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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TAVARYYUAN JOHNSON,

Defendant-Appellant.

No. 25-3691

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 2:22-cr-00117-5—Edmund A. Sargus, Jr., District Judge.

Argued: July 21, 2026

Decided and Filed: October 27, 2026

Before: MOORE, NALBANDIAN, and MATHIS, Circuit Judges.

COUNSEL

ARGUED: Sarah E. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. Kimberly L. Robinson, UNITED STATES ATTORNEY'S OFFICE, Columbus, Ohio, for Appellee. **ON BRIEF:** Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. Kimberly L. Robinson, UNITED STATES ATTORNEY'S OFFICE, Columbus, Ohio, for Appellee.

NALBANDIAN, J., delivered the opinion of the court, in which MOORE and MATHIS, JJ., concurred, as to all issues except Count Two. MOORE, J. (pp. 29–33), delivered a separate opinion of the court, in which MATHIS, J., concurred, as to Count Two.

OPINION

NALBANDIAN, Circuit Judge. Tavaryyuan Johnson went to trial for his role in a prolific drug-trafficking organization operating in Columbus, Ohio. A jury convicted him on the conspiracy- and drug-related counts alleged in the indictment. He now appeals, claiming multiple errors throughout the trial process. In terms of pretrial errors, he argues that the district court erred by denying his motions to suppress evidence from three searches that yielded large quantities of drugs and other contraband. Second, he argues that the district court erred at trial by allowing the government to amend the indictment mid-trial. Third, he argues that the district court erred by admitting hearsay at trial. And finally, he argues that his conviction on the indictment's conspiracy count isn't supported by sufficient evidence and goes against the manifest weight of the evidence. A majority of this Court concludes that the district court erred by amending the indictment mid-trial. Judge Moore has authored a separate opinion with the majority view on that issue. Aside from that, we affirm.

I.

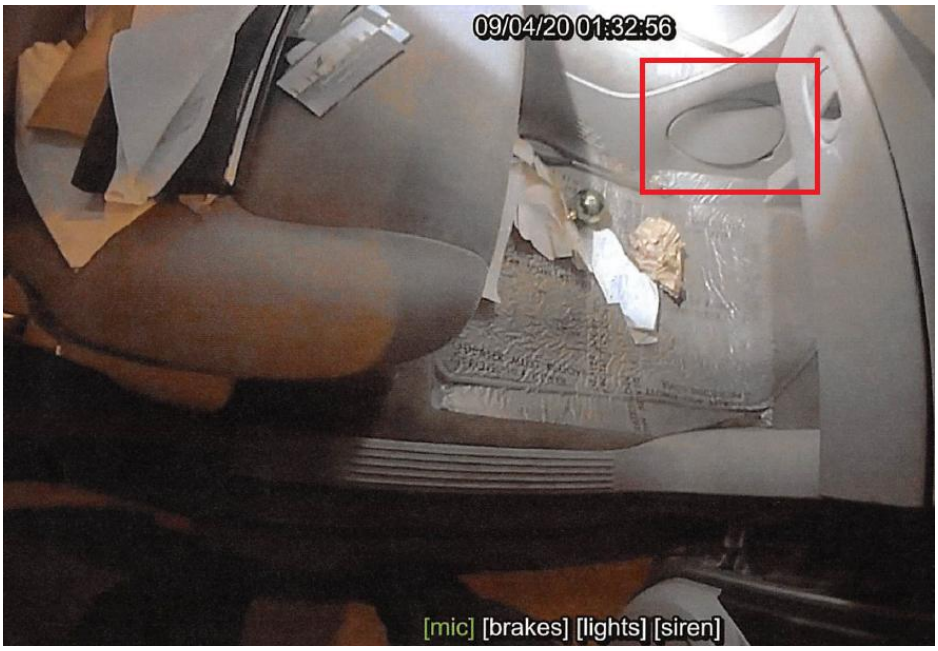
This case started with a broken headlight. The car bearing that broken light belonged to Tavaryyuan Johnson, who was driving when officers with the Columbus Police Department (CPD) pulled him over in the early hours of September 4, 2020. That traffic stop and its fruits ended up comprising, along with evidence obtained from two other searches, the bulk of the evidence against Johnson at trial on conspiracy- and individual-level drug charges. We'll describe the searches and the trial in chronological order.

A.

After stopping Johnson, the officers discovered he was driving on a suspended license. And Johnson's license suspension stemmed from an earlier OVI (Ohio's term for a DUI) offense. So the officers arrested Johnson.

The officers searched Johnson and his car—the former as a search incident to arrest. That search yielded several bundles of low-dollar-value bills in his pockets. Then their attention turned to Johnson's car, which they impounded under CPD policy. A few factors played into that decision. First, the officers couldn't release the car back into Johnson's care because he couldn't legally drive it away on a suspended license. They also didn't want to leave the car at the site of the stop because the neighborhood was a hot spot for crime. And they couldn't release it to a third party with Johnson's consent because there was no one else on the scene when they impounded the car.[1] So having impounded the car, the officers took an inventory of its contents.

But what started as an inventory search came up with a lot more than spare napkins and forgotten coupons stuffed in the glove box—specifically, heroin, cocaine, and loose bullets. A CPD officer noticed a small access panel on the center console "sticking out through the shadows [that] was unhooked on the bottom." R.916, Mot. to Suppress Hr'g Tr., PageID 4944. The government introduced the following photo of that panel, taken from the officer's body camera footage:



[1]That last point held true, in the officer's telling, even though Johnson's uncle Cordell Washington (who'll figure more into the story shortly) eventually arrived. First off, Washington arrived after the inventory search had already begun—and after it had yielded illegal contraband. On top of that, Washington was "aggressive," refused to back away from the scene, and "got into a physical scuffle," leading officers to conclude that he wasn't an appropriate custodian for the vehicle. R.916, Mot. to Suppress Hr'g Tr., PageID 4922.

R.873-2, PageID 5022. The red square, which we've superimposed onto a screen-capture from the footage, surrounds the panel the officer mentioned in his testimony at the suppression hearing. The officer testified that he observed the panel not to be "fully in place," as though it had "been hastily replaced." R.916, PageID 4954. Moreover, the rest of the center console appeared "grim[y]," while the bottom edge of the panel—the part sticking out—"appeared like it had been wiped off, like somebody had been brushing up against it multiple times." *Id.* at PageID 4944. So the officer reached toward the panel, which gave way and fell to the floor "as soon as [he] touched it." *Id.* And behind the panel, the officer saw baggies containing what the officer believed to be (and turned out to be) black tar heroin.

The officers' discovery of the heroin expanded a mere inventory into a full-blown investigatory search. The officers started removing other panels around the center console, like those covering the radio and heater unit, to search for more drugs. And they felt they had "free access to continue searching other places" that they wouldn't have examined while carrying out the more limited inventory. *Id.* at PageID 4950.

In total, the inventory-turned-automobile search yielded approximately 234 grams of heroin, 334 grams of cocaine, and loose rounds of ammunition. One aspect of the cocaine bears mentioning. In its initial assessment, the government classified it as cocaine base (more commonly known as crack cocaine). But at trial, the government's lab analyst testified that, upon reexamination, she found the center-console cocaine to primarily comprise *powder* cocaine—a different substance carrying substantially lower penalties by drug weight than crack cocaine. Still, 0.5 grams of the substance tested as crack cocaine.

B.

It turns out that Johnson's traffic stop presaged something bigger. Multiple police agencies had their eyes on the Sullivant Avenue area in west Columbus—where the CPD searched and impounded Johnson's car—because, according to an officer's testimony, it was "[t]he highest crime area in the city of Columbus every year for narcotics [and] prostitution." R.1386, Trial Tr. Vol. 8, PageID 15850.

Specifically, police were monitoring the Saultz-Washington conspiracy, a sex- and drug-trafficking organization (DTO) running for more than ten years in the Sullivant area. The DTO earned its moniker from its two executives—Pat Saultz and Cordell Washington, Johnson's uncle from earlier in the story. The Saultz-Washington DTO operated multiple drug houses from which it conducted business by renting properties to "drug dealers that would sell out of the house[s] . . . and have people coming in and out throughout the day and night." *Id.* at PageID 14248–49, 14384.

After years of surveillance—and nearly two years after police searched Johnson's car—an increase in the DTO's activity prompted the police to close in with a rapid series of arrests and searches. Two warranted property searches are relevant to this appeal—both of which happened about 21 months after the search of Johnson's car. The first search targeted Johnson's residence at 430A South Warren: one side of a duplex co-owned by Saultz and Washington that officers believed served at least partially as one of the DTO's drug houses. The other search targeted the home of Priscilla Washington—Cordell's mother and Johnson's grandmother. We'll describe both searches and their fruits in turn, starting with the affidavits underlying the warrants for each.

1.

First up, Johnson's residence at 430A South Warren Avenue in Columbus, which we'll refer to as "430A Warren" for brevity's sake. Police executed a search warrant at that address in June 2022.

The police supported their application for a warrant to search 430A Warren with a lengthy affidavit. Across nearly thirty pages, that affidavit mentions 430A Warren only to describe its location and predicted contents. By the government's own description on appeal, the affidavit doesn't contain any information directly linking 430A Warren to any drug-trafficking activities. That said, it explicitly identifies 430B Warren—the other half of the duplex—as a drug house, supported by a controlled purchase of drugs conducted by a confidential source at that address. And it identifies several linkages between 430B Warren's inhabitant—Tyler Bourdo, another defendant (but not appellant) in this case—and the Saultz-Washington DTO.

The warrant affidavit describes Johnson's own activities in three ways. First, the affiant states a CPD officer informed him—in September 2020, almost two years before the search-warrant application—that Saultz and Washington distributed drugs "with the assistance of Tavaryyaun [sic] Johnson." R.706-1, PageID 2714 (capitalization modified). The affiant doesn't provide any further details of his conversations with the CPD about Johnson. Nor does the affiant mention anything about the search of Johnson's car. Second, the affiant relates a letter he received from a confidential informant who stated, among other things, that he "had information on the group of individuals that were involved in narcotics distribution . . . on the west-side of Columbus," followed by a list including Johnson. *Id.* at PageID 2724. Although the officers corroborated much of the confidential informant's other assertions, the confidential informant didn't offer any details about the recency or scope of Johnson's "involv[ment] in narcotics distribution," or whether that involvement merely meant that Johnson sold drugs independently. *See id.* And finally, the affiant relates a wiretapped phone call between Saultz and Johnson in the days before the 430A Warren search, in which Johnson complains to Saultz about an upcoming drug test required by his probation program. Saultz offered Johnson "a drink . . . that will help throw off the drug test," and advised Johnson to "stop touching it" in preparation for the drug test. *Id.* at PageID 2730. And Johnson joked about how "his attorney [thought] he is a drug addict." *Id.*

A magistrate judge approved the warrant and the police searched 430A Warren on June 29, 2022. There, they found approximately 54 grams of crack cocaine, a digital scale, rubber gloves, Narcan, cell phones, a handgun, ammunition, and approximately $44,000 in cash, among other suspected contraband.

2.

The second house search took place at Priscilla Washington's house on 1214 Smith Road. Because we already use her last name to refer to her son Cordell, we'll refer to Priscilla by her first name.

Again, the police sought a search warrant supported by a probable-cause affidavit. This affidavit was markedly different from the affidavit supporting the 430A Warren search warrant.

For example, the 1214 Smith affidavit dedicates about three pages to detailing law enforcement's investigation into the Saultz-Washington's "[n]exus to 1214 Smith Road." R.706-2, PageID 2765–67. The affiant declares a few different facts supporting that nexus. First, law enforcement observed Cordell Washington "frequently come and go" from 1214 Smith. *Id.* at PageID 2765. Moreover, a few of those comings and goings directly preceded "what investigators believe[d] to be drug transactions." *Id.* In one instance, law enforcement intercepted two phone calls between Washington and an unknown male to set up a meeting. After the two agreed to meet, Washington left his home, arrived at 1214 Smith, carried a "medium sized box" back out to his car, and drove to a known drug house to meet with a man whom police believed had been on the other end of the line. *Id.* at PageID 2766–67. Washington and the caller entered the drug house, where officers believed they conducted a drug transaction.

A magistrate judge approved the warrant and police searched 1214 Smith on July 1, 2022. There, they found a safe containing Johnson's Social Security card and car title. And atop those innocuous papers sat six guns, bundles of cash, and large quantities of drugs: approximately 253 grams of fentanyl, 226 grams of cocaine, and 14 grams of a fentanyl-cocaine mixture. One investigator testified at trial that during the search, Priscilla denied knowing about the contraband found in "Tavaryyuan's safe."

* * *

In sum, the CPD collected evidence against Johnson across three searches. First, the September 2020 car search turned up approximately 234 grams of heroin, 334 grams of cocaine (of which half a gram was crack, the rest powder), and loose rounds of ammunition. Second, the June 2022 search of Johnson's residence turned up approximately 54 grams of crack cocaine, a digital scale, rubber gloves, plastic baggies, a razor blade, lottery tickets, Narcan, six phones, a Glock handgun, ammunition, and approximately $44,000 in cash. And finally, the July 2022 search of Priscilla's home yielded approximately 253 grams of fentanyl, 226 grams of cocaine, and 14 grams of a fentanyl-cocaine mixture in a safe along with Johnson's Social Security card, his car title, six guns, and large bundles of cash. Johnson moved to suppress all three buckets of evidence, and the district court denied those motions.

C.

After a few superseding indictments, a federal grand jury charged Johnson (among many others) for his role in the Saultz-Washington DTO. Seven counts named Johnson. Count One charged Johnson and 21 others for conspiracy to distribute and possess with intent to distribute fentanyl, cocaine, cocaine base, heroin, and various other drugs. Counts Two, Eight, and Eleven charged Johnson individually for possessing, with intent to distribute, the drugs found in the car search, the search of 430AWarren, and the search of 1214 Smith, respectively. Finally, Counts Nine, Twelve, and Thirteen charged Johnson for possessing firearms in furtherance of a drug-trafficking crime.

All but two defendants took plea deals, leaving Johnson and one other to go to trial. During trial, the government realized that the evidence underlying Count Two—the drugs found in Johnson's car—differed from the terms of the indictment: instead of the more-than-280 grams of crack cocaine originally charged, the government found only half a gram of crack (with the remainder being powder). So it requested, and the district court granted, an amendment to Count Two's text reflecting the change from a 21 U.S.C. § 841(b)(1)(A) cocaine-base offense to a 21 U.S.C. § 841(b)(1)(C) cocaine offense. And after hearing testimony and evidence for about a month, the jury convicted Johnson on Counts One, Two, Eight, and Eleven, acquitting him on the remaining counts. Johnson moved for a judgment of acquittal and for a new trial, both of which the district court denied. And the district court sentenced him to 200 months' imprisonment on each count of conviction, to be served concurrently. Johnson appealed.

II.

Johnson raises four arguments on appeal. First, he asks us to overturn the district court's denial of his motions to suppress evidence from the government's searches of his car, his house, and his grandmother's house. Second, he asks us to reverse his conviction on Count Two of the indictment because the government amended that count's text at trial. Third, he complains of the district court's decision to admit one of his grandmother's out-of-court statements into evidence. And fourth, he claims that his conviction on Count One isn't supported by sufficient evidence and goes against the manifest weight of the evidence. We're unconvinced by all but his

indictment-amendment argument. To explain why, we'll walk through those arguments one-by-one below, with a caveat: Judge Moore's separate writing explains the majority view as to the indictment issue, while my views are my own.

A.

We'll start with Johnson's motions to suppress. He asked the district court to suppress the three tranches of evidence recovered during the searches of his car, his house, and his grandmother's house. The district court denied all three requests, and Johnson challenges those denials on appeal.

We apply a mixed standard of review to motions to suppress, assessing the district court's factual findings for clear error and legal conclusions de novo. *United States v. Simmons*, 129 F.4th 382, 386 (6th Cir. 2025). And we conduct that review deferentially, "consider[ing] the evidence in the light most favorable to the government." *Id.* (citation modified).

Applying that standard of review to Johnson's arguments, we affirm the district court's denial of all three motions to suppress.

1.

Johnson moved to suppress the evidence collected during the September 2020 car search, arguing that the police shouldn't have impounded his car, let alone conducted an inventory search after impoundment. We disagree.

The Fourth Amendment declares "[t]he right of the people to be secure . . . against unreasonable searches and seizures" and provides that the right "shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The "touchstone" of that guarantee is reasonableness. *Kentucky v. King*, 563 U.S. 452, 459 (2011) (citation modified).

A search is reasonable if the government supports it with a warrant obtained upon a showing of probable cause. *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam); *United States v. Haddix*, 239 F.3d 766, 768 (6th Cir. 2001) (describing the warrant requirement as "the very heart of the Fourth Amendment"). In a delineated set of circumstances, though, the

government can conduct a search without a warrant—so long as they have probable cause. *See, e.g.*, *King*, 563 U.S. at 459. And in some situations, even the probable-cause requirement slips away. One exception to the warrant and probable-cause requirements is relevant here: the vehicle inventory search. *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

The parties frame their dispute around the inventory-search exception. Our analysis under that exception proceeds in two stages. First, we ask if the police "lawfully [took] custody of [the] vehicle." *United States v. Smith*, 510 F.3d 641, 651 (6th Cir. 2007) (citation modified). Under one avenue to lawful custody, police can justify their decision to impound by reference to "legitimate public safety and community caretaking purposes," *United States v. Kimes*, 246 F.3d 800, 804 (6th Cir. 2001), so long as the ultimate impoundment decision was made "according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity," *Bertine*, 479 U.S. at 375; *see also United States v. Snoddy*, 976 F.3d 630, 634 (6th Cir. 2020) ("A vehicle is lawfully seized and, thus, subject to an inventory search if it is lawfully impounded."). If we conclude that the vehicle was lawfully seized, we shift focus to our second inquiry: whether the inventory search enabled by the impoundment unfolded without investigatory purpose and "according to standard police procedures." *United States v. Hockenberry*, 730 F.3d 645, 659 (6th Cir. 2013) (citation modified). So "officers do not enjoy their accustomed discretion" in the inventory-search context: "they simply follow the applicable policy." *Id.* (citation modified). Moreover, the search must be designed to "protect[] the [inventoried] property from unauthorized interference," "guard against claims of theft, vandalism, or negligence," or "avert any danger to police or others that may have been posed by the [inventoried] property." *Bertine*, 479 U.S. at 373; *see also Whren v. United States*, 517 U.S. 806, 811 n.1 (1996). Importantly, then, an inventory search must be "sufficiently tailored" to those purposes. *Hockenberry*, 730 F.3d at 659 (citation modified).

Because the CPD impoundment policy is relevant throughout our analysis, we'll start there. Three aspects of that policy bear mentioning. First, the policy vests officers with discretion to choose between three options, in descending order of preferability, when they stop an impoundable vehicle:

> a. Release the vehicle to the owner, operator, or to another person with the consent of the owner or operator provided there is no legal requirement or need to impound the vehicle, and there are no overdue unpaid parking fines held against the vehicle;
>
> b. Park the vehicle in a legal location, secure it, keep the keys with the operator's property (if arrested), and document the actions taken on the CAD; or
>
> c. Impound the vehicle.

R.873-1, PageID 5014. Second, the policy short-circuits that discretion where, as here, the "vehicle is registered in the arrested person's name and the arrest involved . . . driving under an OVI suspension." *Id.* at PageID 5016–17 (capitalization modified). In those cases, the policy directive instructs the officer to "[f]ollow the impounding procedures" outlined elsewhere in the directive and "[s]eize the vehicle." *Id.* at PageID 5016. And third, the policy provides that, once an officer reaches the point of conducting an inventory search, they may examine "all reasonably accessible areas and containers in the vehicle." *Id.* at PageID 5015.

The officers' testimony at the suppression hearing, construed in the light most favorable to the government, *Simmons*, 129 F.4th at 386, shows that their impoundment decision and subsequent inventory search comported with CPD policy and the Fourth Amendment.

Start with the impoundment decision. CPD policy directs officers to seize a stopped car if it's (1) registered in the arrestee's name and (2) the owner is under arrest for, among other things, driving on a license suspended because of a previous OVI. The testimony at the suppression hearing shows that officers at the scene confirmed both factors before proceeding. The officers testified—and Johnson doesn't dispute—that the car was registered in Johnson's name. The same goes for the nature of the offense underlying his arrest: driving under suspension for a previous OVI offense. Those two factors established the officers' duty under CPD policy to impound the car. And the officers explained that the policy-driven decision ultimately boiled down to safeguarding the public by preventing Johnson from "driv[ing] off [and] ultimately get[ting] into another accident" or "commit[ting] another infraction." R.916, PageID 4909. "That such a policy is consistent with legitimate public safety and community caretaking purposes is beyond question." *Kimes*, 246 F.3d at 804.

Johnson hasn't made any showing that'd make us question whether the officers' impoundment decision was made for non-investigatory purposes. He devotes only two sentences to pretext. First, he identifies the rule that "officers cannot hide an investigative search under the pretext of an inventory search." Appellant Br., p.19 (citation modified). And second, after describing the district court's rejection of his pretext argument, he announces that "these findings are clearly erroneous" without explaining why. *Id.* at p.21. Without any developed argumentation on this front, we deem any challenge to the officers' impoundment decision on pretext grounds forfeited. *See United States v. Johnson*, 79 F.4th 684, 706 (6th Cir. 2023) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed forfeited." (citation modified)).

Now we'll consider the subsequent inventory search. CPD policy structures inventory searches by allowing officers to search "all reasonably accessible areas and containers in the vehicle." R.873-1, PageID 5015. The officers didn't exceed that scope. They testified that the panel appeared accessible because it was slightly ajar and bore indicia of being frequently handled. Moreover, the search was "sufficiently tailored," *Hockenberry*, 730 F.3d at 659, to serve at least two of the three governmental interests underlying inventory searches: (1) "the protection of the owner's property while it remains in police custody," (2) "the protection of the police against claims or disputes over lost or stolen property," and (3) "the protection of the police from potential danger." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976); *see also Florida v. Wells*, 495 U.S. 1, 9 n.2 (1990) (Brennan, J., concurring in the judgment). Here, the officers' testimony supports the finding that their search of the loose panel on the center console served at least the first two governmental interests. They testified that the loose panel's appearance—"[t]he grime had been wiped away from the opening," it appeared "as though it had been used multiple times," and "it was sitting ajar as though it had been replaced in a hasty manner"—lended itself to the conclusion that "maybe [Johnson] had secured valuables or something in there." R.916, PageID 4978.

We've blessed inventory searches of similarly unorthodox compartments in other cases. In one case, officers pulled up loose flaps of carpet that looked "as if someone could have put something underneath" and found a handgun. *United States v. Jackson*, 682 F.3d 448, 451–52,

456 (6th Cir. 2012). In another case, officers conducting an inventory search found a cylinder of meth tucked into a truck's engine bay. *United States v. Lumpkin*, 159 F.3d 983, 985, 988 (6th Cir. 1998). And in an unpublished decision, we approved of police officers' "dismantling of a dashboard during an inventory search" because it was "conducted pursuant to established procedures and without unlawful motive." *United States v. Stewart*, 922 F.2d 842, 1991 WL 1114, at *5 (6th Cir. Jan. 8, 1991) (per curiam) (unpublished table decision).

For those reasons, we affirm the district court's denial of Johnson's motion to suppress evidence from the September 2020 car search.

2.

Johnson also wants to suppress the evidence law enforcement discovered in his residence at 430A Warren. But because the officers relied in good faith on the warrant, we affirm.

The government sought a search warrant for Johnson's half of the duplex (430A Warren) from a magistrate judge. Determining probable cause requires the issuing magistrate to take into account the totality of the circumstances to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability" that evidence will be found at the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In reviewing the issuance of this warrant, we must ask whether the magistrate judge had "a substantial basis for concluding that probable cause existed" to search 430A Warren. *Id.* at 238–39 (citation modified). And we review the issuing magistrate's determination "[w]ith great deference . . . to determine whether, under the totality of the circumstances, the low bar of probable cause has been overcome." *Simmons*, 129 F.4th at 386 (quoting *United States v. Moore*, 999 F.3d 993, 996 (6th Cir. 2021)).

Like all searches, probable cause to search a home requires a showing of a "nexus between the place to be searched and the evidence to be sought." *Id.* (quoting *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc)). But a warrant to search a suspected drug dealer's home can issue on a different showing. Under the "continual-and-ongoing operations theory," a probable-cause affidavit can suffice if it furnishes a substantial basis to conclude (1) that the place to be searched is the suspect's home and (2) that the suspect "is

engaging in continual and ongoing drug trafficking operations." *United States v. Long*, 155 F.4th 829, 835 (6th Cir. 2025).

To sum it up more neatly: under the continual-and-ongoing operations theory, the government can furnish probable cause to support a warrant by showing Johnson's record of past drug convictions coupled with "recent, reliable evidence of drug activity" by Johnson. *United States v. McCoy*, 905 F.3d 409, 418 (6th Cir. 2018); *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020). Such evidence gives rise to an "inference" that fulfills the nexus requirement without direct evidence linking the place to be searched with the evidence sought. *See United States v. Brown*, 828 F.3d 375, 382–84 (6th Cir. 2016).

But even an erroneously issued search warrant "does not always require suppression." *McCoy*, 905 F.3d at 415. Under the good-faith exception to the exclusionary rule, evidence obtained under a deficient search warrant needn't be suppressed if the officers conducting the search relied on the warrant in good faith. *Id.* at 415–16. This good-faith exception saves unlawfully obtained evidence unless "no reasonable officer would have relied on a judge-issued warrant." *Id.* at 416. As relevant here, that protection disappears when officers "rel[y] on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)). That happens when an affidavit's pages are empty of "some modicum of evidence, however slight[,] between the criminal activity at issue and the place to be searched." *Id.* (quoting *United States v. White*, 874 F.3d 490, 497 (6th Cir. 2017)). In other words, an affidavit is insufficient to support an officer's "reasonable, good-faith reliance" if it is "bare bones." *United States v. Christian*, 925 F.3d 305, 312 (6th Cir. 2019) (en banc). A "bare bones" affidavit "nakedly assume[s] or vaguely conclude[s], without attempting to demonstrate why, probable cause has been satisfied." *United States v. Sanders*, 106 F.4th 455, 468 (6th Cir. 2024) (en banc).

Our caselaw shows that an officer could in good faith rely on the affidavit here, so we needn't address any potentially thorny issues of probable cause. *United States v. O'Neill*, 94 F.4th 531, 542 (6th Cir. 2024) ("Because we conclude that the officers relied on the warrant in good faith, we need not decide whether the warrant was supported by probable cause."). For

example, in *United States v. Davidson*, we found that officers had probable cause—a higher bar than good-faith reliance on a warrant—to believe that a defendant's residence contained evidence of drug trafficking based on coded telephone calls between two other people. 936 F.2d 856, 859–60 (6th Cir. 1991). Those phone calls involved coded language—"cryptic reference[s] to drugs," as we described it—that, "viewed in connection with the totality of the circumstances presented in the [search warrant] affidavit," justified a probable-cause finding. *Id.* And the other "star[s]" in the "totality of the circumstances constellation," *Sanders*, 106 F.4th at 463 (citation modified), included the defendant's "frequent meetings" with other known drug-traffickers, *Davidson*, 936 F.2d at 859.

Here, the officers had a good-faith basis to believe that Johnson was affiliated with a drug trafficker and that he'd been communicating in coded language implying bulk-scale drug transactions—both as a result of the recorded phone call with Saultz that took place just days before the search at 430A Warren. That recording captured Johnson complaining that he had to submit to a drug test as directed by his probation officer. Saultz offered a "drink he [would] bring over that [would] help throw off the drug test," and Johnson joked that "his attorney [thought] he [was] a drug addict." R.706-1, PageID 2730. And the affidavit describes information the affiant received from a confidential informant about Johnson's involvement in Saultz and Washington's drug-trafficking activities. If similar facts carried most of the weight for our probable-cause finding in *Davidson*, they certainly carry our good-faith conclusion today. To be sure, *Davidson* involved other facts besides—but that was a probable-cause determination, not a good-faith analysis. *See id.* To fulfill the latter standard, the constellation needn't shine as bright or comprise as many stars. *See United States v. Frazier*, 423 F.3d 526, 536 (6th Cir. 2005) (demonstrating good faith "requires a less demanding showing than the substantial basis threshold required to prove the existence of probable cause" (citation modified)).

So because the affidavit wasn't so bare bones as to render unreasonable an officer's belief in the warrant's validity, we affirm the district court's denial of Johnson's motion to suppress the evidence gathered from his residence at 430A Warren.

3.

Finally, Johnson seeks to suppress the evidence law enforcement discovered in his grandmother Priscilla's residence at 1214 Smith Road. The district court denied Johnson's motion on Fourth Amendment standing grounds, but that's a shaky holding the panel needn't reach to affirm. So we affirm the district court's denial of Johnson's motion to suppress that evidence on the alternative ground that the warrant affidavit establishes probable cause. *See United States v. Hayward*, 2023 WL 3886407, at *2 (6th Cir. June 8, 2023).

The same general probable-cause requirements stated above apply to this search, too. The warrant application must have given the magistrate "a substantial basis for concluding that probable cause existed" to search 1214 Smith Road. *Gates*, 462 U.S. at 238 (citation modified).

The government's affidavit fulfilled the nexus requirement. The 1214 Smith affidavit dedicates about three pages to detailing law enforcement's investigation into the Saultz-Washington's "[n]exus to 1214 Smith Road." R.706-2, PageID 2765–67. The affiant declared a few different facts supporting that nexus. First, law enforcement observed Washington "frequently come and go" from 1214 Smith. *Id.* at PageID 2765. Moreover, a few of those comings and goings directly preceded "what investigators believe[d] to be drug transactions." *Id.* In one instance, law enforcement intercepted two phone calls between Washington and an unknown male to set up a meeting. After the two agreed to meet at "the school"—code for a location known by investigators to be a drug house—Washington left his home, arrived at 1214 Smith, carried a "medium sized box" back out to his car, and drove to the drug house to meet with a man whom police believed had been on the other end of the line. *Id.* at PageID 2766–67. Washington and the caller entered the drug house, where officers believed they conducted a drug transaction.

That frequent coming and going by Washington, combined with the affidavit's copious information about his suspected drug-trafficking activities and an example of a suspected drug transaction implicating 1214 Smith, is enough to establish probable cause. *See Sanders*, 106 F.4th at 462 (explaining that "circumstantial evidence" can sometimes "do the trick," where, for

example, officers observe a person leaving a location and possibly engaging in a sale of contraband collected from that location).

For that reason, we affirm the district court's denial of the motion to suppress evidence from 1214 Smith because the magistrate had a substantial basis for concluding that probable cause existed to search that home.

B.

Next up, Johnson argues that the district court erred by permitting the government to amend Count Two of the indictment during trial, depriving him of his right to indictment by grand jury. Because I believe that he failed to preserve the issue, I consign his argument to plain-error review. And applying that standard, I believe that Johnson fails on two fronts: first, the amendment didn't deprive him of his grand-jury right because it merely restated a lesser offense already included in the original charge; and second, the error didn't "seriously affect the fairness, integrity, or public reputation of" his trial. *United States v. Belcher*, 92 F.4th 643, 648 (6th Cir. 2024) (citation modified). A majority of this panel, however, disagrees. Judge Moore provides the rationale in her separate opinion.

1.

The standard of review applicable to Johnson's amendment argument hinges on whether he complied with the "contemporaneous-objection rule." *Puckett v. United States*, 556 U.S. 129, 134–35 (2009); *see* Fed. R. Crim. P. 51(b). Because he didn't, I apply plain-error review to the merits of his argument.

Two characteristics typify a contemporaneous objection: timeliness and specificity. To satisfy the timeliness requirement, a defendant must object "when the court ruling or order is made or sought." Fed. R. Crim. P. 51(b). And the specificity requirement obligates the objecting party to "inform the court of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." *United States v. Bradley*, 917 F.3d 493, 505 (6th Cir. 2019) (citation modified) (quoting Fed. R. Crim. P. 51(b)).

Johnson was timely in objecting to the amendment, but not specific.[2] The matter arose three times before the district court ultimately allowed the change to Count Two—which originally charged Johnson with possessing, with intent to distribute, enough crack cocaine to warrant a mandatory minimum sentence of 10 years' imprisonment and enough heroin to warrant a 5-year mandatory minimum. Johnson's counsel responded at each juncture with varying degrees of doubt or disagreement. The issue came up initially after the government elicited testimony from its lab analyst showing that all but half a gram of the cocaine recovered from Johnson's car was powder, not crack. So the government informed the district court that it would "have to amend" Count Two to reflect that most of the "crack" cocaine was actually hardened powder—a change that eliminated the potential 10-year mandatory minimum. R.1388, Trial Tr. Vol. 10, PageID 16692. At that point, Johnson's counsel, Jeffrey Stavroff, objected to being caught off-guard:

> THE COURT [to defense counsel]: What's your view?
>
> . . .
>
> MR. STAVROFF: Yes, I just—I guess I was caught offguard. I've looked through all the discovery productions. I have a way to quickly see if I have a document.
>
> THE COURT: I mean, you're being caught cold here, that's the long and the short?
>
> MR. STAVROFF: Yes.

Id. at PageID 16692–93. So Stavroff made his first objection on Johnson's behalf "when the court order or ruling . . . [was] sought," satisfying the timeliness requirement. Fed. R. Crim. P. 51(b). But he hadn't "inform[ed] the court . . . [that] the grounds for that objection" lay upon the impermissibility of the amendment, as opposed to the government's delay in informing Stavroff of the change in evidence. *Bradley*, 917 F.3d at 505 (citation modified); *see also United States v. Lester*, 98 F.4th 768, 776–77 n.5 (6th Cir. 2024) (defendant's objection to admission of evidence on relevance grounds insufficient to preserve argument based on unfair prejudice).

[2]For the reasons given below, I use the term "objection" loosely. One "objection," the first, really was no more than a concern about timing. The later two aren't attorney objections but statements by the lawyer that his client was reluctant to go along. In any event, these issues are subsumed by the lack of specificity in the "objections."

That pattern continued when the district court returned to the topic the next day:

> THE COURT: I mean, generally I don't like to amend indictments, but this is favorable to your client.
>
> MR. STAVROFF: Yes, sir.
>
> THE COURT: So you don't object to it, do you?
>
> MR. STAVROFF: So I'm of—the government and I are of the same opinion. I'm not sure my client is quite there yet. . . . So I guess we'll cross that bridge whenever we get there, but I just wanted to call it to the Court's attention.

R.1389, Trial Tr. Vol. 11, PageID 16714–15. Three problems with that exchange. First, it's not clear that Stavroff's statements constitute an objection in the first place. Speaking as Johnson's counsel, Stavroff agreed with the government, merely noting his client's personal uncertainty as an aside. But our caselaw is clear: a represented defendant speaks through his counsel. *United States v. Golson*, 95 F.4th 456, 460–61 (6th Cir. 2024). So if an attorney equivocates by hedging his own views against his client's, we won't fault the district court for paying heed only to the former. Second, even if we put Stavroff's waffling to the side and assume he did object, he certainly wasn't specific. "Not [being] sure" that Johnson was on board doesn't rise to the level of a discernible legal theory based on Johnson's right to be charged in an indictment issued by a grand jury. R.1389, PageID 16714. And third, Stavroff undercut whatever substantive content he did present by inviting the district court to "cross that bridge" later. *Id.* at PageID 16715.

The district court revisited Count Two a third time at the jury instruction conference. The district court again checked back in with Johnson's counsel:

> THE COURT: So is there an agreement on the amendment?
>
> MR. STAVROFF: Your Honor, I have explained this to my client, how it plays out and what the evidence that was admitted at trial, and my client is not inclined to agree to the amendment.
>
> . . .
>
> THE COURT: Understood. Your client doesn't want to agree?
>
> MR. STAVROFF: Yes.

R.1392, Trial Tr. Vol. 14, PageID 17806–07. Yet again, Johnson's counsel failed to voice a fleshed-out objection rooted in a discernible legal theory, instead pinning the disagreement on his client.

So although Johnson's counsel objected in some sense at every opportunity—meaning he was timely for preservation purposes—his objections weren't specific. For starters, they didn't make even a passing reference at the grounds Johnson presses on appeal: that the district court's decision was error for allegedly violating Johnson's right to be charged by a grand jury through an indictment. *See United States v. Malory*, 2023 WL 7550018, at *2 (6th Cir. Nov. 14, 2023) (finding an otherwise sparse argument to be preserved for appeal where the defendant cited caselaw to the district court in support of that argument). Instead, Johnson's counsel appears to have directly challenged only the timing of the government's pivot. *See United States v. Prater*, 766 F.3d 501, 506–07 (6th Cir. 2014) (finding argument preserved where, among other factors, defendant's otherwise undetailed objection could only be construed to press one legal theory). Past that, he either deferred the issue until later or deposited the source of his disagreement on his client's shoulders.

The former is almost definitionally not an objection, and the latter can't stand because we require a represented party's arguments to be stated by his counsel to qualify as an objection—not presented as the defendant's own disagreement and nothing more. *See Golson*, 95 F.4th at 460–61; *see also Miller v. United States*, 561 F. App'x 485, 488 (6th Cir. 2014) (allowing a defendant to present arguments alongside his counsel is "generally prohibited because it increases the risk of undue delay, jury confusion, and conflicts as to trial strategy"). Indeed, for the later two "objections," it's plain that Stavroff himself didn't really have a problem with the amendment because it was favorable to his client.

Johnson's counterarguments rely on an inapplicable line of cases. True enough, we've said before that "we normally refuse to find forfeiture when a district court 'addresse[s] the merits of the issue'—no matter how the winning party brought the issue to the district court's attention." *United States v. Liggins*, 167 F.4th 894, 904 (6th Cir. 2026) (quoting *United States v. Clariot*, 655 F.3d 550, 556 (6th Cir. 2011)). And the district court, in some sense, addressed the merits of the amendment by "observ[ing] that[,] were Mr. Johnson to be found guilty on Count 2,

the amendment could benefit him at sentencing" and granting the amendment on that basis. R.1130, Order, PageID 6469. So Johnson argues that the district court preserved the argument on his behalf. But even if we accept that the district court addressed Johnson's grand-jury right on the merits—a shaky conclusion for all the reasons discussed above—it's not enough to fall within the scope of the cases Johnson cites. In *Liggins*, we deemed the government's appellate arguments preserved because it had presented those arguments to the district court in step with the court's schedule. *Liggins*, 167 F.4th at 904. And in *Clariot*, the district court resolved the case on grounds not presented by either side, making it improper to hold the parties to a presentment standard because to do so would mean that "the more surprising a district court decision in terms of resolving unbriefed and unargued points, the more insulated from review that decision would be." *Clariot*, 655 F.3d at 556; *see also* Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."). This isn't either case. Johnson didn't adequately present the argument he now presses at any point before the district court, and the district court didn't surprise him by going off on its own accord. The government raised the point, and the district court gave Johnson at least three opportunities to voice his objection.

So because Johnson earns only half-marks under the contemporaneous-objection rule—having been timely, but not specific—we apply plain-error review to the merits of his argument that the district court erred by permitting an amendment to the indictment.

2.

To succeed on plain-error review, Johnson must show that the amendment was (1) an error, that's (2) plain, and (3) affected substantial rights. *United States v. Starling*, __ F.4th __, 2026 WL 2225098, at *9 (6th Cir. Aug. 3, 2026). If he succeeds on those three prongs, "we may then exercise our discretion to address the error, but only if (4) the error seriously affect[ed] the fairness, integrity, or public reputation of [Johnson's] judicial proceedings." *Id.* (citation modified). Johnson fails on the fourth prong.

The amendment didn't seriously affect the fairness, integrity, or public reputation of Johnson's trial because his conviction on Count Two has a fully independent basis: the heroin underlying the same charge. After all, Count Two also charged Johnson for the heroin recovered

from his car. And as the district court noted, the heroin served as a fully independent basis for the jury to find Johnson guilty, even if the government dropped the cocaine aspect of the charge. In other words, Count Two would've still gone to the jury even if the district court denied the amendment and the government either (1) dismissed the cocaine-based allegation altogether or (2) left the cocaine allegation in and the jury simply declined to convict on that basis given the insufficient quantity shown at trial. That's because the heroin-based allegation would've sustained the conviction by itself.

C.

We turn next to Johnson's contention that the district court erred by admitting hearsay testimony at trial. He challenges, for the first time on appeal, the district court's admission of his grandmother Priscilla's hearsay statement tying him to the safe found at her house on 1214 Smith. Because Johnson didn't object to the testimony at trial, he agrees that he's entitled to review only for plain error. And because the district court permissibly admitted Priscilla's statements under the hearsay exclusion for statements made by co-conspirators, we find no error—let alone plain error.

Johnson argues that the district court should've excluded as hearsay the following exchange, comprising testimony by one of the officers who interviewed Priscilla during the 1214 Smith search:

> Q: During that conversation, what did Ms. Priscilla Washington tell you about access to the house and the safe?
>
> A: She advised me that there was—there were only a few people who had access to the house and they were all relatives of hers, being Cordell Washington, Tavaryyuan Johnson, and Erica Washington.
>
> . . .
>
> Q: Did she indicate that all of those individuals had keys to her house?
>
> A: Yes, ma'am.
>
> Q: Did she also indicate who the safe belonged to in the basement of her home?

> A: Yes. She indicated that there's a safe down there, but she doesn't know what's in Tavaryyuan's safe.
>
> Q: Did she call it Tavaryyuan's safe?
>
> A: She did.

R.1390, Trial Tr. Vol. 12, PageID 17255–56. By the time Priscilla and the officer had the conversation recounted in this exchange, Johnson had been arrested.

Federal Rule of Evidence 801(c) "prohibits parties from admitting out-of-court statements that prove the truth of the matter asserted in the statement." *Johnson*, 79 F.4th at 700 (citation modified). But the rule against hearsay is riddled with exceptions. *See, e.g.*, Fed. R. Evid. 803 (enumerating exceptions), 807 (catch-all). And more importantly for this appeal, it's also subject to some exclusions—scenarios in which an out-of-court statement supplied for the truth of the matter asserted is deemed not to be hearsay to begin with. *See United States v. Chavez*, 951 F.3d 349, 358 (6th Cir. 2020).

The parties' dispute revolves around whether the hearsay exclusion applicable to a co-conspirator's statements applies to Priscilla's declaration. That exclusion, codified under Federal Rule of Evidence 801(d)(2)(E), shields testimony from the rule against hearsay if the district court finds that "(1) there was a conspiracy; (2) the defendant was a member of that conspiracy; and (3) the co-conspirator made the statement in furtherance of the conspiracy." *United States v. Iossifov*, 45 F.4th 899, 917 (6th Cir. 2022). The government carries the burden to establish those factors by a preponderance of the evidence. *See United States v. Hitow*, 889 F.2d 1573, 1581 (6th Cir. 1989).

We focus, as the parties do, on the co-conspirator exclusion test's third prong: whether the co-conspirator's statement furthered the conspiracy. A statement furthers the conspiracy "if it was intended to promote the conspiratorial objectives." *Id.* at 1581. That can be true even if the statement doesn't "exclusively, or even primarily, . . . further the conspiracy." *United States v. Tocco*, 200 F.3d 401, 419 (6th Cir. 2000) (citation modified).

This Court's opinions—albeit unpublished—show why Priscilla's statements to the police promoted the conspiracy's objectives: they concealed her own role in the conspiracy and

impeded the government's investigation. In *United States v. Lora*, for example, the government introduced at trial an out-of-court statement made by a suspected co-conspirator to a state highway trooper. 210 F.3d 373, 2000 WL 353742, at *4 (6th Cir. Mar. 29, 2000) (unpublished table decision). The officer found $20,000 in the suspected co-conspirator's car. *Id.* And at trial, the officer testified that the co-conspirator explained his possession of the $20,000 as a loan made out to the co-conspirator by the defendant. *Id.* This Court held that the statement furthered the conspiracy by shielding it from investigation. *Id.* at *5; *see also United States v. Ellis*, 19 F.3d 20, 1994 WL 64844, at *2 (6th Cir. Mar. 1, 1994) (per curiam) (unpublished table decision) ("[S]tatements calculated to delay or prevent a conspirator's arrest, and thus allow the conspiracy to continue, are made in furtherance of the conspiracy." (citing *United States v. Garcia*, 893 F.2d 188, 190 (8th Cir. 1990))).

The same goes here. Priscilla offloaded responsibility for the contents of the safe onto Johnson—whom she ostensibly knew had been arrested—which furthered the conspiracy's aims by potentially delaying her own arrest. Indeed, the officer testified that he wasn't buying Priscilla's representations of ignorance as to what her family members were doing and storing at her house. The district court didn't err in concluding, on that basis, that Priscilla's statements fit the co-conspirator exclusion because they furthered the conspiracy by keeping—or at least attempting to keep—her out of the investigation's spotlight. *See United States v. Elder*, 840 F.3d 455, 459 (7th Cir. 2016) (noting that statements in furtherance of a conspiracy can "include comments designed to assist in recruiting potential members, to inform other members about the progress of the conspiracy, to control damage to or detection of the conspiracy, to hide the criminal objectives of the conspiracy, or to instill confidence and prevent the desertion of other members" (citation modified)).

In any case, Johnson hasn't shown that any error in admitting Priscilla's hearsay prejudiced him. *Barnes v. City of Cincinnati*, 401 F.3d 729, 742 (6th Cir. 2005) ("We will vacate a jury's verdict based on a district court's erroneous admission of hearsay evidence only if the testimony's admission amounted to more than harmless error."). All he argues is that without Priscilla's statements, "there would have been no evidence tying Johnson to the drugs" recovered from 1214 Smith. Appellant Br., p.37; *see also* Reply Br., pp.22–23. But that's not

true. The jury heard testimony that the safe—even without being characterized by Priscilla as belonging to Tavaryyuan—contained Johnson's Social Security card and his car title. That's enough circumstantial evidence to support a jury's conclusion that a sufficient "nexus" existed "between [Johnson] and the . . . area where the contraband [was] discovered." *United States v. Lanier*, 850 F. App'x 419, 421 (6th Cir. 2021) (quoting *United States v. Bailey*, 553 F.3d 940, 944–45 n.3 (6th Cir. 2009)). Alternatively, it's enough to support a finding that Johnson at least had "dominion or control over the [safe] itself." *United States v. Carter*, 2026 WL 252551, at *7 (6th Cir. Jan. 30, 2026) (quoting *United States v. Latimer*, 16 F.4th 222, 225 (6th Cir. 2021)). As we've explained, evidence that a defendant "stored personal property, including his driver's license and personal papers" at a property supports a finding of constructive possession over the contents of the property. *Id.* at *8 (citing *United States v. Jenkins*, 593 F.3d 480, 484 (6th Cir. 2010)). So the presence of Johnson's Social Security card and car title in the safe supports a jury finding of constructive possession over the other contents of that safe, even without Priscilla's declaration that the safe belonged to Johnson.

For those reasons, we conclude that the district court didn't err by admitting Priscilla Washington's out-of-court statements under the hearsay exclusion for statements made by an opposing party's co-conspirator.

D.

Finally, Johnson asks us to overturn the district court's denials of his motions for a judgment of acquittal and for a new trial as to Count One. The former argument challenges the sufficiency of the evidence to support a conspiracy conviction, and the latter argues that the conviction was against the manifest weight of the evidence. We address both arguments—and why we're not convinced by either—in turn below.

1.

Johnson asks this Court to reverse the district court's denial of his motion for a judgment of acquittal based on insufficiency of the evidence to support a conviction on Count One. That count charged him with conspiracy for his role in the Saultz-Washington conspiracy. Johnson argues that the evidence produced at trial was insufficient to show that he knowingly joined the

conspiracy. But because crediting that argument would require us to step far beyond the deference we owe the jury, we reject it.

Start with the standard we apply to challenges to the sufficiency of the evidence. We review the sufficiency of the evidence "with fresh eyes." *United States v. Gardner*, 32 F.4th 504, 522 (6th Cir. 2022). But we don't weigh the evidence or reassess witness credibility. *Id.* Instead, our review is limited to the question of "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." *Id.* (quoting *United States v. Wright*, 774 F.3d 1085, 1088 (6th Cir. 2014)). That's a "very heavy burden" for the defendant to bear. *Wright*, 774 F.3d at 1088 (citation modified). And we assess the challenge in light of "all of the evidence admitted by the trial court, regardless of whether that evidence was admitted erroneously." *United States v. Aldridge*, 98 F.4th 787, 793 (6th Cir. 2024) (citation modified).

Now for the charge underlying Count One and its required elements. A conviction for conspiracy to traffic drugs requires the government to prove three things beyond a reasonable doubt: "(1) an agreement to violate drug laws; (2) knowledge of and intent to join the conspiracy; and (3) participation in the conspiracy." *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007). Importantly, "[k]nowledge and participation can be inferred from the defendant's conduct." *United States v. Sadler*, 24 F.4th 515, 542 (6th Cir. 2022) (citation modified). And "once the existence of a conspiracy is shown, the evidence linking an individual defendant to that conspiracy need only be slight." *Id.* (citation modified) (quoting *United States v. Caver*, 470 F.3d 220, 233 (6th Cir. 2006)). The government can show the requisite linkage with "circumstantial evidence" like "evidence of repeated purchases," *Caver*, 470 F.3d at 233, and evidence that the defendant received a "continuing supply" of drugs from a "constant" source, *United States v. Anderson*, 89 F.3d 1306, 1311–12 (6th Cir. 1996). And "[a] large volume of narcotics creates an inference of conspiracy." *United States v. Gunter*, 551 F.3d 472, 482 (6th Cir. 2009) (citation omitted).

Johnson contests only the sufficiency of the evidence to support the jury's finding as to conspiracy's participation element. He argues that the testimony the government adduced at trial

from other conspiracy members and victims showed, at most, that he dealt drugs in parallel to the conspiracy, not as part of it. But that's an understatement of the evidence.

Construing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could conclude that Johnson participated in the Saultz-Washington conspiracy. Alexis Lewis—a conspiracy member and Saultz's girlfriend—testified that she saw Johnson come around one of the conspiracy's drug houses "every so often . . . to see Cordell or Pat" and "purchase and make money off of what he got from Cordell." R.1387, Trial Tr. Vol. 9, PageID 16341–42. Specifically, she testified that Johnson picked up "packs"—an amount of drugs suitable for redistribution, not personal use—from Cordell about fifty times at the DTO's drug houses. *Id.* at PageID 16374–75. Lewis added that Washington provided Johnson with a scale, baggies, and money. And she also testified that Johnson sold drugs out of his residence on 430A Warren.

Another witness testified that she'd observed Tavaryyuan's packs, and they were "pretty much the same as everybody else's." R.1386, PageID 15893. Other DTO members and customers testified that they'd bought drugs from Johnson at the DTO's direction—for example, when a member approached by a customer wasn't himself available to make the sale.

Johnson's counter—that the above testimony establishes only that he was running a gig "on the side," separate from the Saultz-Washington conspiracy—doesn't convince. Reply Br., p.17. Multiple features of the testimony fit well-recognized patterns our caselaw recognizes as supporting a jury's finding of participation. For example, we've explained that a rational jury can find a defendant participated in a conspiracy when he "worked together" with other conspirators to sell drugs. *Caver*, 470 F.3d at 233. And here, the witnesses testified that Johnson would get packs from Washington, and DTO members would then direct customers to Johnson to buy product. That's collaboration. Perhaps even more straightforwardly, our cases show that evidence supports a finding of participation when the government produces "evidence of repeated purchases," *id.* at 233, or a "continuing supply" of drugs from a "constant" source, *Anderson*, 89 F.3d at 1311–12. Here, the government showed the jury that Johnson received drug packs from Washington approximately fifty times over the years. That's a continuing supply from a constant source within the conspiracy.

2.

Johnson also gestures at seeking reversal of the district court's denial of his new trial motion on the manifest weight of the evidence. But he doesn't do much aside from setting out a rule paragraph. His opening appellate brief follows up the standard for manifest-weight challenges by "adopt[ing] the above arguments"—referring, ostensibly, to the sufficiency-based challenge—to show that the "jury lost its way." Appellant Br., p.33. And in his reply brief, Johnson offers even less, basing his manifest-weight challenge only on the government's failure to contest it in its appellee brief.

Let's say that Johnson's argument as to why the panel should "disagree[] with the jury's resolution of conflicting evidence" comes down to witness credibility. *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998). Many of the witnesses against Johnson were codefendants who took plea deals. But we've explained (albeit in the separate context of whether testimony is unduly prejudicial) that a jury could interpret an adverse witness's "plea agreement . . . as either bolstering *or* hurting a witness' credibility." *United States v. Thornton*, 609 F.3d 373, 377 (6th Cir. 2010) (emphasis added). So even if we squint to discern some substance to Johnson's manifest-weight argument, it's not at all clear that the district judge abused his discretion in declining to "re-weigh the evidence" as Johnson wished. *Lutz*, 154 F.3d at 589.

III.

For these reasons, we affirm the district court's judgment as to all but Johnson's conviction on Count Two, which we reverse for the reasons explained in Judge Moore's separate opinion expressing the majority's view on the mid-trial amendment to the indictment.

OPINION

KAREN NELSON MOORE, Circuit Judge, opinion for the court on Count 2. Johnson argues that the district court amended his indictment as to Count 2, and his conviction on that count must therefore be vacated. We agree.

We begin by tracing the facts surrounding the amendment. Count 2 of Johnson's third superseding indictment charged him with "knowingly, intentionally, and unlawfully possess[ing] with intent to distribute 100 grams or more . . . of heroin . . . ; and 280 grams or more . . . of cocaine base, commonly referred to as 'crack.'" R. 995 (Third Superseding Indictment at 4–5) (Page ID #5628–29). During trial it became clear via a drug-testing expert that what the government initially believed was cocaine base was in fact powder cocaine. *See* R. 1388 (Tr. Vol. 10 at 2780–81) (Page ID #16691–92). The government then requested "to amend . . . [the] count in the indictment that lists cocaine base." *Id.* at 2781 (Page ID #16692).

The district court did not immediately rule on the government's request but brought up the issue again the next day of trial, stating that "generally I don't like to amend indictments but this is favorable to [Johnson]."[1] R. 1389 (Tr. Vol. 11 at 2803) (Page ID #16714). Asked whether he objected, Johnson's attorney said that he personally agreed the amendment would be favorable but was "not sure [his] client [was] quite there yet." *Id.* He indicated, however, that Federal Rule of Criminal Procedure 7 might impose a barrier to an amendment. *Id.* ("I have researched a little bit on Criminal Rule 7; and just being a state court person, Criminal Rule 7 is a lot different. You can amend the indictment anytime you want. It's different here.").

The issue sat dormant for another several days, at which point the government brought it to the court's attention again by "mov[ing] to amend the indictment formally on Count 2." R. 1392 (Tr. Vol. 14 at 3895) (Page ID #17806). The district court, noting that the drug and amount

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[1]The amendment was favorable because a conviction for possession of 280 grams or more of cocaine base would result in a higher mandatory-minimum sentence than either a similar amount of cocaine or the heroin Johnson was charged with possessing. *See* 21 U.S.C. § 841(b)(1)(A)(iii), 841(b)(1)(B)(i), 841(b)(1)(C). By avoiding a conviction for 280 grams of cocaine base, Johnson avoided a 10-year mandatory minimum. *Id.* § 841(b)(1)(A)(iii).

was "a jury finding because it sets the statutory range" but "not an element" of the offense, explained that the indictment did not necessarily need to be formally amended. *Id.* at 3895–96 (Page ID #17806–07). The government nevertheless continued to press for a formal amendment, and Johnson's trial attorney reiterated Johnson's opposition. *Id.* at 3896 (Page ID #17807). Finding that the amendment was "to the defendant's benefit too," the district court "permit[ted] it," *id.*, and memorialized its grant of the government's motion with a written order formally "amending certain language in Count 2" to refer to cocaine, R. 1130 (Order) (Page ID #6469). The jury convicted Johnson on Count 2 and made a specific finding that Johnson possessed 100 grams or more of heroin. R. 1124 (Verdict at 17–18) (Page ID #6402–03).

Focusing on Johnson's trial counsel's equivocating on the amendment issue, the government urges us to review for plain error. D. 24 (Appellee Br. at 57). This strategy makes sense. Though we take no position on the issue, Judge Nalbandian makes a good case for why the government would prevail were we to review for plain error. We disagree with the government on the preservation issue, however, and we hold that Johnson did enough to object to the amendment.

To preserve a claim of error for appellate review, a defendant "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) (quoting *United States v. LeBlanc*, 612 F.2d 1012, 1014 (6th Cir. 1980)), thus "provid[ing] the district court with an opportunity to address the error in the first instance," *id.* Johnson did so here. First of all, it is clear from the record that Johnson never agreed to the amendment, despite his counsel opining that it could be favorable. R. 1389 (Tr. Vol. 11 at 2803) (Page ID #16714); R. 1392 (Tr. Vol. 14 at 3895) (Page ID #17806). Second, Johnson (through counsel) specifically raised Federal Rule of Criminal Procedure 7, which mirrors the Fifth Amendment's requirement that felony offenses be indicted by grand jury. *See* R. 1389 (Tr. Vol 11 at 2803) (Page ID #16714). Third, the district court considered the alternative path of treating the cocaine issue as a variance as opposed to amending the indictment. After Johnson's counsel said that Johnson was "not inclined to agree to the amendment," the court asked the government if it would rather view the matter as a variance, given that a jury could still "find all the elements" to support a 21 U.S.C.

§ 841(a) conviction. R. 1392 (Tr. Vol. 14 at 3895–96) (Page ID #17806–07). Notwithstanding this offramp, the government persisted in the view that it "would rather amend" the indictment, and the district court decided to "permit it." *Id.* at 3896 (Page ID #17807). These facts, viewed in context, demonstrate that the relevant issues were placed before the district court and that the district court had "an opportunity to address [any] error" that would result from the amendment. *Bostic*, 371 F.3d at 871. We therefore review de novo the district court's decision to grant the government's motion to amend. *See United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007).

Johnson having preserved his objection, we must vacate Count 2 because the indictment was actually amended and an actual amendment is a per se violation of the Fifth Amendment's Presentment Clause. *Russell v. United States*, 369 U.S. 749, 770 (1962) ("[A]n indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." (citing *Ex parte Bain*, 121 U.S. 1, 10 (1887))); *Budd*, 496 F.3d at 521. An actual amendment occurs "[w]hen an indictment has undergone an actual change in the text by a prosecutor." *United States v. Robinson*, 99 F.4th 344, 364 (6th Cir. 2024). Although the government on appeal characterizes what occurred as a variance, the record tells a different story. At trial, the government framed its request as a "mo[tion] to amend the indictment formally on Count 2." R. 1392 (Tr. Vol. 14 at 3895) (Page ID #17806). The court granted that motion orally, *id.* at 3896 (Page ID #17807), and then entered a written order "amending certain language in Count 2" to refer to cocaine instead of cocaine base, R. 1130 (Order) (Page ID #6469).[2] Such an amendment, absent Johnson's waiver of the right to have the new indictment passed upon by a grand jury, is "per se prejudicial and . . . reversible error," so we must vacate Johnson's conviction on Count 2. *Budd*, 496 F.3d at 521.

Attempting to evade the ordinary rule that an actual amendment requires reversal, the government directs us to the First Circuit's decision in *United States v. Dowdell*, 595 F.3d 50

[2]There is considerable wrangling in the briefs over whether the court's oral jury instructions reflected the amendment. *See* D. 24 (Appellee Br. at 59–60); D. 26 (Reply Br. at 15–16) Because of the court's oral and written orders formally amending the indictment (which was reflected on the verdict form), this back-and-forth is beside the point.

(1st Cir. 2010).[3] Like this case, *Dowdell* involved a drug prosecution under 21 U.S.C. § 841(a). 595 F.3d at 68. The indictment "simply read 'cocaine,' potentially suggesting the powder form of the substance," but before trial the government moved to amend on the ground that the substance was in fact cocaine base. *Id.* at 57. The district court granted the motion. *Id.* at 57–58. The First Circuit held that this was "an express amend[ment] of the indictment," not a variance or constructive amendment. *Id.* at 67. The First Circuit permitted the amendment, however, as "a matter of form." *Id.* (quoting *Russell*, 369 U.S. at 770). Although that exception is typically applied to "corrections of clerical errors in names, dates, and citations," that court allowed the amendment, viewing drug type as a "fact[] that [was] ancillary to the charged offense," noting that § 841(a) "prohibits distribution of *any* controlled substance regardless of type." *Id.* at 68. It also pointed out that, as in Johnson's case, if the government had not sought to amend the indictment, there likely would not have been grounds for objection because it would have been a non-prejudicial variance. *Id.* at 68–69. The First Circuit thus held that "the district court's amendment of the indictment from distribution of 'cocaine' to 'cocaine base' did not affect the substance of the charges and therefore did not offend the Presentment Clause" of the Fifth Amendment. *Id.* at 69.

Had Johnson been tried in the First Circuit, the government would likely prevail under *Dowdell*. We are unconvinced, however, by that case's extension of the "matter of form" exception to substantive issues. First, we have never extended the "matter of form" exception beyond the traditional categories of "corrections of clerical or typographical errors," which, unlike the change here "do not alter the charging terms of the indictment." *United States v. Rosenbaum*, 628 F. App'x 923, 929 (6th Cir. 2015) (citation modified). Second, following in the First Circuit's footsteps would essentially eliminate our caselaw's distinction between actual amendments, which change the text of an indictment, and constructive amendments/variances, which do not. Our variance cases frequently look to whether the deviation in proof from an indictment goes to the elements of an offense or to ancillary details. *See United States v. Prince*, 214 F.3d 740, 757 (6th Cir. 2000) (distinguishing a constructive amendment from a variance on

[3]Though not mentioned in its brief, the government cited *Dowdell* at oral argument. Oral Arg. Audio at 28:35.

the ground that the former "modif[ies] essential elements of an offense charged"); *United States v. Robison*, 904 F.2d 365, 368–69 (6th Cir. 1990) (upholding conviction as non-prejudicial variance where the type of firearm was different than that listed in indictment). *Dowdell*'s approach to actual amendments looks much the same. *See* 595 F.3d at 68. Adopting that rule here would therefore run afoul of our caselaw holding that actual amendments are per se prejudicial and replace a clear-cut rule against actual amendment with a "sketchy" and difficult-to-apply standard. *Budd*, 489 F.3d at 521 (quoting *United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002)). Following the government's path, which would allow it to redraft any term in an indictment that does not go to an essential element of the charged offense, would amount to a sea change in our circuit's understanding of the Presentment Clause.

Nor does the fact that the jury found facts sufficient to convict Johnson on heroin possession alone change matters. *See* R. 1124 (Verdict at 17–18) (Page ID #6402–03). If the government wanted to eliminate the cocaine base portion of Count 2 from the indictment altogether, it could have done so by moving to strike that language. "A court," after all, "does not err in ignoring irrelevancies in or striking surplusage from an indictment." *United States v. Grenoble*, 413 F.3d 569, 577 & n.6 (6th Cir. 2005); *see also United States v. Miller*, 471 U.S. 130, 144 (1985) (noting that a court may "drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it"). But just because the government *could have* moved to strike cocaine base from the indictment and the jury would have convicted does not cure the violation here. The Fifth Amendment's Presentment Clause confers a right not "to be *tried* on charges that are not made in the indictment," not just a right not to be *convicted* on such charges. *Miller*, 471 U.S. at 143 (emphasis added) (quoting *Stirone v. United States*, 361 U.S. 212, 217 (1960)). The Constitution's text, which requires that "[n]o person shall be *held to answer* for a" felony offense "unless on a presentment or indictment of a Grand Jury," supports this understanding of the right. U.S. Const. amend. V (emphasis added). Because Johnson was held to answer on an indictment the terms of which were not passed on by a grand jury, the Fifth Amendment requires reversal of his conviction on Count 2.

We therefore VACATE Johnson's conviction on Count 2 and REMAND for further proceedings consistent with this opinion.