

Commonwealth of Pennsylvania

APPLICATION FOR
SEARCH WARRANT
AND AUTHORIZATION

COUNTY OF LEBANON

Docket Number
(Issuing Authority)Police Incident
Number: SW513Warrant Control
Number: SW513

Det. Mong. Sgt. Hopkins

Lebanon County Drug Task Force 717-228-4471

May 13, 2015

AFFIDANT NAME

AGENCY

PHONE NUMBER

DATE OF APPLICATION

IDENTIFY ITEMS TO BE SEARCHED FOR AND SEIZED (Be as specific as possible):

Pa Act 64 Controlled Substances; Drug Paraphernalia; Drug Proceeds; Electronic Media; Refer to Attachment

SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSON TO BE SEARCHED (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.):

234 Lehman Street, Lebanon City, Lebanon County, PA 17046, 513 Arnold Street, Lebanon City, Lebanon County, PA 17046, (Refer to attachment) outbuilding and areas/curtilage accessible to Julio Aviles, 2003 Chevrolet Tahoe bearing Pennsylvania Registration JPS7685 VIN: 3GNFK16Z93G126848

NAME OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED (If proper name is unknown, give alias and/or description):

Julio Aviles, Alex Aviles-Diaz, Roselin Sanchez-Nazario

VIOLATION OF (Describe conduct or specify statute):

Title 35 chap 6 780 113a30 PWID CS, 113a16 Poss CS, 113a32 Poss Para

DATE(S) OF VIOLATION

VARIOUS

☐ Warrant Application Approved by District Attorney - DA File No. _____

(If DA approval required per Pa.R.Crim.P. 202(A) with assigned File No. per Pa.R.Crim.P. 507)

☒ Additional Pages Attached (Other than Affidavit of Probable Cause)☒ Probable Cause Affidavit(s) MUST be attached (unless sealed below) Total number of pages: _____

TOTAL NUMBER OF PAGES IS SUM OF ALL APPLICATION, PROBABLE CAUSE AND CONTINUATION PAGES EVEN IF ANY OF THE PAGES ARE SEALED

The below named Affiant, being duly sworn (or affirmed) before the Issuing Authority according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at the particular premises or in the possession of the particular person as described above.

LEBANON COUNTY DRUG TASK FORCE

DETECTIVE, SERGEANT

Signature of Affiant

Agency or Address if private Affiant

Badge Number

Sworn to and subscribed before me this _____ day of _____ Mag. Dist. No. _____

(SEAL)

Signature of Issuing Authority

Office Address

SEARCH WARRANT
TO LAW ENFORCEMENT
OFFICER

WHEREAS, facts have been sworn to or affirmed before me by written affidavit(s) attached hereto from which I have found probable cause, I do authorize you to search the premises or person described, and to seize, secure, inventory and make return according to the Pennsylvania Rules of Criminal Procedure

☒ This Warrant shall be served as soon as practicable and shall be served only between the hours of 6:00 to 10:00 PM but in no event later than:☐ This Warrant shall be served as soon as practicable and may be served any time during the day or night but in no event later than: "

3:55 P M o'clock May 13 2015

* The issuing authority should specify a date not later than two (2) days after issuance. Pa.R.Crim.P. 205(4).

** If the issuing authority finds reasonable cause for issuing a nighttime warrant on the basis of additional reasonable cause set forth in the accompanying affidavits and wishes to issue a nighttime warrant, then this block shall be checked. Pa.R.Crim.P. 206(f)

Issued under my hand this 13th day of May 2015 at 3:55 P M o'clock

52nd

1-2-2012 (SEAL)

Signature of Issuing Authority

Mag. Dist. or Judicial Dist. No.

Date Commission Expires:

Title of Issuing Authority ☐ Magisterial District Judge ☒ Common Pleas Judge ☐☒ For good cause stated in the affidavit(s) the Search Warrant Affidavit(s) are sealed for 60 days by my certification and signature. (Pa.R.Crim.P. 211)

5-13-2015 (Date) (SEAL)

Signature of Issuing Authority (Judge of the Court of Common Pleas or Appellate Court Justice or Judge)

JPC 47A 05

TO BE COMPLETED BY THE ISSUING AUTHORITY

Exhibit A-001

Appendix A

Appx 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA




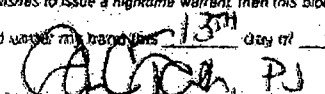
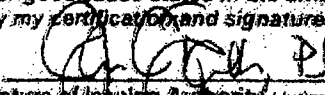
UNITED STATES OF AMERICA	: Criminal No. 1:15-CR-00181
	:
v.	: (Judge Jones)
	:
JULIO AVILES, SR.	: (Electronically Filed)

ORDER

AND NOW, this ____ day of _____, 2016, upon consideration of the
Motion to Suppress Physical Evidence and Statements, **IT IS HEREBY**
ORDERED that the motion is **GRANTED**.

BY THE COURT:

JOHN E. JONES, III
Judge, United States District Court

Commonwealth of Pennsylvania				APPLICATION FOR SEARCH WARRANT AND AUTHORIZATION	
COUNTY OF LEBANON					
Docket Number (Issuing Authority)	Police Incident Number	SW513	Warrant Control Number:	SW513	
Det. Mong, Sgt. Hopkins	Lebanon County Drug Task Force	717-228-4471	May 13, 2015		
AFFIDANT NAME	AGENCY	PHONE NUMBER	DATE OF APPLICATION		
<small>IDENTIFY ITEMS TO BE SEARCHED FOR AND SEIZED (Be as specific as possible)</small>					
Pa Act 64 Controlled Substances, Drug Paraphernalia, Drug Proceeds, Electronic Media, Refer to Attachment					
SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSON TO BE SEARCHED (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.)					
234 Lehman Street, Lebanon City, Lebanon County, PA 17046, 513 Arnold Street, Lebanon City, Lebanon County, PA 17046; (Refer to attachment) outbuilding and areas/curtilage accessible to Julio Aviles. 2003 Chevrolet Tahoe bearing Pennsylvania Registration JPS7685 VIN 3GNFK16Z93G126848					
NAME OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED (If proper name is unknown give alias and/or description)					
Julio Aviles, Alex Aviles-Diaz, Roselin Sanchez-Nazano					
VIOLATION OF (Describe conduct or specify statute)				DATE(S) OF VIOLATION	
Title 35 chap 6 780 113a30 PWID CS, 113a16 Poss CS, 113a32 Poss Para				VARIOUS	
<input type="checkbox"/> Warrant Application Approved by District Attorney - DA File No. <small>(If DA approval required per Pa.R.Crim.P. 202(A) with assigned File No. per Pa.R.Crim.P. 502)</small>					
<input checked="" type="checkbox"/> Additional Pages Attached (Other than Affidavit of Probable Cause)					
<input checked="" type="checkbox"/> Probable Cause Affidavit(s) MUST be attached (unless sealed below) Total number of pages: _____					
<small>THE TOTAL NUMBER OF PAGES IS SUM OF ALL APPLICATION, PROBABLE CAUSE AND CONTINUATION PAGES EVEN IF ANY OF THE PAGES ARE SEALED</small>					
The below named Affiant, being duly sworn (or affirmed) before the Issuing Authority according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at the particular premises or in the possession of the particular person as described above.					
 Signature of Affiant		LEBANON COUNTY DRUG TASK FORCE Agency or Address if private Affiant		DETECTIVE, SERGEANT Badge Number	
Sworn to and subscribed before me this _____ day of _____, Mag. Dist. No. _____					
 Signature of Issuing Authority		_____ Office Address			
SEARCH WARRANT TO LAW ENFORCEMENT OFFICER:					
WHEREAS, facts have been sworn to or affirmed before me by written affidavit(s) attached hereto from which I have found probable cause, I do authorize you to search the premises or person described, and to seize, secure, inventory and make return according to the Pennsylvania Rules of Criminal Procedure					
<input checked="" type="checkbox"/> This Warrant shall be served as soon as practicable and shall be served only between the hours of 5AM to 10PM but in no event later than _____.					
<input type="checkbox"/> This Warrant shall be served as soon as practicable and may be served any time during the day or night but in no event later than _____.					
8:55 P.M. o'clock May 15 2015					
* The issuing authority should specify a date not later than two (2) days after issuance. Pa.R.Crim.P. 203(4) * If the issuing authority finds reasonable cause for issuing a nighttime warrant on the basis of additional reasonable cause set forth in the accompanying affidavit(s) and wishes to issue a nighttime warrant, then this block shall be checked. Pa.R.Crim.P. 206(1)					
Issued under my hand this 13th day of May 2015 at 8:55 P.M. o'clock					
 Signature of Issuing Authority		52ND Mag. Dist. or Judicial Dist. No.		1-2-2022 (SEAL) Date Commission Expires	
Title of Issuing Authority: <input type="checkbox"/> Magisterial District Judge <input checked="" type="checkbox"/> Common Pleas Judge <input type="checkbox"/> _____					
For good cause stated in the affidavit(s) the Search Warrant Affidavit(s) are sealed for 60 days by my certification and signature. (Pa.R.Crim.P. 211)					
 Signature of Issuing Authority		5-13-2015 (Date) (SEAL) (Judge of the Court of Common Pleas or Appellate Court Justice or Judge)			

TO BE COMPLETED BY THE ISSUING AUTHORITY

Exhibit A-002

Commonwealth of Pennsylvania

COUNTY OF LEBANON

APPLICATION FOR
SEARCH WARRANT
AND AUTHORIZATIONDocket Number
(Issuing Authority)Police Incident
Number SW513Warrant Control
Number SW513

Det. Mong, Sgt. Hopkins

Lebanon County Drug Task Force 717-228-4471

May 13, 2015

AFFRANT NAME

AGENCY

PHONE NUMBER

DATE OF APPLICATION

IDENTIFY ITEMS TO BE SEARCHED FOR AND SEIZED (If known, specify as precisely as possible)
Pa Act 64 Controlled Substances, Drug Paraphernalia Drug Proceeds, Electronic Media, Refer to AttachmentSPECIFIC DESCRIPTION OF PREMISES AND/OR PERSON TO BE SEARCHED (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.)
234 Lehman Street, Lebanon City, Lebanon County, PA 17046, 513 Arnold Street, Lebanon City, Lebanon County, PA 17046 (Refer to attachment) outbuilding and areas/curtilage accessible to Julio Aviles
2003 Chevrolet Tahoe bearing Pennsylvania Registration JPS7685 VIN 3GNFK16Z93G125848NAME OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED (If known, specify as precisely as possible)
Julio Aviles Alex Aviles-Diaz Roselin Sanchez-NazarioVIOLATION OF (Describe conduct or specify statute)
Title 35 chap 6 780 113a30 PWID CS: 113a16 Poss CS: 113a32 Poss ParaDATE(S) OF VIOLATION
VARIOUS☐ Warrant Application Approved by District Attorney - DA File No. _____
(If DA approval required per Pa. R. Crim. P. 203(A) with assigned File No. per Pa. R. Crim. P. 507)☒ Additional Pages Attached (Other than Affidavit of Probable Cause)☒ Probable Cause Affidavit(s) MUST be attached (unless sealed below) Total number of pages: _____

TOTAL NUMBER OF PAGES IS SUM OF ALL APPLICATION, PROBABLE CAUSE AND CONTINUATION PAGES EVEN IF ANY OF THE PAGES ARE SEALED

The below named Affiant, being duly sworn (or affirmed) before the Issuing Authority according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at the particular premises or in the possession of the particular person as described above

Signature of Affiant: [Signature] AGENCY OR ADDRESS OF PRIVATE AFFRANT: LEBANON COUNTY DRUG TASK FORCE DETECTIVE SERGEANT

Sworn to and subscribed before me this _____ day of _____ Mag. Dist. No. _____

Signature of Issuing Authority: [Signature] Office Address: _____ (SEAL)

SEARCH WARRANT
TO LAW ENFORCEMENT
OFFICER

WHEREAS, facts have been sworn to or affirmed before me by written affidavit(s) attached hereto from which I have found probable cause, I do authorize you to search the premises or person described, and to seize, secure, inventory and make return according to the Pennsylvania Rules of Criminal Procedure.

☒ This Warrant shall be served as soon as practicable and shall be served only between the hours of 6AM to 10PM but in no event later than _____☐ This Warrant shall be served as soon as practicable and may be served any time during the day or night but in no event later than _____

3:55 P M o'clock May 15 2015

* The issuing authority should specify a date not later than how (2) days after issuance: Pa. R. Crim. P. 203(A)

** If the issuing authority finds reasonable cause for issuing a nighttime warrant on the basis of additional reasonable cause set forth in the accompanying affidavit(s) and wishes to issue a nighttime warrant, then this block shall be checked: Pa. R. Crim. P. 206(f)

Issued under my hand this 13th day of May 2015 at 3:55 P M o'clock

Signature of Issuing Authority: [Signature] Mag. Dist. or Judicial Dist. No. 53ND Date Commission Expires: 1-2-2017 (SEAL)


Title of Issuing Authority: ☐ Magisterial District Judge ☒ Common Pleas Judge ☐ _____☒ For good cause stated in the affidavit(s) the Search Warrant Affidavit(s) are sealed for 60 days by my certification and signature: (Pa. R. Crim. P. 211)

Signature of Issuing Authority: [Signature] (Judge of the Court of Common Pleas or Appellate Court Justice or Judge) 5-13-2015 (Date) (SEAL)

TO BE COMPLETED BY THE ISSUING AUTHORITY


Exhibit A-003

Appx 1

Commonwealth of Pennsylvania			APPLICATION FOR SEARCH WARRANT CONTINUATION PAGES
COUNTY OF LEBANON			
Docket Number	Police Incident	Warrant Control	
Issuing Authority:	Number SW513	Number SW513	
Continuation of:			
<input checked="" type="checkbox"/> Items to be searched and seized	<input type="checkbox"/> Description of premises/person(s) to be searched	<input type="checkbox"/> Owner/ Occupant	<input type="checkbox"/> Violations
ITEMS TO BE SEARCHED FOR AND SEIZED			
<p>Marijuana, cocaine, heroin, methamphetamine, lsd, and any and all controlled substances and drug paraphernalia, including but not limited to scales, baggies, spoons, straws, pipes, razor blades, needles, syringes, cutting agents and any and all items used to package, process, dry, cut, grow, and type of controlled substance or drug; any and all items which can be used to ingest controlled substance into the human body. Books, records, receipts, notes, ledgers, and other papers relating to the transportation, ordering, purchase and distribution of any and all controlled substances. Books, receipts, bank statements and any records, money drafts, letters of credit, money orders, checks, passbooks, cash or other items evidencing the obtaining, secreting, transfer and concealment of assets and the obtaining, secreting, transfer, concealment and or expenditure of money derived from illegal drug sales. Copies of electric, gas, telephone, rent, tax and other types of receipts that show the renter of this apartment. Financial proceeds of dealing drugs or controlled substances; namely united states currency. Photographs, in particular photographs of co-conspirators, assets and or controlled substances. Electronic equipment taken in trade for controlled substances and any and all weapons, firearms, ammunition located at this location. Electronic media including but not limited to wireless telephones, pagers, and other personal electronics that may contain source information, customer formation and or information on co-conspirators. All of the above constitutes contraband, instruments and paraphernalia of illegal drug activities and or evidence of distribution of controlled substances. A search of all occupants of this location is requested for illegal controlled substances and weapons.</p>			
Page of Pages			

AOPC 410C-10-24-98

Exhibit A-004

Commonwealth of Pennsylvania				APPLICATION FOR SEARCH WARRANT	
COUNTY OF LEBANON				CONTINUATION PAGES	
Docket Number (Issuing Authority):		Police Incident Number: SW513		Warrant Control Number: SW513	
Continuation of:					
<input type="checkbox"/> Items to be searched and seized		<input checked="" type="checkbox"/> Description of premises/person(s) to be searched		<input type="checkbox"/> Owner/ Occupant <input type="checkbox"/> Violations	
<p>The buildings to be searched are 234 Lehman Street, Lebanon, Pennsylvania 17046 and 513 Arnold Street, Lebanon, Pennsylvania 17046.</p> <p>The vehicle to be searched is a 2003 Chevrolet Tahoe bearing Pennsylvania registration JPS-7685 VIN: 3GNFK16Z93G126848.</p> <p>The residence to be searched is 234 Lehman Street is the residence of Julio Aviles, Evelyn Aviles, Ashely Aviles and Julio Aviles Jr. The house has yellow in color vinyl siding with a small green in color roof covering the front porch. On the left side of the front door is the number "234" in black.</p> <p>The building to be searched is the garage of Roselin Sanchez-Nazario and Julio Aviles at 513 Arnold Street, Lebanon City, Lebanon County, Commonwealth of Pennsylvania. The garage is a two story red in color brick building. The front of the garage is has a black in color mail box with the number "513" in gold.</p> <p>This search is to include the 513 Arnold Street, curtilage, and any areas accessible to occupants within the garage. This search is also to include Julio Aviles and all persons present inside the garage or residence at the time the warrant is executed. This search is for the safety of the police officers involved with this search warrant and to prevent removal and or destruction of any evidence, as it is well known that individuals involved with controlled substances use weapons and that drug evidence is easily disposed of.</p> <p>The seizure and off-site search, examination of any and all electronic media in the possession or under the control of occupants within the garage.</p>					
Page		of		Pages	

AOPC 4400-10-24-90

Exhibit A-005

Appx 1

Commonwealth of Pennsylvania

AFFIDAVIT OF
PROBABLE CAUSE

COUNTY OF LEBANON

Docket Number

Police Incident
Number: SW513Warrant Control
Number: SW513

(Issuing Authority)

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

That your affiants are Detective Ryan Mong and Sergeant Brett Hopkins of the Lebanon County Drug Task Force, Room 11, 400 South 8th Street, Lebanon, Pennsylvania 17042. Detective Mong has been a police officer for 12 years and a member of the Lebanon County Drug Task Force for 11 years. Sergeant Hopkins has been a police officer for 30 years and a member of the Lebanon County Drug Task Force for 29 years and a member of the Federal Drug Enforcement Administration Task Force. Your affiants have received and successfully completed training in narcotics investigation, drug identification and other courses and/or seminars involving the safe delivery and/or use of controlled substances. Your affiants have also been trained in the use of chemical field test kits for detection of controlled substances and have on numerous occasions conducted true and correct field tests on controlled substances. Your affiants have worked in an undercover capacity during drug investigations. Your affiants have been involved in numerous investigations involving the use and/or delivery of controlled substances. Your affiants' experience has been that in the past individuals involved in illegal trafficking of controlled substances usually possess weapons and multiple cellular telephones to assist them in their drug dealing activities. Your affiants have conducted drug investigations during their career as police officer and have arrested individuals for drug law violations and identified controlled substances. Your affiants have also assisted the Drug Enforcement Administration, Pennsylvania State Police and the Pennsylvania Office of Attorney General with numerous drug investigations.

Within the last six months Reliable Confidential Informant #1 (RCI-1) provided information to Lebanon County Drug Task Force members including your affiants regarding individuals dealing or using controlled substances. RCI-1 provided information that a person known to them as Julio Aviles is selling heroin at 234 Lehman Street and 513 Arnold Street within Lebanon City. RCI-1 states Aviles uses 513 Arnold Street to process, package, store, and sell heroin, crack cocaine and prescription pills. RCI-1 also states Aviles uses cellular telephone number 717-813-4042 to arrange drug transactions. RCI-1 identified Julio Aviles from a Pennsylvania Driver License photograph provided by your affiants. RCI-1 has made eight controlled buys and provided information for the Drug Task Force in the past. These controlled buys and information provided have led to the application of this search warrant. Drug related charges are pending in the Lebanon County Court of Common Pleas from the previous controlled buys.

On February 10, 2015, RCI-1 traveled to 234 Lehman Street, City of Lebanon, Pennsylvania, to make a controlled buy of heroin. After arriving, RCI-1 states Julio Aviles was speaking an unknown subject on the telephone. After Aviles terminated the phone call surveillance units observed Eliezer Soto-Concepcion arrive to the rear of 234 Lehman Street. During the controlled buy RCI-1 stated Soto-Concepcion entered 234 Lehman Street from the rear and placed heroin on the kitchen table. RCI-1 picked up the heroin from the table and next gave the money directly to Aviles.

I, THE AFFIANT, BEING DULY SWORN ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

[Signature] 5/13/15 *[Signature]* 5-13-15 (SEAL)
Affiant Signature Date Issuing Authority Signature Date
Page of Pages

Commonwealth of Pennsylvania

COUNTY OF LEBANON



AFFIDAVIT OF
PROBABLE CAUSE

Docket Number

Police Incident
Number: SW513

Warrant Control
Number: SW513

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

On March 24, 2015, RCI-1 traveled to 234 Lehman Street, City of Lebanon, Pennsylvania, to make a controlled buy of heroin. After arriving, RCI-1 parked to the rear of the residence and made contact with Aviles. RCI-1 and Aviles entered the residence. RCI-1 states Aviles gave the heroin to him or her in exchange for Drug Task Force buy money.

On March 30, 2015, RCI-1 traveled to 234 Lehman Street, City of Lebanon, Pennsylvania, to make a controlled buy of heroin from Julio Aviles. After arriving RCI-1 made contact with Aviles at the rear of the residence. During the buy RCI-1 stated Aviles entered a black in color Chevrolet Tahoe and removed forty glassine bags of heroin and gave the heroin to RCI-1.

Your affiants obtained Pennsylvania registration JPS-7685 off of the Chevrolet Tahoe. This vehicle is registered to Julio Aviles' son, Alex Aviles-Diaz of 518 Jones Street, Lebanon, Pennsylvania 17046.

On April 14, 2015, RCI-1 traveled to 513 Arnold Street, City of Lebanon, Lebanon County, Pennsylvania. While at the garage RCI-1 observed a large amount of heroin on a glass table located on the second floor of the building.

On April 15, 2015, RCI-1 traveled to 513 Arnold Street, City of Lebanon, Pennsylvania, to make a controlled buy of heroin. RCI-1 entered 513 Arnold Street and made contact with Aviles. While inside 513 Arnold Street, RCI-1 stated Julio Aviles removed the heroin from a concealed area and next handed RCI-1 the heroin and RCI-1 handed Aviles the money.

Within the last 48 hours, RCI-1 traveled to the area of 513 Arnold Street, City of Lebanon, Pennsylvania to make a controlled buy of heroin from Julio Aviles. After RCI-1 arrived he or she made contact with Aviles, who was seated in the front seat of a 2003 Chevrolet Tahoe bearing Pennsylvania registration JPS-7685. RCI-1 entered the vehicle on the passenger side. RCI-1 states that Aviles gave him or her heroin and RCI-1 directly gave the money to Aviles.

Prior to the above controlled buy occurring Detective Ryan Mong conducted surveillance on 513 Arnold Street. During the surveillance Detective Mong observed Aviles entering and exiting 513 Arnold Street.

Within the last week your affiants conducted surveillance 234 Lehman Street, Lebanon Pennsylvania 17046. During surveillance your affiants observed short term vehicle traffic arriving to the rear of the residence. Your affiants would observe Julio Aviles have contact with the subjects in the vehicles. The vehicles would depart a short time later. Your affiants are of the opinion and belief this behavior is consistent with drug trafficking.

I, THE AFFIANT, BEING DULY SWORN ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Affiant Signature: [Signature] Date: 5-13-15 Issuing Authority Signature: [Signature] Date: 5-13-15 (SEAL)
Page 1 of 1 Pages

ADPC 4108 10-24-98

Exhibit A-007

Commonwealth of Pennsylvania



**AFFIDAVIT OF
PROBABLE CAUSE**

COUNTY OF LEBANON

Docket Number

Police Incident

Warrant Control

Issuing Authority:

Number: SW513

Number: SW513

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

Your affiants conducted a criminal history check on Julio Aviles. Your affiants observed Aviles to have prior felony drug law convictions.

Your affiants contacted Lebanon County Adult Probation Officer Jeremy Brenton as Julio Aviles is a client of Lebanon County Adult Probation. APO Brenton states that Aviles has lived at 234 Lehman Street since October of 2012. APO Brenton also states Aviles resides at the residence with his wife Evelyn Aviles, and his two kids Ashley Aviles and Julio Aviles Jr.

Your affiants conducted a check through PennDot records on Evelyn Aviles, Ashley Aviles and Julio Aviles Jr. This search reflects all three as having an address of 234 Lehman Street Lebanon, Pennsylvania 17046.

A controlled buy is where a Law Enforcement Officer conducts a strip search of a Reliable Confidential Informant which involves a complete strip search of the individuals clothing and body to determine that there is no controlled substances, currency or contraband. If the Confidential Informant is driving his or her vehicle the vehicle is also searched. After the search the Reliable Confidential Informant is provided recorded Drug Task Force currency to make the purchase and is either driven to or followed to the target location and contact is made. After the controlled buy the Reliable Confidential Informant is transported to an offsite location where an additional search of the Confidential Informants clothing, body and vehicle are conducted. The Confidential Informant turns over the purchased controlled substance and provides a statement detailing with the facts of the controlled buy. A chemical field test is conducted on the purchased controlled substance. That this is the method used in the controlled buys described above.

That chemical field test was performed on representative sample of the suspected heroin purchased during the controlled buys. The results of this test were positive for presence of heroin, a schedule I controlled substance.

Based upon training and experience, your affiants are aware that area drug dealers/users possess and use cellular telephones as a means of communicating with drug customers and/or drug suppliers. Based upon this information your affiants request this warrant authorize the seizure and off-site accessing of the electronic media in the custody or control of the named premises or person(s) to be searched. Your affiants are of the opinion and belief this retrieved data will provide co-conspirator information, to include stored telephone numbers, coding and/ or identifying information of drug related associates as well as incoming and outgoing telephone calls from drug suppliers or drug buyers.

As a result of the information enclosed in this affidavit, your affiants are of the opinion and belief that Julio Aviles is using the residence at 234 Lehman Street, Lebanon, Pennsylvania 17046, 513 Arnold Street, Lebanon, Pennsylvania 17046 and the 2003 Chevrolet Tahoe bearing Pennsylvania registration JPS-7685 VIN: JGNFK16Z93G126848 for storage, sales, transportation and distribution of controlled substances.

I, THE AFFIANT, BEING DULY SWORN, ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Affiant Signature: [Signature] Date: 5/13/15 Issuing Authority Signature: [Signature] Date: 5-13-15 (SEAL)
Page 1 of 1 Pages

Commonwealth of Pennsylvania



**AFFIDAVIT OF
PROBABLE CAUSE**

COUNTY OF LEBANON

Docket Number:

Police Incident
Number: SW513

Warrant Control
Number: SW513

Issuing Authority:

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

Your affiants are of the opinion and belief that probable cause exists to have a day time search warrant issued to search the residence 234 Lehman Street, Lebanon, Pennsylvania 17046, 513 Arnold Street, Lebanon, Pennsylvania 17046, 2003 Chevrolet Tahoe bearing Pennsylvania registration JPS-7685 VIN: 3GNFK16Z93G126848, the person of Julio Aviles, all persons present within the residence of 234 Lehman Street, Lebanon, Pennsylvania 17046, all persons present within the garage of 513 Arnold Street, Lebanon, Pennsylvania, 17046; curtilage and areas accessible to Aviles and off-site accessing of any and all electronic media in the possession, or under the control of Aviles.


That the information contained within the affidavit is true and correct to the best of your affiants' knowledge and belief.

Your affiants request this search warrant affidavit be sealed to protect the identity and safety of the Reliable Confidential Informant as the individuals involved in this drug trafficking organization are Neta gang members. The informant has also expressed a concern for his or her safety as well as the safety of his or her family if Julio Aviles would learn his or her identity.

I, THE AFFIANT, BEING DULY SWORN ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Affiant Signature: *[Signature]* Date: 5/13/15 Issuing Authority Signature: *[Signature]* Date: 5-13-15 (SEAL)
Page 1 of 1 Pages

Exhibit A

	Lebanon County Detective Bureau	RECEIVED FEB 18 2020
	Room 11 Municipal Building 400 S. 8th St. Lebanon PA, 17042 717-228-4403 ORLE: PA0382100	
Case Number: 15-0000163	Narrative(s)	
Assigned: 4/15/2015 20:22	to officer: MONG, RYAN M	
Approved:	by:	

On April 15, 2015 at approximately 1915 hours, members of the Lebanon County Drug Task Force, to include Detective Ryan Mong, Detective Lawrence Minnick and Sgt. Brett Hopkins met with Confidential Informant CI 01-2015 to discuss making a controlled purchase of heroin from a male identified as Julio Aviles. CI 01-2015 advised they were going to meet Aviles either to the rear of his residence located at 234 Lehman Street or at a garage Aviles used to package, store and process heroin located at 513 Arnold Street. CI 01-2015 has made controlled buys from Aviles for the DTF in previous incidents. CI 01-2015 informed detectives that a nonmonetary item(s) would be exchanged with Aviles in exchange for bundles of heroin.

At approximately 1930 hours, Det. Minnick conducted a search of Confidential Informant CI 01-2015's vehicle. This search yielded negative results for money, contraband or controlled substances.

At approximately 1934 hours, Lebanon County Adult Probation Officer Brooke Darkes conducted a search of Confidential Informant CI 01-2015's person and clothing. This search yielded negative results for money, contraband or controlled substances.

At 1938 hours, Det. Mong, Det. Minnick, Sgt. Hopkins, Ofc. Darkes and CI 01-2015 departed 400 S. 8th Street Lebanon, PA 17042 and traveled in civilian style Drug Task Force vehicles to the area of the 200 block of Lehman Street to conduct surveillance. Det. Mong, Sgt. Hopkins and Ofc. Darkes entered a civilian style vehicle and followed CI 01-2015 to the area of 3rd and Lehman Streets. Det. Mong, Sgt. Hopkins and Ofc. Darkes parked at 3rd and Lehman Streets to maintain surveillance on the front of 234 Lehman Street. Det. Minnick parked his vehicle in the 300 block of North 4th Street facing south allowing a vantage point of the 200 block of Beech Street.

At 1949 hours, Det. Minnick observed CI 01-2015 arrive in the 200 block of Beech Street and parks to the rear of Aviles' residence. CI 01-2015 exits his or her vehicle and makes contact with Aviles' wife at his residence. CI 01-2015 is directed to meet Aviles at his garage by Aviles' wife.

At 1956 hours, CI 01-2015 leaves the rear of Aviles residence and travels to his garage at 513 Arnold Street. Det. Minnick observes CI 01-2015 travel east on Beech Street and turn north onto 2nd Street. Det. Mong, Sgt. Hopkins and Ofc. Darkes observed CI 01-2015 at 2nd and

Exhibit 38 "C"

Appendix **A**

Appx 1

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1 Q. So another -- it's not a lie, you were incorrect is what
2 you're saying?

3 A. Correct. When I did the search warrant, to my best
4 knowledge and belief, that information was accurate.

5 Q. Now moving to May 12th. Now we know that on March 30th,
6 you told the informant, you know, you're done with these
7 pre-arrangements; right?

8 A. Yes. The informant is not supposed to be doing that, but
9 that's not an infraction that's going to cause us to terminate
10 their use.

11 Q. Okay. And once again on May 12th, we heard part of the
12 audio, and if you need me to play it again, I can, she's asking
13 Mr. Aviles if he wants parts; right?

14 A. That's correct.

15 Q. Auto parts?

16 A. That's correct.

17 Q. Now I am going to show you Government Exhibit 121.40.
18 That actually depicts one of those car covers, is that right?

19 A. I believe that's accurate, yes.

20 Q. Okay. You would agree that's not a Dollar Store car
21 cover, is it?

22 A. No.

23 Q. That's an expensive car cover, isn't it?

24 A. Yes.

25 Q. And your informant is bringing these in for these

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1 controlled buys, one or more of these; is that right?

2 A. Yes.

3 Q. Now you said -- I think earlier you said you knew she
4 worked at REM?

5 A. Yes.

6 Q. Do you have any idea how much money she was making at REM?

7 A. No.

8 Q. And I think you agreed earlier that these car covers are
9 about 240 dollars retail?

10 A. I believe that's what you said, yes.

11 Q. I want you to assume for a moment that these car covers
12 were, in fact, stolen by your informant, Lis McGovern?

13 A. I was not aware they were stolen.

14 Q. Let's assume for a moment they're stolen. That would be
15 contraband, wouldn't it?

16 A. However, I did not have that knowledge that they were
17 stolen.

18 Q. My question is, yes or no --

19 MR. BLOOM: Your Honor, I'll stipulate.

20 THE COURT: Hold it, hold it.

21 MR. BLOOM: I'll stipulate that if an item is stolen,
22 it's contraband.

23 MS. ULRICH: The witness can answer that question.

24 It's a simple question.

25 THE COURT: It's now a stipulated fact that if

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1 they're stolen, they're contraband. So let's move on.

2 MS. ULRICH: All right.

3 BY MS. ULRICH:

4 Q. And she didn't have this one time, assuming they're
5 stolen, she had them on two, three, four buys, didn't she?

6 A. I believe there were three total car covers.

7 Q. Now I'm going to show you what's been marked as Exhibit
8 197. All right. This is a sales order billed to Elizabeth
9 McGovern. And below it says there's a balance of 450 dollars.
10 The date up top is March 30th. Did Ms. McGovern give that to
11 you?

12 A. Yes.

13 Q. She did. When did she give that to you?

14 A. I don't recall when they were provided.

15 Q. And why did she give that to you?

16 A. They were provided to us to insure that the car covers, as
17 you would say, are not stolen. And we needed receipts to
18 confirm that from her place of employment.

19 Q. Do you know that she had the ability -- are you aware if
20 she had the ability to pay 450 dollars for two car covers on
21 March 30th?

22 A. I don't believe that she did pay for them.

23 Q. I'm sorry, what?

24 A. I don't believe that they were paid for. Those were just
25 receipts provided to us.

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1 Q. For what purpose? To say what?

2 A. Those receipts were provided to us for us to have a
3 record.

4 Q. Did you ask her where she got these receipts?

5 A. I did not ask her, no.

6 Q. Do you know these receipts are false receipts?

7 A. No, I'm not aware of that.

8 Q. But this is what she gave you, right?

9 A. That's one of receipts, yes.

10 Q. And you retained it as evidence?

11 A. We placed it in the folder for the investigation, yes.

12 Q. And did she tell you that she paid 450 dollars for those
13 two car covers? Is that what she represented when she gave you
14 the receipt?

15 A. She didn't tell me anything.

16 Q. Well, it's March 30th, she gave it to you. What did she
17 tell you?

18 A. She didn't give the receipts to me. She gave them to
19 Sergeant Hopkins.

20 Q. Okay, fair enough. Going back one page. Do you know if
21 they were provided all at the same time or separate times?

22 A. I don't know. I don't have that knowledge.

23 Q. Okay. Now here's another receipt. This one is dated
24 4/16/2015. Do you see that?

25 A. Yes.

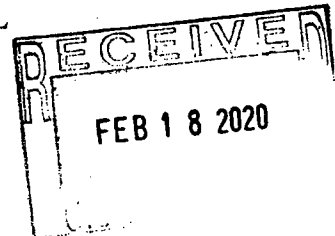
Exhibit 39 Trial testimony From Detective Ryan Mong "affiants"

CLIENT COPY

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 18-2967



UNITED STATES OF AMERICA

v.

JULIO AVILES, SR.,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No.: 1-15-cr-00181-001)
District Judge: Honorable John E. Jones, III

Argued on July 9, 2019

(Opinion filed: September 12, 2019)

Before: McKEE, ROTH and RENDELL, Circuit Judges

Court of Appeal decision Exh. 1 to 25

Exhibit 1

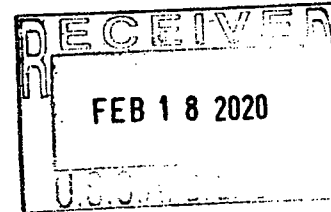
Appendix B Appx 2

Petitioner Mr. Julio Aviles, Sr. Pro Se, does hereby certify under the penalty of perjury that the foregoing is true and correct, and that this brief in support to motion 28 U.S.C. §2255 was placed in the prison mailing system on February 12, 2020 and send to the following person(s) in the manner disclosed;

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United States Court of appeals for the Third Circuit
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Philadelphia, PA. 19106-1790

Julio Aviles, Sr.
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Dated: February 12, 2020



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OPINION

RENDELL, Circuit Judge:

Appellant Julio Aviles, Sr. was charged with various federal drug trafficking crimes and related offenses based, in large part, on evidence obtained pursuant to a search warrant. Aviles moved to suppress evidence obtained in the search or, alternatively, for a hearing to challenge the validity of the warrant. The District Court denied his motion, and he was

Exhibit 2

convicted on all counts. At sentencing, the Government sought a term of mandatory life imprisonment pursuant to the Controlled Substances Act, 21 U.S.C. § 841(b), arguing that Aviles's prior state court convictions qualified as "felony drug offenses" under the statute. The District Court agreed and sentenced him accordingly. Aviles appeals the denial of his motion to suppress evidence obtained pursuant to the warrant and the District Court's order sentencing him to life imprisonment. We will affirm the District Court's denial of his motion to suppress, but, because we hold that at least two of his prior convictions do not qualify as felony drug offenses, we will vacate the District Court's sentencing order and remand for resentencing.

I.

In the course of investigating reports that Aviles was conducting a drug trafficking operation, the Lebanon County Drug Task Force applied for a search warrant to search, among other locations, Aviles's residence. In the affidavit of probable cause in the warrant application, Detective Ryan Mong and Sergeant Brett Hopkins, the affiants, relied upon information gathered through multiple controlled buys conducted by a confidential informant, "RCI-1." The affidavit states that RCI-1 was involved in a total of eight successful controlled buys and describes the five that involved purchases of narcotics from Aviles. These descriptions included, among other things, the dates of the buys and, for four of the five, that RCI-1 exchanged money for narcotics.¹ The affidavit also describes

¹ The application is silent on what she exchanged during the fifth buy.

the affiants and their experience on the Lebanon County Drug Task Force, and offers a general explanation of the execution of controlled buys, which included a statement that an informant "is provided recorded Drug Task Force currency to make the purchase" during a controlled buy.

A magistrate judge issued a warrant, and, in the resulting searches, law enforcement recovered large quantities of multiple controlled substances, drug paraphernalia, and firearms. Aviles and twelve co-defendants were arrested and charged with various drug trafficking crimes and related offenses. In the twenty-one-count indictment, Aviles was charged with conspiracy to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(i), and (b)(1)(A)(iii) (Count 1); possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(i) (Count 2); possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii) (Count 3); possession with intent to distribute cocaine hydrochloride in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 4); distribution of cocaine hydrochloride in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 5); distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 6); distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Counts 11, 14, and 15); possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (Count 19); unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count 20); and maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a) (Count 21).

Exhibit 4

After pleading not-guilty, Aviles moved to suppress the evidence discovered through the searches authorized by the warrant because, he claimed, the officers who had submitted the affidavit included false information and omitted other information, each of which may have affected the magistrate judge's decision to issue the warrant. Specifically, he argued that, while the general description of controlled buys represented that currency is exchanged for drugs at all controlled buys, some of Aviles's buys may have involved RCI-1's exchanging prescription drugs instead of currency. He also claimed that RCI-1 had conducted additional drug-related transactions with Aviles outside of the controlled buys. In his motion, Aviles argued that he had made "a substantial preliminary showing" that the false information and omissions were made intentionally or recklessly, and the falsity and omissions undermined the probable cause finding, and, therefore, he is entitled to an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

Although the District Court determined that Aviles had not made "a substantial preliminary showing" to warrant a *Franks* hearing, the Court conducted an evidentiary hearing to allow him to further develop his claim and make that showing. The Court allowed both parties to question Detective Mong and Sergeant Hopkins regarding their affidavit of probable cause but refused the defense's request to question RCI-1 based on concerns regarding her identity. In supplemental briefing following the hearing, and based on the officers' testimony, Aviles asserted that at least two of the controlled buys involved an exchange of personal property for the drugs,²

² The District Court did not allow the defense to inquire into the exact nature of the personal property exchanged because,

that Aviles and RCI-1 had a "relationship" independent of the controlled buys, that RCI-1 was a heroin addict, and that she had failed to abide by some of the officers' instructions during the controlled buys. He asked that the District Court suppress the evidence discovered through the search pursuant to the warrant.

The District Court denied Aviles's motion to suppress, holding that he had failed to make the requisite threshold showing under *Franks* that the inaccuracies and omissions in the affidavit were made deliberately or recklessly. The Court also dismissed Aviles's challenges to RCI-1's credibility, reasoning that the affidavit "contained sufficient information for the judge to evaluate the informant's reliability." A. 166 n.2.

A jury convicted Aviles of all counts. Prior to sentencing, the Government indicated that it would seek mandatory life imprisonment pursuant to the Controlled Substances Act, 21 U.S.C. § 841(b). Under the law at the time, such a sentence could be imposed upon a defendant who had two or more previous convictions for "felony drug offenses." 21 U.S.C. § 841(b)(1)(A). The Government averred that Aviles had three qualifying predicate state convictions: (1) possession of a controlled dangerous substance with intent to distribute near a school zone in violation of N.J. Stat. § 2C:35-7, (2) operation of a controlled substance production facility in violation of N.J. Stat. § 2C:35-4, and (3) possession of a dangerous substance with intent to distribute or manufacture in violation of Md. Crim. Code § 5-602. In support, the

as the Government asserted, doing so may reveal RCI-1's identity.

Exhibit 6

Government submitted charging documents and commitment orders from the New Jersey convictions and a docket report from the Maryland conviction.

Aviles objected to the application of Section 841(b), arguing that none of his prior convictions qualified as felony drug offenses. In order to qualify as a predicate offense, he claimed that the state crime must criminalize the same controlled substances as those named in the Controlled Substances Act, 21 U.S.C. § 802(44), and the state crimes of which he had been convicted each named at least one additional substance not listed in § 802(44). He also argued that the Maryland conviction was not his.

The District Court overruled Aviles's objections. The Court first noted that whether Aviles's prior convictions qualified as felony drug offenses hinged on the approach used to compare them to the federal definition. Under one approach, the categorical approach—described in *Taylor v. United States*—a court may only look to the statutory elements of a defendant's prior offenses and not to the facts underlying those convictions. *See* 495 U.S. 575, 600–01 (1990). Under the other, the modified categorical approach, a court is permitted to look at the statutory elements and record documents from the underlying convictions. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). The former approach applies to indivisible statutes, or statutes that set forth only one crime, while the latter applies to divisible statutes, or statutes that include more than one crime. *See id.* at 2248–49. Citing *Mathis*, the District Court first determined that the New Jersey statutes under which Aviles had been convicted were divisible and, therefore, subject to the modified categorical approach. Because the indictment clearly established that Aviles's conviction had

included heroin as an element for each of his New Jersey convictions and because crimes involving heroin are felony drug offenses, the Court held that his convictions qualified as such for purposes of 21 U.S.C. § 841(b)(1).

The District Court also briefly addressed Aviles's Maryland conviction, overruling his objection because "a history report generated by the Defendant's fingerprints is sufficient to prove that the prior conviction is properly attributed to the Defendant." A. 618-19. However, the Court noted that a conclusive ruling on the nature of this conviction was not necessary in order to impose a mandatory life sentence, since it concluded that he had been convicted of the requisite two felony drug offenses. The Court held that its determination that Aviles's New Jersey convictions qualify as such is sufficient and, accordingly, sentenced him to a term of life imprisonment. This appeal followed.

After the District Court entered its sentencing order but while Aviles's appeal was pending, Congress amended the Controlled Substances Act with the First Step Act of 2018, Pub. L. No. 115-391, § 401. The First Step Act replaced the mandatory term of life imprisonment with a mandatory term of 25 years. § 401(a)(2)(A)(ii) (amending 21 U.S.C. § 841(b)). It also replaced the term "felony drug conviction" with "serious drug felony" and limited the offenses that qualified for that mandatory sentence. § 401(a)(1) (amending 21 U.S.C. § 802). The First Step Act provides that the amendments made by it "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." § 401(c).

II.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. §§ 1291 and 3742(e).

III.

On appeal, Aviles urges that we should vacate his conviction because the District Court erred by denying his motion to suppress or, alternatively, by denying him a *Franks* hearing. He also seeks resentencing, arguing that a term of life imprisonment should not have been imposed under either the First Step Act or the prior version of the Controlled Substances Act.

A.

In challenging his conviction, Aviles claims that the affidavit submitted in support of the warrant application contained two factual errors and omitted several important pieces of information. Specifically, he urges that the affidavit incorrectly stated that RCI-1 paid for the drugs with police currency at every buy and that RCI-1 exchanged cash for drugs on April 15. He also argues that the affidavit omitted that personal property was traded for drugs on March 30, that RCI-1 scheduled controlled buys without police instruction, that RCI-1 was a heroin addict, any information with which a judge could assess RCI-1's reliability, that RCI-1 had an "independent relationship" with Aviles, and that the personal property was illicit. Br. for Appellant at 17 (internal quotation marks omitted). Aviles urges that these errors and omissions were, at the very least, made recklessly and affected the

magistrate judge's probable cause determination. Thus, he claims that we cannot say with certainty that the warrant would have issued had these errors and omissions been corrected, and the District Court should have granted his motion to suppress, or, alternatively, granted him an opportunity to support his motion in a *Franks* hearing. On this basis, he asks that we vacate his conviction.

The Fourth Amendment provides that "no Warrants shall issue but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. In *Franks*, the Supreme Court held that a defendant has a right to challenge the veracity of statements made in an affidavit of probable cause that supported the issuance of a warrant. *See Franks*, 438 U.S. at 167-71. In order to obtain a hearing to do so, the defendant must first make "a substantial preliminary showing" that the affidavit contained a false statement or omission that (1) was made knowingly and intentionally, or with reckless disregard for the truth, and (2) was material to the finding of probable cause. *Franks*, 438 U.S. at 155-56; *see also United States v. Yusuf*, 461 F.3d 374, 383 (3d Cir. 2006). A motion to suppress is granted if, at the hearing, the defendant establishes the same elements by a preponderance of the evidence. *See Franks*, 438 U.S. at 156. Thus, if Aviles cannot show that he is entitled to a *Franks* hearing, he necessarily cannot show that his motion to suppress should have been granted. Accordingly, we will first consider his argument that the District Court erred in denying him a *Franks* hearing.³

³ We have not yet determined the standard of review that applies to a district court's denial of a *Franks* hearing, *see United States v. Pavulak*, 700 F.3d 651, 665 (3d Cir. 2012), but because our conclusion is the same under any standard,

In this case, regardless of whether the alleged omissions and misstatements were made knowingly or recklessly, Aviles has failed to substantially show that probable cause would have been lacking if they had not been made. The following facts, among others, were supported by the affidavit and would have been unaffected by the deletion of the misstatements and the inclusion of the omissions:

- the affiants have extensive experience with the Lebanon County Drug Task Force;
- RCI-1 assisted the affiants in a total of eight police-supervised controlled buys, six of which involved the exchange of cash for drugs and two of which involved personal property;⁴
- the affiants conducted “a complete strip search” of RCI-1 immediately before each buy, A. 60;
- the affiants witnessed RCI-1 enter the locations of the

controlled buys without heroin and saw her reappear

with it afterwards;

including plenary review, this case does not require us to adopt one.

⁴ Aviles contends that drugs were exchanged for drugs, but he does not provide sufficient evidence to support his claim. Instead, the record shows that the affiants conducted a thorough search of RCI-1 and her belongings before every controlled buy, and that the personal property exchanged at the controlled buys was legal and photographically documented.

- the affiants witnessed one of the deals, which occurred inside Aviles's car;
- the affiants conducted a search of RCI-1's person and belongings after each buy;
- the affiants witnessed "short term vehicle traffic . . . consistent with drug trafficking" coming and going at Aviles's residence, A. 59; and
- the affiants conducted a background check on Aviles, which revealed multiple prior felony drug convictions.

These facts, on their own, provided probable cause to support the issuance of the warrant. Moreover, they are dependent upon police observation and, thus, would not be affected by a judge's questioning of RCI-1's credibility. Because Aviles has not made a substantial showing that the alleged omissions and misstatements would have been material to the magistrate judge's probable cause determination, we conclude that the District Court did not err in denying his request for a *Franks* hearing. Accordingly, because he failed to meet his burden to support a *Franks* hearing, he necessarily cannot show that his motion to suppress should have been granted. We will affirm the District Court's denial of that motion.

B.

Aviles's challenge to the District Court's sentencing order is twofold: First, he urges that the First Step Act, which was enacted while this case was pending on appeal, applies. Because that legislation replaced the mandatory life sentence with a mandatory term of 25 years' imprisonment and limited

the predicate offenses that would qualify a defendant for a mandatory sentence, Aviles argues that his life sentence should be vacated. Even if we determine that the First Step Act does not apply, he argues that his prior state convictions do not qualify as felony drug offenses under the former version of the Controlled Substances Act.

1.

Aviles's first argument, that the First Step Act applies to him, is based on the language provided in Section 401(c) of that Act: Amendments made by it "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." Pub. L. No. 115-391, § 401(c). The crux of Aviles's argument is that a sentence is not "imposed" until entry of final judgment by the highest court authorized to review it.

Although we have not yet had occasion to determine the applicability of the First Step Act to cases pending on appeal at the time of its enactment, the Seventh Circuit recently addressed the issue in *United States v. Pierson* and held that the defendant's "[s]entence was 'imposed' here within the meaning of [the First Step Act] when the district court sentenced the defendant." 925 F.3d 913, 927–28 (7th Cir. 2019). The court rejected reasoning from *United States v. Clark*, which suggested that "[a] case is not yet final when it is pending on appeal," *id.* at 928 (quoting 110 F.3d 15, 17 (6th Cir. 1997)), because "no other circuits have applied Clark's definition of 'imposed'" and because the word more commonly applies to the activity of district courts. *Id.*; *see also id.* at 927 (citing federal statutes and rules that indicate that a sentence is imposed by a district court).

We agree. “Imposing” sentences is the business of district courts, while courts of appeals are tasked with reviewing them by either affirming or vacating them. *See, e.g., United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (“In other words, if the district court’s sentence is procedurally sound, we will *affirm* it unless no reasonable sentencing court would have *imposed* the same sentence on that particular defendant for the reasons the district court provided.” (emphasis added)); *Rita v. United States*, 551 U.S. 338, 352 (2007) (“A pro-Guidelines ‘presumption of reasonableness’ will increase the likelihood that courts of appeals will affirm such sentences, thereby increasing the likelihood that sentencing judges will *impose* such sentences.” (emphasis added)). Congress did not refer to “finality,” and imposition and finality are two different concepts. Congress’s use of the word “imposed” thus clearly excludes cases in which a sentencing order has been entered by a district court from the reach of the amendments made by the First Step Act.⁵ Accordingly, we hold that that Act does not apply to Aviles.

⁵ Many of the cases to which Aviles cites in support of his argument discuss abatement by repeal, a common law rule requiring “abate[ment] of all prosecutions which had not reached a final disposition in the highest court authorized to review them” when a criminal statute is repealed or reenacted with different penalties. *Bradley v. United States*, 410 U.S. 605, 607–08 (1973). But even that rule does not apply where “there is statutory direction or legislative history to the contrary.” *United States v. Dixon*, 648 F.3d 195, 199 (3d Cir. 2011) (quoting *United States v. Jacobs*, 919 F.2d 10, 11 (3d Cir. 1990)) (internal quotation marks omitted); *see also Bradley*, 410 U.S. at 608 (“To avoid such results, legislatures frequently indicated an intention not to abate pending

2.

We next turn to Aviles's argument that the District Court erred in imposing a life sentence under the prior version of the Controlled Substances Act. Specifically, Aviles urges that his New Jersey and Maryland convictions do not qualify as felony drug offenses under that Act. Because his challenge presents a purely legal question, we exercise plenary review over the District Court's sentencing order. *United States v. Henderson*, 841 F.3d 623, 626 (3d Cir. 2016).

Pursuant to 21 U.S.C. § 841(b)(1)(A), convicted defendants were subject to a mandatory term of life imprisonment if they had previously been convicted of two or more "felony drug offenses." "Felony drug offense" is defined as:

an offense that is punishable by
imprisonment for more than one
year under any law of the United

prosecutions by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated."). Congress provided statutory direction here with its use of the word "imposed."

Aviles also argues that our reading of Section 401(c) should be "precluded by the doctrine of constitutional avoidance." Br. for Appellant at 43. However, similar statutes have been held to not apply retroactively and have not raised constitutional concerns. *See, e.g., Bradley*, 410 U.S. at 609–11 (holding that an amendment to a criminal statute did not apply retroactively to offenses committed prior to the effective date of the amendment, even though the defendants were sentenced after that date).

States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44). Other subsections provide the controlled dangerous substances that fall under each substance group. *See, e.g.*, § 802(17) (defining “narcotic drug”).

To determine whether a conviction qualifies as a felony drug offense, we typically employ the “categorical approach,” which requires us to “compar[e] the elements of the statute forming the basis of the defendant’s conviction with the elements of the generic crime,” i.e., the elements of a felony drug offense. *Henderson*, 841 F.3d at 627 (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)) (internal quotation marks omitted). A conviction will qualify as a predicate under this approach “only if the statute’s *elements* are the same as, or narrower than, those of the generic offense.” *Id.* (quoting *Descamps*, 570 U.S. at 257) (internal quotation marks omitted) (emphasis in original). We do not consider the facts underlying a conviction when applying this approach. *Id.* Here, that would require us to compare the elements of the crimes defined in the New Jersey and Maryland statutes to the definition of “felony drug offense.” If one of the state statutes is broader, or covers more conduct than the federal law, then Aviles’s conviction under that law cannot qualify as a felony drug offense.

The categorical approach cannot be applied with ease, however, where a statute of conviction is “divisible,” or

contains alternative elements, thereby making it impossible to determine precisely which crime was committed. *Id.* When presented with such a statute, we employ the “modified categorical approach,” which allows courts to “look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.” *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (citation omitted). In this case, we would then compare the elements of that crime to the definition of “felony drug offense” to determine whether Aviles’s state conviction qualifies as such.

Although these two approaches appear straightforward, difficulty ensues when presented with a statute that contains alternatives that may not be elements and, instead, may be “various factual means of committing a single element” that “a jury need not find (or a defendant admit).” *Id.* If the listed alternatives are indeed elements, the modified categorical approach applies. If, on the other hand, the listed alternatives are means of committing the crime, so that we are presented with essentially one crime, the categorical approach applies. Thus, “[t]he first task for a sentencing court faced with an alternatively phrased statute is . . . to determine whether its listed items are elements or means.” *Id.* at 2256. In *Mathis*, the Supreme Court enumerated a three-step process for doing so: First, a sentencing court should look to see if a state court decision “definitively answers the question.” *Id.* Second, the court looks to “the statute on its face.” *Id.* “If statutory alternatives carry different punishments, then . . . they must be elements.” *Id.* On the other hand, if the list provides only “illustrative examples” of how the same crime might be committed, then they are merely means. *Id.* (citation and

internal quotation marks omitted). If these “authoritative sources of state law” “fail[] to provide clear answers,” then a sentencing court may look to “the record of prior conviction itself.” *Id.* The Court explained that if an indictment and jury instructions reiterated the alternatives laid out in the law or used an umbrella term when charging the defendant, the alternatives are means. *Id.* at 2257. Conversely, reference to one of the alternatives at the exclusion of the others indicates that the listed alternatives are elements. *Id.* The Court warned that:

such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy “*Taylor*’s demand for certainty” when determining whether a defendant was convicted of a generic offense. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule.

Id. (citation omitted).

The District Court imposed a mandatory life sentence based on Aviles’s two prior convictions under New Jersey state law. Because all three state statutes of conviction—both New Jersey statutes and the Maryland statute—explicitly list, or incorporate other provision’s lists of, covered controlled substances, and each criminalize conduct involving at least one substance not covered by Section 841’s definition of “felony drug offense,” we need to delve more deeply under *Mathis* to determine whether the statute is divisible. If it is divisible

because the alternative drug types listed or incorporated by the state statutes are elements, such that different crimes are enumerated, we may use the modified categorical approach and look at the relevant criminal records to determine whether those state offenses are predicate offenses. On the other hand, if those substances are merely means, such that there is only one crime with different ways of committing it, then the state statute criminalizes conduct broader than that included in the definition of "felony drug offense," and Aviles's convictions cannot qualify as such. We must consider whether substance type is an element or a means in each statute of conviction individually.

We first address Aviles's conviction under N.J. Stat. Ann § 2C:35-4 for maintaining or operating a controlled dangerous substance production facility. That New Jersey law provides:

Except as authorized by P.L.1970, c. 226 (C.24:21-1 et seq.), any person who knowingly maintains or operates any premises, place or facility used for the manufacture of *methamphetamine, lysergic acid diethylamide, phencyclidine, gamma hydroxybutyrate, flunitrazepam, marijuana in an amount greater than five pounds or ten plants or any substance listed in Schedule I or II, or the analog of any such substance*, or any person who knowingly aids, promotes, finances or otherwise participates in the maintenance or

operations of such premises, place or facility, *is guilty of a crime of the first degree* and shall, except as provided in N.J.S.2C:35-12, be sentenced to a term of imprisonment which shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, during which the defendant shall be ineligible for parole. Notwithstanding the provisions of subsection a. of N.J.S.2C:43-3, the court may also impose a fine not to exceed \$750,000.00 or five times the street value of all controlled dangerous substances, controlled substance analogs, gamma hydroxybutyrate or flunitrazepam at any time manufactured or stored at such premises, place or facility, whichever is greater.

N.J. Stat. Ann. § 2C:35-4 (emphasis added).

First, we look to see if a New Jersey state court decision “definitively answers the question.” *Mathis*, 136 S. Ct. at 2256. Aviles asserts that *State v. Kittrell*, 678 A.2d 209, 216 (N.J. 1996), does so by referencing the drugs listed in the statute as “CDS,” or controlled dangerous substances. But that case does not address the exact issue before us: whether the substances listed in or referenced by the statute are means or

elements. See *Mathis*, 136 S. Ct. at 2256 (using an Iowa state court decision explicitly holding that the Iowa statute's listed alternatives are means). We have neither found nor been alerted to any New Jersey state court decision speaking to this discrete issue and, thus, must turn to the other two methods provided by the Supreme Court in *Mathis*.

The next method requires us to consider the language of N.J. Stat. Ann. § 2C:35-4. As explained above, if different punishments are proscribed, then the alternatives are elements. *Id.*; see also *Henderson*, 841 F.3d at 630 (holding that an alternative list of substances provides separate elements in part because the statute provides different maximum sentences for violators). We have also recently noted that the inverse is true: The statutory provision of the same punishment, regardless of which alternative was involved in a crime, could indicate that the alternatives are means. See *Hillocks v. Att'y Gen. United States*, No. 17-2384, 2019 WL 3772101, at *7-8 (3d Cir. 2019); see also *Harbin v. Sessions*, 860 F.3d 58, 65 (2d Cir. 2017) (reasoning that the fact that a statute carries the same punishment regardless of which controlled substance is used shows "that each controlled substance is a mere 'means' of violating the statute, not a separate alternative element"). The New Jersey statute provides that any person found guilty under it "is guilty of a crime of the first degree," regardless of the substance or substances used in the commission of a crime. See N.J. Stat. Ann. § 2C:35-4. And N.J. Stat. Ann. § 2C:43-6(a)(1) provides that any person convicted of a crime in the first degree "may be sentenced to imprisonment . . . for a specific term of years which shall be fixed by the court and shall be between 10 and 20 years" Because the punishment does not vary based on substance type, the statute, on its face, could be said

to indicate that its alternative list of substances are merely means. *See Hillocks*, 2019 WL 3772101, at *8.

Additionally, the language of N.J. Stat. Ann. § 2C:35-4 does not indicate that a jury must agree on the particular substance manufactured. Much like the hypothetical statute described in *Mathis*, which allowed jurors to disagree over the exact weapon used as long as all agree that the defendant used a “deadly weapon,” 136 S. Ct. at 2249, N.J. Stat. Ann. § 2C:35-4 appears to allow some jurors to conclude that one drug was being manufactured in a particular instance, while others may believe that the drug involved was a different one. As long as they could agree that a defendant maintained or operated a facility for the production of a controlled substance, the jury may determine that the defendant is guilty. *See Harbin*, 860 F.3d at 65 (concluding that a similarly worded New York statute “does not suggest that a jury must agree on the particular substance sold”).

The Government supports its argument for the opposite conclusion by citing to the discretionary fine provided by N.J. Stat. Ann. § 2C:35-4, whereby the fine may “not to exceed \$750,000.00 or five times the street value of *all* controlled dangerous substances, controlled substance analogs, gamma hydroxybutyrate or flunitrazepam at any time manufactured or stored at such premises, place or facility, whichever is greater.” N.J. Stat. Ann. § 2C:35-4 (emphasis added). Because the amount of that fine depends upon the specific drug type involved, the Government urges that the punishment, in fact, varies based on the substance or substances used, and, thus, drug type must be an element. *Id.* We disagree. We first note that the fine is discretionary and may not be imposed in all cases. Even if the fine was mandatory, however, its provision

in the statute does not support the Government's argument because, in imposing the fine, the sentencing court must total the value of *all* substances involved in a single conviction. Thus, the statute itself contemplates a single criminal conviction for a violation that could involve more than one substance. If the Government's interpretation were correct and drug type was an element, a defendant would be charged with separate offenses based on each drug, even if they were being manufactured at the same place and at the same time. Because the discretionary fine contemplates the opposite scenario, it supports our conclusion that the substances listed in the statute are merely means by which the crime may be committed.⁶

Having concluded that Aviles's conviction under N.J. Stat. Ann. § 2C:35-4 is not a predicate felony drug offense, both of his two remaining convictions must qualify as such in order for us to affirm the District Court's sentencing order. Thus, we turn to Aviles's conviction under Md. Crim. Code § 5-602.⁷ As noted above, the Maryland statute covers a broader

⁶ The Government argues that the New Jersey Pleading and Practice Form and the New Jersey Model Criminal Jury Charge for N.J. Stat. Ann. § 2C:35-4 may be considered in our analysis. But *Mathis* instructs us only to look at state court decisions and the language of the statute itself as "authoritative sources of state law," 136 S. Ct. at 2256, and this Court has recently "rejected the significance the Government places on the structure of the model jury instructions." *Hillocks*, 2019 WL 3772101, at *8; see also *Harbin*, 860 F.3d at 67-68 (rejecting the Government's reliance on pattern jury instructions).

⁷ Aviles's second New Jersey conviction, under N.J. Stat. Ann. § 2C:35-7, presents a thorny issue unaddressed by *Mathis*. The

set of substances than the federal definition of “felony drug offense.” Thus, if the list of substances incorporated by Md. Crim. Code § 5-602 are means, the categorical approach would apply, and Aviles’s conviction could not qualify as a felony drug offense. On the other hand, if the incorporated substances are elements, the modified categorical approach would apply, and we look to the record documents underlying that conviction to determine of exactly which crime, with which elements, Aviles was convicted. Even if the modified categorical approach applies, however, the record documents from that conviction provide no indication of the substance involved in Aviles’s conviction. Instead, those documents merely state that Aviles was charged with and found guilty of “Poss. of CDS W/I to Dist/Manufacture” and “Poss. of CDS.” A. 541. Because we would not be able to determine the exact crime of which Aviles was convicted, we could not rule that

statute provides for two different punishments, depending on whether “the violation involves less than one ounce of marijuana.” N.J. Stat. Ann. § 2C:35-7. Thus, it is divisible, but only into two alternative elements, namely, violations involving less than one ounce of marijuana, and “all other cases,” which would include any other “controlled dangerous substance” or “controlled substance analog” (the “other controlled substances”). *Id.* Looking at the definition of the other controlled substances, the drug type appears to be a mere means of committing the latter crime. Thus, while the statute is technically divisible, the drug type, other than the marijuana exception, does not appear to be an element. Because this type of “hybrid” statute is not addressed by *Mathis* and because we conclude that Aviles’s Maryland conviction clearly cannot qualify as a federal drug offense, we decline to address whether his second New Jersey conviction does.

that conviction is a predicate felony drug offense using that approach.

We conclude that two of Aviles's three prior state convictions, his convictions under N.J. Stat. Ann. 2C:35-4 and Md. Crim. Code § 5-602, cannot qualify as felony drug offenses. Thus, he could not have been subject to a mandatory term of life imprisonment. See 21 U.S.C. § 841(b)(1)(A) (providing for a mandatory life sentence where a defendant has been convicted of *at least two* felony drug offenses). Accordingly, we will vacate the District Court's sentencing order.⁸

IV.

For the foregoing reasons, we will affirm the District Court's denial of Aviles's motion to suppress, and we will vacate the judgment of sentence and remand for the District Court to determine the appropriate sentence.

⁸ We do not address the issue, not raised or briefed before us, that could arise on remand, namely, whether the First Step Act will apply on resentencing. See, e.g., *United States v. Jackson*, 2019 WL 2524786, at *1 (N.D. Ohio June 18, 2019) *appeal pending*, No. 19-3711 (6th Cir. July 19, 2019) (holding that the amendments made through the First Step Act applies to a defendant on resentencing, even though he was originally sentenced before the enactment of the Act); *United States v. Uriarte*, 2019 WL 1858516, at *4 (N.D. Ill. April 25, 2019) (holding the same).

Exhibit 25

Appendix B Appx2

1 Q What is a controlled buy?

2 A A controlled buy is commonly we'll have --
3 there could be an officer that operates as an
4 undercover officer that will make a controlled buy or
5 we can do it through the use of a confidential
6 informant.

7 Typically, the informant will come in.
8 We'll debrief them. They will provide the
9 information in reference to the person that we're
10 going to target in that specific case. They are
11 strip-searched. If they're male or female, they are
12 strip-searched; a male if they're male, female if
13 they're a female.

14 We try to control the buy the best as
15 possible. We'll have them typically shoot a phone
16 call to the person that we intend to purchase the
17 narcotic from. They will be given money from the
18 Drug Task Force. We will go out. We will attempt to
19 control that buy the best we can.

20 They will make a controlled buy from that
21 individual. They will come back. We will come back
22 to the office. They'll be searched again to make
23 sure that they don't have any money or narcotics on
24 them after they provide the narcotics they purchased.
25 Then we typically debrief them as to the facts of the

G001660
Exhibit 26 "A"

Grand Jury transcript
Detective Ryan Mong testimony

Appendix C

Appx 3

1 buy.

2 Q And all the buys that occurred in this
3 particular investigation, would they have occurred
4 under those circumstances?

5 A Always.

6 Q So during the course of your investigation,
7 you identify individuals that you believe are working
8 with Mr. Aviles Senior, is that correct?

9 A That's correct.

10 Q And how were you able to identify some of
11 these individuals?

12 A We were able to identify those individuals
13 through debriefing heroin addicts.

14 Q And as well as your investigation and
15 surveillance activity?

16 A That's correct.

17 Q Taking you to January 2nd of 2015, did you
18 conduct a buy from one of Mr. Aviles Senior's
19 associates on that day?

20 A Yes, we did.

21 Q And that would have been a Kengie
22 Millan-Miranda. Am I correct?

23 A That's correct.

24 Q Did you learn prior to this date that he was
25 connected to Mr. Aviles?

G001661

Exhibit 26 "B"

Suppression hearing affiant #1

7

1 Q. Did the search warrant also reference the description that
2 you just provided about what a controlled buy is?

3 A. Yes, it did.

4 Q. [The controlled buys that are referenced in the search
5 warrant, were they conducted in the manner that you just
6 described?]

* 7 A. [Yes, all of them.]

8 Q. And so prior to each controlled buy, the informant would
9 have been searched; am I correct?

10 A. Yes.

11 Q. Who would have been the searching individual?

* 12 A. It would have been a female probation officer.

13 Q. And that would have been Brooke Darkes, am I correct?

14 A. Yes.

15 Q. After searches are done, is the result of that search
16 provided to you?

17 A. Always.

18 Q. What's the reason that controlled buys are done in the
19 manner that you described and searches are performed?

20 A. So that we can control the buy and corroborate all
21 information provided by the confidential informant.

22 Q. Now in this particular case, were there any red flags that
23 came up during the searches or the controlled buys that caused
24 you any concern?

25 A. No.

should
be
discovered
evidence

Exhibit 28

8

1 Q. If any red flags had come up, what would you have done?

2 A. We would have terminated use of that confidential
3 informant.

4 Q. Okay. For any of the controlled buys that are listed in
5 the warrant, did anything come up during the course of them
6 that caused you any issues?

7 A. No.

8 Q. The information that is set forth in the search warrant
9 probable cause, as far as the controlled buys conducted, was
10 that information true and correct when you included it?

11 A. Yes.

12 Q. And is that information still true and correct?

13 A. Yes.

* * 14 Q. [Did you falsify anything in that search warrant?]

* * 15 A. [No.]

* * 16 Q. [Did you leave anything out that might affect whether or
* * 17 not probable cause existed?]

* * 18 A. [No.]

* 19 Q. You would have been one of the officers or agents that
* 20 went to swear out the warrant in front of the judge, is that
* 21 correct?

* 22 A. That's correct.

23 Q. At the time you completed the warrant and provided the
24 warrant to the judge, did you believe you had probable cause
25 for the locations set forth; the residence, the garage, the

Exhibit 29

1 the record. I do have the recording. This was the one they
2 blurred, but they blurred everything.

3 THE COURT: Well, we'll talk about that later. I
4 mean, it's not going to help you here.

5 MS. ULRICH: No, I wasn't going to get into that.

6 THE COURT: We'll talk about that later.

7 BY MS. ULRICH:

8 Q. March 24th, that was recorded. So the informant comes
9 back. Again, [that's in the house, correct, inside 234 Lehman?]

10 A. [Yes.]

11 Q. So no officers actually see the transaction, is that
12 right?

13 A. No.

14 Q. So again, it comes down to reliability of your
15 confidential informant; correct?

16 A. Along with the officers corroborating what's occurring
17 with the buy.

18 Q. Because they followed her to and from 234 Lehman?

19 A. Correct.

20 Q. They don't lose sight of her, is that right?

21 A. I see her in the -- obviously, when she goes in the house,
22 we can't maintain sight.

23 Q. Right. She comes back, and as per protocol, [she gives you
24 the money,] she gets strip searched, her vehicle is searched;

* 25 correct?

* 1 A. Yes.

2 Q. You take a recorded statement from the informant?

3 A. Correct.

* 4 Q. Okay. Then we move onto the March 30th controlled buy.

* 5 This was again in and around 234 Lehman Street, is that right?

* 6 A. Yes.

* 7 Q. And again, you follow protocols in this case?

* 8 A. Yes. There was, during this specific buy, there was

* 9 personal property. 2-stolen Car Cover

* 10 Q. Yeah, we're going to talk about personal property So you

* 11 meet with the confidential informant?

* 12 A. Yes.

* 13 Q. And there's no call to the target?

* 14 A. I believe in that buy, there was no call to the target.

* 15 Q. But the informant tells you that she has already made

* 16 arrangements with Mr. Aviles for this transaction, correct?

* 17 A. Yes. I believe that's accurate.

*** 18 Q. And did you put that in your search warrant affidavit?

*** 19 A. No. I don't believe that's listed, but that's not

* 20 uncommon for informants to communicate with the targets.

* 21 Q. Right. No, it's not -- it may not be uncommon, but let's

* 22 talk about exactly what arrangements were made because you said

* 23 earlier they're not supposed to make arrangements for drugs.

* 24 Okay. So on March 30th, you meet with your informant, and she

* 25 has already made arrangements to trade the target for drugs.

2-car cover
stolen.

In Page
30 L-5 to 12

1 correct?

* 2 A. I believe there was personal property to be traded,

* 3 correct.

* 4 Q. And in your police report or a police report says that she

* 5 had made arrangements to, quote, trade negotiable instruments

* 6 for drugs?

* 7 A. Personal property, correct!

* 8 Q. Well, the police report says negotiable instruments! Do

* 9 you need to see the police report?

* 10 A. No.

* 11 Q. Okay. So you agree with me that the police report says

* 12 negotiable instruments?

* 13 A. Okay.

* 14 Q. Did you put that in your search warrant?

* 15 A. It doesn't reflect what was exchanged or if money was used

* 16 to make that controlled buy.

* * 17 Q. Because turn to the next page where it has your protocols

* * 18 in. Do you see where it says that the informant is provided

* * 19 recorded drug task force currency to make the purchase? Do you

* * 20 see that?

* * 21 A. Um-hum!

* 22 Q. You put that in there?

* 23 A. Yes, that's what I wrote.

* 24 Q. And you say below that last line, you say, this is the

* 25 method used in the controlled buys described above?

1 A. Correct.

2 Q. And that's what you testified to, that's what you do in
 3 every one of your cases? Earlier that's what you testified to,
 4 didn't you?

5 A. Correct.

* 6 Q. But you didn't give the informant controlled buy money on
 * 7 March 30th of 2015, did you?

* 8 A. No, because that buy was done with ^{(STOLEN) CAR COVER} personal property.

* 9 Q. So you broke protocols, number one, correct?

** 10 A. [That's not broken protocol.] We've done controlled buys in

** 11 the past before where there was personal property traded?

*** 12 Q. You didn't tell the magistrate judge or the president

*** 13 judge who signed this that on March 30th you broke protocols?

*** 14 did you?

*** 15 A. [I believe the judge read the search warrant and signed it]

*** 16 determining there was probable cause to have the search warrant

*** 17 for those properties.

* 18 Q. You don't put here on March 30th that you gave the

* 19 informant controlled buy money, did you?

* 20 A. No, it doesn't reflect that.

* 21 Q. Of course, it doesn't say that after the transaction, the

* 22 informant - [strike that.] You already said it doesn't say

* 23 anything about what the trade is for for the March 30th in the

* 24 search warrant?

* 25 A. It doesn't depict what was traded for the heroin. ^{it does because there was 2 car cover stolen from Confidential Informant from her job.}

- 1 A. I believe so, yes.
- 2 Q. To trade negotiable instruments for drugs?
- 3 A. Correct.
- * 4 Q. Did you know -- without telling me what they were, did you
* 5 know what the negotiable instruments were?
- * 6 A. Yes.
- * 7 Q. Were they legal? [Illegal?]
- * 8 A. Of course, they would be legal.
- * 9 Q. The negotiable instruments -- whatever the informant was
* 10 trading was something legal?
- * 11 A. Yes.
- * 12 Q. In other words, [it wasn't prescription medication?]
- * 13 A. [That would be a controlled substance.]
- * 14 Q. Right. So it was something legal?
- * 15 A. Correct.
- 16 Q. Okay. So the informant is searched, striped searched;
17 correct?
- 18 A. Yes.
- 19 Q. And her clothing is strip searched -- she's strip
20 searched, and her clothing and her body are searched; correct?
- 21 A. Her person and clothing are searched.
- 22 Q. And her vehicle is searched?
- 23 A. Yes.
- * 24 Q. And where were these negotiable instruments then? Were
* 25 they in the car? Were they on her?

Exhibit 34

* 1 A. They were present in the office.

* 2 Q. In the office?

* 3 A. Correct.

* 4 Q. Is that what you said? So the informant brought a
* 5 negotiable instrument to the office?

* 6 A. Yes.

* 7 Q. Did you take pictures of these negotiable instruments?

* 8 A. Those items would have been searched prior to

* 9 participating in the controlled buy.

10 Q. So did you take pictures of the negotiated instruments?

11 MS. EISENHART: Objection, relevance.

12 THE COURT: I'll allow him to answer. Objection is
13 overruled.

* 14 THE WITNESS: We have pictures of them, yes.

15 BY MS. ULRICH:

16 Q. That you what?

* 17 A. We have pictures of those items, yes.

* 18 Q. Okay. And so how did you, like did you mark these

* 19 exhibits or anything other than take pictures of them?

* 20 A. No, we didn't mark the items.

* 21 Q. Did you tell the informant at that time it was not
* 22 appropriate for this informant to make arrangements with the
* 23 target ahead of time?

* 24 A. Correct. We speak with them about that when that occurs,
* 25 and we explain to them that that's not appropriate for them to

Exhibit 35

1 Q. It doesn't indicate that Mr. Aviles was at 513 Arnold
2 Street?

3 A. Correct, just reflects a fact and circumstance of what the
4 informant observed.

5 Q. Now moving on -- and that, by the way, was that video
6 taped or audio taped, to your knowledge?

7 A. Not that I'm aware of.

8 Q. Then moving onto April 15th, that was a controlled buy, it
9 looks like, at 513 Arnold Street; is that right?

10 A. Yes.

11 Q. [And again, that would have been a case where you followed
12 your protocols?]

13 A. [Yes.] [During that controlled buy, there was money
14 exchanged.] Contradict with affidavit turn in on March 14, 2016
"Lie on stand under oath" Again

15 Q. [And you know that because you actually put that in your
16 search warrant, didn't you?]

17 A. [Yes.]

18 Q. On this occasion, the informant would have been strip
19 searched?

20 A. Always.

21 Q. And the vehicle was searched?

22 A. Yes.

23 Q. And then she would have went to 513 Arnold Street,
24 correct?

25 A. Correct.

PREScription (Rx) MORPHINE OWN BY RCI
Exchange

Exhibit 36

1 Q. There were no officers inside 513 Arnold Street?

2 A. No.

3 Q. Are you aware that your informant was carrying morphine
4 and viagra pills on her when she went into 513 Arnold Street?

5 MS. EISENHART: Objection, Your Honor. She's making
6 her own testimony.

7 MS. ULRICH: I have a good faith basis for asking
8 that question.

9 THE COURT: Well, no, I'm going to sustain the
10 objection. You're going to have to rephrase the question. You
11 may have a good faith basis to ask it, but you have to ask it
12 the right way. You can't ask it like that.

13 MS. ULRICH: Okay.

14 BY MS. ULRICH:

15 Q. All right. So the informant -- by the way, your informant
16 is a heroin addict; is that right?

17 A. [Yes.]

18 Q. [And you know she's a heroin addict?]

19 A. [Yes.]

20 Q. [And was she using during these controlled buys, to your
21 knowledge?]

22 A. [Not to my knowledge.]

23 Q. Do you know if she had kicked the habit or how was she
24 controlling her heroin addiction during this time period,
25 February through May of 2015?

Exhibit 37

Detective Ryan Mong Testimony
Affiant #1
Trial transcripts

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1 Q. And, of course, on this particular occasion, there was no
2 money given to the informant, no controlled buy money; is that
3 right?
4 A. Correct.
5 Q. But you said earlier that that was standard procedure,
6 that was protocol in these cases to give controlled buy money
7 to your informant; right?
8 A. It doesn't always happen that way.
9 Q. Well, you testified early on that was part of your
10 protocol; right?
11 A. Well, we need to trade something or provide them with
12 money in order to get the heroin or another controlled
13 substance we're going to purchase or receive during that
14 controlled buy.
15 Q. Well, you testified in this matter on August 26th, 2016,
16 before a grand jury, didn't you?
17 A. Yes, ma'am.
18 Q. And you were asked these very same questions, protocols
19 involving your controlled buys; right?
20 A. Yes.
21 Q. I'm going to show you what's been marked as Defense
22 Exhibit 134. Page 7, okay. This is your testimony. We try to
23 control the buy the best as possible. We'll have them
24 typically shoot a phone call to the person that we intend to
25 purchase the narcotic from. They will be given money from the

224

1 task force. We will go out. We will attempt to control the
2 buy the best we can.
3 That's your testimony, isn't it?
4 A. Yes, ma'am.
5 Q. You didn't say anything about car covers, did you?
6 A. No.
7 Q. Okay. And then the next page, page 8. If you could pull
8 out lines 2 through 5. This is the very next page. The
9 question put to you was, And all the buys that occurred in this
10 particular investigation, would they have occurred under those
11 circumstances? What was your answer?
12 A. Always.
13 Q. Right. Again, you don't tell me anything about negotiated
14 instruments, did you?
15 A. Correct. That's not something we normally do.
16 Q. Well, let's be clear. You can take that down. You took
17 an oath at this grand jury proceeding, right, to testify?
18 A. Yes, ma'am. I testified truthfully and accurately.
19 Q. The truth, the whole truth, and nothing but the truth;
20 right?
21 A. Yes, ma'am. Again, I make mistakes. I'm not perfect.
22 Q. I'm not making any comments. Okay. April 15th. April
23 15th, you testified about that. It's a controlled buy,
24 correct?
25 A. Which date, ma'am?

225

1 Q. April 15th?
2 A. Okay.
3 THE COURT: If you're going to get into a new area,
4 maybe this is a good place to wrap it up, unless you just have
5 one or two questions.
6 MS. ULRICH: (Shook head negatively.)
7 THE COURT: No? Okay. Well, I think this is a good
8 break point then. Folks, let's break for lunch. We will
9 return here, if I could ask your indulgence, in time for you to
10 get in the jury box and be ready to go at quarter to 2, if you
11 don't mind, so we can pick this up and keep moving. So we'll
12 be in recess until quarter to 2. Anything else from counsel
13 before we break for lunch? Mr. Bloom, anything else?
14 MR. BLOOM: Nothing from the United States, Your
15 Honor.
16 THE COURT: Nothing from defense counsel?
17 MS. ULRICH: No, Your Honor.
18 THE COURT: All right. Thank you, all. We'll see
19 you at quarter to 2.
20 COURTROOM DEPUTY: All rise.
21 (Lunch recess taken at 12:32 p.m. and proceedings
22 reconvened at 1:49 p.m.)
23 THE COURT: Welcome back, folks. I hope you had a
24 nice lunch. We continue with cross and Ms. Ulrich.
25 CROSS EXAMINATION (CONTINUED)

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1 BY MS. ULRICH:
2 Q. Detective Mong, I think when we ended, we were talking
3 about March 30th of 2015. And I believe your testimony, and
4 you can correct me if I'm wrong, but it was okay for the
5 informant to make these arrangements ahead of time with the
6 target regarding car covers; is that right?
7 A. Yes. There's no -- we don't have any policy that
8 terminates the use of informant because they make contact with
9 a target prior to us having knowledge. We frown upon it. We
10 counsel them about it.
11 Q. Okay. And you testified, again, in this matter on
12 February 1st, 2016, didn't you; correct?
13 A. What's the date?
14 Q. You testified about this matter February 1st, 2016, at a
15 hearing?
16 A. Yes.
17 Q. And at that hearing, you took an oath to tell the truth,
18 the whole truth, and nothing but the truth?
19 A. Yes.
20 Q. I just want to refer you to Exhibit 127.
21 MR. BLOOM: Just so we're clear, it's Defense Exhibit
22 127.
23 BY MS. ULRICH:
24 Q. Pages 43 to 44. Okay, so here we are. We're talking
25 about the buys. Then the question is asked, Did you tell the

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~~Detective~~ Ryan Mong ~~testimony~~
Affiant #1

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Trial
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1 -- now this is regarding, we're talking about the March 30th
2 buy. If you need to go back in the transcript, I have the
3 transcript if you want to look at it, but here we are talking
4 about the March 30th buy.
5 And the question is, Did you tell the informant at that
6 time it was not appropriate for this informant to make
7 arrangements with the target ahead of time? Can you read your
8 answer?
9 A. It says, Correct, we speak with them -- speak with them
10 about that when it occurs, and we explain to them that it's not
11 appropriate for them to --
12 Q. Next page.
13 A. -- be doing that.
14 Q. And then the question was, Did you speak to the informant
15 that day about it? And you said what?
16 A. I didn't speak, no.
17 Q. Now I want to take you to page 65 of this transcript.
18 Again, there's a question, So there's this whole other
19 relationship between your informant and this target that has
20 something to do with negotiable instruments, is that right?
21 Your answer was?
22 A. Sorry, where is that at?
23 Q. Line 13, question was, So there's this whole other
24 relationship between your informant and this target that has
25 something to do with negotiable instruments, is that right?

1 And what was your answer?
2 A. Yes.
3 Q. And down to line 20, it says, And you had told the
4 informant on March 30th -- because now we're talking about the
5 15th -- that she was not permitted to do that, is that right?
6 What's your answer?
7 A. Correct. That would have been the buy where negotiable
8 instruments were exchanged.
9 Q. Now on March 30th, you say you knew that there were these
10 negotiable instruments; correct?
11 A. Yes.
12 Q. And now, of course, you've always taken pictures of your
13 buy money that you give the informant; right?
14 A. Correct.
15 Q. Did you take pictures of the car covers?
16 A. I did not, no.
17 Q. Even though you knew that was to be exchanged with the --
18 for drugs?
19 A. I did not take any pictures of the car covers, correct.
20 Q. But you knew there were pictures of those car covers,
21 right?
22 A. There's no pictures retained for the car covers.
23 Q. But there were pictures taken of the car covers, weren't
24 there?
25 A. I did not take the pictures.

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1 Q. I'm not asking that. There were pictures taken, right?
2 A. Yes. There was no pictures retained with the amount of
3 overwhelming evidence we have in this case.
4 Q. I'm going to show you again that same exhibit. I think
5 it's 127. Page 43. Again, you're under oath to tell the
6 truth --
7 MR. BLOOM: Your Honor, again, I'm going to ask
8 counsel to please stop, to refrain from making these comments.
9 Again, you're under oath. If there's a question, that's great.
10 But the comments, I would really ask they stop, please.
11 THE COURT: I think you said that he's under oath.
12 MS. ULRICH: Well, that's a question. I mean, you
13 were under oath at that hearing? That's a question. You were
14 under oath -- I meant that as a question.
15 BY MS. ULRICH:
16 Q. You were under oath at that hearing, right?
17 A. Yes, ma'am.
18 THE COURT: Now it's a question.
19 MS. ULRICH: Okay, okay.
20 BY MS. ULRICH:
21 Q. And the date of this hearing was February 1st, 2016,
22 correct?
23 A. Correct.
24 Q. And the question is asked, So did you take pictures of the
25 negotiated instruments? And if you go down to the objections,

1 what do you say on line 14?
2 A. We have pictures of them, yes.
3 Q. And then I say, That you what? And what's your answer
4 again?
5 A. I said, We have pictures of those items, yes.
6 Q. So this was February 1st, 2016; right?
7 A. But as I explained, I did not take the pictures nor retain
8 them.
9 Q. I'm not asking who took them. This is your testimony,
10 right?
11 A. Yes. It says, we have pictures of those items.
12 Q. And this is February 1st, 2016; right?
13 A. Yes. And I explained I did not take the pictures and they
14 were not retained.
15 Q. And I appreciate that. But at this hearing on February
16 1st, 2016, we knew we had pictures of the car covers; right?
17 A. But I did not take the pictures.
18 Q. It doesn't matter who took them, okay. So you know that
19 was a hotly contested matter at this hearing on February 1st,
20 2016? That was the subject of that hearing, those car covers,
21 wasn't it?
22 A. As to if they were photographed?
23 Q. The subject was the car covers not that they were
24 photographed. We already know that you had pictures at the
25 time. But that was a hotly contested matter at that hearing on

Appendix D (2)

Detective Ryan Mong testimony
Affiant # 1
Trial transcripts

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1 February 1st, what those negotiable instruments were; correct?

2 A. Yes, that's correct.

3 Q. Okay. So you're telling me between February 1st, 2016,

4 and today, this trial, you destroyed those pictures or somebody

5 destroyed those pictures?

6 A. No. I'm saying I did not take the photographs of the

7 pictures, and from what I understand, they're not retained. I

8 did not take the pictures to begin with.

9 Q. I know you didn't take the pictures. Are there -- where

10 are those pictures today that you said you had February 1st,

11 2016? Where are they?

12 A. They were not retained. We have overwhelming evidence in

13 this case. They were not retained.

14 MR. ABOM: Your Honor, I'm going to object because

15 that's not responsive to her question, particularly his opinion

16 as to the quality of the evidence in the case.

17 THE COURT: You want to respond?

18 MR. BLOOM: I think he answered it. They were not

19 retained.

20 THE COURT: Well, he also answered that there was

21 overwhelming evidence. The jury will disregard that statement

22 about overwhelming evidence. That was not responsive to the

23 question. That's stricken. It will be disregarded. Your

24 objection is sustained. You may continue.

25 MS. ULRICH: Thank you.

232

1 BY MS. ULRICH:

2 Q. So the buy money is important. You retained those

3 pictures, right?

4 A. We photocopy those.

5 Q. You saved those pictures, right?

6 A. Those pictures were retained, yes.

7 Q. Because that's evidence in the case?

8 A. Right.

9 Q. But you didn't retain pictures or somebody -- the pictures

10 of the car covers are gone?

11 A. The pictures were not retained. However --

12 Q. Are the pictures gone, yes or no?

13 MR. BLOOM: Your Honor, I'm going to object at this

14 point. It's been asked and answered at least a couple times.

15 He said, I don't know how many times ad nauseam, they were not

16 retained. That means they do not have them. They were not

17 retained.

18 MS. ULRICH: Thank you for testifying.

19 BY MS. ULRICH:

20 Q. In other words, evidence in this case was destroyed?

21 Evidence that would have been pertinent to Mr. Aviles, is that

22 right, that evidence was destroyed?

23 A. They were not retained. However, the officer that looked

24 at them that would have took the pictures would be able to

25 readily identify them upon looking at them again.

233

1 THE COURT: They've been disposed of. Let's move out

2 of this area. I mean, there's nothing left to get here.

3 MS. ULRICH: Okay.

4 BY MS. ULRICH:

5 Q. Agent Mong -- or Detective Mong, let's move to April 15th.

6 So now we have you at the suppression hearing telling your

7 informant on March 30th that she's not supposed to be making

8 these pre-arrangements, right? You can agree with that? We

9 just looked at your testimony?

10 A. Yes.

11 Q. But then again, here again on April 15, we have your

12 informant trading what you say in your police report are

13 non-monetary items; right?

14 A. That's correct.

15 Q. So here we are again on April 15th. And your police

16 report this time says that it was a non-monetary item that's

17 going to be exchanged for heroin, correct?

18 A. That's correct.

19 Q. And again, you testified in this matter on February 1st,

20 2016; is that right?

21 A. Yes.

22 Q. Where you were under oath to tell the truth, the whole

23 truth, and nothing but the truth?

24 A. Yes, ma'am.

25 Q. I'm going to show you Exhibit 127, page 49, so you can

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1 see, line 8. Question is, Then moving onto April 15th, that

2 was a controlled buy, it looks like, at 513 Arnold Street; is

3 that right? What was your answer?

4 A. Yes.

5 Q. And my question is, Again, that would have been a case

6 where you followed your protocol? What was your answer?

7 A. Yes. During that controlled buy, there was money

8 exchanged.

9 Q. Okay. So on April 15th, 2015, at this suppression hearing

10 when you were under oath, you said there was money exchanged?

11 A. Correct. I was wrong. There was a car cover exchanged.

12 Q. I'm sorry?

13 A. There was a car cover exchanged. I was wrong. There

14 wasn't money exchanged.

15 Q. Well, so is that another mistake?

16 A. That was an incorrect response. I was wrong.

17 Q. Well, you prepared a search warrant in this case, too,

18 didn't you?

19 A. Yes, ma'am.

20 Q. Because at this hearing, we were talking about the search

21 warrant, too, weren't we?

22 A. Yes.

23 Q. And you said the same thing in your search warrant, didn't

24 you, that it was money that was exchanged for drugs?

25 A. Yes, and I was incorrect as well.

Detective Ryan Mong testimony
Affiant #1 Trial testimony

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1 Q. So another -- it's not a lie, you were incorrect is what
2 you're saying?
3 A. Correct. When I did the search warrant, to my best
4 knowledge and belief, that information was accurate.
5 Q. Now moving to May 12th. Now we know that on March 30th,
6 you told the informant, you know, you're done with these
7 pre-arrangements; right?
8 A. Yes. The informant is not supposed to be doing that, but
9 that's not an infraction that's going to cause us to terminate
10 their use.
11 Q. Okay. And once again on May 12th, we heard part of the
12 audio, and if you need me to play it again, I can, she's asking
13 Mr. Aviles if he wants parts; right?
14 A. That's correct.
15 Q. Auto parts?
16 A. That's correct.
17 Q. Now I am going to show you Government Exhibit 121.40.
18 That actually depicts one of those car covers, is that right?
19 A. I believe that's accurate, yes.
20 Q. Okay. You would agree that's not a Dollar Store car
21 cover, is it?
22 A. No.
23 Q. That's an expensive car cover, isn't it?
24 A. Yes.
25 Q. And your informant is bringing these in for these

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1 controlled buys, one or more of these; is that right?
2 A. Yes.
3 Q. Now you said -- I think earlier you said you knew she
4 worked at REM?
5 A. Yes.
6 Q. Do you have any idea how much money she was making at REM?
7 A. No.
8 Q. And I think you agreed earlier that these car covers are
9 about 240 dollars retail?
10 A. I believe that's what you said, yes.
11 Q. I want you to assume for a moment that these car covers
12 were, in fact, stolen by your informant, Liz McGovern?
13 A. I was not aware they were stolen.
14 Q. Let's assume for a moment they're stolen. That would be
15 contraband, wouldn't it?
16 A. However, I did not have that knowledge that they were
17 stolen.
18 Q. My question is, yes or no?
19 MR. BLOOM: Your Honor, I'll stipulate.
20 THE COURT: Hold it, hold it.
21 MR. BLOOM: I'll stipulate that if an item is stolen,
22 it's contraband.
23 MS. ULRICH: The witness can answer that question.
24 It's a simple question.
25 THE COURT: It's now a stipulated fact that if

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1 they're stolen, they're contraband. So let's move on.
2 MS. ULRICH: All right.
3 BY MS. ULRICH:
4 Q. And she didn't have this one time, assuming they're
5 stolen, she had them on two, three, four buys, didn't she?
6 A. I believe there were three total car covers.
7 Q. Now I'm going to show you what's been marked as Exhibit
8 197. All right. This is a sales order billed to Elizabeth
9 McGovern. And below it says there's a balance of 450 dollars.
10 The date up top is March 30th. Did Ms. McGovern give that to
11 you?
12 A. Yes.
13 Q. She did. When did she give that to you?
14 A. I don't recall when they were provided.
15 Q. And why did she give that to you?
16 A. They were provided to us to insure that the car covers, as
17 you would say, are not stolen. And we needed receipts to
18 confirm that from her place of employment.
19 Q. Do you know that she had the ability --, are you aware if
20 she had the ability to pay 450 dollars for two car covers on
21 March 30th?
22 A. I don't believe that she did pay for them.
23 Q. I'm sorry, what?
24 A. I don't believe that they were paid for; Those were just
25 receipts provided to us.

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1 Q. For what purpose? To say what?
2 A. Those receipts were provided to us for us to have a
3 record.
4 Q. Did you ask her where she got these receipts?
5 A. I did not ask her, no.
6 Q. Do you know these receipts are false receipts?
7 A. No, I'm not aware of that.
8 Q. But this is what she gave you, right?
9 A. That's one of receipts, yes.
10 Q. And you retained it as evidence?
11 A. We placed it in the folder for the investigation, yes.
12 Q. And did she tell you that she paid 450 dollars for those
13 two car covers? Is that what she represented when she gave you
14 the receipt?
15 A. She didn't tell me anything.
16 Q. Well, it's March 30th, she gave it to you. What did she
17 tell you?
18 A. She didn't give the receipts to me. She gave them to
19 Sergeant Hopkins.
20 Q. Okay, fair enough. Going back one page. Do you know if
21 they were provided all at the same time or separate times?
22 A. I don't know. I don't have that knowledge.
23 Q. Okay. Now here's another receipt. This one is dated
24 4/16/2015. Do you see that?
25 A. Yes.

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Sergeant Brett Hopkins testimony
Affiant #2

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microphones.)
THE COURT: All right. Ms. Ulrich, you may resume.
BY MS. ULRICH:
Q. Now we were talking about your testimony, and we were
talking about February 10th, 2015. I want to play the snippet
from that interview, February 10th, 2015. It's the last part
of it. Could you go ahead? I want you to listen.
(Audio is being played.)
That's you asking a question, correct? You were asking
the question, okay, and here we are taking the statement?
A. Right.
Q. Do you want to listen to it again?
A. No, I heard that.
Q. Okay. Was that you asking the question?
A. Yeah.
Q. Who's saying, that's when the vehicle search was
conducted, correct?
A. Yes.
Q. I said, who's saying it?
A. It might have been Detective Minnick in the background.
Q. And then someone says, yes, the vehicle search was then
conducted by Detective Dipalo. Who was that?
A. Was that me that said that?
Q. I don't know. That's what I'm asking?
A. Can you play it again?

Trial
Transcripts

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Q. Go ahead. Listen to the second voice.
(Audio is being played.)
Who was that?
A. That was Detective Minnick.
Q. And then the next one is saying, yes, the vehicle search
was then conducted. Go ahead.
(Audio is being played.)
A. That was me.
Q. Now in this report -- I'm going to play another clip. I'm
going to play Defense Exhibit 102.
(Audio is being played.)
You heard that, right?
A. Yes.
Q. But yet she was searched when she came back from that buy
February 10th, is that right?
A. That's correct.
Q. Her person was searched?
A. That's correct.
Q. Her vehicle was searched?
A. That's correct.
Q. And nobody found 60 dollars, did they?
A. I testified she handed over to me six 10 dollar bills that
she got for those car covers that she gave to him. It was not
in the report, but it should have been in the report, but it
wasn't.

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Q. Okay. So wait a minute. So we have this detailed report
from two years ago that was made at or near the time of the
event, is that right?
A. Yes.
Q. It's not your report, correct?
A. It's part of the report, correct.
Q. Okay, it's yours and it's Detective Mong's. So now this
report that's supposed to contain every detail doesn't mention
the car covers, correct? It doesn't mention the car covers, is
that right?
A. Right, because it wasn't part of the heroin deal.
Q. And now we got 60 dollars in cash that now you say the
informant handed you when she came back?
A. Yes.
Q. And that's not in your police report?
A. That's correct, and it should have been.
Q. So now we have two very -- strike that. Strike that. Now
in this clip, I'm going to play another clip for you, it's
Defense Exhibit 103.
(Audio is being played.)
Do you know what happened to that gram of really good
shit?
A. No. We searched her and her vehicle and there was nothing
there.
Q. She may have used it while she was there, right?

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A. I don't know that.
Q. You weren't there, correct?
A. I wasn't in the house, no.
Q. The only person in the house was the informant and Mr.
Aviles, is that right?
A. I wasn't inside.
Q. You had to rely on the credibility of Ms. McGovern to tell
you what happened?
A. She showed no signs of using when we had contact with her.
Q. Now on this same -- in the same recording, it says that
you provided her with 120 dollars in pre-recorded Drug Task
Force funds; right?
A. Yes.
Q. And that is, in fact, what you're saying you gave her, 120
dollars in pre-recorded Drug Task Force money; is that right?
A. Yes.
Q. Also during this conversation, she talked about Xanax. Do
you remember that?
A. Yes.
Q. Did you ever follow-up with her if she ever got that
Xanax?
A. There was no Xanax given to us or found.
Q. Because she was supposed to touch base with the person the
next day about the Xanax. Did you ever ask her about that?
A. No.

Appendix D (5)

Seragent Brett Hopkins testimony
Affiant #2 Trial transcripts

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1 Q. You didn't care?

2 A. No, I care.

3 MS. EISENHART: Objection, argumentative.

4 THE COURT: It's not argumentative. She asked him if

5 he cared, and he said no. Move on. Next question.

6 BY MS. ULRICH:

7 Q. February 10th, you say this is a good buy, no red flags

8 with your informant?

9 A. No.

10 Q. And that's because -- and that's because you didn't even

11 ask her where she got the car covers?

12 A. The conversation when I talked to her earlier in the night

13 when I asked her to come in, she says, good, I have car covers

14 to give to him anyhow, that will be my excuse. And that's what

15 we used as the ruse to be able to go to him. But that car

16 cover had nothing to do on that particular date with the

17 purchase of the 120 dollars worth of heroin.

18 Q. I'm not going to get into an argument, but it had

19 everything to do with that buy because that's what she was

20 going to do to get to Mr. Aviles was to give him that car

21 cover. It had everything to do with the buy.

22 MS. EISENHART: Objection, Your Honor.

23 THE COURT: The objection is sustained. That wasn't

24 a question, that was a comment. Ask a question.

25 BY MS. ULRICH:

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1 Q. Those car covers were a material or a very important fact

2 or detail of that controlled buy, wasn't it?

3 A. Not in my opinion.

4 Q. That's why it just happened to be out of the report?

5 A. No. I made a mistake. I should have put it in there. It

6 was on the recording.

7 Q. So it was important enough, it should have been in your

8 report?

9 A. I should have included it, yes.

10 Q. And really, you didn't even remember that there was a car

11 cover involved until you listened to this recording last night,

12 would you agree with that?

13 A. I wouldn't agree with that, no.

14 Q. All right. Moving on. Now we go to March 4th of 2015.

15 And here again, we have another car cover, don't we?

16 A. May I look at my report?

17 Q. Well, you can, but I don't think you're going to find it.

18 Do you have your report that says it involved car covers?

19 A. No.

20 Q. Okay. So what you're telling me is, you don't really

21 remember much about March 4th, 2015? You just asked to refer

22 to your notes?

23 A. I was getting confused with the date because there was a

24 lot of things going on.

25 Q. That was over two years ago, wasn't it?

458

1 A. Yes.

2 Q. Now on that date, okay, now -- now on that date, we have

3 another car cover, don't we?

4 A. When I called her to come in. She said, oh, good, I can

5 drop off the car cover as an excuse to go over there.

6 Q. By the way, going back to February 10th, that was -- you

7 guys were talking about three car covers, weren't you? She's

8 talking about plural car covers, is that right?

9 A. Yes.

10 Q. And there were actually three car covers, weren't there?

11 A. I believe there was, yes.

12 Q. That was on February 10th?

13 A. Yes.

14 Q. Three. And are you telling this jury you have no idea

15 what the value of these three car covers would be?

16 MS. EISENHART: Objection, asked and answered.

17 THE COURT: Yes, it has been. Sustained.

18 BY MS. ULRICH:

19 Q. Did you know the informant to have any like significant

20 means of money other than this job she was working at REM?

21 A. No.

22 Q. All right. So let's go back to March 4th. So here we are

23 March 4th now. And once again, now we have a fourth car cover;

24 is that right? Three from February 10th, right?

25 A. Right, that had nothing to do with the buying heroin.

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1 Q. I know you keep saying that. But now we have a fourth car

2 cover that's used in this undercover controlled heroin buy?

3 A. It wasn't part of the operation.

4 Q. That's not what I'm asking. I'm asking, this is now car

5 cover number four, isn't it?

6 A. If you say it is.

7 Q. Well, you don't have to take my word. You were there, I

8 wasn't. You said already February 10th, there was three;

9 right? Right?

10 A. Yes.

11 Q. And now we're talking about number four, right?

12 A. Yes.

13 Q. That's four car covers, right?

14 A. Yes.

15 Q. Okay. So we can agree on that?

16 A. Okay.

17 Q. So here we are February 4th. And you're saying you gave

18 Ms. McGovern 200 dollars, is that right?

19 A. Yes.

20 Q. And, of course, now we know she had this car cover; right?

21 A. She said in an earlier conversation that would be her

22 reason to go over there and drop that off and then she would

23 get the heroin.

24 Q. And so then, of course, you learned that last night when

25 you were listening to the briefing or the debriefing tape last

Seragent Brett Hopkins testimony
Affiant #2 trial testimony

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1 night that there was a car cover involved in this one, too?

2 A. That's not true.

3 Q. You have an independent memory of that?

4 A. No. I reviewed it long before last night.

5 Q. Now again, she was searched and you searched the car: is

6 that right?

7 A. Yes.

8 Q. And according to all reports, there's no contraband found

9 in the car?

10 A. Correct.

11 Q. Currency or drugs?

12 A. Correct.

13 Q. Well, but the car cover had to be in the car, right?

14 A. That isn't considered contraband.

15 Q. Well, if it's stolen, if it's a stolen car cover --

16 MS. EISENHART: Your Honor, objection. She's asked

17 this question numerous times.

18 THE COURT: Approach.

19 (Sidebar discussion held:)

20 THE COURT: I'm an ostensibly objective observer

21 here, and I got to tell you that I think you made your point

22 with respect to the car covers. I mean, I can deal with that

23 individual objection if you want, but, I mean, I don't --

24 you've covered it. You made your point.

25 MS. ULRICH: I know I made it. I guess what I'm

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1 getting now is his total evasiveness, which I said in my

2 opening they're going to be evasive. That's what I'm getting

3 now is that he's not answering the questions, he's being

4 evasive.

5 THE COURT: But the way to deal with evasiveness.

6 with all due respect, is not to ask the same question over and

7 over again. I don't think, especially when you got an answer.

8 Well, it's also going to trigger an objection. and I'm going to

9 have to rule on the objection. I'm going to give you some

10 latitude, but I'm watching the jury on the car cover issue, and

11 I think you're wearing it out.

12 MS. ULRICH: I'll just ask it once, and then if he

13 doesn't want to answer --

14 THE COURT: But I think --

15 MS. EISENHART: Your Honor, it's objectionable even

16 if she asks it once. There's nothing to establish the car

17 covers were stolen. And all she's asking is, if it was stolen,

18 was it contraband. She's going to get the same answer.

19 MR. BLOOM: We've stipulated to that anyway, that

20 they were stolen. We stipulated to that earlier in the trial.

21 THE COURT: You know, I want to move this on because

22 we're running in mud here in this trial. I'm going to give her

23 some latitude only because I don't think it's so objectionable

24 that I'm going to rule it out, but if we don't get out of the

25 car cover area. I'm going to start sustaining objections. The

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1 jury is rolling their eyes. Every time you say car cover, they

2 look like they're going on dial tone. I'm being honest here.

3 MS. ULRICH: And I appreciate that. And you know

4 that's my whole defense. I mean, we have Don Moyer under

5 subpoena to come in and testify.

6 THE COURT: If I put these jurors under oath right

7 now, and I ask them what your defense involved, the first thing

8 they would say is car covers.

9 MS. ULRICH: And my client would be happy.

10 THE COURT: Okay, I'm telling you, okay, if I press

11 them, if I said, what is the fulcrum of Mr. Aviles' defense,

12 every one of those 12 -- no, 14 jurors would say, car cover.

13 MS. ULRICH: That's what I'm arguing.

14 THE COURT: Okay.

15 MS. ULRICH: Okay, I appreciate that. Thank you. I

16 made my point.

17 (Sidebar discussion concluded.)

18 THE COURT: You may proceed. Was there a question or

19 was there an answer? I think there might have been -- Wendy,

20 I'm sorry, if you could read that back again?

21 (Complied.)

22 THE COURT: You can finish the question.

23 MS. ULRICH: Oh, I can finish?

24 THE COURT: If you choose to, yes.

25 BY MS. ULRICH:

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1 Q. If it was a stolen car cover, that would be contraband;

2 correct?

3 A. If I knew it was stolen, absolutely.

4 Q. Now you said that in February, back to February 10th, that

5 she gave you 60 dollars for the car covers; is that right?

6 A. She came back with 60 dollars, yes.

7 Q. And she gave it to you, right?

8 A. Yes.

9 Q. That's what you testified to?

10 A. Yes.

11 Q. So you're saying the car covers had nothing to do with the

12 controlled buy, right?

13 A. No.

14 Q. But you took the 60 bucks?

15 A. And we gave it back to her.

16 Q. Now going back to March -- I'm going to go to March 13th.

17 Okay. So here we are, March 13th now. Now we have yet a fifth

18 car cover involved, is that right, March 13th?

19 A. No.

20 Q. No? There's no car covers?

21 A. I believe it was some type of auto part.

22 Q. Oh, okay. What kind of auto part was it?

23 A. Some kind of molding or small cover, not a car cover, but

24 some kind of molding or small cover. I don't exactly recall.

25 When I called her, she said, oh, good, I can drop off this part

March 13, 2015
under hood
molding

Appendix D (7)

Seragent Brett Hopkins testimony
Affiant #2 Trial transcripts

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1 as a way to get over there.

2 Q. I'm sorry, I didn't hear. What kind of part did you say

3 it was?

4 A. Molding or some kind of small cover.

5 Q. A molding for what?

6 A. On the hood, like for a firewall.

7 Q. It's an auto part?

8 A. It wasn't anything to do with, you know, to do with the

9 heroin deal.

10 Q. Nothing to do with the controlled buy?

11 A. No.

12 Q. How much -- I don't know what this molding looks like. Do

13 you have a picture of it?

14 A. No.

15 Q. You didn't take a picture of it?

16 A. No.

17 Q. All right. And how much is something like that worth

18 because I don't know?

19 A. I don't know.

20 Q. No idea?

21 A. No.

22 Q. Okay. It could be a hundred dollars?

23 MS. EISENHART: Objection. He's already indicated he

24 doesn't know.

25 THE COURT: Sustained. He said he doesn't know.

465

1 BY MS. ULRICH:

2 Q. So now we have this molding. Of course, you searched the

3 car ahead of time; right?

4 A. Yes.

5 Q. And all the reports indicate there's nothing in the car?

6 A. Right.

7 Q. Nothing on her?

8 A. Right.

9 Q. But now today, we find out we have some molding in the

10 car; right?

11 A. There was no contraband in the car.

12 Q. Now in this particular buy, you gave her a hundred

13 dollars?

14 A. I gave her 75.

15 Q. Correct?

16 A. I gave her 75. I made a mistake when I said that she said

17 that she received a hundred.

18 Q. Oh, okay. You listened to these tapes last night, right?

19 A. I listened to them before that.

20 Q. You didn't talk to Detective Mong?

21 A. No.

22 Q. Let's play that clip on March 13th. Okay. Defense

23 Exhibit 108.

24 (Audio is being played.)

25 So there's a couple things about that. Number one, you

466

1 said a hundred dollars; right?

2 A. I did.

3 Q. You're sitting there, yes?

4 A. She said a hundred.

5 Q. Okay. She said a hundred. And you heard her say a

6 hundred?

7 A. I should have corrected her because it was 75, and that's

8 what we had.

9 Q. This is another mistake?

10 A. Yes. Yes, ma'am.

11 Q. And you know it's 75 because you were looking at Detective

12 Mong's report, and that says 75 dollars?

13 A. No, I knew it before that. I saw the receipt.

14 Q. Okay. You remembered that from two years ago and you saw

15 the receipt?

16 A. I looked at my case.

17 Q. So here we have, you're sitting here during this

18 conversation; is that right?

19 A. Yes.

20 Q. Detective Mong is sitting here during this conversation?

21 A. I believe so, yes.

22 Q. And McGovern is there, right?

23 A. Yes.

24 Q. And you and Detective Mong are seasoned task force

25 officers, aren't you?

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1 A. Yes.

2 Q. So she's telling you, you gave her a hundred, and what

3 you're telling me today is, oh, that was a mistake and you

4 didn't bother to correct it? That's what you're saying today?

5 MS. EISENHART: Objection, Your Honor. It's been

6 asked and answered several times already.

7 MS. ULRICH: This is cross examination, Your Honor.

8 THE COURT: I'll allow the question, but I'll hear

9 you if she continues.

10 THE WITNESS: I should have corrected her and said it

11 was 75.

12 BY MS. ULRICH:

13 Q. And then we have, that was given to her in case, in case

14 there was going to be an outright purchase for heroin; right?

15 A. Right.

16 Q. In other words, the car cover was going to be in exchange

17 for the heroin or the molding in this case? The molding was

18 going to be in exchange for the heroin, right?

19 A. No. We gave her the money to see if she could get some

20 heroin.

21 Q. Okay. Well, because let's play that clip again, Defense

22 Exhibit 108. Listen where you say, okay, in case there was

23 going to be an outright purchase for heroin.

24 A. Right.

25 Q. Listen to that again. Exhibit 108.

Seragent Brett Hopkins testimony
Affiant #2 Trial testimony

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1 (Audio is being played.)

2 Q. So the hundred dollars, or today 75, was in case there was

3 going to be an outright purchase for heroin?

4 A. In case she could purchase heroin for 75 dollars.

5 Q. So it had nothing to do -- so you're still saying the

6 molding had nothing to do with this controiled buy?

7 A. That's correct.

8 Q. All right. On March 13th, of course, you testified that

9 there was a purchase of a bundle and a half; is that right?

10 A. Yes.

11 Q. And what was that? How many bags?

12 A. Fifteen.

13 Q. All right. Do you have that report in front of you, March

14 13th, 2015, that you and Detective Mong jointly prepared? Do

15 you have that in front of you?

16 A. I think so.

17 Q. Okay. Can you go through that report? And it says, upon

18 further inspection, Detective Minnick found both bundles held a

19 combined total of 15 bags. Do you see that? If you need me to

20 --

21 A. No, I found it.

22 Q. I think I can show it to you?

23 A. Yes.

24 Q. You have it, okay. Do you see that where it says, upon

25 further inspection, it's 15 bags? Do you see that?

*March 30, 2015
*2 car covers

469

1 A. Yes.

2 Q. And then two paragraphs below that, your police report

3 says that, upon further inspection, each bundle held 10 clear

4 plastic Ziploc baggies each. Do you see that?

5 A. Where are you referring to?

6 Q. You know what. Let me see if I can pull it up?

7 A. I see where it is.

8 Q. So you see we have, upon further inspection, we have 15

9 bags? Do you see that?

10 A. Yes.

11 Q. And then after that, upon even further inspection, now we

12 have 20 bags? Is that right?

13 A. It says, each bundle held 10 clear Ziploc baggies.

14 Q. That would be 20, right?

15 A. If you do the math, yes. I believe that it was 15. I

16 have to refer to the report that went to the lab.

17 Q. So that's my point. Only 15 bags went to the lab, is that

18 right?

19 A. Yes. That's what I received from her, 15 bags.

20 Q. So are we saying this is yet another mistake in a police

21 report?

22 A. Yes, ma'am, that may be an error.

23 Q. Okay. Let's move on to March 30th. All right. Here we

24 are March 30th. And now we know there's supposed to be -- that

25 we have, it looks like, two more car covers?

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1 A. Yes.

2 Q. So that's six car covers and molding is that we have now;

3 to date?

4 A. This was one of the two buys that we actually asked her to

5 bring in two car covers that we would trade for heroin we

6 reimbursed her for.

7 Q. Okay. Did she come in and represent to you that she paid

8 for those car covers?

9 MS. EISENHART: Objection. That would be hearsay.

10 MS. ULRICH: Your Honor, I understand the Government

11 is going to be calling her.

12 MS. EISENHART: Then she can ask that witness.

13 MS. ULRICH: Your Honor, I mean, I can -- do you want

14 us up?

15 THE COURT: Yes.

16 (Sidebar discussion held.)

17 THE COURT: It seems to me it would be hearsay. I

18 don't think it's an exception that they're going to call her

19 under these circumstances.

20 MS. ULRICH: I can play the tape recording. She's

21 all over it.

22 THE COURT: That's fair, but you're asking him what

23 she said.

24 MS. ULRICH: I can just rephrase the question. I'll

25 just ask the investigator where they came from.

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1 THE COURT: All right.

2 MS. ULRICH: I can ask if she made representations.

3 THE COURT: How much more cross do you have? What's

4 that? What are you going to ask her?

5 MS. ULRICH: I probably have about --

6 MS. EISENHART: She referenced whether or not the

7 informant made representations. Well, that's the same thing.

8 THE COURT: You can't back-door hearsay. If there's

9 an objection, I'll hear it.

10 MS. ULRICH: I have about another half hour or so, 45

11 minutes probably.

12 THE COURT: Well, I might as well ask you this now.

13 Wendy, we're off the record.

14 (Sidebar discussion on the record concluded.)

15 THE COURT: Folks, thank you for bearing with us.

16 What we were trying to discuss a little bit is some logistics

17 and timing, which I'll fill you in on, I hope, later today.

18 We're going to stay with this. Ms. Ulrich, you may proceed.

19 BY MS. ULRICH:

20 Q. Sergeant Hopkins, we were on March 30th. Now March 30th,

21 we have car parts; is that right?

22 A. They were car covers.

23 Q. They were. And there was two car covers on March 30th,

24 correct?

25 A. Yes.

Appendix D (9)

Seragent Brett Hopkins testimony
Affiant #2 Trial testimony

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1 Q. 'Now we have six car covers that have been involved?
2 A. 'Yes!
3 Q. All right. And now on this particular occasion, you said
4 you took your cell phone and you took pictures of these car
5 covers?
6 A. 'Yes, ma'am.
7 Q. 'Your personal cell?'
8 A. 'Yes.'
9 Q. 'When you took the pictures, you knew it was evidence in'
10 the case; right?
11 A. 'Yes.'
12 Q. And so then, of course, we have McGovern go, she gets rid
13 of the car covers, comes back with heroin.
14 MS. EISENHART: Objection, Your Honor. Was there a
15 question? She's summarizing testimony.
16 THE COURT: Yeah, try to put it in the form of a
17 question, please.
18 BY MS. ULRICH:
19 Q. Your informant went, she drops off these two car covers,
20 comes back with heroin; correct?
21 A. 'Yes, from Julio Aviles, Sr.'s, place.
22 Q. And now, okay, now the buy is over; right?
23 A. 'Yes.'
24 Q. And you're doing your police reports, right?
25 A. 'Yes.'

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1 and April 15th, on your personal cell?
2 A. It's a work cell.
3 Q. Oh, it's a work cell?
4 A. Yes.
5 Q. Okay. I take that back. So, of course, that's why you're
6 taking pictures with your work cell because that's evidence in
7 the case?
8 A. It's a combination.
9 Q. All right. So now you have April 15th where you have
10 these pictures. Now you have pictures from March 30th and
11 April 15th, right?
12 A. Yes.
13 Q. The buy happened. The reports are done, the police report
14 is done; right?
15 A. I don't know when it was completed.
16 Q. Well, it's completed soon after the event occurs; right?
17 That's the rule, the reports are done soon after? Your police
18 report details the events soon after they occur?
19 A. We try to. We had a lot to sort through.
20 Q. Going back to my question. Now we have March 30th, April
21 15th, two buys on your phone. Again, I guess your testimony is
22 that you forgot they were on your phone?
23 A. No, they were on the phone. I just forgot to transfer
24 them over. It just slipped my mind.
25 Q. Two times. Now we got two big buys. You have evidence in

473

1 Q. And you have these pictures on your cell phone?
2 A. 'Yes.'
3 Q. And you don't transfer them to a computer?
4 A. No, I did not.
5 Q. 'You didn't put them where they needed to be because they
6 were evidence in the case, right?
7 A. Correct.
8 Q. Did you just forget them on your cell phone?
9 A. We had a lot going on, and I just forgot about them.
10 Q. So you forgot they were on your cell phone. Then we move
11 to April 15th, right?
12 A. 'Yes.'
13 Q. And now we have another car cover, right?
14 A. 'Yes.'
15 Q. That's our seventh car cover?
16 A. 'Yes.'
17 Q. And you take a picture on your personal cell?
18 A. 'Yes.'
19 Q. But what you're saying is, you took the picture on your
20 personal cell, but it didn't jar your memory that you still had
21 the pictures from March 30th on your cell?
22 A. No.
23 Q. Just didn't think about it?
24 A. I was intending to transfer them over, but I didn't.
25 Q. Okay. So now we have evidence from two buys, March 30th

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1 two cases, and again, it just happens to slip your mind?
2 MS. EISENHART: Objection, Your Honor.
3 THE COURT: What's the objection?
4 MS. EISENHART: It's argumentative. The officer
5 already answered the question.
6 THE COURT: I'm going to allow the question so we can
7 move on. The objection is overruled. You can answer the
8 question, Sergeant.
9 THE WITNESS: Yes.
10 BY MS. ULRICH:
11 Q. 'And then all of a sudden, you say you're jogging)
12 somewhere; right?
13 A. 'Yes.'
14 Q. 'With your work cell phone?
15 A. 'Yes.'
16 Q. 'With the evidence pictures on?
17 A. 'Yes, listening to music, yes.
18 Q. How long after April 15th were you jogging with your cell
19 phone?
20 A. 'It was in May sometime.
21 Q. 'Of 2015?
22 A. 'Yeah.'
23 Q. 'So about a month after you have this evidence on your,
24 phone, you're jogging, and you just happen to lose everything
25 on your phone?'

Appendix D (10)

Seragent Brett Hopkins testimony
Affiant #2 Trial transcripts

No
Pictures of
the car covers

This
Portion
Contradicted
Court of Appeal
ruling.

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1 A. I didn't happen to, I lost it.
2 Q. Of course, that includes evidence in two of these buys?
3 A. I realize that, yes.
4 Q. And here we are two years later, and now we have no
5 pictures of those car covers, do we?
6 A. I think we have the car covers.
7 Q. In the garage -- right, we have the -- oh, you have the
8 car covers right now?
9 A. They were recovered, yes.
10 Q. And so, by the way, those pictures then were lost long
11 before February 1st of 2016, weren't they?
12 A. Yes.
13 Q. And I assume that you told your supervisor you lost the
14 evidence in the case?
15 A. No, I don't believe I did.
16 Q. Okay.
17 A. We tried to retrieve the stuff that was on the phone, but
18 it was all gone.
19 Q. Who's we?
20 A. Then I realized -- I realized that -- I reached out to my
21 sergeant and just said, is there any way we can retrieve? But
22 if I recall, he looked at the phone, and it was all gone.
23 Q. Did you make a notation of this somewhere?
24 A. No.
25 Q. Okay. And, of course, we already talked about the

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1 importance of chain of custody; right?
2 A. Right.
3 Q. And you made no notation anywhere that you lost this
4 evidence?
5 A. No.
6 Q. Okay. But it was lost before February 1st, 2016; right?
7 A. Yes.
8 Q. You said, we discussed it. Who's we?
9 A. When my phone went down, I believe I reached out to
10 Detective Dipalo, and I realized that I had snapped some
11 pictures of those car covers quickly on those nights of those
12 buys.
13 Q. Detective Dipalo is your boss, your supervisor?
14 A. He's the sergeant of the Drug Task Force.
15 Q. Did you discuss it with Detective Minnick?
16 A. I don't believe I did, no.
17 Q. Did you discuss it with Detective Mong?
18 A. No.
19 Q. So you lost valuable evidence in a case, and the only two
20 people that knew were you and Detective Dipalo?
21 A. I don't know if I told them or not. I don't recall.
22 MS. ULRICH: I think I'm done with the controlled
23 buys, Your Honor, if you want to -- I don't know if you want me
24 to keep going?
25 THE COURT: Can you wrap it up by 20 after?

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1 MS. ULRICH: I can't promise that.
2 THE COURT: All right. Well, then we'll break.
3 We're going to break at this time, folks, for lunch. Why don't
4 we say that we will return this afternoon at 1:30 and give you
5 an opportunity to have a good lunch. Counsel, anything else
6 before we recess for lunch?
7 MR. BLOOM: Nothing for the United States, Your
8 Honor.
9 MS. ULRICH: I have nothing.
10 THE COURT: Folks, we'll see you back here in time to
11 start at 1:30 this afternoon. Thank you all.
12 COURTROOM DEPUTY: All rise.
13 (Lunch recess taken at 12:12 p.m. and proceedings
14 reconvened at 1:37 p.m.)
15 THE COURT: All right. Folks, welcome back. We'll
16 continue with cross examination, Ms. Ulrich.
17 MS. ULRICH: Thank you.
18 CROSS EXAMINATION (CONTINUED)
19 BY MS. ULRICH:
20 Q. Sergeant Hopkins, I want to show you Defense Exhibit 197.
21 Can you just scroll through those pages?
22 MR. CONRAD: Your Honor, may I have the Court's
23 indulgence? My battery is not working back here.
24 THE COURT: No problem. I'm tempted to say that my
25 battery is not working that well either, but I don't have a

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1 battery.
2 (Batteries are being changed in the headsets.)
3 THE COURT: Back to Ms. Ulrich.
4 BY MS. ULRICH:
5 Q. Sergeant Hopkins, let's redo and go back to page 123.
6 Just so we're clear, those documents were provided to you or
7 the task force by Elizabeth McGovern?
8 A. I believe so, yes.
9 Q. All right. You can take that down. Sergeant Hopkins, you
10 had testified on direct that Mr. Aviles was an informant for
11 you at one point; is that right?
12 A. Yes.
13 Q. And that was in about the year 2013, wasn't it?
14 A. Yes, ma'am.
15 Q. And it was for a little over a year, wasn't it?
16 A. It was around a year, yes.
17 Q. And what happened was, you knew that he had gotten charged
18 and convicted of this theft by unlawful taking; correct?
19 A. I read it in the paper, but I hadn't had any contact with
20 him.
21 Q. It was after that conviction that you went to him and you
22 asked him if he would become an informant for the Lebanon
23 County Drug Task Force?
24 A. No.
25 Q. You were interested, were you not, in an individual named

Appendix D (11)

508

1 BY MS. EISENHART:

2 Q. Sergeant Hopkins, I'm showing you what's been marked as

3 Exhibit 78. What is that item?

4 A. This is a contents of a safety deposit box at the Metro

5 Bank. We received a consent search from Mr. Julio Aviles, Sr.

6 Q. And you've got a blue bag on your lap, is that correct?

7 A. Yes.

8 Q. Is what you're referring to inside that blue bag?

9 A. Yes.

10 Q. Were there some items in particular that were of

11 importance to you in your investigation?

12 A. Yes.

13 Q. And if we could pull up 78.1? Sergeant Hopkins, I'm going

14 to direct your attention to page 1 of this exhibit. What is

15 depicted here?

16 A. That is a Fulton Bank receipt in the amount of 4000

17 dollars. And at the top, there's an address, which I believe

18 is a law office, with the money amount of 19,000.

19 Q. And page 2 of the exhibit. Sergeant Hopkins, what is

20 depicted there?

21 A. That's a Metro Bank receipt paid to Lebanon Title Company,

22 \$19,507.98.

23 Q. If we could turn to page 3 of the exhibit? What is

24 depicted here?

25 A. That is a deed for the garage address of 513 Arnold

509

1 Street. The sellers were Jose Lopez and Iris Lopez to a

2 Roselyn Sanchez.

3 Q. Okay. If we could skip to page 8, what is this document?

4 A. That is a power of attorney letter giving Julio Aviles

5 power of attorney over that address.

6 Q. And page 9, what is depicted here?

7 A. That looks like a receipt for that transaction preparing a

8 power of attorney related to the property at 513 Arnold.

9 Q. If we could go to page 14, what is depicted here?

10 A. That is also a bank receipt, balance of 19,020 dollars.

11 And at the bottom, 24,720. It's two different dates on there.

12 MS. EISENHART: Those are all the questions I have.

13 THE COURT: All right. Any recross? Ms. Ulrich.

14 MS. ULRICH: Just a couple questions.

15 RECROSS EXAMINATION

16 BY MS. ULRICH:

17 Q. You talked to Doug Moyer at REM, correct?

18 A. I believe it was Doug Moyer, yes.

19 Q. You found out she was fired because she was stealing the

20 car covers, right?

21 MS. EISENHART: Objection, hearsay.

22 THE COURT: Well, it's what he learned. What's your

23 understanding of it is the nature of the question.

24 THE WITNESS: My understanding is that there was some

25 issues there with like a candy fund, and they were told about

510

1 car covers.

2 BY MS. ULRICH:

3 Q. They told you the car covers were stolen, right?

4 MS. EISENHART: Objection, hearsay.

5 THE COURT: Well, yes. I mean, it's his

6 understanding. Let's try to avoid the hearsay. Sustained.

7 BY MS. ULRICH:

8 Q. I'm going to move to -- you said something about candy.

9 What did you say, candy fund? What did you say, something

10 about a what fund?

11 A. A candy fund.

12 Q. A candy fund. What about the candy fund?

13 MS. EISENHART: Objection, hearsay.

14 MS. ULRICH: No, he just testified he learned about a

15 candy fund.

16 THE COURT: Ask a question.

17 BY MS. ULRICH:

18 Q. Why did she get fired over a candy fund?

19 A. It wasn't over a candy fund. Doug Moyer just said there

20 was some money missing at some point from a candy fund.

21 MS. EISENHART: Your Honor, it's the same objection

22 of hearsay.

23 THE COURT: Do you want it stricken? Is that what

24 you're asking here? Do you care? Or do you just want to

25 object because it's hearsay like everybody else has been

511

1 objecting because these things are hearsay? Or can we stop it?

2 All of you. Now let's move on.

3 BY MS. ULRICH:

4 Q. Okay. I'm going to show you what's been marked as Defense

5 Exhibit 139. You'll agree that these are other items found in

6 the safety deposit box? That is a document in the name of

7 Leandro Nazario Sanchez, is that right?

8 A. Yes, na'am.

9 Q. Next page. That's another document that was in the safety

10 deposit box in the name of Leandro Nazario Sanchez?

11 A. Yes.

12 Q. That's another document you found in the box in the name

13 of Leandro Nazario?

14 A. Yes, na'am.

15 Q. Again, that's another document in the safety deposit box

16 in the name of Leandro Nazario?

17 A. Yes.

18 Q. And again, that's another document that was found in the

19 name of Leandro Nazario?

20 A. Yes.

21 Q. Another document found in that box in the name of Leandro

22 Nazario?

23 A. Yes.

24 MS. ULRICH: That's all I have. Thank you.

25 THE COURT: Thank you.

Exhibit 46

Appx D (13)

925

1 because she wasn't involved with it, and it was tucked away.
 2 she was not involved.
 3 And I expect her to say she never saw Michael
 4 involved with that. Guideposts and principles. So during voir
 5 dire, the judge several times stated a principle, that
 6 individuals when they come to court are presumed to be
 7 innocent. And the judge would ask, can you live with that?
 8 And nobody really said no. And no disrespect to the judge, I
 9 would prefer that it would say, these are our rules and
 10 guidelines by which you must, that you must follow, by which
 11 you must abide, and if you can't apply these rules, please
 12 don't be on our jury.
 13 So can you live with Michael is presumed to be
 14 innocent? He comes in here with a clean slate. And the burden
 15 of proof is on the United States Government. Michael doesn't
 16 have to produce any evidence. We don't have to make any
 17 argument. We don't have to do anything. The Government has to
 18 prove every element of every offense beyond a reasonable doubt.
 19 I risk deferring an opening statement because I was
 20 uncertain if we didn't -- essentially, if you make up your
 21 mind, and we ask you not to, but it's sort of human nature, we
 22 sort of come to a gut decision, a feeling for whatever reason,
 23 and we begin to get filters.
 24 And so I like to show this Far Side cartoon. Because
 25 we sort of start to pick out the pieces that fit our narrative,

926

1 fit what we want to hear, fit what we want to believe. So as
 2 you listen to the evidence, I ask you to keep an open mind
 3 because you might hear a police officer take the witness stand
 4 and testify, well, or a recording that says we spent a hundred
 5 dollars, and, well, we wrote it down, it had to be 75 because
 6 that's the way we wrote it down, but a recording might say it's
 7 a hundred dollars.
 8 And how do we reconcile that. It was a mistake, and
 9 we make mistakes. We're forgiving because generally these bias
 10 and filters that we have, we don't like people who handle
 11 poison, but we very much like police officers, at least here in
 12 Central Pennsylvania I find that we do. And so that helps us.
 13 Whether we like it or not, we have this implicit bias. And
 14 when you have that implicit bias, sometimes you filter out what
 15 you are listening to and you focus on what works for you and
 16 what doesn't work for you or what you think should apply or
 17 what you don't think should apply.
 18 Keep that open mind. Ultimately every Defendant in
 19 the courtroom has separate charges pending against them.
 20 They're similar as to each other, but they're three different
 21 Defendants. They're not all just one big Defendant. And with
 22 regard to each of the Defendants, there are different drugs
 23 that apply to them. And I won't tell you what the punishments
 24 are, but you know that there are punishments that come with all
 25 of that.

Start Testimony of Mr. Doug Moyer owner of REM Automotive

927

1 So that's why I ask you to consider not just each
 2 individual, but consider each individual charge and consider
 3 the evidence as it applies to each count against Michael
 4 Millan-Miranda. I would submit to you that when you do, at the
 5 end, you're going to find that he was on the team, all right.
 6 Count 1, conspiracy.
 7 But you're going to get a second opportunity to make
 8 another decision, and that's going to come to a quantity. And
 9 that's where I ask you, and I'll later argue, and I won't do it
 10 now, but that's what I'm going to ask you to focus on, are
 11 those amounts.
 12 And then there are charges regarding cocaine. And I
 13 would submit to you there's no evidence that Michael was
 14 involved in distributing crack or powder cocaine, and you
 15 should, and I believe you will, find him not guilty of those.
 16 Thank you very much.
 17 THE COURT: Thank you, Mr. Abon. That is Mr. Abon's
 18 opening then. And so we are on the defense case. And I
 19 understand, Ms. Ulrich, you may have a witness for us; is that
 20 correct.
 21 MS. ULRICH: I do. I would call Doug Moyer to the
 22 stand.
 23 THE COURT: Very well.
 24 DOUG MOYER, DEFENDANT AVILES' WITNESS, SWORN
 25 COURTROOM DEPUTY: State your name for the record.

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1 THE WITNESS: Doug Moyer.
 2 DIRECT EXAMINATION
 3 BY MS. ULRICH:
 4 Q. Good morning, Mr. Moyer. I'm Lori Ulrich. We've never
 5 met, have we?
 6 A. No.
 7 Q. It's nice to meet you. Mr. Moyer, you are here because I
 8 want to talk to you about your business, okay. And what
 9 business do you own?
 10 A. REM Automotive.
 11 Q. How long have you owned REM Automotive?
 12 A. Full owner for about two years.
 13 Q. Pardon?
 14 A. Full owner, complete owner for about two years.
 15 Q. And you've been there how long?
 16 A. Fifteen years.
 17 Q. And what does REM do?
 18 A. Manufacturers restoration parts for classic cars.
 19 Q. And can you give the jury an idea what parts you
 20 manufacture?
 21 A. It's interior soft goods, hood liners.
 22 Q. If you could just let them know?
 23 A. Trump mats, glove boxes, things made of fabric and
 24 cardboard.
 25 Q. And you manufacture car covers?

Exhibit 47 Trial testimony from Mr. Doug Moyer

925

1 because she wasn't involved with it, and it was tucked away,
2 she was not involved.

3 And I expect her to say she never saw Michael
4 involved with that. Guideposts and principles. So during voir
5 dire, the judge several times stated a principle, that
6 individuals when they come to court are presumed to be
7 innocent. And the judge would ask, can you live with that?
8 And nobody really said no. And no disrespect to the judge. I
9 would prefer that it would say, these are our rules and
10 guidelines by which you must, that you must follow, by which
11 you must abide, and if you can't apply these rules, please
12 don't be on our jury.

13 So can you live with Michael is presumed to be
14 innocent? He comes in here with a clean slate. And the burden
15 of proof is on the United States Government. Michael doesn't
16 have to produce any evidence. We don't have to make any
17 argument. We don't have to do anything. The Government has to
18 prove every element of every offense beyond a reasonable doubt.

19 I risk deferring an opening statement because I was
20 uncertain if we didn't -- essentially, if you make up your
21 mind, and we ask you not to, but it's sort of human nature, we
22 sort of come to a gut decision, a feeling for whatever reason,
23 and we begin to get filters.

24 And so I like to show this Far Side cartoon. Because
25 we sort of start to pick out the pieces that fit our narrative,

926

1 fit what we want to hear, fit what we want to believe. So as
2 you listen to the evidence, I ask you to keep an open mind
3 because you might hear a police officer take the witness stand
4 and testify, well, or a recording that says we spent a hundred
5 dollars, and, well, we wrote it down, it had to be 75 because
6 that's the way we wrote it down, but a recording might say it's
7 a hundred dollars.

8 And how do we reconcile that. It was a mistake, and
9 we make mistakes. We're forgiving because generally these bias
10 and filters that we have, we don't like people who handle
11 poison, but we very much like police officers, at least here in
12 Central Pennsylvania I find that we do. And so that helps us.
13 Whether we like it or not, we have this implicit bias. And
14 when you have that implicit bias, sometimes you filter out what
15 you are listening to and you focus on what works for you and
16 what doesn't work for you or what you think should apply or
17 what you don't think should apply.

18 Keep that open mind. Ultimately every Defendant in
19 the courtroom has separate charges pending against them.
20 They're similar as to each other, but they're three different
21 Defendants. They're not all just one big Defendant. And with
22 regard to each of the Defendants, there are different drugs
23 that apply to them. And I won't tell you what the punishments
24 are, but you know that there are punishments that come with all
25 of that.

Start Testimony of Mr. Doug Moyer owner of REM Automotive

927

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2 individual, but consider each individual charge and consider
3 the evidence as it applies to each count against Michael
4 Millan-Miranda. I would submit to you that when you do, at the
5 end, you're going to find that he was on the team, all right.
6 Count 1, conspiracy.

7 But you're going to get a second opportunity to make
8 another decision, and that's going to come to a quantity. And
9 that's where I ask you, and I'll later argue, and I won't do it
10 now, but that's what I'm going to ask you to focus on, are
11 those amounts.

12 And then there are charges regarding cocaine. And I
13 would submit to you there's no evidence that Michael was
14 involved in distributing crack or powder cocaine, and you
15 should, and I believe you will, find him not guilty of those.
16 Thank you very much.

17 THE COURT: Thank you, Mr. Abon. That is Mr. Abon's
18 opening then. And so we are on the defense case. And I
19 understand, Ms. Ulrich, you may have a witness for us; is that
20 correct.

21 MS. ULRICH: I do. I would call Doug Moyer to the
22 stand.

23 THE COURT: Very well.

24 DOUG MOYER, DEFENDANT AVILES' WITNESS, SWORN
25 COURTROOM DEPUTY: State your name for the record.

928

1 THE WITNESS: Doug Moyer.

2 DIRECT EXAMINATION

3 BY MS. ULRICH:

4 Q. Good morning, Mr. Moyer. I'm Lori Ulrich. We've never
5 met, have we?

6 A. No.

7 Q. It's nice to meet you. Mr. Moyer, you are here because I
8 want to talk to you about your business, okay. And what
9 business do you own?

10 A. REM Automotive.

11 Q. How long have you owned REM Automotive?

12 A. Full owner for about two years.

13 Q. Pardon?

14 A. Full owner, complete owner for about two years.

15 Q. And you've been there how long?

16 A. Fifteen years.

17 Q. And what does REM do?

18 A. Manufacturers restoration parts for classic cars.

19 Q. And can you give the jury an idea what parts you
20 manufacture?

21 A. It's interior soft goods, hood liners.

22 Q. If you could just let them know?

23 A. Trump mats, glove boxes, things made of fabric and
24 cardboard.

25 Q. And you manufacture car covers?

Exhibit 5

Trial testimony of the real owner of the Personal
property in which he confirm that the Personal
property was in fact stole by "RCI-1"

Appx

D (14)

235

1 Q. So another -- it's not a lie, you were incorrect is what
2 you're saying?

3 A. Correct. When I did the search warrant, to my best
4 knowledge and belief, that information was accurate.

5 Q. Now moving to May 12th. Now we know that on March 30th,
6 you told the informant, you know, you're done with these
7 pre-arrangements, right?

8 A. Yes. The informant is not supposed to be doing that, but
9 that's not an infraction that's going to cause us to terminate
10 their use.

11 Q. Okay. And once again on May 12th, we heard part of the
12 audio, and if you need me to play it again, I can, she's asking
13 Mr. Aviles if he wants parts, right?

14 A. That's correct.

15 Q. Auto parts?

16 A. That's correct.

17 Q. Now I am going to show you Government Exhibit 121.40.
18 That actually depicts one of those car covers, is that right?

19 A. I believe that's accurate, yes.

20 Q. Okay. You would agree that's not a Dollar Store car
21 cover, is it?

22 A. No.

23 Q. That's an expensive car cover, isn't it?

24 A. Yes.

25 Q. And your informant is bringing these in for these

236

1 controlled buys, one or more of these, is that right?

2 A. Yes.

3 Q. Now you said -- I think earlier you said you knew she
4 worked at REM?

5 A. Yes.

6 Q. Do you have any idea how much money she was making at REM?

7 A. No.

8 Q. And I think you agreed earlier that these car covers are
9 about 240 dollars retail?

10 A. I believe that's what you said, yes.

11 Q. I want you to assume for a moment that these car covers
12 were, in fact, stolen by your informant, Liz McGovern?

13 A. I was not aware they were stolen.

14 Q. Let's assume for a moment they're stolen. That would be
15 contraband, wouldn't it?

16 A. However, I did not have that knowledge that they were
17 stolen.

18 Q. My question is, yes or no --

19 MR. BLOOM: Your Honor, I'll stipulate.

20 THE COURT: Hold it, hold it.

21 MR. BLOOM: I'll stipulate that if an item is stolen,
22 it's contraband.

23 MS. ULRICH: The witness can answer that question.
24 It's a simple question.

25 THE COURT: It's now a stipulated fact that if

237

1 they're stolen, they're contraband. So let's move on.

2 MS. ULRICH: All right.

3 BY MS. ULRICH:

4 Q. And she didn't have this one time, assuming they're
5 stolen, she had them on two, three, four buys, didn't she?

6 A. I believe there were three total car covers.

7 Q. Now I'm going to show you what's been marked as Exhibit
8 197. All right. This is a sales order billed to Elizabeth
9 McGovern. And below it says there's a balance of 450 dollars.
10 The date up top is March 30th. Did Ms. McGovern give that to
11 you?

12 A. Yes.

13 Q. She did. When did she give that to you?

14 A. I don't recall when they were provided.

15 Q. And why did she give that to you?

16 A. They were provided to us to insure that the car covers, as
17 you would say, are not stolen. And we needed receipts to
18 confirm that from her place of employment.

19 Q. Do you know that she had the ability -- are you aware if
20 she had the ability to pay 450 dollars for two car covers on
21 March 30th?

22 A. I don't believe that she did pay for them.

23 Q. I'm sorry, what?

24 A. I don't believe that they were paid for. Those were just
25 receipts provided to us.

238

1 Q. For what purpose? To say what?

2 A. Those receipts were provided to us for us to have a
3 record.

4 Q. Did you ask her where she got these receipts?

5 A. I did not ask her, no.

6 Q. Do you know these receipts are false receipts?

7 A. No, I'm not aware of that.

8 Q. But this is what she gave you, right?

9 A. That's one of receipts, yes.

10 Q. And you retained it as evidence?

11 A. We placed it in the folder for the investigation, yes.

12 Q. And did she tell you that she paid 450 dollars for those
13 two car covers? Is that what she represented when she gave you
14 the receipt?

15 A. She didn't tell me anything.

16 Q. Well, it's March 30th, she gave it to you. What did she
17 tell you?

18 A. She didn't give the receipts to me. She gave them to
19 Sergeant Hopkins.

20 Q. Okay, fair enough. Going back one page. Do you know if
21 they were provided all at the same time or separate times?

22 A. I don't know. I don't have that knowledge.

23 Q. Okay. Now here's another receipt. This one is dated
24 4/16/2015. Do you see that?

25 A. Yes.

Exhibit 4

Trial testimony from Detective Ryan Mong
explaining that personal property was provided
by "RCI-1"

Appx D (2/20)

929

1 A. Yes.

2 Q. I want to be clear on that. I am going to show you what's

3 been marked as Defense Exhibit 117. Do you recognize that

4 individual?

5 A. Possibly.

6 Q. Who do you -- who is she? Who do you believe her to be?

7 A. Liz McGovern.

8 Q. Now you know Liz McGovern?

9 A. Yes.

10 Q. And you know her as Elizabeth or Liz?

11 A. Liz.

12 Q. Liz McGovern. And how do you know Ms. McGovern?

13 A. She was employed at RDM.

14 Q. And how long was she an employee at RDM?

15 A. Probably more than 15 years.

16 Q. Is she working there now?

17 A. No.

18 Q. And can you kind of give us -- well, was she working there

19 in the beginning part of 2015?

20 A. Yes.

21 Q. And what were her job responsibilities?

22 A. She had entered orders, customer service, accounts

23 receivable.

24 Q. And was she an office, somebody that you would consider an

25 office employee?

930

1 A. Yes.

2 Q. And as an office employee, were there times when she was

3 in the office alone?

4 A. Yes.

5 Q. Now where did you keep the car covers and these automotive

6 parts?

7 A. Just in our warehouse or finished goods are in the same

8 building attached to the office.

9 Q. Would Ms. McGovern have had access to those areas?

10 A. Yes.

11 Q. And would she have been in those areas alone?

12 MS. EISENHART: Your Honor, I'm going to object at

13 this point to the leading questions.

14 THE COURT: Approach, please.

15 (Sidebar discussion held.)

16 THE COURT: You want to just proffer for me what this

17 witness is for? I think I know.

18 MS. ULRICH: He's going to say the car covers were

19 stolen and that they suspected she was using heroin. She was

20 falling asleep, poor performance. Those two things.

21 THE COURT: I'd like to get through this testimony.

22 I mean, you know that's what he's going to testify to. You'll

23 have him on cross examination.

24 MS. EISENHART: That's fine. I'm just asking her not

25 to lead.

931

1 THE COURT: I'd like to get this trial finished.

2 MR. BLOOM: I think every single question so far has

3 really been objectionable, and I think we've given about 10

4 non-objections.

5 THE COURT: Try not to lead as much. I know you're

6 trying to get through it. Try to find a balance here that

7 makes everybody happy.

8 (Sidebar discussion concluded.)

9 THE COURT: All right, Ms. Ulrich, you may continue.

10 BY MS. ULRICH:

11 Q. Mr. Moyer, can you describe for the jury -- well, do you

12 know when she was -- was she terminated or did she voluntarily

13 quit?

14 A. She was terminated about a year ago.

15 Q. And can you tell the jury what led up to that termination?

16 A. She had been on probation for stealing money from the

17 company, just general poor performance at work, being late, not

18 showing up, leaving without notifying anyone. Then we became

19 aware of her taking more items beyond money, some of the

20 products we made. At that point, we decided to move on.

21 Q. You said you became aware she was taking more items? Is

22 that what you just said?

23 A. Yes.

24 Q. What were those more items?

25 A. I don't remember specifically. I mean, car covers were

932

1 mentioned and some other, I think a truck mat.

2 Q. And was there anything about her demeanor that you noticed

3 that might have been a problem or good for that matter?

4 A. I mean, towards the end, she was late all the time and

5 falling asleep sometimes at her desk.

6 Q. And did that give you any cause for concern?

7 A. Yes.

8 Q. And what were your concerns?

9 A. My concerns were that she was using some type of drugs.

10 Q. Did you know, were you aware of whether she had a history

11 of using drugs?

12 A. Yes, we had known from -- she had been employed there, I

13 don't know if it was 20 or 25 years ago, and had left there and

14 then had been incarcerated, that was before I was there, for

15 drug use or something to do with drugs.

16 Q. Did she ever have -- let me ask you this. Did she

17 purchase -- well, who do you sell these -- what's the value?

18 Let's talk about the value first. What's the value of a car

19 cover? I know there's two values, wholesale and retail?

20 A. Yeah, the retail is probably around 240 to 250 dollars.

21 Wholesale is at the lowest points probably 185 dollars.

22 Q. And you said you manufacture hood liners?

23 A. Yes.

24 Q. What's the value of a hood liner?

25 A. Those can range probably from 20 dollars for a non-molded

Exhibit 48

Appx D (15)(a)

933

1 one to about 35 dollars for one that's folded.
 2 Q. And who typically purchases items such as car covers from
 3 your business?
 4 A. We primarily sell wholesale, so it would be our dealers,
 5 our vendors that then retail the items.
 6 Q. So is it common for individuals to purchase these things
 7 then?
 8 A. On occasion if somebody is local, we'll sell retail, but
 9 otherwise, no.
 10 Q. Did Ms. McGovern ever purchase any car covers from your
 11 business?
 12 A. Not that we have record of.
 13 Q. And I'm going to show you what's been marked as Defense
 14 Exhibit 197. Do you recognize that document?
 15 A. I mean, I haven't seen petty cash slips like that before.
 16 That's signed by another employee there who I -- I know she had
 17 borrowed money from that employee from Holly Light, H Light.
 18 Q. Is that somebody that works for you, H Light?
 19 A. She had at the time. She does not anymore.
 20 Q. I'm sorry?
 21 A. Holly had at that time worked there, but does not anymore.
 22 Q. And do you know, is this -- do you know this to be an
 23 accurate representation of a transaction that occurred at REM?
 24 A. Not that I am aware of, no.
 25 Q. I'm going to show you the next page. This is an invoice,

934

1 and it purports to be an invoice from REM. Do you see that?
 2 A. Yes.
 3 Q. And it's billed to E. McGovern. And you've seen this
 4 before?
 5 A. Yes.
 6 Q. Okay. And did you have an opportunity to check your
 7 records?
 8 A. Yes. This one either has been completely deleted out of
 9 our accounting system or it was overwritten for another
 10 customer, a normal customer vendor.
 11 Q. So would you consider this a fraudulent invoice?
 12 A. Yes.
 13 Q. Then I'm going to show you the next page. Same thing. Do
 14 you see that? It says, two car covers, 450 dollars. Do you
 15 see that?
 16 A. Yes.
 17 Q. You looked for that as well?
 18 A. Yep.
 19 Q. And what did you determine?
 20 A. Yeah, that one was also -- one of the two was deleted, and
 21 one was overwritten for a regular customer.
 22 Q. So you would consider that fraudulent as well?
 23 A. Yes.
 24 MS. ULRICH: That was all I have. Thank you.
 25 THE COURT: Thank you, Ms. Ulrich. Why don't we go

935

1 cross, and then we'll go back and see if there's anything. Do
 2 you have any questions, Mr. Abom?
 3 MR. ABOM: I do not, Your Honor.
 4 MR. CONRAD: I do not, Your Honor.
 5 THE COURT: That settles that.
 6 MS. EISENHART: Just briefly, Your Honor.
 7 CROSS EXAMINATION
 8 BY MS. EISENHART:
 9 Q. Mr. Moyer, you indicated you terminated Ms. McGovern
 10 approximately a year ago?
 11 A. Yes.
 12 Q. And what was it that caused you to become aware that there
 13 may have been stolen merchandise?
 14 A. Mr. Garvey had talked to me and indicated that she may
 15 have stolen some items. She was in that -- I believe she was
 16 in the hospital at that point. And when she got out, I met
 17 with her, confronted her about it, and she confessed to
 18 stealing items.
 19 Q. And one of the things that you had indicated to Mr. Garvey
 20 was that your inventory control policies were a little bit lax?
 21 A. That's correct.
 22 Q. And as it relates to the invoices that we saw on the
 23 screen, you indicated that there was no record in your system
 24 of them at the point that you checked; correct?
 25 A. Correct.

936

1 Q. Do you have any way to know whether or not there ever were
 2 invoices?
 3 A. Yeah. All of our invoices that are issued are in our
 4 system, the ones that are issued to regular customers.
 5 Q. Okay.
 6 MS. EISENHART: No other questions.
 7 THE COURT: All right. Anything else?
 8 MS. ULRICH: No. Thank you, Mr. Moyer.
 9 THE COURT: Mr. Moyer, thank you. You can step down.
 10 You're released. And do you rest?
 11 MS. ULRICH: We would rest.
 12 THE COURT: All right. And I think those exhibits
 13 were already in?
 14 COURTROOM DEPUTY: Yes, Judge.
 15 THE COURT: Am I right, those exhibits were in?
 16 MS. ULRICH: Yes, Your Honor.
 17 THE COURT: Okay. Mr. Abom.
 18 MR. ABOM: We are not going to be offering any
 19 testimony.
 20 THE COURT: All right. Mr. Conrad.
 21 MR. CONRAD: Your Honor, I will have one witness,
 22 but, sir, because we've had to bump the schedule up here, we're
 23 still waiting to see if she's here because we had to move her
 24 up. She was traveling some distance. May I have the Court's
 25 indulgence for a few moments?

Exhibit 49

Appx D (15X6)