IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 09-20068-STA**
	)	
JAMES BAKER,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Before the Court is Defendant James Baker's Motion for Judgment of Acquittal, or in the Alternative, Motion for New Trial (D.E. # 223) filed on December 21, 2011, to which the government has responded (D.E. # 231). At a hearing on February 29, 2012, the Court granted Defendant fourteen (14) days to file a supplemental motion and the government fourteen (14) days thereafter to respond to Defendant's supplemental brief. Defendant filed his Supplemental Motion (D.E. # 241) on March 14, 2012, and the government filed a response to the Supplemental Motion (D.E. # 243). The Court conducted a second hearing on May 15, 2012, addressing the issues raised in Defendant's Motion and Supplemental Motion. For the reasons set forth below, Defendant's Motion and Supplemental Motion are **DENIED**.

BACKGROUND

A three-day jury trial commenced in this case on December 5, 2011. The testimony at trial established that on June 14, 2008, Officer Mark Reese ("Officer Reese") and Officer Dennis Rodgers ("Officer Rodgers") of the Memphis Police Department ("MPD") were on patrol at the

Northside Manor Apartments in Memphis, Tennessee. The police were responding to a series of complaints about narcotics sales at the complex. Officer Reese and Officer Rodgers were in an unmarked police vehicle and were wearing plain clothes. According to the testimony of both officers, they pulled into the apartment complex and observed Defendant on the premises. Defendant was approaching a parked vehicle, and so Officer Reese, who was driving the unmarked police vehicle, backed his vehicle into a parking space to observe Defendant. During the surveillance, Officer Reese and Officer Rodgers saw Defendant engage in what appeared to be a hand-to-hand transaction and receive money from someone in the parked vehicle. Defendant walked away from the car, and the occupants of the vehicle pulled out of the complex.

Officer Reese radioed to a marked unit waiting outside of the complex to stop the vehicle on suspicion of a drug transaction. Officer Reese then pulled out of his parking space with the intention of meeting the marked unit outside the complex. As Officer Reese and Officer Rodgers were driving out of the complex, the officers observed Defendant approach another vehicle in the parking lot, this time with what appeared to be a plastic baggie containing crack cocaine. When Officer Reese also saw a handgun in Defendant's back pocket, he radioed again to the marked unit and asked it to come to complex as back-up right away. Officer Reese made a u-turn and approached the parked vehicle where Defendant was still standing. Upon exiting his vehicle, Officer Reese moved toward Defendant, took hold of Defendant's hand holding the baggie, and grabbed the gun in Defendant's pocket. According to Reese, Defendant immediately stated that he was armed. The firearm seized from Defendant's pocket was a Smith & Wesson .357 magnum. Officer Reese placed Defendant under arrest. In addition to the weapon and the plastic baggie, the arresting officers also found several hundred dollars in cash on Defendant's person.

With respect to the parked vehicle where Defendant was standing at the time of his arrest, Officer Reese testified that there were three men in the car, one of whom possessed a pipe used for smoking crack. Two of the men in the vehicle testified at trial. Franklin Duane Stroder ("Stroder"), who was seated in the back seat of the parked car Defendant had approached, testified that Defendant had sold him crack cocaine two or three other times at the Northside Manor Apartments, including one transaction earlier on the day of the arrest. Danny Sullins ("Sullins"), the man in the driver's seat of the car at the time of Defendant's arrest, testified that after he was released from the scene, a crack rock was discovered in the car. Sullins knew that the drugs were not in the car previously because the car belonged to his mother.

The evidence showed that the substance held in the plastic baggie seized from Defendant contained cocaine base, which is also known as crack cocaine. Dana Parmenter of the Tennessee Bureau of Investigation performed a cobalt thiocyanate color change test and a Fourier transform infrared spectrometer instrumental analysis on the substance and concluded that it contained cocaine base. The evidence at trial also established that the firearm seized from Defendant had no recoverable latent fingerprints. Sergeant Robin Hulley of MPD testified that she processed the weapon and found no latent fingerprints. Finally, the evidence demonstrated that the weapon was a "firearm," as the relevant statutes define the term, which was manufactured outside of the state of Tennessee. Special Agent Benny Allen of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") testified that he had processed the weapon, identified the make and model of the gun, and determined that it was made outside of the state of Tennessee and no earlier than 1980.

On December 7, 2011, a jury convicted Defendant of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), one count of possession of a controlled

substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and one count of using a firearm in furtherance of a drug trafficking offense in violation 18 U.S.C. § 924.

STANDARD OF REVIEW

Defendant has filed the instant Motion for Judgment of Acquittal or in the alternative Motion for New Trial. "The test for denial of a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is the same as the test for reviewing a claim that the evidence is insufficient to support a conviction."[1] Federal Rule Criminal Procedure 33 provides, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."[2] The Court should grant a Rule 33 motion only where the verdict was against the manifest weight of the evidence.[3] Not only are motions pursuant to Rule 33 distinct from Rule 29 motions, but Rule 33 motions for new trial are "disfavored, discretionary, and granted only in the extraordinary circumstance where the evidence preponderates heavily against the verdict."[4]

ANALYSIS

Defendant has moved for a judgment of acquittal or a new trial on the basis of several assignments of error. The Court will consider each assignment of error separately in its analysis and take each argument in the order it was presented in Defendant's Supplemental Motion.

I. Evidentiary Ruling on the Firearms Incident Report

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[1] *United States v. Pennyman*, 889 F.2d 104, 106 (6th Cir. 1989).

[2] Fed. R. Crim. P. 33(a).

[3] *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010).

[4] *United States v. Mitchell*, 9 F. App'x 485, 489 n.2 (6th Cir. 2001) (citation omitted).

In his first assignment of error, Defendant argues that he is entitled to a new trial based on the Court's erroneous evidentiary ruling excluding a firearms incident report prepared by Deputy Patrick Dean[5] of the Shelby County Sheriffs Department. At trial Officer Reese testified that he first observed the gun in Defendant's pocket when Defendant walked right in front of his vehicle. However, at the time of the arrest, Officer Reese informed Deputy Dean that he and Officer Rodgers observed the gun, an apparent drug transaction, and the baggie of crack cocaine from 400 to 500 feet away and with the aid of binoculars. Officer Reese provided Dean with this information which Dean included in his firearms screening information report. The defense attempted to introduce the report first through Officer Reese during his cross-examination and later through Deputy Dean during his direct testimony in Defendant's case-in-chief. The Court will consider each ruling in turn.

A. Refreshing Recollection of Officer Reese

On cross-examination of Officer Reese, counsel for Defendant asked Reese if he knew Patrick Dean or had ever spoken to Dean. When the defense attempted to pass Dean's firearms screening report to Officer Reese to refresh his recollection, the government objected, and the Court sustained the objection. According to the Motion for New Trial, the Court ruled that if Reese did not prepare the report, then counsel could not use it to refresh his recollection. Defendant now argues that any document can be used to refresh a witness's recollection. Just as it did at trial, the government responds that the defense did not set a proper foundation for using the report to refresh Officer Reese's recollection. According to the government, the report was not prepared by Reese, and Reese never adopted the statement contained in the report. The government also argues that the

[5] The parties' briefs spell the witness's name "Deane." The official trial transcript spells the witness's name "Dean." Therefore, the Court will refer to the witness as "Dean."

defense should have first asked Officer Reese about the time and place of the statement he gave to Dean and otherwise exhausted Reese's recollection of the report before attempting to refresh Reese's recollection with the document.

The Court holds that it did not abuse its discretion by not admitting the report into evidence through Officer Reese. The Court's explanation for its ruling at trial was as follows: "You [defense counsel] are familiar with how to introduce documents. If this witness prepared the document or has firsthand information, you can give it to him to refresh his memory. But just pulling a document out of a stack and saying, do you recognize this, we're not going to be doing side bars every two minutes."[6] The Court concluded at trial, and restates its holding here, that Defendant had failed to lay a proper foundation for the document prior to passing it up to Officer Reese. Defendant correctly argues that a district court has discretion to allow a witness to refresh his recollection with a writing prepared by another person.[7] As a general matter, however, the proponent of any document must first lay a foundation by eliciting testimony "to establish the reliability of its own exhibit."[8] At trial counsel for Defendant pulled the report "out of a stack" and sought to place it before the witness. The defense simply did not establish the reliability of the document either through Officer Reese or another witness before attempting to use it to refresh Reese's recollection.

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[6] Trial Tr. 111:14–20.

[7] *United States v. Marrero*, 651 F.3d 453, 471–72 (6th Cir. 2011).

[8] *United States v. Brika*, 416 F.3d 514, 529 (6th Cir. 2005), abrogated on other grounds by *United States v. Booker*, 543 U.S. 222 (2005); *see also United States v. Shoupe*, 548 F.2d 636, 642 (6th Cir. 1977) (concluding that district court abused its discretion by allowing witness to use memorandum to refresh his recollection without first establishing the reliability of the memorandum). *Accord* Fed. R. Evid. 901(a) ("[A]uthentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

Without a proper foundation, exclusion of the document was proper at that point in the proceedings. For this reason alone, the Court holds that it was not error to sustain the government's objection to the use of the report during Officer Reese's cross-examination.

Furthermore, the Court holds that it was not an abuse of discretion to exclude the report because the defense did not exhaust Officer Reese's recollection about the report itself or his statement to Deputy Dean prior to the defense's attempt to use it on cross-examination of Officer Reese. Rule 612 of the Federal Rules of Evidence allows a party to refresh a witness's recollection with a writing as long as the "adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."[9] The Sixth Circuit has explained that the party attempting to use the writing to refresh a witness's memory must lay a proper foundation.

> Proper foundation requires that the witness's recollection to be exhausted, and that the time, place and person to whom the statement was given be identified. When the court is satisfied that the memorandum on its face reflects the witness's statement or one the witness acknowledges, and in his discretion the court is further satisfied that it may be of help in refreshing the person's memory, the witness should be allowed to refer to the document.[10]

The Court holds that the defense failed to lay such a foundation before attempting to use the report to refresh Officer Reese's memory. During cross-examination, the defense simply asked Reese if he knew Patrick Dean and whether he had ever spoken to Dean. Counsel's question did not identify Dean as the Shelby County Sheriffs Deputy that prepared the firearms incident report in this case

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[9] *Rush v. Illinois Cent. R. Co.*, 399 F.3d 705, 715–16 (6th Cir. 2005) (citing Fed. R. Evid. 612).

[10] *Id.* at 716 (quoting *Shoupe*, 548 F.2d at 641) (other citations omitted).

or even mention that Dean was law enforcement at all. Counsel simply passed the witness the report and stated, "I'm going to hand you a document to see if that refreshes your recollection as to whether you ever had a conversation with Patrick Dean."[11] Counsel for Defendant did not ask Officer Reese whether he knew a firearms incident report was prepared in this case, whether he had seen the report, or whether he had made a statement and provided information that was included in the report. Counsel did not ask Officer Reese when or where he made such statements. Counsel did not even inquire about to whom such statements were made or who prepared the report. As such, the defense laid no foundation for using the report to refresh Officer Reese's recollection about the facts stated in the report prior to the attempt to pass the report to the witness. Therefore, the Court holds that it was not error to sustain the government's objection about the report at that point in the trial. As such, the Court's ruling provides no grounds for granting a new trial.

B. Admissibility as Prior Inconsistent Statement

Defendant next argues that he is entitled to a new trial on the basis of the Court's ruling that the firearms incident report could not be admitted into evidence through Deputy Dean himself. Following the testimony of Officer Reese, the defense called Patrick Dean as a witness and sought to question Dean about Reese's statements recorded in the report. At trial, the Court sustained the government's initial objection that the report was inadmissible hearsay. At that time, the defense argued that the report was not being admitted to prove the truth of the matters asserted but only as impeachment evidence. The Court explained that while counsel was permitted to ask Deputy Dean questions about the contents of the report, the Court was "not going to allow the document to be introduced at least at this point. Now if something changes, we will look at it again, but not at this

[11] Trial Tr. 110:20–22.

point."[12] Despite the fact that the report did not initially come into evidence, the defense went on to question Dean about the statements in the report, including Reese's account that he was 400 to 500 feet away from Defendant and observed Defendant's activities through binoculars. At the conclusion of his direct examination of Dean, counsel for Defendant again sought to have the report admitted into evidence, and the Court again sustained the government's hearsay objection.

In his Motion for New Trial, Defendant argues that the Court erred by not admitting the report. According to Defendant, the statements in the report were not being offered to prove the truth of the matters asserted, i.e. that Officer Reese was 400 to 500 feet away when he observed Defendant carrying a firearm. Rather Defendant contends that the statements in the report were admissible as prior inconsistent statements. Defendant adds that the error was not cured by allowing Dean's testimony about the statements in the report. Defendant asserts that Dean clouded the issue by stating that he could not remember whether Reese or another officer made the statements. Defendant emphasizes that Officer Reese's credibility was crucial in this case because Officer Reese and Officer Rodgers were the only witnesses at trial who testified that Baker possessed the firearm. Because the defense was denied the opportunity to impeach Officer Reese with this evidence, Defendant claims that the erroneous evidentiary ruling violated his Sixth Amendment right to present a defense and impeach a government witness. In response, the government argues that the report was inadmissible hearsay even when Dean testified and also that Dean's own testimony was extrinsic evidence of Officer Reese's prior inconsistent statement.

Rule 613(b) provides that an impeaching party may produce "extrinsic evidence of a prior inconsistent statement" if "the witness is afforded an opportunity to explain or deny the same and

[12] Trial Tr. 465:7–10.

the opposite party is afforded an opportunity to interrogate the witness thereon . . . ."[13] The Sixth Circuit has explained that a party establishes a proper foundation under Rule 613(b) simply by giving the witness "an opportunity, at some point, to explain or deny the prior inconsistent statement" and giving the opposing party "the opportunity to examine the statement."[14] In this case, although Officer Reese testified that he saw the handgun at close range, Deputy Dean testified about the contents of his report including the statement from Officer Reese that the officers observed Defendant from a distance of 400 to 500 feet by using binoculars. The Court finds that the proper foundation for impeaching Officer Reese was laid under Rule 613(b). Officer Reese stated that he did not recall telling Patrick Dean that he was about 400 to 500 feet away as he observed Defendant's activities prior to the arrest. Thus, Officer Dean had an opportunity to deny the statement.[15] It is further undisputed that the government had the opportunity to examine the source of the statement, Deputy Dean's report. Thus, the proper foundation for the impeachment evidence was laid here. Deputy Dean went on to testify about the statements contained in his report. Neither party has objected to Dean's testimony about the statements attributed to Officer Reese in the report.

The issue presented then is whether the Court erred in not admitting the report itself into evidence. The government maintains that Deputy Dean's testimony about the report constituted

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[13] Fed. R. Evid. 613(b).

[14] *Rush*, 399 F.3d at 722 (citing Rule 613(b) and *United States v. Foster*, 376 F.3d 577, 591–92 (6th Cir. 2004)).

[15] Even if Officer Reese had not denied the statement on cross, the defense could have nevertheless called Deputy Dean in its case to establish the prior inconsistent statement. The Sixth Circuit has held that the proper foundation can be laid so long as the witness can be called in rebuttal and given the chance to explain or deny the prior statement. *Rush*, 399 F.3d at 723 (citing *United States v. McCall*, 85 F.3d 1193, 1195 (6th Cir. 1996)).

extrinsic evidence of Officer Reese's prior inconsistent statement. While the Court does not disagree with the government's contention, Defendant argues that he was denied the opportunity to admit the report itself into evidence through Deputy Dean. The Court holds that the report was hearsay and that Defendant failed to established that the report was covered by a hearsay exception defined in Federal Rule of Evidence 803, such as the business-records exception. In other words, the report was hearsay because it was Deputy Dean's out-of-court statement about the investigation of the case. The Sixth Circuit has held

> [a] business record is admissible under Rule 803(6) where a sufficient foundation for reliability is established. Business records are properly admitted under the business records exception to the hearsay rule if they satisfy four requirements: (1) they must have been made in the course of regularly conducted business activities; (2) they must have been kept in the regular course of business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge.[16]

"Additionally, if the record is based on the statements of an informant rather than the first-hand observations of its author, the informant must also be acting under a business duty."[17] In *United States v. Cecil*, the Sixth Circuit concluded that a proper foundation was not laid to admit a police report prepared by one officer (i.e. the author) containing information provided by another officer (i.e. the informant).[18] Specifically, the proponent of the report failed to show that the informing officer with firsthand information had a duty to relay the information to the authoring officer who

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[16] *United States v. Cecil*, 615 F.3d 678, 690 (6th Cir. 2010) (quoting *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 588 (6th Cir. 2009)).

[17] *Id.* (collecting cases).

[18] *Id.*

prepared the report.[19] The *Cecil* court highlighted that the author of the report was not the informing officer's supervisor or even in the same section of their law enforcement agency. Therefore, there was no proper foundation to admit the police report under the business records exception.

Applying the reasoning in *Cecil*, the Court holds that the defense did not establish why Officer Reese "had a duty" to give information to Deputy Dean, thereby demonstrating why the business records exception should apply to the report. Deputy Dean only testified that he was assigned to the Project Safe Neighborhoods Firearms Unit, that he was assigned to Defendant's case, and that he spoke with the arresting officers about the offenses. Although Deputy Dean identified the report as his, no testimony was elicited to show why Officer Reese had a duty to relay the information to Deputy Dean in the normal course of police business. Both officers worked for different agencies and had distinct roles in the investigation of this case. Without this foundation, the defense failed to show why the report qualified as business record. Therefore, the Court did not err in sustaining the government's hearsay objection to the admission of the report.

C. Harmless Error

Even if the Court abused its discretion by not admitting the report either through Officer Reese or Deputy Dean, an erroneous evidentiary ruling does not require a new trial "unless the error affects substantial rights of the defendant."[20] The United States has the burden to show that the

[19] *Id.* at 690–91 (discussing the "break in the chain" to explain the officer's duty to prepare a report).

[20] *United States v. White*, 87 F. App'x 566, 569–70 (6th Cir. 2004) (citing *United States v. Bonds*, 12 F.3d 540, 554 (6th Cir. 1993)).

erroneous ruling did not substantially affect the rights of the defendant.[21] An error "affects a defendant's substantial rights when it prejudices the defendant and materially affects the outcome of trial."[22] On the other hand, a harmless error is one that does not implicate constitutional rights "unless it is more probable than not that the error materially affected the verdict."[23]

Upon examination of the evidence offered at trial,[24] the Court holds that any possible error related to the exclusion of Dean's report did not materially affect the verdict or prejudice Defendant. Even though the report itself was not admitted into evidence, the jury still received evidence about the contents of the report and how the statements in the report were inconsistent with Reese's trial testimony. Reese denied on cross-examination that he had observed Defendant through binoculars from a distance of 400 to 500 feet; whereas, the defense elicited testimony from Deputy Dean about the contents of the report and in particular Reese's statement to Dean that he observed Defendant from 400 to 500 feet. Defendant's arguments to the contrary notwithstanding, the jury received unequivocal testimony from Deputy Dean that Officer Reese told him he was 400 to 500 feet away from Defendant:

> By [counsel for Defendant]
> Q. During your conversation with Officer Reese, did he advise you how far away he was located from Mr. Baker when they observed him?
> A. In my summary I have here four to five hundred feet.
> Q. Four to five hundred feet did you say?

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[21] *Id.* (citing Fed. R. Crim. P. 52(a)).

[22] *Id.* (citing *United States v. Thomas*, 321 F.3d 627, 635 (7th Cir. 2003)).

[23] *Id.* (quoting *United States v. Fountain*, 2 F.3d 656, 668 (6th Cir. 1993) (other citation omitted)).

[24] *Id.*

A. Yes, sir.[25]

Based on this evidence, the Court charged the jury with Sixth Circuit Pattern Instruction 7.04, the standard jury charge on prior inconsistent statements.[26] The instruction was given at Defendant's request[27] and specifically mentioned Reese and the fact that the jury received evidence of his prior inconsistent statements. Furthermore, Defendant was able to highlight Officer Reese's prior inconsistent statements to the jury in closing arguments, by questioning Reese's credibility generally and emphasizing Reese's prior inconsistent statement to Dean about the distance from which he watched Defendant before the arrest.[28] Under the circumstances the Court's evidentiary ruling on the report did not deny Defendant the opportunity to present evidence about the prior inconsistent statement to the jury or otherwise prevent Defendant from putting Officer Reese's credibility at issue. The Court finds then that the exclusion of the report more probably than not had no effect on the verdict in this case. The Court holds that even if it abused its discretion in excluding the report, the rulings amounted to nothing more than harmless error. Therefore, Defendant's Motion for New Trial is **DENIED** as to this issue.

II. Violations of the *Jencks* Act

In his second assignment of error, Defendant argues that he is entitled to a new trial based on the United States's failure to produce *Jencks* material. In particular Defendant objects to the

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[25] Trial Tr. 465:15–21. While it is true that Dean went on to testify that he did not remember whether Reese or Rodgers mentioned binoculars, that testimony was addressed to the officers' use of binoculars, and not the distance from which the officers watched Defendant.

[26] Jury Instructions, 19 (D.E. # 216).

[27] Trial Tr. 484:9–485:4.

[28] *Id.* at 514:16–515:18.

government's failure to produce Officer Reese's incident report and the PSN firearms worksheet prepared by Sgt. Hulley. The *Jencks* Act provides that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."[29] The Court will analyze Defendant's claims as to each violation separately.

A. Officer Reese's Incident Report

In his Motion for New Trial, Defendant argues that the government violated the *Jencks* Act by failing to produce the incident report prepared by Officer Reese. Defendant asserts that Reese testified about the incident report on redirect in order to demonstrate that he had correctly recorded the serial number of the firearm in the report. Although Reese referred to the report at trial and testified that the document was his incident report, the document was never admitted into evidence. According to Defendant, the government never produced a copy of the incident report Reese reviewed during his redirect, despite the fact that Defendant had filed a motion for production of Officer Reese's *Jencks* material.[30] Defendant admits that he received a document purporting to be Reese's incident report but argues that the incident report provided in discovery had the words "Shelby County Sheriffs Department" ("the SCSD version") across the top of each page. By

[29] 18 U.S.C. § 3500(b); *see also* Fed. R. Crim. P. 26.2(a) ("After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government . . . to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.").

[30] *See* Def.'s Mot. for Production of Jencks/Rule 26.2 Statements of Officer Mark Reese, Dec. 5, 2011 (D.E. # 207). Defendant filed his motion at the conclusion of the first day of trial and after Officer Reese's direct testimony.

contrast, the report Reese prepared and referred to at trial had the words "Memphis Police Department" across the top of each page and had one less page than the report produced in discovery ("the MPD version"). The MPD version of the incident report also included additional information such as addresses and other identifying information about two other suspects, Franklin D. Stroder and John Phillips. Defendant now argues that he was entitled to receive the MPD version as *Jencks* material when Reese testified.

The government responds that there was no *Jencks* violation because Defendant received the incident report prepared by Officer Reese in discovery and the two versions were virtually the same document. According to the government, the version it used at trial had thirteen pages because the last page was inadvertently left off, and in any event Officer Reese referred only to page 9 of the report. As for the headings on the two versions, the government explains that when an Shelby County Sheriffs Department employee accessed and printed the report, it was produced with the heading on the SCSD version. When an MPD employee printed the document, the report was produced with the heading in the MPD version. The government further asserts that the information missing from the SCSD version produced in discovery was redacted and available from other sources of information, which were also produced to Defendant in discovery. The government also argues that it satisfied *Jencks* by showing the defense the MPD report when Reese testified at trial.

The Court holds that Defendant has not shown that the government's failure to disclose the MPD version of the incident report was a violation of the *Jencks* Act or that the failure prejudiced

his defense.[31] It is undisputed that Defendant received the SCSD version of the report in discovery and in time to use any information contained in the report in Officer Reese's cross-examination. The government has provided an explanation for why the two versions have different headings and the MPD version used at trial had one less page than the SCSD version. The Court finds that this explanation is credible and that the government did not act in bad faith.[32] The only material difference between the SCSD version, which Defendant did receive, and the MPD version, which Defendant did not, is the contact and identifying information for Stroder, Phillips, and Defendant himself, specifically each man's drivers license number, social security number, and home telephone number. The United States asserts that this information was simply redacted from the SCSD version Defendant received in discovery. Therefore, the Court holds that the government's failure to produce a substantially identical version of a document (with a formatting difference and unredacted personal information) does not amount to a *Jencks* violation.

Even if this redaction amounted to a *Jencks* violation, and Defendant has cited no authority for such a proposition, the Court holds that Defendant has not shown how his defense was prejudiced by the violation. Pursuant to the *Jencks* Act, a defendant is prejudiced only if "the error is one that might reasonably be thought to have had substantial and injurious effect or influence in

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[31] The parties have assumed that the report was *Jencks* material, and so the Court will not address that issue for purposes of the Motion for New Trial. A "statement" for purposes of the *Jencks* Act includes only (1) a "written statement made" and "signed or otherwise adopted" by the witness, (2) a "substantially verbatim recital of an oral statement ... by [the] witness . . . recorded [or "transcribed"] contemporaneously with the making of [the] oral statement," or (3) "a statement, however taken or recorded . . . made by said witness to a grand jury." 18 U.S.C. § 3500(e).

[32] The Court would caution that in the future when the government uses two substantially identical versions of the same document, the government would be better served by producing both versions in discovery, out of an abundance of caution.

determining the jury verdict."[33] Defendant has not shown how the contact information about Stroder or Phillips would have had a substantial effect or influence on the jury verdict here. Stroder testified at trial, and Defendant had the opportunity to cross-examine him. In fact, Stroder provided some exculpatory evidence, testifying that he did not observe Defendant with a gun or a plastic baggie of crack at the time of the arrest.[34] As for Phillips, Defendant has not argued that he was in any way denied the opportunity to produce Phillips as a trial witness or that Phillips had relevant information that would have altered the jury verdict. Therefore, the Court concludes that any supposed *Jencks* violation as to the use of the MPD version of Officer Reese's report was harmless.

B. Sgt. Hulley's Firearms Worksheet

Defendant also argues that the government's failure to produce Sgt. Hulley's firearms worksheet until March 1, 2012, a matter of almost three months after the completion of the trial, was a violation of the *Jencks* Act. According to the Motion for New Trial, Sgt. Hulley's notes indicated that the firearm had a chrome finish. Defendant emphasizes that Officer Reese's report described the black appearance of the weapon. In response to the Motion for New Trial, the government contends that the failure to produce these notes was harmless. The government states that there was no inconsistency between Sgt. Hulley's trial testimony, her written report, and her handwritten notes. The government also argues that the worksheet with the notes was inadmissible hearsay. As for the finish of the firearm, the government contends that the firearm was entered into evidence and did in fact have a chrome finish. Therefore, Sgt. Hulley's notes reporting this fact were not material.

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[33] *United States v. Faulkenberry*, 614 F.3d 573, 589 (6th Cir. 2010) (citing *United States v. Susskind*, 4 F.3d 1400, 1406 (6th Cir. 1993)).

[34] Trial Tr. 170:25–171:19.

Finally, the government argues in a footnote that the defense failed to make a timely request for Sgt. Hulley's *Jencks* material and therefore waived the issue.

The Court holds that the failure to produce Sgt. Hulley's notes was not a violation of the *Jencks* Act. First, although the defense did not request Sgt. Hulley's *Jencks* material at the conclusion of her direct testimony, the defense did make a blanket request for all *Jencks* material as to all of the government's witnesses through the second day of trial, including Sgt. Hulley. By the very terms of the statute, the government's duty to produce *Jencks* material is triggered by two things: the witness's testimony at trial and the defendant's motion for the information.[35] There is some authority for the proposition that no *Jencks* violation occurs where a defendant waits until after the witness has testified and the trial is over to request *Jencks* statements.[36] Neither party here has cited any authority to show whether a defendant waives his right to *Jencks* material by failing to request at the conclusion of the direct testimony. The Court need not resolve the issue here because even if Defendant's motion for the materials was timely, the Court is not convinced that Hulley's notes on the firearms worksheet constitute *Jencks* material. The handwritten notes did not constitute a "statement" adopted by Sgt. Hulley. By its own term, the Jencks Act only applies to specific statements given or adopted by a witness. Therefore, the Court holds that Sgt. Hulley's handwritten notes were not *Jencks* material.

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[35] 18 U.S.C. § 3500 ("After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.").

[36] *United States v. Conlee*, 1991 WL 203748, at *2–3 (6th Cir. 1991) ("If the defendant waits until after the trial to request Jencks material, he has waived the right to relief.") (citing *United States v. Petito,* 671 F.2d 68 (2d Cir. 1982)).

Even assuming that the *Jencks* Act applies to the notes, the Court finds that any error resulting from the failure to produce the notes was harmless. The Sixth Circuit has held that there was no *Jencks* violation where the government failed to turn over handwritten notes used to make a report and yet the report itself was provided to the defense.[37] In this case, the defense received a copy of Sgt. Hulley's final report in discovery. Based on Defendant's receipt of Sgt. Hulley's final report, the Court holds that the failure to produce the notes did not have "substantial and injurious effect or influence in determining the jury verdict" in this case. What is more, the jury was well aware that the firearm at issue had a chrome finish because the weapon was admitted into evidence. Because this assignment of error is without merit, Defendant's Motion for New Trial is **DENIED** as to this issue.

III. Violations of the Government's Discovery Obligations Under Rule 16

In a third assignment of error, Defendant argues that he is entitled to a new trial based on the United States's failure to produce discovery in violation of Rule 16 of the Federal Rules of Criminal Procedure.[38] In particular Defendant objects to the late disclosure of the firearms trace summary, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") firearms trace, the incident report prepared by Officer Reese, and the handwritten notes of Sgt. Hulley. Rule 16(a) provides the standards for information the government must disclose to the defense. At issue here is Rule 16(a)(1)(E), which states that

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[37] *United States v. Lane*, 479 F.2d 1134, 1136 (6th Cir. 1973).

[38] In one unreported decision, the Sixth Circuit remarked that Rule 16 provides certain "pre-judgment forms of relief" for discovery violations and that a defendant's "only possible post-judgment" avenue for relief was a motion for a new trial. *United States v. Causey*, No. 97-1018, 1998 WL 381433, at *1 (6th Cir. June 24, 1998).

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.[39]

Largely at issue here is whether the government produced in discovery items that were material to preparing the defense. Rule 16 "is intended to prescribe the minimum amount of discovery to which the parties are entitled, and leaves intact a court's discretion to grant or deny the broader discovery requests of a criminal defendant."[40] Rule 16(d)(2) grants the district court discretion to impose various sanctions for the failure to comply with discovery requirements, including compelling the discovery, granting a continuance, excluding the undisclosed evidence, and entering any other order that is just under the circumstances.[41]

Having set out the general standards for disclosure under Rule 16(a), the Court will now consider each piece of late-disclosed or undisclosed evidence Defendant has raised in his Motion for New Trial.

A. Firearms Traces

The first item of late-disclosed evidence is the firearm trace reports completed by ATF. It is undisputed that the government did not produce the trace documents until the trial was under way. Defendant argues that he based his defense in large part on the government's inadequate

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[39] Fed. R. Crim. P. 16(a)(1)(E).

[40] *United States v. Richards*, 659 F.3d 527, 543 (6th Cir. 2011) (quoting *United States v. Jordan*, 316 F.3d 1215, 1249 n.69 (11th Cir. 2003).

[41] *Id.* (citing *United States v. Jordan*, 544 F.3d 656, 667 (6th Cir. 2008)); Fed. R. Crim. P. 16(d)(2).

investigation into the firearm itself and the apparent failure to conduct the trace. The Court would add that the defense questioned the government's firearms opinion witness ATF Special Agent Benny Allen on cross-examination about the failure to complete the firearms trace in this case. At the conclusion of that testimony, the government inquired of ATF whether the trace was done and discovered that a trace report was prepared. The government then produced the report to the defense. In his Motion for New Trial, Defendant argues that had he been provided with the trace report, he could have questioned the original purchaser of the firearm to determine why the weapon was no longer in his possession and would have prepared a very different defense theory.

Moreover, Defendant objects to the Court's ruling on the admissibility of the trace at trial. Specifically, the Court granted Defendant's request that the government not be permitted to introduce the trace report[42] and ordered that the government could not bring out the trace in its case-in-chief.[43] When the government later sought to introduce the trace report as rebuttal evidence, the Court denied that request and at the same time instructed that the defense should not be allowed to argue to the jury that no trace was actually performed.[44] The Court emphasized that its ruling was designed to minimize the prejudice to Defendant, which would clearly follow if the government was allowed to introduce the trace report.[45] The Court also found that permitting counsel for Defendant to make an argument to the jury that he knew to be false would be improper.[46] Now in the Motion

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[42] Trial Tr. 337:16–20.

[43] *Id.* at 342:12–16.

[44] *Id.* at 444:2–8.

[45] *Id.* at 445:8–14.

[46] *Id.* at 448:1–9.

for New Trial, Defendant contends that the Court's ruling prevented him from arguing to the jury that no trace was performed and therefore denied him a fair trial.

The Sixth Circuit has held that a defendant fails to show that an item is "material" to the preparation of a defense simply by raising "conclusory arguments concerning materiality."[47] A defendant bears the burden to make a *prima facie* showing of materiality in order to establish his right to disclosure of a document under Rule 16.[48] The Supreme Court has construed a "defense" under Rule 16 to mean the "defendant's response to the Government's case in chief."[49] As result, disclosure under Rule 16(a)(1)(E) is limited to "shield claims that refute the Government's arguments that the defendant committed the crime charged."[50] Although the Sixth Circuit has not "authoritatively defined" materiality for purposes of Rule 16,[51] the Sixth Circuit has recently explained "that information which does not counter the government's case or bolster a defense is not material merely because the government may be able to use it to rebut a defense position."[52] The defendant must make some showing that "pre-trial disclosure would have enabled the defendant to alter the quantum of proof in his favor, not merely that a defendant would have been dissuaded

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[47] *United States v. Dobbins*, No. 10-6262, 2012 WL 1662453, at * 6–7 (6th Cir. May 14, 2012); *United States v. Lykins*, 428 F. App'x 621, 624–25 (6th Cir. 2011) (*per curiam*) (quoting *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (internal citation omitted)).

[48] *Dobbins*, 2012 WL 1662453, at * 6 (citing *Phillip*, 948 F.2d at 250).

[49] *Lykins*, 428 F. App'x at 624 (quoting *United States v. Armstrong*, 517 U.S. 456, 462 (1996)).

[50] *United States v. Robinson*, 503 F.3d 522, 532 (6th Cir. 2007) (quoting *Armstrong*, 517 U.S. at 462) (internal quotation marks omitted)).

[51] *Lykins*, 428 F. App'x at 624 (other citation and internal quotation marks omitted)).

[52] *Id.* (other citation and internal quotation marks omitted)).

from proffering easily impeachable evidence."[53] To determine whether a defendant has made this showing, the Court must "consider the logical relationship between the information withheld and the issues in the case, as well as the importance of the information in light of the evidence as a whole."[54]

With respect to the issue presented here, the Sixth Circuit has never considered whether a firearms trace is material to the preparation of a defense in the prosecution of a firearms charge. In fact, the only two Circuits to have addressed the issue arrived at opposite conclusions. The First Circuit held that a firearms trace report was not material to the defense in a prosecution for possessing a firearm in furtherance of a drug crime.[55] The firearm in *Mejia* had an obliterated serial number and was recovered from a vehicle in which the defendant was a passenger, and the defendant confessed to possessing the gun.[56] The Court finds that the result in *Mejia* was to some extent fact-specific, and so the case is arguably distinguishable. The Third Circuit, on the other hand, has held that a firearms trace constitutes possible *Brady* material, particularly in so far as the trace identified the original owner of the firearm.[57] The Third Circuit went on to conclude that the non-disclosure of the trace was also a Rule 16 violation, reasoning that "the contours of Rule 16 [] should be

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[53] *Id.* (other citation and internal quotation marks omitted)).

[54] *Id.* (citation omitted)).

[55] *United States v. Mejia*, 600 F.3d 12, 20 (1st Cir. 2010).

[56] *Id.* It is true that there was evidence in this case showing that Defendant admitted to having the firearm in his pocket. However, unlike the weapon in *Mejia*, the serial number of the weapon in this case was still in tact.

[57] *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 255–56, 256 n.9 (3d Cir. 2005); *see also United States v. Roberts*, 419 F. App'x 155, 163 (3d Cir. 2011) (holding that failure to disclose trace summary was violation of Rule 16 where the government intended to use the document in its case-in-chief).

interpreted to minimize conflict with the government's constitutional disclosure obligations under *Brady*."[58] The Court finds *Fahie* less persuasive because Defendant in this case has not argued that the nondisclosure of the trace was a *Brady* violation and because the Third Circuit did not specifically analyze whether the trace information was material to the preparation of a defense under Rule 16. In sum, the Court finds no persuasive precedent on the issue presented.

Putting aside the lack of binding legal authority on the production of trace summaries under Rule 16, the Court holds that the trace information would not have altered the quantum of proof in Defendant's favor in this case and therefore was not material to the preparation of the defense. The Sixth Circuit has held in two recent decisions that undisclosed evidence was not material to the preparation of the defense where the undisclosed evidence was actually unfavorable to the defendant.[59] In *Lykins*, the undisclosed evidence was a photograph of the defendant holding a firearm other than the one with which the defendant was charged with possessing.[60] The government introduced the photograph to rebut defendant's own testimony that he had never held or hunted with a gun.[61] The Sixth Circuit concluded that "a Rule 16 violation cannot be sustained based merely on an argument that disclosure would have resulted in reconsideration of defendant's decision to testify or formulation of a more effective defense strategy."[62] In *Dobbins*, the government failed to disclose a police officer's rough notes which contained a confidential informant's description of a drug seller

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[58] *Fahie*, 419 F.3d at 257.

[59] *Dobbins*, 2012 WL 1662453, at * 6; *Lykins*, 428 F. App'x at 624.

[60] *Lykins*, 428 F. App'x at 622, 624–25.

[61] *Id.* at 624.

[62] *Id.* at 624–25.

matching the defendant's description.[63] When the officer testified about the informant's description at trial, counsel for the defendant asked why the informant's description was not in the officer's report.[64] The officer responded by passing counsel a copy of the notes he had made on the file jacket, which had the description given by the informant.[65] The Sixth Circuit found that "the notes on BeCraft's case folder were unfavorable to the defense, and the disclosure of the notes would likely have resulted in 'formulation of a more effective defense strategy.'"[66] Therefore, the *Dobbins* panel concluded that the notes were not material and therefore their non-disclosure did not violate Rule 16.[67]

For similar reasons, the Court holds that the trace information was not material to the preparation of the defense in the case at bar. The Court finds that the trace here was in some ways unfavorable to Defendant's theory of the case. The trace report dispelled Defendant's theory that the firearm was perhaps a police-issued weapon, an implication from the defense's cross-examination of the government's firearms expert. The report indicates that the weapon was sold by Guns & Ammo located in Memphis, Tennessee, to an individual named Timothy Ray Rowberry. On its face, the trace also did nothing to negate the other proof that Defendant possessed the weapon or to buttress Defendant's theory that the arresting officers may have planted the weapon. Defendant argues that he was prejudiced by the government's failure to disclose the trace because

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[63] *Dobbins*, 2012 WL 1662453, at * 7.

[64] *Id.* at *2.

[65] *Id.*

[66] *Id.* at * 7 (citing *Lykins*, 428 F. App'x at 624).

[67] *Id.*

he had based his defense on what he thought were inadequacies in the government's investigation and because he was denied the chance to speak with the original purchaser of the gun. However, the Court finds that these are precisely the kinds of arguments the Sixth Circuit rejected in *Lykins* and *Dobbins*. At best, Defendant argues that he would have reconsidered his attack on the thoroughness of the police investigation and "formulated a more effective defense strategy." As for Defendant being denied the opportunity to question the original owner, the Court would simply point out that the trace indicated the firearm was originally sold in 1987, a matter of twenty-one years before Defendant's arrest for possessing it.[68] Defendant has only speculated that the original owner may have had relevant information about the weapon. Because Defendant has not shown that the firearms trace would have altered the quantum of proof in his favor, the Court holds that the trace information was not material to the preparation of the defense. Therefore, no violation of Rule 16 occurred as to this evidence.

Even if the Court had held that the trace summary information was material to the preparation of the defense, Defendant has not demonstrated that the late disclosure actually prejudiced his defense. In this case, the late-disclosure "did not materially affect the verdict, given the substantial evidence supporting the government's case."[69] The government's proof showed that Defendant was observed in actual possession of the firearm in his pocket and that Defendant admitted to the arresting officers that he had the weapon. The jury heard no evidence to refute this

[68] *See* ATF Firearms Trace Summ. (D.E. # 242-6).

[69] *See Phillip*, 948 F.2d at 251 (holding Rule 16 error harmless under Fed. R. Crim. P. 52(a) unless "more probable than not that the error materially affected the verdict").

testimony.[70] Furthermore, the Court finds that its ruling to prohibit argument about the trace never deprived Defendant of the opportunity to pursue his theory that the gun was planted and that he never possessed it. During cross-examination of Special Agent Allen, the defense elicited testimony that the make and model of the weapon in this case, a Smith and Wesson .357 magnum, was common police issue at one time.[71] The defense also created the inference that no trace had been completed on the weapon by getting Special Agent Allen to admit that he did not know if a trace was performed on the firearm.[72]

While it is true that the defense was not allowed to argue to the jury directly that no trace was actually performed, Defendant went to great lengths to suggest that the arresting officers had planted the firearm on Defendant.[73] The defense called into question the credibility of Officer Reese and

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[70] It is true that both Stroder and Sullins testified that they did not see Defendant in possession of the firearm or the narcotics. However, both men also admitted that they could only see the front of Defendant's pants, and not the back pocket where Officer Reese found the gun or Defendant's hands.

[71] Trial Tr. 313:16–25.

[72] It was at this point that the government came forward with evidence of the trace. Rather than permit the government to introduce the evidence either in its case-in-chief or in rebuttal, the Court excluded the evidence at Defendant's request. Defendant's only objection is that the Court did not permit him to argue to the jury that there was evidence of a firearm trace in this case. Defendant has cited no authority and the Court is aware of none that would permit counsel to make an argument to a jury that counsel knew to be false or unsupported in the evidence.

[73] At the motion hearing, counsel for Defendant made the peculiar argument that the Court should place little weight on what arguments the defense actually made to the jury because the jury was instructed not to consider arguments of counsel as evidence. At the same time, counsel for Defendant contended that the defense was prejudiced, precisely because it could not make an argument to the jury. That is, Defendant was not permitted to argue to the jury that a firearms trace was not done in this case. As discussed herein, the defense arguably created an inference through Special Agent Allen's cross-examination that no trace was done in this case. The Court simply prohibited the defense from taking the additional step of highlighting that testimony to the jury and arguing no trace was performed when counsel knew that it had.

pointed out a number of apparent inconsistencies in his testimony. Importantly, the defense argued that Officer Reese and Officer Rodgers were the only two witnesses to testify that they saw the firearm in Defendant's pocket. Counsel also stressed that Officer Reese incorrectly recorded the serial number on the weapon in one report and that Defendant's fingerprints were not found on the gun. Based on that evidence, counsel argued in closing, "I suggest to you the only theory that really wasn't even discussed that should have been perhaps was maybe [Defendant] didn't possess it. That's why his fingerprints aren't on it. If he never touched it, his fingerprints wouldn't be on it. It is their burden to prove to you beyond a reasonable doubt that he possessed it."[74] In light of the record, the Court finds that the defense had ample opportunity to persuade the jury that the government had not proven Defendant's possession of the firearm beyond a reasonable doubt. Defendant has not shown how his defense was prejudiced by the late disclosure of the trace information. Therefore, the Court finds no merit in Defendant's assignment of error as to this issue.[75]

As a final point on the subject of the firearms trace, the Court would stress that its holding on the issue of whether the trace information was material to the preparation of the defense in this

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[74] Trial Tr. 518:19–24.

[75] The Court also notes that Defendant moved for mistrial at the time the Court made its ruling on the exclusion of the firearms trace and prohibited counsel from arguing that no trace was performed. The Court denied the motion for mistrial. Later in the trial, Defendant asked the Court to reconsider its ruling, at which time the Court also denied the motion. Defendant has not raised the mistrial rulings in his Motion for New Trial. Nevertheless, the denial of a motion for mistrial based on a Rule 16 discovery violation is proper where the government's violation was not willful. *United States v. Clark*, 385 F.3d 609, 621–22 (6th Cir. 2004). Counsel for Defendant conceded at trial that the government's failure to produce the firearms trace was inadvertent. Trial Tr. 445:17–19 ("[W]e are not accusing the government attorneys of doing anything improper. It was just not produced. It was inadvertent. We are not suggesting it was intentional.").

case is limited to the facts of the case. The Court finds that whether a firearms trace summary is material to preparation of a defense will generally be fact-intensive. Furthermore, as the Court stated during the motion hearing, the problems surrounding the disclosure of the trace information in the case at bar were largely avoidable, and both sides bear some responsibility for the late disclosure of the trace reports. Therefore, the Court finds that in future cases involving firearms offenses, the best practice would be for the United States to produce trace information in discovery. Likewise, the best practice for the defense would be to request the trace information specifically, rather than relying on blanket Rule 16 discovery requests.

B. Reese's Incident Report

Defendant also argues that the government failed to comply with Rule 16 by not producing the incident report prepared by Officer Reese. The Court finds that no discovery violation occurred because the incident report produced in discovery was substantially the same document that Reese referred to during his trial testimony.[76] The Court has previously discussed the discrepancies between the SCSD version of the incident report and the MPD version. The only information that did not appear in the version Defendant received in discovery was the personal identifying information for two witnesses named in the incident report. In the specific context of Rule 16, Defendant has not shown how information in the version he did not previously receive in discovery would have altered the quantum of proof in his favor. Therefore, the Court holds that no violation of Rule 16 occurred as to the incident report.

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[76] *United States v. Collins*, No. 10-6353, 2012 WL 34375, at *2 (6th Cir. Jan. 9, 2012) ("But the supplemental reports did not differ from the incident report (which the prosecution provided to Collins) in any meaningful way, establishing that access to them was not material to the preparation of the defense.").

C. Hulley's Handwritten Notes

Likewise, the Court holds that the late disclosure of Hulley's handwritten notes did not violate Rule 16. In contrast to the other late-disclosed evidence already discussed, the government did not produce Hulley's handwritten notes until several months after the trial was over. Still Defendant has not shown how any information in the notes was material to the defense or how the notes would have altered the quantum of proof in his favor. Defendant argues that the notes stated that the firearm at issue had a chrome finish; whereas, Officer Reese's report stated that the firearm he observed in Defendant's pocket appeared to be black. The Court would simply state that the firearm introduced into evidence had a chrome finish and black grip. Defendant has not shown how Hulley's notes would have altered the quantum of proof in his favor. Additionally, Defendant has failed to show how the government's failure to produce the handwritten notes amounted to anything more than a harmless error. Nothing in the notes contradicted Hulley's formal report or her trial testimony. The Court holds that the government's non-disclosure of the handwritten notes does not rise to the level of a violation of Rule 16. Therefore, Defendant's Motion for New Trial is **DENIED** as to the issue of Rule 16 discovery violations.

IV. Admission of Prior Acts Evidence Under Rule 404(b)

Defendant next contends that the Court erroneously admitted evidence of his prior bad acts.[77] Specifically, Defendant objects to the Court's ruling allowing Franklin D. Stroder to testify that he had purchased crack cocaine from Defendant earlier on the day of Defendant's arrest.[78] Defendant

[77] Defendant raised this objection only in his initial Motion and not in the Supplemental Motion.

[78] The Court also permitted Stroder to testify that he had purchased crack from Defendant one or two other times in the two or three months before the arrest. Defendant has not

argues that the Court should not have admitted this evidence because it was not relevant to any of the offenses charged, was highly prejudicial, and led to jury confusion. The government relies on its arguments at trial in support of its position on this issue.

Pursuant to Federal Rule of Evidence 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," although such evidence might be relevant and admissible for other purposes, such as to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[79] Before the Court may admit Rule 404(b) evidence, it must (1) determine whether there is sufficient evidence that the prior acts occurred; (2) determine whether the other act is admissible for one of the proper purposes outlined in the rule; and (3) apply Rule 403 balancing to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.[80] It is well-established that evidence of prior drug trafficking offenses may be relevant to an accused's specific intent to commit the crime of possession with intent to distribute a controlled substance, and therefore such evidence is generally admissible under Rule 404(b).[81]

The Court finds that its bench ruling admitting this evidence was not erroneous. Here the government sought to admit Stroder's testimony that he had purchased crack cocaine from

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specifically objected to that ruling. Nevertheless, the Court will consider it here.

[79] *United States v. Niece*, 297 F. App'x 442, 446 (6th Cir. 2008) (quoting Fed. R. Evid. 404(b)).

[80] *United States v. Hardy*, 643 F.3d 143, 150 (6th Cir. 2011) (citation omitted).

[81] *E.g. Hardy*, 643 F.3d at 151; *United States v. Davis*, 547 F.3d 520, 527 (6th Cir. 2008); *United States v. Ayoub*, 498 F.3d 532, 548 (6th Cir. 2007); *United States v. Myers*, 102 F.3d 227, 234 (6th Cir. 1996); *United States v. Elkins*, 732 F.2d 1280, 1286 (6th Cir. 1984).

Defendant on prior occasions. The government argued that Stroder's testimony was being offered to prove Defendant's intent at the time of his arrest to distribute a substance containing cocaine base. The parties agreed that the Court should first hear Stroder's testimony outside of the presence of the jury and then determine whether there was sufficient evidence that the prior act of drug distribution had occurred. Stroder testified about the circumstances which brought him to the Northside Manor Apartments on June 14, 2008, and about his prior drug transactions with Defendant for the sale of crack cocaine at the same apartment complex. The Court made its determination that Stroder's testimony was sufficient evidence that Defendant had previously sold drugs to him in the same location earlier on the day of the arrest and on one or two other occasions in the two to three months prior to June 2008. The Court further concluded that the evidence was relevant to Defendant's specific intent to possess the cocaine base with the intent to distribute it. The Court did not find that the probative value was not substantially outweighed by the prejudicial effect of the evidence. At that point, the Court allowed Stroder to testify before the jury.[82]

The Court disagrees that this evidence was irrelevant or unfairly prejudicial to Defendant. The government in this case had the burden to prove beyond a reasonable doubt that Defendant possessed the cocaine base and that he did so with intent to distribute. The Sixth Circuit long ago recognized that "prior acts evidence may often be the only method of proving intent" in the prosecution of a specific intent crime such as possession of narcotics with an intent to distribute.[83]

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[82] The Court did not allow Stroder to testify about previously visiting an apartment he believed to have been Defendant's residence and seeing a weapon similar to the .357 Defendant was charged with possessing. The Court found that this evidence was unduly prejudicial to Defendant under Rule 403 and accordingly excluded it.

[83] *United States v. Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994).

As such, "where there is thrust upon the government, either by virtue of the defense raised by the defendant or by virtue of the elements of the crime charged, the affirmative duty to prove that the underlying prohibited act was done with a specific criminal intent, other acts evidence may be introduced under Rule 404(b)."[84] Defendant put at issue his reasons for approaching a parked car in the apartment complex. The Court finds that prior bad acts evidence that Defendant had sold crack to one of the occupants of the car earlier on the same day and in the same location was highly relevant to Defendant's intent in approaching the parked car just before his arrest.

Furthermore, the prior acts evidence was not unfairly prejudicial. While Defendant has argued that this evidence was highly prejudicial, Defendant has not shown that the evidence was unfairly prejudicial. Clearly Stroder's testimony about Defendant's prior acts of drug distribution was damaging to Defendant's case. However, Defendant has not shown that evidence of his prior drug sales to Stroder tended "to suggest a decision on an improper basis."[85] For this reason, Defendant has not demonstrated that the prior bad acts evidence was unfairly prejudicial.

Finally, Defendants has suggested that Stroder's testimony confused the jury. The Court finds no basis for this argument. Following Stroder's testimony, the Court gave the jury the following limiting instruction about the evidence of Defendant's prior drug sales to Stroder:

> Let me advise you that this evidence is being admitted only for you to consider two issues. The first issue is whether the defendant had the intent to possess the drugs alleged in the indictment, and the second one is whether the defendant had the intent to distribute the drugs named in the indictment. You cannot consider this testimony as evidence that

[84] *Id.*

[85] *United States v. Poulsen*, 655 F.3d 492, 508 (6th Cir. 2011).

the defendant committed the crime that he's on trial for now . . . .[86]

Additionally, the Court used Sixth Circuit Pattern Jury Instruction 7.13 to charge the jury, explaining that the jury could consider evidence of Defendant's prior acts only as to the issue of "intent, plan or knowledge."[87] The instruction also directed the jury not to consider the evidence for any other purpose and reminded them that Defendant was not on trial for any offenses other than those charged in the indictment.[88] The Court's limiting instructions after Stroder testified and again at the conclusion of the proof clearly explained how the jury could use the prior acts evidence. "Juries are presumed to follow their instructions, and the record provides no basis to believe that the jury here did otherwise."[89] Under the circumstances, the Court finds no reason to conclude that the jury was confused by Stroder's testimony regarding Defendant's prior acts of drug distribution. Therefore, the Court finds this assignment of error related to the admission of Defendant's prior acts to be without merit.

V. Due Process Rights

Defendant has argued that the accumulation of error at trial has resulted in the denial of his due process rights. "Individually non-prejudicial errors, when taken together, may result in a

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[86] Trial Tr. 180:18–25.

[87] Jury Instructions 21 (D.E. # 216).

[88] *Id.*

[89] *United States v. Cunningham*, — F.3d —, 2012 WL 1500180, at * 22 (6th Cir. May 1, 2012) (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (internal quotation marks and citation omitted)).

fundamentally unfair trial that violates a defendant's due process rights."[90] The Court has held that none of the assignments of error had merit and therefore, "the accumulation of non-errors cannot collectively amount to a violation of due process."[91] The Court has held in the alternative that the supposed errors did not actually prejudice Defendant or were otherwise harmless and did not require a new trial. Even taking these supposed harmless errors together, the accumulation of harmless errors does not constitute a due process violation in this case. Therefore, Defendant's Motion for New Trial is **DENIED** as to this issue.

VI. Reconsideration of Motion to Suppress

Defendant next seeks reconsideration of the Court's previous orders denying his motion to suppress. Before being transferred to the undersigned, the Court had adopted the Magistrate Judge's report and recommendation that the motion to suppress be denied.[92] In particular, the Court credited Officer Reese's overall testimony about the circumstances of the arrest and found that Reese was approximately eight feet away from Defendant when he observed the plastic baggie and the firearm before approaching him.[93] The Court drew attention to the testimony that Officer Reese had called for back-up from the marked unit even though Officer Reese earlier advised the marked unit to detain another vehicle.[94] The Court concluded that "Officer Reese's testimony that his observation

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[90] *United States v. Stuckey*, 253 F. App'x 468, 492 (6th Cir. 2007) (citing *United States v. Pierce*, 62 F.3d 818, 834–35 (6th Cir. 1995)).

[91] *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004) (quotation omitted).

[92] *See* Order Adopting the Magistrate Judge's Report & Recommendation as Modified Nov. 2, 2010 (Mays, J.) (D.E. # 86).

[93] *Id.* at 10.

[94] *Id.*

of a handgun on Baker's person led to Reese's safety concern is the only explanation in the record for this otherwise unusual request."[95] As a result, the Court found Officer Reese's version of events to be more credible than Defendant's.

Just before trial commenced, Defendant filed a motion for reconsideration of the Court's suppression ruling.[96] Defendant argued that he had obtained new evidence during discovery that was not presented at the first suppression hearing and sought to revisit the suppression issue on the basis of these unspecified new facts. Defendant also pointed out that the Court had appointed new counsel for him since the first suppression hearing. The United States responded in opposition to Defendant's motion. The Court denied the motion holding that reopening the suppression hearing would prejudice the government and that the motion was untimely under the case's scheduling order deadlines.[97] The Court also rejected Defendant's suggestion that the suppression hearing could occur on the morning of the first day of trial. As for Defendant's claim about newly discovered evidence, the Court concluded that Defendant had not described the evidence with sufficient detail and had failed to show why the new evidence was not produced earlier.

Approximately thirty minutes after the Court entered its order denying reconsideration, Defendant filed a reply brief without leave and offered more new evidence in support of his motion.[98] Defendant argued that on November 28, 2011, the government had produced Deputy

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[95] *Id.*

[96] Def.'s Motion to Reconsider & Reopen Suppression Hr'g, Nov. 28, 2011 (D.E. # 184).

[97] *See* Order Denying Motion to Reconsider & Reopen Suppression Hr'g, Dec. 1, 2011 (Mays, J.) (D.E. # 197).

[98] Def.'s Reply Dec. 1, 2011 (D.E. # 198).

Dean's firearms screening report to the defense as part of the government's *Brady*, *Giglio*, and *Jencks* disclosures. As previously discussed herein, Dean's report included a statement that Officer Reese and Officer Rodgers had observed Defendant's activities at a distance of 400 to 500 feet. Defendant also cited notes made by Dean about his interview with Danny Sullins, the driver of the car Defendant approached just before his arrest. According to Dean's notes, Sullins indicated to him that he did not see a gun or a baggie of drugs in Defendant's possession at the time of the arrest. In his reply brief, Defendant argued that these statements contradicted Officer Reese's testimony at the suppression hearing and undermined the Court's credibility determination in the earlier order denying the motion to suppress. In turn, the new evidence called into question whether the officers had probable cause to arrest Defendant. Defendant also argued that the government's failure to produce this evidence before that time constituted a *Brady* violation. As a result of this last contention, the government filed a motion of its own seeking clarification on the *Brady* issue prior to trial.[99] The government maintained that no *Brady* violation had occurred.

The Court issued another order in which it again declined to reopen the suppression issue.[100] The Court emphasized that Defendant's continued filings threatened the finality of the previous orders on suppression and essentially raised issues more applicable to Defendant's innocence or guilt, and not the police conduct in this case. The Court also held that the government had satisfied its *Brady* obligations by producing the evidence Defendant described in his reply prior to trial. As such, the government had no duty to produce the evidence for purposes of the suppression hearing.

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[99] Pl.'s Mot. for Clarification, Dec. 2, 2011 (D.E. # 199).

[100] Order Denying Def.'s Mot. for Permission to File Reply, Dec. 3, 2011 (Mays, J.) (D.E. # 203).

Perhaps most significantly, the Court concluded that the new evidence Defendant cited would not alter its holding on the motion to suppress. In sum, the new evidence did not dispute Officer Reese's testimony that Defendant possessed narcotics and a firearm. Therefore, the Court struck the reply brief from the record and construed it as a motion for leave to file a reply, which was denied.[101]

In his Motion for New Trial, Defendant requests that the undersigned reconsider the previous suppression orders of the Court in light of the trial testimony of Deputy Dean and Danny Sullins. The Court heard trial testimony from Deputy Dean about Officer Reese's statement in the firearms screening report that Reese and Rodgers were 400 to 500 feet away from Defendant as they observed the firearm and the hand-to-hand transactions. The Court also heard Sullins testify that he never saw a firearm or narcotics in Defendant's possession at the time of the arrest.[102] Defendant now argues that in order to preserve the issue for appeal, he must make a post-trial motion for the Court to reconsider the pre-trial suppression rulings in light of evidence presented at trial. The government responds that Judge Mays already considered the evidence about Dean's report and Sullins' testimony and concluded that it would not alter his ruling on the motion to suppress.

The Court holds that Defendant's request for reconsideration of the suppression ruling is not well taken. First, the authority Defendant cites for the proposition that he must again ask the Court to reconsider the suppression order so that he can preserve the issue for appeal is arguably inapposite. The Sixth Circuit has stated that "[u]nless the district court is given an opportunity to

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[101] Based on the Court's ruling, it issued a separate Order Denying the Government's Motion for Clarification, also on December 3, 2011 (D.E. # 204).

[102] Although Defendant's Motion for New Trial does not mention it, the Court also heard Franklin D. Stroder testify that like Sullins, he never saw Defendant possess a firearm or a plastic baggie containing drugs at the time of the arrest. Trial Tr. 170:25–171:19.

correct the error, an appellate court cannot review evidence presented at trial which casts doubt upon a pre-trial suppression motion."[103] In *United States v. Thomas*, the defendant argued on appeal that "the trial testimony undermined the suppression hearing testimony of the government's witnesses."[104] Similarly, Defendant argues here that the trial testimony of Dean and Sullins undermines the credibility of Officer Reese and specifically his testimony that he observed Defendant with the firearm at very close range. However, unlike the scenario presented in *Thomas*, the Court has already had an opportunity to "correct the error" in light of new evidence. At the very least, Judge Mays considered the new evidence in his December 3, 2011 order, in which he found that the Dean report and the notes about Sullins's statement to Dean would not alter his ruling on the motion to suppress.[105] On that basis alone, the Court finds the case law Defendant relies on distinguishable.

Even if the Court accepted Defendant's preservation argument and reached the merits of the motion for reconsideration, the Court would not reconsider the previous rulings. Although Defendant's Motion for New Trial does not develop the reasons for reconsideration, his theory

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[103] *United States v. Thomas*, 875 F.2d 559, 562 n.2 (6th Cir. 1989).

[104] *Id.*

[105] The Court would also note that Judge Mays presided over this matter at all times up to the trial and therefore handled all pre-trial matters including the motion to suppress. The plan for the criminal rotation docket calendar adopted for the Western Division for this District states, "The judge to whom the case is assigned will handle all pretrial matters, including any motions for continuance or other pending motions, or changes of plea tendered prior to trial." Plan for Criminal Rotation Docket Calendar 3. As a result, Judge Mays, and not the undersigned, was in the unique position to rule on the suppression issue, first by considering only the record presented at the suppression hearing and later on reconsideration of that evidence along with the evidence in Dean's report and Sullins's statement to the police. Under these circumstances, the Court would conclude that Defendant has preserved his objections to the suppression rulings for purposes of appeal.

appears to be that the new evidence would cast doubt on Officer Reese's credibility about what he saw. In turn, if the Court found that Officer Reese did not actually observe Defendant with the plastic baggie of narcotics or the firearm, then Officer Reese arguably lacked probable cause to approach Defendant in the first place. Following this theory to its logical conclusion, any evidence seized from Defendant should have been suppressed as fruit of the poisonous tree. The Court finds this theory problematic, primarily because the testimony of Dean and Sullins is insufficient to discredit Officer Reese's version of events. Defendant relies heavily on Deputy Dean's report to argue that Officer Reese was inconsistent about how far away he was when he observed Defendant's activities immediately prior to the arrest. Whatever the distance was, the fact remains that Officer Reese stated that he saw the transaction. The fact also remains that Officer Reese and Officer Rodgers subsequently observed Defendant at closer range as they were leaving the complex and spotted the firearm. It is undisputed that Officer Reese radioed for back-up at that point, requesting that a marked unit assist even though Reese knew the marked unit was conducting a stop. Officer Roger Barbey, the officer in the marked unit, testified at trial, that "[o]ur radio keyed up with the plain clothes officers with an urgent call to come back to where they were"[106] and explained that the voice on the radio sounded "urgent" both by tone of voice and in volume.[107] As Judge Mays aptly stated in his initial order on suppression, "Officer Reese's testimony that his observation of a handgun on Baker's person led to Reese's safety concern is the only explanation in the record for this otherwise unusual request."[108] For the same reasons, Sullins's testimony that he never saw

[106] Trial Tr. 229:8–9.

[107] *Id.* at 233:22–234:4.

[108] Order Adopting the Magistrate Judge's Report & Recommendation as Modified 10.

Defendant in possession of a weapon or narcotics does not undermine the officers' testimony that Defendant had a gun and even stated to them that he had a gun. The Court holds that this additional evidence would not alter the Court's previous ruling on probable cause. Therefore, Defendant's Motion for Reconsideration is **DENIED**.

VII. Sufficiency of the Evidence

Defendant has also moved for a judgment of acquittal under Rule 29 of the Federal Rules of

Criminal Procedure. As previously stated, "[t]he test for denial of a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is the same as the test for reviewing a claim that the evidence is insufficient to support a conviction."[109] In reviewing claims for sufficiency of the evidence to support a conviction, the Court should review the record in the light most favorable to the prosecution and grant relief only if it is found that upon the evidence adduced at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt.[110] The government must receive the benefit of all inferences which can reasonably be drawn from the evidence.[111] In deciding a motion for judgment of acquittal, the district court may not make its own determinations with respect to the credibility of witnesses or the weight to be given such evidence.[112] Under the

[109] *United States v. Pennyman*, 889 F.2d 104, 106 (6th Cir. 1989).

[110] *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *see also United States v. Henderson*, 626 F.3d 326, 341 (6th Cir. 2010).

[111] *Glasser v. United States*, 315 U.S. 60, 80 (1942).

[112] *United States v. Graham*, 622 F.3d 445, 448 (6th Cir. 2010).

Rule 29 standard, "circumstantial evidence alone is sufficient to sustain a conviction,"[113] and such evidence need not remove every reasonable hypothesis except that of guilt.[114] The Sixth Circuit has stated that a defendant claiming insufficiency of the evidence bears a "heavy burden."[115]

Defendant made an initial Rule 29 at the conclusion of the government's proof, which the Court denied.[116] In addition to the government's case-in-chief, Defendant called Deputy Patrick Dean and Shawn Lovejoy ("Lovejoy"), a communication supervisor for MPD. Deputy Dean testified about the preparation of his firearms screening report, which the Court has already discussed in some detail. Lovejoy testified about the event chronologies of the officers' activities leading up to Defendant's arrest. Viewing all of the evidence at trial in the light most favorable to the government and giving the government the benefit of all inferences reasonably drawn from the evidence, the Court holds that the government presented sufficient evidence to support the conviction on all three counts in this case.

First, a rational trier of fact could have found Defendant guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) beyond a reasonable doubt. In order to convict Defendant of this charge, the government had to prove (1) that Defendant had a previous felony conviction; (2) that following his conviction, Defendant knowingly possessed the firearm; and (3) that the firearm crossed a state line prior to the alleged possession.[117] The parties entered into a

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[113] *Id.*

[114] *United States v. Clay*, 667 F.3d 689, 702 (6th Cir. 2012) (citation omitted).

[115] *Henderson*, 626 F.3d at 340–41.

[116] Trial Tr. 377:6–11.

[117] *United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007).

stipulation that Defendant had a prior felony at the time of his arrest, thereby establishing the first element of the offense. With respect to the second element, the proof showed that Officer Reese observed a handgun in Defendant's back pocket and that Officer Reese seized the gun from Defendant's pocket when he approached him. There was also evidence that Defendant stated to the officers that he had a gun. Based on this evidence, a rational juror could have found that Defendant was in actual possession of the firearm beyond a reasonable doubt. Regarding the third element, the evidence further showed that the gun was manufactured by Smith & Wesson in the state of Massachusetts. This evidence was sufficient to prove beyond a reasonable doubt that the firearm traveled in interstate commerce.[118] Therefore, the Court concludes that there was sufficient evidence to support Defendant's conviction on count one.

Likewise, the Court holds the evidence was sufficient to support Defendant's conviction on count two, possession with intent to distribute a controlled substance. In order to establish a violation of 21 U.S.C. § 841(a)(1), the government had to prove the following elements: (1) knowing (2) possession of a controlled substance (3) with intent to distribute.[119] The evidence showed that Officer Reese observed Defendant engage in one hand-to-hand transaction and then appear moments later in the same area holding a plastic baggie with an unidentified substance. Upon approaching Defendant, Officer Reese subsequently seized from Defendant's hand the plastic baggie containing a substance that was later tested and found to be crack cocaine. Dana Permenter of TBI testified that

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[118] *United States v. Campbell*, 436 F. App'x 518, 529 (6th Cir. 2011) (quoting *United States v. Fish*, 928 F.2d 185, 186 (6th Cir. 1991) ("[E]vidence that the firearm was manufactured outside the state of possession is sufficient to prove an interstate commerce nexus in [a § 922(g)] case.").

[119] *United States v. Ham*, 628 F.3d 801, 807–808 (6th Cir. 2011) (citations and quotations omitted).

the substance tested positive for cocaine base and that the cocaine base is also known as crack cocaine. The Court finds that this evidence was sufficient to establish the first two elements of the offense beyond a reasonable doubt. As for Defendant's intent to distribute, this same evidence along with evidence that Defendant was in possession of $852 in currency and had sold crack to Stroder earlier in the day on June 14, 2008, was sufficient to establish Defendant's intent to distribute. Therefore, a rational juror could have found Defendant guilty of possession of a controlled substance with intent to distribute beyond a reasonable doubt.

There was also sufficient evidence from which a rational trier of fact could have found Defendant guilty beyond a reasonable doubt of the charge in count three. In order to establish a violation of 18 U.S.C. § 924(c), the government had to prove (1) that the Defendant committed the drug trafficking crime of possession with intent to distribute a controlled substance; and (2) that during or in relation to that crime, Defendant used or carried a firearm.[120] Here the Court has already concluded that sufficient evidence was introduced to support Defendant's conviction for the drug trafficking offense charged in count two. With respect to the "use or carrying" element, the Sixth Circuit has held that evidence that a defendant had a weapon in his waistband at the time of a drug trafficking offense was sufficient to establish this element.[121] Furthermore, there must exist some nexus between the carrying and the criminal activity, which is to say "the firearm must have some

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[120] *United States v. Hopper*, 436 F. App'x 414, 412 (6th Cir. 2011); *United States v. Cecil*, 615 F.3d 678, 692–93 (6th Cir. 2010). The Sixth Circuit has recently restated that § 924(c) "criminalizes two distinct offenses: using or carrying a firearm during and in relation to a drug offense, and possessing a firearm in furtherance of a drug offense." *United States v. Kelsor*, 665 F.3d 684, 691–92 (6th Cir. 2011). The indictment in the case at bar charged Defendant only with using or carrying the firearm during and in relation to the drug offense.

[121] *United States v. Bonas*, 434 F. App'x 422, 430 (6th Cir. 2011).

purpose or effect with respect to the drug trafficking crime" and "must at least facilitate or have the potential of facilitating the drug trafficking offense."[122] The Court holds that there was sufficient evidence from which a rational juror could find that Defendant carried the firearm during the drug trafficking offense and that the gun had the potential to facilitate the drug offense. Officer Reese testified that Defendant was carrying the gun in such way as to display it for others to see, which would in turn protect Defendant from any potential robbery.[123] Therefore, the Court concludes that there was sufficient evidence to convict Defendant of this offense beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the government, Defendant's Motion for Judgment of Acquittal must be **DENIED**.

VIII. Court's Inquiry

Defendant's final request for relief in his Supplemental Motion is his request for an inquiry "to determine if there is any additional discovery, *Brady*, *Giglio*, or *Jencks* material that the Government has failed to produce in this matter." Defendant argues without citation to any authority that his request for an inquiry is based on the government's "numerous late disclosures both during and post-trial." The United States responds that such an inquiry is unnecessary because, with the exception of Sgt. Hulley's handwritten notes, the government has "exceeded its discovery

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[122] *United States v. Walls*, 293 F.3d 959, 968 (6th Cir. 2002) (quoting *Smith v. United States*, 508 U.S. 223, 238 (1993) (internal quotation marks omitted)).

[123] Trial Tr. 49:3–9 ("[T]he gun was visible. And what I got out of it, that he wanted the gun to be seen for some sense of protection because I don't think he was trying to hide the gun. It was in his back pocket and the way that it was propped up, I think it was for everyone in the complex to see I guess maybe so he didn't get robbed."). *See United States v. Combs*, 369 F.3d 925, 940 (6th Cir. 2004) ("Law enforcement officers may testify concerning the methods and techniques employed in an area of criminal activity and to establish modus operandi of particular crimes.") (internal quotation marks and citations omitted).

obligations." The Court would add that this is Defendant's only argument based on *Brady* or *Giglio* which his Motion for New Trial raises.

The Court finds that Defendant's request for an inquiry is not well taken. First, Defendant has failed to state with particularity the grounds for the inquiry or the possible scope of the inquiry in either of the briefs that are properly before the Court. Defendant filed a timely initial Motion for New Trial but without mentioning his request for an inquiry. Putting aside the failure to raise the issue in his opening brief, the Court did grant Defendant an extension of time to file a more fully developed brief in support of his Motion after he had received the trial transcript. Even when Defendant had the benefit of the trial transcript, Defendant requested the discovery-*Brady*-*Giglio*-*Jencks* inquiry only on the last page and in the last paragraph of his Supplemental Motion and without citation to any legal authority. Defendant did not request an inquiry into any specific document much less lay an appropriate foundation for *in camera* production of a document. Defendant simply asks the Court to determine if such material even exists. Under the circumstances, Defendant has not shown why such an inquiry is required.

It is true that Defendant did seek leave to file a reply brief; however, the Court denied that motion based on the already significant amount of briefing the parties had filed in connection with the Motion for New Trial. The Court has granted no other extensions of the fourteen-day time limit for filing a motion for new trial provided in Rule 33(b)(2) of the Federal Rules of Criminal Procedure. Even so, Defendant filed a separate motion for hearing, in which he actually expounded on his Motion for New Trial and the Supplemental Motion and developed his request for an inquiry, listing several documents he believes the Court should investigate in an evidentiary hearing and in

camera review of the government's case file.[124]

The Court will not consider the motion for hearing. It appears to the Court that Defendant's motion for hearing was simply a means by which Defendant could circumvent the Court's orders and further expand the number of issues he might raise in support of his Motion for New Trial but outside of the time limit for filing motions for new trial and without leave of Court. Defendant's motion for hearing was filed on April 18, 2012, more than four months after the jury returned its verdict and well beyond the fourteen-day time limit for filing motions for new trial under Rule 33(b)(2). Were the Court to grant Defendant's motion for hearing and take up all of the new issues raised for the first time in the motion as grounds for a new trial, the deadlines set out in the Federal Rules of Criminal Procedure would be rendered meaningless. Furthermore, as Defendant's motion for hearing suggests, a hearing and inquiry into the several issues Defendant has now raised for the first time would undoubtedly lead to requests for consideration of even more issues, denying the proceedings any finality for some months. For these reasons, the Court declines to consider Defendant's motion for hearing and specifically Defendant's request for an open-ended inquiry into the government's case file.

Second, even if the Court considered the merits of Defendant's request for an inquiry, Defendant has cited no authority for post-trial procedures that would require the Court to determine whether there existed discoverable information in the files of the government pursuant to Rule 16,

[124] *See* Mot. for Hr'g Apr. 18, 2012 (D.E. # 249). The United States has filed a motion to strike Defendant's motion for hearing, arguing that the motion is essentially the same document as Defendant's proposed reply brief (D.E. # 250).

Jencks, or *Giglio*.[125] The Court is aware of authority that permits a district court to undertake an *in camera* examination of withheld files or documents to determine whether they might contain *Brady* material.[126] For example, in *Ritchie*, the Supreme Court held that an inquiry might be advisable where a defendant charged with child molestation was denied access to the child's Children and Youth Services ("CYS") records during pretrial discovery.[127] Even the prosecution in *Ritchie* did not have access to the files because they were privileged under state law.[128] The Supreme Court remanded the case for *in camera* review of the file in order for the district court to decide "whether it contains information that probably would have changed the outcome of [the defendant's] trial."[129] Based on *Ritchie*, the Sixth Circuit has held that in order to obtain *in camera* review of withheld information under *Brady*, a defendant must at the very least "establish a basis for his claim that the records sought contain material evidence, even though he cannot articulate with specificity the materiality of those records."[130]

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[125] *E.g. United States v. Fletcher*, 295 F. App'x 749, 753 (6th Cir. 2008) (holding that a district court is not obligated to conduct an *in camera* review of government files because "defendant bears the burden of proving that a 'statement' for purposes of the Jencks Act exists and is covered by the Act's disclosure requirements"); *United States v. Carmichael*, 232 F.3d 510, 516–17 (6th Cir. 2000) (commenting in dicta that "we do not believe that it would be a satisfactory solution to force district judges to scrutinize large volumes of sealed materials whenever defense counsel request that they do so . . .").

[126] *Penn. v. Ritchie*, 480 U.S. 39, 43 (1987); *United States v. White*, 492 F.3d 380, 409–10 (6th Cir. 2007).

[127] *Ritchie*, 480 U.S. at 44–45.

[128] *Id.* at 57.

[129] *Id.* at 58.

[130] *White*, 492 F.3d at 410 (quoting *Ritchie*, 480 U.S. at 58 n.15) (internal quotation marks and ellipsis omitted).

In *United States v. White*, the Sixth Circuit held that even in the absence of such a showing, a hearing and *in camera* review of possible *Brady* material was required where the prosecution "made misrepresentations to the district court" about whether a potential expert witness had reviewed evidence and possible *Brady* material.[131] In *White*, the government had considered retaining a fraud examiner as a possible expert witness and asked the expert to review documents related to the charges of wire fraud and Medicare fraud in the case.[132] The expert did not testify at trial, and the defense only learned about the expert's involvement in the case when an industry publication reported that the expert received an award for fraud examination and listed the defendants' case as one of the expert's successful investigations.[133] The government opposed the defendants' post-trial motion to compel production of documents submitted to the expert or produced by the expert, stating that the expert never reviewed actual evidence in the defendants' case.[134] In a subsequent filing, the government reversed its position and admitted that it had submitted documents to the expert.[135] Due to the government's equivocation and its ongoing efforts to oppose production of the materials, the Sixth Circuit remanded with instructions to conduct an *in camera* review of the documents for the purpose of determining whether they constituted *Brady* material.[136]

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[131] *Id.* at 411 (distinguishing *United States v. Hernandez*, 31 F.3d 354, 360 (6th Cir. 1994) and *United States v. Carmichael*, 232 F.3d 510, 516–17 (6th Cir. 2000)).

[132] *Id.* at 408–409.

[133] *Id.* at 408.

[134] *Id.* at 411.

[135] *Id.*

[136] *Id.* at 413.

In the case at bar by contrast, Defendant's request for an inquiry is simply an invitation to comb the government's case file and make a document-by-document determination of whether Defendant was entitled to the information. According to Defendant, the only grounds for undertaking this inquiry is the government's late disclosure (or non-disclosure) of some evidence in this case, failures the Court has found to be inadvertent and harmless.[137] This is not a situation where Defendant has reason to know that specific *Brady* material might exist, and the government has misrepresented the very existence of the material to the Court. Under the circumstances, the Court holds that Defendant has not established why conducting an *in camera* review would be required under *Brady*. Therefore, Defendant's unsupported request for an inquiry is **DENIED**.

CONCLUSION

The Court concludes that none of the assignments of error Defendant briefs in his Motion and Supplemental Motion support his request for a new trial. The Court holds that Defendant has failed to show that the Court abused its discretion in its evidentiary rulings, that the government violated the Jencks Act, or that the government failed to produce discovery to which Defendant was entitled under Rule 16. Therefore, the Motion for New Trial and the Supplement Motion are **DENIED**. The Court further holds that Defendant's Motion for Reconsideration of the suppression issue is **DENIED**. The evidence presented at trial would not alter the Court's previous credibility findings or holdings on probable cause. Defendant's Motion for Judgment of Acquittal is **DENIED**. Viewing the evidence in the light most favorable to the government, a rational trier of

[137] *See United States v. Ferguson*, 385 F. App'x 518, 524–25 (6th Cir. 2010) (holding that hearing was not warranted for *Brady* violation where the prosecutor had disclosed information late but as soon as she discovered it and where the district court had an opportunity "to assess the impact of the violation on the jury verdict").

fact could have found Defendant guilty on all charges. Finally, Defendant's request for a hearing and inquiry into the government's case file is without merit and is therefore **DENIED**.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: June 1, 2012.