No. 18-2576

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REX A. HOPPER,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois
The Honorable J. Phil Gilbert
Case No. 17-CR-40034

REPLY BRIEF OF DEFENDANT-APPELLANT REX HOPPER

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I. Mr. Hopper should have been given access to the cooperating witnesses' proffer letters as a matter of course under Rule 16, and the fact that he was denied them hampered his defense.

Because the district court refused to give Mr. Hopper access to the cooperating witnesses' proffer letters, Mr. Hopper faced an uphill battle before his trial even began. Like Jencks, *Brady*, and *Giglio*, Rule 16 contains another, separate disclosure requirement, and its mandate applied to the proffer letters here. 18 U.S.C. § 3500 (2018); *see Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). Yet, at the government's urging (Tr. 4–17), the district court rejected the defense's request for these letters, relying on a non-precedential and distinguishable opinion from this Court. On appeal, the government skirts the threshold disclosure requirement, opting instead to focus mostly on defense counsel's (limited) ability to probe the witnesses at trial about the plea process. When it does reach the discovery-level lapse, the government makes an astounding—and incorrect—assertion: that defense counsel "knew what the terms of the proffer letters of all the witnesses were" (Gov't Br. 30), despite having never seen them. As discussed below, the government never confirmed that the letters were identical—or even similar—to the kinds of letters defense counsel had previously seen; if they were truly form letters, there was no reason for the government to object so vehemently to their disclosure. Because the district court refused to permit Mr. Hopper's review of the cooperating witnesses' proffer letters, he was unable to adequately prepare his defense or to fully impeach those witnesses at trial.

First, as to the Rule 16 error, the government muddles together discoverability and admissibility. *See* (Gov't Br. 30–32.) Mr. Hopper has not argued that the proffer letters should have been *admitted*. Rather, Mr. Hopper's argument—one backed up by the straightforward application of Rule 16—is that proffer letters must be *disclosed* to the defense as material information. Fed. R. Crim. P. 16(a)(1); *see also United States v. Jumah*, 599 F.3d 799, 809 (7th Cir. 2010) ("[The defendant] was entitled to receive any documents . . . which might undermine the reliability of witnesses."); *United States v. Baker*, 453 F.3d 419, 425 (7th Cir. 2006) (noting that information is material to preparing the defense when it is "exculpatory or helpful for impeachment").

As it did below, the government again relies on *Weidenburner*, an unpublished decision, for the proposition that proffer letters need not be disclosed. *See* (Gov't Br. 22–25); *United States v. Weidenburner*, 550 F. App'x 298 (7th Cir. 2013). The government suggests that defense counsel agrees. (Gov't Br. 24.) In fact, trial counsel carefully preserved the issue for appeal. *See* (Tr. 5) ("I'm requesting [the letters] . . . and would like the record to be clear that I think that I ought to be provided a copy of those documents."). To the extent that the district court and the government did not recognize that *Weidenburner* was non-precedential, that does not change its status on appeal, contrary to the government's assertion. (Gov't Br. 24) (arguing that the district court did not abuse its discretion by following a "faithful reading of Seventh Circuit *precedent*") (emphasis added).

Putting aside the district court's threshold error in believing that *Weidenburner* controlled as precedent, it further erred in relying on its holding because it is distinguishable from Mr. Hopper's case. That case asks only whether lost proffer letters—ones that a witness had confirmed as identical to an already disclosed letter—must be turned over pursuant to Jencks and *Giglio*. Because those tests hinge on the government's possession of the materials, and lost items are not by definition in the government's possession, this Court found that disclosure was not constitutionally required. *Weidenburner*, 550 F. App'x at 304. It pointed out that the plea agreements, which were turned over, superseded the proffer letters for purposes of satisfying due process. *Id.* at 304–05. In Mr. Hopper's case, however, the government never claimed that it did not have those letters, just that it did not believe it had to disclose them. (Tr. 8.) And, unlike *Weidenburner*, there has been no affirmative statement from either the government or any of the witnesses that the undisclosed proffer letters are identical to the disclosed proffer letter.[1] Finally, as noted above, Mr. Hopper claims a Rule 16 violation, not one based on the Jencks Act or *Giglio*, and the governing test is different.

The government rapidly shifts focus from discovery to trial, claiming that defense counsel's sole purpose with respect to these letters was to probe the plea

[1] The government asserts that Mr. Hopper knew the terms of the proffer letters. (Gov't Br. 30.) This is simply false. Mr. Hopper's trial counsel stated, "It's been my experience that those proffer letters do not change, only the names of the defendants do." (Tr. 5.) Mr. Hopper's counsel spoke about his past experiences, not the present case. Notably, in the present case, the government was completely silent as to whether the undisclosed proffer letters were identical to its prior letters or even to the one proffer letter that it disclosed. (Tr. 220.)

process and that it was fully able to do so. (Gov't Br. 25–30.) The government is wrong on both counts. Defense counsel's first purpose was to obtain those letters; he told the court that he has traditionally been given these letters in the past and would like to see them here. (Tr. 14.) When the district court unequivocally told defense counsel that he would not receive them, (Tr. 8, 15), counsel naturally tried for the sake of his client to at least ask witnesses about the proffer letters at trial, given that challenging their credibility was central to Mr. Hopper's defense.

As defense counsel predicted, (Tr. 7) (defense counsel telling the court that he expected the government to object "on both fronts"—discoverability and witness questioning), the government resisted the defense's attempt to question witnesses about the proffer letters. *See, e.g.*, (Tr. 171–72) (government counsel objecting to defense counsel's questioning of Lucas Holland's proffer, stating: "Your Honor, I'm going to object. We are going far beyond just that he gave a proffer."). In the end, the district court limited defense counsel to asking "whether they've entered into a proffer agreement," but refused "to let [counsel]" ask about the "terms of it." (Tr. 15–16.) As a result, defense counsel's questioning at trial was not as "thorough[] and vigorous[]" as the government claims. (Gov't Br. 26.)

For example, the government points to Lucas Holland as an instance of vigorous cross-examination, (Gov't Br. 26–28), but in fact—perhaps in light of the district court's pretrial ruling—defense counsel did not broach the topic of proffer letters until *re*-cross-examination, only after the government had raised proffers in re-direct. (Tr. 168.) Even then, the government objected. (Tr. 171–72.) After the

government proved that it was ready to object, trial counsel did not question most of the other witnesses about their proffers. The government makes much of the fact that defense counsel did not probe Blake Gordon—the one witness who proffered but did not enter a plea. (Gov't Br. 29.) But the government also selectively quotes the record when it claims that defense counsel was free to question Gordon with no government objection; in fact, in a sidebar, the government warned that it "[could] still object" to Gordon's testimony. (Tr. 220.) Defense counsel instead highlighted Gordon's potential bias against Mr. Hopper and the fact that Gordon was hoping to receive a reduced sentence under Rule 35 after testifying. *See* (Tr. 220–35); Fed. R. Crim. P. 35(b). In total, defense counsel asked just two witnesses about their proffer letters, and only after the government already opened the door to that line of questioning. This limited inquiry neither supplanted nor neutralized the threshold error in refusing to allow the defense access to the letters before trial.

Finally, this error was not harmless. The government improperly relies on a harmlessness standard reserved for erroneously admitted evidence. (Gov't Br. 31) (citing *United States v. Quiroz*, 874 F.3d 562 (7th Cir. 2017) (finding admission of coconspirators' statements at trial harmless error in light of the other overwhelming evidence)). The harmlessness test for discovery errors, however, is when "the error was prejudicial to the substantial rights of the accused." *United States v. Harris*, 542 F.2d 1283, 1291 (7th Cir. 1976). A defendant is prejudiced under Rule 16 when he is "unduly surprised" and "lacks an adequate opportunity to prepare a defense." *United States v. Mackin*, 793 F.3d 703, 709 (7th Cir. 2015) (quoting *United States v.*

De La Rosa, 196 F.3d 712, 715 (7th Cir. 1999)); *see also United States v. Noe*, 821 F.2d 604, 607 (11th Cir. 1987) (noting that prejudice depends upon the defendant's ability to present a defense, not the balance of all evidence introduced against him). Mr. Hopper faced prejudice under Rule 16 because he was unable to adequately prepare his defense or fully impeach cooperating witnesses without viewing the proffer letters. Imagine, for example, that the undisclosed proffer letters expressly referenced Mr. Hopper or indicated the type of information that the government was hoping to obtain from these witnesses. *See, e.g.*, *United States v. Burnside*, 824 F. Supp. 1215, 1268 (N.D. Ill. 1993) (in *Brady*/*Giglio* context, recognizing that suppressed impeachment evidence "allow[s] defense counsel to show that the government's witnesses had strong and substantial reasons to testify in the way government counsel desired."). Had Mr. Hopper been armed with this information, he could have more forcefully challenged these witnesses' credibility with the jury, and defense counsel could have pursued additional discovery from the government agents who interviewed these witnesses.

II. Mr. Hopper suffered a material variance that caused prejudice at his trial and sentencing.

Instead of proving the conspiracy it charged in the indictment, the government presented evidence of a series of buyer-seller relationships and conspiracies between other, uncharged, individuals. The government entered the first day of trial claiming that every one of its non-law-enforcement witnesses were part of the conspiracy. (Tr. 35) (government assuring jury during opening statement that Mr. Hopper's associates were "all involved in this conspiracy to distribute

drugs."). The government never retreated from that position, even though by closing arguments it seemed unsure about what the evidence showed or who was involved in the conspiracy. (Br. 22–23.) Even the jury was confused, (R.72 Jury Note), and Mr. Hopper must have been as well. On appeal, although it recounts witness testimony over pages and pages of its brief, the government never attempts to define for the Court (or for Mr. Hopper) the scope of the agreement he allegedly joined. *See United States v. Townsend*, 924 F.2d 1385, 1390 (7th Cir. 1991) ("To join a conspiracy. . . is to join an agreement rather than a group."). The shifting cast of methamphetamine users in Southern Illinois was never united by a single agreement, working toward a common criminal purpose. *See United States v. Gilmer*, 534 F.3d 696, 701 (7th Cir. 2008) ("A defining characteristic of a conspiracy is a common agreement 'to further a single design or purpose.'") (quoting *United States v. Thomas*, 520 F.3d 729, 733 (7th Cir. 2008)). In the end, as discussed in the opening brief, (Br. 20–34), the government may have proven that Mr. Hopper was involved in a series of buyer-seller relationships, but it did not prove the existence of the conspiracy it alleged in the indictment or that Mr. Hopper joined that conspiracy, as defense counsel below tried to point out for the jury. (Tr. 495) ("A conspiracy is a different crime and it's an important difference . . . .").

Given this confusing morass of relationships and allegations, and because the government steadfastly insisted all the way through closing that it had proven a large, single conspiracy, this Court should not now entertain its complaint that Mr. Hopper failed to request a multiple conspiracy instruction. (Gov't Br. 33.) By the

time evidence of the jury's confusion came to light, it was too late for such an instruction. (Tr. 509) ("THE COURT: I can't give any supplemental instructions that have not already been given."). The Government also acknowledged, disparagingly, Mr. Hopper's counsel's concerns with the nature of the government's evidence. (Tr. 501–02) (The Government: "I was a little confused hearing [defense counsel], when he said, 'My client's innocent. Now, he's committed a bunch of crimes, but not the one the Government charged him with. He's a drug dealer, just not with [sic] the Government charged him with.'") Regardless, a multiple-conspiracy instruction is not typically necessary when a defendant is tried alone, as Mr. Hopper was here. *See United States v. Martin*, 618 F.3d 705, 736 n.3 (7th Cir. 2010). And that instruction is not a prerequisite to a variance claim, either for preservation purposes or in ruling on the merits. As this Court has said, variance claims in the conspiracy context are essentially insufficiency claims. *United States v. Avila*, 557 F.3d 809, 815 (7th Cir. 2009) (explaining that a claim of variance from a charged conspiracy is treated as a challenge to the sufficiency of the evidence). Mr. Hopper moved for a judgment of acquittal, (Tr. 425), and he also asserted his separate insufficiency argument based on a "buyer-seller" theory, (Tr. 451–55). That instruction was given at trial. (Tr. 467.) No more is required for this Court's review.

Turning from issue preservation to the merits, the scattershot approach that the government employed at trial has been resurrected here on appeal.[2] Nearly

[2] This approach may originate from the government's suggested standard of review for this claim. Relying on a novel "totality of the evidence" standard from another circuit, (Gov't Br. 37) (citing *United States v. Rivera-Donate*, 682 F.3d 120, 129 (1st Cir. 2012)), the

twenty-five percent of its brief is spent recounting facts from trial, often witness by witness. (Gov't Br. 4–14, 37–42.) But the government never once explains how the pieces fit together into the single conspiracy it charged. Instead, through over five bullet-pointed pages discussing evidence at trial, the government makes isolated statements about some of its witnesses without explaining the interconnection between all of them and Mr. Hopper that rose to a single illicit agreement, as opposed to buyer-seller relationships. (Gov't Br. 37–42.) For example, the government implies that Mr. Hopper's knowledge that William Craig intended to resell some of the drugs was evidence of a conspiracy. (Gov't Br. 41, Bullet 21.) This is incorrect. *United States v. Bustamante*, 493 F.3d 879, 886 (7th Cir. 2007) ("[A] defendant's knowledge of a conspiracy is not enough to prove that the defendant participated in it."). It also suggests that sharing knowledge of a dealer or sharing a source could be evidence of a conspiracy. (Gov't Br. 40–41, Bullets 16, 18, 21; Gov't Br. 43.) *But see United States v. Caldwell*, 589 F.3d 1323, 1331 (10th Cir. 2009) (holding the mere introduction of a common supplier, made by one drug dealer to another, is insufficient to create a single conspiracy among all the dealers). The government also uses several bullets to recount instances in which witnesses claimed Mr. Hopper provided methamphetamine on a "front." (Gov't Br. 37–41, Bullets 1, 5, 23, 24.) However, fronting is just one of many considerations this Court

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government steps around this Court's established precedent: In drug conspiracy cases, if "the plausibility of a mere buyer-seller arrangement is the same as the plausibility of a drug-distribution conspiracy," this Court will overturn the conviction. *United States v. Pulgar*, 789 F.3d 807, 812 (7th Cir. 2015) (citing *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010)).

considers in distinguishing a buyer-seller relationship from a conspiracy, *United States v. Brown*, 726 F.3d 993, 999 (7th Cir. 2013), and "occasional sales on credit are consistent with an ordinary buyer-seller relationship." *United States v. Neal*, 907 F.3d 511, 516 (7th Cir. 2018). Three bullets discuss how people drove Mr. Hopper to drug deals, (Gov't Br. 37–42, Bullets 7, 19, 26), but ignore two critical facts: that Mr. Hopper did not have a valid license for much of this period, (R.94; Tr. 43), and he actually paid (in money or drugs) Williams and Shuman to do so.[3] (Tr. 77, 399, 401.) That friends drove with or for Mr. Hopper because he could not, and that they also accepted payment in the form of drugs, actually shows the lack of a shared purpose to distribute drugs. *See United States v. Korey*, 472 F.3d 89, 96 (3d Cir. 2007) (vacating a drug conspiracy conviction because the jury instructions equated accepting payment in the form of cocaine to commit a crime with sharing a purpose with the dealer to distribute cocaine). The government fleetingly references several other alleged co-conspirators—Blake Gordon, William Karnes, Shara Peyton, Erin Wright, William Craig, and Jason Clapp—but never explains the overarching relationship among them or what agreement they supposedly joined. Notably, some co-conspirators have apparently dropped out of the government's

[3] The government also characterizes these odd jobs as fronting drugs. *Compare* (Gov't Br. 37–42, Bullets 1–4, 6, 13) (citing in part Tr. 61–65) *with* (Tr. 77) (Williams acknowledging that he did jobs when he fell behind in paying Mr. Hopper back for drugs he had previously provided). Even if they constituted fronting, however, these limited instances cannot rise to the level of a conspiracy because they lack the unity of purpose a conspiracy requires; the drivers would drive with the purpose of obtaining drugs for *themselves*, not, as the indictment charges, to distribute drugs *to others*. *See, e.g.*, (Tr. 398–99) (Kevin Shuman: "There wasn't really any discussion of why [I would drive Mr. Hopper to drug deals.]"); *Avila*, 557 F.3d at 814 (holding "the defining quality of a conspiracy" is "an agreement to further a *single* design or purpose") (emphasis added).

vision of the conspiracy on appeal; Brooke Peyton, Jericha White, and other government witnesses from trial are not mentioned.

The government's pooling argument, which encompasses more than half of the government's bullet-point discussion, similarly lacks merit. (Gov't Br. 37–42, Bullets 1, 8–12, 14–17, 20, 23, 25). As an initial matter, several of the instances that the government identifies as pooling are actually just typical drug transactions. For example, the government concludes that Mr. Hopper was pooling funds with Riley, Holland, and Weir, (Gov't Br. 39, Bullets 9–10), but these transactions are plausibly categorized as sales from Holland and Riley to Mr. Hopper and Weir. *See* (Br. 25–26); *see also Pulgar*, 789 F.3d at 812. In addition, most or even all of the government's cited examples fail as a matter of law because they lack the "something more" this Court requires, such as proof of a shared purpose, of lower transaction costs, or of economies of scale. *See United States v. Haywood*, 324 F.3d 514, 517 (7th Cir. 2003) ("The existence of a simple agreement of two persons to pool their money and to buy drugs together, without more, is not sufficient to establish a conspiracy, even where each buyer intends to resell cocaine."). Without additional evidence of shared purpose, any pooling of funds on Mr. Hopper's part does not rise to a conspiracy.[4] In fact, all the cases on which the government affirmatively relies

[4] The government cannot rely on the conditions inherent in any drug sale to meet this burden. *Brown*, 726 F.3d at 998 ("[A]lthough the substantive trafficking crime is an agreement, it cannot also count as the agreement needed to find conspiracy."). In the same vein, buying drugs from a new source because one's previous source is unavailable (Gov't Br. 40–41, Bullets 14, 16, 18) does not show shared purpose beyond the continued intent to obtain drugs; it is just shared sources, not a shared intent to distribute. Just as the conditions inherent in drug sales and purchases are not enough, the government's other

also included evidence of this "something more" before finding a conspiracy. *See Haywood*, 324 F.3d at 517 (pooling was evidence of conspiracy because it allowed each conspirator to "*run a cheaper operation—and earn higher profits*—if the other succeeded.") (emphasis added); *United States v. Harris*, 567 F.3d 846, 851 (7th Cir. 2009) ("As in *Haywood,* James and the others pooled their money and shared rides *to buy cheaper crack*, meaning that each could earn more if the others succeeded.")(emphasis added); *United States v. Lomax*, 816 F.3d 468, 475 (7th Cir. 2016) (affirming conviction because defendants pooled money and also shared customers, a supplier, and had a shared pool of drugs to sell from). Thus the assertion that pooling funds to purchase methamphetamine shows a conspiratorial relationship, without additional evidence of shared purpose, simply does not suffice.

Through these efforts, the government repeats the fundamental error it made at Mr. Hopper's trial: it treats the charged indictment as carte blanche to convict Mr. Hopper for any drug sale, buyer-seller relationship, or uncharged conspiracy for which it can supply witnesses, rather than proving the conspiracy approved by the grand jury.

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attempts to show "something more" fail because they amount to nothing more than the conditions inherent in pooling. For example, the government suggests that various individuals "shar[ed] the loss" while pooling (Gov't Br. 39, Bullet 8), but that is just another way of defining pooling itself. The government further states that pooling requires some mutual trust, which shows a conspiracy. (Gov't Br. 39, Bullet 9.) But buyer-seller agreements likewise require at least a modicum of mutual trust, *United States v. Colon*, 549 F.3d 565, 569 (7th Cir. 2008) (explaining that some level of mutual trust is inherent in any buyer-seller relationship), and that does not magically transform those transactions into conspiracies.

The government does not address the issue of prejudice at all, ignoring the impact of its shifting definition of conspiracy on Mr. Hopper's substantive rights. As a result, the government very well may have waived this argument; a failure to argue harmlessness in the Rule 52 context routinely results in a finding of waiver. *United States v. Giovannetti*, 928 F.2d 225, 226–27 (7th Cir. 1991) (explaining that the government's silence on the impact of a defendant's claimed error on appeal "would be particularly questionable in a case such as this where the defendant goes out of his way to argue that the error of which he complains was prejudicial, and the government by not responding signals its acquiescence that if there was error, it indeed was prejudicial.").

Mr. Hopper went out of his way to argue that the variance he suffered was prejudicial, *see* (Br. 35–41), and will not repeat those arguments here except to raise three brief points. First, the government's haphazard evidence of the alleged conspiracy—highlighted above—prejudiced Mr. Hopper at trial by limiting his ability to prepare a meaningful defense. Second, the record is crystal clear that the jury was confused on the critical issue of conspiracy, (R.72, Jury Note) ("Pages 17 & 21 are confusing as to the definition of 'conspiracy'"), which itself is evidence of prejudice. *Bustamante*, 493 F.3d at 887. The principle that juries are presumed to follow instructions, (Gov't Br. 36), is irrelevant when the jury did not understand those instructions. Finally, the sentencing implications of the government's failure of proof are especially critical now that the government has admitted on appeal that it inadvertently failed to raise relevant conduct at sentencing. (Gov't Br. 50 n.6.) If,

for example, either Riley or Holland (or both) engaged in just buyer-seller relationships with Mr. Hopper, then the drug amounts attributed to them could not be counted towards his sentence and relevant conduct cannot step in to resurrect that base offense level. (R.94 at ¶¶ 12, 14, 21) (attributing 850 grams and 793 grams to Mr. Hopper based on transactions with Holland and Riley, respectively); *see also* U.S. Sentencing Guidelines Manual §§ 2D1.1(c)(2), (4) (U.S. Sentencing Comm'n 2016) (base offense level for between 1.5 kilograms and 4.5 kilograms of methamphetamine ice, Level 36; base offense level for between 0.150 kilograms and 0.5 kilograms of methamphetamine ice, Level 32). This combination of events renders the prejudice to Mr. Hopper particularly acute. Viewed in its entirety, the government's conspiracy case against Mr. Hopper suffers from significant and material deficits that confused the jury and markedly increased his sentence; for those reasons, his conviction should be vacated.

III. Mr. Hopper has not waived his right to challenge the plainly erroneous double-counting in the district court's drug amount calculation.

This Court can and should review the district court's double-counting of drugs attributed to Mr. Hopper. The government's waiver argument manufactures bad faith that did not exist, contravenes this Court's and the Supreme Court's handling of such sentencing errors, and would succumb to the manifest miscarriage of justice exception in any event. The sentencing error here was plain and affected Mr. Hopper's substantial rights because without it his sentencing range would have been 188 to 235 months' imprisonment, far below the 235 to 293-month range the district court actually used. This Court should remand for a limited resentencing for

the district court to sentence Mr. Hopper with either the drugs attributed to Riley or those attributed to Holland, but not both.

First, nothing in the record supports the government's claim that defense counsel strategically opted not to object to the base offense level calculations because doing so would "distract" from Mr. Hopper's objection to the drug-premises enhancement or "alert" the government of the "undercounting" of relevant conduct. (Gov't Br. 47–48.) With respect to the distraction rationale, the case on which the government relies extends only to alternative arguments that are frivolous—that is, a party can strategically forego an argument when concerned with damage to his credibility when raising it. *See United States v. Brodie*, 507 F.3d 527, 532 (7th Cir. 2007) (not raising near-frivolous arguments was strategic). A meritorious objection, even if it did "distract" from another objection, would do so at no harm to the defendant. The results of both objections would be the same: a two-point reduction in the base offense level; as discussed below, this objection is far from frivolous.

As for the second rationale, the government suggests that defense counsel's failure to object was intentional because the defense attorney recognized an argument that the government itself, along with the probation officer and the court, missed. Counsel then decided to risk having his client serve 47 additional months in prison by not pointing out the offense-level altering double counting, all to ensure it did not cause a further *increase* to Mr. Hopper's sentence with all of the uncounted drug conduct. (Gov't Br. 48) (suggesting that defense counsel did not alert the court to Probation's "grossly undercounted" relevant conduct because it would have

resulted in a higher sentence for Mr. Hopper). *But cf.* (Gov't Br. 50 n.6) (suggesting that guideline range would not have changed which is why the government "inadvertently" did not raise relevant conduct below). But if one operates within this realm of speculation, then the same accusation could be leveled at the government: It chose to remain silent about the drug amount because it knew that most of its evidence was vague, inconsistent or unsupported, and thus may have undermined the reliability of *any* drug amount finding. It moreover did not want to call attention to the double-counted drugs that shifted Mr. Hopper's pre-enhancement offense level upward from a 34 to a 36. The truth is that everyone missed it, but that is why plain-error review exists—to ensure that defendants are not forced to serve unwarranted, wrongly calculated sentences. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) ("When a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.").

In its brief on appeal, the government spends much time trying to establish that relevant conduct, had it been pressed, established, or found below, would not only have supported the district court's actual drug-amount finding, but should have resulted in an even higher drug amount determination. (Gov't Br. 48–51.) But its purpose is less clear—having neither raised an objection below nor cross-appealed to challenge the district court's sentence, the government cannot now alter that drug finding in this Court or in the event that the case is remanded for a

limited resentencing. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (absent a government appeal or cross-appeal, an appellate court cannot increase a defendant's sentence); *see also United States v. Maday*, 799 F.3d 776, 779 (7th Cir. 2015) ("[W]e will not order [Defendant] resentenced, because the government has not filed a cross-appeal."); *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014) ("[T]he district court's discretion to consider new arguments is limited by two related principles, the mandate rule and the law of the case doctrine, [which] prohibit a district court from revisiting certain issues on remand.") (internal quotation marks omitted).

Once the government's speculation is set aside, Mr. Hopper's sentencing fully accords with this Court's waiver jurisprudence and shows why relief is warranted here. Waiver means an intentional relinquishment of a known right. *United States v. Ortiz*, 431 F.3d 1035, 1038 (7th Cir. 2005). In the sentencing context that means that a defendant who does not object generally retains the ability to challenge an issue for plain error on appeal, particularly because waiver is to be construed "liberally in favor of the defendant." *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005) (interpreting its own precedent as "not . . . establishing an inflexible rule that every objection not raised at a sentencing hearing is waived."). Thus, the government is wrong when it argues that a defendant who challenges one aspect of the PSR is considered to automatically have waived any other errors discovered later. (Gov't Br. 45.) It is also wrong when it tries to recast defense counsel's statements as an affirmative embrace of that guideline range to the

exclusion of all others. (Gov't Br. 46–47.) In context those statements are better characterized as arguing *against* other guideline ranges, not affirmatively arguing for the base offense level contained in the PSR, and this does not rise to a knowing and intelligent waiver. *See United States v. Romero*, 896 F.3d 90, 92 (1st Cir. 2018) (defense counsel's statement at sentencing that "there is no dispute with respect to the sentencing guideline range" did not preclude review of sentencing enhancement); *United States v. Joaquin*, 326 F.3d 1287, 1291 (D.C. Cir. 2003) ("Nothing in defense counsel's passing comment suggests that he made a conscious, strategic decision to 'intentional[ly] relinquish[ ] or abandon[ ] . . . a known right.'") (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks and citation omitted)); *United States v. Jimenez*, 258 F.3d 1120, 1124 (9th Cir. 2001) (holding that defendant who "failed to object to the district court's finding of a prior aggravated felony" and who "confirmed the accuracy of the PSR" had not "sufficient[ly]" waived his right to appeal).[5]

The government's response to the double-counting claim simply reinforces that resentencing is warranted here. It cannot refute that the PSR, as written, adopts the testimony from Riley and Holland that describes them providing the exact same drugs to Mr. Hopper, and then counts them as separate amounts. This

[5] Even if this Court were to find a waiver, it may excuse it in the interests of justice. *United States v. Litos*, 847 F.3d 906, 910 (7th Cir. 2017) ("[T]here are exceptional situations in which waiver does not foreclose appellate review. . . ."); *see also Romero*, 896 F.3d at 93 ("[W]e need not decide whether Romero's representations to the court amounted to waiver, for even if they did, we would excuse the waiver in the interest of justice."). Here, saddling a defendant with at least 47 additional months in prison for an error missed by the sentencing court, the government, the probation office, and defense counsel would constitute a miscarriage of justice that justifies a resentencing.

is error, plain or otherwise. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1905 (2018) (the double-counting of a state court conviction was a plain error, affecting the defendant's substantial rights). Although a two-point reduction in guideline range may seem unimportant, "[t]o a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept. Any amount of actual jail time is significant." *Id.* at 1907 (internal quotation marks and citations omitted). And as noted above, the time is not insignificant; if Mr. Hopper were sentenced similarly at the bottom end of the new range, he would be entitled to 47 fewer months in prison.

IV. Mr. Hopper's sentence was improperly enhanced for maintaining a premises for the purposes of drug distribution.

Not all defendants who have used their home for some drug activity were meant to fall within the reach of the drug-premises enhancement, U.S. Sentencing Guidelines Manual § 2D1.1(b)(12) (U.S. Sentencing Comm'n 2016); if that were so, it would be a near-automatic two-point enhancement. In its response, the government relies on vague, non-specific testimony that does not controvert Mr. Hopper's affirmative steps to shield his home from drug activity over time. Of the five witnesses whose testimony it summarizes, only one, Dameon Williams, gives a specific date of a transaction occurring at Mr. Hopper's home. (Gov't Br. 54.) The other witnesses either give no dates at all, (Erin Wright, Gov't Br. 53–54, 56), or give an imprecise range, (Gov't Br. 55–56) (Brooke Peyton: "in 2016"; William Craig: "towards the end of 2015"; Kevin Shuman: "March/April 2016"). Besides Ms. Peyton's broad timeline of sometime within the entire year of 2016, each of these

dates are at least one year removed from Mr. Hopper's arrest. This tracks with Wright's testimony at sentencing that Mr. Hopper abandoned the use of his home over time and stopped distributing drugs all together. (Sent. Hr'g Tr. 24.)

The government cites two of this Court's cases for the proposition that four or eight transactions is sufficient for the enhancement. (Gov't Br. 58) (citing *United States v. Contreras*, 874 F.3d 280, 284 (7th Cir. 2017); *United States v. Winfield*, 846 F.3d 241, 243 (7th Cir. 2017)). The government further argues that Mr. Hopper's discontinued drug activity should be given no weight. (Gov't Br. 58.) Accepting both positions requires mischaracterizing this Court's precedent, collapsing the required inquiry, and improperly expanding the reach of Guideline § 2D1.1(b)(12) beyond the text and Congress's intent.

This Court is clear that whether four or eight transactions suffices for the enhancement depends, in part, on the time period in question. *United States v. Edwin Sanchez*, 710 F.3d 724, 731 (7th Cir. 2013), *vacated on other grounds*, *Sanchez v. United States*, 134 S. Ct. 146 (2013) ("Neither a specific frequency nor a particular significance automatically warrants applying the enhancement."). In *Contreras*, for example, this Court approved of the district court's reasoning that "eight specific transactions" in a "very short period of time" (two months), satisfied the frequency prong. 874 F.3d at 283. The denominator of total time period was also relevant in *Winfield*, where this Court approved of the enhancement where there had been four transactions in a twelve-week period. *See* 846 F.3d at 242. Relevant to this Court's finding was the fact that the defendant was earning his living from

the drug sales, which implied that even more drug transactions occurred at the defendant's home. *Id.*

Here, the number of transactions cannot be extrapolated to determine frequency as in *Winfield* because of the government's overall lack of specificity and also because the evidence demonstrates that Mr. Hopper had fully ceased drug activity at his home six months to one year before he was arrested.[6] Additionally, Mr. Hopper's discontinued use of the home demonstrates that it was not integral to the drug enterprise. *Cf. Contreras*, 874 F.3d at 284 (upholding the enhancement in part because there was evidence that the use of the defendant's residence was *integral* to the distribution of drugs).

The drug premises enhancement has arguably been expanded beyond its original text and purpose—applying it to Mr. Hopper would further improperly extend its reach. Courts are instructed by the application notes to 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. Sentencing Guidelines Manual § 2D1.1(b)(12) cmt. 17 (U.S. Sentencing Comm'n 2016). Concerned that a literal

[6] The government repeatedly points to drugs "stored" at Mr. Hopper's residence. (Gov't Br. 51, 56–59.) The enhancement, however, only applies to storage when it is "for the purpose of distribution." U.S. Sentencing Guidelines Manual § 2D1.1(b)(12) cmt. 17 (U.S. Sentencing Comm'n 2016). Section 2D1.1(b)(12) was patterned after 18 U.S.C § 856, which criminalized "manufacturing, distribution, or use." Yet the sentencing enhancement omits the term "use." *Edwin Sanchez*, 710 F.3d at 730. This omission is presumed to be intentional. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Thus, storage is only relevant if it is part of distribution, and not personal use. The record is clear that Mr. Hopper used drugs in his home, but that does not transform storage into distribution.

application of that note would immunize all family homes against the enhancement, courts have substituted their own tests, which has continually lowered the threshold for applying it. *See United States v. Flores-Olague*, 717 F.3d 526, 533 (7th Cir. 2013) (noting that comparing frequency of illegal and legal activities would lead to "odd results" and instead applying the frequency and significance tests). *Compare Edwin Sanchez*, 710 F.3d at 731 (considering the frequency and significance to "determine whether the prohibited purpose can be *fairly described as a 'primary or principal' use of the premises*") (emphasis added) *with United States v. Acasio Sanchez*, 810 F.3d 494, 497 (7th Cir. 2016) (the enhancement is appropriate "*as long it is more than 'incidental or collateral'*") (emphasis added). Exacerbating this slippery slope is the fact that courts have considered many factors to be sufficient for the enhancement to apply, but none to be necessary. *See Acasio Sanchez*, 810 F.3d at 497 ("Although other cases have found that certain facts justified the enhancement, this 'does not mean that those facts *necessarily* must be shown in every case.'") (citing *United States v. Johnson*, 737 F.3d 444, 448 (6th Cir. 2013)). *Compare, e.g.*, *Winfield*, 846 F.3d at 243 (upholding enhancement on evidence of four drug transactions where there were "additional drugs and drug paraphernalia" observed) *with Contreras*, 874 F.3d at 283 (no tools of the trade at the residence did not preclude the enhancement).

Courts have justified this departure from the text of the application notes by reasoning that holding otherwise would result in unintended consequences. *Edwin Sanchez*, 710 F.3d at 731. But "[t]he best evidence of congressional purpose is the

statutory text. . . ." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991). As this Court has acknowledged regarding 21 U.S.C. § 856(a) (upon which U.S. Sentencing Guideline § 2D1.1(b)(12) is patterned), this enhancement is aimed at "persons who occupy a *supervisory, managerial, or entrepreneurial role* in a drug enterprise"—in short, high-level offenders. *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993) (emphasis added); *see* (Br. 43–44); *see also* Fair Sentencing Act of 2010, Pub. L. 111-220,124 Stat. 2372, §§ 6(1)–6(3) (drug-premises enhancement situated between enhancements for bribing a law enforcement officer and being a drug king pin). Mr. Hopper never occupied such a role. Not only that, but for a significant period of time before his arrest, he had stopped any drug activity at the home. Not crediting this voluntary abandonment would further expand the reach of this already stretched enhancement. Accordingly, this Court should recognize that when a defendant voluntarily ceases drug activity in the home for a proportionally significant period of time, he cannot be deemed to have maintained a drug premises within the meaning of § 2D1.1(b)(12).

CONCLUSION

Because the district court committed reversible error when it refused to mandate the disclosure of proffer letters, this Court should reverse Mr. Hopper's conviction. Because Mr. Hopper suffered a material variance, his conviction should be vacated. And, in the alternative, this Court should reverse and remand for a limited resentencing without the double-counted drug amounts, without the drug premises enhancement, and/or so that his sentence omits buyer-seller relationships.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for Defendant-Appellant Rex Hopper, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on March 6, 2019, which will send notice of the filing to counsel of record in the case.

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