcript of the hearing on Johnson's motion in limine refers to Angel as "Witness C." However, the identity of witness C as Angel was revealed at a later date.

at 445. The district court admitted this testimony, finding it was *res gestae* evidence and, thus, not subject to Rule 404(b). *Id.* at 446. We affirmed, noting that the definition of "background" evidence included evidence that was "part of a continuing pattern of illegal activity." *Id.* at 450–51 (citing *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995)).

The district court did not abuse its discretion in admitting the evidence. The close temporal, spatial, and causal proximity between the "couple of" drug deals and the circumstances of Johnson's arrest confirm that Angel's testimony was *res gestae* evidence. After all, these transactions took place between three to five weeks prior to the charged conduct, involved the same drug, the same residence, the same undercover witness who provided information essential to securing the search warrant in this case, and the same practice of Johnson having a firearm during each of the relevant transactions. These prior acts establish a pattern of drug activity which, in turn, provides valuable background to Johnson's charged conduct.[5]

D. Substantive Reasonableness of Sentence

We generally review the reasonableness of a defendant's sentence for an abuse of discretion. *United States v. Fleischer*, 971 F.3d 559, 567 (6th Cir. 2020). Substantive reasonableness, when challenged by a defendant, concerns whether "a sentence is too long." *United States v. Rayyan*, 885 F.3d 440, 442 (6th Cir. 2018). This inquiry requires us to consider if "the court placed too much weight on some of the [18 U.S.C.] § 3553(a) factors and too little on others." *Id.* A sentence within the Sentencing Guidelines range is presumptively reasonable. *United States v. Pirosko*, 787 F.3d 358, 374 (6th Cir. 2015). "Accordingly, a defendant's burden of demonstrating that his below-guidelines sentence is unreasonably long is even more demanding." *United States v. Fields*, 763 F.3d 443, 455 (6th Cir. 2014) (citations and internal quotation marks omitted).

The district court sentenced Johnson to a below-Guidelines sentence of 300 months' imprisonment.

---

[5]The district court alternatively found that the testimony was admissible under Rule 404(b). Because we find that the district court did not err in admitting the evidence as *res gestae*, we need not address that separate ground.

One of Johnson convictions was for possession with the intent to distribute 500 grams of a mixture or substance containing methamphetamine. To ascertain the offense level for defendants convicted of trafficking methamphetamine, the Guidelines' Drug Quantity Table employs a 10:1 weight ratio between methamphetamine mixtures and actual methamphetamine or "ice." U.S.S.G. § 2D1.1(c). For example, "10 grams of a methamphetamine mixture is the equivalent of 1 gram of actual methamphetamine or ice. And, in the case of a mixture, the base offense level is to be determined by (1) the entire weight of the methamphetamine mixture or (2) the weight of the methamphetamine (actual), *whichever is greater*." *United States v. Johnson*, 812 F. App'x 329, 332 (6th Cir. 2020) (citation and internal quotations marks omitted).

Johnson argues that the district court erred in its use of the 10:1 ratio because this methodology "is not based upon any accurate factual premise" and "results in unwarranted sentencing disparities." D. 35 at pp.47–48. But a district court's use of the 10:1 ratio is a discretionary decision that cannot, by itself, render a criminal sentence invalid. *See United States v. Kennedy*, 65 F.4th 314, 326 (6th Cir. 2023); *United States v. Mosley*, 53 F.4th 947, 965 (6th Cir. 2022) (finding petitioner's challenge to 10:1 ratio lacked "salience" because the argument "amount[ed] to little more than a policy disagreement[,] . . . which the district court had discretion to reject."); *see also United States v. Brooks*, 628 F.3d 791, 800 (6th Cir. 2011). Therefore, the district court did not abuse its discretion when it declined to reject the 10:1 ratio, and Johnson has failed to rebut the presumption of reasonableness.

III.

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

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-6048

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARLON JERMAINE JOHNSON,

Defendant - Appellant.

FILED
Mar 05, 2024
KELLY L. STEPHENS, Clerk

Before: SILER, MATHIS, and BLOOMEKATZ, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at London.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Southern Division at London

UNITED STATES OF AMERICA
v.
Marlon Jermaine Johnson

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:18-CR-065-SS-CHB-01
USM Number: 22353-032
Patrick F. Nash
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) 1SS, 2SS, and 3SS [DE #83] after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	Possession with the Intent to Distribute 500 Grams of a Mixture or Substance Containing Methamphetamine	November 19, 2018	1SS
18:924(c)	Possession of a Firearm in Furtherance of a Drug Trafficking Offense	November 19, 2018	2SS
18:922(g)(1)	Felon in Possession of a Firearm	November 19, 2018	3SS

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

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

☒ Count(s) Original [DE #1] and Superseding Indictments [DE #35] ☐ is ☒ are dismissed on the motion of the United States.

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

November 29, 2022
Date of Imposition of Judgment

Claria Horn Boom
Signature of Judge

Honorable Claria Horn Boom, U.S. District Judge
Name and Title of Judge

November 30, 2022
Date

DEFENDANT: Marlon Jermaine Johnson
CASE NUMBER: 6:18-CR-065-SS-CHB-01

IMPRISONMENT

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

Two Hundred Forty Months (240) Months on Count 1SS and Sixty (60) Months on Count 3SS, to run concurrently to each other; and Sixty (60) Months on Count 2SS, to run consecutively to Counts 1SS and 3SS, for a total term of THREE HUNDRED (300) MONTHS

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

That the defendant participate in the 500-Hour RDAP Program.
That the defendant participate in a mental health program.
That the defendant participate in a job skills and/or educational/vocational training program.
That the defendant be designated to either of the facilities in Lompoc, Terminal Island, or Victorville, California.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Marlon Jermaine Johnson
CASE NUMBER: 6:18-CR-065-SS-CHB-01

SUPERVISED RELEASE

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

Five (5) Years on Counts 1SS and 2SS, and Three (3) Years on Count 3SS, to all run concurrently, for a total term of FIVE (5) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

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

DEFENDANT: Marlon Jermaine Johnson
CASE NUMBER: 6:18-CR-065-SS-CHB-01

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.
14. You must comply strictly with the orders of your physicians or other prescribing source with respect to the use of any prescribed controlled substances. You must report any changes regarding your prescriptions to your probation officer immediately (i.e., no later than 72 hours). The probation officer may verify your prescriptions and your compliance with this paragraph.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: Marlon Jermaine Johnson
CASE NUMBER: 6:18-CR-065-SS-CHB-01

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in urinalysis testing, or any other form of substance abuse testing, as directed by the probation officer. You must refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing which is required as a condition of your release. You must not knowingly use or consume any substance that interferes with the accuracy of substance abuse testing.

2. You must submit your person, properties, homes, residences, vehicles, storage units, papers, computers (as defined in 18 U.S.C. § 1030(e)(1), but including other devices excluded from this definition), other electronic communications or cloud storage locations, data storage devices or media, or offices, to a search conducted by a United States probation officer. Any search must be done at a reasonable time and manner. Failure to submit to a search will be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

DEFENDANT: Marlon Jermaine Johnson
CASE NUMBER: 6:18-CR-065-SS-CHB-01

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ $300.00 ($100/Count)	$ Community Waived	$ Waived	$ N/A	$ N/A

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

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

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

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

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Marlon Jermaine Johnson
CASE NUMBER: 6:18-CR-065-SS-CHB-01

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

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

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

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

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

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

Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
310 S. Main Street, Room 215, London, KY 40741

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

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

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	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:
As indicated in the Preliminary Judgement of Forfeiture [DE #415] as to the items set forth in the Forfeiture Allegation of the Second Superseding Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.