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.

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

BRIEF FOR APPELLEE UNITED STATES

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JURISDICTIONAL STATEMENT

Appellant's Jurisdictional Statement is not complete and correct.

This is a direct appeal from the judgment of conviction and sentence of the United States District Court for the Southern District of Illinois entered on July 18, 2018.

On June 6, 2017, a Federal Grand Jury sitting in Benton, Illinois, returned a one count indictment charging Appellant Rex A. Hopper (hereinafter "appellant") with conspiracy to distribute fifty (50) grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 841(b)(1)(B). R. 1.[1]

On January 4, 2018, the grand jury returned a one count superceding indictment charging appellant with conspiracy to distribute fifty (50) grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 841(b)(1)(B). R. 32. The superceding indictment expanded the dates of the conspiracy. Id.

The district court had original jurisdiction over this case pursuant to Title 18, United States Code, Section 3231.

[1] References to documents in the Record on Appeal are designated herein as "R." followed by the appropriate number for the document (i.e. R. 1); references to the trial transcripts are designated as "Tr., pg#"; references to other transcripts are designated by the proceeding to which they relate followed by the relevant page number(s) (i.e. "Plea Tr. at ___" or "Sent. Tr. at ___"); references to defendant-appellant's brief or appendix are, respectively, to "Def. Br. __" or "Def. App. __"; references to the appendix of this brief are to "Gov. App. __"; references to documents filed in this court are designated as "7th Cir. Doc. ___"; references to the Presentence Investigation Report are designated "PSR" followed by the relevant paragraph or page number.

On February 28, 2018, following a three day trial, the jury found appellant guilty and also returned a special verdict form finding that the amount involved in the conspiracy was 50 grams or more. R. 68.

On July 17, 2018, the district court sentenced appellant to 235 months' imprisonment, four years of supervised release, a $250 fine; and a $100 special assessment. R. 99. The court entered written judgment on July 18, 2018. R. 102.

On July 18, 2018, appellant timely filed a notice of appeal. R. 104.

This court has jurisdiction over this appeal pursuant to Title 28, United States Code, Sections 41 and 1291, and Rule 4(b) of Federal Rules of Appellate Procedure. Because appellant seeks review of his sentence, this court also has jurisdiction pursuant to Title 18, United States Code, Section 3742.

STATEMENT OF THE ISSUE(S)

1. Whether the district court was within its discretion when it followed Seventh Circuit authority in finding that the government did not need to disclose proffer letters for witnesses that were testifying pursuant to cooperating plea agreements, where the government had already provided the cooperating plea agreements.

2. Whether there was sufficient evidence to prove that appellant was a member of the conspiracy where there was evidence of pooling money to buy larger

amounts, fronting drugs to co-conspirators, having co-conspirators collect money for appellant, co-conspirators driving appellant to make drug deals, sharing of sources of supply, and helping each other obtain methamphetamine when the normal source of supply had nothing for sale.

3. Whether appellant knowingly and intelligently waived any appellate challenge to his relevant conduct when defendant on multiple occasions acknowledged to the district court that his base offense level, which is calculated solely on relevant conduct, was correct.

4. Whether the district court grossly undercounted the amount of relevant conduct in this case.

5. Whether the district court correctly applied a two level enhancement for maintaining a premises for the purpose of distributing a controlled substance where appellant, among other things, repeatedly distributed drugs from his residence, weighed drugs at the residence, stored drugs at the residence, and collected payments for drugs at the residence.

STATEMENT OF THE CASE

On June 6, 2017, a Federal Grand Jury sitting in Benton, Illinois, returned a one count indictment charging appellant with conspiracy to distribute fifty (50) grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 841(b)(1)(B). R. 1.

On January 4, 2018, the grand jury returned a one count superceding indictment charging appellant with conspiracy to distribute fifty (50) grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 841(b)(1)(B). R. 32. The superceding indictment expanded the dates of the conspiracy. Id.

Trial Proceedings

The district court held a three day jury trial on February 26-28, 2018. R. 65, 66, 67. The facts from the trial are as follows:

Franklin County Deputy Sheriff Paul Uraski testified about a traffic stop he made on May 8, 2016, involving appellant and Kevin Schuman. Tr., pg. 43. The vehicle was appellant's 2001 red Chevy Tahoe. Id.

On May 29, 2016, Deputy Uraski stopped the same red Chevy Tahoe driven by Dameon Williams. Tr., pg. 47-48. Deputy Uraski recovered approximately 82 grams of methamphetamine in three separate packages (about 1 ounce each) from the vehicle, as

well as other drug paraphernalia. Tr., pg. 48-49.

Dameon Williams received methamphetamine "ice" from appellant between May 2015-May 29, 2016. Tr., pg. 59-61. Williams received approximately 1-2 ounces of methamphetamine ice from appellant per occasion, and Williams received the methamphetamine ice 1-3 times per month. Tr., pg. 59-61. Sometimes appellant fronted (i.e., provided on credit) the methamphetamine to Williams. Tr., pg. 61-62. Williams would then sell methamphetamine to pay appellant back. Id.

Williams collected money for appellant when some of appellant's other customers would not pay appellant back on time. Tr., pg. 62-64. The appellant would call Williams and tell him to go by a person's house and either collect money for appellant, or bring the person to appellant's house. Tr., pg. 63. One of the individuals whom Williams took to appellant's house was Andy Karnes, a/k/a "Tiny." Tr., pg. 63. Williams saw appellant provide Karnes with methamphetamine. Id. The reason Williams helped collect money for appellant was "to help him, I mean, I was selling drugs for him." Tr., pg. 64.

Williams testified regarding the traffic stop on May 29, 2016. Earlier in the day, appellant traded cars with Williams and gave Williams appellant's red Tahoe.[2] In addition, appellant fronted Williams "97 grams of ICE to get rid of because he [appellant]

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[2] Williams called the vehicle a Yukon. It was actually a red Tahoe that Williams was stopped in by Deputy Uraski.

was tired of being in the dope game, and he was getting nervous." Tr., pg. 67.

Illinois State Police Forensic Scientist Chandra Girtman testified that the methamphetamine recovered from Williams in the May 29, 2016, traffic stop had a total weight of 75 grams. Tr., pg. 135-142.

Brooke Peyton met appellant during 2016 when she was dating Andy Karnes. Tr., pg. 87. Peyton saw appellant provide three to five "8-balls" (3.5 grams each) of methamphetamine ice to Karnes on multiple occasions. Tr., pg. 88-90. Peyton said this occurred several times per week during the summer of 2016. Id. The appellant provided the methamphetamine to Karnes "on a front." Tr., pg. 90. Karnes was supposed to pay appellant back after Karnes sold the methamphetamine. Tr., pg. 89-90. The appellant also had Dameon Williams bring methamphetamine ice to Karnes on behalf of appellant. Tr., pg. 91-92. Peyton saw appellant distribute methamphetamine to Erin Wright, the defendant's brothers – Mark, Rick, and Dean – in addition to herself. Tr., pg. 95-96.

Robert Weir, a/k/a "Boog," was a co-conspirator who was involved with appellant and others in obtaining multi-ounce amounts of methamphetamine on numerous occasions. Weir testified that on one occasion, in the summer/fall of 2015, he drove appellant from Southern Illinois to Cape Girardeau, Missouri, so that appellant could obtain an ounce of methamphetamine. Tr., pg. 114-115. This transaction took place in a Wal Mart store and appellant handled the transaction. Tr., pg. 111-115.

On another occasion, Weir, appellant, Blake Gordon, and Shara Peyton pooled their money together to purchase four ounces of methamphetamine – one ounce apiece. Tr., pg. 116-117. Weir arranged the transaction through a person named Angel. Id. Weir and Angel drove to Cape Girardeau, purchased the methamphetamine, and drove back to Southern Illinois to split up the methamphetamine. Id. It was then that the group realized they had been shored an ounce. Because Weir purchased only three ounces, instead of four ounces, Weir was going to take the loss and not receive any methamphetamine. Id. However, appellant gave Weir one-half ounce of methamphetamine because of this shortage. Id.

Weir, appellant, Randall Riley, and Lucas Holland also pooled money together for the purchase of methamphetamine ice on numerous occasions from Riley's source. Tr., pg. 119-120. Riley and Holland lived in Murphysboro, Illinois. Id. Sometimes appellant would take his and Weir's money to Murphysboro to provide to Riley; on some occasions Weir would take the money to Riley; on some occasions, both appellant and Weir would travel together to provide money to Riley. Id., at 120-121.

Riley would go to Cape Girardeau, Missouri, purchase the methamphetamine, and then return to Illinois. Tr., pg. 121-122. Riley would then provide appellant and Weir their portion of the methamphetamine. Id. All four individuals pooling their money would usually get one ounce of methamphetamine apiece. Id., at 122-123. This arrangement of pooling money together to obtain larger amounts of methamphetamine

from Riley's source of supply occurred several times per week for at least a month. Id., at 123-124.

Weir, appellant, and Riley pooled their money together to obtain methamphetamine from one of Weir's source. Tr., pg. 125-126. Weir arranged the transaction (he believed two ounces), and Weir traveled to Missouri where he purchased the methamphetamine. Id. Weir brought the methamphetamine back to Illinois and gave appellant and Riley their shares. Id.

After Riley was arrested in March 2016, appellant and Weir pooled their money together ($4,300), which they provided to Holland to purchase methamphetamine. Tr., pg. 129. Holland took their money but never returned with any drugs. Tr., pg. 129.

Weir was familiar with Dameon Williams (they were mutual friends of appellant) and indicated that Williams obtained methamphetamine from both appellant and Weir. Tr., pg. 126-127. The appellant told Weir that he (appellant) traded his red Tahoe and three ounces of methamphetamine for Williams' vehicle.[3] Tr., pg. 127. Weir observed appellant distribute methamphetamine to a number of individuals. Tr., pg. 127-128.

After Riley and Holland were gone, appellant and Weir discussed a source of supply in Kansas City. Tr., pg. 128-129. The appellant and Weir were supposed to start obtaining methamphetamine from this individual in Kansas City, but Weir went to jail

[3] This is the May 29, 2016 , transaction described by Williams during his testimony and described above.

on the day the transaction was supposed to happen. Tr., pg. 128-129. Weir testified that the defendant went to Kansas City to try and obtain methamphetamine. Tr., pg. 129.

Lucas Holland testified that in the beginning of 2016, he, appellant, Riley, and Weir put their money together for the purpose of purchasing methamphetamine. Tr., pg. 150-154. Holland testified that he and Riley would go to Missouri to obtain the methamphetamine. Id. The appellant, Weir, or both would come to Riley's house with money and provide the money to Riley. Id. Riley and Holland would go to Missouri, purchase the methamphetamine, and then return to Illinois. Id. All four would then get their share of the methamphetamine. Id. This occurred from December 2015 through the time Riley got arrested (March 2016). Id.

Holland testified that on one occasion, he, appellant, Riley, and appellant's girlfriend (Erin Wright), went to Missouri to purchase methamphetamine. Tr., pg. 154-156. The appellant set up the transaction with a methamphetamine source that he knew. Id. Holland, Riley, and appellant pooled their money together to purchase the methamphetamine. Id.

After Riley was arrested, appellant and Weir came to Holland and provided Holland with money to obtain methamphetamine. Tr., pg. 157. Holland confirmed Weir's testimony that he (Holland) ran off with the money and did not give them any methamphetamine. Id. Holland also saw appellant distribute methamphetamine to

other individuals, including Kevin Schuman. Tr., pg. 157-158.

DEA Task Force Officer Orion Mata testified that on March 22, 2016, appellant was stopped in Kansas City, Kansas, in a vehicle with a person named Jason Clapp. Tr., pg. 175-177. Clapp went to a residence in which the DEA had just executed a search warrant for drugs. Id.

Randall Riley testified that in late 2015-beginning of 2016, Riley initially sold appellant methamphetamine ice through a person named Wesley Miller. Tr., pg. 192-194. After that initial purchase, Riley, appellant, Holland, and Weir pooled their money together to purchase methamphetamine ice. Tr., pg. 194-196. Riley and Holland had a source of supply in Missouri. Id. At first, it was just Riley, appellant, and Holland pooling money to obtain methamphetamine ice. Tr., pg. 195. After a while, Weir join the three of them in pooling their money together to obtain methamphetamine ice. Id. The group was obtaining one-quarter pound (4 ounces) of methamphetamine ice and sharing it amongst themselves. Id.

Sometimes appellant would come alone with money for he and Weir; sometimes Weir would come with the money for he and appellant; sometimes they would both come and bring money. Tr., pg. 195-196. The appellant and/or Weir would give the money to either Riley or Holland. Id. Riley and Holland would then go obtain the methamphetamine and bring it back for purposes of splitting it up. Id.

When Riley's source was out of methamphetamine, appellant had a source from

whom the group could obtain the methamphetamine. Tr., g. 196-197. The appellant and his girlfriend (Erin Wright) picked up Riley and Holland and they went to Missouri. Tr., pg. 197. Riley and Holland gave appellant their money. Id. The appellant gave the money to a person who provided methamphetamine that was subpar. Id. Riley, appellant, and Holland split up the methamphetamine amongst themselves. Tr., pg. 197-198.

Blake Gordon met appellant through Weir. Tr., pg. 224. Gordon, Weir, and appellant pooled their money together to obtain methamphetamine in Missouri. Tr., pg. 227-228. Weir went and obtained the drugs, brought them back to Southern Illinois, and split the drugs up amongst the three who put money into the deal. Tr., pg. 227-228. Gordon drove appellant around Southern Illinois so appellant could distribute methamphetamine to customers. Tr., pg. 226-227.

Crystal Boulton dated and lived with Riley in March 2016. Tr., pg. 268-271. Boulton was familiar with appellant and Weir. Tr., pg. 269-271. Boulton testified that appellant would be at Riley/Boulton's residence several times per week prior to Riley's arrest in early March 2016. Tr., pg. 271-272. The appellant would obtain an ounce of methamphetamine on these occasions. Tr., pg. 271-273. Sometimes Weir would come to the residence; sometimes appellant would come to the residence; sometimes both appellant and Weir would come to the residence. Tr., pg. 273. Boulton heard appellant and Riley discussing pooling their money in order to obtain methamphetamine in

Missouri. Tr., pg. 274.

Erin Wright dated and lived with appellant during the time frame of the conspiracy. Tr., pg. 284-286. Wright confirmed the previous testimony about appellant's dealings with Riley (described above). Tr., pg. 286-291. Wright also testified that after Riley got arrested, appellant and Weir pooled money to provide to Holland to get methamphetamine ice. Tr., pg. 291. Wright also testified about the occasion that she, appellant, and Jason Clapp were in Kansas City to get methamphetamine when they were approached by federal agents. Tr., pg. 291-294. Wright testified that the next day appellant and Clapp purchased methamphetamine in Kansas City which appellant brought back to Southern Illinois. Tr., pg. 295-296. Clapp then brought several ounces of methamphetamine to appellant on multiple occasions. Tr., pg. 296.

Officer Kenneth Sneed testified about finding methamphetamine during an April 12, 2017, search of appellant's residence. Tr., pg. 313-315. DEA Chemist Louis Chavez testified that one exhibit of methamphetamine recovered in appellant's residence weighed 3.352 grams and was 98% pure methamphetamine, and a second exhibit recovered weighed .590 grams and was 97% pure methamphetamine. Tr., pg. 329.

Chelsea McCormack testified that from late 2015 – April 2016, appellant sold her methamphetamine. Tr., pg. 334-335. McCormack testified that on one occasion, she, appellant, and Erin Wright went to Missouri, where appellant purchased

methamphetamine the size of a nerf football. Tr., pg. 335-337.

William Craig testified that he met appellant through Weir. Tr., pg. 356. The appellant provided Craig with methamphetamine on multiple occasions from appellant's residence beginning in late 2015. Tr., pg. 356-357. The appellant would give methamphetamine to Craig free of charge for Craig's personal use, but would charge Craig if Craig was obtaining the methamphetamine for other individuals. Tr., pg. 356-358. Craig described an incident where appellant and Weir pooled their money to obtain methamphetamine in Missouri. Tr., pg. 359-361. Craig and Weir then traveled to Missouri to get the methamphetamine to bring back to Southern Illinois, where appellant and Weir divided the methamphetamine. Tr., pg. 360-361. Craig saw appellant sell methamphetamine to a number of customers where the transactions occurred at appellant's residence. Tr., pg. 362-364.

Kevin Shuman testified that in December 2015-January 2016, Shuman lived at the defendant's residence. Tr., pg. 395. The appellant provided Shuman with methamphetamine at the residence. Tr., pg. 395-396. At first, appellant provided Shuman 3.5 – 7 grams of methamphetamine at a time, but the amount increased to ounces of methamphetamine over time. Tr., pg. 396-397. The appellant fronted Shuman the methamphetamine. Tr., pg. 396-397.

Shuman went to jail for 45 days in early 2016. Tr., pg. 397. After Shuman got out of jail, in March/April 2016, appellant again "fronted" ounces of methamphetamine

to Shuman on multiple occasions. Tr., pg. 396-398. Shuman described this manner of dealing in fronts as an agreement: "That's where you make an agreement to pay somebody back later, you get the drugs, you sell them and pay the person back what they want for it." Tr., pg. 396. The appellant would leave the methamphetamine for Shuman in appellant's garage. Tr., pg. 397. Shuman would take the methamphetamine and leave appellant money owed from the methamphetamine previously fronted to Shuman. Tr., pg. 397-398.

Shuman, appellant, and Wright took two trips to Missouri to obtain methamphetamine to bring back to Southern Illinois to sell. Tr., pg. 398-402. Shuman testified that he knew that Weir pooled money with appellant to obtain methamphetamine. Tr., pg. 402. Shuman also drove appellant around Southern Illinois when appellant delivered methamphetamine to customers. Tr., pg. 402-403.

On February 28, 2018, following a three day trial, the jury found appellant guilty and also returned a special verdict form finding that the amount involved in the conspiracy was 50 grams or more. R. 68.

Sentencing Proceedings

On May 3, 2018, the Probation Office prepared an initial Presentence Investigation Report ("PSR"). R. 81. The initial PSR determined that appellant had a "base offense level of 36 for offenses involving at least 1.5 kilograms but less than 4.5 kilograms of ice.

The instant offense involved 1.968 kilograms of ice." R., 81, ¶28. The initial PSR, however, erroneously awarded appellant two (2) levels off for acceptance of responsibility because: "[appellant] was interviewed by the probation officer and provided a statement wherein the [appellant] admitted involvement in the offense." R., 81, ¶¶24, 35. The initial PSR concluded that appellant had a Total Offense Level of 34. R., 81, ¶36.

The appellant filed an objection to the initial PSR. R. 82. The appellant objected to the two-level decrease for acceptance of responsibility indicating that he did <u>not</u> admit his involvement in the offense. R., 82, pg. 1. The appellant represented that "[h]is Total Offense Level is therefore 36; the proper advisory guidelines range is one hundred and eighty-eight (188) to two hundred and thirty-five (235) months." R., 82, pg. 1.

On May 24, 2018, the Probation Office filed the first revised PSR. Doc. 84. That PSR removed the two level decrease for acceptance of responsibility and had a Total Offense Level of 36. R., 84, ¶¶34, 35.

On May 30, 2018, the government filed an objection to the first revised PSR. R., 90. The government argued that there should be a two level increase in the offense level because appellant maintained a premises for the purpose of manufacturing or distributing a controlled substance. R., 90; U.S.S.G. § 2D1.1(b)(12).

On June 12, 2018, the Probation Office filed a second revised PSR. R., 94. The Probation Office agreed with the government's position that appellant maintained a

residence for the purpose of distributing a controlled substance, and that the offense level should be increased by two levels. R., 94, ¶28. The Total Offense Level, therefore, was 38. R., 94, ¶35.

On June 26, 2018, appellant objected to the second revised PSR arguing that the two level enhancement for maintaining a residence for the distribution of controlled substances was wrong. R., 96. The appellant stated:

> The defense maintains that the First Revised Presentence Report submitted an appropriate offense level, and in turn, an appropriate guideline range. The Court is respectfully asked to find, consistent with this earlier report, that the defendant's Adjusted Offense Level and Total Offense Level are 36, and that his advisory imprisonment range is 188 to 235 months, and that his low end fine amount is $40,000.

R., 96, pg. 2.

The appellant later stated: "The total offense level in this case should be 36, and the advisory guidelines range should be 188 to 235 months. The Court is respectfully asked to sustain this objection and to enter findings consistent with this position." R., 96, pg. 10.

On July 17, 2018, the district court held the sentencing hearing in this case. R., 99. The only objection raised by appellant was the two-level enhancement that he maintained a residence for the purpose of distribution controlled substance pursuant to U.S.S.G. §2D1.1(b)(12).

In addition to the trial testimony the government cited in its previous objection, the government put on additional evidence at the sentencing hearing supporting the

enhancement. Erin Wright testified that she lived in a residence in Creal Springs, IL, with appellant from mid-October 2015 – April 2017. Sent. Tr., pg. 6-7. Wright testified that appellant stored methamphetamine at the residence in Creal Springs nearly every day that they lived there. Sent. Tr., pg. 7-8. Wright testified that after appellant obtained methamphetamine from Riley, Holland, Weir, or Clapp, appellant would bring the methamphetamine back to their residence. Tr., pg. 8-9. Wright testified that appellant distributed methamphetamine from the residence every week. Sent. Tr., pg. 9. The appellant collected money from drug debts at the residence. Sent. Tr., pg. 9. Wright described how appellant would use scales to weigh up methamphetamine at the residence. Sent. Tr., pg. 9-10. Wright said that the majority of the time she lived with appellant, methamphetamine was stored and distributed from the residence. Sent. Tr., pg. 10.

The district court found that the two level enhancement applied, stating:

> There's no question that, first of all, based upon the evidence I've heard at trial, also of Ms. Wright, when Mr. Hopper would go purchase this methamphetamine he brought it back to the Creal Springs residence in probably the vast majority of the time. So, therefore, he was storing these drugs at the premises, and there's no question that there were people buying and he was distributing from the residence. Now, was it incidental or collateral, as Defendant argues, or was it just friends coming over and he was just -- Sure, I'm sure some of that happened, I'm sure it did happen, but I can't discount the testimony of Ms. Wright that just in response to my question that the frequency was weekly for a large period of time. That's more than just incidental or collateral.
>
> So, the Court, based upon the testimony I heard at trial, as well as the testimony here, considering the arguments of Defense Counsel, is going

> to overrule the Defendant's objection and find the two-point enhancement under 2D1.1(B)12 applies, as the Defendant maintained a residence for the purpose of distributing and storing a controlled substance and, therefore, the two-level increase applies.

Sent. Tr., pg. 41.

The district court adopted the PSR and the findings therein as the findings of the Court, including that relevant conduct was between 1.5 and 4.5 kilograms of ice methamphetamine, specifically 1,968 kilograms of ice methamphetamine, having a base-level offense of 36, plus the two-point enhancement described above for an offense level of 38. Sent. Tr., pg. 42. The district court found that appellant only had one criminal history point, which the district judge found "amazing when I read the presentence report with all the allegations of residential burglary." The district court determined that appellant's advisory guideline range was 235 to 293 months' imprisonment. Sent. Tr., pg 42.

The district court sentenced appellant to 235 months' imprisonment, four years of supervised release, a $250 fine; and a $100 special assessment. R. 99. Written judgment was entered by the district court on July 18, 2018. R. 102.

On July 18, 2018, appellant timely filed a notice of appeal. R. 104.

SUMMARY OF THE ARGUMENTS

The district court was within its discretion when it followed Seventh Circuit authority in finding that the government did not need to disclose proffer letters for witnesses that were testifying pursuant to cooperating plea agreements, where the government had already provided the cooperating plea agreements in discovery. The district court was simply following this Court's authority when it held that the proffer letters did not need to be turned over, as they were superseded by the disclosed plea agreements. However, the district court did allow appellant's counsel to cross-examine witnesses and provide the jury with the process by which proffers are done. This was appellant counsel's stated purpose for wanting the proffer letters and he was able to accomplish this purpose.

There was sufficient evidence to prove that appellant was a member of the conspiracy where there was evidence of pooling money to buy larger amounts, fronting drugs to co-conspirators, having co-conspirators collect money for appellant, co-conspirators driving appellant to make drug deals, sharing of sources of supply, and helping each other obtain methamphetamine when the normal source of supply had nothing for sale.

The appellant claims that there was only a buyer-seller relationship in this case, and asks this Court, improperly, to look at all of the witnesses' testimonies in isolation. Rather than looking at each witnesses' testimony in isolation, this Court must look at the

totality of the evidence when determining there was a conspiracy. In addition, the district court gave the jury the Seventh Circuit pattern buyer-seller jury instruction. Thus, the jury was aware that they could not convict appellant if they believed that he was merely in a buyer-seller relationship. Jurors are presumed to follow the instructions.

The appellant knowingly and intelligently waived any appellate challenge to his relevant conduct when defendant on multiple occasions represented to the district court that his base offense level, which is calculated solely on relevant conduct, was correct. The appellant affirmatively and repeatedly represented to the district court that he agreed with the base offense level (and, hence, the relevant conduct calculations) on several occasions. Thus, it would be fundamentally wrong to allow appellant to affirmatively represent to the district court that he agrees with the base offense level (relevant conduct), yet on appeal be allowed to present an argument that the district court's reliance on that representation was erroneous.

The district court did not double count drug quantities in this case; rather, the district court actually grossly undercounted the amount of relevant conduct in this case. The appellant and three others pooled their money to purchase four ounces of methamphetamine together for at least 30 days (if not more), which they would then split. The district court should have included the entire four ounce amount for each purchase in appellant's relevant conduct as the entire four ounces was foreseeable relevant conduct

to the defendant.

The district court correctly applied a two level enhancement for maintaining a premises for the purpose of distributing a controlled substance where appellant, among other things, repeatedly distributed drugs from his residence, weighed drugs at the residence, stored drugs at the residence, and collected payments for drugs at the residence. The district court's factual findings that appellant maintained a premises for the purpose of distributing a controlled substance were not clearly erroneous. The findings were based upon both trial testimony and testimony at the sentencing hearing that appellant distributed, stored, and weighed out methamphetamine on many occasions at his residence for a significant period of time.

ARGUMENTS

I. The District Court Did Not Abuse its Discretion When it Followed Seventh Circuit Authority in Finding that the Government did not Need to Disclose Proffer Letters for Witnesses that were Testifying Pursuant to Cooperating Plea Agreements, Where the Government had Already Provided the Cooperating Plea Agreements.

A. Standard of Review

A district court's determination that the disputed information did not have to be disclosed is accorded substantial deference, and appellant can only succeed if he demonstrates that the district court's decision constituted an abuse of discretion. United States v. Baker, 453 F.3d 419, 421-22 (7th Cir. 2006), citing United States v. O'Hara, 301 F.3d

563, 569 (7th Cir. 2002) and United States v. Plescia, 48 F.3d 1452, 1457 (7th Cir. 1995). A district court's decision constitutes an abuse of discretion only "if no reasonable person could agree with the district court." Id. at 422, quoting Tobel v. City of Hammond, 94 F.3d 360, 362 (7th Cir.1996).

B. Argument

At appellant's jury trial, multiple witnesses testified pursuant to cooperating plea agreements. All the plea agreements, along with all the witnesses' statements and their criminal histories, were disclosed to appellant prior to trial. In the district court, appellant requested copies of all proffer letters for the witnesses who had cooperating plea agreements, in addition to the previously tendered plea agreements. Consistent with this Court's decision in United States v. Weidenburner, 550 F. App'x 298, 304–05 (7th Cir. 2013), the district court denied appellant's request, finding that the proffer letters did not need to be turned over, as they were superseded by the disclosed plea agreements. On appeal, appellant asserts that the district court abused its discretion when it ruled that the Government did not need to disclose the proffer letters to appellant. Appellant's claim fails for multiple reasons.

In Weidenburner, the government could not locate copies of "proffer letters" written to the lawyers for witnesses Michelle Barth and David Duffy, two of Weidenburner's codefendants who testified against him. The principle underlying

proffer letters is simple -- the government wants to know what information a defendant possesses before bargaining for his cooperation. See United States v. Schuster, 706 F.3d 800, 804–05 (7th Cir.2013). These proffer letters, which the government drafted and the two codefendants acknowledged by initialing each paragraph, set the ground rules for "off the record" interviews that could lead to favorable plea agreements. United States v. Weidenburner, 550 F. App'x at 304–05.

The government could not locate copies of the letters sent to counsel for Barth and Duffy, but neither witness disputed their existence, and Duffy even confirmed that the letter sent to his lawyer was identical to a proffer agreement shown to him for another testifying codefendant. And Weidenburner did receive copies of the plea agreements executed by Barth and Duffy. This Court held that the government did not violate Weidenburner's rights by not providing the proffer letters. The court stated:

> Weidenburner's motion for a new trial was premised on his belief that disclosure of the proffer letters was required by Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), or the Jencks Act, 18 U.S.C. § 3500. In light of the record, a claim of nondisclosure would be factually frivolous, but, more importantly, these letters are not Giglio material or Jencks Act statements. Giglio requires disclosure of inducements for a witnesses's testimony, 405 U.S. at 154–55, 92 S.Ct. 763; United States v. Morris, 498 F.3d 634, 640 (7th Cir. 2007), but the prosecutor fulfilled that obligation by producing the plea agreements, which describe the benefits Barth and Duffy would receive for cooperating, including by testifying. The proffer letters were preliminary to the resulting plea agreements, and thus Giglio was satisfied by disclosure of the plea agreements. See United States v. Santisteban, 501 F.3d 873, 880 (8th Cir. 2007) (concluding that government provided due process by disclosing plea agreements that superceded proffer agreements); United States v. Thornton, 197 F.3d 241, 253 (7th Cir. 1999) (explaining that proffer letters are "of scant relevance at

> trial when a subsequent, superseding plea agreement has been reached"); United States v. Quesada, 607 F.3d 1128, 1131–32 (6th Cir. 2010) (explaining that plea agreements supercede proffer agreements); United States v. Davis, 393 F.3d 540, 546 (5th Cir. 2004) (same).

Weidenburner, 550 F. App'x at 304–05; see also United States v. Thornton, 197 F.3d 241, 252–53 (7th Cir. 1999) ("The plea agreements explained the conditions under which the cooperating codefendants were testifying. The proffer letters, which memorialize the framework under which the codefendants agreed to talk in the first place, seem of scant relevance at trial when a subsequent, superseding plea agreement has been reached.").

In the instant case, the district court was simply following this Court's authority when it held that the proffer letters did not need to be turned over, as they were superseded by the disclosed plea agreements. In fact, appellant even stated that he expected that the district court would follow Seventh Circuit precedent and not provide the proffer letters. Tr., pg. 8 (Appellant's counsel said: "I'm asking for the agreements I don't expect you to give them to me. The Seventh Circuit has ruled that they are not materials that have to be provided."). The district court cannot be deemed to have abused its discretion by following a faithful reading of Seventh Circuit precedent. See Baker, 453 F.3d at 422 (a district court's decision constitutes an abuse of discretion only "if no reasonable person could agree with the district court.").

However, the district court did allow appellant to cross-examine witnesses and provide the jury with the process by which proffers are done. Again, while he recognized this Court's holding in Weidenburner, appellant counsel argued that his

purpose for wanting the proffer letters was for appellant to be able to describe to the jury the process by which a cooperating witness provides a proffer and gets a cooperating plea agreement. This was the only purpose identified by counsel for demanding production of the proffer letters. Appellant's counsel stated:

> Mr. Kuehn: Now, Judge, this is a very important aspect of the defense, and the reason why is because no plea agreements are offered until you proffer. This is a preliminary step. This is part of the process by which men and women ultimately find their way on to the stand to give testimony against a defendant. And to ignore it ignores the fact that very early on agents sit down with them in a room with no cameras rolling behind closed doors and start asking questions, many times with a list, many times asking very specific things about what did or did not occur, and there are terms that govern that. And we exit with a document that is ultimately drafted by the government or by their agents, and then that is what does or does not lead to the plea agreements that they hear about.
>
> ***This is very much a part of this process.*** And it's important for the jurors if they are to fairly and honestly reach an opinion about the credibility of these witnesses. They have to understand that before a plea agreement, these aren't just one day you get a plea agreement and then off you go to court and you testify for the first time. ***This is a process. And if these jurors don't have some understanding of this process, we are really hampered in terms of our constitutional right to put on a defense and our constitutional right to confront the witnesses through cross examination that are here to accuse Rex Hopper of various crimes.*** So there is nothing in that opinion [Weidenburner], Judge, that says that I can't ask questions about the proffer sessions.
>
> THE COURT: Right. ***I was going to say you can ask questions about it.***
>
> MR. KUEHN: Okay. Well, I just -- I think the government was planning on leveling an objection on both fronts. As long as -- I mean, I'm asking for the agreements I don't expect you to give them to me. The Seventh Circuit [Weidenburner] has ruled that they are not materials that have to be provided. ***But as long as I'm able to ask about that process, I'm satisfied with the Court's ruling.*** I just -- I wanted the record to be made that I feel

like I should be entitled to these documents, but I understand if the Court doesn't rule that way, because the Seventh Circuit has already ruled. I want to make a record on that front.

THE COURT: Okay.

MR. KUEHN: But I just wanted to make sure that during cross examination, I was able to ask about that process.

THE COURT: Okay.

MR. KUEHN: Thank you, your Honor.

Tr., pg. 7-8.

This issue of the proffer letter/plea agreements applied to only six of the government's twenty-five witnesses – Holland, Riley, Kondoudis, Wright, Craig, and Shuman. The first of those witnesses chronologically at trial was Lucas Holland. During Holland's cross-examination, appellant's counsel thoroughly and vigorously questioned Holland about the process of giving a proffer:

Q. (By Mr. Kuehn) In terms of getting a plea agreement, Mr. Holland, is that proffer not a preliminary step to getting a plea agreement?

A. Yes.

Q. And you are there with your lawyer giving a confession, right?

A. Yes.

Q. Because you want a plea agreement, right?

A. Yes.

Q. You're behind closed doors at this time, correct?

A. Yes.

Q. There are no cameras rolling at this time, correct?

A. Yes.

Q. The agents who are investigating this case -- They are asking questions of you behind those closed doors --

MR. NORWOOD: Your Honor, I'm going to object. We are going far beyond just that he gave a proffer.

MR. KUEHN: Your Honor --

THE COURT: I'll allow a little latitude, but you may continue.

MR. KUEHN: Okay.

THE COURT: I'll stop you if I think you are going too far.

MR. KUEHN: I know you will, Judge. I know you will.

Q. (By Mr. Kuehn) So, the agents who are investigating the case are asking you questions at that time, right?

A. Yes.

Q. And it's your hope at that point to satisfy them so that you can get a plea agreement, is that correct?

A. Yes.

Q. And, once again, if they don't believe your proffer, they are not going to get -- you are not going to get a plea agreement. Was that your understanding at the time?

A. Right.

Q. And it wouldn't be your lawyer that would have a say in whether or not you provided a truthful proffer; that would be the agents who are investigating the case, --

A. Right.

Q. -- right? And that proffer statement differed from your post-arrest statement with regards to the inclusion of Rex Hopper, is that right?

A. True.

Q. And before you went into the proffer you had had an opportunity to review all the Government's case, all the Government's evidence in the case, is that right?

A. Right.

Q. And that --

MR. NORWOOD: Just to be clear, all the Government's evidence in what case? His case? Not Rex Hopper's case.

THE COURT: Yeah.

Q. In your case.

A. Correct.

Q. You were able to -- And that's going to include what other people have said about various different people involved in this, right?

A. Yes.

Q. And you were able to review that before you had to go in and satisfy agents that you were telling the truth so you could get one of these --

A. Yes.

Q. -- plea agreements, correct? And you knew the benefit of the plea agreement would ultimately hopefully be this Rule 35, right?

A. Correct.

MR. KUEHN: That's all I have, Your Honor.

Tr., pg. 171-173.

Thus, appellant accomplished what he desired vis-à-vis the proffer letters – to tell the jury the process by which a person proffers and how that process leads to a cooperating plea agreement. The appellant did not ask the other five witnesses listed

above about the process for giving a proffer, although there was nothing to preclude him from so doing.

There was one witness who had proffered, but had not entered into a cooperating plea agreement with the government – Blake Gordon. With respect to Gordon, the government provided appellant with Gordon's proffer letter and had no objection to appellant cross examining Gordon on his proffer letter.

> MR. KUEHN: Okay. As long as we are here, I just -- I don't know -- This individual [Mr. Gordon] does not have a plea agreement and I have been tendered a proffer letter for this witness and will be going through the proffer letter, because he doesn't have a plea agreement. But, I wanted you to know that in advance because of some of the *in limine* discussions we had about proffer letters.
>
> THE COURT: So, he has proffered?
>
> MR. NORWOOD: Yes, Your Honor, he had a proffer, but he entered an open plea, so there's no plea agreement to supersede the proffer.
>
> THE COURT: Okay.

Tr., pg. 220.

Because Gordon had entered an open plea of guilty, there was no cooperating plea agreement that superceded his proffer letter. Although appellant asked many questions suggesting that Gordon was seeking a reduction in sentence through his cooperation, appellant never showed Gordon the proffer letter, never moved for admission into evidence of the proffer letter, nor did appellant ask Gordon a single question based on the proffer letter itself. Tr., pg. 233-235. This makes clear that defense counsel's stated

purpose in requesting the proffer letter was his only purpose, and that such purpose was accomplished by his questioning of Holland (above).

On appeal, appellant raises a new argument that was never presented to the district court. The appellant now argues that Rule 16 requires disclosure of the proffer letters. The appellant cites no case authority in support of that proposition. Because this argument was never presented below, appellant has forfeited the issue and review is only for plain error. United States v. Baines, 777 F.3d 959, 963 (7th Cir. 2015).

Rule 16 is a discovery rule, not a rule of admissibility at trial. Assuming for the sake of argument that Rule 16 makes proffer letters discoverable, appellant knew what the terms of the proffer letters of all the witnesses were. As appellant's counsel explained to the district court, the wording in all proffer letters is the same and just the defendant's name is replaced. Tr., pg. 5 (Appellant counsel stated: "It's been my experience that those proffer letters do not change, only the names of the defendant do.").[4] Thus, appellant knew the terms of each person's proffer letter prior to trial. Indeed, a proffer letter was even sent to appellant. Tr., pg. 4 ("I have a copy of a proffer letter that was submitted to me."). But this rule of discovery does not affect admissibility at trial.

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[4] This is contrary to appellant's argument on appeal that there was no evidence that the proffer letters were the same. Appellant's Brief, pg. 16-17.

In addition, appellant has not demonstrated how he was prejudiced by not having the proffer letters. The appellant's counsel knew the substance of the letters, and cross-examined Holland on the purpose of the letters. The appellant has not shown how the failure to have the actual letters affected his substantial rights and would have affected the result in this case.

Even if the district court abused its discretion by following Weidenburner, (which the government does not believe it did), any error was harmless. Harmless errors are those that do not have an effect on the outcome because the case against the defendant is so overwhelming absent the erroneously admitted evidence. United States v. Quiroz, 874 F.3d 562, 571 (7th Cir. 2017).

In the instant case, appellant thoroughly cross examined Holland and all of the other witnesses with cooperating plea agreements at length about their motivation to provide information in exchange for a possible sentence reduction. See Tr., pg 159-167 (Lucas Holland); pg. 204-210, 213-214 (Randall Riley); pg. 246-252 (Ronelle Kondoudis); pg. 309-311 (Erin Wright); pg 365-368 (William Craig); pg. 408-413 (Kevin Shuman).[5] Thus, the jury was well aware of proffers, potential Rule 35 motions, cooperation agreements, and such matters by the time the jury deliberated.

[5] The appellant also thoroughly cross examined the other lay witnesses about their motivation to testify and suggested that the lay witnesses were not telling the truth.

In addition, some of the witnesses providing very damaging testimony (i.e., Weir and Williams) were not affected by the district court's ruling as they had neither proffered nor had cooperating plea agreements. Any error in not allowing appellant to cross-examine five witnesses about a proffer letter was harmless given the overwhelming evidence in this case. Tellingly, other than simply saying the proffer letters are material, appellant offers no argument about how, beyond simply not receiving copies of the letters, that the outcome of this trial would have been different.

II. There was more than Sufficient Evidence to Prove That the Appellant was a Member of the Conspiracy.

The appellant raises several alternative arguments about the defendant's conviction. First, appellant argues that he was involved only in a buyer-seller relationship, not a conspiracy. The appellant next argues that if he was in a conspiracy, it was not the conspiracy charged in the superseding indictment. Then appellant argues that the government proved multiple conspiracies, not one conspiracy. None of appellant's arguments have merit.

A. Standard of Review

A conspiracy variance claim is a challenge to the sufficiency of the evidence, which this Court reviews under a highly deferential standard. See United States v. Nitch, 477 F.3d 933, 936 (7th Cir. 2007) (citing United States v. Townsend, 924 F.2d 1385, 1389 (7th Cir. 1991)); United States v. Williams, 272 F.3d 845, 862 (7th Cir. 2001). Viewing the

evidence in the light most favorable to the government, this Court asks whether the evidence is sufficient to support the jury's determination. United States v. Womack, 496 F.3d 791, 794 (7th Cir. 2007), as amended on denial of reh'g and reh'g en banc (Oct. 5, 2007).

Because appellant failed to ask for a jury instruction on multiple conspiracies or otherwise bring this challenge to the attention of the district court, this Court reviews that portion of appellant's conspiracy variance claim for plain error only. United States v. Womack, 496 F.3d at 794; see United States v. Briscoe, 896 F.2d 1476, 1513 (7th Cir. 1990) (applying plain error standard of review because defendants failed to propose multiple conspiracy jury instruction).

B. Argument

A conspiracy requires a common criminal goal shared among two or more people. United States v. Neal, 907 F.3d 511, 515 (7th Cir. 2018); United States v. Long, 748 F.3d 322, 325 (7th Cir. 2014). This Court has stated that ordinary simple drug transactions do not entail a conspiracy, for the buyer's only purpose is to buy and the seller's only purpose is to sell: the buyer and seller lack a shared criminal goal. United States v. Neal, 907 F.3d at 515; United States v. Long, 748 F.3d at 325. But a shared purpose—some unity of enterprise—between a buyer and seller to resell drugs to others can be enough to indicate the requisite common commitment to demonstrate a conspiracy to distribute drugs.

United States v. Neal, 907 F.3d at 515; United States v. Johnson, 592 F.3d 749, 755–56 (7th Cir. 2010). And such a shared purpose, this Court has explained, may be inferred from "sales on credit or consignment." Id.

"[B]y their very nature, drug conspiracies are loosely-knit ensembles." United States v. Townsend, 924 F.2d 1385, 1391 (7th Cir. 1991). So long as the evidence demonstrates that the co-conspirators embraced a common criminal objective, a single conspiracy exists, even if the parties do not know one another and do not participate in every aspect of the scheme." United States v. Longstreet, 567 F.3d 911, 919 (7th Cir. 2009)

Proof of conspiracy may come from direct evidence or circumstantial evidence, United States v. George, 900 F.3d 405, 410 (7th Cir. 2018), as well as 'the reasonable inferences ... concerning the parties' relationships, their overt acts, and their overall conduct.' United States v. George, 900 F.3d 405, 410 (7th Cir. 2018); United States v. Miller, 405 F.3d 551, 555 (7th Cir.2005) (quoting United States v. Navarrete, 125 F.3d 559, 562 (7th Cir.1997))."

To overturn a conspiracy conviction because of a variance, the defendant must show that there was a variance between what was charged in the indictment and the evidence at trial and that he was prejudiced by this variance. United States v. Williams, 272 F.3d at 862-63. Whether a single conspiracy exists is a question of fact for the jury. United States v. Townsend, 924 F.2d at 1389. "Even if the evidence arguably established the existence of multiple conspiracies, there is no material variance from the indictment

charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment." United States v. Williams, 272 F.3d at 862 (citing United States v. Townsend, 924 F.2d at 1389; United States v. McAllister, 29 F.3d 1180, 1186 (7th Cir.1994)).

The Government "may elect to proceed on a subset of the allegations in the indictment, proving a conspiracy smaller than the one alleged, so long as the subset is also illegal." United States v. Martin, 618 F.3d 705, 737 (7th Cir. 2010), as amended (Sept. 1, 2010); United States v. Wilson, 134 F.3d 855, 865 (7th Cir.1998) (internal quotation marks and citation omitted).

Occasional sales on credit can be consistent with an ordinary buyer-seller relationship. United States v. Neal, 907 F.3d 511, 515 (7th Cir. 2018); see e.g., United States v. Villasenor, 664 F.3d 673, 680 (7th Cir. 2011) ("For example, evidence that a supplier extends credit to an individual purchasing small quantities of drugs for personal consumption would not suffice to establish conspiracy."). But, "when a credit sale is combined with certain other characteristics inherent in an ongoing wholesale buyer-seller relationship—i.e., large quantities of drugs, repeat purchases or some other enduring arrangement—the credit sales become sufficient enough to distinguish a conspiracy from a nonconspiratorial buyer-seller relationship." United States v. Neal, 907 F.3d 511, 515 (7th Cir. 2018).

Pooling money to purchase drugs is also evidence of a conspiracy as opposed to a

mere buyer-seller relationship. In United States v. Haywood, 324 F.3d 514, 517 (7th Cir. 2003), this Court found sufficient evidence supported a conspiracy conviction where two alleged coconspirators "pooled their money and shared rides ... in order to buy inexpensive crack, meaning that each could run a cheaper operation-and earn higher profits-if the other succeeded." In United States v. Harris, 567 F.3d 846, 851 (7th Cir. 2009), this court held there was a conspiracy where the evidence showed that defendant James pooled his money with that of Harris, Morrow, and the other alleged co-conspirators to buy larger amounts of crack cocaine from outside the state for resale. See also United States v. Lomax, 816 F.3d 468, 475 (7th Cir. 2016) (a reasonable jury could have found that the shared supplier, funds, and product indicated an agreement between Brandon and Demond and that their communications suggested a common goal between them to sell the heroin, which is sufficient to establish a conspiracy).

With respect to the instant case, there is no dispute that the district court gave the jury the Seventh Circuit pattern buyer-seller jury instruction. R., 75, pg. 30. Thus, the jury was aware that they could not convict appellant if they believed that he was merely in a buyer-seller relationship. Jurors are presumed to follow the instructions. United States v. Dillard, 884 F.3d 758, 769 (7th Cir. 2018) (there is a presumption that jurors follow the court's instructions).

The appellant recites the testimony of many witnesses and asks the court, improperly, to look at their testimonies in isolation. Rather than looking at each

witnesses' testimony in isolation, this Court must look at the totality of the evidence when determining there was a conspiracy. United States v. Rivera-Donate, 682 F.3d 120, 129 (1st Cir. 2012) (In order to determine whether a single conspiracy was proved by the government, we look at the totality of the evidence with various factors in mind, "none of which, standing alone, is necessarily determinative."); see also United States v. Morales, 655 F.3d 608, 638 (7th Cir. 2011) (the jury could reasonably infer from the totality of the evidence that defendant joined the narcotics conspiracy).

There was more than ample evidence that appellant was involved in a conspiracy and not just a simple buyer-seller relationship. For example, there was evidence of pooling money to buy larger amounts, fronting drugs to co-conspirators, having co-conspirators collect money for appellant, co-conspirators driving appellant to make drug deals, sharing of sources of supply, and helping each other obtain methamphetamine when the normal source of supply had nothing for sale. Any one of these facts show a common unity of purpose more than a simple buyer-seller relationship. When viewing all of these factors together, and in the light most favorable to the government, it is very easy to see how the jury could find that the defendant was guilty of being in a conspiracy. Some of the facts include:

- Dameon Williams sold methamphetamine ice for appellant for approximately one year, including the time frame when appellant, Weir, and others were pooling money and obtaining methamphetamine in large amounts. Tr., pg. 59-61.

Williams received approximately 1-2 ounces of methamphetamine ice from the defendant per occasion, and he received the methamphetamine ice 1-3 times per month. Id. Sometimes appellant fronted (i.e., provided on credit) the methamphetamine to Williams. Id. at 61-62.

- Williams collected money for appellant when some of appellant's other sellers/customers would not pay the defendant back on time. Tr., pg. 62-64.
- The appellant would call Williams and tell him (Williams) to go by a person's house and either collect money for appellant, or bring the person to appellant's house. Id.
- Williams testified that the reason he helped collect money for the defendant was ***"to help him, I mean, I was selling drugs for him."*** Tr., pg. 64.
- William Karnes sold methamphetamine for appellant during 2016. Appellant fronted three to five "8-balls" of methamphetamine ice to Karnes on multiple occasions. Tr., pg. 88-90.
- Dameon Williams brought methamphetamine ice to Karnes on behalf of appellant. Tr., pg. 91-92. This action goes beyond a simple buyer-seller relationship when one of the people selling methamphetamine ice for appellant delivers drugs to another seller for appellant.
- Weir drove appellant from Southern Illinois to Missouri, so that appellant could obtain an ounce of methamphetamine. Tr., pg. 111-115.

- Weir, appellant, Gordon, and Shara Peyton pooled their money together to purchase four ounces of methamphetamine – one ounce apiece. Tr., pg. 116-117. When Weir purchased only three ounces, instead of four ounces, Weir was going to take the loss and not keep any methamphetamine. Id. However, appellant gave half of his ounce to Weir because of the shortage. Id. Thus, appellant is sharing the loss during the transaction with Weir, and also making sure his co-conspirator has methamphetamine to sell.
- Weir and appellant then met Riley and Holland. They pooled money together for the purchase of methamphetamine ice. Tr., pg. 119-120. It is clear that Weir and appellant had mutual trust with each other, as well as Riley/Holland with their drug money and proceeds.
- All four individuals pooling their money would get one ounce of methamphetamine apiece. Id., at 122-123. This arrangement of pooling money to obtain larger amounts of methamphetamine went on for a significant period of time.
- The appellant and others shared sources of supply. When Riley's source of supply was unavailable, Weir, appellant, and Riley pooled their money together to obtain methamphetamine from one of Weir's sources. Tr., pg. 125-126. Weir traveled to Missouri, purchased the methamphetamine, and brought the methamphetamine back to Illinois to split with appellant and Riley. Id.

- After Riley was arrested in March 2016, appellant and Weir had a transaction with Holland. Tr., pg. 129. The appellant and Weir pooled their money together ($4,300), which they provided to Holland. Tr., pg. 129.
- Weir indicated that Williams obtained methamphetamine from both appellant and Weir. Tr., pg. 126-127.
- After Riley and Holland were out of the picture, appellant and Weir discussed a new source of supply in Kansas City. Tr., pg. 128-129. The appellant and Weir were going to continue their pooling of money to purchase methamphetamine from this individual in Kansas City, but Weir went to jail on the day the transaction was supposed to happen.
- Holland testified about the pooling of money for the purpose of purchasing methamphetamine, similar to Weir and Riley. Tr., pg. 150-154.
- Holland testified that on one occasion when their normal source of supply was unavailable, Holland, appellant, Riley, and appellant's girlfriend (Wright), went to Missouri to purchase methamphetamine from appellant's source. Tr., pg. 154-156. The appellant set up the transaction and Holland, Riley, and appellant pooled their money together to purchase the methamphetamine.
- Riley testified about the pooling of money to purchase methamphetamine ice. Tr., pg. 194-196.

- When Riley's source was out of methamphetamine, appellant had a source from whom the conspirators obtained the methamphetamine. Tr., g. 196-197.
- Blake Gordon, who met appellant through Weir, drove appellant around Southern Illinois so appellant could distribute methamphetamine to customers. Tr., pg. 226-227. Driving appellant around so he can make drug sales goes beyond a simple buyer-seller relationship.
- Gordon, Weir, and appellant pooled their money together to obtain methamphetamine in Missouri. Tr., pg. 227-228.
- William Craig met appellant through Weir. Tr., pg. 356. The appellant provided Craig methamphetamine on multiple occasions and would give methamphetamine to Craig for free if it was for Craig's personal use, but would charge Craig if he was obtaining the methamphetamine for other individuals. Tr., pg. 356-358. Thus, appellant would know when Craig was re-selling the methamphetamine to others.
- Craig and Weir then traveled to Missouri to get the methamphetamine to bring back to Southern Illinois, where appellant and Weir divided the methamphetamine. Tr., pg. 360-361.
- Kevin Shuman lived with appellant during late 2015 – early 2016. Tr., pg. 395. This was during the time when appellant, Weir, Riley, and Holland were pooling

money and obtaining large amounts of methamphetamine. The appellant was fronting Shuman methamphetamine. Tr., pg. 395-397.

- After Shuman got out of jail, in March/April 2016, when appellant was dealing with Riley, Holland, and then Capp. The defendant again "fronted" ounces of methamphetamine to Shuman on multiple occasions. Tr., pg. 396-398. Shuman even described their manner of dealing in fronts was an agreement: "That's where you make an agreement to pay somebody back later, you get the drugs, you sell them and pay the person back what they want for it." Tr., pg. 396.
- Shuman discussed two trips that he, the defendant, and Wright took to Missouri to obtain methamphetamine to bring back to Southern Illinois to sell. Tr., pg. 398-402. Shuman testified that he knew that Weir pooled money with appellant to obtain methamphetamine. Tr., pg. 402.
- Shuman testified that he would drive appellant around Southern Illinois when the defendant delivered methamphetamine to customers. Tr., pg. 402-403.

All of the above activities go beyond a mere buyer-seller relationship. There was a prolonged method of repeatedly pooling money to obtain drugs from out of state. See United States v. Harris, 567 F.3d 846, 851 (7th Cir. 2009) (court held there was a conspiracy where the evidence showed that defendant James pooled his money with that of Harris, Morrow, and others to buy larger amounts of crack cocaine from outside the state for

resale.).

There was a sharing of sources of supply. For example, when Riley/Holland's source of supply was not available or had no drugs, then appellant or Weir had a source of supply for the group to purchase methamphetamine from.

In addition to obtaining large amounts of methamphetamine jointly with Weir, Riley, Holland, and others, appellant had several individuals who were below him in the hierarchy who were selling methamphetamine for appellant. Dameon Williams, William Karnes, and Kevin Shuman all were selling methamphetamine for appellant during the time frame that appellant and Weir were pooling money amongst themselves, and with others, to obtain methamphetamine. Shuman and Karnes were normally fronted the methamphetamine for resale; Williams was fronted methamphetamine for resale some of the time.

Williams helped to collect drug debts for appellant and stated that he did so because he was selling drugs for the defendant. Shuman said he and appellant had an agreement to distribute methamphetamine. Weir, Gordon, and Shuman drove appellant around Southern Illinois so appellant could sell methamphetamine. Weir introduced both Gordon and Craig to appellant for purposes of obtaining methamphetamine.

When viewed in the light most favorable to the government, and in its totality, there is more than ample evidence that appellant was involved in a conspiracy, and not

merely a buyer-seller relationship.

III. Appellant Knowingly and Intelligently Waived Any Appellate Challenge to His Relevant Conduct When Defendant on Multiple Occasions Acknowledged to the District Court that His Base Offense Level, Which is Calculated Solely on Relevant Conduct, was Correct.

A. Standard of Review

Waiver of a right extinguishes any error and precludes appellate review. United States v. Brodie, 507 F.3d 527, 530 (7th Cir. 2007).

B. Argument

In order for an alleged error raised for the first time on appeal to be reviewed under Rule 52(b), an appellant must first affirmatively demonstrate that he has merely "forfeited" his right to appellate review by negligently failing to bring the alleged error to the district court's attention rather than having "waived" that right by knowingly and intentionally failing to do so. United States v. Olano, 507 U.S. 725, 733 (1993).

"Waiver occurs when a criminal defendant intentionally relinquishes a known right." United States v. Brodie, 507 F.3d 527, 530 (7th Cir.2007) (citations and internal quotation marks omitted). Waiver of a right extinguishes any error and precludes appellate review. Id. The touchstone of waiver is a knowing and intentional decision. United States v. Jaimes–Jaimes, 406 F.3d 845, 848 (7th Cir.2005). Therefore, when a

criminal defendant selects among arguments as a matter of strategy, he waives the arguments he decides not to present. Id.

This court's precedent regarding waiver where an appellant elects to file objections to some issues at sentencing, but not others, could not be more clear:

> [I]t is clear from the record that Brodie had access to the PSR and knew of his right to object to the probation officer's recommendations. **Brodie objected to certain parts of the PSR and stated on the record that he did not have any further objections when asked by the district court. This seems to us the paragon of intentional relinquishment.**

Brodie, 507 F.3d at 531 (emphasis added).

In the instant case, appellant on multiple occasions affirmatively stated to the district court that appellant's base offense level, which is calculated solely by relevant conduct, was correct.

On May 3, 2018, the Probation Office prepared an initial Presentence Investigation Report ("PSR"). R. 81. The initial PSR stated that appellant had a "base offense level of 36 for offenses involving at least 1.5 kilograms but less than 4.5 kilograms of ice. The instant offense involved 1.968 kilograms of ice." R., 81, ¶28. The initial PSR, however, also erroneously indicated that appellant should receive two (2) levels off for acceptance of responsibility. R., 81, ¶¶24, 35. The initial PSR concluded that appellant had a Total Offense Level of 34. R., 81, ¶36.

The appellant filed an objection to the initial PSR claiming that he should not receive a two-level decrease for acceptance of responsibility. R., 82, pg. 1. In his

objection, appellant affirmatively stated to the district court that "[h]is Total Offense Level is therefore 36; the proper advisory guidelines range is one hundred and eighty-eight (188) to two hundred and thirty-five (235) months." R., 82, pg. 1. This base offense level of 36 was calculated solely on the relevant conduct findings in the PSR which appellant agreed was correct.

Subsequently, on June 12, 2018, the Probation Office filed a second revised PSR. R., 94. The Probation Office agreed with the government's position that appellant maintained a residence for the purpose of distributing a controlled substance, and that the offense level should be increased by two levels. R., 94, ¶28. The Total Offense Level, therefore, was increased to 38. R., 94, ¶35. On June 26, 2018, appellant objected to the second revised PSR arguing that the two level enhancement for maintaining a residence for the distribution of controlled substances was wrong. R., 96. The appellant stated:

> ***The defense maintains that the First Revised Presentence Report submitted an appropriate offense level***, and in turn, an appropriate guideline range. ***The Court is respectfully asked to find, consistent with this earlier report, that the defendant's Adjusted Offense Level and Total Offense Level are 36,*** and that his advisory imprisonment range is 188 to 235 months, and that his low end fine amount is $40,000.

R., 96, pg. 2 (emphasis added). That offense level of 36 is based solely on the relevant conduct – at least 1.5 kilograms but less than 4.5 kilograms of ice -- in the PSR which appellant stated was correct.

The appellant later stated in his objection: "The total offense level in this case should be 36, and the advisory guidelines range should be 188 to 235 months. The Court

is respectfully asked to sustain this objection ***and to enter findings consistent with this position***." R., 96, pg. 10 (emphasis added).

Thus, appellant affirmatively and repeatedly represented to the district court that he agreed with the base offense level (and, hence, the relevant conduct calculations) on several occasions. Thus, it would be fundamentally wrong to allow appellant to affirmatively represent to the district court that he agrees with the base offense level (relevant conduct), yet on appeal be allowed to present an argument that the district court's reliance on that representation was erroneous.

There were also at least two, interrelated strategic reasons for appellant not to raise any objections to relevant conduct before the district court. First, appellant obviously did not want to distract the district court from his main objection to the two level enhancement for maintaining a premises (described below), with a frivolous argument about relevant conduct. See e.g., United States v. Armour, 804 F.3d 859, 865 (7th Cir. 2015) ("we are persuaded that Armour's decision not to challenge the readily-proven facts in the violation memorandum was intentional and supported by a tactical rationale, as these weak arguments could have distracted the court from Armour's stronger arguments); United States v. Brodie, 507 F.3d 527, 532 (7th Cir. 2007) (counsel had sound reasons not to raise near-frivolous arguments to the sentencing judge).

Second, and relatedly, raising an objection to relevant conduct would have alerted the court, probation, and the government to the serious undercounting of relevant

conduct that occurred. As shown below, the Probation Office grossly undercounted the relevant conduct in this case which could have resulted in appellant receiving a higher sentence range or higher sentence.

This court should find that appellant knowing and intelligently waived any argument regarding relevant conduct by affirmatively stating that the base offense level (i.e., relevant conduct) was correct. Accordingly, such argument is beyond appellate review.

IV. The District Court Did Not Double Count Drug Quantities in this Case; Rather, the District Court Actually Grossly Undercounted the Amount of Relevant Conduct in this Case.

A. Standard of Review

If this Court finds that appellant has not waived the issue for appellate review (see above), then appellant has forfeited the issue and review is for plain error. United States v. Baines, 777 F.3d 959, 963 (7th Cir. 2015).

B. Argument

In drug distribution cases, the defendant's relevant conduct will include drug quantities from transactions carried out by others, if those transactions were within the scope, and in furtherance, of criminal activity that the defendant agreed to jointly undertake, and the transactions were reasonably foreseeable to the defendant. *See* U.S.S.G. § 1B1.3(a)(1)(B); United States v. Stadfeld, 689 F.3d 705, 713 (7th Cir. 2012).

When a defendant has participated in a narcotics conspiracy, he is responsible for the total quantity of narcotics involved in the conspiracy that was reasonably foreseeable to him. See United States v. Stadfeld, 689 F.3d 705, 713–14 & n. 2 (7th Cir.2012).

The district court is not limited to reviewing the PSR when calculating drug quantity; "what controls the analysis is the 'entire evidence' before the district court." United States v. Longstreet, 567 F.3d 911, 928 (7th Cir. 2009) United States v. Sutton, 406 F.3d 472, 474 (7th Cir.2005) (quoting United States v. Span, 170 F.3d 798, 803 (7th Cir.1999)); see also Hankton, 432 F.3d at 790 ("In determining reliability we consider the totality of the evidence before the sentencing judge."). This Court may affirm a sentence on any basis supported by the record, even evidence not relied on by the sentencing judge. United States v. Longstreet, 567 F.3d 911, 928 (7th Cir. 2009); Sutton, 406 F.3d at 474.

The district court must determine the quantity of drugs attributable to a defendant by a preponderance of the evidence. United States v. Longstreet, 567 F.3d 911, 928 (7th Cir. 2009).

In the instant case, appellant claims that the district court double counted relevant conduct by including the amounts in the PSR from both Randall Riley and Lucas Holland. However, what has actually occurred is that the district court severely undercounted the relevant conduct in this case.

There can be no real dispute that appellant, Weir, Riley, and Holland pooled their money together to purchase four ounces of methamphetamine per trip for at least thirty days. Tr., pg. 119-123; 192-196; 286-291. On appeal, even appellant appears to acknowledge that he pooled his money with others. Def. Brief, pg. 42-43 ("They both [Riley and Holland] testified that they would pool money with [appellant] to buy methamphetamine, which they would then divide according to contribution. . .. These pooling transactions would occur as a group – neither Holland nor Riley testified to distributing [appellant] drugs independent of other.").

With respect to appellant, Riley, Holland, and Weir pooling their money to purchase four ounces of methamphetamine together, which they would then split, the district court should have included the entire four ounce amount for each purchase in appellant's relevant conduct. The entire four ounces was foreseeable relevant conduct to the defendant.[6] The testimony at trial was that appellant and Weir would combine their money and take it to Holland and/or Riley, who would then put in their share of money to purchase four ounces of methamphetamine. If all four ounces per trip are included in appellant's relevant conduct, then the amount of relevant conduct would be at least 3,400 grams of methamphetamine. (28.35 grams per ounce x 4 ounces x 30 days = 3,402 grams).

---

[6] Because it most likely would not have affected the advisory guideline range, the government inadvertently failed to object to this under calculation of relevant conduct.

Even if the district court only included the amount of relevant conduct between appellant and Weir, since they pooled their money together to take to Riley, the amount of relevant conduct would be 1,701 grams (28.35 grams per ounce x 2 ounces x 30 days = 1,701 grams). Either figure – 3,402 grams or 1,701 grams – is between 1.5 kilograms and 4.5 kilograms of a methamphetamine ice, resulting in a base offense level 36.

There was no plain error in appellant's relevant conduct calculation which requires a resentencing.

V. The District Court Correctly Applied a Two Level Enhancement for Maintaining a Premises for the Purpose of Distributing a Controlled Substance Where the Appellant, Among Other Things, Repeatedly Distributed Drugs From his Residence, Weighed Drugs at the Residence, Stored Drugs at the Residence, and Collected Payments for Drugs at the Residence.

A. Standard of Review

This Court reviews the district court's application of the sentencing guidelines de novo and its factual findings under the clearly erroneous standard. United States v. Thomas, 845 F.3d 824, 831 (7th Cir. 2017).

B. Argument

The appellant claims that the district court erred in applying a two level enhancement for maintaining a premises for the purpose of distributing a controlled substance. Appellant's claim has no merit.

Section 2D1.1(b)(12) of the Sentencing Guidelines applies to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance. *Id*. cmt. n. 17. The Guidelines state that for §2D1.1(b)(12) to apply, distributing a controlled substance must be a "primary or principal" use for the premises. U.S.S.G. § 2D1.1 cmt. n. 17.

Seventh Circuit authority makes clear, however, that drug distribution does not need to be the sole use of a premises in order for it to constitute a "primary" use; it simply must be "more than incidental or collateral." United States v. Contreras, 874 F.3d 280, 283 (7th Cir. 2017); United States v. Acasio Sanchez, 810 F.3d 494, 497 (7th Cir. 2016); United States v. Evans, 826 F.3d 934, 938 (7th Cir. 2016).

To determine whether drug distribution was a primary or incidental use, district courts "are not required to apply a simple balancing test that compares the frequency of unlawful activity at the residence with the frequency of lawful uses." United States v. Contreras, 874 F.3d at 284. This Court notes that applying such a test would immunize every family home that is also used for drug distribution from being deemed an illegally maintained "premises" as the amount of lawful activity in a home is all but certain to exceed the amount of illegal activity. Id.

Instead, the sentencing court should focus on both the frequency and significance of the illicit activities, including factors such as quantities dealt, customer interactions, keeping "tools of the trade" and business records, and accepting payment. United

States v. Contreras, 874 F.3d at 284; citing United States v. Flores-Olague, 717 F.3d 526, 533 (7th Cir. 2013). The guideline also specifically covers storage of a controlled substance for the purpose of distribution. See U.S.S.G. § 2D1.1(b)(12) cmt. n. 17 (2014); United States v. Sanchez, 810 F.3d 494, 497 (7th Cir. 2016).

In Contreras, for example, the Seventh Circuit affirmed the district court's finding that evidence of eight transactions, most within a two-month period, supported the two level enhancement under §2D1.1(b)(12). United States v. Contreras, 874 F.3d at 284. In United States v. Winfield, 846 F.3d 241, 243 (7th Cir. 2017), the court upheld the enhancement based on four drug transactions within twelve weeks.

In the instant case, just some of the evidence presented at trial and sentencing clearly supports the two level enhancement in this case, as appellant used his residence as a place for distributing methamphetamine as described in the cases above.

Testimony of Erin Wright

Erin Wright testified that she met appellant on September 30, 2015, and that shortly thereafter she and appellant moved to appellant's residence in Creal Springs, Illinois. Tr., pg. 284-286.

Wright testified about a number of drug transactions at the Creal Springs' residence. Ms. Wright testified that after appellant, Riley, Holland, and Weir obtained methamphetamine together, appellant would bring the drugs back to his residence. Tr.,

pg. 286-291. Wright also testified that appellant had drug scales at his residence and she observed appellant using the scales to weigh out methamphetamine. Tr., pg. 290. Wright also testified that Riley and Holland came to the Creal Springs' residence and would bring methamphetamine for appellant. Tr., pg. 286-291.

Wright also testified that Jason Clapp, from Kansas City, came to appellant's residence on a couple of occasions and brought methamphetamine for appellant. Tr., pg. 295-296. Wright testified that Dameon Williams came to the residence to purchase methamphetamine from appellant. Tr., pg. 297.

Testimony of Dameon Williams

Williams had known Hopper from approximately May 2015 – May 29, 2016. Tr., pg. 59-61. Williams testified that when individuals owed appellant money from prior drug transactions, Williams would get the individual and take him or her to appellant's residence for appellant to find out why the person had not paid the drug debt. Tr., pg. 62-64. Williams testified that on May 29, 2016, he went to appellant's residence with William Karnes, a/k/a Tiny and, while at the residence appellant fronted Williams approximately 97 grams of methamphetamine Ice. Tr., pg. 67. The appellant weighed the drugs on a scale at the residence. Tr., pg. 68.

Testimony of Brooke Peyton

Ms. Peyton testified that in 2016, she was at appellant's residence and saw him with methamphetamine at the residence. The appellant was providing Ms. Peyton's boyfriend, William Karnes, with three to five 8-balls of methamphetamine at a time. Tr., pg. 88-90. Some of the methamphetamine was obtained at appellant's residence, and on some occasions appellant brought the methamphetamine to Ms. Peyton's residence. Tr., pg. 91-92. Ms. Peyton was with Dameon Williams at appellant's residence for the purpose of Williams obtaining methamphetamine Ice from appellant. Id.

Testimony of William Craig

William Craig testified that towards the end of 2015, Craig and Weir went to appellant's residence to hang out and do drug deals "back and forth." Tr., pg. 356-57. Craig obtained methamphetamine from appellant at his residence. Tr., pg. 357-358. Craig testified that he and Weir went to Charleston, Missouri, to purchase a couple of ounces of methamphetamine. Tr., pg. 360. They brought the methamphetamine back to appellant's residence where appellant and Weir split up the methamphetamine. Tr., pg. 360.

Craig saw appellant sell methamphetamine to Kevin Page, a/k/a "Dink," on multiple occasions at appellant's residence. Tr., pg. 362-363. Craig observed Williams and appellant go into appellant's bedroom in order to conduct a drug transaction. Id.

Craig observed appellant provide methamphetamine to Karnes on five or six occasions at appellant's residence. Id.

Testimony of Kevin Shuman

In December 2015/January 2016, Kevin Shuman moved into appellant's residence for about a month or so. Tr., pg. 395. Shuman then went to jail for approximately 45 days and, after that, was coming back to appellant's residence to obtain methamphetamine. Tr., pg. 396-398. Shuman began by obtaining methamphetamine in amounts from 3.5 to seven grams. Id. The amounts eventually increased to Shuman obtaining ounces of methamphetamine from appellant. Id. In March/April 2016, appellant would leave ounce amounts for Shuman in appellant's garage where Shuman would pick them up and leave the money for appellant. Tr., pg. 396-398.

Sentencing Testimony of Erin Wright

At the sentencing hearing, Wright testified that appellant stored methamphetamine at the residence in Creal Springs, Illinois, nearly every day that they lived there. Sent. Tr., pg. 7-8. Wright testified that after appellant obtained methamphetamine from Riley, Holland, Weir, or Clapp, appellant would bring the methamphetamine back to the residence. Sent. Tr., pg. 8-9. Wright said appellant distributed methamphetamine from the residence every week; collected money from

drug debts at the residence; and used scales to weigh up methamphetamine at the residence. Sent. Tr., pg. 9-10. Wright said that the majority of the time she lived with appellant, methamphetamine was stored and distributed from appellant's residence. Sent. Tr., pg. 10.

Following argument, the district judge made the finding that the enhancement applied, stating:

> There's no question that, first of all, ***based upon the evidence I've heard at trial, also of Ms. Wright, when Mr. Hopper would go purchase this methamphetamine he brought it back to the Creal Springs residence in probably the vast majority of the time. So, therefore, he was storing these drugs at the premises, and there's no question that there were people buying and he was distributing from the residence.*** Now, was it incidental or collateral, as Defendant argues, or was it just friends coming over and he was just -- Sure, I'm sure some of that happened, I'm sure it did happen, but ***I can't discount the testimony of Ms. Wright that just in response to my question that the frequency was weekly for a large period of time. That's more than just incidental or collateral.***
>
> So, the Court, ***based upon the testimony I heard at trial, as well as the testimony here***, considering the arguments of Defense Counsel, is going to overrule the Defendant's objection and find the two-point enhancement under 2D1.1(B)12 applies, as the Defendant maintained a residence for the purpose of distributing and storing a controlled substance and, therefore, the two-level increase applies.

Sent. Tr., pg. 41.

The district court's factual findings were not clearly erroneous. The findings were based upon both trial testimony and Ms. Wright's testimony at the sentencing hearing. The appellant distributed, stored, and weighed out methamphetamine on many occasions for a significant period of time. Clearly, there were more than the eight

transactions in the Contreras case, 874 F.3d at 284, and more than the four transactions in the Winfield case. Winfield, 846 F.3d 241, 243 (7th Cir. 2017). In addition, like in Contreras, the government also presented evidence that drugs were shipped to and stored at appellant's home, that appellant accepted payment for drugs at his home, and that other codefendants met at appellant's home to settle a narcotics debt.

The appellant claims that Ms. Wright and others weren't credible. But the district court found the evidence credible and this Court will not disturb that finding unless it is wholly without any support. United States v. Harper, 766 F.3d 741, 744 (7th Cir. 2014) ("We have recognized that the sentencing judge is in the best position to determine the credibility of witnesses at the sentencing hearing, and will not disturb the credibility determination unless it is without foundation."). There is no showing that the district court's factual findings were in error.

The appellant also makes the novel argument that because appellant slowed down his drug activity near the end of the conspiracy, that slow down immunizes appellant from the two level enhancement. The appellant cites no case authority for this argument which is illogical. Simply because a defendant slows down his drug distribution (because he is paranoid he may get caught), does not insulate him from all of the prior illegal activity in which he participated.

Finally, appellant argues that his drug activity at his residence was insignificant. The district judge made the finding that appellant's drug activity was significant, and not

merely isolated or incidental. That factual finding was not clearly erroneous.

The district court correctly applied a two level enhancement for maintaining a premises for the purpose of distributing a controlled substance where appellant, among other things, repeatedly distributed drugs from his residence, weighed drugs at the residence, stored drugs at the residence, and collected payments for drugs at the residence.

CONCLUSION

For the foregoing reasons, the United States prays that this Court AFFIRM appellant's conviction and sentence in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as modified by Circuit Rule 32(c), because this brief contains 13,893 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 Seventh Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared using Microsoft Word 2016, in 12-point Book Antiqua font, a proportionally spaced typeface.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	**COURT OF APPEALS**
	)	**NO. 18-2576**
Plaintiff-Appellee,	)	
	)	**Southern District of Illinois**
vs.	)	**District Court No. 17-CR-40034-JPG**
	)	
REX A. HOPPER,	)	**Honorable J. PHIL GILBERT,**
	)	**Judge Presiding**
Defendant-Appellant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing and by placing said copy in a postpaid envelope addressed to the following:

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