Nos. 09-5381 & 09-5790

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ARTHUR SEASE and ANTOINE OWENS,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - RFK 3716
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-0333
nathaniel.pollock@usdoj.gov

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would aid the Court's consideration of this case and is, therefore, warranted.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742. The district court entered

final judgment as to Antoine Owens on March 24, 2009. (R. 380, Judgment.)[1] Owens filed a timely notice of appeal on April 1, 2009. (R. 382, Notice of Appeal.) The district court entered final judgment as to Arthur Sease on July 1, 2009. (R. 424, Judgment.) Sease filed a timely notice of appeal on July 6, 2009. (R. 428, Notice of Appeal.)

STATEMENT OF ISSUES

1. Whether the district court correctly instructed the jury that a police officer's seizure of money, drugs, and other property solely for the officer's own personal enrichment violates the Fourth Amendment.

2. Whether the district court correctly determined that defendant Owens was not entitled to a minor-participant adjustment to his Guidelines Offense Level.

STATEMENT OF THE CASE

Arthur Sease was a Memphis police officer. He used his official position and authority to become a drug dealer and a robber. He repeatedly initiated drug deals, stole drugs, cash, and other items, and sold drugs.

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[1] This brief uses the following abbreviations: "R. __" for the docket number of documents filed in the district court; "____ Br. __" for the page number of appellants' opening briefs; "PSR __" for the page number of Owens's Presentence Investigation Report; "Tr. __" for the page number of the trial transcript; "Sent. Tr. __" for the page number of Owens's sentencing hearing transcript; and "Pl. Hear. Tr. __" for the page number of Owens's plea hearing transcript.

On September 16, 2008, a federal grand jury returned a 51-count second superseding indictment. (R. 227, Second Superseding Indictment.) The indictment charged Sease with: (1) one count of conspiracy against rights, which included instances of kidnapping or attempting to kidnap, in violation of 18 U.S.C. 241 (Count 1); (2) one count of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846 (Count 2); (3) 12 counts of robbery and extortion under color of official right interfering with interstate commerce, in violation of 18 U.S.C. 1951 (Counts 3 through 14); (4) 11 counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846 (Counts 15 through 25); (5) 12 counts of deprivation of rights under color of law, including two counts alleging that the violations involved kidnapping or attempted kidnapping, in violation of 18 U.S.C. 242 (Counts 26 through 37); (6) 13 counts of using or carrying a firearm during and in relation to the commission of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(c) (Counts 38 through 50); (7) and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1) (Count 51). (R. 227, Second Superseding Indictment.)

On February 5, 2009, after a two-week trial, the jury found Sease guilty on Counts 1-11, 13-18, 20-24, 26-33, 35-46, and 48-49; Sease was acquitted on Counts 12, 25, 34, 47, 50, and 51. (R. 451, Tr. 1818-1844.) (Count 19 was

dismissed before trial, (R. 287, Order Granting Motion to Dismiss Count 19).) The district court sentenced Sease to life plus 255 years of imprisonment, five years of supervised release, and assessed a $3725 penalty. (R. 424, Judgment.) This appeal followed. (R. 428, Notice of Appeal.)

Antoine Owens, while employed as a police officer in the Memphis Police Department, used his position to help Sease steal drugs and cash and received a share of the proceeds from that theft. Owens was charged with one count of conspiracy against rights in violation of 18 U.S.C. 241 (Count 1); and one count of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846 (Count 2). (R. 54, Superseding Indictment.) Owens initially pleaded not guilty. (R. 110, Plea Agreement.) On August 28, 2007, he changed his plea and, pursuant to a plea agreement, pleaded guilty to one count of conspiracy. (See R. 109, Order on Change of Plea.) On March 24, 2009, the court sentenced Owens to 63 months of imprisonment and three years of supervised release. (R. 380, Judgment.) The court dismissed count two of the indictment. (R. 381, Order Dismissing Count 2.) Owens appealed. (R. 382, Notice of Appeal.)

STATEMENT OF THE FACTS

From late 2003 to April 2006, Arthur Sease led a conspiracy, in which Antoine Owens was a participant, to steal drugs, cash, and other property from drug dealers and to resell the drugs. Both men were Memphis police officers. The

essence of Sease's scheme was for a uniformed police officer, in a squad car and carrying a gun, to stop individuals Sease believed would be carrying drugs and/or large amounts of cash. The officer would then search for and seize the drugs and cash, and, in some cases, other property. Sease and/or his principal coconspirator, Andrew Hunt, would then sell the drugs or use them to set up another drug deal that they would intercept and rob. Owens and another police officer coconspirator, Alexander Johnson, were each involved, as the uniformed officer, in one incident. For the other 12 incidents, Sease or Hunt performed that role. Hunt was not a police officer at the beginning of the conspiracy (although he posed as one), but became an officer while the conspiracy was ongoing. Sease was fired during the course of the conspiracy and charged with robbery. He nonetheless continued the robbery scheme, with Hunt, by that point a police officer, filling the role of the uniformed officer, while Sease set up drug deals and played a supporting role during the robberies.

Described below are seven of the 14 robberies that Sease and his coconspirators perpetrated as part of this conspiracy and which form the basis for Sease's convictions.

1. In November or December 2003 (R. 442, Tr. 258 (Johnson)), Sease and his coconspirators stole half of a kilogram of cocaine and $11,000 from Dejaun "Nard" Brooks. (R. 443, Tr. 400 (Hunt).) Sease and Johnson were in plain clothes

in an unmarked car. (R. 442, Tr. 245, 253 (Johnson).) Sease told Johnson he was going to show him how to make a big dope arrest. (*Id.* at 245.) Sease and Johnson were assigned to the South Precinct (*Id.* at 236-237), but Sease drove to a location in the East Precinct. (*Id.* at 245.) When Johnson expressed concern about leaving their precinct – a violation of police procedure – Sease told him not to worry: "I got this." (*Id.* at 246.)

Sease and Johnson watched a dark-colored car occupied by Sease's cousin. (R. 442, Tr. 247, 249 (Johnson).) An SUV pulled up next to the dark-colored car. (*Id.* at 247.) Sease was on the phone with Officer Owens, who worked in the East Precinct, and told him to hurry up and get there. (*Id.* at 247-248.) Owens arrived in his patrol car within seconds and pulled the SUV over. (*Id.* at 248-249.) Sease told Owens to "make it look real." (*Id.* at 248.) Owens approached the cars with his gun drawn and detained two men – a man in the SUV, Brooks, and Sease's cousin. (R. 442, Tr. 249 (Johnson); R. 443, Tr. 399-400 (Hunt).) Sease searched the SUV and found a bag containing half a kilogram of cocaine. (R. 442, Tr. 250-252 (Johnson); R. 443, Tr. 297 (Johnson), 400 (Hunt).) He put the bag of cocaine in the front seat of the unmarked police car he and Johnson were using. (R. 442, Tr. 252-253 (Johnson).) The officers did not make any arrests. (*Id.* at 252.) They let Brooks go but kept Sease's cousin in the back of Owens's squad car until everyone else had left. (R. 442, Tr. 252-253 (Johnson); R. 443, Tr. 399-400

(Hunt).) Sease's cousin complained that Owens "didn't have to rough [him] up that bad." (R. 442, Tr. 253-254 (Johnson).)

During the robbery, Sease called his friend Andrew Hunt (who was not a police officer at the time but later became one, (R. 443, Tr. 399, 460-461 (Hunt).) Sease asked Hunt if he knew Brooks and told him to relay to Brooks that he owes Sease $500. (*Ibid.*) Sease said Brooks owes him because Sease "talked the guys into letting him go." (*Ibid.*)

After the robbery, Sease and Johnson dropped off the cocaine at a house in South Memphis. (R. 442, Tr. 254 (Johnson).) Sease and Johnson then met Owens and Owens distributed the cash he had taken during the stop. (*Id.* at 256.) Owens said "this is a big lick we got this time." (*Id.* at 255-256.)

Later, Hunt asked Sease what had happened with Brooks. (R. 443, Tr. 400-403 (Hunt).) Hunt had learned from Brooks that Sease took his drugs and $11,000. (R. 443, Tr. 400 (Hunt).) Sease admitted that he had taken the money and drugs. (*Id.* at 403.) He said that robbing drug dealers would be a good way to make money. (*Id.* at 404-405.) Hunt was initially skeptical, but Sease assured him that it would work. (*Id.* at 405.) Sease said he and other officers had robbed drug dealers when Sease worked in the downtown precinct. (*Id.* at 406-407.) Sease said they would be safe because, if a drug dealer tried to report them, it would be an officer's

word against a thug's word. (*Id.* at 407-408.) After that, Hunt began to help Sease set up drug deals so Sease could steal money and drugs. (*Id.* at 408.)

2. The next robbery (R. 442, Tr. 269 (Johnson)) happened while Sease was off duty driving with Hunt. (R. 443, Tr. 438 (Hunt).) Sease got a call from one of his drug contacts who said he had arranged to buy seven or eight pounds of marijuana. (*Ibid.*) Sease explained to the contact that he was off duty but said he would try to put something together. (*Id.* at 439.) Sease called Johnson who was on duty and agreed to carry out the robbery. (R. 443, Tr. 439 (Hunt); R. 442, Tr. 269-270 (Johnson).) Sease then called his contact and told him to go forward with the deal. (R. 443, Tr. 439-440 (Hunt).)

Sease instructed Johnson to get in a car by himself. (R. 443, Tr. 440 (Hunt).) He told Johnson to pull over a Nissan Altima and gave him the location of the car. (R. 442, Tr. 270 (Johnson); R. 443, Tr. 440 (Hunt).) Johnson, in his squad car, pulled over the Nissan. (R. 442, Tr. 270 (Johnson); R. 443, Tr. 441 (Hunt).) Sease and Hunt were nearby watching. (R. 443, Tr. 441 (Hunt).) When Johnson made the stop, Sease called and told him that the marijuana would be in the trunk. (R. 442, Tr. 270 (Johnson).) Johnson put the two occupants of the Nissan in the back of his squad car. (R. 442, Tr. 270 (Johnson); R. 443, Tr. 443 (Hunt).) He found a bag containing drugs and placed it on the hood of the squad

car. (R. 443, Tr. 443 (Hunt).) Sease called and told Johnson to get the bag off the hood and put it inside the car on the floorboard. (*Ibid.*)

Johnson let the occupants of the Nissan go but kept the drugs. (R. 442, Tr. 271 (Johnson); R. 443, Tr. 443-444 (Hunt).) He then met Sease and Hunt behind a grocery store and gave them the drugs. (R. 442, Tr. 271 (Johnson); R. 443, Tr. 444 (Hunt).) Sease and Hunt gave some of the drugs to the people who set up the deal for them and sold the rest. (R. 443, Tr. 445-446 (Hunt).)

3. On February 6, 2004 (R. 442, Tr. 274 (Johnson)), Sease sold some drugs and then stole them back again. Andrew Hunt asked his brother Anthony whether he knew of anyone who wanted to buy some cocaine (he and Sease had the drugs from a previous robbery). (R. 443, Tr. 429, 431 (Hunt).) Anthony arranged to sell four and a half ounces of cocaine to a co-worker for $2600. (*Id.* at 431, 434.)

Andrew and Anthony Hunt met the buyer in a parking lot. (R. 443, Tr. 433 (Hunt).) The buyer drove up in a white work van. (R. 442, Tr. 279 (Johnson); R. 443, Tr. 433 (Hunt).) Anthony Hunt got into the van and exchanged the cocaine for cash. (*Id.* at 434.) Meanwhile, Andrew Hunt was on the phone with Sease who was watching the transaction from his squad car. (*Ibid.*) After the exchange, Sease pulled the van over. (R. 443, Tr. 300, 306 (Johnson), 434 (Hunt).) Johnson and Officer Erick Ervin were in the area and arrived at the scene to assist Sease. (R. 443, Tr. 300 (Johnson); R. 445, Tr. 715 (Ervin).) When they arrived, Sease had

detained the van's driver and was searching the van while getting information by phone about where the drugs were hidden. (*Ibid*.) He found the cocaine but did not arrest the driver of the van. (R. 443, Tr. 301-302 (Johnson), 434 (Hunt).)

Sease then met Hunt to split up the money and drugs. (R. 443, Tr. 434-435 (Hunt).) Sease and Andrew Hunt each got $1000, Anthony Hunt got $500, and Sease was supposed to pay Johnson $100. (*Id.* at 435.)

4. In March 2004 (R. 443, Tr. 355 (Allen)), Sease and Johnson took money and a large quantity of marijuana from Jermaine Allen. Andrew Hunt's brother Anthony set up the deal. (R. 443, Tr. 447-448 (Hunt).) Allen agreed to meet Anthony Hunt in a gated apartment complex. (*Id.* at 448-449.) Allen was driving a white BMW. (R. 442, Tr. 258-259 (Johnson); R. 443, Tr. 448 (Hunt).) When Allen pulled up to the entrance of the complex, Sease and Johnson pulled up behind him. (R. 442, Tr. 258, 260 (Johnson); R. 443, Tr. 340 (Allen), 449 (Hunt).) Hunt was serving as a lookout. (R. 443, Tr. 449 (Hunt).) Sease told Johnson there was a large amount of marijuana in the BMW. (R. 442, Tr. 258-259 (Johnson); R. 443, Tr. 341-342 (Allen).) The officers quickly got out of the car and approached the BMW. (R. 442, Tr. 260-261 (Johnson).)

Sease removed Allen from the BMW and had Johnson guard him. (R. 442, Tr. 261-262 (Johnson); R. 443, Tr. 341 (Allen).) Sease then searched the vehicle and found a large quantity of marijuana in the trunk. (R. 442, Tr. 262 (Johnson);

R. 443, Tr. 342 (Allen).) He put it in the police car. (R. 442, Tr. 263 (Johnson); R. 443, Tr. 343 (Allen).) Sease then patted Allen down and took $500 and his driver's license. (R. 443, Tr. 343-344 (Allen).) Sease told Allen that either he would keep the drugs and money or Allen would go to jail. (R. 443, Tr. 343-344 (Allen), 450 (Hunt).) He also told Allen he was going to keep the driver's license as insurance in case Allen was thinking about retaliating. (R. 443, Tr. 344 (Allen).) Sease and Johnson did not arrest Allen or report the seizure of drugs. (R. 442, Tr. 264-265 (Johnson).)

When the officers and Allen got back into their cars, a high speed chase ensued. Allen decided he wanted to try to get his driver's license back, so he began to chase Sease and Johnson. (R. 443, Tr. 344, 358 (Allen).) Sease was driving between 90 and 100 miles per hour. (R. 442, Tr. 265 (Johnson).) During the chase Sease was very angry and was holding his gun. (*Id.* at 265-266.) Eventually, Allen gave up the chase. (R. 442, Tr. 266 (Johnson); R. 443, Tr. 345 (Allen).) Sease and Johnson went back to the police precinct and Sease put the marijuana in his personal car. (R. 442, Tr. 266 (Johnson).) He told Johnson he would give him some money after he sold the drugs, but never did. (*Ibid.*) Sease split the marijuana with Hunt and they each sold their own share. (R. 443, Tr. 453 (Hunt).)

5. The next night Sease stopped Allen again. (R. 443, Tr. 346, 348 (Allen).) Sease approached Allen's car, asked Allen to get out, and put him in the back of the police car. (R. 443, Tr. 349 (Allen).) Sease searched the trunk of the car and found two pounds of marijuana. (*Id.* at 347, 349.) Sease walked back toward the police car where Allen was detained and told Allen that, since being a police officer doesn't pay well enough, he had been stealing drugs. (*Id.* at 349.) Sease then tried to get Allen to reveal his drug supplier. (*Id.* at 349-350.) Finally, after refusing to return Allen's drivers license, Sease let Allen go. (*Id.* at 350.)

6. On April 10, 2004 (R. 445, Tr. 764 (Greenwood)), Sease stole about $32,000 from Reggie Brown, Brown reported him, and he was removed from active duty as a Memphis Police Officer. In early 2004, Sease had several conversations with a drug-dealer friend, Nicholas Crawford, about helping him to find someone with drugs or money whom he could pull over and rob. (R. 445, Tr. 771-774 (Crawford).) Crawford arranged, through Nicholas Biles, to sell one-and-a-half kilos of cocaine. (*Id.* at 776.) He then told Sease about the deal. (*Id.* at 777.) The day before the deal was to take place, Crawford showed Sease Biles's house. (*Id.* at 778-779.) Crawford relayed information about the buyer to Sease. (*Id.* at 778, 780.)

The buyer was Reggie Brown. (R. 445, Tr. 828, 831 (Brown).) He came to Memphis from Omaha, Nebraska, to buy cocaine. (*Ibid.*) He brought $32,400 in a

metal safe. (*Id.* at 829-830, 832.) When Brown got to Biles's house, Biles made a phone call. (*Id.* at 833.) Then Biles and Brown got in the van to go buy the cocaine. (*Ibid.*) Brown saw a police car parked nearby. (*Id.* at 833-834.) He then noticed, and mentioned to Biles, that the police car was following them. (R. 445, Tr. 801 (Biles), 833 (Brown).) At that point, Sease turned on the flashing lights and pulled the van over. (R. 445, Tr. 802 (Biles), 834 (Brown).) Sease went to the van and took Brown's and Biles's drivers licenses and the money they had in their pockets ($800 from Biles and an unspecified amount from Brown). (R. 445, Tr. 803 (Biles), 834-837 (Brown).) He put them in the back of the squad car and tried to get them to admit that they were drug dealers. (R. 445, Tr. 836 (Brown).) Brown insisted that they had done nothing wrong and that the van did not contain drugs. (*Ibid.*) Sease searched the van. (*Ibid.*) When he came back to the squad car, he picked up the money he had taken from Brown and Biles and said "you guys are going to buy me lunch." (*Id.* at 836-837.) Finally Sease let them go, instructing them to get in their car "and get up the road." (*Id.* at 338.)

When Brown and Biles returned to their car, Brown noticed that his safe, with $34,400 in it, was gone. (R. 445, Tr. 838 (Brown).) He accused Sease of taking it. (*Id.* at 838-839.) Sease said Brown had five seconds to leave. (*Id.* at 839.) Brown continued to accuse Sease of taking his money. (*Ibid.*) Sease pulled

his gun halfway out of its holster and repeated that Brown had five seconds to leave. (R. 445, Tr. 805 (Biles), 839 (Brown).)

Brown and Biles got into the van and left; they called 911 and reported the incident. (R. 445, Tr. 806 (Biles), 840 (Brown).) They then returned to the location where they were stopped. (R. 445, Tr. 840 (Brown).) Officer Donald Ross, a lieutenant in the North Precinct, met them there. (R. 445, Tr. 872-874 (Ross).) Ross called the two officers assigned to that area, Lloyd and Miller. (R. 445, Tr. 875 (Ross).) They said that they had not stopped an out-of-state vehicle, but that they had seen a squad car from the South Precinct. (R. 445, Tr. 867 (Lloyd).) Ross then called a lieutenant in the South Precinct, and learned that the South Precinct car Lloyd and Miller saw was assigned to Sease. (R. 445, Tr. 876 (Ross).)

When Sease reported for work at the South Precinct, he was relieved of duty. (R. 445, Tr. 919 (Smith).) He turned in his badge and gun. (*Id.* at 920-921.) Later, he was fired. (R. 443, Tr. 458 (Hunt).) He was also charged with robbery in state court. (*Id.* at 496-497.)

* * * * *

As these events transpired, Anthony Hunt completed the required training and became a reserve police officer. (R. 443, Tr. 460-461 (Hunt).) As a reserve officer, Hunt had the same powers and same uniform as a regular police officer.

(*Id.* at 412-413.) Reserve officers were allowed to go on duty when they chose by simply signing out a police car and informing the reserve office. (*Id.* at 464-465.)

Sometime after Sease was fired, he contacted Hunt. (R. 443, Tr. 460 (Hunt).) He told Hunt he wanted to continue doing robberies with Hunt as the uniformed police officer. (*Ibid.*) He said that he had looked out for Hunt and now it was Hunt's turn to look out for him. (*Ibid.*) Hunt agreed to Sease's plan. (*Ibid.*)

7. After this, Hunt and Sease set up and then robbed several large drug deals. Hunt set up the largest robbery through a drug-dealer friend named Lurico Barrett; it involved four kilos of cocaine. (R. 443, Tr. 476-477, 504 (Hunt).) Barrett told Hunt there would be two Mexicans with four kilos of cocaine driving a Tahoe or Yukon with 20 inch rims. (R. 443, Tr. 511 (Hunt).) The plan was for Barrett to meet them at a Walgreens and tell them to caravan to another location to pick up the money. (R. 443, Tr. 511-512 (Hunt); R. 446, Tr. 1045 (Barrett); R. 447, Tr. 1213-1214 (Moreno).) Hunt would then pull the Mexicans over and take the drugs. (R. 443, Tr. 511 (Hunt).)

Barrett also told Hunt that Barrett and his people would get three of the four kilos of cocaine and that Hunt and his partners would have to split the fourth. (R. 443, Tr. 509 (Hunt).) Hunt protested, but ultimately agreed. (*Id.* at 509-510.) (Hunt was aware that Barrett believed he had been cheated in a previous robbery. (*Id.* at 503, 506).) When Hunt relayed this to Sease and Laterrica Woods – a friend

Hunt brought into the deal for extra protection (R. 443, Tr. 507-508 (Hunt); R. 446, Tr. 1120, 1124 (Woods)), they were indignant. (R. 443, Tr. 510 (Hunt).) Sease decided that they would take all four kilos and would not give Barrett anything. (*Ibid*.) Sease also decided that Hunt would need to pull the Mexicans over before the agreed upon location to avoid the possibility of an ambush. (*Id.* at 511.) Sease bought plastic gloves so they could move the robbery to a different location without leaving fingerprints in the Mexicans' truck. (*Ibid*.)

On the appointed day in September 2005 (R. 446, Tr. 1187-1188 (Merriweather)), Sease and Hunt picked Woods up from his house. (R. 446, Tr. 1124 (Woods).) They were driving Hunt's truck and all three were armed. (R. 443, Tr. 523 (Hunt); R. 446, Tr. 1124 (Woods).) They drove to the police station and Hunt got into a squad car. (R. 443, Tr. 512 (Hunt); R. 446, Tr. 1124 (Woods).) Sease and Woods waited near the meeting point for several hours while Hunt patrolled in his squad car. (R. 443, Tr. 512 (Hunt); R. 446, Tr. 1125 (Woods).)

Finally, the Mexicans, Pedro Moreno and Victor Saucedo (R. 447, Tr. 1211, 1213 (Moreno)), arrived at the Walgreens in their Yukon and Barrett and a partner met them there. (R. 446, Tr. 1045 (Barrett); R. 447, Tr. 1213 (Moreno).) They asked Moreno and Saucedo to follow them to the location where they had the money to pay for the drugs. (R. 446, Tr. 1045 (Barrett); R. 447, Tr. 1213-1214 (Moreno).) After they left the Walgreens parking lot, Hunt pulled the Yukon over

into an apartment complex. (R. 443, Tr. 512-513 (Hunt).) Sease and Woods, driving Hunt's truck, and Barrett, in his vehicle, also pulled into the complex. (*Id.* at 512.) Hunt took Moreno's license and insurance and then handcuffed Moreno and Saucedo and put them in the back of the squad car. (R. 447, Tr. 1214 (Moreno).) Hunt searched the Yukon wearing gloves and found the cocaine. (R. 443, Tr. 513 (Hunt); R. 446, Tr. 1046-1047 (Barrett); R. 447, Tr. 1214-1215 (Moreno).) Barrett got in the truck with Sease and Woods, but then got out because he became nervous that they intended to harm him when he saw them putting on latex gloves. (R. 446, Tr. 1046-1048 (Barrett).)

Sease, Hunt, and Woods then moved the operation to a different location in order to execute their plan to keep all the cocaine for themselves. (R. 443, Tr. 513-514 (Hunt).) Woods, wearing gloves, got into the Mexicans' Yukon. (R. 443, Tr. 514 (Hunt); R. 446, Tr. 1127 (Woods).) They drove all three vehicles – Woods in the Yukon, Sease in Hunt's truck, and Hunt in the squad car with Moreno and Saucedo in the back – to a dark parking lot behind an office park. (R. 443, Tr. 514 (Hunt); R. 446, Tr. 1048 (Barrett), 1128 (Woods), 1188 (Merriweather).) Hunt gave the cocaine to Sease. (R. 443, Tr. 515 (Hunt).) Sease encouraged Hunt to "squeeze" Moreno and Saucedo for information about where they could get more drugs. (*Ibid.*) Hunt attempted to do this, but without success. (*Id.* at 516.) Sease also tried to get Moreno and Saucedo to reveal the location where they had more

drugs. (R. 446, Tr. 1131 (Woods).) At some point Hunt aimed his gun at Moreno and threatened to shoot him unless somebody could pay a ransom. (R. 447, Tr. 1218 (Moreno).) While he was making this threat, a building security guard pulled up to the scene and Hunt put his gun down. (*Ibid.*) Hunt told the security guard he had the situation under control and the security guard left. (R. 446, Tr. 1188 (Merriweather).)

Barrett also drove up while Sease, Hunt and Woods were in the parking lot with Moreno and Saucedo. (R. 443, Tr. 515 (Hunt); R. 446, Tr. 1048-1049 (Barrett).) He asked Hunt for two of the kilos of cocaine. (R. 443, Tr. 515 (Hunt).) But Hunt waved him off, saying they would split up the drugs later. (R. 443, Tr. 515 (Hunt); Tr. 446, Tr. 1048-1049 (Barrett).) Barrett left, but remained in the area. (R. 443, Tr. 515-516 (Hunt); R. 446, Tr. 1049 (Barrett).) At some point Sease and Woods left the scene behind the offices and drove around; Sease warned Hunt that Barrett's people were circling the area. (R. 443, Tr. 515-516 (Hunt).) By this time, Moreno had informed Hunt that no one was going to pay a ransom, and Hunt had concluded that he was not going to get information about how they could obtain more drugs. (R. 443, Tr. 516 (Hunt); R. 447, Tr. 1219 (Moreno).)

Hunt and Sease then decided that Hunt would arrest Moreno and Saucedo. (R. 443, Tr. 516 (Hunt).) They cut 180 grams of cocaine from one of the kilos to

use to charge Moreno and Saucedo. (R. 443, Tr. 518-519 (Hunt); R. 446, Tr. 1131 (Woods).) Sease filled out the narrative portion of the arrest ticket. (R. 446, Tr. 1129 (Woods).) They then moved the Yukon and the squad car from behind the offices to a location just off the street, so it would look like a normal traffic stop. (R. 443, Tr. 517 (Hunt); R. 446, Tr. 1132 (Woods).) Sease and Woods left the scene. (R. 443, Tr. 516 (Hunt); R. 446, Tr. 1132 (Woods).) Hunt called the dispatcher and said he had two individuals in custody and had confiscated drugs from them. (R. 443, Tr. 519.)

After Hunt called in the arrest, other officers arrived at the scene. (R. 443, Tr. 519 (Hunt).) Hunt transported Moreno and Saucedo to the police station. (*Id.* at 524.) He took the 180 grams of cocaine to the evidence room and tagged it. (*Ibid.*) Then he left and met Sease and Woods. (*Ibid.*)

They divided the cocaine between them. Sease got one kilo, Woods got one kilo, and Hunt got one full kilo plus the kilo that had 180 grams taken out of it. (R. 443, Tr. 525 (Hunt); R. 446, Tr. 1135 (Woods).) Sease sold his kilo for approximately $21,600. (R. 444, Tr. 540 (Hunt).)

SUMMARY OF ARGUMENT

1. This Court should affirm Sease's convictions.

Although Sease identifies his argument as insufficiency of the evidence to sustain any of his 45 convictions, it actually amounts to a challenge of the district

court's jury instruction on the Fourth Amendment. His argument, which this Court should review only for plain error since it was not made below, is meritless.

For purposes of the Fourth Amendment, the reasonableness of a search or seizure is determined by reference to the legitimate governmental interest that occasioned it. Where, as here, searches and seizures are the product not of any legitimate governmental interest but rather of a criminal conspiracy, and further only criminal purposes, they are plainly unreasonable. This is not a case where an officer's objectively reasonable conduct was undertaken for an improper motive. Sease's conduct – setting up drug deals, intercepting those drug deals for the sole purpose of stealing drugs, cash, and other property, and then selling the stolen drugs to other drug dealers – was thoroughly and objectively illegal from start to finish.

Sease attempts to use probable cause as a defense. But knowledge born of a criminal conspiracy is not probable cause. And, in any event, probable cause only justifies searches and seizures that further legitimate governmental interests. In other words, probable cause does not make theft under color of law constitutional.

2. This Court should affirm Owens's sentence.

Owens's argument that he should have gotten a minor participant adjustment is meritless. The undisputed facts reveal plainly that he was not a minor participant for purposes of Sentencing Guidelines § 3B1.2(b)(2) in the incident that

formed the basis for his sentence. And the district court made findings in compliance with Federal Rule of Criminal Procedure 32(i)(3).

ARGUMENT

I

THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT A POLICE OFFICER'S SEIZURE OF MONEY, DRUGS, AND OTHER PROPERTY SOLELY FOR THE OFFICER'S OWN PERSONAL ENRICHMENT VIOLATES THE FOURTH AMENDMENT

A. Introduction

Although Sease purports to base his appeal on an insufficient evidence argument (Sease Br. 15), his brief does not actually make that argument. He makes no effort to explain why, for example, the evidence that he repeatedly stole drugs and then sold those drugs failed to give the jury a reasonable basis for concluding that he "(1) knowingly, (2) possessed a controlled substance, (3) with intent to distribute it" in violation of 21 U.S.C. 841. See *United States* v. *Russell*, 595 F.3d 633, 645 (6th Cir.), cert. denied, 131 S. Ct. 130 (2010). He likewise fails to give this Court any reason to conclude that the evidence was insufficient to support his convictions for: conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846; and using or carrying a firearm during and in relation to the commission of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(c).

He does assert, without any coherent legal argument or citation to the record, that "there was no proof of any of the charged offenses in this case" and that "[e]verything the government said was illegal was, in fact, perfectly legal." Sease Br. 23. But "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States* v. *Sandridge*, 385 F.3d 1032, 1035 (6th Cir. 2004); see also *United States* v. *Layne*, 192 F.3d 556 (6th Cir. 1999) (concluding that where a defendant "purports to challenge the sufficiency of the evidence supporting all counts" but does not actually develop any argument as to some counts, the sufficiency of the evidence argument is forfeited as to those counts), cert. denied, 529 U.S. 1029 (2000). Sease has accordingly forfeited any challenge to the above-mentioned convictions.

What Sease does argue is that his conduct did not violate the Fourth Amendment. Sease Br. 16-23. He accordingly challenges his convictions for conspiracy against rights in violation of 18 U.S.C. 241 and deprivation of rights under color of law in violation of 18 U.S.C. 242. His argument is not insufficiency of the evidence to sustain these convictions; it is a purely legal argument about the requirements of the Fourth Amendment. Specifically, he argues that a police officer who searches for and seizes drugs, money, and other property solely to enrich himself does not thereby violate the Fourth Amendment. Sease Br. 16-23.

This is effectively a challenge to one of the district court's Fourth Amendment jury instructions. Cf. *United States* v. *Fontenot*, 611 F.3d 734, 737 (11th Cir. 2010) ("[Defendant] is actually challenging [one of] the court's * * * jury instruction[s] under the guise of an insufficient evidence claim.").

B. Standard Of Review: Plain Error

This Court should review Sease's argument for plain error because Sease did not make his Fourth Amendment argument to the district court. See *Russell*, 595 F.3d at 643 (explaining that where a defendant "failed to object at trial to [a] jury instruction * * * [this Court] will review only for plain error"). In order to prevail in this appeal, Sease must show "(1) an error, (2) that is plain, and (3) that affects his fundamental rights." *Ibid.* (citation omitted). And this Court will exercise its discretion to correct an error only if it "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Ibid.* (citation omitted).

C. The District Court's Instruction Was Correct

Here there is no error at all; the district court's Fourth Amendment jury instruction was correct.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

To decide whether conduct is reasonable under the Fourth Amendment, courts weigh an individual's protected interest in security and privacy against the legitimate governmental interest in conducting a search or effecting a seizure. See *Scott* v. *Harris*, 550 U.S. 372, 383 (2009) (courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion").

Thus, in a particular case, the question will often be whether a police officer's intrusion on an individual's Fourth Amendment interests was justified by the governmental interest that occasioned that intrusion. So to determine whether a particular seizure of property was reasonable under the Fourth Amendment "it is necessary to balance the government interest in the * * * seizure against the individual's interest in avoiding the intrusion." *Bennett* v. *City of Eastpointe*, 410 F.3d 810, 826 (6th Cir. 2005); see also *Farm Labor Org. Comm.* v. *Ohio State Highway Patrol*, 308 F.3d 523, 544-546 (6th Cir. 2002). The same balancing test is used in determining the constitutionality of a search. See, *e.g.*, *Williams* v. *Kaufman Cnty.*, 352 F.3d 994, 1004 (5th Cir. 2003) (ruling that the "intrusiveness of [a] search outweighed the legitimate law enforcement interests" that occasioned it). It follows that a seizure not justified by any legitimate law enforcement purpose is, for that reason, unreasonable and violates the Fourth Amendment. See *Bennett*, 410 F.3d at 826-827 (concluding that a seizure of property for "no urgent

or specific law-enforcement interest" violates the Fourth Amendment). Indeed, Sease does not disagree with this statement of the law. Sease Br. 19 (stating that "*[i]f the officer has a legitimate law enforcement reason for doing what he does* what he is thinking does not matter").

Articulating this undisputed legal standard, the district court here instructed the jury that, to pass muster under the Fourth Amendment, a search or seizure must be "reasonably necessary to accomplish a legitimate law enforcement purpose." (R. 451, Tr. 1813.) Sease and his coconspirators searched for and seized drugs, money, and other property not for any legitimate law enforcement purpose, but solely to enrich themselves. Presumably, he disagrees with the district court's specific instruction that "seizure of money, drugs or other personal property solely for the personal enrichment of an individual law enforcement officer is not a legitimate law enforcement purpose." (R. 451, Tr. 1814.) But that too is an accurate statement of the law.

Sease argues that his illegitimate subjective motive is irrelevant to the Fourth Amendment reasonableness inquiry because the test of reasonableness is an objective one. Sease Br. 19-20. Sease quotes the Supreme Court's statement that "[s]ubjective intent alone . . . does not make *otherwise lawful conduct* illegal or unconstitutional." Sease Br. 19 (quoting *Scott* v. *United States*, 436 U.S. 128 (1978)) (emphasis added). It is true that *if* there is a lawful basis for a search or

seizure, an officer's illicit motive will not, by itself, make the officer's conduct a violation of the Fourth Amendment. See *ibid.* But Sease's conduct was not "otherwise lawful." He was the architect and principal actor in a criminal conspiracy that had only illegal purposes, including theft of money, property, and drugs.

Sease attempts to argue (Sease Br. 19-20) that his conduct was perfectly legal up until the point when he failed to turn in the seized property. But that conclusion is flatly inconsistent with the facts. Sease's illegal plan to take money, property, and drugs was manifest before and during the seizures. Sease and his coconspirators targeted, staked out, and set up their victims. See, *e.g.*, p. 8, *supra* (one coconspirator called Sease to tell him about a drug deal he could rob; Sease called another coconspirator to arrange the robbery before returning the initial call to say that everything was in place and the deal could go forward); pp. 9-10, *supra* (Sease and his coconspirators arranged a drug deal with cocaine Sease had taken in a previous robbery); p. 12, *supra* (Sease urged a drug dealer he knew to help set up a drug deal he could rob).

The coconspirators demonstrated that they lacked a legitimate law enforcement purpose by not following police procedure for a stop – *i.e.*, failing to notify a dispatcher or create a record of the stop, making stops outside their precinct, failing to notify a supervisor when they discovered large quantities of

drugs. Indeed, they often told their victims exactly what was happening (that they were being robbed, not arrested). See, *e.g.*, p. 11, *supra* (Sease gave his victim the choice between being arrested or letting him keep the money and drugs); p. 12, *supra* (Sease told his victim that police work does not pay enough so he supplements his income by stealing drugs); p. 13, *supra* (Sease told his victims that the money he took from them was going to "buy [him] lunch").

And, of course, they stole money, drugs and other property. They did not follow police procedure to effect valid seizures of the property incident to a drug arrest. They let the drug dealers go (except in a couple of instances when they thought an arrest was necessary to help them avoid detection) and they took the money, drugs, and property to keep for themselves. They kept large quantities of drugs in circulation by selling them to other drug dealers. Indeed, if Sease had turned in the seized property and drugs, he would not have been able to explain where they came from since police procedures were not followed and the drug dealers were not arrested.

Sease does not and cannot cite any authority in support of the notion that a police officer's theft of money, drugs, and property pursuant to a premeditated and objectively manifest criminal conspiracy is permissible under the Fourth Amendment. The objectivity of the reasonableness test does not help him. This is not an example of an objectively valid seizure, which was undertaken by an officer

with a bad motive. Sease never had a lawful basis for the seizures. Instead, his conduct was thoroughly and objectively illegal from start to finish.

Sease also argues (Sease Br. 17) that his searches and seizures did not violate the Fourth Amendment because "in every one of the incidents * * * [he] had probable cause to believe that the victims were in possession of contraband." He fails to mention that the reason he knew his victims would be in possession of contraband was that, in most instances, he and his coconspirators set up the drug deals that he later intercepted for his own personal gain. These were not searches and seizures born of probable cause; they were searches and seizures born of a criminal conspiracy.

In any event, having probable cause to believe that a car contains contraband does not permit a police officer to stop the car in order to take the contraband and other property to keep for his own use or sell for his personal profit. The Fourth Amendment requires searches and seizures to have both a legitimate governmental interest, see pp. 23-25, *supra*, and sufficient factual bases – typically probable cause. In other words, once the government has a good enough reason to intrude, the probable-cause requirement assures that there is a sufficient probability the government will find what it is looking for when it does. See *United States* v. *Knights*, 534 U.S. 112, 121 (2001) ("Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser

degree satisfies the Constitution *when the balance of governmental and private interests makes such a standard reasonable*.") (emphasis added). As the district court explained when discussing the proposed Fourth Amendment jury instruction with counsel, this case turns on the legitimate governmental interest requirement – not probable cause. (See R. 450, Tr. 1801 (concluding that "this isn't a probable cause case"; instead it is "an illegal purpose" case).)

Sease attempts to support his argument with a number of 42 U.S.C. 1983 false arrest cases. Sease Br. 17. Certainly, the existence of probable cause to make an arrest is a defense to a false arrest claim under Section 1983. See *Sykes* v. *Anderson*, 625 F.3d 294, 305 (6th Cir. 2010). These cases do not, however, help Sease. The purpose of an arrest is to take someone into custody, a legitimate law enforcement purpose. But Sease was not interested in arresting drug dealers; he was interested in stealing from them. Even if probable cause would have supported the arrest of Sease's victims, it does not allow searches and seizures for purely illegal purposes.[2] No case that Sease cites comes close to supporting his

[2] Moreover, even with probable cause, it is a violation of the Fourth Amendment for police to seize contraband without a warrant when they know in advance where the contraband will be. See *United States* v. *Chambers*, 395 F.3d 563, 565 (6th Cir. 2005) ("[O]fficers must seek a warrant based on probable cause when they believe in advance they will find contraband or evidence of a crime."). Sease typically knew in advance when and where the drug deals he intercepted would take place and where the drugs would be hidden, but he did not seek a warrant.

(continued…)

claim (Sease Br. 18) that probable cause to believe a crime is taking place makes theft under color of law constitutional.

Finally, to the extent that Sease is arguing (Sease Br. 18) that there were no Fourth Amendment violations in this case because the victims were in possession of illegal drugs, he is clearly wrong. Persons retain their Fourth Amendment right not to be unreasonably searched or to have their property unreasonably seized even when they are in possession of contraband. A search that is unreasonable under the Fourth Amendment does not become reasonable just because it uncovers drugs or other evidence of a crime. See, *e.g.*, *United States* v. *Davis*, 430 F.3d 345 (6th Cir. 2005) (concluding that a search and seizure of drug money from a vehicle were unreasonable and therefore violated the Fourth Amendment).[3]

(continued…)

[3] Sease also makes a very cursory argument (Sease Br. 18) that his robbery of drugs did not violate 18 U.S.C. 1951 because "a possessor of contraband has no right to possess it" and Sease "had the right to seize [money and property] he believed to be the proceeds of illegal drug activity." As explained above, Sease had no right to "seize" the drugs or the other property whether it was proceeds of drug sales or not. To the contrary, these seizures violated the Fourth Amendment. But regardless of whether the seizure of these items violated the Fourth Amendment, the stealing of them clearly violated Section 1951. Section 1951 is regularly used to prosecute robbers who choose drug dealers as their targets and steal drugs and drug money from those drug dealers. See, *e.g.*, *United States* v. *Ostrander*, 411 F.3d 684 (6th Cir. 2005); *United States* v. *Lynch*, 367 F.3d 1148 (9th Cir. 2004).

This Court should conclude that the district court's Fourth Amendment jury instruction was correct and that there is ample evidence to support the jury's determination that Sease conspired to violate and did violate his victims' Fourth Amendment rights under color of law.

II

THE DISTRICT COURT CORRECTLY DETERMINED THAT DEFENDANT OWENS IS NOT ENTITLED TO A MINOR-PARTICIPANT ADJUSTMENT TO HIS GUIDELINES OFFENSE LEVEL

A. Owens's Sentencing

Owens's Presentence Report (PSR) calculated his offense level as 31. PSR 8. Given Owens's criminal history category and the applicable statutory maximum, the advisory Guidelines range for Owens was 108 to 120 months' imprisonment. PSR 13.

The PSR's Guidelines calculation was predicated upon two incidents in which Owens played a role. One was the robbery of Dejaun "Nard" Brooks, during which the conspirators stole half of a kilogram of cocaine and $11,000. See pp. 5-8, *supra*. Owens participated in that robbery by: agreeing to Sease's offer of payment for making a stop for him, stopping and detaining the robbery targets, confiscating money, failing to report the stop, transporting one of the detained individuals to another location, meeting Sease after the stop and accepting payment

for his role. PSR 4-6. The second was an attempted robbery. Owens pulled a car over at Sease's request, but Sease and Owens did not find drugs in the car. PSR 5.

Owens objected to the PSR on two grounds. First, he argued that it incorrectly held him responsible for two incidents when he was only criminally involved in one. Second, he argued that he should be allowed a two-level minor-participant reduction pursuant to Sentencing Guidelines § 3B1.2(b)(2).

Focusing on his "primary objection," Owens argued that the government had essentially conceded its validity. (R. 468, Sent. Tr. 4-5.) Government counsel agreed with this assessment of the government's position. (R. 468, Sent. Tr. 5-6.) He also briefly argued that Owens's other objection to the PSR, the minor-participant argument, was not meritorious. (R. 468, Sent. Tr. 6.) And the court indicated its agreement on that point. (*Ibid.*) Owens's counsel then elected not to press his minor participant-argument. He chose instead to ask the court to use its sentencing discretion to look at Owens's relatively minor role in the conspiracy as a whole. He explained that

> Mr. Owens in no way seeks to minimize or avoid or [abdicate] responsibility for his actions in this matter, and that we simply pointed out to the court to look at Mr. Owens' conduct in the context of the grander scheme of things, in some kind of way when Your Honor computes and considers what his sentence will be.

(R. 468, Sent. Tr. 6-7.)[4] The court accepted the government's concession on Owens's first objection to the PSR and concluded that Owens's Guidelines Offense Level should be 29 instead of 31. (R. 468, Sent. Tr. 16.) Though Owens did not press his minor-participant argument, the court nonetheless ruled that Owens "was a regular participant in [the criminal incident that formed the basis for his Guidelines calculation], he was not minimal or minor, and he doesn't get a reduction under the guidelines for that." (R. 468, Sent. Tr. 18.)

[4] Owens's brief gives a confusing and misleading account of what took place at the sentencing hearing. Specifically, it conveys the impression that a colloquy quoted at Owens Br. 6-7 was principally about the minor-participant argument. But when that colloquy is considered in context, it becomes obvious that it was really about Owens's first objection to the PSR – that he was only responsible for one criminal incident. Owens's counsel began his presentation to the court by saying that he thought he could "streamline things" because it appeared that the government was "in essence, agreeing with" Owens's "primary objection" to the PSR. (R. 468, Sent. Tr. 4-5.) Owens's counsel mentioned his second argument, the minor-participant argument, in order to argue that the government had essentially conceded that his "primary objection" was meritorious. That is, the government's failure to respond to the "primary objection" and the fact that the government discussed only the one criminal incident Owens admitted responsibility for in its response to the minor-participant argument, amounted to a concession that the "primary objection" was meritorious. In response, as explained above, government counsel conceded the correctness of Owens's "primary objection," but noted his objection to Owens's minor-participant argument. When the court indicated its agreement with the government on that point, Owens's counsel, jettisoned the minor-participant argument. He instead pressed his alternative argument, urging "the court to look at Mr. Owens' conduct in the context of the grander scheme of things, in some kind of way." (R. 468, Sent. Tr. 7.)

The recalculated Offense Level carried a Guidelines range of 87 to 108 months of imprisonment. (R. 468, Sent. Tr. 16.) The court discussed the 18 U.S.C. 3553 factors and heard testimony from Owens's mother and Owens. (R. 468, Sent. Tr. 18-21, 27-36, 38-52.) The court also considered the government's motion for a departure from the guidelines range pursuant to Sentencing Guidelines § 5K1.1 for substantial assistance to authorities. (R. 468, Sent. Tr. 21, 52-55.) The court sentenced Owens to 63 months of imprisonment, a 24-month departure from the low end of the Guidelines range. (R. 468, Sent. Tr. 68.)

B. Owens Was An Indispensable Participant In The Criminal Conduct That Formed The Basis Of His Guidelines Offense Level Calculation

Owens's minor-participant argument is meritless. This Court should review it for clear error. See *United States* v. *Latouf*, 132 F.3d 320, 332 (6th Cir. 1997), cert. denied, 523 U.S. 1086, 523 U.S. 1101, and 524 U.S. 920 (1998).

Where more than one person is involved in an offense, Sentencing Guidelines § 3B1.2(b) provides for a two-level offense level reduction "[i]f the defendant was a minor participant in any criminal activity." This court has emphasized that "the salient issue is the role the defendant played in relation to the activity for which the court held him or her accountable." *United States* v. *Campbell*, 279 F.3d 392, 396 (6th Cir. 2002). Therefore, in considering a Section 3B1.2(b) reduction, a sentencing court looks only at the defendant's role in the conduct on which his sentence is based, not in the conspiracy as a whole. *Ibid.*

Here, Owens pleaded guilty to one count of conspiracy in violation of 18 U.S.C. 241 for actions relating to a single incident.

"The minor participant reduction is available only to a party who is less culpable than most other participants and substantially less culpable than the average participant." *United States* v. *Lanham*, 617 F.3d 873, 888 (6th Cir. 2010) (citation and internal quotation marks omitted); Sentencing Guidelines § 3B1.2(b), comment. (n.5). Moreover, defendants "who are indispensable to the conspiracy are not entitled to a role reduction pursuant to USSG § 3B1.2." *United States* v. *Samuels*, 308 F.3d 662, 672 (6th Cir. 2002), cert. denied, 537 U.S. 1225 (2003).

Owens plainly does not qualify as a minor participant under this standard. He admitted that: Arthur Sease called him and offered to pay him if he would pull someone over, (R. 167, Pl. Hear. Tr. 23; Doc. 314, Objections to PSR, p. 2); he stopped the persons Sease indicated using his squad car, with police lights flashing, and detained these persons using his police authority, (R. 468, Sent. Tr. 13-14; R. 167, Pl. Hear. Tr. 26); see also p. 6, *supra*; during the stop, he saw more drugs than he had ever seen before in his career, (R. 468, Sent. Tr. 46); he confiscated cash from one of the detained persons, (R. 468, Sent. Tr. 14; R. 167, Pl. Hear. Tr. 23, 26); he did not call in the stop, he did not record it on a log sheet, and he did not report or turn in the cash he confiscated, (R. 468, Sent. Tr. 46-48; R. 167, Pl. Hear. Tr. 26); he transported in his squad car one of the persons he had detained to

another location without notifying a police dispatcher, in clear violation of police policy, (R. 468, Sent. Tr. 14; R. 167, Pl. Hear.23, 26); he brought the money he had confiscated to Sease and Officer Johnson and was paid for his role in the robbery, (R. 468, Sent. Tr. 47; R. 167, Pl. Hear. Tr. 23-24, 26). Given these facts, the district court was plainly correct in concluding that Owens did not carry his burden of showing he was "less culpable than most other participants and substantially less culpable than the average participant." *Lanham*, 617 F.3d at 888.

Moreover, Owens's participation was clearly indispensible[5] to this robbery. See *Samuels*, 308 F.3d at 672. The essence of the scheme was the presence of a uniformed officer in a squad car who could detain drug dealers in order to confiscate their property. When this robbery occurred, Sease and Johnson were in plainclothes and in an unmarked car. See pp. 5-6, *supra*. Sease needed a uniformed officer in a marked squad car to carry out his plan and Owens was that officer.

[5] By "indispensible" this Court means that the defendant's conduct was necessary to the success of the criminal enterprise, not that the defendant is the only person in the world who could fill a particular role. See, *e.g.*, *United States* v. *Allen*, 516 F.3d 364, 375 (6th Cir. 2008) (rejecting a defendant's argument that "his role was not 'indispensable,'" because he "was relegated to conducting surveillance [and] driving the getaway car").

C. The District Court Complied With Rule 32(i)(3) Of The Federal Rules Of Criminal Procedure In Sentencing Owens

Owens also argues that, pursuant to Rule 32(i)(3), his sentence must be vacated because the district court did not make the findings required in support of its denial of the minor-participant reduction. Owens Br. 21-22. The argument should be reviewed only for plain error because Owens failed to give the district court notice of the claimed Rule 32 violation. See *United States* v. *Vonner*, 516 F.3d 382, 388 (6th Cir.) (applying a plain error standard of review to a defendant's claim that the district court violated Rule 32(i)(3)(B) by failing to address his sentencing arguments more fully where the defendant did not raise his Rule 32 objection before the district court), cert. denied, 129 S. Ct. 68 (2008). Indeed, as explained, pp. 32-33, *supra*, Owens elected not to press this argument at the sentencing hearing.[6]

[6] This was clearly a strategic decision. Owens had already prevailed on his best argument. The district court had expressed an initial disinclination to accept his other argument. He recognized that an aggressive minor-participant argument could jeopardize his ability to get credit for accepting responsibility for his crime. (R. 468, Sent Tr. 6; see also R. 314, Objections to PSR, p. 7) ("NOTE: Defendant, by [arguing for the minor-participant reduction], is in no way suggesting that he is less than fully responsible for his actions or that he is less than sincerely and utterly remorseful for his conduct."). So he decided to abandon the minor-participant argument and instead ask the court to use its sentencing discretion to do something the Sentencing Guidelines plainly do not allow: "look at Mr. Owens' conduct in the context of the grander scheme of things, in some kind of way." (R. 468, Sent Tr. 7; see also R. 314, Objections to PSR, p. 8) (relying, in the alternative, on the same sentencing discretion argument); *Campbell*, 279 F.3d at 396.

In actuality, the district court complied with Rule 32(i)(3). Rule 32(i)(3) sets out a district court's obligation to find facts in support of its sentencing determinations. It may accept undisputed portions of the PSR. Fed. R. Crim. P. 32(i)(3)(A). But if a portion of the PSR is disputed, it must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B).

Owens claims the district court failed to make adequate factual findings to justify its denial of a minor-participant adjustment. Owens Br. 21. But Owens admitted the veracity of the majority of the facts set out in the PSR and these facts plainly justify the denial of the adjustment. See, pp. 35-36, *supra*; see also *United States* v. *Warneke*, 310 F.3d 542, 550 (7th Cir. 2002) ("An admission is even better than a jury's finding beyond a reasonable doubt; it removes all contest from the case."), cert. denied, 538 U.S. 1035, 538 U.S. 1048, and 538 U.S. 1049 (2003).

Moreover, the district court complied with Rule 32(i)(3)(B) as to Owens's factual objection to the PSR. Owens maintained that, contrary to the PSR's account, he did not learn of the conspiracy until he saw the drugs during the stop and realized that Sease did not plan to report them. (R. 468, Sent. Tr. 17, 56-57.) The district court responded that resolution of this dispute – about whether Owens knew of the conspiracy before the stop or learned of it during the stop – would not

"change the [offense level] calculation." (R. 468, Sent. Tr. 18); see Fed. R. Crim. P. 32(i)(3)(B) (stating that a district court need not rule on a disputed portion of the PSR when such a ruling "is unnecessary * * * because the matter will not affect sentencing").

Finally, to the extent that Owens's objection is that the court did not sufficiently explain its denial of the minor-participant objection, it is not supported by Rule 32. The duty defined in Rule 32(i)(3) is a duty to resolve factual disputes, not a duty to give an extensive explanation about why a particular guidelines-level adjustment is inapplicable. See *United States* v. *White*, 492 F.3d 380, 415 (6th Cir. 2007) (describing the duty imposed under Rule 32(i)(3)(B) as a "duty to find facts"); *United States* v. *Lang*, 333 F.3d 678, 681 (6th Cir. 2003) (explaining "that Rule 32 prohibits a court faced with a dispute over sentencing factors from adopting the *factual findings* of the presentence report without making *factual determinations* of its own") (citation omitted; emphasis added). Additionally, it is worth noting that the district court almost certainly would have given a more extensive explanation of its ruling if Owens had asked for one. Instead, as explained pp. 32-33, 37 n.6, *supra*, Owens made a strategic decision to jettison his minor-participant argument in favor of an alternative one.

CONCLUSION

This Court should affirm Sease's convictions and Owens's sentence.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/Nathaniel S. Pollock
JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - RFK 3716
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-0333
nathaniel.pollock@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains 10,006 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/Nathaniel S. Pollock
NATHANIEL S. POLLOCK
Attorney

Date: April 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2011, 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.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Nathaniel S. Pollock
NATHANIEL S. POLLOCK
Attorney

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	**Title**
54	Superseding Indictment
167	Plea Hearing Transcript as to Antoine Owens
227	Second Superseding Indictment
287	Order Granting Motion to Dismiss Count 19
314	Antoine Owens's Objections to the PSR
380	Judgment as to Antoine Owens
382	Antoine Owens's Notice of Appeal
424	Judgment as to Arthur Sease
428	Arthur Sease's Notice of Appeal
442	01/22/2009 Transcript
443	01/23/2009 Transcript
444	01/26/2009 Transcript
445	01/27/2009 Transcript
446	01/28/2009 Transcript
447	01/29/2009 Transcript
450	02/04/2009 Transcript
451	02/05/2009 Transcript
468	Sentencing Transcript as to Antoine Owens