No. _____

In the
Supreme Court of the United States

MAHLON PRATER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 22-5599*, USA v. Mahlon Prater, Jr.*
Originating Case No. : 3:19-cr-00151-7

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. LeAnna Wilson

Enclosures

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 24a0344n.06

Case No. 22-5599

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 02, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAHLON PRATER, JR.,

Defendant-Appellant.

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

OPINION

Before: SUTTON, Chief Judge; GRIFFIN and READLER, Circuit Judges.

SUTTON, C.J., delivered the opinion of the court in which READLER, J., joined. GRIFFIN, J. (pp. 13–29) delivered a separate dissenting opinion.

SUTTON, Chief Judge. The government charged Mahlon Prater with joining two conspiracies. One involved an agreement focused on selling methamphetamine, heroin, and oxycodone on behalf of the Vice Lords. It was centered in Knoxville, Tennessee, though its reach extended to California. The other conspiracy involved an agreement to sell crack cocaine with low-level crack dealers in the Knoxville area. A grand jury indicted Prater for his involvement in both conspiracies. He pleaded guilty to the smaller conspiracy involving crack cocaine, and he went to trial on the larger conspiracy involving the Vice Lords and the other drugs. A jury found him guilty of the second conspiracy. He argues that the two conspiracies were one and the same and that his prosecution for both violates the Fifth Amendment's Double Jeopardy Clause. We disagree, and we also reject his alternative challenges to his conviction and sentence.

I.

In 2018, law enforcement officers uncovered a large drug-trafficking conspiracy involving the Vice Lords in Knoxville, Tennessee. The investigation homed in on a dozen gang members, including Prater, who made "bread" (money) by selling "ice cream" (methamphetamine), "blues" (oxycodone), fentanyl, and "boy" (heroin). R.541 at 8–9. Between June and August 2019, FBI wiretaps recorded conversations about the group's drug transactions and use of guns. Officers also intercepted a package containing five pounds of pure methamphetamine that the Vice Lords had mailed from California to Prater's Tennessee home. Based on these developments, a grand jury indicted six of the Vice Lords for a drug-trafficking conspiracy on September 4, 2019, and later indicted them for a money laundering conspiracy and related firearm offenses.

That same day, the grand jury indicted Prater for a separate agreement to sell crack cocaine. It charged him with efforts to "combine, conspire, confederate, and agree with each other persons known and unknown to the Grand Jury, to knowingly and intentionally distribute, and to possess with intent to distribute, a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance." R.1 at 1 (No. 152); *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C). Prater pleaded guilty to this conspiracy charge. His plea agreement stipulated that, between December 2018 and April 2019, he "worked with others to sell crack cocaine" "to a confidential source" "[o]n at least 6 separate occasions." R.15 at 2 (No. 152). The government described his coconspirators as "a limited number of lower-level east Knoxville crack dealers." R.231 at 51. The specified drug weight, approximately 30 grams, amounted to between 60 and 300 doses.

After Prater's plea but before his sentencing, a superseding indictment in the Vice Lords case added him to the conspiracy, charging him with agreeing to possess and distribute "fifty (50) grams or more of methamphetamine," "a quantity of . . . fentanyl," "a quantity of . . . oxycodone,"

"a quantity of . . . alprazolam," "a quantity of . . . marijuana," "a quantity of . . . buprenorphine," and "a quantity of . . . heroin" between July 2018 and November 2019. R.78 at 1–2; *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), (b)(1)(C), (b)(1)(D), (b)(1)(E), (b)(2). The five pounds of methamphetamine alone totaled between 9,000 and 22,000 doses. *Cf. United States v. Potter*, 927 F.3d 446, 448 (6th Cir. 2019). A second superseding indictment charged Prater with two more methamphetamine offenses plus possession of a firearm in aid of selling the drugs. *See* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A); 18 U.S.C. §§ 924(c)(1)(A)(i), 2.

Prater moved to dismiss the second superseding indictment on double jeopardy grounds. The district court denied the motion, concluding that the conspiracies were "separate and distinct offenses." R.322 at 12.

At trial, Christopher Hounschell, a Vice Lord who sold crack cocaine outside of the agreement to sell the other drugs, testified that Prater also dealt cocaine. Hounschell said that he had no knowledge of Prater selling crack cocaine with the Vice Lords and stated that he had not "heard anybody else [in the conspiracy] talking about that." R.537-2 at 128. He confirmed that he knew of no "Vice Lords [] selling crack cocaine as part of this conspiracy" and that crack cocaine was not among the gang's "predominant[]" drugs. *Id.* at 125, 127.

A jury found Prater guilty on four counts. Prater twice renewed his double jeopardy motion, first at the close of the government's case and then at the end of the trial. He argued that Hounschell's testimony established that the Vice Lords conspiracy involved crack cocaine. The district court denied the motion, finding that Hounschell's testimony had the opposite effect. It showed that the two conspiracies were distinct and focused on different drugs.

The district court sentenced him to 384 months for the Vice Lords conspiracy. It set that sentence to run concurrently with his sentence of 240 months for the crack cocaine conspiracy. Prater appealed.

II.

The first issue is whether Prater's conviction for his participation in the Vice Lords conspiracy violates his rights under the Fifth Amendment's Double Jeopardy Clause.

Our standard of review usually turns on whether the district court engaged in fact finding. If so, clear-error review applies. *In re Grand Jury Proc.*, 797 F.2d 1377, 1380–81 (6th Cir. 1986). If not, fresh review applies. *See United States v. Meda*, 812 F.3d 502, 508–10 (6th Cir. 2015). Because the district court concluded that "the Government's proffered evidence preponderates in favor of the existence of two conspiracies" based on fact finding, clear error review is the natural choice. R.322 at 11; *see In re Grand Jury Proc.*, 797 F.2d at 1380–81 ("The finding of fact by the lower court that the government had proven by a preponderance of the evidence that multiple conspiracies existed can be set aside only if it is clearly erroneous."). But in this instance, the outcome of the parties' debate makes no difference. Whether deferential or fresh review applies, no Fifth Amendment violation occurred.

The Double Jeopardy Clause guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In the context of successive conspiracy indictments, we gauge whether the indictments charge the "same offense" based on five potential sources of overlap: (1) time; (2) coconspirators; (3) charges in the indictment; (4) overt acts and the nature of the conspiracy; and (5) place. *Meda*, 812 F.3d at 508; *see United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983). If at least a few factors differ between the conspiracies, it usually "follows that the alleged illegal conspiracies are separate and

distinct offenses." *Meda*, 812 F.3d at 508 (quoting *Sinito*, 723 F.2d at 1256–57). In this instance, the many differences between the two conspiracies favor the district court's decision to treat them as separate.

Take time. Prater's two conspiracies covered materially distinct time periods. The crack cocaine conspiracy ran from just December 2018 to April 2019, while the Vice Lords conspiracy ran from July 2018 to November 2019. The four-month crack cocaine conspiracy covered "a significantly shorter duration" than the sixteen-month conspiracy. *United States v. Wheeler*, 535 F.3d 446, 457 (6th Cir. 2008). Four months of overlap does not imply a single conspiracy, and neither does the reality that one time period is subsumed within a much larger one. *See Sinito*, 723 F.2d at 1257; *see also United States v. Inmon*, 594 F.2d 352, 354 (3d Cir. 1979) (holding that multiple conspiracies existed when the time period in one indictment completely subsumed the time period in the second).

Turn to the coconspirators. The indictment for the crack cocaine conspiracy listed Prater and unnamed others, later described as "a limited number of lower-level east Knoxville crack dealers." R.231 at 51. The indictment in the Vice Lords conspiracy named eleven coconspirators, all enmeshed in large-scale drug dealing that focused on drugs other than crack cocaine. Prater was the only individual named in both conspiracies. These differences also favor the district court's conclusion that two conspiracies existed. *See Wheeler*, 535 F.3d at 457; *United States v. Toaz*, 59 F. App'x 94, 101 (6th Cir. 2003) (holding that this factor favored the government because the defendant was "the only conspirator . . . mentioned in both indictments").

Turn to the charges in the indictment. Both indictments charged Prater with conspiracy to distribute controlled substances, and both indictments involved the same statutory provisions: 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) (conspiracy to possess with intent to distribute a

controlled substance). In addition, the Vice Lords conspiracy turned on violations of several other statutes: 18 U.S.C. § 1956(h) (money laundering conspiracy); 18 U.S.C. §§ 924(c)(1)(A)(i) and 2 (possession of a firearm in furtherance of drug trafficking); and 18 U.S.C. § 922(g)(1) (felon in possession of a firearm). Our cases seem to assume that this factor turns solely on an overlap in statutes, as opposed to an overlap in shared goals of an agreement. *See, e.g.*, *In re Grand Jury Proc.*, 797 F.2d at 1382; *Wheeler*, 535 F.3d at 456. Other courts look at the shared goals (or not) of the agreement. *See, e.g.*, *United States v. Reyes-Correa,* 971 F.3d 6, 12–13 (1st Cir. 2020); *United States v. Leal*, 921 F.3d 951, 960 (10th Cir. 2019). Under our precedents, the reality that the two indictments share a statutory offense favors Prater. But even then, it "is a minor point, since one can certainly enter two conspiracies to commit the same type of crime." *Wheeler*, 535 F.3d at 456 (quotation omitted); *see Meda*, 812 F.3d at 509–10 (holding that a combination of time, coconspirators, and overt acts showed that there were two conspiracies, even if the charges and geography were the same).

Turn to the overt acts and the nature of the conspiracy, often called the "most significant" factor. *United States v. Vichitvongsa*, 819 F.3d 260, 274 (6th Cir. 2016); *United States v. Kennedy*, 743 F. App'x 649, 653 (6th Cir. 2018) (quoting *Wheeler*, 535 F.3d at 450). Prater's crack cocaine conspiracy involved the distribution of a relatively small amount of crack cocaine—just 60 to 300 doses. *See* U.S. Sent'g Comm'n, Cocaine and Federal Sentencing Policy 17 (2002). His role with the Vice Lords, by contrast, effected the distribution of 50 grams or more of methamphetamine plus oxycodone, alprazolam, marijuana, buprenorphine, and heroin. The five-pound shipment to his house supplied 9,000 to 22,000 doses of just one of the distributed drugs: methamphetamine. *See Potter*, 927 F.3d at 448. Because the Vice Lords conspiracy was "far more expansive in scope" and focused on different drugs (methamphetamine in particular), *Kennedy*, 743 F. App'x at 653,

and the smaller conspiracy focused on another drug (crack cocaine), the two conspiracies differed on this "significant" metric.

Finish with place. The Vice Lords conspiracy covered a lot of territory—Tennessee to California. Recall that the Vice Lords mailed pounds of methamphetamine from the Golden State to Prater's Knoxville house on at least three occasions. While the Vice Lords conspiracy operations crossed the continent, Prater confined his crack cocaine conspiracy to east Knoxville.

All in all, four of the five factors—time, coconspirators, overt acts, geography—show that there were two conspiracies. That suffices to uphold the district court's ruling.

United States v. Wheeler reinforces this conclusion. In that case from our Court, the government charged a defendant with drug-trafficking conspiracies under the same statutes invoked in Prater's two conspiracies. 535 F.3d at 456 (citing 21 U.S.C. §§ 846, 841(a)). On fresh review, we found two distinct conspiracies. *Id.* at 449, 456–57. Even though they overlapped in time, they covered distinct lengths of time. *Id.* at 456. Even though the defendant appeared in both conspiracies, the first indictment listed three coconspirators, the second indictment named thirty-four coconspirators, and only the defendant appeared in both. *Id.* The "most significant factor"— "the scope and nature of the conduct charged in each count"—diverged as well. *Id.* at 456–57. The first conspiracy featured only cocaine and methamphetamine while the second also had LSD, marijuana, ecstasy, and valium. *Id.* at 457. The first conspiracy took place mainly in Florida and Michigan while the second one covered Florida, Michigan, Ohio, Kentucky, and Indiana. *Id.* at 456. These differences in time, coconspirators, drugs, and place led us to conclude that no double jeopardy violation occurred. *See id.* at 456–57.

In some ways, this case is just like *Wheeler*, and in other ways, it is easier than *Wheeler*. As in *Wheeler*, Prater's crack cocaine conspiracy, lasting a mere four months, was materially

shorter than the Vice Lords conspiracy. Prater's crack cocaine coconspirators were "limited in number" and were "lower-level" crack dealers in contrast to the many leading Vice Lords members implicated in the second conspiracy. And Prater was the one common denominator in the two conspiracies' memberships.

This case is easier than *Wheeler* in other ways. The amounts of crack cocaine in the smaller conspiracy pale in comparison to the large amounts of methamphetamine and other drugs in the Vice Lords conspiracy. That thousands-of-doses difference does not appear in *Wheeler*. That the Vice Lords did not conspire to sell the drug featured in the low-level conspiracy (cocaine) also differs from *Wheeler*, where cocaine featured in both conspiracies. *Wheeler*, moreover, involved two multistate conspiracies. Here, only one conspiracy spanned multiple states, while the other involved only overt acts in Knoxville.

Prater objects to this conclusion on several grounds. He contends that the trial court failed to recognize that the government bore the burden of proof to show by a preponderance of the evidence that the crack cocaine conspiracy was not a subset of the Vice Lords conspiracy. But the district court acknowledged the point and said the government had met its burden. The "Government's proffered evidence," it reasoned, "preponderates in favor of the existence of two conspiracies." R.322 at 11. Any doubt about the point is alleviated by the court's decision to deny Prater's double jeopardy motion at the end of his trial based in part on the evidence introduced at trial.

Prater separately insists that the conspiracies were the same because the sixteen-month Vice Lords conspiracy enveloped the four-month crack cocaine conspiracy. That is true, but it is not dispositive. "Overlap in time alone is not conclusive evidence of a single conspiracy." *Vichitvongsa*, 819 F.3d at 273 (quotation omitted). "An overlap of ten months is not indicative of

one conspiracy," a reality that remains true even when one indictment's time period "completely subsumed" the other. *Sinito*, 723 F.2d at 1257 (citing *Inmon*, 594 F.2d at 354).

Prater claims that his crack coconspirators must be Vice Lords because the government did not identify them. That's not what the record before us shows. Hounschell, another Vice Lord who himself dealt crack, was unaware of *any* Vice Lords selling crack cocaine *for* that conspiracy. As the government explained, Prater's crack cocaine operation relied on "lower-level" crack dealers. *Cf. United States v. Stapleton*, 39 F.4th 1320, 1330 (11th Cir. 2022) ("A conspiracy indictment . . . may properly refer to unidentified co-conspirators." (quotation omitted)).

Prater argues that Hounschell's statement that crack cocaine was not a "predominant" drug of the Vice Lords implies that the Vice Lords still dealt some amount of crack. But there is no evidence that the Vice Lords integrated this controlled substance into their business model, as opposed to permitting members to sell it on their own. Recall that Hounschell testified that he had no knowledge of Prater selling *crack* cocaine *with* the Vice Lords, said that he had not "heard anybody else [in the conspiracy] talking about that," and confirmed that he knew no "Vice Lords [] selling crack cocaine as part of this conspiracy." R.537-2 at 125, 127–28. But even if that were not the case, Prater would face another problem. The same was true in *Wheeler*. It involved overlapping drugs, and we nonetheless found two conspiracies. That's because there, as here, the number and volume of substances revealed multiple conspiracies. *See Wheeler*, 535 F.3d at 456–57; *see also Toaz*, 59 F. App'x at 102 (concluding that while both indictments "charge [the defendant] with conspiracy to distribute and possess with intent to distribute methamphetamine, the similarities between the two conspiracies end there").

Prater argues that one of the factors (place) leans in his favor because the Vice Lords operated in Knoxville, where he sold crack cocaine. This argument overlooks the thousands of

methamphetamine doses shipped to Prater's home from California. That both conspiracies overlapped in part in the same area "is of minimum significance." *Sinito*, 723 F.2d at 1258–59. Even within the same city, the existence of similar criminal schemes is not dispositive. *Vichitvongsa*, 819 F.3d at 274 (holding that this factor favored the government even when both conspiracies occurred in Nashville); *see Inmon*, 594 F.2d at 354. Each metropolitan area in this country may well have more than one drug distributor involved in more than one drug distribution conspiracy—and, sad to say, they may have lots more. The government is permitted to target each conspiracy, as it permissibly did here and as the district court correctly concluded it did here.

III.

That leaves just a few loose ends. Prater raises three additional challenges—one to the sufficiency of his conviction and two to the reasonableness of his sentence.

A.

Prater claims that the evidence fails to show that he possessed a firearm (or aided and abetted his codefendants' possession of a firearm) to further the Vice Lords conspiracy. This sufficiency claim requires us to examine "the evidence in the light most favorable to the prosecution," asking whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The indictment charged Prater with one count of aiding and abetting the knowing possession of a firearm "in furtherance of" a drug trafficking crime. 18 U.S.C. §§ 924(c)(1)(A), 2. A defendant commits a § 924(c) offense when he knowingly possesses a firearm "to aid drug trafficking." *United States v. Maya*, 966 F.3d 493, 500 (6th Cir. 2020). And a defendant aids and abets that crime "when he knows that one of his confederates will carry a gun." *Rosemond v. United States*, 572 U.S. 65, 77 (2014).

Ample evidence supported Prater's conviction. A codefendant testified that Prater and two other codefendants carried guns "[a]t all times" during the summer of 2019—the middle of the Vice Lords conspiracy. R.537 at 54–55. And Hounschell testified that three codefendants regularly carried guns for protection while dealing drugs. These facts adequately support the jury's finding that Prater knew that his codefendants carried guns during this period of drug trafficking. Because Prater aided and abetted his codefendants' crimes, we need not consider whether Prater also violated § 924(c) by personally using a firearm while drug dealing.

B.

Prater separately challenges his sentence by arguing that the district court miscalculated his guidelines range by applying an obstruction enhancement and denying an acceptance of responsibility reduction. *See Gall v. United States*, 552 U.S. 38, 50–51 (2007). We review the district court's fact findings for clear error. *United States v. Thomas*, 933 F.3d 605, 608 (6th Cir. 2019). This court has not settled on the proper standard of review for a district court's application of its factual findings to either guideline provision. *See id.* at 608–12. We need not resolve that issue in this case because Prater's challenges fail even under fresh review.

Obstruction of justice. Prater first contests the district court's two-level sentence enhancement for willful obstruction of justice. *See* U.S.S.G. § 3C1.1. A court must impose this enhancement if a defendant threatens a witness to deter his cooperation with the government. *United States v. Hurst*, 228 F.3d 751, 761–62 (6th Cir. 2000).

Codefendant Seth Curtis testified that Prater and another codefendant, Trevor Cox, demanded that Curtis either pay them or recant his guilty plea. When Curtis refused, Cox "pulled a shank" on him, and Prater threw Curtis's sleeping mat to the door, perhaps to intimidate him. R.903 at 21. These facts show that Prater obstructed justice by trying to coerce Curtis to withdraw

his guilty plea.

Acceptance of responsibility. Prater next claims that the district court should have granted him a reduction for his acceptance of responsibility. To receive the guidelines reduction, a defendant must "clearly demonstrate[]" his acceptance of responsibility—a showing that is almost always inconsistent with proceeding to trial and obstructing justice. U.S.S.G. § 3E1.1(a) & cmt. nn.2, 4; *see United States v. Trevino*, 7 F.4th 414, 431–32 (6th Cir. 2021); *Thomas*, 933 F.3d at 612. Prater contested his guilt for the Vice Lords conspiracy at trial and continues to do so on appeal. And the district court found that he obstructed justice by threatening a codefendant. So the district court rightly rejected Prater's request for the reduction.

Prater contends that the reduction should apply because he took responsibility for the crack cocaine conspiracy and only proceeded to trial to advance his double jeopardy arguments. Both points fail. Prater "must accept responsibility for all counts before he is entitled to a reduction." *Trevino*, 7 F.4th at 432 (quotation omitted). Prater's actions during the crack cocaine conspiracy proceedings do not excuse his choices during the Vice Lords conspiracy proceedings. And a reduction is inappropriate if a "defendant contests even one factual element of the offense." *Id.* Prater could have preserved his rights before trial by appealing the pretrial order rejecting his double jeopardy challenge. *Abney v. United States*, 431 U.S. 651, 662 (1977). Instead, Prater proceeded to trial and denied an essential factual element of guilt: that he knew his codefendants possessed firearms. Prater's obstruction of justice and his choice to challenge the charges' factual bases preclude application of this reduction even under fresh review.

We affirm.

GRIFFIN, Circuit Judge, dissenting.

Law enforcement officials learned of defendant Mahlon Prater's drug-trafficking activities through their investigation into a chapter of the Vice Lords street gang operating in Knoxville, Tennessee. That investigation first resulted in two conspiracy indictments issued on the same day—one for Prater for trafficking crack cocaine, and another for other Vice Lords for trafficking methamphetamine. Prater pleaded guilty to the cocaine-trafficking charge, but he was later indicted on and found guilty of—along with many other Vice Lords—conspiring to traffic methamphetamine and several other controlled substances (but not crack cocaine), as well as other drug-trafficking-related crimes.

In my view, Prater's subsequent prosecution violates his rights against double jeopardy. Therefore, I would vacate Prater's convictions for Count One (conspiracy to distribute various controlled substances) and for Count Two (aiding and abetting the possession of firearms to further the drug-trafficking conspiracy) and remand for plenary resentencing. Because the majority opinion holds to the contrary, I respectfully dissent.

I.

As part of its investigation into the Vice Lords' drug-trafficking efforts, the government used a confidential informant to make several controlled purchases of crack cocaine from Prater in December 2018 and January 2019. Law enforcement officers eventually obtained wiretaps for three cell phones (including Prater's), and they ultimately uncovered significant evidence of a widespread drug-trafficking conspiracy centered in Knoxville, Tennessee, headed by two brothers, Alim and Ronald Turner. Our separate opinion—which addresses the appeals by Prater's co-defendants, *see* Nos. 22-5046, 22-5107, 22-5131, 22-5681, and 22-6056 (appeals of Alim Turner,

Ronald Turner, Kedaris Gilmore, Ushery Stewart, and Demetrius Bibbs)—sets forth further detail on the scope of the government's investigation and the Vice Lords' drug-trafficking activities.

On September 4, 2019, a grand jury returned two indictments. It first indicted several Vice Lords members—but not Prater—for conspiring to distribute methamphetamine. That case is referred to as Case No. 151, which is the case underlying this appeal. The grand jury separately indicted Prater on a single count of conspiring with "persons known and unknown to the Grand Jury" to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846, referred to as Case No. 152. That indictment named none of Prater's alleged co-conspirators. It alleged that the conspiracy began "at least as early as in or around December of 2018, continuing through in and around April of 2019."

Prater pleaded guilty to the charge in Case No. 152. The factual basis for the plea agreement provided that "[w]ithin the charged conspiracy dates, the defendant worked with others to sell crack cocaine." Specifically, Prater sold the substance to a confidential informant six times, totaling about 30 grams of crack cocaine.

Before Prater was sentenced in Case No. 152, the government filed a superseding indictment in Case No. 151. That filing upgraded the drug-conspiracy count to allege a multi-drug conspiracy and included Prater as a co-defendant, along with several other Vice Lords. Eventually, the government obtained a second superseding indictment, which charged Prater with additional crimes.

Two crimes in the Case No. 151 superseding indictment are important for our purposes. Count One added Prater to the drug-trafficking conspiracy, alleging that he conspired to distribute controlled substances, including methamphetamine, fentanyl, oxycodone, alprazolam, marijuana, buprenorphine, and heroin, in violation of 21 U.S.C. §§ 841, 846. This conspiracy was alleged to

have occurred "in the Eastern District of Tennessee and elsewhere" "on or about July 15, 2018 through on or about November 22, 2019" and to have involved "other persons known and unknown to the Grand Jury." Count Two is predicated on Count One. It alleged that during the same time, Prater aided and abetted the possession of firearms in furtherance of a drug-trafficking crime (the drug-trafficking conspiracy), in violation of 18 U.S.C. § 924(c)(1)(A).

Prater moved to dismiss the superseding indictment, asserting the Double Jeopardy Clause prohibited his prosecution in Case No. 151 given his guilty plea in Case No. 152. The government opposed, arguing that Case No. 152 involved a smaller conspiracy between Prater and other crack-cocaine dealers separate from the larger Vice Lords conspiracy. A magistrate judge agreed with the government, issuing a report and recommendation denying Prater's motion to dismiss. On Prater's objections, the district court issued an opinion and order that "agree[d] with and incorporate[d]" the magistrate judge's analysis and denied Prater's motion to dismiss. Prater again objected on double-jeopardy grounds through a Rule 29 motion for a new trial, which the district court denied. He now appeals.

II.

The Constitution's Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. As the Supreme Court long ago recognized, "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 85 U.S. 163, 168 (1873). Accordingly, the Double Jeopardy Clause "protects against a second prosecution for the same offense after conviction or acquittal." *United States v. Turner*, 324 F.3d 456, 461 (6th Cir. 2003) (citation omitted).

Courts typically evaluate double-jeopardy claims using the "same evidence" test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See, e.g.*, *United States v. Garner*, 529 F.2d 962, 971 (6th Cir. 1976). But we use a different method to evaluate claims of double jeopardy for conspiracies given their unique nature. In conspiracy cases, like this one, "it is the agreement which forms the nucleus of the offense." *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983). "A single agreement to commit several crimes constitutes one conspiracy. By the same reasoning, multiple agreements to commit separate crimes constitute multiple conspiracies." *United States v. Broce*, 488 U.S. 563, 570–71 (1989).

"[T]he multiple/single conspiracy issue is determined by applying a 'totality of the circumstances' test rather than the more limited 'same evidence' test normally applied to double jeopardy reviews of substantive offenses," *In re Grand Jury Proc.*, 797 F.2d 1377, 1380 (6th Cir. 1986) (citations omitted), due to "the inherent infirmities in applying the same evidence test to conspiracy cases," *Sinito*, 723 F.2d at 1256. "An overzealous prosecutor," we explained in *Sinito*, could "circumvent a charge of double jeopardy" by "carving up one conspiracy into two or even more," charging "certain overt acts in one indictment and a different set of overt acts in" another. *Id.* To mitigate that risk, we instead apply a totality-of-the-circumstances, five-factor balancing test. Under *Sinito*, courts must weigh: "1) time; 2) persons acting as co-conspirators; 3) the statutory offenses charged in the indictments; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place." *Id.* The "ultimate question" this test is designed to answer "is whether the evidence shows one agreement or more than one agreement." *In re Grand Jury Proc.*, 797 F.2d at 1380.

This test requires application of a burden-shifting paradigm. The defendant must first establish a "non-frivolous or prima facie showing of a single conspiracy." *Id.* It then becomes the government's burden "to show separate conspiracies by a preponderance of the evidence." *Id.* We generally review for clear error a district court's finding that the government showed separate conspiracies by a preponderance of the evidence when the district court engages in factfinding and when it applies the correct burden of proof. *Id.* at 1380–81. But when the district court fails to do so and merely compares the language in the indictments, we review de novo. *See, e.g.*, *United States v. Wheeler*, 535 F.3d 446, 449, 455 (6th Cir. 2008); *United States v. DeCarlo*, 434 F.3d 447, 452, 454–57 (6th Cir. 2006).

The district court here neither considered our burden-shifting test nor engaged in factfinding when it reviewed Prater's motions to dismiss the indictment. Instead, when it rejected Prater's initial motion to dismiss before trial, it relied on a magistrate judge's comparison of the indictments to evaluate the *Sinito* factors, a purely legal exercise. At the motion hearing, the magistrate judge did not take any evidence warranting deference to factual findings; instead, it heard only argument from counsel. Its report and recommendation did not mention which party bore the burden of proof. Most worrisomely, at times, the magistrate judge's opinion seemed to have improperly kept the burden of proof on Prater. *See United States v. Prater*, 2020 WL 8484944, at *4 (E.D. Tenn. Dec. 21, 2020) ("Defendant fails to point to any additional evidence supporting his claim that the two charged conspiracies involve the same co-conspirators."). *But see id.* at *6 ("[T]he Court finds that the Government's proffered evidence preponderates in favor of the existence of two conspiracies."). There being no reason to defer to the district court's erroneous application of law, I would therefore "determine, *de novo*, whether the preponderance of the evidence points to two conspiracies or only one." *United States v. Sertich*, 95 F.3d 520, 524

(7th Cir. 1996); *cf. In re Grand Jury Proc.*, 797 F.2d at 1380–81 ("The finding of fact by the lower court *that the government had proven by a preponderance of the evidence* that multiple conspiracies existed can be set aside only if it is clearly erroneous." (emphasis added)).

As for the district court's later denial of Prater's renewed double-jeopardy motion after trial, the district court made no further factual findings there warranting deference. To the extent that the district court made a factual finding that separate conspiracies existed (as part of its denial of Prater's motion for a judgment of acquittal under Rule 29) because Christopher Hounschell testified that "he did not know defendant, or any other Vice Lords to be selling crack cocaine as part of the instant drug conspiracy," such a finding is clearly erroneous. *In re Grand Jury Proc.*, 797 F.2d at 1380–81. As set forth below, Hounschell admitted that he sold crack cocaine as part of the conspiracy indicted in Case No. 151.

III.

According to Prater, all five *Sinito* factors weigh in his favor, establishing that the crack-cocaine conspiracy for which he was indicted, and to which he pleaded guilty in Case No. 152, was a mere slice of the larger, multi-drug conspiracy for which he was later indicted, tried, and convicted in Case No. 151. I agree. Prater made out (which neither the government nor the majority opinion dispute) a "non-frivolous or prima facie showing of a single conspiracy." *In re Grand Jury Proc.*, 797 F.2d at 1380. The government thus bears the burden of proving that these factors favor separate conspiracies by a preponderance of the evidence. *Id.* It has not sustained its burden.

Time. This factor favors Prater, which the government concedes and yet the majority opinion finds to the contrary.

If one charged conspiracy overlaps significantly in time with another charged conspiracy, this factor favors finding a single conspiracy. *See id.* at 1382; *see also United States v. Kistner*, 590 F. App'x 514, 517 (6th Cir. 2014) (observing that a months-long overlap between conspiracies weighed in favor of finding a single conspiracy); *United States v. Rabhan*, 628 F.3d 200, 205 (5th Cir. 2010) ("An overlap in time periods between two alleged conspiracies favors a finding of a single conspiracy, especially when that overlap is substantial."). There is more than just overlap here: the time period for the Case No. 151 conspiracy (July 15, 2018–November 22, 2019) eclipses the time period for the Case No. 152 conspiracy (December 2018–April 2019). When the time period of the larger conspiracy "completely embrace[s] the time period covered" by the smaller one, this factor favors a single conspiracy. *United States v. Jones*, 858 F.3d 221, 227 (4th Cir. 2017) (citation omitted). The umbra here is significant, with just a few months—and not years like the cases the majority opinion relies on—outside of the overlap on either side. *See, e.g.*, *United States v. Wheeler*, 535 F.3d 446, 457 (6th Cir. 2008) (two conspiracies, one from 1990 to 1997, and the other from 1990 to 2003); *Sinito*, 723 F.2d at 1257 (two conspiracies, one from March 1974 to January 1979, and the other from March 1978 to October 1982).[1] Because the larger conspiracy charge subsumes the smaller, this factor suggests that the government carved the smaller charge out of a single, larger conspiracy.

Same/Different Co-Conspirators. This factor favors Prater.

"Under this factor, the relevant question is not whether the same persons were actually charged in each indictment, but rather whether the same persons were involved in the activities

[1]True, *United States v. Inmon*, 594 F.2d 352, 354 (3d. Cir. 1979), had a similar eclipse, but I do not read that case as universally supporting the government's position here. Although *Inmon* observed that "[t]ime frames and personnel can overlap in separate criminal agreements," it made clear that its analysis turned not on time, but rather on there being a "clear . . . difference between the two conspiracies with respect to the key factor of suppliers." *Id.* at 354.

charged under each indictment, unindicted persons included." *United States v. Meda*, 812 F.3d 502, 509 (6th Cir. 2015).

The Case No. 152 indictment names no other alleged co-conspirators—it states only that Prater conspired with individuals "known and unknown to the Grand Jury." At oral argument, the government admitted that it still does not know who the other co-conspirators were in Case No. 152. The government never proved that Prater's co-conspirators were anyone other than Prater's fellow Vice Lords, many of whom were ultimately indicted in Case No. 151. That Prater is the only named conspirator in the Case No. 152 indictment establishes only that the government chose to draft that indictment narrowly and says nothing about whether the co-conspirators in fact differed between the conspiracies. Moreover, though the government argues that "Prater worked with a couple low level East Knoxville crack dealers to distribute to [the confidential informant]," it offered no evidence about who these "low level" dealers were. And one thing is certain—they could not have been the people to whom Prater sold the drugs because a mere buy-sell relationship does not demonstrate a conspiracy. *United States v. Deitz*, 577 F.3d 672, 680 (6th Cir. 2009).

The evidence suggests that Prater's co-conspirators were, in fact, his fellow Vice Lords. Indeed, it was law enforcement officers' "belief that they were investigating one massive conspiracy." *Sinito*, 723 F.2d at 1258. Although "not controlling," their opinions are part of the "totality of evidence" and are "entitled to consideration." *Id.* The wiretap affidavits confirm that federal law enforcement officers thought that Prater's crack-cocaine sales were part of the larger conspiracy involving other Vice Lords. The affidavits use the term "DTO" to refer to the "drug-trafficking organization" that the officers' overall investigation targeted. That DTO encompassed all the co-conspirators from the larger No. 151 conspiracy. The affidavits state that Prater "conduct[ed] crack cocaine transactions and business associated with the DTO"; that the

confidential informant made "controlled buys of crack cocaine from a single member of the DTO"; that the controlled buys of crack cocaine from Prater revealed a "slice of the DTO's operations"; that distribution of "crack cocaine" was one of the offenses the Vice Lords investigation was targeting; and that several other Vice Lords were known distributors of "crack cocaine," including defendant Kedaris Gilmore, Kevin Roberts, Jeremiah Moore, Jaylen Cody and, perhaps most importantly, the conspiracy's leader, defendant Alim Turner.

Christopher Hounschell—a fellow member of the Vice Lords conspiracy—also sold crack cocaine "in addition to the other drugs that [he was] dealing with as part of this conspiracy." Hounschell testified that Gilmore sold "anything he could get his hands on." Put differently, crack cocaine was not the "predominant[]" trafficked drug by the Vice Lords like methamphetamine, but it was one of the many controlled substances they acquired and sold.

The majority opinion ignores altogether that other Vice Lords sold crack cocaine, electing instead to weigh this factor against Prater based on its mischaracterization that Hounschell differentiated between the collective efforts of the gang and individuals' side dealings. I cannot agree. Perhaps Hounschell did not know that Prater was selling crack cocaine, but Hounschell knew that he himself was selling crack cocaine as part of the Vice Lord's larger operations. In his testimony, Hounschell admitted that he sold crack cocaine as part of the Vice Lords conspiracy:

> Q. And you sold crack cocaine as part of this drug trafficking organization; correct? You sold crack cocaine? You were a Vice Lord; right?
>
> A. Yes, sir.
>
> Q. And as of the day that you were arrested, how long had you been selling crack cocaine?
>
> A. A few years.
>
> Q. A few years? And the sale of crack cocaine was something, again, that you did as a Vice Lord?
>
> A. I did it while I was a Vice Lord, yeah.

Q. You did it while you were a Vice Lord. That's one of the drugs that the Vice Lords were engaged in selling during the time that you were in the Vice Lords; right?

A. Not predominantly, no.

Q. No?

A. But -- no.

Q. But it happened; right?

A. I'm pretty sure it did.

Q. And some of the monies that you received from the proceeds of selling crack cocaine, you paid those as dues into the box; right?

A. I would think so, yeah.

Q. Because it was benefitting the Vice Lords for you to do so; right?

A. Yes, sir.

* * *

Q. And prior to your arrest, how often did you sell crack cocaine?

A. Not much.

Q. Okay. Just something you did in addition to the other drugs that you were dealing with as a part of this conspiracy?

A. Yes, sir.

Q. Okay. Can you tell us how much money you made, you know, on a weekly or monthly or whatever basis during the course of this conspiracy? How much did you make selling crack -- make off of selling crack?

A. Not too much of nothin'.

Q. Okay. Hundreds a month?

A. 2-, 300 a month.

Q. Okay. All right. Now, were there other Vice Lords in addition to yourself who were selling crack cocaine as part of this conspiracy?

A. Not that I know of.

In targeting one drug-trafficking organization, federal law enforcement officers in their warrant affidavits viewed the co-conspirators for the Case No. 152 conspiracy as the same co-conspirators for the Case No. 151 conspiracy. Moreover, the government does not rebut this

relationship. On the contrary, it concedes that it does not know who the co-conspirators were in Case No. 152. And the majority's superficial observation that Prater is "the only individual named in both conspiracies" misses the point. Because the government bears the burden of proof and did not establish that the unnamed co-conspirators in Case No. 152 were anyone other than Prater's co-conspirators from Case No. 151, this factor favors a single conspiracy.

Offenses Charged. This factor again favors Prater, which both the government and the majority opinion concede.

Where "precisely the same statutory offenses" are charged, this factor favors a single conspiracy. *In re Grand Jury Proc.*, 797 F.2d at 1382; *Meda*, 812 F.3d at 509. The two indictments here identically charged Prater with conspiracy to possess with intent to distribute controlled substances under 21 U.S.C. §§ 841(a)(1) and 846, albeit different types of controlled substances. The Case No. 151 indictment alleges that the drugs at issue in the larger conspiracy were methamphetamine, fentanyl, oxycodone, alprazolam (Xanax), marijuana, buprenorphine, and heroin. The Case No. 152 indictment alleges a conspiracy that involved only crack cocaine.

But that is a distinction without a difference. A § 846 drug conspiracy requires an agreement to violate drug laws, *United States v. Gunter*, 551 F.3d 472, 482 (6th Cir. 2009), and here, the predicate drug law is § 841(a). It is that section, and that section alone, that sets forth the "complete offense" of drug trafficking. *United States v. Mahaffey*, 983 F.3d 238, 243 (6th Cir. 2020) (internal quotation marks omitted). All that is required is that a defendant "knowingly possess"—or in this case, conspire to possess—"a controlled substance." *Id.* (internal quotation marks and emphases omitted). The exact type and quantity of the controlled substance is irrelevant from an offense standpoint and matters only instead with respect to § 841(b)'s sentencing regime. *See id.* at 243–44.

The Case No. 151 indictment illustrates the point. If mere differences in the types of drugs distributed could generate separate conspiracy counts for each drug, then the Case No. 151 indictment would have charged seven counts for the seven different kinds of drugs. That it charged one count under § 841(a)(1) and § 846 for poly-drug conspiracy—and resulted in convictions on that conspiracy count—demonstrates that the nature of this single conspiracy was to acquire and sell many types of drugs. And the fact that the offense charged in Case No. 152 is identical is indicative that Prater's distribution of crack cocaine was, in fact, part of the larger, multi-drug conspiracy.

When two "indictments require proof of the same elements, using the same facts, and only vary[] as to the type and amount of controlled substance involved," we have concluded that this factor weighs "heavily" in favor of "a single, unified conspiracy" to distribute controlled substances. *Corral v. United States*, 562 F. App'x 399, 406–07 (6th Cir. 2014). Put differently, "a showing that the same predicate crimes were committed under different factual circumstances only tends to prove that the pattern of activity was more widespread than the initial indictment originally conveyed. It does not tend to prove a separate pattern of conduct." *Wheeler*, 535 F.3d at 454; *see also United States v. Scott*, 760 F. App'x 151, 155 (4th Cir. 2019) (describing different types of controlled substances alleged in two indictments as a "minor distinction" between the two); *United States v. Shepard*, 89 F. Supp. 2d 884, 888–89 (W.D. Mich. 1999) (where a defendant was charged "with a conspiracy involving marijuana" and then separately "charged with a conspiracy involving marijuana as well as cocaine and heroin," "[a] single agreement to conspire could encompass marijuana, cocaine, and heroin"); *cf. United States v. Powell*, 894 F.2d 895, 898–99 (7th Cir. 1990) (finding multiplicitous two conspiracy counts, one for trafficking methamphetamine and the other for cocaine).

Overt Acts Charged/Scope of Activity. This factor favors Prater.

Next is "whether the particular acts alleged in the indictment" in Case No. 152 "are part of a larger, unified conspiracy" from Case No. 151. *Sinito*, 723 F.2d at 1258. Unified conspiracies require "assent of its members to contribute to a common enterprise." *United States v. Kelley*, 849 F.2d 999, 1003 (6th Cir. 1988) (citation omitted). "Seemingly independent transactions may be revealed as parts of a single conspiracy by their place in a pattern of regularized activity involving a significant continuity of membership." *Id*. (internal quotation marks omitted). Evidence of the "unity essential to a conspiracy," *id*., can be found in the common goal of the conspirators and the purpose served by the co-conspirators' activities, *see United States v. Maddox*, 944 F.2d 1223, 1232 (6th Cir. 1991).

As with the co-conspirators factor, the indictment in Case No. 152 does not contain all the overt acts contained in the Case No. 151 indictment. But Prater's overt acts to distribute crack cocaine share the common goal and purpose with the larger drug conspiracy from Case No. 151: for Vice Lords to acquire and distribute controlled substances and to profit from that distribution. If differences in the particular types of drugs sold were given significant weight, then the government could simply charge different overt acts in different indictments for the same conspiracy, "arbitrarily" splitting unitary conspiracies into several prosecutions. *Sinito*, 723 F.2d at 1258. This conduct is exactly what the Double Jeopardy Clause prohibits.

On this point, *Corral* is instructive. There, the defendant was indicted first in California for a poly-drug-distribution conspiracy and later in Michigan for a cocaine-distribution conspiracy. 562 F. App'x at 400–01. The district court found that the overt acts were "clearly different," but we reversed, holding that "the district court's factual findings were clearly erroneous." *Id.* at 408. We observed that "[t]he overt acts charged in Michigan and California were all related to Corral's

purpose of distributing a controlled substance, which was the common goal of his co-conspirators." *Id.* So too here.

Yet, the majority opinion concludes to the contrary, juxtaposing the amounts and types of drugs involved in each alleged conspiracy. We have made the distinction in cases before, *see, e.g.*, *United States v. Kennedy*, 743 F. App'x 649, 653 (6th Cir. 2018) (noting that one charged conspiracy was "far more expansive in scope" than the other), but the record evidence here belies such an application. As set forth above, although the government charged two separate conspiracies, the government's investigation and trial evidence establish the Vice Lords acquired and distributed all sorts of drugs in all sorts of amounts. True, methamphetamine was their focus, but they also dealt crack cocaine. Most importantly, Hounschell admitted that, while the Vice Lords did "[n]ot predominantly" distribute crack cocaine, he was "pretty sure" they did distribute it.[2]

In sum, crack cocaine was not the Vice Lords' drug of choice, but it was one they trafficked. That they distributed many more doses of their primary product than of their ancillary products does not change the fact that the latter were part of the same conspiracy. Indeed, that is how the government charged and proved the case with respect to ancillary drugs like oxycodone, alprazolam, marijuana, buprenorphine, and heroin. The government offers no evidence that crack cocaine was not one of the other ancillary products in this drug conspiracy that predominantly, though not exclusively, distributed methamphetamine.

[2]The majority opinion seemingly faults Prater for lacking evidence that "the Vice Lords integrated [crack cocaine] into their business model." But that ignores the burden of proof—it is the government's burden to establish that crack cocaine was not part of the Vice Lords' business model.

Location. This factor again favors Prater.

Both indictments alleged that the conspiracies' activities occurred "in the Eastern District of Tennessee and elsewhere." And the wiretap affidavits make clear that the government's investigation targeted the Knoxville chapter of the Vice Lords. As the trial testimony elaborated, many of the central characters in the Case No. 151 conspiracy—defendants Alim and Ronald Turner, Gilmore, Stewart, and Prater—were largely located in Knoxville. "When two alleged conspiracies overlap geographically, it is appropriate to consider where they are based as an indicator of whether the geographic overlap is significant." *Rabhan*, 628 F.3d at 208. Both alleged conspiracies here were based not only in the Eastern District of Tennessee, but more specifically in Knoxville. *See id.* (finding only a single conspiracy where Georgia was a "base" of operations for both alleged conspiracies).

It is true that the conspiracy charged in Case No. 151 encompassed additional jurisdictions, but only because one of the co-conspirators (Ronald Turner) was in prison and because the Vice Lords sourced some of their drugs from California and elsewhere in Tennessee. Accordingly, the geographic scope of activities relating to Case No. 152 is more limited than the geographic scope of activities relating to Case No. 151 because the former pertains to only a subset of the latter. *See United States v. Maslin*, 356 F.3d 191, 197 n.2 (2d Cir. 2004) ("That the Binghamton case included more proof about the additional sales of lower grade marijuana from the south does not make it a separate conspiracy.").

* * *

The totality of the circumstances—indeed, every factor weighs in Prater's favor—demonstrates that the Case No. 152 conspiracy was part of the larger Case No. 151 conspiracy. The government has failed to meet its burden by a preponderance of the evidence to establish that

there were two separate conspiracies. Prater's prosecution in Case No. 151 thus violated the Double Jeopardy Clause.

Our decision in *Wheeler* is not to the contrary. 535 F.3d at 446. There, the defendant was charged with three drug-trafficking-conspiracy counts, two in Florida and one in Ohio. *Id.* at 449. In the Florida prosecution, he was acquitted of one of the drug-conspiracy counts (the other was dismissed). He challenged the later Ohio prosecution on double-jeopardy grounds, arguing that it charged the same conspiracy as the one for which he had already been acquitted. *Id.* On de novo review, we found no double-jeopardy violations with the Ohio drug-conspiracy charge and conviction. *Id.* at 449, 456–58. We reasoned that, even though all counts involved the same statutory offense (§§ 841(a), 846), none of the other factors pointed in the defendant's favor. The Ohio conspiracy and Florida conspiracies did not significantly overlap in terms of time, participants, scope, or location. *Id.* at 456–58.

True, how *Wheeler* distinguished the scope of the various conspiracies in terms of drug differences is what the majority says about Prater's appeal here. There, the Ohio conspiracy involved the distribution of numerous drugs (including cocaine, methamphetamine, LSD, marijuana, ecstasy, and valium), while one Florida conspiracy involved only cocaine and the other involved cocaine and methamphetamine. *Id.* at 456–57. But here, as set forth above, the indictments and factual record developed at trial established no delineation between the drugs peddled by the Vice Lords. Although crack cocaine was not the "predominant[]" drug the Vice Lords distributed, it was one of the many controlled substances they acquired and sold as part of their drug-distribution conspiracy. In sum, *Wheeler*'s balancing of the *Sinito* factors based on different facts is immaterial to Prater's case on de novo review.

IV.

For these reasons, I would vacate Prater's conviction for Count One in Case No. 151. And because his conviction on Count Two was predicated upon Count One, I would vacate that conviction as well. Remaining then would be Prater's convictions for Counts Four (aiding and abetting the attempted possession with intent to distribute methamphetamine) and Six (distributing methamphetamine). With Counts One and Two vacated, I would remand for plenary resentencing. *See, e.g*, *United States v. Faulkenberry*, 461 F. App'x 496, 502 (6th Cir. 2012).[3]

For these reasons, I respectfully dissent.

[3]Because I would vacate Counts One and Two and remand for resentencing, I would not reach the other two issues Prater raised on appeal—the sufficiency of the evidence supporting his Count Two conviction and the reasonableness of the district court's calculation of his Guidelines range at sentencing.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5599

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MAHLON T. PRATER, JR.,

Defendant - Appellant.

FILED
Aug 02, 2024
KELLY L. STEPHENS, Clerk

Before: SUTTON, Chief Judge; GRIFFIN and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.

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

IN CONSIDERATION THEREOF, it is ORDERED that the district court's judgments of conviction and sentence are AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION

UNITED STATES OF AMERICA

v.

MAHLON T. PRATER, JR.
aka "Lil' Moe", "Moe", "Hethic", "Heck Dog"
USM#54532-074

JUDGMENT IN A CRIMINAL CASE

Case Number: **3:19-CR-00151-TAV-DCP(7)**
3:19-CR-00152-TAV-DCP(1)

Gerald L Gulley
Defendant's Attorney

THE DEFENDANT:

☒ **pleaded guilty to count(s): 1 of the Indictment in case 3:19-CR-152**

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

☒ **was found guilty on count(s) 1, 2, 4, and 6 of the Second Superseding Indictment after a plea of not guilty.**

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

Title & Section and Nature of Offense – Document Number 3:19-CR-151	Date Violation Concluded	Count
21 U.S.C. § 846, 841(a)(1), 841(b)(1)(A) and 21 U.S.C. § (b)(1)(C) – Conspiracy to Distribute Schedule I and II Substances Including: Fifty(50) Grams or More of Methamphetamine; a detectable Amount of Oxycodone; and a Detectable Amount of Marijuana	11/22/2019	1ss
18 U.S.C. §§ 924(c)(1)(A)(i) and 2 – Aiding and Abetting the Possession of Firearm in Furtherance of Drug Trafficking Crime	09/06/2019	2ss

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 and 18 U.S.C. § 3553.

☒ The defendant has been found not guilty on count(s) 7 of Second Superseding Indictment in 3:19-CR-151.

☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

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.

July 12, 2022
Date of Imposition of Judgment

s/ Thomas A. Varlan
Signature of Judicial Officer

Thomas A Varlan, United States District Judge
Name & Title of Judicial Officer

July 12, 2022
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section and Nature of Offense – 3:19-CR-151 cont.	Date Violation Concluded	Count
21 U.S.C. §§ 846, 841 (a)(1), 841 (b)(1)(A), and 18 U.S.C. § 2 - Aiding and Abetting the Attempted Possession with Intent to Distribute 50 Grams or More of Methamphetamine	07/15/2019	4ss
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A) Distribution of 50 Grams or More of Methamphetamine	07/31/2019	6ss
Docket Number: 3:19-CR-00152		
21 U.S.C. §§ 846, 841 (a)(1) and 21 U.S.C. § 841 (b)(1)(C) – Conspiracy to Possess with Intent to Distribute Cocaine Base	04/30/2019	1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **384 months**. This term consists of 324 months as to each of Counts One, Four and Six, to be served concurrently, and 60 months as to Count Two to be served consecutively to all other counts in Docket Number 3:19-CR-151-7, and a term of 240 months as to Count One in Docket Number 3:19-CR-152 to be served concurrently to all other Counts for an effective sentence of 384 months. The defendant has been in continuous federal custody since September 20, 2019.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons' Institution Residential Drug Abuse Treatment Program. It is further recommended that the defendant be designated to either FCI Beckley or FCC Yazoo.

☒ 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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**. This term consists of five years as to each of Counts One, Two, Four, and Six in Docket Number 3:19-CR-00151-7, and three years as to Count One in Docket Number 3:19-CR-00152, with all such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing 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 which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as you are released from the program by the probation officer.

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

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment **
TOTALS	$500.00	$.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* 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.

☐ 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 under the Schedule of Payments sheet of this judgment 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.

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 $500.00 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:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 800 Market Street, Suite 130, Howard H. Baker, Jr. United States Courthouse, Knoxville, TN, 37902**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) 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.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 3:19-CR-151-TAV-DCP-7
	)	
MAHLON PRATER, JR.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This criminal case is before the Court on defendant's renewed motion for a judgment of acquittal and motion for a new trial [Doc. 531], which the government opposes [Doc. 534]. After considering the record and controlling law, for the reasons that follow, the Court will **DENY** defendant's motion [Doc. 531].

I. Background

On October 8, 2020, a federal grand jury returned a multi-count, multi-defendant second superseding indictment, charging defendant with conspiracy to distribute 50 grams or more of methamphetamine, and quantities of fentanyl, oxycodone, alprazolam, marijuana, buprenorphine, and heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), 841(b)(1)(E), and 841(b)(2) (Count 1), aiding and abetting the possession of firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2 (Count 2), aiding and abetting possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 18 U.S.C. § 2 (Count 4), distribution of 50 grams or more of

methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) (Count 6), and possession of a firearm in furtherance of a drug trafficking offense (specifically, the offense charged in Count 6), in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count 7) [Doc. 243].

The case proceeded to trial on July 7, 2021, with eight of the charged defendants proceeding to trial jointly [Doc. 495]. At the close of the government's case-in-chief, defendant made an oral motion for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure [Doc. 537-2, pp. 255–59]. Of relevance, defendant renewed a prior motion regarding double jeopardy, arguing that there was testimony that co-conspirator Christopher Hounschell was selling crack cocaine as part of the overall conspiracy, as well as a bag of crack cocaine seized on the date of Hounschell's arrest [*Id.* at 256 (citing Ex. 9-D)]. Accordingly, defendant argued that, because he already pled guilty to a conspiracy to distribute crack cocaine in a separate case, double jeopardy barred the charge in Count 1 [*Id.* at 256–57]. Defendant also argued that there was insufficient evidence as to Count 2 to show that he aided and abetted anyone in the possession of firearms in furtherance of a drug trafficking crime [*Id.* at 257]. Defendant did acknowledge that co-conspirator Michael Scott Stewart testified that he saw defendant with a firearm on a certain day in late July, but there was no proof of aiding and abetting [*Id.*].

In response, the government argued that Hounschell only testified that defendant sold powder cocaine, not crack cocaine [*Id.* at 280]. As to Count Two, the government pointed to testimony from Stewart that he witnessed defendant with a gun when he obtained

methamphetamine from him [*Id.* at 286]. The Court took the matter under advisement [*Id.* at 295], and ultimately, denied defendant's Rule 29 motion [Doc. 554, pp. 126–41].

After a seven-day trial, a jury convicted defendant on the portions of Count 1 relating to 50 grams or more of methamphetamine, and quantities of oxycodone and marijuana, and Counts 2, 4, and 6, but found defendant not guilty as to Count 7 [Doc. 519]. Defendant now renews his motion for a judgment of acquittal as to the counts of conviction and moves, in the alternative, for a new trial [Doc. 531].

II. Legal Standards

A motion for judgment of acquittal pursuant to Rule 29 challenges the sufficiency of the evidence to support the conviction. *See* Fed. R. Crim. P. 29(c); *United States v. Montgomery*, 358 F. App'x 622, 628 (6th Cir. 2009). When reviewing such a motion, the Court must decide "whether, after viewing the evidence in a light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, the Court must not weigh evidence, assess witness credibility, or "substitute its judgment for that of the jury." *United States v. Chavis*, 296 F.3d 450, 455 (6th Cir. 2002). This standard places a "very heavy burden" on defendants. *Id.*

Alternatively, the Court "may vacate any judgment and grant a new trial" under Rule 33 "if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Rule 33's 'interest of justice' standard allows the grant of a new trial where substantial legal error has

occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010 "The decision whether to grant a new trial is left to the sound discretion of the district court . . . ." *United States v. Wheaton*, 517 F.3d 350, 361 (6th Cir. 2008) (quoting *United States v. Pierce*, 62 F.3d 818, 823 (6th Cir. 1995)).

III. Analysis

A. Inconsistent Verdicts

Defendant first argues that he is entitled to a judgment of acquittal on Count 2,[1] in which he was convicted of aiding and abetting the possession of firearms in furtherance of a drug trafficking offense [Doc. 531, p. 1]. Specifically, defendant states that he was acquitted of the substantive charge of violating § 924(c) in Count 7, and there was insufficient proof of other weapons that defendant used from which a reasonable jury could conclude beyond a reasonable doubt that he possessed such firearms in furtherance of the charged drug trafficking offense or that he aided and abetted anyone else in the charged drug conspiracy with using or possessing a firearm in furtherance of the charged drug trafficking offenses [*Id.*].

The government responds that defendant's "inconsistent verdict" argument is without merit because consistency of the verdict is not necessary [Doc. 534, p. 15]. Further, the government contends that there was sufficient evidence to support the verdict on

[1] Although defendant states that this argument relates to Count 4 [Doc. 531, p. 1], it appears that his arguments actually relate to Count 2 of the Second Superseding Indictment, charging him with aiding and abetting the possession of firearms in furtherance of a drug trafficking crime [*See* Doc. 243].

Count 2, including Stewart's testimony about defendant's armed methamphetamine distribution in late July 2019 [*Id.* at 15–16]. The government states that the jury heard other evidence involving firearms possession during the conspiracy, including Agent Brandon Stryker's testimony about a wiretap call in which defendant discusses a violent altercation at a night club, and Hounschell's testimony that he saw defendant with a firearm [*Id.* at 17].

"[W]here truly inconsistent verdicts have been reached, the most that can be said is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *United States v. Powell*, 469 U.S. 57, 64–65 (1984) (internal quotation marks and alterations omitted) (citing *Dunn v. United States*, 284 U.S. 390, 393 (1932)). The Supreme Court has recognized several factors that support the "rule that the defendant may not upset [an inconsistent] verdict," including the fact that a jury, convinced of guilt, may, through mistake, compromise, or lenity, arrive at an inconsistent conclusion, but the government has no recourse to correct such error. *Id.* at 65. Thus, the Supreme Court concluded that, given the uncertainty about whether the jury erred in favor of the defendant or the government in the case of an inconsistent verdict, and the fact that the government is precluded from challenging an acquittal, "it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course." *Id.*

The Sixth Circuit has recognized two exceptions to the rule that inconsistent verdicts are generally not reviewable, including: (1) when the verdicts are marked by such

inconsistency as to indicate arbitrariness or irrationality, or (2) where a guilty verdict on one count necessarily excludes a finding of guilt on another. *United States v. Randolph*, 794 F.3d 602, 610–11 (6th Cir. 2015); *United States v. Hofstetter*, 31 F.4th 396, 434 (6th Cir. 2022).

The relevant counts here charged defendant with: (1) aiding and abetting the possession of firearms in furtherance of a drug trafficking offense, namely, the drug conspiracy charged in Count 1, from July 15, 2018, to September 6, 2019 (Count 2); and (2) possession of a firearm in furtherance of a drug trafficking offense, namely, the substantive drug offense charged in Count 6, in late July 2019 (Count 7) [Doc. 243]. The jury convicted defendant on Count 2, the aiding and abetting count, but acquitted him on Count 7, the substantive firearm count [Doc. 519].

Initially, the Court notes that the jury's conviction on Count 2 and acquittal on Count 7 are not necessarily inconsistent. There was evidence at trial that defendant possessed firearms in connection with drug activities in July 2019, a timeframe that falls within those charged in both Counts 2 and 7 [*See* Doc. 243]. Specifically, at trial, Hounschell testified that he had seen defendant with a firearm before, and also knew other members of the conspiracy, including Alim Turner, Ushery Stewart, and Kedaris Gilmore, to regularly carry firearms [Doc. 537-1, pp. 152–53]. Hounschell also testified that he saw other members of the drug conspiracy possessing firearms while dealing drugs, which they did for protection purposes [*Id.* at 153]. Moreover, Stewart testified that he had seen defendant in possession of firearms, and, in fact, that defendant, as well as Alim Turner

and Kedaris Gilmore carried firearms "at all times" during the summer of 2019 [Doc. 537, pp. 51, 54–55]. Stewart testified that these conspirators possessed pistols or some kind of automatic firearms, which they could carried in the waistband of their pants [*Id.* at 54]. Stewart also testified about a specific incident in late July 2019, when he went to defendant's house to purchase methamphetamine and witnessed defendant in possession of a pistol and a gallon bag of methamphetamine [*Id.* at 56–58].

While this evidence seems to show that defendant possessed firearms during the time frames alleged in both Counts 2 and 7, the second superseding indictment made clear that Count 2 related to possession of firearms in furtherance of the drug conspiracy in Count 1, and Count 7 related to the possession of firearms in furtherance of the substantive drug count in Count 6 [Doc. 243]. In light of the testimony described above, the jury's decision to convict on Count 2 and acquit on Count 7 could reasonably be interpreted as a determination that defendant possessed firearms to further the conspiracy, but not necessarily to further his personal distribution of methamphetamine in July 2019, as charged in Count 6. This conclusion would not be arbitrary or unreasonable in light of the testimony presented.

Moreover, to the extent that the jury's verdict on Counts 2 and 7 are inconsistent, the Court finds that such inconsistency is unreviewable. *See Powell*, 469 U.S. at 64–65. The second exception to the general rule against review of inconsistent verdicts does not apply, as it is only applicable "when a defendant is *convicted* of two 'logically inconsistent' crimes." *Hofstetter*, 31 F.4th at 434. Further, in light of the evidence described above, the

Court finds that the jury's verdicts on Counts 2 and 7, even if inconsistent, are not arbitrary or irrational. And, the Court finds that the testimony summarized above provided sufficient evidence for a rational jury to convict on Count 2. Accordingly, defendant's request for a judgment of acquittal as to Count 2 is **DENIED**.

B. Double Jeopardy

Defendant next argues that he is entitled to a judgment of acquittal on Count 1, the charged drug conspiracy [Doc. 531, p. 2]. Defendant states that the proof at trial from Hounschell indicated that the drug conspiracy charged in Count 1 also involved the distribution of "crack" cocaine, and defendant previously pleaded guilty to conspiracy to distribute "crack" cocaine in a related case. Accordingly, defendant contends that double jeopardy principles should bar his conviction as to Count 1 [*Id.*].

The government responds that defendant's double jeopardy argument is both legally meritless and factually mistaken [Doc. 534, p. 17]. The government notes that this issue was previously litigated [*Id.* at 17–18]. Additionally, the government states that Hounschell testified at trial that he had personal knowledge of defendant selling cocaine, not crack cocaine [*Id.* at 18]. The government states that the fact that Hounschell himself may have sold some crack cocaine on the side does not convert defendant's separate agreement with others to conspire to distribute crack cocaine (as charged in the related case) into the same agreement to conspire to distribute the various drugs charged in this case [*Id.*].

As background, in September 2019, defendant was individually indicted in a separate case on one count of conspiracy to distribute and possess with intent to distribute a quantity of crack cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(C) [Case No. 3:19-cr-152, Doc. 1]. Shortly thereafter, defendant pled guilty to this charge [*Id.*, Docs. 15, 23, 25, 27]. Defendant has not yet been sentenced for that conviction.

In September 2020, defendant moved in this case to dismiss the charges against him on double jeopardy grounds, arguing that his guilty plea to a conspiracy in Case Number 3:19-cr-152 related to the same conspiracy for which he was charged in this case [Doc. 193]. United States Magistrate Judge Debra C. Poplin issued a report and recommendation ("R&R") recommending that the Court deny defendant's motion to dismiss [Doc. 322]. Judge Poplin provided a thorough analysis of the relevant considerations under *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983), which set forth five factors to be considered in determining whether two drug conspiracies charged in an indictment violate the double jeopardy clause [*Id.* at 5–12].

Defendant then objected to Judge Poplin's weighing of the *Sinito* factors [Doc. 323, pp. 2–4]. However, this Court overruled defendant's objections, accepted the R&R in whole, and denied defendant's motion [Doc. 332]. The Court noted that defendant's objections were largely conclusive, arguing simply that the Court should reach a different result from the *Sinito* factors [*Id.* at 3]. Nevertheless, after a *de novo* review, the Court agreed with Judge Poplin's assessment of these factors and concluded that, based on the

totality of the circumstances, there were two separate conspiracies, and therefore, no double jeopardy violation [*Id.* at 3–4].

In the course of moving for a judgment of acquittal, defendant renewed his prior double jeopardy motion [Doc. 537-2, p. 256–57]. The Court denied defendant's motion for judgment of acquittal on this ground, citing the reasons in its prior order [Doc. 554, p. 134]. Defendant now summarily re-argues his position on this issue [Doc. 531, p. 2].

The Court finds no reason to deviate from its prior holding on this issue, which the Court incorporates into this memorandum and order. And, to the extent that defendant argues that the analysis has changed based on trial testimony from Hounschell, the Court does not find that Hounschell's testimony supports a conclusion that the conspiracy charged in Count 1 of the second superseding indictment also involved the distribution of crack cocaine. Hounschell testified that he personally sold crack cocaine, but, on cross-examination, he said that crack cocaine was not a primary drug sold by the Vice Lords and denied knowledge of other Vice Lords selling crack cocaine as part of the conspiracy charged in Count 1 [Doc. 537-2, pp. 123, 124–25, 127]. Specific to this defendant, Hounschell made clear that he only knew defendant to be involved in selling powder cocaine as part of this conspiracy, not crack cocaine, stating the following:

Q: And you said he was selling cocaine?

A: Cocaine.

Q: Okay. You were aware that he was selling cocaine in this conspiracy?

A: But not crack cocaine. Crack and cocaine is two different things.

Q: Okay. Okay. So crack cocaine but not regular cocaine?

A: Cocaine.

Q: Okay. The powder?

A: Yeah.

Q: Okay. Not crack?

A: Not crack.

Q: Okay. Do you have any personal knowledge whether he was selling crack cocaine as part of this conspiracy?

A: No, sir.

[*Id.* at 127–28]. The Court does not find that Hounschell's testimony that he personally was involved in some level of selling crack cocaine, but that he did not know defendant, or any other Vice Lords to be selling crack cocaine as part of the instant drug conspiracy, to establish that the sale of crack cocaine was part of the instant conspiracy. Accordingly, the Court adopts and incorporates its prior analysis on the double jeopardy issue [Docs. 323, 332], and defendant's request for a judgment of acquittal on Count 1 is therefore **DENIED**.

C. Courtroom Seating Arrangement and *Voir Dire*

Finally, defendant argues that he is entitled to a new trial on all charges of conviction based on the denial of his right to a jury trial under the Sixth Amendment [Doc. 531, p. 2]. Defendant contends that, due to the seating arrangement in the courtroom, his view of all of the jurors during *voir dire* was blocked by the podium, and he was therefore unable to gauge juror reactions to questions and comments of trial counsel, thereby prejudicially

impairing his ability to select a fair jury. Additionally, defendant states that he was shackled with leg irons, which prevented him from moving about to see the jury and the reactions of its members to questions during *voir dire* [*Id.*].

The government responds that, prior to *voir dire*, the Court instructed defense counsel that they could re-position themselves in the courtroom to modify their vantage point, if they so desired [Doc. 534, pp. 18–19]. The government states that all defendants were physically present during *voir dire* and able to converse with their respective counsel [*Id.* at 19]. Further, the government states that defendant has cited no authority for his claim that the Constitution requires him to be able to view all the jurors at all times [*Id.*]. The government further argues that, even if defendant's partial visual obstruction was error, any such error would be harmless [*Id.* at 20].

As background, the sheer number of defendants proceeding to trial collectively in this case necessitated rearrangement of the standard courtroom set-up, to create sufficient space for all eight defendants and eight defense attorneys. To do so, the Court extended the standard defense table into an L-shape, directly across from the jury box, by adding several additional tables. This set-up was in place at the time of the final pretrial conference. At the final pretrial conference, counsel for a co-defendant raised concerns about the podium in the middle of the courtroom, stating that he could not see several juror seats in the jury box as a result of the podium's placement [Doc. 846, p. 133]. The Court explained that the podium and accompanying equipment could not be moved and suggested that counsel be permitted to stand up during *voir dire* [*Id.*]. Co-defendant's counsel agreed

that such would be an acceptable solution [*Id.* at 134]. Neither defendant nor his counsel lodged an objection to this solution at the final pretrial conference.

Before the start of trial, however, Mr. Gulley, defendant's counsel, raised concerns that the podium, which was situated between the L-shaped table and the jury box, might affect counsel's and defendant's view of the jurors [Sealed Doc. 540, p. 8]. Other counsel joined in Mr. Gulley's concern, and the Court asked for suggestions from counsel, noting that it was "constrained by the number of people participating in this trial" [*Id.* at 9]. The Court explained that the podium could not be significantly moved because of the electrical wiring to the podium [*Id.*]. The Court ultimately reiterated that defense counsel, and particularly Mr. Gulley, could move around the courtroom during *voir dire* as necessary to ensure they had an unobstructed view of the jury panel in its entirety [*Id.* at 11].

The Court photographed the courtroom set-up for the record [Def. Exs. 17A, 17B, 17C (view of jury box from defense table), 17D (view of jury box set-up from gallery, behind defense table)]. To the Court's recollection, Mr. Gulley did not take advantage of the Court's offer to permit counsel to move around the courtroom during *voir dire*.

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The primary purpose of *voir dire* "is to make possible the empaneling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel." *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001) (internal quotation marks omitted). A "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges[.]"

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). Despite thorough research on this matter, the Court has uncovered no cases directly addressing visibility issues related to potential jurors during *voir dire*.

The Sixth Circuit has, however, addressed constitutional arguments related to a defendant's absence during the *voir dire* stage of a trial. *United States v. Riddle*, 249 F.3d 529 (6th Cir. 2001). The court acknowledged that Federal Rule of Criminal Procedure 43 mandates that a defendant be present at every stage of a trial, including the impaneling of a jury, but explained that "[t]his right is more extensive than that guaranteed by the Constitution." *Id.* at 534. The court held that "the right to be present at voir dire is not one of those structural rights whose violation constitutes per se error. Rather, there must be prejudice in the absence to warrant reversal." *Id.* at 535.

The Second Circuit has also addressed whether a district court's bringing certain venire members to the bench to be questioned on limited issues, outside the hearing of defendants, violated defendant's Fifth and Sixth Amendment rights. *United States v. Feliciano*, 223 F.3d 102 (2d Cir. 2000). The Second Circuit ultimately declined to specifically determine whether the district court's decision to exclude defendants from the limited bench questioning was error, because, even if it was error, it was not a structural error that required reversal. *Id.* at 112. The court noted that the defendants were present in the courtroom for the entire jury selection process, with most of the questioned answered in open court, and were provided unlimited opportunity to consult with their counsel at any time during the limited bench questioning, as well as during the peremptory challenge

process. *Id.* In light of these facts, the Second Circuit concluded that "any error here was not of such dimension as to undermine the integrity of the trial[.]" *Id.*

Turning to the facts of this case, the Court finds that any limited visibility of the jury venire was not a structural error that requires reversal. First, the Court acknowledges the importance of in-person observation of the *voir dire* process for purposes of ensuring the selection of a fair and impartial jury. However, under the specific facts of this case, some modifications to the Court's usual *voir dire* process were simply necessary. Several factors played into the Court's decisions on how to conduct the *voir dire* process in this case, including: (1) the number of trial defendants; (2) the anticipated length of trial; (3) the limited space in the courtroom; (4) security concerns; and (5) the ongoing COVID-19 pandemic. In fact, the combination of these concerns required the Court to call a significant number of potential jurors, and conduct *voir dire* in two phases, because all of the potential jurors could not fit into the courtroom for one *voir dire* proceeding. The Court spent extensive time and effort planning the logistics of this trial, including the *voir dire* process, and discussed its plans, while also soliciting other suggestions from counsel at the final pretrial conference. And, when the visibility issue was raised by counsel at the final pretrial conference, the Court offered that counsel could move around the courtroom during *voir dire* as necessary to see the entire jury venire.

The Court finds that this was a reasonable solution to the visibility issue presented. As the Court explained to counsel before the start of trial, the podium in the courtroom that obstructed some parties' view of the jurors could not be moved any significant distance

because electronic equipment attached to the podium was wired into the courtroom floor. Moreover, after the Court offered the solution that counsel be permitted to move about the courtroom, no counsel provided any alternative course of action to resolve the problem. That defendant's counsel may not have taken advantage of the opportunity the Court provided to move around the courtroom to better observe the jurors during *voir dire* is of no consequence in this analysis, as the Court offered the option to protect defendant's rights during the *voir dire* process, and any complaint regarding counsel's conduct thereafter is more appropriately raised as a claim of ineffective assistance of counsel in a motion under 28 U.S.C. § 2255.

The Court does acknowledge that its solution only related to defense counsel's observation of the jurors, not defendant's. As defendant notes, due to security concerns, he was wearing leg shackles during the course of the trial, and therefore, could not move around the courtroom during *voir dire*. To the extent that defendant seeks to challenge the Court's decision to authorize the United States Marshals Service to use leg shackles on him during the trial, the Court thoroughly analyzed this issue in a written order [Doc. 485] and defendant has presented no ground for challenging that decision. And, while defendant was unable to move around the courtroom to view the potential jurors during *voir dire*, he was able to hear all *voir dire* questions and answers, his counsel was permitted to move around during *voir dire*, and he was given unlimited opportunity to discuss the *voir dire* proceedings with his attorney. Accordingly, the Court finds this case substantially comparable to *Feliciano*, and concludes that any error stemming from the partial

obstruction of defendant's personal view of the jurors during *voir dire* was harmless and does not require a new trial. Defendant's request for a new trial is therefore **DENIED**.

IV. Conclusion

For the reasons discussed, the Court finds, after viewing the evidence in a light most favorable to the government, that a rational trier of fact could have found beyond a reasonable doubt that defendant was guilty as to the counts of conviction, and that no constitutional error requires the reversal of defendant's convictions or a new trial. Neither a judgment of acquittal nor a new trial is warranted, and defendant's motion [Doc. 531] is therefore **DENIED**.

IT IS SO ORDERED.

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 3:19-CR-151-TAV-DCP-7
	)	
MAHLON T. PRATER, JR.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This case is before the Court on defendant's Motion to Dismiss Superseding Indictment [Doc. 193]. This Court referred the motion to United States Magistrate Judge Debra C. Poplin, who issued a Report and Recommendation ("R&R") recommending that the Court deny defendant's motion [Doc. 322]. Defendant objected to the R&R [Doc. 323], and the government responded [Doc. 324]. Because the Court agrees with Judge Poplin's conclusion, it will **OVERRULE** defendant's objections [Doc. 323], **ACCEPT IN WHOLE** the R&R [Doc. 322], and **DENY** defendant's Motion to Suppress Evidence [Doc. 193].

I. Background

The Court presumes familiarity with the R&R's description of the background. Neither party objected to the magistrate judge's description of the background of the case and the positions of the parties. The Court, therefore, incorporates this section by reference from the R&R as background.

II. Standard of Review

A court must conduct a *de novo* review of those portions of a magistrate judge's report and recommendation to which a party objects unless the objections are frivolous, conclusive, or general. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); *Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987); *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). "Objections disputing the correctness of the magistrate's recommendation, but failing to specify the findings believed to be in error are too general and therefore insufficient." *Stamtec, Inc. v. Anson*, 296 F. App'x 516, 519 (6th Cir. 2008) (citing *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006)). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations" made by the magistrate judge. 28 U.S.C. § 636(b)(1).

III. Analysis

Defendant makes two objections to the R&R [Doc. 323]. First, defendant objects to Judge Poplin's conclusion that the factors considered under *United States v. Sinito* indicate the two drug conspiracies[1] are separate and distinct conspiracies [*Id*. p. 4]. 723 F.2d 1250, 1256 (6th Cir. 1983). Second, defendant objects to Judge Poplin's recommendation to deny defendant's motion because Counts Two and Seven were not multiplicitous [*Id*. p. 4]. The Court will address each argument in turn.

[1] The Court will herein refer to case no. 3:19-cr-151 as "case no. 151" and case no. 3:19- cr-152 as "case no. 152."

A. Double Jeopardy

Defendant objects to Judge Poplin's conclusion that after analyzing the *Sinito* factors, "the two drug conspiracies are separate and distinct offenses and not barred by the double jeopardy clause" [Doc. 32 p. 12]. Defendant states the factors "militate[] overall in favor of dismissal" because the timing of the conspiracies overlaps, the co-conspirators in case no. 152 are undisclosed, there are no overt acts charged in the conspiracies, and both of the alleged multiple conspiracies took place within the Eastern District of Tennessee [Doc. 323]. Defendant does not object to Judge Poplin's analysis of the third factor, the statutory offenses charged.

However, defendant's objections are largely conclusive, arguing the Court should reach a different result from the *Sinito* factors. As the government notes in its response, defendant cites no cases to support his interpretations and conclusions on these facts [Doc. 324 p. 1]. After a careful *de novo* review of the parties' briefing and the R&R, the Court agrees with and incorporates the Judge Poplin's analysis as the totality of the circumstances favors a finding of two separate conspiracies.

For example, the Court highlights in particular the strength of the fourth and fifth factors, "the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case" and "places where the events alleged as part of the conspiracy took place." *Sinito*, 723 F.2d at 1256. Defendant states there were no overt acts contained within the indictments in these cases [Doc. 323 p. 3], but the Court may also look at any

other description indicating the nature and scope of the activity. *Id.* Though defendant maintains that most events in each alleged conspiracy occurred in this District, the conspiracy in case no. 152 was limited to Knoxville, whereas the conspiracy in case no. 151 included four cities in the Eastern District as well as having connections to Nashville, Tennessee and California. As Judge Poplin noted, the conspiracies also involve distribution of different drugs in vastly different amounts [Doc. 322 p. 10].

Defendant's objection to Judge Poplin's conclusion is therefore **OVERRULED** as the Court finds the two alleged conspiracies are separate and distinct offenses.

B. Multiplicity

Defendant objects to Judge Poplin's conclusion that the charges in Count Two and Seven of the Second Superseding Indictment are not multiplicitous [Doc. 322 p. 15]. Defendant admits that Count Two charges defendant with possession of a firearm in furtherance of the conspiracy charged in Count One and Count Seven charges defendant with possession in furtherance of the distribution of methamphetamine as charged in Count Six [Doc. 323 p. 4]. Defendant argues "given that the alleged distribution of methamphetamine appears to constitute an overt act in furtherance of the conspiracy," the charges "thus reflect the same conduct" which "violates the Fifth Amendment proscription against multiplicitous indictments" [*Id*]. However, a conspiracy count and a substantive offense that comprises an overt act in furtherance of the conspiracy can both support a § 924(c) conviction. The Sixth Circuit has stated that "Congress intended section 924(c) to serve as an enhancement to other drug trafficking crimes whether they be conspiracies

or substantive offenses." *United States v. Gibbons*, 994 F.2d 299, 302 (6th Cir. 1993). When the statute then indicates Congress had "authorized multiple punishments based on committing a crime in a particular manner, here using a firearm, the resulting sentences do not violate the double jeopardy clause." *Id*. The Sixth Circuit thus affirmed a defendant's two § 924(c) charges that each corresponded to a charge of possession with intent to distribute and a conspiracy to distribute charge. Therefore, both Counts Two and Seven may both sustain their own § 924(c) charge without violating the Fifth Amendment. Accordingly, defendant's objection is **OVERRULED**.

IV. Conclusion

For the reasons discussed herein, and upon careful, *de novo* review of the record and the law, defendant's objections [Doc. 323] are **OVERRULED**. The Court **ACCEPTS IN WHOLE** the R&R [Doc. 322] and incorporates it into this Memorandum Opinion and Order. Accordingly, defendant's Motion to Dismiss Superseding Indictment [Doc. 193] is **DENIED**.

IT IS SO ORDERED.

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	No. 3:19-CR-151-TAV-DCP-7
	)	
MAHLON T. PRATER, JR.,	)	
	)	
Defendant.,	)	

REPORT AND RECOMMENDATION

All pretrial motions in this case have been referred to the undersigned pursuant to 28 U.S.C. § 636(b) for disposition or report and recommendation regarding disposition by the District Court as may be appropriate.

Now before the Court is Defendant's Motion to Dismiss Superseding Indictment [Doc. 193], filed on September 18, 2020, to which the Government filed a Response [Doc. 231 at 46–54] on October 2, 2020.

The Court held a motion hearing on December 2, 2020. [Doc. 307]. Assistant United States Attorney David Lewen appeared on behalf of the Government, while Attorney Gerald Gulley, Jr., appeared on behalf of Defendant, who was also present. Accordingly, for the reasons detailed below, after reviewing the parties' briefs and the relevant legal authorities, the Court recommends that Defendant's Motion to Dismiss Superseding Indictment [Doc. 193] be denied.

I. BACKGROUND AND POSITIONS OF THE PARTIES

In a separate case, No. 3:19-cr-152, Defendant was the sole defendant and indicted on September 4, 2019 on a single count of conspiracy to distribute and possess with intent to distribute cocaine base, a Schedule II controlled substance, as early as in or around December of 2018 continuing through April of 2019 in the Eastern District of Tennessee and elsewhere, in violation

of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). *See United States v. Mahlon T. Prater*, No. 3:19-cr-152-TAV-DCP (E.D. Tenn. Sept. 4, 2019) [Doc. 1]. A plea agreement was filed on this count on October 16, 2019, which states that "[o]n at least 6 separate occasions within the charged conspiracy dates, the defendant sold crack cocaine to a confidential source" and "[d]uring the charged conspiracy period the defendant sold or conspired to sell approximately 30 grams of crack cocaine." [Doc. 15 in 3:19-cr-152]. Defendant entered his guilty plea on November 22, 2019 [Doc. 23 in 3:19-cr-152], which was ultimately accepted on December 17, 2019 [Doc. 27 in 3:19-cr-152].

Also on September 4, 2019, the grand jury returned an Indictment [Doc. 3] in the present case (no. 3:19-cr-151) against Defendants Alim Turner, Ushery Stewart, Ronald Turner, Kedaris Gilmore, Christopher Hounschell, and Michael Stewart, charging these defendants with conspiring to knowingly and intentionally distribute, and possess with intent to distribute, fifty (50) grams or more of methamphetamine, in violation of 18 USC §§ 846, 841(a)(1) and 841(b)(1)(A).

Defendant was subsequently indicted in the Superseding Indictment in the present case [Doc. 78] on March 3, 2020 and charged with:

> Count One: Conspiracy to possess and distribute Schedule I, II, III, and IV controlled substances, including 50 grams or more of methamphetamine; a quantity of fentanyl; a quantity of oxycodone; a quantity of alprazolam; a quantity of marijuana; a quantity of buprenorphine; and, a quantity of heroin, [from on or about July 15, 2018, through on or about November 22, 2019, in the Eastern District of Tennessee and elsewhere], in violation of 21 U.S.C. § 846;
>
> Count Two: Possession of a firearm in furtherance of drug trafficking [between the dates of on or about July 15, 2018, and continuing thereafter until or on about September 6, 2019 in the Eastern District of Tennessee], in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (2);
>
> Count Four: Aiding and abetting to possess with intent to distribute 50 grams or more of methamphetamine [on or about July 15, 2019 in the Eastern District of Tennessee], in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and 18 U.S.C. § 2:

> Count Six: Knowingly and intentionally distributing 50 grams or more of methamphetamine, a Schedule II controlled substance, [in or around the end of July 2019, in the Eastern District of Tennessee], in violation of 21 U.S.C. § 841 (a)(1) and 841 (b)(1)(A); and
>
> Count Seven: Knowingly and unlawfully possessing a firearm in furtherance of drug trafficking, [in or around the end of July 2019, in the Eastern District of Tennessee], in violation of 18 U.S.C. § 924(c)(1)(A)(i).

A Second Superseding Indictment [Doc. 243] was subsequently returned on October 8, 2020 with the same charges against Defendant.[1]

A. Double Jeopardy

Defendant asserts [Doc. 193] that the two charged conspiracies (Count One in 3:19-cr-152 and Count One in 3:19-cr-151)[2] are a part of the same conspiracy and the Fifth Amendment precludes his conviction on Count One of the Indictment in the present case after his guilty plea in case no. 152. Defendant claims that applying the appropriate "totality of the circumstances" analysis, including the factors set forth in *United States v. Sinito*, 723 F.2d 1250 (6th Cir. 1983), provides that the two conspiracies are the same and the overall conspiracy is one large scheme. [Doc. 194 at 3]. Accordingly, Defendant asserts that the Fifth Amendment precludes the prosecution of Count One in case no. 151, and thus "that charge must be dismissed . . . as well as the charged overt acts in Count Four and Count Six that relate to the drug conspiracy charged in Count One." [*Id.* at 8].

Defendant maintains that a portion of the Rule 16 discovery provided to him in case no. 152 on February 2, 2020 "contained Fifteen-Day Reports to the Court, a Periodic Report to the

[1] Therefore, the Court will refer to the Superseding Indictment [Doc. 78] as discussed in the parties' briefing.

[2] The Court will herein refer to case no. 3:19-cr-151 as "case no. 151" and case no. 3:19-cr-152 as "case no. 152."

Court, and Applications for Search Warrants" which provided information on Defendant "discussing the sale of an illegal drug with an unknown individual; and information about Alim Turner, Ushery Stewart, Christopher Hounschell, Kedaris Gilmore, and Jyshon Forbes involved in the sale or purchase of methamphetamine and/or marijuana, as well as information about the use of firearm by Alim Turner that was associated with drugs trafficking, and the possession of a firearm by Ushery Stewart that presumably associated with drug trafficking." [*Id.* at 2]; *see* [Doc. 194-1]. These individuals are all codefendants in the present case, while Defendant is the sole individual charged in case no. 3:19-cr-152.

The Government responds [Doc. 231 at 46–54] that the Indictments do not violate the double jeopardy clause of the Fifth Amendment. The Government reviews the same factors addressed by Defendant in *Sinito* and maintains that the two conspiracies do not arise from a single agreement. With respect to the provided discovery allegedly for case no. 152, the Government asserts [*Id.* at 46] that it contacted defense counsel on January 21, 2020 and informed him that the Government sought to seek a Superseding Indictment in case no. 151, which would include Defendant, charging him with multiple offenses. The Government then provided Defendant with the supplemental discovery for all defendants in case no. 151 "as a professional courtesy," although the discovery letter listed case no. 152 in the heading because it was "the only case pending before the Court in which Defendant Prater was a named Defendant." [*Id.* at 47]. As detailed above, Defendant was subsequently charged in the Superseding Indictment [Doc. 78] in the present case on March 3, 2020.

B. Multiplicity

Defendant also alleges that he may not be convicted of both Count Two and Count Seven of the Superseding Indictment in case no. 151, as "the facts underlying the two separate counts

appear to constitute a single unit of prosecution" and thus "violates the Fifth Amendment proscription against multiplicitous indictments." [Doc. 194 at 8]. Defendant details that Count Two charges him with possessing a firearm in furtherance of the drug conspiracy charged in Count One, while Count Seven charges him with possessing a firearm in furtherance of the distribution of methamphetamine as charged in Count Six. Therefore, Defendant asserts these charges "involve the same time frame and—given that the alleged distribution of methamphetamine appears to constitute an overt act in furtherance of the conspiracy charged in Count One—thus reflect the same conduct." [*Id.*].

The Government responds [Doc. 231 at 53–54] that "the Superseding Indictment's two § 924(c) charges against Defendant Prater are grounded in separate predicate acts," as Count Two "is predicated on the drug trafficking conspiracy in Count One," while Count Seven "is predicated on the separate, substantive drug distribution crime in Count Six." [*Id.* at 53].

II. ANALYSIS

A. Double Jeopardy

The Fifth Amendment prevents persons "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "That clause protects criminal defendants from prosecution following conviction or acquittal for the same offense, and also prohibits infliction of 'multiple punishments for the same offense imposed in a single proceeding.'" *Jones v. Harry*, 405 F. App'x 23, 28 (6th Cir. 2010) (quoting *Jones v. Thomas*, 491 U.S. 376, 381 (1989)). "Determining whether two drug conspiracies charged in an indictment violate the double jeopardy clause requires examining the 'totality of the circumstances' by applying '*Sinito*'s five-factor test.'" *United States v. Frazier*, No. 3:17-CR-130, 2019 WL 4242412, at *11 (M.D. Tenn. Sept. 6, 2019) (quoting *United States v. Wheeler*, 535 F.3d 446, 456 (6th Cir. 2008)).

The *Sinito* factors consider "(1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place." *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983); *accord United States v. Meda*, 812 F.3d 502 (6th Cir. 2015). "These factors assist in answering the ultimate question: 'whether the evidence shows one agreement or more than one agreement.'" *United States v. Kennedy*, 743 F. App'x 649, 653 (6th Cir. 2018) (quoting, *In re Grand Jury Proceedings*, 797 F.2d 1377, 1380 (6th Cir. 1986)). "Where several of these factors differ between the conspiracies, the conclusion follows that the alleged illegal conspiracies are separate and distinct offenses." *Sinito*, 723 F.2d at 1256. Ultimately, after a review of the relevant factors set forth in *Sinito*, the Court finds that no double jeopardy bar exists between Count One in case no. 151 and Count One in case no. 151.

1. Time

First, the parties agree that the conspiracy charged in case no. 152 is alleged to have occurred from December 2018 through in or around of April 2019 [Doc. 1 in 3:19-cr-152], while the drug conspiracy in the present case, no. 151, is alleged to have occurred from on or about July 15, 2018 through on or about November 22, 2019 [Doc. 78]. While Defendant correctly states that the conspiracies overlapped in time, the charged conspiracy in the present case involved a more extensive period of time—approximately sixteen months versus approximately four months. *See, e.g., United States v. Frazier*, No. 3:17-CR-130, 2019 WL 4242412, at *12 (M.D. Tenn. Sept. 6, 2019) ("The time frame is entirely different. Count Two alleges a three-year drug conspiracy lasting from March 2015 to the return of the Third Superseding Indictment on June 28, 2018. Count

Twenty-Eight alleges a 16-day conspiracy that began on January 1, 2016 and ended on January 16, 2018.").

While the length of the conspiracy in case no. 152 was lengthier than the example in *Frazier*, the Sixth Circuit has found that although a subsequent indictment "overlaps and subsumes the time period in the initial indictment . . . this is not conclusive evidence of a single conspiracy." *United States v. Lacey*, 983 F.2d 1070 (Table), 1993 WL 1292 at *7 (6th Cir. 1993). Therefore, the Court finds that this factor weighs against Defendant, as the conspiracies involve different lengths and intervals of time

2. Persons Acting as Co-Conspirators

Ultimately, *Sinito* "hold[s] that two distinct conspiracies can be found 'even though they may involve some of the same participants.'" *United States v. Goff*, 400 F. App'x 1, 9 (6th Cir. 2010) (quoting *Sinito*, 723 F.2d at 1257). However, in the present case, the participants in the two conspiracies at issue are completely different. Defendant points to the discovery letter provided by the Government in case no. 152 including Fifteen-Day Reports, Periodic Court Reports, and search warrant information about Codefendants (in case no. 151) Alim Turner, Ushery Stewart, Kedaris Gilmore, and Jyshon Forbes. The Government, however, explained that it informed defense counsel that Defendant would be included in the upcoming Superseding Indictment in case no. 151, and sent the initial discovery as a professional courtesy. While the heading of the discovery letter lists case no. 152, it is clear to the Court that the provided discovery refers to case no. 151. Defendant fails to point to any additional evidence supporting his claim that the two charged conspiracies involve the same co-conspirators.

Defendant is the only individual named in the Indictment in case no. 152, while the Superseding Indictment (and Second Superseding Indictment) in the present case includes twelve

individuals as Codefendants—including Codefendants Alim Turner, Ushery Stewart, Kedaris Gilmore, and Jyshon Forbes. *See, e.g.*, *United States v. Goff*, 187 F. App'x 486, 492 (6th Cir. 2006) ("As to the second factor, there is no overlap whatsoever between the three coconspirators alleged in *Avila* and the nine alleged here[.]"); *United States v. Toaz*, 59 F. App'x 94, 101 (6th Cir. 2003) ("Toaz is the only conspirator that is mentioned in both indictments. Given the extent of the conspiracies alleged, the overlap of a single defendant does not indicate a single conspiracy."). Moreover, Defendant's plea agreement in case no. 152 lists only that Defendant "worked with others to sell crack cocaine," as "[o]n at least 6 separate occasions within the charged conspiracy dates, the defendant sold crack cocaine to a confidential source," and "[o]n one additional occasion, the defendant arranged the transaction over the telephone." [Doc. 15 in 3:19-cr-152]. The charged conspiracy in the present case, which the Court will subsequently discuss in greater detail, involved a significant increase in both named and unnamed co-conspirators. Therefore, the Court finds that this factor also weighs against Defendant's argument.

3. Statutory Offenses Charged

Here, the Court first notes that the statutory offenses are the same, as Defendant is charged with violations of 21 U.S.C. § 846 in both indictments at issue. However, "even if 'the statutory offenses charged are the same, . . . in context with the other factors, this is a minor point, since one can certainly enter two conspiracies to commit the same type of crime.'" *United States v. Wheeler*, 535 F.3d 446, 456 (6th Cir. 2008) (quoting *United States v. Ledon*, 49 F.3d 457, 460 (8th Cir. 1995)). The Court notes that Defendant is charged in Count One in case no. 152 with conspiracy to distribute and possess with intent to distribute cocaine base; whereas he is charged in Count One in case no. 151 with conspiracy to possess and distribute 50 grams or more of methamphetamine, as well as a quantity of oxycodone, alprazolam, marijuana, buprenorphine, and heroin. *See United*

States v. Darden, 353 F. Supp. 3d 697, 712–13 (M.D. Tenn. 2018) ("This is particularly true since the Kentucky indictment was limited to crack cocaine while the allegations here include a cornucopia of drugs."). Therefore, the Court finds that this factor weighs both for and against a double jeopardy bar. *See United States v. Kitchen*, 428 F. App'x 593, 596 (6th Cir. 2011) (finding no double jeopardy bar where "the two conspiracies involved different (although overlapping) time periods, different (although perhaps overlapping) locations, and different types of drugs").

4. Overt Acts Charged and the Nature and Scope of the Activity which the Government Sought to Punish

Defendant states that there were no overt acts charged in case no. 152, although he details the references in the plea agreement to the six occasions where he sold crack cocaine to a confidential source, and the one occasion where he arranged a transaction over the telephone. With respect to case no. 151, Defendant claims that there were no overt acts identified in Count One of the Superseding Indictment, but notes that he was also charged with attempting to illegally possess with intent to distribute fifty grams or more of methamphetamine (Count Four), as well as illegally distributing fifty grams or more of methamphetamine (Count Six). *See* [Doc. 78].

The Government claims that the conspiracy in case no. 152 "involved Defendant Prater working with a limited number of lower-level east Knoxville crack dealers, with Defendant Prater in turn selling small amounts of crack to an FBI confidential informant." [Doc. 231 at 51]. Conversely, the Government asserts that the "large scale conspiracy charged in case [no.] 151 includes different drugs in far larger quantities, sourced from Nashville and California via a Mexican drug distributor housed in a middle Tennessee prison with Defendant Ronald Turner, and which were subsequently distributed in several locations, including, Knoxville, Lenoir City, Cleveland, and Chattanooga, Tennessee." [*Id.*].

Ultimately, the two charged conspiracies at issue were vastly different in size and scope. *See United States v. Goff*, 187 F. App'x 486, 492 (6th Cir. 2006) ("As to the fourth factor, the instant indictment and the *Avila* indictment seek to punish conduct that is generally of the same nature but is not nearly of the same scope, particularly as to Goff's alleged concrete action in furtherance of the conspiracies."). As the Court detailed above, the charged conspiracy in case no. 152 involved the distribution of a small amount of crack cocaine; whereas as Count One in case no. 151 involved fifty grams or more in methamphetamine, as well as several additional controlled substances. Moreover, the Government detailed how the large-scale conspiracy in the present case included several co-conspirators and large amounts of methamphetamine—obtained from various Mexican sources of supply and subsequently distributed throughout the state—as established through the plea agreements of Codefendants Kiante Cooper, Christopher Hounschell, and Seth Curtis. *See* [Docs. 115, 128, 135].

The Court finds that the facts of the present case are analogous to *United States v. Darden*, where the Eastern District of Kentucky found that "the nature and scope of the activity that the Government seeks to punish [in two drug conspiracies] is different." 353 F. Supp. 3d at 713. Similar to Defendant in case no. 151, the indictment in *Darden* targeted drug trafficking activities of a gang, and the Government represented that the defendant "was involved in obtaining kilogram quantities of powder cocaine from his source in Atlanta, and cooking, packaging, and distributing controlled substance in Clarksville." *Id.* However, in the defendant's previous federal conviction, the defendant "pled guilty to conspiring to distribute more than fifty grams of crack cocaine base because he facilitated a single sale of 141.5 grams of crack cocaine to an informant in that case." *Id.*

Therefore, similar to *Darden*, the Court finds that the nature and scope of the activity which the Government sought to punish are vastly different due to the difference in the nature and scope of the two conspiracies. *See, e.g.*, *United States v. Frazier*, No. 3:17-CR-130, 2019 WL 4242412, at *12 (M.D. Tenn. Sept. 6, 2019) ("Count Two involves a wide-ranging conspiracy to distribute methamphetamine involving more than a dozen named individuals that lasted more than three years. In contrast, Count Twenty-Eight was a small conspiracy to distribute oxymorphone by a trio of named individuals over a course of little more than two weeks.").

5. Places Where the Events Took Place

While both indictments assert that the drug conspiracies were alleged to have occurred in the Eastern District of Tennessee, the Government has alleged, as discussed above, that the drug conspiracy in the present case involved a much larger geographic scale. *See, e.g.*, *id.* at *12–13 (holding "[i]f established at trial, this evidence indicates that the places where the events took place was different," where the Government alleged that the "large-scale methamphetamine trafficking conspiracy . . . had far-reaching consequences outside the State of Tennessee . . . and it involved a single, continuous and reliable source of supply, located in California," whereas the other pill conspiracy "was limited in scope to Tennessee").

Ultimately, weighing the totality of the circumstances in light of the five *Sinito* factors, the Court finds that the Government's proffered evidence preponderates in favor of the existence of two conspiracies. The record before the Court indicates that Count One in case no. 151 and Count Two in case no. 152 involved different agreements, parties, time periods, conduct, and controlled substances, and as such they did not constitute a "single agreement to commit several crimes," but rather "multiple agreements to commit separate crimes." *United States v. Broce*, 488 U.S. 563, 570–71 (1989); *see, e.g.*, *United States v. Goff*, 187 F. App'x 486, 493 (6th Cir. 2006) ("In sum, at

least three of the five factors militate against finding the *Avila* conspiracy to be the same as the conspiracy charged here."). Therefore, the Court finds that the two drug conspiracies are separate and distinct offenses and not barred by the double jeopardy clause. *See United States v. Sinito*, 723 F.2d 1250, 1256–57 (6th Cir. 1983) ("Where several of these factors differ between the conspiracies, the conclusion follows that the alleged illegal conspiracies are separate and distinct offenses.").

B. Multiplicity

Defendant also claims that the Superseding Indictment [Doc. 78] is multiplicitous and asserts that he may not be convicted of Count Two and Count Seven. As the Court previously detailed, these counts include:

> Count Two: Possession of a firearm in furtherance of drug trafficking [between the dates of on or about July 15, 2018, and continuing thereafter until or on about September 6, 2019 in the Eastern District of Tennessee], in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (2);
>
> Count Seven: Knowingly and unlawfully possessing a firearm in furtherance of drug trafficking, [in or around the end of July 2019, in the Eastern District of Tennessee], in violation of 18 U.S.C. § 924(c)(1)(A)(i).

[*Id.*]. Defendant maintains that "in reality these differing Counts involve the same time frame and—given that the alleged distribution of methamphetamine appears to constitute an overt act in furtherance of the conspiracy charged in Count One—thus reflect the same conduct." [Doc. 194 at 8].

The Government responds that the two separate § 924 (c) charges "are grounded in separate predicate acts: Count Two, which alleges that the named defendants aided and abetted each other in the possession of firearms in furtherance of a specified drug trafficking crime, is predicated on the drug trafficking conspiracy in Count One; Count Seven, which alleges that Defendant Prater

possessed a firearm in furtherance of a specified drug trafficking crime, is predicated on the separate, substantive drug distribution crime in Count Six." [Doc. 231 at 53].

"The Double Jeopardy Clause of the Fifth Amendment prohibits multiple punishments for the same criminal act or transaction." *United States v. Graham*, 275 F.3d 490, 519–20 (6th Cir. 2001). "In this Circuit, it is well-settled that because of the Double Jeopardy Clause's prohibition on multiple punishments a court may not impose more than one sentence upon a defendant for violations of section 924(c) which relate to but one predicate offense." *Id.* at 519 (brackets omitted) (quoting *United States v. Sims*, 975 F.2d 1225, 1233 (6th Cir. 1992)). However, the Sixth Circuit "ha[s] upheld convictions and sentences under 18 U.S.C. § 924(c)(1) so long as such convictions are based on separate predicate acts." *Id.* at 520. Thus, "[i]t is now firmly established that the imposition of separate consecutive sentences for multiple § 924(c) violations occurring during the same criminal episode are lawful." *United States v. Burnette*, 170 F.3d 567, 572 (6th Cir. 1999).

"[W]hen predicate offenses consist of non-identical conduct and are not committed simultaneously, these offenses are separate predicate acts that can support multiple convictions under 18 U.S.C. § 924(c)." *United States v. Angeles*, 484 F. App'x 27, 34 (6th Cir. 2012) (affirming two § 924(c) convictions based upon predicate offenses of kidnapping and carjacking). "[W]hile a temporal gap between predicate offenses may bolster a showing that predicate acts are separate, predicate offenses need not occur at different times in order to support multiple § 924(c) convictions. Rather, the fact that each offense requires proof of facts not required by the other offense appears to be sufficient to show that the predicate acts are separate." *Id.* at 34–35 (internal citation omitted).

However, "[a] conspiracy count and a substantive offense that comprises an overt act in furtherance of the conspiracy can both support a § 924(c) conviction." *United States v. Kincaid*, No. 3:10-CR-160, 2013 WL 1501988, at *12 (E.D. Tenn. Feb. 13, 2013), *report and recommendation adopted by*, 2013 WL 1501983 (E.D. Tenn. Apr. 12, 2013). In *Kincaid*, the applicable superseding indictment alleged in Count Two that "from in or about October 2009 through on or about December 14, 2010," the defendant possessed firearms in furtherance of a drug conspiracy alleged in Count One. *Id.* at *8. Additionally, Count Four alleged that the defendant, along with a codefendant, possessed oxycodone and morphine with the intent to distribute in violation of 18 U.S.C. § 841. *Id.* The defendant was also charged in Count Five that "on or about December 14, 2020," the defendant possessed firearms in furtherance of the drug trafficking crime alleged in Count Four. *Id.* However, Magistrate Judge Guyton found that:

> Based on the allegations in the Superseding Indictment the Court cannot find as a matter of law that Counts One and Four may not support separate § 924(c) convictions. These two counts do not allege identical conduct, but the Manner and Means section of Count One reveals that it alleges additional and different types of conduct than that alleged in Count Four. Although the allegations in Count Four occurred on the last day of the alleged conspiracy, the conspiracy went on much longer. Finally, Count One requires proof of a criminal agreement, which Count Four does not. Based upon the similarity of facts in *Gibson* discussed above, the Court finds that Defendant Randy Kincaid's charges in Count Two and Count Five are not multiplicitous.

Id. at *12.

Here, similar to *Kincaid*, the Court finds that Counts Two and Seven are based on separate predicate offenses that consist of non-identical conduct and were not committed simultaneously. The Sixth Circuit has noted that "Congress intended section 924(c) to serve as an enhancement to other drug trafficking crimes whether they be conspiracies or substantive offenses." *United States v. Gibbons*, 994 F.2d 299, 302 (6th Cir. 1993) (holding "[w]here statutory intent clearly indicates that Congress authorized multiple punishments based on committing a crime in a particular

manner, here using a firearm, the resulting sentences do not violate the double jeopardy clause"). In *Gibbons*, the Sixth Circuit affirmed the defendant's convictions for a section 924(c) charge that corresponded to a charge of possession with intent to distribute, as well as a section 924(c) "firearm conspiracy charge" that corresponded to a conspiracy to distribute charge. *Id.*; *see also Kincaid*, 2013 WL 1501988 at *12.

In the present case, Count Two charges broad and extensive conduct from July 15, 2018 through September 6, 2019 and is alleged to be in furtherance of the overarching conspiracy set forth in Count One. However, Count Seven is based upon the distribution of methamphetamine charge in Count Six, which was alleged to have occurred in or around the end of July 2019. Additionally, the conspiracy count alleged in Count One requires the proof of a criminal agreement, which the distribution charge in Count Six does not. Again, the Court notes that "[a] conspiracy count and a substantive offense that comprises an overt act in furtherance of the conspiracy can both support a § 924(c) conviction." *Id.*

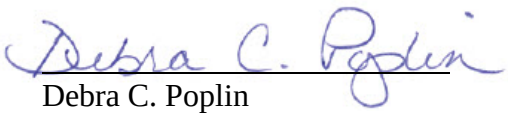
Therefore, the Court finds that the charges against Defendant in Count Two and Count Seven are not multiplicitous. Accordingly, the Court recommends that Defendant's Motion to Dismiss [Doc. 193] be denied. However, the Court notes that the denial of this motion does not preclude Defendant from raising the issue again at the close of the proof at trial, in a post-verdict motion to vacate his conviction, or at sentencing, depending on the proof for Counts Two and Seven. *See United States v. Throneburg*, 921 F.2d 654, 656–57 (6th Cir. 1990) (finding election between multiplicitous counts prior to trial is appropriate when "the mere making of the charges would prejudice the defendant with the jury"); *see also United States v. McCafferty*, 482 F. App'x 117, 126 (6th Cir. 2012) ("[T]he proper remedy for multiplicitous counts may include allowing the jury to consider all counts that are reasonably supported by the evidence and addressing any

multiple-punishment issues at sentencing by merging overlapping convictions.") (citing *Ball v. United States*, 470 U.S. 856, 864–65 (1985)).

III. CONCLUSION

Accordingly, the undersigned respectfully **RECOMMENDS**[3] that that Defendant's Motion to Dismiss Superseding Indictment [**Doc. 193**] be **DENIED**.

Respectfully submitted,



Debra C. Poplin
United States Magistrate Judge

[3] Any objections to this report and recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Fed. R. Crim. P. 59(b)(2) (as amended). Failure to file objections within the time specified waives the right to review by the District Court. Fed. R. Crim. P. 59(b)(2); *see United States v. Branch*, 537 F.3d 582, 587 (6th. Cir. 2008); *see also Thomas v. Arn*, 474 U.S. 140, 155 (1985) (providing that failure to file objections in compliance with the required time period waives the right to appeal the District Court's order). The District Court need not provide de novo review where objections to this report and recommendation are frivolous, conclusive, or general. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370, 1373 (6th Cir. 1987).