

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL WALLACE,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary in this case because the defendant's sufficiency-of-the-evidence and sentencing arguments do not raise any complex or novel issues. This appeal can be easily resolved on the briefs.

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No. 21-6011

UNITED STATES OF AMERICA,

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v.

MICHAEL WALLACE,

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

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This appeal is from the final judgment in a criminal case in the Eastern District of Kentucky. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Michael Wallace on October 19, 2021. (Judgment, R. 196, PageID# 2057-2058).¹ Three days later,

¹ “R. ____” refers to the document number assigned on the district court’s docket sheet for case number 6:20-cr-00011-REW-HAI-1. “PageID# ____” indicates the page number in the paginated electronic record for case number 6:20-cr-00011-REW-HAI-1. “Br. ____” refers to the page number of Wallace’s opening brief.

Wallace filed a timely notice of appeal. (Notice of Appeal, R. 198-4, PageID# 2080). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports Wallace's conviction under 21 U.S.C. 841(a)(1) for possession with the intent to distribute five grams or more of methamphetamine, a Schedule II controlled substance.

2. Whether the district court at sentencing properly applied a two-level enhancement under Sentencing Guidelines § 2D1.1(b)(1) because Wallace possessed firearms in his home, where he stored the drugs underlying his drug conviction, and carried a firearm in his job as constable, where he conspired to violate civil rights, including by planting drugs on others.

STATEMENT OF THE CASE

This case arises from Wallace's and Gary Baldock's abuse of their authority as law enforcement officers, where they conspired to violate the civil rights of civilians in Pulaski County, Kentucky, including by planting drugs on them to support false arrests. In relevant part, a jury convicted Wallace with one count of conspiring to violate people's civil rights—specifically, their rights to be free from unreasonable searches and seizures and to be free from the deprivation of liberty and property without due process of law—in violation of 18 U.S.C. 241, and one count of possessing with the intent to distribute five grams or more of

methamphetamine found in his home by FBI agents on March 6, 2020, in violation of 21 U.S.C. 841(a)(1). (Transcript (Tr.), R. 216, PageID# 3028). In doing so, the jury rejected Wallace's defense at trial that his possession of methamphetamine was lawful because, as a constable, he had authority to store drug evidence in his home. (See Tr., R. 216, PageID# 2953-2955).²

On appeal, Wallace challenges the sufficiency of the evidence supporting his Section 841(a)(1) conviction and the district court's application of a two-level sentencing enhancement for possessing a firearm during the drug offense, which also served as the underlying offense for calculating the offense level for his Section 241 conviction. Set forth below are only the facts material to Wallace's arguments on appeal.

² At trial, Baldock was also convicted of one count of conspiring to violate people's civil rights, in violation of 18 U.S.C. 241, as well as one count of possessing with the intent to distribute a mixture or substance containing a detectable amount of methamphetamine found by FBI agents in a separate search of his property on March 6, 2020, in violation of 21 U.S.C. 841(a)(1). (Tr., R. 216, PageID# 3028-3029). When FBI agents executed an arrest warrant against Baldock, he shot at the agents, leading to additional charges of attempted murder, in violation of 18 U.S.C. 1114, and using and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). (Third Superseding Indictment, R. 88, PageID# 353). The district court severed these counts from Baldock's and Wallace's civil rights and drug counts. (Order, R. 56, PageID# 258-259). The United States ultimately filed, and the district court granted, a motion dismissing the indictment against Baldock due to his death on August 23, 2021. (Motion to Dismiss Indictment, R. 185, PageID# 1892; Order, R. 186, PageID# 1895).

1. *Factual Background*

Wallace was elected a constable of Pulaski County, Kentucky, in 2007. (Tr., R. 215, PageID# 2771). Constables are “elected peace officer[s] established by the Kentucky Constitution that serve[] within each county’s magisterial district.” (Tr., R. 212, PageID# 2309). They “possess countywide law enforcement authority equal to the sheriff.” (Tr., R. 212, PageID# 2309). And they “may possess a controlled substance during the lawful execution of these duties.” (Tr., R. 212, PageID# 2309).

a. *Wallace Abused His Law Enforcement Authority, Including By Planting Drugs*

The Federal Bureau of Investigation (FBI) began investigating Wallace after receiving information that he had planted methamphetamine on individuals in Somerset, Kentucky. (Tr., R. 212, PageID# 2314). FBI agents first interviewed three Somerset Police Department (SPD) officers who had been involved in an incident where the officers believed that Wallace planted drugs on a motorist (Timothy Sizemore) whom he stopped for expired tags. See pp. 6-8, *infra*; (Tr., R. 212, PageID# 2314). The FBI then set up an undercover operation, which culminated in Wallace falsely arresting an undercover agent (Kareem Pinkney) for public intoxication. See pp. 8-11, *infra*; (Tr., R. 212, PageID# 2314-2315). The FBI also learned of two additional traffic stops (involving Danny Hughes and Kayla Dobbs) where Wallace abused his authority as a law enforcement officer.

See pp. 5, 11-12, *infra*. These four incidents are discussed in chronological order and in detail below.

Danny Hughes

In 2018, Wallace pulled over Danny Hughes “for no apparent reason.” (Tr., R. 213, PageID# 2585). Wallace then “put baggies and scales in [Hughes’s] truck.” (Tr., R. 213, PageID# 2585). While doing so, he seized Hughes’s pistol, dune buggy (go-kart), car, and \$459 in cash. (Tr., R. 213, PageID# 2587-2588). Wallace then arrested Hughes. (Tr., R. 213, PageID# 2588). Hughes admitted to having less than a quarter gram of methamphetamine, an ounce of marijuana, and a pistol in his car. (Tr., R. 213, PageID# 2585-2586). But he denied having any baggies or scales in the car. (Tr., R. 213, PageID# 2586).³

Drug trafficking charges against Hughes were dismissed, and Hughes pleaded guilty to being a convicted felon in possession of a firearm. (Tr., R. 213, PageID# 2592).

³ The difference between having only a minute amount of drugs in a car and having scales and baggies in addition to the drugs is that the latter could support a drug trafficking charge, as opposed to just mere possession. (Tr., R. 215, PageID# 2855-2856). And with suspicion of drug trafficking, officers can seize a car. (Tr., R. 215, PageID# 2855). Without the scales and baggies, Wallace would have had no basis to seize Hughes’s car. (Tr., R. 215, PageID# 2855).

Timothy Sizemore

On November 18, 2018, Wallace pulled over a car being driven by Timothy Sizemore, who had just left a hotel room at the Budget Inn, for expired tags. (Tr., R. 213, PageID# 2453, 2462-2463).⁴ Wallace then contacted the SPD for assistance with the traffic stop. (Tr., R. 213, PageID# 2369). After three SPD officers—Officers Andrew Salmons, Nick Taylor, and James Mayfield—appeared at the scene, Wallace removed Sizemore from the car and placed him in front of his cruiser. (Tr., R. 213, PageID# 2369-2370, 2394-2395, 2455).

Wallace circled the car with a canine unit that he claimed alerted at the driver's door, and the SPD officers began searching Sizemore's car. (Tr., R. 213, PageID# 2369-2370, 2376, 2394-2395, 2408-2409). Officers Salmons and Taylor thoroughly searched the driver's side compartment area and door panel but did not find any illegal drugs. (Tr., R. 213, PageID# 2370, 2372, 2409). Officer Taylor proceeded to sit in the driver's seat and search the center console of the car, while Officers Salmons searched the back hatch of the car. (Tr., R. 213, PageID# 2370, 2410). Officer Mayfield mostly stood behind the car with Wallace and Sizemore

⁴ Before being pulled over, Sizemore had met Robert Beach in a hotel room at the Budget Inn, after giving Beach's girlfriend a ride to the hotel. (Tr., R. 213, PageID# 2428-2429, 2455). To show his appreciation, Beach gave Sizemore a bag containing a gram of methamphetamine. (Tr., R. 213, PageID# 2428-2429, 2455). Sizemore and Beach's girlfriend consumed the drugs and then left the empty bag in the hotel room. (Tr., R. 213, PageID# 2428-2429, 2455). Sizemore did not appear to have any drugs on him when he left the room. (Tr., R. 213, PageID# 2449).

before holding up the rear hatch of the car while Officer Salmons searched. (Tr., R. 213, PageID# 2370, 2395).

Despite the officers having found nothing, Wallace walked past them saying “watch this shit” and briefly approached the driver’s side of the car where Officer Taylor was sitting. (Tr., R. 213, PageID# 2370-2371, 2389, 2396-2397). He returned shortly thereafter with a cylindrical container that looked like a pill bottle and said either, “I’ve got you now, motherfucker,” or “I told you I would get you, motherfucker,” or “[y]ou lying motherfucker.” (Tr., R. 213, PageID# 2370-2371, 2396-2397, 2409-2410).

Sizemore responded, “[t]hat’s not mine” and denied having any drugs in the car. (Tr., R. 213, PageID# 2397, 2457). Wallace replied, “Are you calling me a fucking liar? * * * Do you think we planted this on you?” (Tr., R. 213, PageID# 2397). Wallace also said, “If you’re saying that me or the [SPD] put drugs in your car, I’m going to take you back to the cruiser and kick your ass.” (Tr., R. 213, PageID# 2457). Wallace proceeded to question Sizemore when Officer Mayfield interrupted him to read Sizemore his *Miranda* rights. (Tr., R. 213, PageID# 2396).

While Wallace continued questioning Sizemore, the three SPD officers conferred about the traffic stop. (Tr., R. 213, PageID# 2371, 2374). SPD officers receive training and specific guidance on how to conduct searches properly, and Officers Salmons and Taylor had thoroughly searched the driver’s side of the car

and had not found any drugs or pill bottles. (Tr., R. 213, PageID# 2369, 2372, 2394, 2396, 2408-2409). The officers shared concerns about Wallace's conduct and later reported him to their supervisor. (Tr., R. 213, PageID# 2374). Officer Taylor later reported Wallace to a state police trooper. (Tr., R. 213, PageID# 2374).

Wallace then took Sizemore to the police department, where he applied for a search warrant for the hotel room that Sizemore had left from. (Tr., R. 213, PageID# 2371). In his application, Wallace wrote that he had found "Percocet prescription tablets and suspected methamphetamine * * * under the driver's seat inside a cigarette pack." (Tr., R. 214, PageID# 2678). He also wrote that Sizemore "reported that the substance found was methamphetamine" and "that he just purchased the found items from Budget Inn, room 253, from a Robert Beach for \$350." (Tr., R. 214, PageID# 2678). Wallace obtained the warrant. (Tr., R. 213, PageID# 2402, 2416).

Sizemore maintained that he did not have drugs in his car. (Tr., R. 213, PageID# 2456-2457, 2464, 2466). He was ultimately released from police custody and was not criminally charged. (Tr., R. 213, PageID# 2458).

"Kareem Pinkney" (Undercover FBI Employee)

On September 24, 2019, the FBI stationed an undercover employee, using the alias "Kareem Pinkney," at a mall parking lot. (Tr., R. 212, PageID# 2315; Tr.,

R. 213, PageID# 2488, 2492). The FBI arranged to have a cooperating informant make calls to a crime tip line that Wallace had installed for reporting drug activity. (Tr., R. 212, PageID# 2315; Tr., R. 213, PageID# 2471). During those calls, the informant told Wallace about an individual (Pinkney) coming into town who might have had drugs on him. (Tr., R. 212, PageID# 2335; Tr., R. 213, PageID# 2471). The informant later told Wallace about Pinkney's car, location, and ethnicity. (Tr., R. 213, PageID# 2471).

Per FBI instruction, Pinkney sat in his car in the mall parking lot, with cash in his truck, a hotel room key in the truck's middle console, and \$11,000 in cash in his front pants pocket. (Tr., R. 213, PageID# 2494, 2499, 2502). He was not under the influence of drugs or alcohol, and the FBI did not instruct him to act intoxicated. (Tr., R. 213, PageID# 2495). Wallace approached Pinkney, asked for his license, and then removed him from his car and his cash from his pockets. (Tr., R. 213, PageID# 2497-2499). Pinkney informed Wallace that the money he took was legitimate, meaning not counterfeit. (Tr., R. 213, PageID# 2499).

Wallace then circled Pinkney's car with his canine unit and claimed that the canine alerted when it reached the driver's door. (Tr., R. 213, PageID# 2500). Wallace searched the car and found no drugs. (Tr., R. 213, PageID# 2540). But he did find the hotel room key and questioned Pinkney about it. (Tr., R. 213, PageID# 2502). After Pinkney declined a request for consent to search the hotel

room, Wallace left the scene to apply for a search warrant. (Tr., R. 213, PageID# 2502-2503).

Wallace also called Officer Thomas and told him that “this guy needs to go. See if you can get him for DUI.” (Tr., R. 213, PageID# 2567). Officer Thomas arrived and administered a field sobriety test to Pinkney, which Pinkney passed. (Tr., R. 213, PageID# 2504, 2567-2568). Officer Thomas informed Wallace that “there wasn’t much there,” he wasn’t going to arrest Pinkney, and it would be up to Wallace to arrest him. (Tr., R. 213, PageID# 2568-2569).

Wallace obtained a warrant for the hotel room and, at the hotel, told Pinkney that he would be charged with public intoxication. (Tr., R. 213, PageID# 2508-2509, 2552). After searching the hotel room, Wallace found no drugs. (Tr., R. 213, PageID# 2553). Wallace ultimately executed a citation for public intoxication, arrested Pinkney, and took him to jail. (Tr., R. 212, PageID# 2325; Tr., R. 213, PageID# 2520). The FBI later arranged for Pinkney’s release. (Tr., R. 213, PageID# 2520).

After learning of Pinkney’s release, Wallace called the FBI and asked if he was being investigated. (Tr., R. 215, PageID# 2802-2805). Wallace also showed up at Officer Thomas’s home and asked if he had talked to federal agents. (Tr., R. 213, PageID# 2570-2571). After learning that Officer Thomas had not, Wallace

asked him several times, in person and by phone, what he was planning to tell the agents. (Tr., R. 213, PageID# 2570).

Kayla Dobbs

On December 22, 2019, Kayla Dobbs and three others were traveling back from Lexington, Kentucky, where they had consumed alcohol. (Tr., R. 214, PageID# 2626-2628). One of the passengers had vomited, so they pulled over to clean the car. (Tr., R. 214, PageID# 2627). The car was off the road and parked in a safe manner. (Tr., R. 214, PageID# 2629). Wallace pulled behind the stopped car and directed Dobbs to pull into a parking spot. (Tr., R. 214, PageID# 2627). Dobbs informed Wallace that there had been another driver and that she had been drinking and did not want to drive. (Tr., R. 214, PageID# 2627, 2629-2630). Wallace told her to drive and that she would not “get in [to] trouble.” (Tr., R. 214, PageID# 2627).

As soon as Dobbs put her keys in the car’s ignition, Wallace activated the emergency lights on his cruiser. (Tr., R. 214, PageID# 2627). Dobbs pulled into the parking lot as Wallace instructed, and then Wallace approached Dobbs’s car and asked for her license and registration. (Tr., R. 214, PageID# 2627-2628). Wallace then told Dobbs that she was driving under the influence and that he recalled arresting her before for heroin. (Tr., R. 214, PageID# 2631). Dobbs denied ever having been arrested or using drugs. (Tr., R. 214, PageID# 2631).

Wallace told her, “Well, we can make all of this go away.” (Tr., R. 214, PageID# 2631).

Wallace removed Dobbs from her car. (Tr., R. 214, PageID# 2634). He circled the car with his canine and informed Dobbs that the canine alerted. (Tr., R. 214, PageID# 2638). But then Wallace “kept getting mad” because he could not find any illegal contraband in the car. (Tr., R. 214, PageID# 2638). He found only Tylenol, Ibuprofen, and an Icy Hot patch. (Tr., R. 214, PageID# 2638).

Another officer appeared at the scene and performed a field sobriety test. (Tr., R. 214, PageID# 2631-2632). Dobbs admitted to consuming alcohol but told the officer that she had not been driving and indicated another individual was the designated driver. (Tr., R. 214, PageID# 2631-2632). Dobbs was arrested for a DUI and transported to jail. (Tr., R. 214, PageID# 2632). The criminal case against her was later dismissed. (Tr., R. 214, PageID# 2638).

b. A Search Of Wallace’s Home Produced 5.9 Grams Of Methamphetamine And Countless Firearms

On March 6, 2020, after receiving Wallace’s consent, FBI agents searched his home. (Tr., R. 214, PageID# 2684). The FBI agents first asked Wallace if he had any controlled substances in his home, and Wallace replied that he did not but mentioned that he had seized some firearms and drugs that were in his car on the property. (Tr., R. 214, PageID# 2684-2685; Tr., R. 215, PageID# 2703). The agents then found a safe inside a room in Wallace’s home containing 5.9 grams of

methamphetamine in two totes. (Tr., R. 212, PageID# 2309; Tr., R. 215, PageID# 2707-2708). When the agents first saw the safe and asked about it, Wallace said, “There’s nothing in there.” (Tr., R. 215, PageID# 2809). The agents also found firearms in the same room but in a separate closet. (Tr., R. 215, PageID# 2707-2708). FBI agents later searched Wallace’s car on the property and found more drugs and firearms. (Tr., R. 214, PageID# 2684-2685).

Wallace had drugs on his property even though, as a constable, he had 24-hour access to evidence lockers at the Somerset Police Department (SPD), where he could store evidence—including drug evidence. (Tr., R. 214, PageID# 2663-2664; Tr., R. 215, PageID# 2773-2774). Although the evidence custodian had some concerns about storage space for firearms, SPD never restricted Wallace from storing “[d]rugs, money, or handguns” in the locker. (Tr., R. 214, PageID# 2666-2670). And Wallace never had “any problems bringing in evidence.” (Tr., R. 214, PageID# 2668).

When officers use the evidence lockers, they also benefit by having access to a computerized system called the BEAST. (Tr., R. 214, PageID# 2774). The BEAST keeps track of where evidence is located, as well as specific details about the evidence (*e.g.*, how much a drug weighs). (Tr., R. 214, PageID# 2774). The BEAST and the evidence lockers contain multiple levels of security and safeguards to ensure that drugs are properly accounted for. (Tr., R. 214, PageID# 2774-2776).

And those who use the BEAST can request that the evidence submitted be tested, as opposed to having to transport the evidence to the lab themselves. (Tr., R. 214, PageID# 2775-2776).

2. *Procedural Background*

a. A federal grand jury returned an indictment charging Wallace with one count of conspiring to violate people's civil rights in Pulaski County—specifically, their rights to be free from unreasonable searches and seizures and to be free from the deprivation of liberty and property without due process of law—in violation of 18 U.S.C. 241, and one count of possessing with the intent to distribute the five grams or more of methamphetamine found in his home on March 6, 2020, in violation of 21 U.S.C. 841(a)(1). (Third Superseding Indictment, R. 88, PageID# 352, 354).

b. Wallace was tried before a jury. (Tr., R. 212, PageID# 2279). After the government presented its case, Wallace moved for judgment of acquittal on both counts. (Tr., R. 215, PageID# 2720). The district court denied the motion. (See Tr., R. 215, PageID# 2750-2763; Tr., R. 215, PageID# 2865-2867). Wallace renewed his motion for judgment of acquittal at the close of all the evidence. (Tr., R. 215, PageID# 2864). The district court again denied the motion. (Tr., R. 215, PageID# 2866). In doing so, the court rejected Wallace's argument that the evidence did not support a finding that he had the specific intent to distribute the

methamphetamine, as required under 21 U.S.C. 841(a)(1). (Tr., R. 215, PageID# 2866). The court found that there was sufficient evidence for the jury to infer specific intent to distribute by “planting [drugs on civilians].” (Tr., R. 215, PageID# 2866).

The jury convicted Wallace on both the conspiracy and possession-with-intent-to-distribute counts. (Tr., R. 216, PageID# 3028).

c. In advance of sentencing, the U.S. Probation Office prepared a Presentence Investigation Report (PSR). The PSR calculated a base offense level of 26 for Count 1 (conspiracy) under Sentencing Guidelines § 2H1.1(a)(1) (PSR, R. 195, PageID# 2025), which cross references “the offense level from the offense guideline applicable to any underlying offense.” The PSR determined that the “underlying offense” was the drug offense and applied Sentencing Guidelines § 2D1.1(c)(8) based on the quantity of actual methamphetamine that was found in Wallace’s home to establish a base offense level of 24, and then added a two-level enhancement under Sentencing Guidelines § 2D1.1(b)(1) for possessing a dangerous weapon. (PSR, R. 195, PageID# 2025). The PSR then increased that by six levels under Sentencing Guidelines § 2H1.1(b)(1) for committing the offense under color of law, and by two levels under Sentencing Guidelines § 3A1.3 for physically restraining a victim, arriving at a total adjusted offense level of 36. (PSR, R. 195, PageID# 2025). The PSR calculated a base offense level of 24 for

Count 4 (possession with intent to distribute methamphetamine) under Sentencing Guidelines § 2D1.1(c)(8), and then increased that by two levels under Sentencing Guidelines § 2D1.1(b)(1) for possessing a firearm, and by another two levels under Sentencing Guidelines § 3B1.3 for Wallace's role in the offense, arriving at a total adjusted offense level of 28. (Tr., R. 195, PageID# 2026). Grouping the offenses under Sentencing Guidelines § 3D1.2(c), the PSR calculated a total offense level of 36 and determined Wallace's criminal history to fall within category I, for a guidelines imprisonment range of 188 to 235 months. (PSR, R. 195, PageID# 2025-2026).

Wallace objected to the application of the two-level enhancement for possessing a firearm under Sentencing Guidelines § 2D1.1(b)(1), which applies "[i]f a dangerous weapon (including a firearm) was possessed." (Sentencing Memorandum, R. 190, PageID# 1946-1947; Tr., R. 206, PageID# 2118). The commentary explains that this means "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Sentencing Guidelines § 2D1.1, comment. (n. 11(A)).

The district court denied Wallace's objection, referencing the "arsenal of firearms in [Wallace's] home" and in his car. (Tr., R. 206, PageID# 2126). The court then found that Wallace failed to demonstrate that "it's clearly improbable that the firearms are connected to the offense." (Tr., R. 206, PageID# 2127). The

court explained that “the whole case is about Mr. Wallace using his power, his authority as law enforcement, to deprive the civil rights of Pulaski countians. And part of his authority is the force that he demonstrated through the possession of firearms.” (Tr., R. 206, PageID# 2127). In sum, the court emphasized, “if somebody is planting drugs on you, and threatening you if you call him on it, and he’s got a gun on his hip, that’s undoubtedly a factor in the overall crime.” (Tr., R. 206, PageID# 2128).⁵

The district court adopted the PSR’s guidelines calculations and factual findings. (Tr., R. 206, PageID# 2139). It calculated an advisory guidelines sentencing range of 188 to 235 months of imprisonment. (Tr., R. 206, PageID#

⁵ Wallace initially objected to the PSR’s application of the firearm enhancement only to Count 4 (possession with intent to distribute methamphetamine). (Sentencing Memorandum, R. 190, PageID# 1946-1947; see also PSR, R. 195, PageID# 2046). On October 5, 2021, the Probation Office revised its recommendation to include application of a two-level firearm enhancement for both Count 4 and, under Section 2H1.1(a)(1), Count 1 (conspiracy) by applying it to the underlying offense, which also happened to be the drug offense charged in Count 4. (See PSR, R. 195, PageID# 2025-2026, 2041-2042). The district court held a sentencing hearing nearly two weeks later, on October 18, 2021, and Wallace did not file a new sentencing memorandum objecting to application of the firearm enhancement for Count 1 in the revised PSR. At sentencing, Wallace argued that the court should not apply the enhancement, but it is not clear from the transcript whether his objection was limited to Count 4 or applied to Count 1 as well. (See Tr., R. 206, PageID# 2118-2120, 2124-2125). Although the enhancement applies to both counts, it only affects the offense level for Count 1 because the counts were grouped for guideline calculation purposes and Count 1 had the greater guidelines range. (See PSR, R. 195, PageID# 2025).

2190-2191, 2195-2196). The court then varied downward 48 months from the bottom end of the guidelines range, citing “the impact of meth on the guideline calculation” and sentenced Wallace to 140 months. (Tr., R. 206, PageID# 2190-2191, 2195-2196). In doing so, the court recognized that when methamphetamine is involved, a defendant “gets a significant lick under the guidelines, for good reason because meth is highly addictive, it hurts communities, it destroys lives.” (Tr., R. 206, PageID# 2191-2192). But the court realized that the methamphetamine served “a different function” in this case. (Tr., R. 206, PageID# 2192). While planting drugs qualifies as drug trafficking, the court pointed out that, in this case, “the[] drugs were not going to the street.” (Tr., R. 206, PageID# 2191). The court found that the small quantity of drugs Wallace intended to plant on others seemed primarily for obtaining warrants and effectuating arrests, not to put others at risk of drug consumption. (Tr., R. 206, PageID# 2193-2194).

d. Wallace timely appealed the judgment of conviction and his sentence. (Notice of Appeal, R. 198-4, PageID# 2080).

SUMMARY OF ARGUMENT

This Court should affirm Wallace's convictions and below-guidelines sentence. Wallace's challenges to the sufficiency of the evidence supporting his conviction for possession with the intent to distribute methamphetamine and the district court's application of a two-level enhancement for possessing a firearm lack merit.

1. Sufficient evidence supports Wallace's 21 U.S.C. 841(a)(1) conviction for possession with intent to distribute the 5.9 grams of methamphetamine that the FBI found in Wallace's home on March 6, 2020. Wallace's argument that the evidence failed to support a finding of specific intent to distribute the methamphetamine is unfounded. A rational jury could infer that Wallace intended to distribute the methamphetamine based on circumstantial evidence construed in the government's favor. This evidence includes: FBI testimony about the quantity of drugs found in Wallace's possession and Wallace's lies to the FBI about whether he had any drugs in his home; SPD staff testimony that Wallace had access to secured evidence lockers and record-keeping systems and refused to use them; testimony from three SPD Officers that Wallace appeared to plant drugs (which Wallace himself identified as methamphetamine in his petition for a search warrant) on motorist Sizemore; and testimony from several other witnesses

demonstrating Wallace's pattern of falsely arresting people based on fabricated evidence, including drug paraphernalia.

2. The district court properly applied a two-level enhancement under Sentencing Guidelines § 2D1.1(b)(1) for both counts of conviction, finding that Wallace possessed a firearm while possessing drugs with the intent to distribute. The district court's finding is supported by evidence that Wallace possessed numerous firearms in his home, where he stored the drugs, as well as in his car. Wallace also conceded that he carried a firearm in his job as a constable, a position that was integral to his ability to falsely search and arrest people for drugs. The court also correctly found that Wallace failed to show that it was clearly improbable that his firearms were connected to the offense. He offered no evidence, and his arguments that the enhancement should not apply because he lawfully possessed firearms as a constable and that the enhancement was improperly based on the civil rights conspiracy are incorrect.

ARGUMENT

I

SUFFICIENT EVIDENCE SUPPORTS WALLACE'S CONVICTION FOR POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

A. Standard Of Review

This Court reviews *de novo* "a district court's denial of a motion for judgment of acquittal based on the sufficiency of the evidence." *United States v.*

Callahan, 801 F.3d 606, 616 (6th Cir. 2015), cert. denied, 577 U.S. 1227 (2016).

The Court must “determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Ibid.* (citations and internal quotation marks omitted). “[C]ircumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.” *United States v. Peters*, 15 F.3d 540, 544 (6th Cir.) (internal quotation marks omitted) (quoting *United States v. Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989)), cert. denied, 513 U.S. 883 (1994). This Court also does not “reweigh the evidence, reevaluate the credibility of witnesses, or substitute [its] judgment for that of the jury,” and a defendant claiming insufficient evidence thus bears “a very heavy burden.” *Callahan*, 801 F.3d at 616 (citations omitted).

B. Sufficient Evidence Supports A Finding Of Specific Intent To Distribute By Planting Drugs

To prove a violation of 21 U.S.C. 841(a)(1), the government had to show beyond a reasonable doubt that Wallace (1) knowingly (2) possessed methamphetamine (3) with the intent to distribute that methamphetamine. *United States v. Allen*, 619 F.3d 518, 522 (6th Cir.), cert. denied, 562 U.S. 1110 (2010). Wallace challenges (Br. 34-49) the evidence with respect to only the third element—an element that can be met by showing an intent to plant drugs. See *United States v. Cortés-Cabán*, 691 F.3d 1, 23 (1st Cir. 2012) (holding that the

officers' specific intent to plant drugs qualified as specific intent to distribute drugs), cert. denied, 569 U.S. 1019 (2013). The evidence of specific intent was sufficient.

First, multiple experienced FBI agents testified in court that they found 5.9 grams of methamphetamine hidden in a safe in Wallace's home on March 6, 2020. (Tr., R. 212, PageID# 2309; Tr., R. 215, PageID# 2707-2708). The government introduced numerous pictures of the safe and the drugs therein at trial. (See Tr., R. 214, PageID# 2654-2655); see also Br. 24-29. FBI agents also testified that, before finding the drugs, Wallace lied and told them that he did not have any drugs in his home and that there was nothing in the safe. (Tr., R. 214, PageID# 2678; Tr., R. 215, PageID# 2703, 2809). The large amount of drugs and Wallace's lies could support an inference that Wallace possessed the drugs with the intent to use it for an unlawful purpose—in this case, to plant on others for false arrests. See, *e.g.*, *Peters*, 15 F.3d at 544-545 (referencing drug amount—five grams of crack cocaine—as supporting an inference of drug distribution).

Second, SPD evidence custodian John Swiderski and SPD long-time officer Douglass Ralph Nelson both testified that Wallace had 24-hour access to a secured evidence locker at the SPD to store evidence, including drug evidence. (Tr., R. 214, PageID# 2663-2664; Tr., R. 215, PageID# 2773). Swiderski explained that, while he had some concerns about storage space for long firearms, SPD never

restricted Wallace from storing “[d]rugs, money, or handguns” in the locker. (Tr., R. 214, PageID# 2666-2670). And he made clear that Wallace never had “any problems bringing in evidence.” (Tr., R. 214, PageID# 2668). Nelson also testified that Wallace could only benefit by using the SPD’s BEAST system to record and keep track of evidence while also having it tested. (Tr., R. 215, PageID# 2774-2776). But Wallace chose not to use these secured safe-keeping and recording systems for the 5.9 grams of methamphetamine that the FBI found at his home, even though doing so would have been advantageous for him in performing his law enforcement duties. The jury could infer from Wallace’s decision to instead store the drugs in his home that he did so for ease of access and with the intent to use them to support false arrests.

Third, SPD Officers Salmons, Taylor, and Mayfield testified that after they arrived at the scene of Wallace’s traffic stop of Sizemore, they thoroughly searched Sizemore’s car, including the driver’s side of the car where Wallace claimed that the canine alerted, and found no drugs. (Tr., R. 213, PageID# 2370, 2372, 2395-2396, 2409). The officers testified that they were trained on how to properly conduct thorough searches and, in doing so, did not find a cigarette pack, let alone any drugs or the pill bottle, during their search. (Tr., R. 213, PageID# 2369, 2372, 2394-2396, 2408-2409). The three officers also testified that when Wallace approached the driver’s side of the car, they did not see anything. (Tr., R. 213,

PageID# 2370-2371, 2389, 2396-2398). Officer Taylor specifically testified that, because he was sitting in the driver's seat, he would have seen if Wallace had gotten something out of the driver's seat area. (Tr., R. 213, PageID# 2410-2411). The SPD officers' testimony that they did not find drugs in Sizemore's car is consistent with Robert Beach's testimony that when Sizemore left the hotel, he did not have any drugs on him and that the bag containing the methamphetamine that he gave to Sizemore was left empty in the hotel room. (Tr., R. 213, PageID# 2449). The testimony that Sizemore did not have drugs on his person or in his car could support an inference that Wallace intended to plant drugs on Sizemore.

Although the SPD officers found no drugs in the car, Officers Salmons and Mayfield testified that Wallace approached the driver's side and said, "watch this shit," and returned a second later with a pill bottle while saying, "I've got you now, motherfucker," or "I told you I would get you, motherfucker." (Tr., R. 213, PageID# 2370-2371, 2396-2397). Sizemore testified that, in response, he immediately denied that the bottle belonged to him or that he had any drugs in the car. (Tr., R. 213, PageID# 2397, 2457). Officer Mayfield recalled Sizemore denying having any drugs and then hearing Wallace respond, "Are you calling me a fucking liar? * * * Do you think we planted this on you?" (Tr., R. 213, PageID# 2397). Sizemore also testified that Wallace told him, "If you're saying that me or the [SPD] put drugs in your car, I'm going to take you back to the

cruiser and kick your ass.” (Tr., R. 213, PageID# 2457). The officers’ testimony about Wallace’s conduct during the Sizemore traffic stop, including his response to Sizemore when he denied that the drugs belonged to him, could further support an inference that Wallace possessed methamphetamine with the intent to plant it on others.

Even though none of the trained SPD officers found any drugs in Sizemore’s car and Sizemore denied that the drugs belonged to him, Wallace applied for a warrant to search the hotel room where Sizemore had been. (Tr., R. 213, PageID# 2371). FBI agent Michael McLaughlin read to the jury Wallace’s warrant application, which specified that Wallace found “Percocet prescription tablets and suspected methamphetamine * * * under the driver’s seat inside a cigarette pack.” (Tr., R. 214, PageID# 2678). Wallace had also written that Sizemore “reported that the substance found was methamphetamine” and “that he just purchased the found items from Budget Inn, room 253, from a Robert Beach for \$350.” (Tr., R. 214, PageID# 2678). A reasonable jury could infer that Wallace lied about Sizemore’s statement about the drugs and about finding the drugs inside a cigarette pack because Wallace intended to plant the drugs on Sizemore so that he could falsely arrest him.

Finally, three other civilians—Hughes, Pinkney, and Dobbs—offered testimony demonstrating that Wallace engaged in a pattern of false arrests

supported by fabricated evidence. Hughes testified that Wallace pulled him over “for no apparent reason” and then “put baggies and scales in [his] truck.” (Tr., R. 213, PageID# 2585). Officer Thomas testified that Wallace told him that Pinkney “needs to go” and to “[s]ee if you can get him for DUI,” and that Pinkney passed the field sobriety test he administered. (Tr., R. 213, PageID# 2567-2268). Pinkney separately testified he was not under the influence of drugs or alcohol, yet Wallace still arrested him for public intoxication. (Tr., R. 213, PageID# 2495, 2520). And Dobbs testified that after telling Wallace she was under the influence, he told her to drive her car and she would not “get in trouble.” (Tr., R. 214, PageID# 2627, 2629-2630). She further stated that, after driving the car, Wallace performed a traffic stop and told her she was driving under the influence, which he later arrested her for. (Tr., R. 214, PageID# 2627-2628, 2631-2632). This evidence shows that Wallace had a history of falsely arresting people based on fabricated evidence, including drug paraphernalia, and could further support an inference that Wallace had the requisite intent to plant the drugs that he stored in his home.

Viewing the evidence in the light most favorable to the government, *Callahan*, 801 F.3d at 616, a reasonable jury could infer from the evidence concerning the search of Wallace’s home—the amount of methamphetamine; the lies Wallace told the FBI about having drugs in his home; and Wallace’s decision to store the drugs in his home despite having access to SPD’s secured evidence

lockers—that he possessed the 5.9 grams of methamphetamine with the intent to distribute it. A reasonable jury could also infer from evidence concerning the Sizemore traffic stop—Wallace’s conduct before and after “discovering” the pill bottle containing drugs; the SPD officers’ inability to find any drugs after having conducted a thorough search of the car; and Wallace’s misrepresentations in his application for a warrant—that Wallace intended to plant drugs on Sizemore.

Based on these two events, coupled with testimony that Wallace engaged in pattern of falsely arresting people based on fabricated evidence, a reasonable jury could infer that Wallace had the requisite intent to distribute the 5.9 grams of methamphetamine he held in his home by planting it on motorists or others. See, e.g., *United States v. DesMarais*, 938 F.2d 347, 352 (1st Cir. 1991)

(“[S]pecific intent, like any other essential element, may be demonstrated ‘through the use of circumstantial evidence so long as the total evidence, including reasonable inferences, is sufficient to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt.’”) (quoting *United States v. Campa*, 679 F.2d 1006, 1010 (1st Cir. 1982)).

C. Contrary To Wallace’s Argument, Evidence Of Intent To Plant Drugs Can Establish The Specific Intent Element Of 21 U.S.C. 841(a)(1)

Wallace argues (Br. 36-37) that the district court erred in denying his motion for judgment of acquittal by misconstruing Section 841(b)(1)’s specific intent element. He contends that the “specific intent” has to be drug distribution, not

“[f]urthering a civil rights scheme.” Br. 37. But in denying Wallace’s motion, the district court explained that, based on the evidence, “the jury could find that the drugs held by the individuals were held for the purpose of furthering that conspiracy. Here, that would be under the theory, *planting them*.” (Tr., R. 215, PageID# 2866) (emphasis added). In other words, the district court recognized, correctly, that an intent to plant drugs can supply the requisite specific intent under Section 841, while also serving as part of a greater conspiracy to deprive people of their civil rights under Section 241. This was not error.

Planting drug evidence is literally a drug distribution, even if the distribution is only temporary or for purposes of establishing a fabricated basis to arrest and search civilians. The case Wallace predominately relies on (Br. 46-48) clearly makes that point. In *Cortés-Cabán*, the First Circuit considered the defendants-officers’ challenge to the sufficiency of the evidence for drug distribution under Section 841(a)(1) as it related to a civil rights conspiracy and found: “The evidence is that there was a transfer of drugs between the officers followed by the planting of drugs to facilitate arrests, which amounts to distribution; it follows that the intent to take those actions satisfies the specific intent requirement of the statute.” 691 F.3d at 23. The *Cortés-Cabán* court found ample support for that interpretation, including in Section 841(a)(1)’s plain language, legislative history, and caselaw broadly defining “distribute.” See *id.* at 17-21 (citation omitted); see

also *United States v. Figueroa*, 729 F.3d 267, 273-274 (3d Cir. 2013) (agreeing with the *Cortés-Cabán* court and holding that “[u]nder the plain language of the statute, a ‘distribution’ encompasses the transfer of a controlled substance from one person or place to another and thus the planting of controlled substances on individuals to facilitate false arrests”), cert. denied, 571 U.S. 1181 (2014).

Wallace references the dissent in *Cortés-Cabán* and contends that he “did not seek to inject drugs into society’s illicit channels and that the specific intent requirement cannot be satisfied by an intent to falsify cases.” Br. 48 (citing *Cortés Cabán*, 691 F.3d at 31). But the majority in *Cortés-Cabán* correctly rejected that argument, finding that that “is not the test for specific intent under § 841, and no court has so held.” 691 F.3d at 24; accord *Figueroa*, 729 F.3d at 274.

Here, the district court properly instructed the jury on the meaning of “intent[] to distribute.” (Tr., R. 216, PageID# 3009). It explained that the phrase “means the defendant intended to deliver or transfer the controlled substance sometime in the future.” (Tr., R. 216, PageID# 3009). The court specified that “[t]he possession of controlled substances by a law enforcement officer for the purpose of planting those substances on others is possession with intent to distribute those substances.” (Tr., R. 216, PageID# 3009). Wallace did not challenge these instructions and does not raise any argument on appeal as to the validity of the court’s jury instructions. (See Tr., R. 217, PageID# 3037-3088).

A rational jury could infer from the evidence that Wallace intended to distribute methamphetamine by planting it, even if the intent to plant also was in furtherance of the civil rights conspiracy. See pp. 21-27, *supra*. It does not matter what purpose the intent to distribute the drugs serves so long as there was evidence that Wallace intended to distribute it—here, by planting them on others. See *Cortés-Cabán*, 691 F.3d at 23; *Figueroa*, 729 F.3d at 273-274.⁶

D. The Jury Rejected Wallace’s Law Enforcement Defense

Wallace also argues (Br. 39-44) that the evidence does not support a finding that he intended to distribute methamphetamine because he stored it legally in his role as a constable. But the jury squarely rejected this argument. Indeed, the district court instructed the jury that Wallace cannot “face criminal liability for proper conduct when lawfully engaged in the enforcement of any state or federal law relating to controlled substances. This would exempt possession by an officer for legitimate law enforcement purposes, but would not exempt possession for an

⁶ Wallace also argues (Br. 46-49) that the facts surrounding the Section 241 and Section 841 violations in *Cortés-Cabán* are “markedly different” than this case. Br. 46. He contends (Br. 46-48) that his case is distinguishable because far less evidence supports the drug possession conviction, separate from the conspiracy conviction. Even if that were the case, that does not undermine the court’s holding in *Cortés-Cabán* that evidence of planting drugs can satisfy Section 841’s specific intent element. 691 F.3d at 23. And, as already explained, the evidence was sufficient for a jury to infer that Wallace intended to plant drugs. See pp. 21-27, *supra*. Wallace’s argument thus fails.

illegitimate purpose, such as falsely planting evidence on a person.” (Tr., R. 216, PageID# 3009).

The evidence supports the jury’s verdict. Both SPD’s evidence custodian and a long-time SPD officer testified that Wallace had 24-hour access to a secured evidence locker at the local police department for drug evidence. (Tr., R. 214, PageID# 2663-2664; Tr., R. 215, PageID# 2773). That same officer explained that Wallace could only benefit by using the SPD’s BEAST system to record and keep track of evidence while also having it tested. (Tr., R. 214, PageID# 2774-2776). Wallace decided against using the secured locker and BEAST system and instead, as FBI agents testified, held the drugs in a Tupperware container concealed at the bottom of a safe in his home. (Tr., R. 212, PageID# 2309; Tr., R. 215, PageID# 2707-2708). FBI agents also stated that when they asked Wallace if he had any drugs in his home, he said no. (Tr., R. 214, PageID# 2684; Tr., R. 215, PageID# 2703). And they attested that, even when the agents discovered the safe with the drugs and asked if there was anything inside, Wallace again said no. (Tr., R. 215, PageID# 2809). FBI Agent Greg Cox testified specifically that Wallace should have “understood” that when asked whether there is anything in the safe, that meant “drugs or anything illegal.” (Tr., R. 215, PageID# 2810).

Construing this evidence in the government’s favor, *Callahan*, 801 F.3d at 616, a reasonable jury could have found that Wallace was not lawfully engaged in

the enforcement of controlled substances when he possessed 5.9 grams of methamphetamine in his home.

E. The Government Did Not Need To Prove That Wallace Distributed Drugs

Wallace argues (Br. 44-46) that he did not distribute drugs during the Sizemore traffic stop because the pill bottle containing drugs never left his possession and, other than the warrant affidavit, there was no evidence that the bottle actually contained drugs. Wallace's argument is inapposite.

The government does not need to show that Wallace actually distributed drugs. Wallace was charged with and convicted of *possession* with the intent to distribute methamphetamine, not *distribution* itself. His offense requires only that the government show Wallace (1) knowingly (2) possessed methamphetamine (3) with the intent to distribute that methamphetamine. See *Allen*, 619 F.3d at 522. There is no element requiring that the government prove actual distribution. See *United States v. Gardner*, 32 F.4th 504, 533 (6th Cir. 2022) ("Missing from the offense's list of elements? Actual distribution."). Thus, in considering whether a violation of 21 U.S.C. 841(a)(1) for possession with intent to distribute can serve as a predicate offense under a federal statute that imposes a ban on federal benefits for persons who have engaged in actual "distribution," 21 U.S.C. 862(a), numerous courts have held that "possession with intent to distribute is not an offense 'consisting of distribution.'" *United States v. Silva-De Hoyos*, 702 F.3d 843, 849

(5th Cir. 2012); see also *United States v. Jacobs*, 579 F.3d 1198, 1200 (10th Cir. 2009) (same); *United States v. Williams*, 541 F.3d 1087, 1090-1091 (11th Cir. 2008) (same), cert. denied, 558 U.S. 856 (2009); *Gardner*, 32 F.4th at 533 (reaching same conclusion with respect to conspiracy to violate 21 U.S.C. 841 under 21 U.S.C. 846).

At trial, the government introduced facts about Wallace's traffic stop of Sizemore as circumstantial evidence demonstrating his specific intent to distribute methamphetamine. As already explained, sufficient evidence supports the jury's finding on that element. See pp. 21-27, *supra*. Whether Wallace actually planted drugs on Sizemore or whether the pill bottle in fact contained methamphetamine is beside the point. The government is not required to show actual distribution, and Wallace offers no authority to the contrary.

II

THE DISTRICT COURT PROPERLY APPLIED A TWO-LEVEL ENHANCEMENT FOR POSSESSING A FIREARM

A. Standard Of Review

This Court reviews a district court's calculation of guidelines range for abuse of discretion. See *United States v. Duke*, 870 F.3d 397, 401 (6th Cir. 2017), cert. denied, 138 S. Ct. 1026 (2018). The Court reviews a district court's interpretation of the Guidelines de novo, its factual findings for clear error, and mixed questions of law and fact de novo. *Ibid*. "If a party fails to object to a

perceived error at sentencing after being afforded the opportunity to do so, [this Court] reviews the claim for plain error only.” *United States v. Wright*, 747 F.3d 399, 413 (6th Cir.), cert. denied, 574 U.S. 866, and 574 U.S. 887 (2014).⁷

B. The District Court Correctly Found That Wallace Possessed Firearms, And Wallace Failed To Show That It Was Clearly Improbable That The Firearms Were Connected To The Offense

Sentencing Guidelines § 2D1.1(b)(1) provides that, in calculating the base offense level for drug offenses, including violations of 21 U.S.C. 841, “[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels.” “The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” Sentencing Guidelines § 2D1.1, comment. (n.11(A)). Thus, for Section 2D1.1(b)(1) to apply, the government must establish by a preponderance of the evidence that (1) Wallace

⁷ As noted above, see p. 17 n.5, *supra*, Wallace did not file a written objection to the PSR’s recommendation that the two-level enhancement for possessing a firearm be applied to the offense level for the Count 1 (conspiracy) conviction, which used the Count 4 conviction (possession with intent to distribute) as the underlying offense level, and it is unclear from the sentencing transcript whether Wallace’s argument that the enhancement should not be applied related to both counts of conviction. This matters because Wallace’s guidelines range was based on the offense level for the Count 1 conviction, not the Count 4 conviction. To preserve an objection, Wallace “must object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection.” *United States v. Bostic*, 371 F.3d 865, 871 (6th Cir. 2004) (citation and internal quotation marks omitted). Arguably, therefore, this Court could choose to review Wallace’s challenge to his sentence for plain error. See *Wright*, 747 F.3d at 413. Either way, for the reasons explained above, the challenge fails.

actually or constructively possessed a firearm, and (2) possession was during the commission of the offense. See *United States v. Greeno*, 679 F.3d 510, 514 (6th Cir.), cert. denied, 568 U.S. 922 (2012). The government need only show that “the dangerous weapon [was] possessed during relevant conduct,” *United States v. Faison*, 339 F.3d 518, 520 (6th Cir. 2003) (internal quotation marks omitted), not that it was “possessed *during the commission of the crime*,” *Greeno*, 679 F.3d at 514. Once the government has met its burden, “a presumption arises that the weapon was connected to the offense.” *United States v. Wheaton*, 517 F.3d 350, 367 (6th Cir. 2008) (quoting *United States v. Hough*, 276 F.3d 884, 894 (6th Cir.), cert. denied, 535 U.S. 1089, and 537 U.S. 898 (2002)).

The burden then shifts to Wallace to show that it was “clearly improbable” that his firearm was connected to the offense. *Greeno*, 679 F.3d at 514 (quoting *United States v. Hill*, 79 F.3d 1477, 1485 (6th Cir. 1996)). “A defendant must present evidence, not mere argument, in order to meet his or her burden.” *Ibid.*; see also *Hough*, 276 F.3d at 894 (“[S]peculation is not evidence and does not establish that it was ‘clearly improbable’ that [the defendant] possessed the firearms during the offense.”); *Wheaton*, 517 F.3d at 368 (“The bare assertion of Wheaton’s counsel that the gun might simply have been for the lawful purpose of defending the residence is insufficient to sustain Wheaton’s burden of showing it was ‘clearly improbable’ that the gun was related to the drug conspiracy.”).

This Court considers the following factors, none of which alone is controlling, to decide whether the district court properly applied Sentencing Guidelines § 2D1.1: (1) the type of firearm; (2) the defendant's accessibility of the weapon; (3) the presence of ammunition; (4) how close the weapon is to illegal drugs, proceeds, or paraphernalia; (5) the defendant's evidence for how he used the firearm; and (6) whether the defendant actually engaged in drug-trafficking, rather than mere possession. See *Greeno*, 679 F.3d at 515.

The district court correctly determined that the government met its burden in establishing that Wallace possessed firearms. It recognized that the underlying drug offense was based on FBI agents discovering the 5.9 grams of methamphetamine in Wallace's home. (Tr., R. 206, PageID# 2126). The court found that there was "an arsenal of firearms in that home," as well as firearms in Wallace's car found on the property. (Tr., R. 206, PageID# 2126). It also emphasized that, though some of the firearms may have been lawfully seized, there was no "actual proof that any of those guns were seized." (Tr., R. 206, PageID# 2126). Additionally, the court considered Wallace's traffic stop of Sizemore, which was "during [his] performance of his law enforcement function," and found "it more likely than not true that he would be armed based on the other evidence in the record." (Tr., R. 206, PageID# 2126-2127).

The record supports the district court's findings. FBI agents testified, and Wallace concedes, that the agents found numerous firearms beyond any service weapons in Wallace's police car and residence, in close proximity to where the methamphetamine was located. Br. 52-53; (Tr., R. 214, PageID# 2684-2685; Tr., R. 215, PageID# 2707-2708). As detailed in the PSR, countless types of firearms, including ammunition and magazines, were found in Wallace's home and police car. (Tr., R. 195, PageID# 2023-2024).⁸ Wallace offered no evidence that he possessed the firearms for an alternative, lawful purpose. In addition, Wallace conceded that he carried a firearm as part of his job as constable, further demonstrating that he had access to firearms. (Sentencing Memorandum, R. 190,

⁸ The firearms found in the home included a Smith & Wesson .38 caliber pistol, a SCCY CPX-2 nine-millimeter, a Smith & Wesson 1911, a Colt Tactical Level III, a Bauer Firearms Corp. .25 caliber-automatic, a UX-357 revolver pellet gun, a Jimenez Arms J.A. nine-millimeter, a Taurus PT 738 .380 caliber, an Imperial Metal .22 caliber, a Sundance Industries .22 caliber double barrel blank, a Smith & Wesson SD9VE, a single shot Marlin 200 12 gauge, a camo shotgun, a Mossberg 12 gauge pump shotgun, a New England Firearms Pardner Model 20 gauge, a Mossberg Obsession bolt action .50 caliber, a Colt .38 Special, a Ruger Security 6 .357 magnum, a Century Arms TP nine-millimeter, a Chiappa .22 caliber, a RG Industries model 23 .22 caliber, a Glock 19, a Ruger .22 Mark II, a Colt 45 Series 80, a Braztech LC Model 5411220, a Taurus millennium PT1 40 Pro .40 caliber, a Glock 22 .40 caliber, a Glock 23 .40 caliber, and a Spike's Tactical Model ST15 multi-caliber. (PSR, R. 195, PageID# 2023). The firearms found in Wallace's car included a .380 caliber nine-millimeter firearm, a Kel-tec .380 caliber gun, a Harrington & Richardson shotgun, a CZ Scorpion EVO3 pistol, and a RZ17 12-gauge tactical shotgun. (PSR, R. 195, PageID# 2024). The district court adopted the PSR's guidelines calculations and factual findings, which included the above-mentioned firearms. (Tr., R. 206, PageID# 2139).

PageID# 1946-1947). He admits that “it was likely that [he] was armed with his law enforcement service weapon at the time of the Sizemore traffic stop,” which the government offered as circumstantial evidence of Wallace’s intent to distribute methamphetamine. (Sentencing Memorandum, R. 190, PageID# 1946-1947).

The district court also correctly determined that Wallace failed to rebut the presumption that Wallace’s firearms were connected to the offense. Wallace offered “mere argument” and no evidence in support of his burden. *Greeno*, 679 F.3d at 514.

First, Wallace argued to the district court and again argues on appeal (Br. 53-54) that it was clearly improbable that his firearms were connected to the offense because he lawfully carried firearms as part of his job as constable. This Court foreclosed that argument in *United States v. Sivils*, 960 F.2d 587, 596 (6th Cir.), cert. denied, 506 U.S. 843 (1992), which affirmed application of the firearm enhancement for a police officer who was on duty at the time of the offense thus was required to carry a gun. The *Sivils* Court recognized that “[t]he fact that [the defendant] was compelled to carry the gun by virtue of his employment was, of course, to be considered—but that fact alone did not make it ‘clearly improbable’ that the weapon was connected with the drug offenses.” *Ibid.* (quoting *United States v. Ruiz*, 905 F.2d 499, 508 (1st Cir. 1990)).

Here, as the district court found (Tr., R. 206, PageID# 2126-2128), the evidence established that Wallace's position as a constable—including his corresponding firearm possession—was integral to the offense. Wallace used his authority as a constable to stop, search, and falsely arrest civilians, including for drug possession. The district court explained, "if somebody is planting drugs on you, and threatening you if you call him on it, and he's got a gun on his hip, that's undoubtedly a factor in the overall crime." (Tr., R. 206, PageID# 2128). As in *Sivils*, "the weapon was closely linked to the very powers and office which appellant used to implement his felonious activities." 960 F.2d at 596 (quoting *Ruiz*, 905 at 508); see also *United States v. Upshaw*, 114 F. App'x 692, 716 (6th Cir. 2004) (citing *Sivils* and finding firearm enhancement in robbery guideline for law enforcement officer "particularly warranted" when there is a close link between police power and criminal activity) (internal citations omitted), judgment vacated on other grounds, *Rice v. United States*, 545 U.S. 1136 (2005). As the district court put it, "to disregard the presence of firearms as part of Mr. Wallace's execution of his misbegotten law enforcement plan, would I think be to just ignore the reality of the evidence." (Tr., R. 206, PageID# 2128).

Second, and relatedly, Wallace's argument (Br. 54-55) that the gun enhancement constituted impermissible double-counting because he already received a six-level enhancement under Sentencing Guidelines § 2H1.1(b) for

committing the offense “under color of law” is unavailing. “[D]ouble counting occurs when precisely the same aspect of the defendant’s conduct factors into his sentence in two separate ways[,] * * * no double counting occurs if the defendant is punished for distinct aspects of his conduct.” *United States v. Battaglia*, 624 F.3d 348, 351 (6th Cir. 2010) (citation omitted). The firearm enhancement is designed to increase the sentence of an offender who possesses a firearm by highlighting the increased danger in possessing a firearm in connection with drug activity. See Sentencing Guidelines § 2D1.1, comment. (n.11(A)). In contrast, this Court has explained that “the harm to be punished, and deterred, by the ‘under color of law’ enhancement is the misuse of power by one with governmental authority.” *United States v. Hickman*, 766 F. App’x 240, 251 (6th Cir. 2019). That is a distinct harm from the danger inherent in possessing a firearm. The district court therefore properly applied the firearm possession enhancement and, in doing so, punished an aspect of Wallace’s conduct distinct from his misuse of his authority as a constable for the conspiracy offense. *Ibid.*; see also, cf., *Sivils*, 960 F.2d at 599 (rejecting defendant’s double-counting argument because “[t]he enhancement based on abuse of a position of public trust * * * is not related to [his] carrying of a firearm).

In sum, the district court properly applied the two-level enhancement under Section 2D1.1(b)(1). The district court’s finding that Wallace possessed a firearm

is supported by the record and the *Greeno* factors. The evidence shows that Wallace possessed countless firearms and ammunition in close proximity to the methamphetamine, and that a firearm always was accessible to him, including during the Sizemore traffic stop, because he carried one in his job as constable. See *Greeno*, 679 F.3d at 515. The court also correctly determined that Wallace failed to show that it was “clearly improbable” that his firearm possession was connected to the offense, as Wallace offered “mere argument” and no evidence in support of his burden. *Ibid.* And, as already explained, Wallace’s arguments to the contrary lack merit.⁹

⁹ Even without the two-level enhancement under Sentencing Guidelines § 2D1.1(b)(1), Wallace’s sentence would still be below the guidelines. A total offense level of 34, as opposed to 36, with a criminal history category of 1, results in a guidelines range of 151 to 188 months’ imprisonment. The court imposed a sentence of 140 months imprisonment. See p. 18, *supra*.

CONCLUSION

For the foregoing reasons, this Court should affirm Wallace's conviction and below-guidelines sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS
APPELLEE:

- (1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9952 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and
- (2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font.

s/ Natasha N. Babazadeh

Natasha N. Babazadeh

Attorney

Date: June 16, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Natasha N. Babazadeh
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ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellee United States designates the following documents from the electronic record in the district court:

Record Entry Number	Description	PageID# Range
56	Order	258-259
88	Third Superseding Indictment	352-354
185	Motion To Dismiss Indictment	1892
186	Order	1895
190	Sentencing Memorandum	1946-1947
195	Presentence Investigation Report (PSR)	2023-2046
196	Judgment	2057-2058
198-4	Notice of Appeal	2080
206	Transcript (Sentencing)	2118-2196
212	Transcript (Trial Day 1)	2279-2335
213	Transcript (Trial Day 2)	2369-2592
214	Transcript (Trial Day 3)	2626-2685
215	Transcript (Trial Day 4)	2703-2867
216	Transcript (Trial Day 5)	2953-3029