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IN THE
SUPREME COURT OF THE UNITED STATES

DEMETRIUS D. BIBBS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

6th Circuit Case No. 22-6056

PETITION FOR WRIT OF CERTIORARI

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pursuant to the Criminal Justice Act of 1964*

QUESTIONS PRESENTED

I. Whether there is insufficient evidence for a rational trier of fact to convict Mr. Bibbs of conspiracy to distribute heroin and possession of a firearm by a convicted felon, and whether the convictions were against the manifest weight of the evidence.

II. Whether the proof at trial of multiple conspiracies, rather than the single conspiracy alleged in Count One of the second superseding indictment, constitutes a fatal variance between the proof at trial and the indictment that requires Mr. Bibbs' conspiracy conviction be vacated.

III. Whether the verdicts are so inconsistent as to be arbitrary or irrational.

IV. Whether the sentence imposed by the trial court is procedurally and substantively unreasonable and excessive.

RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

United States v. Alim Turner

Sixth Circuit Case No. 22-5046 (decided August 2, 2024)

United States v. Ronald Turner

Sixth Circuit Case No. 22-5107 (decided August 2, 2024)

United States v. Kedaris Gilmore

Sixth Circuit Case No. 22-5131 (decided August 2, 2024)

United States v. Ushery Stewart

Sixth Circuit Case No. 22-5681 (decided August 2, 2024)

United States v. Mahlon Prater, Jr.

Sixth Circuit Case No. 22-5599 (decided August 2, 2024)

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit affirming Petitioner's convictions was entered on August 2, 2024, is reported at 2024 U.S.App. LEXIS 19408, and was designated as "Not Recommended for Publication." A copy of the 6th Cir. opinion is attached to this petition as Appendix A. No petition for rehearing was filed in the Sixth Circuit.

The judgment of the district court is unpublished and attached as Appendix B. The order of the district court denying Petitioner's Motion for New Trial was filed on November 30, 2022, and is attached as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit affirming Petitioner's convictions was entered on August 2, 2024. (Appendix A). This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1) provides:

- (g) It shall be unlawful for any person—
 - (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year

18 U.S.C. § 3553(a) provides, in pertinent part:

- (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

21 U.S.C. § 841(a)(1) provides, in pertinent part:

(a) **Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

The 8th Amendment of the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below

On September 4, 2019, a one-count indictment was filed alleging that Alim Turner, Ushery Stewart, Ronald Turner, Kedaris Gilmore, Christopher Hounschell, and Michael Stewart conspired to distribute and possess with intent to distribute fifty grams or more of methamphetamine from June, 2018, to August, 2019. (R. 3, Indictment, PID# 4-6).

A superseding indictment, filed on March 3, 2020, (R. 78, Superseding Indictment, PID# 149-164), added Mr. Bibbs and six other defendants. Mr. Bibbs was charged in the superseding indictment as follows:

- **Count One**- Possession with intent to distribute Schedule I, II, III, and IV controlled substances including fentanyl, oxycodone (Roxycodone™), alprazolam (Xanax™), marijuana, buprenorphine, heroin, and more than 50 grams of methamphetamine

- **Count Two-** Aiding and abetting the possession of firearms in furtherance of a drug-trafficking crime
- **Count Twelve-** Aiding and abetting the possession of heroin with the intent to distribute
- **Count Thirteen-** Aiding and abetting the possession and brandishing of a firearm in furtherance of a drug-trafficking offense
- **Count Fifteen-** Possession of a firearm by a convicted felon.

The superseding indictment also alleged that Mr. Bibbs was subject to enhanced penalties in Counts 1 and 12 because he had at least one previous conviction for a serious violent felony.

A second superseding indictment was filed on October 8, 2020, (R. 243, Second Superseding Indictment, PID# 1944-1958). The charges against Mr. Bibbs were unchanged from the first superseding indictment.

The trial began on July 7, 2021. On July 23, 2021, the jury found Mr. Bibbs not guilty in Counts 2 and 13, guilty of the lesser-included offense of simple possession of heroin in Count 12, guilty of conspiracy to distribute heroin in Count 1¹, and guilty of being a felon in possession of a firearm in Count 15. (R. 519, Verdict Form, PID# 4911-4934).

Mr. Bibbs moved for a judgment of acquittal pursuant to F.R.Crim.P. 29 at the close of the government's proof-in-chief, (R. 537-2, Trial Transcript, PID# 7789-7790). The district court reserved ruling on that motion. (R. 537-2, Trial Transcript, PID# 7790).

¹After the close of the Government's proof in chief and after Mr. Bibbs' motion for judgment of acquittal, the government moved to dismiss the conspiracy count in Count 1 against Mr. Bibbs with regard to all drugs other than heroin and oxycodone (R. 537-2, Trial Transcript, PID# 7841-7842). The government also moved to dismiss the allegation of "brandishing" a firearm by Mr. Bibbs in Count 13. The jury found Mr. Bibbs responsible for distributing heroin, but not oxycodone. (R. 519, Verdict Form, PID# 4917).

Mr. Bibbs filed a renewed motion for judgment of acquittal and motion for new trial on August 20, 2021, challenging the sufficiency of the evidence to support his conviction of conspiracy and alleging there was a fatal variance between the indictment and the proof at trial. (R. 532, Motion for New Trial, PID# 6962-6973). The district judge denied this motion, without a hearing, by order dated November 30, 2022. (R. 913, Memorandum Opinion and Order, PID# 13627-13639). (Appendix C).

Following a sentencing hearing, the district judge imposed a total term of imprisonment of 120 months, followed by a term of supervised release of three years. (R. 921, Sentencing I, PID# 13709-13805; R. 922, Sentencing II, PID# 13806-13860).

The trial court's written judgment order was filed on November 30, 2022. (R. 915, Judgment, PID# 13641-13647). (Appendix B). On December 1, 2022, Mr. Bibbs timely filed a notice of appeal. (R. 918, Notice of Appeal, PID# 13702).

On August 2, 2024, the Sixth Circuit affirmed the convictions and sentence imposed by the trial court. (Appendix A).

II. Relevant Facts

Of the eighteen government witnesses who testified at trial, only three witnesses provided substantial testimony regarding Mr. Bibbs—Knoxville Police Department (KPD) Officer Brandon Stryker, Hamilton County Sheriff's Office (HCSO) Detective Jason Maucere, and Camaron Billips, a/k/a All-Star, a co-defendant and cooperating witness for the government.

Chris “Woogie” Hounschell, a cooperating witness, testified extensively about his dealings with almost all the other co-defendants, stated that he did not know Mr. Bibbs. (R. 537-1, Trial Transcript, PID# 7474-75). None of the other cooperating witnesses, other than Billips, provided any testimony regarding Mr. Bibbs.

A. Brandon Stryker

Brandon Stryker, a KPD drug task force officer who was the lead agent in this case, gave a general overview of the operations of the Vice Lords and Bloods street gangs and their involvement in “drug trafficking, robberies, home invasions, and

homicides . . . against rival gang members." (R. 541, Trial Transcript, PID# 8198-8199. 8202-3).

Stryker testified that each of the defendants at trial had nicknames, except for Mr. Bibbs, who Stryker said was referred to as "D. Bibbs." (R. 541, Trial Transcript, PID# 8207). According to Stryker, all of the defendants at trial, except for Mr. Bibbs, were members of the Vice Lords, as were the government's cooperating witnesses. Stryker said that Mr. Bibbs was a member of the Bloods. (R. 541, Trial Transcript, PID# 8210-13).

Stryker said search warrants, recorded jail calls, and in-person interviews were used to gather information in the investigation,. Title III wiretaps were placed on telephones belonging to co-defendants Mahlon Prater and Alim Turner. (R. 541, Trial Transcript, PID# 8213-16). Stryker admitted on cross-examination that Mr. Bibbs was in none of the "thousands" of phone calls and text messages intercepted on the wiretaps. (R. 541-1 Trial Transcript, PID# 8370).

Stryker implied that search warrants obtained by HCSO and the Chattanooga Police Department (CPD) for 510 Gillespie Road in Chattanooga, where Mr. Bibbs was staying, were obtained as part of Stryker's investigation. (R. 541, Trial Transcript, PID# 8230). However, Stryker admitted on cross-examination that these search warrants were not part of his investigation and had been obtained in a separate investigation by CPD and HCSO. (R. 541-1, Trial Transcript, PID# 8368-69).

Stryker testified about the contents of Billips' cellphone, which was seized when Billips was arrested at 510 Gillespie Road following the execution of the CPD search warrant. Stryker identified eight text messages between Mr. Bibbs and Billips. Only one of these messages explicitly mentioned drugs- a text from Billips to Mr. Bibbs asking Mr. Bibbs if he had roxicodone. There was no reply from Mr. Bibbs to Billips' text. (R. 541, Trial Transcript, PID# 8243-47, R. 541-1, Trial Transcript, PID# 8372-75).

Stryker admitted on cross-examination that of the 984 text messages extracted from Billips' phone, these eight text messages were the only ones between Billips and Mr. Bibbs. (R. 541-1, Trial Transcript, PID# 8376-77).

Stryker identified several posts and videos from Mr. Bibbs' Facebook page that had been entered into evidence. (R. 541, Trial Transcript, PID# 8254-58). Some of these appeared to show Mr. Bibbs in possession of a firearm. Stryker admitted on cross-examination that none of the alleged weapons displayed in the posts and videos were ever recovered and that he could not say these were functioning firearms. He also admitted that he could not tell that what appeared to be a Glock pistol in one of the videos was the same Glock firearm that was in Billips' possession at 510 Gillespie when the search warrants were executed there. (R. 541-1, Trial Transcript, PID# 8377-79, 8411-12).

B. Jason Maucere

Detective Maucere testified regarding the execution of two search warrants at 510 Gillespie Road, Chattanooga, Tennessee, early in the morning of July 25, 2019, and his interview of Mr. Bibbs later that same day. The first search warrant was executed by CPD and the second was executed by HCSO. (R. 541-1, Trial Transcript, PID# 8468-69).

During the execution of the CPD search warrant, the CPD SWAT squad shot Billips immediately upon entering the apartment. (R. 541-1, Trial Transcript, PID# 8469). The HCSO obtained the second search warrant to search the apartment for evidence regarding the shooting of Billips. (R. 541-1, Trial Transcript, PID# 8470).

According to Maucere, Mr. Bibbs was the target of the CPD search warrant. When that warrant was executed by CPD, Mr. Bibbs, Billips, and Carmen Noble were inside the apartment. (R. 541-1, Trial Transcript, PID# 8470). The CPD search warrant was issued on July 23, 2019, but was not executed until July 25, 2019, at 6:00 a.m. (R. 541-1, Trial Transcript, PID# 8500).

Noble, the wife of CPD homicide detective Jamaal Noble, (R. 541-1, Trial Transcript, PID# 8500), was having an affair with Billips. Noble's vehicle, a white

Volkswagen Atlas registered to her and her husband Det. Noble, was outside of the apartment. The car was equipped with a GPS tracking device. (R. 541-1, Trial Transcript, PID# 8472). Det. Noble used the GPS in Mrs. Noble's car to track her whereabouts. (R. 541-2, Trial Transcript, PID# 8715).

At the time of the execution of the CPD search warrant, Billips and Noble were sleeping on an air mattress in the living room. Billips was shot in the chest by a CPD officer immediately upon entry when Billips sat up on the air mattress. (R. 541-1, Trial Transcript, PID# 8499). On a table beside the air mattress where Billips and Noble were sleeping was a Glock 22 loaded with 11 rounds. (R. 541-1, Trial Transcript, PID# 8470-76, 8516). This was the only firearm found in the apartment. (R. 541-1, Trial Transcript, PID# 8501).

Other items found in the front room of the apartment were a digital scale and Narcan. (R. 541-1, Trial Transcript, PID# 8476-77). The digital scale was found next to the air mattress Billips and Noble were sleeping on. (R. 541-1, Trial Transcript, PID# 8515).

Mr. Bibbs was found in the back bedroom of the apartment by the SWAT team during the execution of the CPD search warrant. (R. 541-1, Trial Transcript, PID# 8501). No firearms were found in Mr. Bibbs' room. (R. 541-1, Trial Transcript, PID# 8502-03). There was a baggie corner containing 1.2 grams of heroin found in this bedroom. Maucere said this was a "small amount" of heroin, an amount that a regular user of heroin could use up in a matter of days. (R. 541-1, Trial Transcript, PID# 8506). There were also a number of "plastic baggies" found in the back bedroom. (R. 541-1, Trial Transcript, PID# 8477-78). None of these baggies had anything in them and looked like the kind of baggies someone had bought a small quantity of heroin in. (R. 541-1, Trial Transcript, PID# 8502).

Mr. Bibbs was not in the apartment when the second search warrant was executed. (R. 541-1, Trial Transcript, PID# 8500).

Maucere said there was a "pillow case full of money" found in the back bedroom along with Mr. Bibbs' wallet. (R. 541-1, Trial Transcript, PID# 8479). Maucere

admitted on cross-examination that the “pillow case full of money” contained only \$198.00. (R. 541-1, Trial Transcript, PID# 8503). During Maucere’s interview of Mr. Bibbs, Bibbs was told that the money was going to be seized as “drug money” and was asked to sign a seizure receipt for the money. Mr. Bibbs refused to sign the receipt because the money was not “drug money.” (R. 541-1, Trial Transcript, PID# 8509).

Maucere said an ounce of Similac powder was found in the kitchen of the apartment, which he initially thought was heroin until he received the lab results showing it was Similac. (R. 541-1, Trial Transcript, PID# 8487). Maucere said that, in his experience, Similac could be used to “cut” heroin, but he acknowledged that it could also be used for baby formula. (R. 541-1, Trial Transcript, PID# 8504). Mr. Bibbs’ son was born the night before the search warrants were executed. (R. 541-1, Trial Transcript, PID# 8511).

Maucere interviewed Mr. Bibbs in the Hamilton County Jail following Bibbs’ arrest. The transcript of this interview was entered as an exhibit and the video recording of the interview was played for the jury. (R. 541-1, Trial Transcript, PID# 8482).

In the interview, Mr. Bibbs denied selling heroin and denied possessing guns. When asked if Billips had a gun, Mr. Bibbs said he didn’t know if Billips had a gun or not. When told there was an ounce of heroin found in the house, Mr. Bibbs laughed and said there was not, because Mr. Bibbs knew it wasn’t true. (R. 541-1, Trial Transcript, PID# 8486-87, 8513). Maucere admitted on cross-examination that only small amounts of marijuana and heroin and some drug paraphernalia that could be used to smoke heroin, indicative of drug use, were found in the apartment. No methamphetamine or roxicodone was found in the apartment. (R. 541-1, Trial Transcript, PID# 8511-14).

C. Camaron Billips

In his plea agreement, Billips admitted to distributing 20-40 grams of heroin and 8-16 grams of fentanyl. (R. 541-1, Trial Transcript, PID# 8522).

Billips admitted he was a member of the Unknown Vice Lords. (R. 541-1, Trial Transcript, PID# 8527).

Billips testified about the many telephone calls and text messages he had with his co-defendants that were intercepted on the wiretaps. (R. 541-1, Trial Transcript, PID# 8537-8559; R. 541-2, Trial Transcript, PID# 8565-8615). Mr. Bibbs was not on any of these calls or text messages.

Billips said that, when he was younger, he met Mr. Bibbs in a county jail before Billips was sent to prison. When Billips got out of prison in June of 2018, he reestablished contact with Mr. Bibbs. (R. 541-2, Trial Transcript, PID# 8616-17).

Billips said that he and Mr. Bibbs would “just be around each other selling drugs together.” “I mean, he had some drugs, I had some drugs.” He said that he and Mr. Bibbs would have firearms on them for protection. (R. 541-2, Trial Transcript, PID# 8618).

Billips acknowledged that Mr. Bibbs was not a member of the Vice Lords. (R. 541-1, Trial Transcript, PID# 8531; R. 541-2, Trial Transcript, PID# 8619, 8632).

Billips said that on June 21, 2019, Mr. Bibbs took a picture of Billips in Mr. Bibbs’ apartment showing Billips with a gun. (R. 541-2, Trial Transcript, PID# 8620-21).

Billips said that on July 24, 2019, he was staying overnight at Mr. Bibbs’ apartment because Billips’ “baby mama was getting on [his] nerves.” Billips admitted he had a Glock that night, but said the Glock belonged to Mr. Bibbs. (R. 541-2, Trial Transcript, PID# 8624).

Billips said that Mr. Bibbs would buy heroin from Fat T. After Fat T died, Billips said that Mr. Bibbs gave him money to buy heroin. Billips used that money to buy 7 grams of heroin from Alim Turner. (R. 541-2, Trial Transcript, PID# 8626, 8628). Billips said that the 1.2 grams of heroin found in Mr. Bibbs’ bedroom was part of the

heroin Billips bought from Turner with Mr. Bibbs' money. (R. 541-2, Trial Transcript, PID# 8630).

Billips admitted that Mr. Bibbs did not know Alim Turner. (R. 541-2, Trial Transcript, PID# 8642).

Billips stated that he sold drugs for himself, not for the Vice Lords. (R. 541-2, Trial Transcript, PID# 8642-43).

Billips admitted that, at the time of the execution of the search warrants at 510 Gillespie Road, Carmen Noble was pregnant with his child. (R. 541-2, Trial Transcript, PID# 8703). Noble worked at a place near Mr. Bibbs' apartment. Billips would drop Noble off at work and stay at Mr. Bibbs' apartment while Noble was at work. (R. 541-2, Trial Transcript, PID# 8704). Billips said that, on the night of July 24, 2019, he and Noble picked Mr. Bibbs up at the hospital, where Mr. Bibbs' son had just been born, and went to Mr. Bibbs' apartment to sleep. (R. 541-2, Trial Transcript, PID# 8626-27).

Noble's husband, CPD Det. Jamaal Noble, had threatened Billips' life and threatened to get Noble "fucked up." This is why all of Billips' belongings were in Noble's car that was parked outside 510 Gillespie Road when the CPD warrant was executed. (R. 541-2, Trial Transcript, PID# 8704).

Billips was questioned by ATF agents after the execution of the search warrants while he was still in the hospital being treated for his gunshot wound. Billips admitted that he told the agents Noble was pregnant with his child and asked what he needed to do to keep her out of trouble. (R. 541-2, Trial Transcript, PID# 8706).

Billips told the agents he had been to Bibbs' apartment "5 times at the most," and that he smoked marijuana and heroin there. (R. 541-2, Trial Transcript, PID# 8706).

Billips admitted that he asked the ATF agents if he helped them could they help him with the state charges against him arising from the execution of the search warrant at 510 Gillespie Road. (R. 541-2, Trial Transcript, PID# 8707). This included four counts of aggravated assault for brandishing a firearm at the officers who were executing the warrant, felony possession of heroin, and employing a firearm during a

dangerous offense. (R. 541-2, Trial Transcript, PID# 8710-11). The ATF agent told Billips he could reduce his federal time and his state time by cooperating. (R. 541-2, Trial Transcript, PID# 8706-07).

Billips admitted he told the ATF agents "Man, if I could do something to help my situation out right now, I would. You want me to say that I know that [Bibbs] sells drugs and the gun was [Bibbs], but what if it wasn't [Bibbs]?" (R. 541-2, Trial Transcript, PID# 8706).

REASONS FOR GRANTING THE WRIT

I. There is insufficient evidence for a rational trier of fact to convict Mr. Bibbs of conspiracy to distribute heroin and possession of a firearm by a convicted felon, and the convictions were against the manifest weight of the evidence.

A. There is insufficient evidence to support the conviction for conspiracy to distribute heroin.

None of the government's witnesses charged with conspiring with Mr. Bibbs knew him, other than Billips. There was no testimony that Mr. Bibbs interacted with or knew any of the alleged co-conspirators other than Billips. Even if the Court were to rely on the dubious testimony of Billips, it establishes at best that he and Mr. Bibbs merely associated with each other, occasionally sold drugs together, and used drugs together. Billips' testimony establishes at best that any drug distribution that Bibbs may have engaged in was on Bibbs' own and was not a part of the alleged conspiracy.

"Mere association with conspirators is not enough to establish participation in a conspiracy." *United States v. Pearce*, 912 F2d 159, 162 (6th Cir. 1990).

There was no evidence at trial of repeated sales or purchases of heroin or other controlled substances by Bibbs or from Bibbs. At best the evidence shows a buyer-seller relationship between Billips and Bibbs. *See United States v. Caver*, 470 F.3d 220 (6th

Cir. 2006). There was no evidence at trial that Billips fronted drugs to Bibbs. *See United States v. Humphrey*, 287 F.3d 427, 435 (6th Cir. 2002). There is no evidence of repeated transactions between Mr. Bibbs and Billips sufficient to show that Mr. Bibbs knew the objectives of the conspiracy and chose to participate in the conspiracy. *United States v. Brown*, 332 F.3d 363, 373 (6th Cir. 2003).

“Guilt with us remains individual and personal, even as respects conspiracies.” *Kotteakos v. United States*, 328 U.S. 750, 772, 66 S. Ct. 1239, 1252 (1946).

The manifest weight of the evidence is against the jury’s verdict. The Sixth Circuit’s ruling on this issue is in contravention of this Court’s opinion in *Kotteakos*. This Court should grant the writ of certiorari, vacate the conviction and dismiss Count One of the indictment.

B. There is insufficient evidence to support the jury's verdict finding

Mr. Bibbs guilty of being a convicted felon in possession of a firearm.

Count Fifteen of the second superseding indictment charged Mr. Bibbs with being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) on or about July 25, 2019, the same date of the execution of the search warrants at 510 Gillespie Road apartment. The only firearm found in the apartment at that time was the Glock 22 pistol possessed by Billips in the living room. This pistol was admitted into evidence as Exhibit 17-A (R. 541-1, Trial Transcript, PID# 8481-8482). This was the only firearm found in the apartment. (R. 541-1, Trial Transcript, PID# 8500-8501). There were no firearms or ammunition found in Mr. Bibbs’ bedroom. (R. 541-1, Trial Transcript, PID# 8502).

Mr. Bibbs stipulated at trial to his status as a convicted felon, his knowledge of that status, and to the interstate nexus of the firearm. (R. 541-1, Trial Transcript, PID# 8497-8498; R. 474, Felony Stipulation, PID# 3748; R. 475, Interstate Nexus Stipulation, PID# 3749). Mr. Bibbs contests the “possession” element of his firearm conviction.

There is no credible evidence that Mr. Bibbs had actual possession of the firearm at 510 Gillespie Road on July 25, 2019. Billips admitted in his testimony that he had actual possession of the firearm, but said that the firearm belonged to Mr. Bibbs and Mr. Bibbs had let him have the firearm that night. As noted in the section of this petition regarding the inconsistency of the verdicts, the jury obviously did not give credit to Billips' testimony regarding Mr. Bibbs' possession of the firearm because they found Mr. Bibbs not guilty of possessing this same firearm in Count Thirteen of the second superseding indictment.

The proof is also insufficient to show that Mr. Bibbs had constructive possession of the firearm. In his statement to HCSO Det. Maucere, Bibbs said that he did not know that Billips had a gun and denied possessing the gun himself.

Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.

United States v. Craven, 478 F.2d 1329, 1333 (6th Cir. 1973)

There is no credible proof that Mr. Bibbs had the requisite knowledge of the firearm's presence and the intent to exercise dominion and control of the firearm. This Court should grant the writ of certiorari, vacate Mr. Bibbs conviction, and dismiss this count of the second superseding indictment.

II. The proof at trial of multiple conspiracies, rather than the single conspiracy alleged in Count One of the second superseding indictment, constitutes a fatal variance between the proof at trial and the indictment that requires Mr. Bibbs' conspiracy conviction be vacated.

There were eight named defendants in Count One of the second superseding indictment. Count One alleged that Mr. Bibbs conspired to with these other defendants to distribute methamphetamine, fentanyl, oxycodone, buprenorphine, and heroin. However, the proof at trial showed multiple conspiracies.

As noted above in the section of this petition regarding the sufficiency of the evidence, none of the other alleged co-conspirators, other than Billips, had any contact or dealings with Mr. Bibbs or even knew of his existence. Mr. Bibbs knew none of the co-conspirators other than Billips.

There is no evidence that Mr. Bibbs knew anything about the structure of the alleged conspiracy. None of the co-operating witnesses who testified for the government, other than Billips, knew who Mr. Bibbs was or had any dealings or contact with him. Mr. Bibbs was on none of the thousands of recorded Title III wiretap phone calls or text messages among the other alleged co-conspirators.

The proof showed that co-defendants Alim Turner, Ushery Stewart, Ronald Turner, Kedaris Gilmore, Mahlon Prater, Jr., and Camaron Billips are all Vice Lords and all from Knoxville, with the exception of Billips, who is a Vice Lord from Cleveland, Tennessee. Mr. Bibbs is not a Vice Lord and is from Chattanooga.

The proof showed separate conspiracies between some of the co-defendants and others to obtain methamphetamine from a dealer in Nashville. There was proof of other conspiracies involving various other co-defendants regarding other drugs. There was no proof of an overarching conspiracy involving Mr. Bibbs.

Even if the dubious and un-credible testimony of Billips is considered for the purposes of argument, Billips' testimony at best could only support a separate conspiracy between he and Mr. Bibbs to distribute heroin in Chattanooga, Tennessee.

“[As a conspiracy] is broadened to include more and more, in varying degrees of attachment to the confederation, the possibility for miscarriage of justice to particular individuals becomes greater and greater” *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

“Charges of conspiracy are not to be made out by piling inference upon inference.” *Direct Sales Co. v. United States*, 319 U.S. 703, 711, 63 S. Ct. 1265, 1269, 87 L.Ed. 1674, 1681 (1943).

The prohibitions against proof of multiple conspiracies are to prevent a defendant of being convicted of a conspiracy of which he was not a part. See *United v States v. Hughes*, 505 F.3d 578, 587 (6th Cir. 2007) and *United States v. Levine*, 569 F.2d 1175, 1177 (1st Cir. 1978).

Mr. Bibbs respectfully submits that the trying of the multiple conspiracies in this case as a single conspiracy had a substantial influence on the outcome of this case and violated Mr. Bibbs’ rights to due process and a fair trial. There was overwhelming evidence of the other conspiracies, including testimony of co-operating witnesses and incriminating telephone calls between different conspirators. There is only the dubious testimony of Billips against Mr. Bibbs, which, even if one accepts Billips’ testimony, is insufficient to prove Mr. Bibbs involvement in the alleged conspiracy.

“A ‘variance occurs if the evidence proves facts materially different from those alleged in the indictment.’” *United States v. Matthews*, 31 F.4th 436, 455 (6th Cir. 2022) (internal citation omitted). “Within the context of a conspiracy, a variance constitutes reversible error only if a defendant demonstrates that he was prejudiced by the variance and that the ‘indictment allege[d] one conspiracy, but the evidence can reasonably be construed only as supporting a finding of multiple conspiracies.’” *United States v. Sadler*, 24 F.4th 515, 541 (6th Cir. 2022) (internal citation omitted).

“The principal considerations to determine the number of conspiracies are the existence of a common goal, the nature of the scheme, and the overlapping of the

participants in various dealings.” *United States v. Garcia*, 834 F. App’x 134, 143 (6th Cir. 2020), citing *United States v. Warman*, 578 F.3d 320, 341–42 (6th Cir. 2009).

“If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, supra, at 764-65. (Internal citation omitted).

Mr. Bibbs was prejudiced by this variance between the indictment and proof. In the context of a variance, reversal is required where the defendant can prove “prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment’s sufficiency to bar subsequent prosecutions.” *United States v. Bradley*, 917 F.3d 493, 503 (6th Cir. 2019).

As previously noted, of the eighteen witnesses called by the government at the trial of this cause, only three of those witnesses provided any substantial testimony regarding Mr. Bibbs. Further, there was abundant testimony regarding the other alleged co-conspirators’ involvement in violent crimes, including robberies and murders. This greatly impacted the ability of Mr. Bibbs to defend himself and caused the trial to be generally unfair with respect to Mr. Bibbs.

Because of the variance between the allegations in the indictment and the proof adduced at trial, this Court must grant the writ of certiorari, vacate Mr. Bibbs’ conspiracy conviction, dismiss Count One of the indictment.

III. The verdicts are so inconsistent as to be arbitrary or irrational.

Inconsistent verdicts in a criminal case generally are not reviewable, *United States v. Lawrence*, 555 F.3d 254, 262 (6th Cir. 2009), however, relief may be warranted

when jury verdicts are so inconsistent that arbitrariness or irrationality are indicated. *Lawrence, supra*, at 263.

Mutually exclusive verdicts, where the finding of not guilty on one count would exclude a finding of guilt on another count, are reviewable as inconsistent verdicts. *United States v. Randolph*, 794 F.3d 602, 610-611 (6th Cir. 2015).

“[W]here a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand.” *United States v. Daigle*, 149 F. Supp. 409, 414 (1957) (Internal citations omitted).

Count Two of the second superseding indictment charged that Mr. Bibbs, and all the other co-defendants “aided and abetted by each other” possessed firearms in furtherance of a drug trafficking offense between July 15, 2018, and September 6, 2019. (R. 243, Second Superseding Indictment, PID# 1945-6). Count Thirteen charged that Mr. Bibbs and Billips “aided and abetted by each other” possessed and brandished a firearm in furtherance of a drug trafficking offense on July 25, 2019. (R. 243, PID# 1951). Count Fifteen charged Mr. Bibbs with being a felon in possession of a firearm on July 25, 2019.

In Count Two. Mr. Bibbs was found not guilty of possessing firearms in furtherance of a drug trafficking offense between July 15, 2018, and September 6, 2019. This includes July 25, 2019.

In Count Thirteen, Mr. Bibbs was found not guilty of possessing a firearm in furtherance of a drug trafficking offense on July 25, 2019.

In Count Fifteen, Mr. Bibbs was found guilty of being a felon in possession of a firearm on July 25, 2019.

The same firearm was the basis for the offenses alleged in Counts Thirteen and Fifteen. These counts arose from the search warrant execution at 510 Gillespie Road on July 25, 2019. At that time, there was only one firearm found in Mr. Bibbs’ apartment. This is the same firearm found in the living room of the apartment next to the air mattress that Billips and Noble were sleeping on. This is the same firearm Billips pled guilty to possessing.

This is the firearm that Mr. Bibbs was convicted of possessing on July 25, 2019, in Count Fifteen. This is the same firearm he was found not guilty of possessing on July 25, 2019, in Count Thirteen.

The Sixth Circuit held that the verdicts were not so inconsistent as to be arbitrary or irrational.

Mr. Bibbs respectfully submits the verdicts in this case are so inconsistent that they are arbitrary and irrational and are mutually exclusive in that the verdicts of not guilty on Counts Two and Thirteen necessarily exclude the guilty verdict in Count Fifteen. For these reasons, this Court should grant the writ of certiorari, vacate Mr. Bibbs' conviction in Count Fifteen, and dismiss Count Fifteen.

IV. The sentence imposed by the trial court is procedurally and substantively unreasonable and excessive.

"Procedural reasonableness requires the court to 'properly calculate the guidelines range, treat that range as advisory, consider the sentencing factors in 18 U.S.C. § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence.' *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018) (citing *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)). Substantive reasonableness focuses on whether a "sentence is too long (if a defendant appeals) or too short (if the government appeals)." *Id.* at 442. "The point is not that the district court failed to consider a factor or considered an inappropriate factor; that's the job of procedural unreasonableness." *Id.* Instead, substantive unreasonableness is "a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual." *Id.* We review claims of both procedural and substantive unreasonableness for an abuse of discretion, although we review the district court's factual findings for clear error and its legal conclusions *de novo*. *Id.* at 440, 442.

United States v. Parrish, 915 F.3d 1043, 1047 (6th Cir. 2019)

Following a sentencing hearing, the trial court denied each of Mr. Bibbs' objections to the presentence investigation report except for Mr. Bibbs' objection to the drug quantity calculation and also denied Mr. Bibbs' request for a downward departure for a mitigating role in the offense. The trial court also denied Mr. Bibbs' request for

a downward variance. The trial court granted the government's motion for an upward variance.

The trial court calculated Mr. Bibbs' base offense level as Level 14 based on a drug quantity of 10-20 grams of heroin and calculated Mr. Bibbs' criminal history category as Category VI. After applying enhancements for possessing a dangerous weapon, maintaining a premises for illegal drug distribution, and obstruction of justice, the trial court calculated Mr. Bibbs total offense level at Level 20 with a criminal history category of VI, resulting in a sentencing guideline range of 70-87 months. The trial court granted the government's motion for an upward variance and imposed a total term of imprisonment of 120 months, followed by a term of supervised release of three years. (R. 921, Sentencing I, PID# 13709-13805; R. 922, Sentencing II, PID# 13806-13860).

A. There is insufficient evidence to support the application of the enhancement under U.S.S.G. § 2D1.1(b)(12) for maintaining a premises for the purpose of manufacturing or distributing a controlled substance.

The district court found by a preponderance of the evidence that Mr. Bibbs used 510 Gillespie "for drug distribution purposes" and applied a two-level enhancement under U.S.S.G. § 2D1.1(b)(12). (R. 922, Sentencing Transcript, PID# 13818-19).

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

U.S.S.G. § 2D1.1, App. note 17

The Sixth Circuit ruled that the district court did not err in applying the drug premises enhancement. This despite the fact that only user amounts of drugs were

found in the apartment at the time of the execution of the search warrant. Det. Maucere, one of the HCSO officers executing the search warrant, testified that the amount of heroin found in the apartment was a “small amount” and that there was only \$198.00 in cash found in the apartment. (R. 541-1, Trial Transcript, Page ID#8503, 8628).

Billips testified that he was at 510 Gillespie Road only because he asked Bibbs if he could stay there because he “needed a place to stay.” (Trial Transcript 541-2, page 149, Page ID# 8709). Billips also testified that he had been to the apartment at 510 Gillespie Road only five times “at the most” and only smoked heroin or marijuana there. (Trial Transcript 541-2, p. 146, Page ID# 8706).

“Our case law, and that of other circuits, instructs that for drug-related activity to constitute a primary use of the residence, it must not only be frequent but also substantial.” *United States v. Murphy*, 901 F.3d 1185, 1191 (10th Cir. 2018) (citing *United States v. Bell*, 766 F3d 634 (6th Cir. 2014)).

Mr. Bibbs respectfully submits that there is insufficient evidence to establish that manufacturing or distributing a controlled substance was one of Mr. Bibbs’ primary or principal uses for the premises and, therefore, this enhancement should not have been applied.

Further, Mr. Bibbs was acquitted of possession of heroin with intent to deliver, a count alleging that this offense occurred at 510 Gillespie Road in Chattanooga on the date the search warrants were executed, and was convicted only of possession of heroin.

“Despite the fact that the defendant in this case has been acquitted of [several] different crimes . . . the Government nevertheless seeks to exact its 'pound of flesh' for these alleged criminal acts during the defendant's sentencing proceeding.” *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 929 (N.D. Iowa 2006). However, the Court should “refuse[] to . . . judicially endors[e] the Government's attempt to bootstrap acquitted conduct, through the use of acquitted conduct as relevant conduct, into the factors this court will consider during the defendant's sentencing proceeding.” *Id.*

Even if it is otherwise proper to consider, Mr. Bibbs' acquitted conduct should not be taken into account, because it results in a sentence greater than necessary to accomplish the goals of sentencing set forth in § 18 U.S.C. 3553(a).

On April 17, 2024, the United States Sentencing Commission voted unanimously to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the federal sentencing guidelines. The amendment revises U.S.S.G. §1B1.3 (Relevant Conduct) to exclude acquitted conduct from the scope of relevant conduct considered under the sentencing guidelines.

The new rule adds subsection (c) to § 1B1.3, stating that "relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court unless such conduct also establishes, in whole or in part, the instant offense of conviction". Even though this amendment does not take effect until November 1, 2024, Mr. Bibbs submits that this is a further argument that the acquitted conduct should not be used in determining the application of the drug-involved premises enhancement. Consideration of the acquitted conduct would effectively negate the jury's acquittal on these counts in the indictment.

B. The firearm enhancement was improperly applied.

Mr. Bibbs was acquitted of all counts alleging possessing or brandishing a firearm during a drug-trafficking offense. Mr. Bibbs was acquitted of the substantive count of possessing a firearm at 510 Gillespie Road on July 25, 2019, the day the search warrants were executed there. Yet the district court applied the two-level enhancement for possession of a firearm in connection with the offense.

Mr. Bibbs would incorporate his arguments regarding the use of acquitted conduct in applying the drug-involved premises enhancement in support of his objection to the application of the firearm enhancement.

C. The district court judge erred in denying Mr. Bibbs a two-level downward departure for his minor role in the offense or, in the alternative, a downward variance for limited involvement in the alleged conspiracy.

The mitigating role guideline, is intended to apply to a person who is “substantially less culpable than the average participant in the criminal activity.” U.S.S.G. § 3B1.2(b), App. Note 3(A).

A court should grant a downward departure for a minor role in the offense if the proof establishes that a defendant played a minor role in the conduct for which the defendant has been held accountable. *See United States v. Roberts*, 223 F.3d 377, 380 (6th Cir. 2000) (citing multiple cases).

The Sixth Circuit, despite noting that Mr. Bibbs “played a smaller role” in the conspiracy, *United States v. Turner*, 2024 U.S. App. LEXIS 19408, at *3-4 (6th Cir. Aug. 2, 2024), upheld the district court’s denial of a minor role downward departure. *Id.*, at *92.

As noted above, Billips, the only alleged co-conspirator who had any dealings with Mr. Bibbs, testified to only one heroin transaction between he and Mr. Bibbs, and this involved only 7 grams of heroin.

It is clear from the proof adduced at trial that Billips and the other alleged co-conspirators were heavily involved in trafficking multi-pound quantities of methamphetamine in addition to trafficking in fentanyl, oxycodone, alprazolam, marijuana, buprenorphine, and heroin.

Mr. Bibbs respectfully submits that the proof adduced at trial establishes he is substantially less culpable than Billips and the other alleged co-conspirators who were convicted of the heroin conspiracy. Mr. Bibbs had no contact with or knew any of the members of the alleged conspiracy except for Billips.

Mr. Bibbs is “substantially less culpable” than the average participant in the criminal activity alleged in this case and should have received a 2-level downward decrease in the offense level pursuant to U.S.S.G. § 3B1.2(b).

In the alternative, given that the evidence adduced at trial showed, at best, that Mr. Bibbs had a very limited role in the conspiracy, the district court should have granted Mr. Bibbs request for a downward variance from the guideline sentencing range due to Mr. Bibbs’ limited involvement in the offense.

D. An upward variance was not warranted in this case.

As noted above, the district court judge calculated Mr. Bibbs guideline sentencing range as 70-87 months based on an offense level of 20 and a criminal history category of VI. The trial court granted the government's request for an upward variance and sentenced Mr. Bibbs to 120 months of imprisonment followed by three years of supervised release.

The government had asked for an upward variance to the statutory maximum of 20 years, based on the sentencing considerations in 18 U.S.C. 3553(a). (R. 815, Gov. Sent. Memo. SEALED).

Mr. Bibbs submits that the criminal history category of VI does not underrepresent the seriousness of Mr. Bibbs' criminal history or the likelihood that he will commit other crimes.

Mr. Bibbs respectfully submits that the upward departure from the guideline range to 120 months is wholly disproportionate, grossly excessive, unreasonable, and is a cruel and unusual sentence in violation of the 8th Amendment to the United States Constitution. Mr. Bibbs respectfully request that this Court grant the writ of certiorari, and remand this cause for resentencing.

CONCLUSION

For all the reasons set forth in this petition, this Court should grant the writ of certiorari, vacate Mr. Bibbs' convictions for conspiracy to distribute heroin and being a convicted felon in possession of a firearm, and dismiss those counts.

For the reasons set forth in Mr. Bibbs' challenges to his sentence, this Court should grant the writ of certiorari, vacate Mr. Bibbs' and remand for resentencing.

Respectfully submitted this the 30th day of October, 2024.

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