No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMIAH D. EDWARDS,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

SEPARATE APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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APPENDIX A

Decision of the United States Court of Appeals for the Seventh Circuit (*United States v. Edwards*, 34 F.4th 570 (7th Cir. 2022))

In the
United States Court of Appeals
For the Seventh Circuit

No. 20-3297
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JEREMIAH D. EDWARDS,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 18-cr-162 — **James D. Peterson**, *Chief Judge*.

ARGUED SEPTEMBER 29, 2021 — DECIDED MAY 16, 2022

Before EASTERBROOK, RIPPLE, and ST. EVE, *Circuit Judges*.

St. Eve, *Circuit Judge*. A string of ten armed robberies plagued the Madison, Wisconsin area in the fall of 2018. Law enforcement believed that one man was behind all ten. One of these robberies occurred on the evening of November 4, 2018, when the unidentified suspect, subsequently identified as Jeremiah Edwards, robbed Neil's Liquor in Middleton, Wisconsin. Security camera footage enabled law enforcement officers to obtain a warrant for a GPS tracking device on Edwards's vehicle, a black Mitsubishi Outlander. After another armed robbery, a high-speed chase, and the seizure of key evidence, the government charged Edwards with Hobbs Act robbery, brandishing a firearm in furtherance of a crime of violence, being a felon in possession of a firearm, possession with intent to distribute marijuana, and possession of a firearm in furtherance of a drug trafficking crime. A jury found Edwards guilty of all counts. Edwards appeals, claiming a series of errors. We see no error and affirm.

I. Factual Background

A. The Robbery of Neil's Liquor

On November 4, 2018, a man—subsequently identified as Edwards—robbed Neil's Liquor in Middleton, Wisconsin. Six security cameras captured Edwards and the robbery.

Edwards parked a black Mitsubishi Outlander on a street behind Neil's Liquor, crossed a wooden footbridge connected to the store's parking lot, and entered the liquor store. Moments later, Edwards robbed Neil's Liquor at gunpoint then escaped out the back door. Edwards left the scene on foot, leaving the parked Outlander behind.

Two hours later, a white SUV parked in Neil's Liquor's lot. A man (presumably Edwards), a woman, and a dog exited the SUV and walked onto the wooden footbridge. The pair then split up, with the man driving off in the Outlander and the woman and dog returning to the white SUV.

Detective Schultz of the Middleton Police Department learned the Outlander was registered to Edwards's ex-girlfriend, who told Detective Schultz that she sold Edwards the Outlander in 2016. Based on the security camera footage of the robbery, Detective Schultz's observations, and the statements from Neil's Liquor's cashier and Edwards's ex-girlfriend, Detective Schultz prepared a warrant application to place a GPS tracking device on the Outlander. The supporting affidavit included Edwards's criminal history, which Detective Schultz described as "lengthy ... including but not limited to arrests for" six robberies between 1998 and 2005. Edwards in fact had fifteen arrests and five convictions. A judge issued the warrant, and on November 7, 2018, law enforcement officers placed the GPS tracking device on Edwards's Outlander.

B. The Robbery of O'Reilly Auto Parts

On November 8, 2018, Edwards and co-defendant Kenasha Woods robbed the O'Reilly Auto Parts in Madison, Wisconsin. Woods met Edwards, who she knew as "Moe," through the Moorish Science Temple in Madison. The night ofthe O'Reilly Auto Parts robbery Edwards offered Woods a ride home after service at the Temple. Edwards and Woods smoked marijuana as they drove. At some point, Edwards pulled a handgun on Woods and ordered her to help him with a robbery. Armed with handguns, they robbed O'Reilly Auto Parts and left the scene in the Outlander.

Law enforcement responded to the robbery and located the Outlander using the GPS tracking device. Edwards and Woods fled, leading the officers on a high-speed chase. When the officers finally caught up to the Outlander, they discovered it crashed and empty. The officers located Woods nearby and brought her to the police station for questioning. Edwards was nowhere to be found.

At the station, officers escorted Woods into an interview room, where Detective Johnson of the Madison Police Department questioned her. Woods initially told a fabricated story. Detective Johnson then opened a binder on the table and momentarily displayed Edwards's booking photo from a previous arrest. Woods saw

the photo, but neither Woods nor Detective Johnson mentioned it. Detective Johnson proceeded to explain everything law enforcement knew about "Moe" and the O'Reilly Auto Parts robbery. Woods then positively identified "Moe" as the man in the booking photo and claimed she could pick "Moe" out of a crowd. Detective Johnson showed her Edwards's booking photo. Woods confirmed it was Edwards and noted that Edwards had hair in the photo, but he was now bald. The government obtained a warrant for Edwards's arrest on November 13, 2018, and on November 28, 2018, a grand jury indicted him.

C. Search of Edwards's Outlander

On November 9, 2018, the Madison Police Department obtained a search warrant for the Outlander. Officers searched the vehicle and recovered a loaded 9mm handgun, cash, drugs, gloves, a ski mask, and items from Woods's purse. Law enforcement returned the warrant on November 12, 2018, sealed the Outlander with evidence tape, and stored it in an impound facility without conducting a separate inventory search.

In December 2018, Woods was incarcerated and awaiting trial. Edwards was still missing. The night of her arrest, Woods informed officers that her personal handgun was in a pink purse in the back of "Moe's" car. Now, Woods's counsel asked the government for the money in Woods's purse to fund her jail account. Because the purse was not in the inventory of seized property, law enforcement believed it must still be in the Outlander.

On January 1, 2019, Detective Johnson broke the evidence tape sealing the Outlander and entered the vehicle through the front passenger side door to retrieve Woods's purse. Realizing that the purse was in the back seat, he reached over the front seat and inadvertently bumped into the sunglasses holder on the ceiling. The holder dislodged and revealed a hidden compartment. As he attempted to reinsert the holder, Detective Johnson immediately recognized a Glock handgun stashed in the compartment. He left the Outlander and contacted a federal prosecutor, who advised Detective Johnson to get a search warrant, which FBI Agent Boxwell obtained. Law enforcement officers searched the vehicle and found a knit cap and Glock handgun bearing Edwards's fingerprints.

II. Procedural Background

On March 25, 2019, law enforcement finally apprehended Edwards in Chicago, Illinois. The grand jury subsequently returned a superseding indictment including additional charges.

A. Motions to Suppress

Edwards filed several suppression motions challenging the evidence linking him to the O'Reilly Auto Parts robbery. First, Edwards sought to suppress evidence resulting from the GPS tracking device. Edwards argued Detective Schultz's affidavit violated *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and did not support probable cause. Second, Edwards moved to suppress Woods's photo identification of him for violating his due process rights. Third, Edwards sought to suppress the Glock recovered from the Outlander, claiming Detective Johnson violated his Fourth Amendment rights when he entered the vehicle without a warrant.

The magistrate judge held a combined *Franks* and evidentiary hearing. During the hearing, the magistrate judge reviewed the security camera footage and heard testimony from Detective Schultz, Detective Johnson, and Woods. The magistrate judge then issued a thorough report and recommendation, concluding that Detective Schultz did not misrepresent the security camera footage or intend to mislead the issuing judge by omitting portions of Edwards's criminal history. Recognizing Detective Johnson's actions may have influenced Woods's photo identification, the magistrate judge found the photo identification reliable after considering the *Biggers* factors. *See Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Additionally, the magistrate judge credited Detective Johnson's testimony regarding how he discovered the hidden compartment in the Outlander and concluded the entry did not implicate the Fourth Amendment.

Edwards objected to the magistrate judge's recommendation. On January 21, 2020, the district court entered its opinion and order adopting the report and recommendation, and overruled Edwards's objections. The district court's order questioned Detective Johnson's credibility, suggesting the magistrate judge found Detective Johnson had lied at the evidentiary hearing. The next day, the government moved to reconsider the findings, arguing that the magistrate judge did not find that Detective Johnson lied. Two days later, without waiting for Edwards to file a response, the district court granted the motion and issued a revised opinion and order adopting the report and recommendation. Three days later, Edwards filed his own motion to reconsider, which the district court denied.

B. Alibi Witness Report

Before trial, Edwards designated Ms. Connie Burrell as an alibi witness. Her story, however, shifted multiple times. Shortly after the robbery, Burrell told Dane County Sheriff's Department officers that she had not seen Edwards in a few weeks.

Almost a year later, in September 2019, Burrell told Agent Boxwell the alibi story about recording Edwards during the time of the robbery, and emailed time-stamped music files to prove it. But in early 2020, the alibi fell apart.

On January 16, 2020, law enforcement executed a warrant to search Burrell's apartment. During the search, Burrell recanted the alibi and claimed she visited Edwards in jail and he instructed her to "tell them I was with you." On January 17, 2020, Burrell told Agent Boxwell that Edwards threatened her if she would not provide an alibi. Then, on January 18, 2020, she told Agent Boxwell she overheard Edwards on the phone planning the robbery and he came directly to her apartment after crashing the Outlander. On January 19, 2020, Burrell told Agent Boxwell she lied—she never heard Edwards plan a robbery over the phone and he did not instruct her during the jailhouse visit to "tell them I was with you." Then, on February 6, 2020, Burrell told Agent Boxwell she lied on January 19, she manipulated the dates on the music files, Edwards instructed her to say he was with her that night, but she did not overhear Edwards plan a robbery.

Agent Boxwell documented each of Burrell's statements in separate reports. Before trial, the government provided the reports for multiple statements, but not the report containing her January 19 statement. Edwards chose not to call Burrell as an alibi witness. Edwards first learned of the existence—but not details—of the January 19 statement during a pre-trial hearing. Edwards never followed up with Burrell regarding this statement and did not receive a copy of the report until after trial.

C. Juror No. 11

Before trial, the government asked to exclude two case agents, Agent Boxwell and Detective Keith of the Dane County Sheriff's Office, from witness sequestration pursuant to Federal Rule of Evidence 615. Given the multi-jurisdictional nature of this case, the district court granted the motion in part, choosing to sequester Detective Keith until she completed her testimony. Detective Keith testified at trial then sat in the gallery while Detective Johnson testified.

Shortly thereafter, Juror No. 11 informed the district court that he believed Detective Keith coached Detective Johnson's testimony by shaking her head and making animated facial gestures. Edwards moved for a mistrial and the district court held an evidentiary hearing outside the jury's presence.

Although the district court was critical of Detective Keith's actions and admonished her for exhibiting unprofessional behavior, the court denied the motion. The district court ruled that Detective Johnson credibly testified he was not influenced by Detective Keith's behavior, there was not significant evidentiary overlap between

the testimonies, and Detective Johnson's testimony was consistent with other evidence presented at trial.

After hearing from Juror No. 11, the district court dismissed him for improper bias. It explained, "the jury is special. I have to give both sides a jury that is going to decide the case based on the evidence, and if I harbor some misgivings about a juror, I have to let that juror go."

D. Post-Trial Motions and Appeal

The jury convicted Edwards on all counts. He subsequently moved for a new trial, arguing the government's failure to turn over the January 19, 2020, report of Burrell's statement violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Edwards claimed he would have altered his trial strategy and used Burrell as an alibi witness if the government had provided him with the report in a timely manner. The district court denied Edwards's motion, finding no *Brady* violation. The district court thereafter sentenced Edwards to a combined total 180-month term of imprisonment, followed by a three-year term of supervised release. Edwards filed a timely appeal.

III. Discussion

On appeal, Edwards challenges the district court's rulings on the motions to suppress, its ruling exempting Detective Keith from sequestration after her trial testimony, its rulings regarding Juror No. 11, and its ruling on the *Brady* challenge. We consider, and reject, each argument in turn.

A. The GPS Tracking Warrant

Edwards argues that the district court erred when it denied his motion to suppress evidence obtained through the GPS tracking device on the Outlander. He contends that the warrant is unconstitutional because Detective Schultz's affidavit violated *Franks v. Delaware* and failed to establish probable cause. Edwards does not argue that the affidavit, absent *Franks* relief, would be facially insufficient to support probable cause.

Placing a GPS tracking device on a vehicle is a Fourth Amendment search, requiring law enforcement to show probable cause and obtain a warrant beforehand. *See United States v. Jones*, 565 U.S. 400, 404, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). Where the affidavit is the only evidence supporting probable cause, the issuing court focuses "solely on the strength of the affidavit." *United States v. Peck*, 317 F.3d 754, 755-56 (7th Cir. 2003). Under *Franks*, the district court must suppress evidence seized during a search "when the defendant shows by a

preponderance of the evidence that (1) the affidavit in support of the warrant contains false statements or misleading omissions, (2) the false statements or omissions were made deliberately or with reckless disregard for the truth, and (3) probable cause would not have existed without the false statements and/or omissions." *United States v. Williams*, 718 F.3d 644, 647-48 (7th Cir. 2013) (citing *Franks*, 438 U.S. at 155-56).

"An affiant acts with reckless disregard for the truth when he 'in fact entertain[s] serious doubts as to the truth of his allegations.'" *Id.* at 650 (quoting *United States v. Lowe*, 516 F.3d 580, 584 (7th Cir. 2008)). The inquiry is subjective, focusing on the affiant's state of mind. *Id.* Reckless disregard is greater than negligence. *Id.* "[O]ur task is to determine whether, based on the totality of the circumstances, it was reasonable for the [lower] court to conclude that law enforcement did not doubt the truth of the affidavit." *Id.* A *Franks* violation predicated on an omission requires that it was done "deliberately or recklessly *to mislead* the issuing [judge]." *Id.* (citing *United States v. McMurtrey*, 704 F.3d 502, 513 (7th Cir. 2013)).

We review factual determinations, including whether the officer made statements deliberately or with reckless disregard for the truth, for clear error. *Id.* at 649 (citing *United States v. Spears*, 673 F.3d 598, 604 (7th Cir. 2012)). "A factual finding is clearly erroneous only if, after considering all of the evidence, we cannot avoid or ignore a definite and firm conviction that a mistake has been made." *United States v. Hammond*, 996 F.3d 374, 383 (7th Cir. 2021) (quoting *United States v. Thurman*, 889 F.3d 356, 363 (7th Cir. 2018)).

We see no error in the district court's denial of Edwards's motion to suppress the evidence obtained from the GPS tracking device because Edwards has failed to identify a false statement or misleading omission in the supporting affidavit. The Neil's Liquor security camera footage supports the description in Detective Schultz's affidavit and corroborates his representations to the issuing judge. Our own review of the tape supports the district court's conclusions, and its findings are not clearly erroneous. Additionally, the affiant's underreporting of Edwards's criminal history does not render the warrant constitutionally deficient. If anything, the underreporting benefited Edwards.

Furthermore, even if the explanation of Edwards's criminal history was misleading, Edwards fails to establish that Detective Schultz deliberately or recklessly attempted to mislead the issuing judge. The magistrate judge credited Detective Schultz's testimony that he had no intention to mislead. We defer to the magistrate judge who "had the opportunity to listen to testimony and observe the demeanor of a witness at the suppression hearing." *Thurman*, 889 F.3d at 366 (quoting *United States v. Biggs*, 491 F.3d 616, 621 (7th Cir. 2007)). Because Edwards cannot identify

any evidence that the magistrate judge's credibility finding was clearly erroneous, the district court did not err when it denied the motion to suppress evidence from the GPS tracking device.

B. Woods's Photo Identification

Edwards next argues that the district court erred when it denied his motion to suppress Woods's photo identification. A photo identification procedure violates a defendant's due process rights when (1) it was "impermissibly suggestive" and (2) "under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." *United States v. Gonzalez*, 863 F.3d 576, 584 (7th Cir. 2017) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 107, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). We review de novo the lower court's decision to deny a defendant's motion to suppress a photo identification, "with due deference to the court's findings of historical fact." *Id.* (citing *United States v. Harris*, 281 F.3d 667, 669-70 (7th Cir. 2002)).

Presenting a witness with only one suspect for an identification is inherently suggestive but may be permissible in certain circumstances. *Id.* at 584-85 (showing state identification photos within minutes of robbery would be suggestive lacking exigent circumstances); *United States v. Brown*, 471 F.3d 802, 804 (7th Cir. 2006) (reviewing Supreme Court precedent and scholarship regarding single-suspect presentations and attempts to mitigate suggestibility); *but see United States v. Vines*, 9 F.4th 500, 506-07 (7th Cir. 2021) (holding that it was not suggestive to show a Facebook profile picture after witness volunteered the suspect had a Facebook page). Because the government does not dispute the finding that the photo procedure was impermissibly suggestive, we proceed straight to the second prong.

An impermissibly suggestive photo identification may nonetheless survive a suppression motion where the totality of the circumstances demonstrates the reliability of the identification. *See Gonzalez*, 863 F.3d at 585-86 (citing *Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012)). In assessing reliability, we consider the *Biggers* factors: (1) the witness's opportunity to view the defendant during the crime; (2) the witness's degree of attention paid to the defendant; (3) the accuracy of any prior descriptions of the defendant; (4) the level of the witness's certainty at the time of the identification; and (5) the time that has passed between the crime and the identification. *Biggers*, 409 U.S. at 199-200; *Gonzalez*, 863 F.3d at 586.

All five *Biggers* factors support the reliability of the photo identification and indicate the process did not give rise to a substantial likelihood of irreparable

misidentification. First, Woods knew Edwards and spent hours with him that night. Second, Woods paid significant attention to Edwards over this period as he drove her, pulled a gun on her, committed a robbery with her, and fled from the police with her in a high-speed car chase. Third, Woods correctly observed that, while Edwards had hair in the booking photo Detective Johnson showed her, he was currently bald. Fourth, Woods immediately recognized "Moe" in the booking photo and has not wavered in her identification. Fifth, Woods identified Edwards within hours of the robbery.

Additionally, Edwards argues that Woods's identification was unreliable because she was intoxicated and under great stress. The magistrate judge heard live testimony from Woods and Detective Johnson, and was in the best position to evaluate Woods's credibility and how Detective Johnson's actions may have impacted her photo identification. *See Thurman*, 889 F.3d at 366. Edwards fails to present evidence sufficient to challenge these findings. The district court did not err when it denied Edwards's motion to suppress Woods's photo identification.

C. Detective Johnson's Second Entry into the Outlander

Edwards next argues the district court erred when it denied his motion to suppress evidence obtained from Detective Johnson's January 1, 2019, warrantless entry into the impounded Outlander. When reviewing the district court's denial of a motion to suppress, we review findings of fact for clear error and legal conclusions de novo. *See United States v. Cole*, 21 F.4th 421, 427 (7th Cir. 2021) (en banc).

Edwards considers Detective Johnson's account of the January 2019 entry incredible, but points to nothing beyond those plausibility concerns rejected below. Here, again, the magistrate judge enjoyed the benefit of observing Detective Johnson's live testimony and evaluating his credibility. Nothing on the record leaves us with the definite and firm conviction the lower court erred in crediting Detective Johnson's version of events. *See Hammond*, 996 F.3d at 383. We decline to disturb the district court's factual findings and accept Detective Johnson's account: Detective Johnson entered the Outlander for the sole purpose of retrieving Woods's purse. Once in the Outlander, he did not stray beyond this objective. In reaching for the purse, Detective Johnson inadvertently dislodged the sunglasses holder and revealed a hidden compartment concealing what he immediately recognized to be a Glock handgun.

Edwards argues that law enforcement needed to obtain a new warrant before searching the impounded Outlander a second time. *See United States v. Keszthelyi*, 308 F.3d 557, 568 (6th Cir. 2002) (articulating the "reasonable continuation rule" that the government needs a new warrant if the second entry is not a reasonable continuation of the first); *Bills v. Aseltine*, 958 F.2d 697, 703 (6th Cir.

1992) (differentiating between entry for the purposes outlined in the warrant and entry for a different purpose). Edwards suggests that after the officers returned the initial search warrant, he had a legitimate expectation of privacy against further searches without a new warrant or identifiable exception to the warrant requirement. The record indicates the government assumed the same—a prosecutor instructed Detective Johnson to seek a warrant before recovering new evidence. Today, we need not consider when an additional warrant was necessary because Edwards had no privacy interest in the Outlander after he abandoned the vehicle.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. Amend. IV. This protects a defendant from unreasonable searches in places where the defendant has a legitimate expectation of privacy. *See Hammond*, 996 F.3d at 384 (citing *United States v. Sawyer*, 929 F.3d 497, 499 (7th Cir. 2019). The Amendment does not apply to abandoned property. *United States v. Pitts*, 322 F.3d 449, 455-56 (7th Cir. 2003) (citing *Abel v. United States*, 362 U.S. 217, 241, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960)). "[N]o person can have a reasonable expectation of privacy in an item that he has abandoned." *Id.* at 456 (quoting *United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000)).

Abandonment turns upon an objective test of "the external manifestations of the defendant's intent as judged by a reasonable person possessing the same knowledge available to the government agents involved in the search." *Id.* (citing *Basinski*, 226 F.3d at 836). We have stated on multiple occasions that a driver relinquishes any privacy interest when he flees a vehicle. *See United States v. Vasquez*, 635 F.3d 889, 894 (7th Cir. 2011) (questioning how a defendant "could argue with a straight face that he maintained an expectation of privacy in [the vehicle] after he ditched it and bolted off on the run"); *United States v. Pittman*, 411 F.3d 813, 817 (7th Cir. 2005) (noting that when a driver flees from police, that "is pretty good evidence that he's abandoned the car—that he doesn't want to be associated with it and therefore isn't going to reclaim it").

After the government declined to challenge Edwards's privacy interest, the magistrate judge sua sponte raised abandonment in its report and recommendation. The magistrate judge explained that, but for the government's concession, it would have found Edwards abandoned the Outlander. We agree. Edwards ditched the Outlander (which was not registered in his name) after a high-speed car chase the night of the O'Reilly Auto Parts robbery when he fled on foot, and he was a fugitive at the time Detective Johnson entered the vehicle. A reasonable person would conclude that Edwards abandoned the vehicle. *See Pitts*, 322 F.3d at 455-56.

Although both parties assumed Edwards had a Fourth Amendment right to privacy in the Outlander, we are not bound by the parties' view. Likewise, we may affirm the district court's decision on "'any ground supported by the record.'" *United States v. Harden*, 893 F.3d 434, 451 (7th Cir. 2018) (quoting *Boyd v. Ill. State Police*, 384 F.3d 888, 897 (7th Cir. 2004)). The government's failure to raise abandonment forfeits that issue on appeal. *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc) (citing *United States v. Olano*, 507 U.S. 725, 731-35, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)); *see United States v. Rahman*, 805 F.3d 822, 831 (7th Cir. 2015) (determining forfeiture when "the argument was available to [the defendant] at the time of the search"); *United States v. Combs*, 657 F.3d 565, 571 (7th Cir. 2011) (explaining that "[t]he government can forego a defense—whether by design or neglect—but we are not obligated to accept the government's waiver"). But we may "base our decision on a forfeited ground" when the record presents "an 'exceptional case.'" *See Hill v. Werlinger*, 695 F.3d 644, 647 (7th Cir. 2012) (quoting *Wood v. Milyard*, 566 U.S. 463, 473, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012)).

As our sister circuit recently articulated, "courts do have the ability to 'resurrect' forfeited issues *sua sponte* in 'extraordinary circumstances.'" *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (en banc) (quoting *Wood*, 566 U.S. at 471 n.5). "The degree to which we adhere to the prudential practice of forfeiture and the conditions under which we will excuse it are up to us as an appellate court." *Id.* at 873 (citation omitted). The court considered the forfeited issue because it had "all the findings of fact necessary ... and that purely legal conclusion jumps off the page." *Id.* at 877. We are in similar territory. Under any standard of review, the record shows Edwards abandoned the Outlander. It also qualifies as an exceptional case to forgive the forfeiture.

In *Wood v. Milyard*, the Supreme Court stated that a court may consider a forfeited ground "founded on concerns broader than those of the parties." 566 U.S. at 471 (citing *Granberry v. Greer*, 481 U.S. 129, 133-35, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987)). A case may be exceptional once "third-party costs are taken into account, [and] reversal may be an excessive sanction for the government's [forfeiture]." *United States v. Ford*, 683 F.3d 761, 769 (7th Cir. 2012) (quoting *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991). "[T]he facts of individual cases" inform when we should use our discretion to decide a case on the forfeited ground, *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976), including when the facts indicate "broader interests are at stake," *Bourgeois v. Watson*, 977 F.3d 620, 632 (7th Cir. 2020).

Based on the facts of this case, it qualifies as exceptional. In failing to challenge Edwards's privacy interest in the Outlander, the government presents alternate

reasons for affirmance that would require us to examine unresolved nuances to the Fourth Amendment constitutional doctrine. Yet, the record provides a clear disposition under our established constitutional precedent. As such, we exercise our discretion to forgive the forfeiture and avoid the needless exploration of uncharted constitutional matters which could bring unintended consequences for future litigants.

Presented with the magistrate judge's well-reasoned report, we agree with its recommendation regarding abandonment. Law enforcement was wise to seek a search warrant for the Outlander in the first instance. It is best practice to rely on a warrant instead of gamble on a court's evidentiary determination. But the record here shows Edwards had no expectation of privacy in the abandoned Outlander. Handed a peculiar set of facts, the district court did not err when it denied Edwards's motion to suppress, albeit on different grounds than we affirm on today.

D. The Government's Motion to Reconsider

Additionally, Edwards claims the district court erred when it granted the government's motion to reconsider its opinion and order adopting the magistrate judge's report and recommendation. Edwards argues because the government never objected to the report and recommendation, the government waived the issue. We review the district court's ruling on a motion to reconsider for abuse of discretion. *Jaburek v. Foxx*, 813 F.3d 626, 630 (7th Cir. 2016).

A party may object to a magistrate judge's report and recommendation "[w]ithin 14 days after being served with a copy of the recommended disposition, or at some other time the court sets." Fed. R. Crim. P. 59(b)(2). Failure to object "waives a party's right to review." *Id.* Waiver is not jurisdictional, however, and a district court may review a recommendation on its own initiative. *United States v. Street*, 917 F.3d 586, 597-98 (7th Cir. 2019). Furthermore, "we have recognized exceptions when enforcing [the deadline] would 'defeat the ends of justice.'" *Id.* at 597-98 (quoting *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 540 (7th Cir. 1986)).

Waiver does not apply here. The magistrate judge entered a well-reasoned and unambiguous report and recommendation. Nowhere in the report did the magistrate judge include that Detective Johnson lied or gave false testimony. Instead, the district court erroneously concluded that the magistrate judge had made such a finding, and the government objected to the district court's error. The district court acted well within its discretion in correcting its mistake.

E. Trial & Juror No. 11

Edwards next claims the district court made numerous errors at trial: failing to sequester Detective Keith from the court room, denying Edwards's motion for a mistrial, and dismissing Juror No. 11. We review these rulings for abuse of discretion. *See United States v. Olofson*, 563 F.3d 652, 660 (7th Cir. 2009) (witness sequestration exemption); *United States v. Lowe*, 2 F.4th 652, 658 (7th Cir. 2021) (mistrial); *United States v. Lorefice*, 192 F.3d 647, 654 (7th Cir. 1999) (juror dismissal). We review the district court's factual findings in connection with a mistrial motion for clear error. *See United States v. Mannie*, 509 F.3d 851, 856 (7th Cir. 2007) (citing *Shakman v. City of Chicago*, 426 F.3d 925, 932 (7th Cir. 2005)).

1. Detective Keith

Federal Rule of Evidence 615 directs a court to exclude witnesses from the courtroom during trial so they do not influence, and are not influenced by, the testimony of other witnesses. Rule 615 exempts several categories of witness from exclusion, including a government's investigative case agent. *See* Fed. R. Evid. 615(b) & (c); *United States v. Berry*, 133 F.3d 1020, 1024 (7th Cir. 1998).

The district court did not abuse its discretion by permitting both Agent Boxwell and Detective Keith (after her testimony) in the courtroom. Agent Boxwell was the lead investigator for the case and squarely fell under the Rule 615(b) case agent exemption. Similarly, Detective Keith's presence was essential to the government's case pursuant to Rule 615(c). Detective Keith's role was separate from Agent Boxwell's, the case was multi-jurisdictional, Detective Keith worked for a different law enforcement body, and she had independent knowledge of other aspects of the case. Moreover, the district court sequestered Detective Keith until she had completed her testimony, thereby eliminating the risk that the testimony of other trial witnesses would impact hers.

2. Motion for Mistrial

Edwards argues that the district court erred by denying his motion for a mistrial after Juror No. 11 raised concerns of potential witness coaching. "[A] trial judge is in the best position to weigh the circumstances peculiar to each trial." *Lowe*, 2 F.4th at 658 (quoting *United States v. Wrensford*, 866 F.3d 76, 89, 67 V.I. 1037 (3d Cir. 2017)). In considering the context of the district court's decision, we must "determine whether the defendant was deprived of a fair trial." *Mannie*, 509 F.3d at 856 (citing *United States v. Clarke*, 227 F.3d 874, 881 (7th Cir. 2000)).

The district court did not abuse its discretion. Though Edwards disagrees with the result, he does not explain how the district court's factual findings were clearly

erroneous. Instead, he asks us to reweigh the evidence. The record indicates that the district court took great care to ensure that it did not allow a tainted trial to move forward. It took testimony from Juror No. 11 and the detectives, allowed the parties to question the detectives, and heard arguments from both sides. The district court carefully considered the evidence and the circumstances, recognizing it was in the best position to weigh the situation. It then made clear factual findings that Keith did not coach Johnson, Johnson credibly testified that Keith's behavior did not impact his testimony, and there was no prejudice to warrant a mistrial. It also admonished Detective Keith for her conduct. The district court could not declare a mistrial for witness coaching when no witness coaching took place.

3. Excusing Juror No. 11

Edwards next argues that the district court abused its discretion when it excused Juror No. 11. A district court may remove and replace sitting jurors "who are unable to perform or who are disqualified from performing their duties." Fed. R. Crim. P. 24(c)(1). The district court is in the best position to consider a juror's potential bias and weigh that against the juror's claims that he can still be fair and impartial. *See Lorefice*, 192 F.3d at 654. A district court abuses its discretion when "*no legitimate basis* for the court's decision can be found in the record, and the appellant shows that the juror's dismissal prejudiced his case." *United States v. Pineda*, 743 F.3d 213, 217 (7th Cir. 2014) (citing *United States v. Vega*, 72 F.3d 507, 512 (7th Cir. 1995)).

Edwards challenges the district court's basis for excusing Juror No. 11, claiming that a juror is entitled to consider what takes place in the courtroom. He suggests that Detective Keith's actions in the gallery were fair game for the jury, and the district court abused its discretion when it excused a juror who was merely weighing witness credibility.

The district court took a methodical approach to protect the sanctity of the jury and the fairness of Edwards's trial. It found, after careful consideration, that Detective Keith's actions did not impact Detective Johnson's testimony. After questioning Juror No. 11 twice, however, the district court observed that Juror No. 11 believed Detective Keith may have coached Detective Johnson's testimony. Indeed, Juror No. 11 felt so strongly about the behavior that he voiced his concerns. The district court recognized that Juror No. 11 initially stated he would consider Detective Keith's actions when weighing Detective Johnson's credibility. Despite Juror No. 11's agreement to follow its instructions, the district court believed the cloud of bias remained. Based upon its evaluation of Juror No. 11's demeanor and credibility, the district court concluded that the juror's continued service on the jury risked tainting the trial and deliberations. The district court's detailed finding supports its

conclusion. It did not abuse its discretion in excusing Juror No. 11.

F. Motion for a New Trial

Next, Edwards appeals the district court's decision to deny his motion for new trial pursuant to Federal Rule of Civil Procedure 33 and *Brady v. Maryland*. We review the district court's decision to grant or deny a motion for new trial for abuse of discretion, including when the defendant alleges there was a *Brady* violation. *United States v. Ballard*, 885 F.3d 500, 504 (7th Cir. 2018). Because "*Brady* violations often implicate both issues of fact and law; we review the district court's factual findings for clear error, and legal conclusions de novo." *Ballard*, 885 F.3d at 504 (citing *United States v. Griffin*, 652 F.3d 793, 797 (7th Cir. 2011)).

"To succeed on a *Brady* claim, a defendant 'bears the burden of proving that the evidence is (1) favorable, (2) suppressed, and (3) material to the defense." *United States v. Walter*, 870 F.3d 622, 629 (7th Cir. 2017) (quoting *United States v. Walker*, 746 F.3d 300, 306 (7th Cir. 2014)). Edwards has failed to satisfy these elements.

1. Favorable Evidence

Evidence is "favorable" if it is exculpatory or impeaching. *Ballard*, 885 F.3d at 504 (citing *Turner v. United States*, 137 S. Ct. 1885, 1893, 198 L. Ed. 2d 443 (2017)). The district court noted that Edwards knew of the existence, but not the details, of the January 19 statement. Edwards claims the details in the report are favorable because they reflect Burrell denouncing her prior statements, which were detrimental to Edwards's case. We cannot see how the January 19 report is favorable, particularly when Burrell called Agent Boxwell again on February 6, 2020, to contradict her January 19 statement. If anything, it further undermines Burrell's credibility.

2. Suppression

Evidence is suppressed when the government "fail[s] to disclose evidence not otherwise available to a reasonably diligent defendant." *Bryant v. Brown*, 873 F.3d 988, 998 (7th Cir. 2017) (quoting *Jardine v. Dittmann*, 658 F.3d 772, 776 (7th Cir. 2011)). Evidence is not suppressed when a defendant is aware a witness recanted a prior statement and the defendant has access to question the witness further. *See United States v. Lockhart*, 956 F.2d 1418 (7th Cir. 1992). Edwards claims that the government suppressed the January 19, 2020, report's contents. Even if he had asked her about the statement, Edwards contends, only the report could verify whether Burrell's recollection of her statement was reliable.

We agree with Edwards that, as a practical matter, the government should have turned over the report. But the nature of this report falls outside the scope of *Brady*. Though the government did not produce the report, anything Edwards would have gained from it was available to him through reasonable diligence because Burrell was his witness. *See Lockhart*, 956 F.2d at 1426 (noting that the government is not required to "transcribe the recantation of a witness available to the defendant"). Edwards points to *Boss v. Pierce*, 263 F.3d 734 (7th Cir. 2001), arguing that Burrell could not have relayed the exact contents contained in the report. *Boss* does not apply here. In *Boss*, we explained that reasonable diligence does not extend to everything a defense witness might have told the government, such as additional information about the crime unrelated to his alibi testimony. *Boss*, 263 F.3d at 740-42. Conversely, Burrell's statement goes directly to her role as an alibi witness. When Edwards's counsel learned about the January 19, 2020, statement, reasonable diligence required counsel to follow up with Burrell to determine what she did or did not say. If Burrell recanted her recantation on January 19, she could easily have told Edwards.

3. Materiality

Evidence is "material" when "there is a 'reasonable probability' that the result would have been different had the suppressed evidence been put before the jury." *Goudy v. Cummings (Goudy II)*, 922 F.3d 834, 842 (7th Cir. 2019) (citing *Kyles v. Whitley*, 514 U.S. 419, 422, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). This standard "is less rigorous than a preponderance of the evidence ... [the defendant] must show only that 'the cumulative effect of all of the suppressed information is to undermine confidence in the verdict.'" *Id.* (quoting *Goudy v. Basinger (Goudy I)*, 604 F.3d 394, 399 (7th Cir. 2010)). Cumulative effect is considered "in the context of the entire record." *Id.* (quoting *Beaman v. Freesmeyer*, 776 F.3d 500, 507 (7th Cir. 2015)). Edwards argues the report is material because he could have used it to rehabilitate Burrell's alibi testimony had she taken the stand.

Edwards fails to show how the contents of the January 19, 2020 report could possibly rehabilitate Burrell's credibility had she testified, let alone how it would present a reasonable probability that the outcome of his trial would have been different. As the district court correctly observed, the evidence against Edwards was strong. *See United States v. Asher*, 178 F.3d 486 (7th Cir. 1999) (affirming when the suppressed FBI interview summaries would not have undermined confidence in the jury's verdict given the weight of additional evidence). Woods, Edwards's codefendant, testified against him, the two used his Outlander during the O'Reilly Auto Parts robbery, the surveillance video captured him, and his DNA was on the gun Detective Johnson found in the Outlander. Moreover, Burrell's account of the

events was a moving target. She told multiple versions of the events. The report would not have created a reasonable probability of a different outcome in Edwards's case.

G. Cumulative Error

Edwards concludes by asking us to reverse on cumulative error. "Cumulative errors, while individually harmless, when taken together can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law." *United States v Marchan*, 935 F.3d 540, 549 (7th Cir. 2019) (quoting *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001)). "To establish cumulative error a defendant must show that '(1) at least two errors were committed in the course of the trial; (2) considered together along with the entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial.'" *Id.* (quoting *Allen*, 269 F.3d at 847). As explained above, Edwards fails to establish a single error, let alone two.

IV. Conclusion

For these reasons, we affirm.

APPENDIX B

Decision of the United States District Court for the Western District of Wisconsin to Exclude Juror No. 11 (excerpt from transcripts from the fourth day of Petitioner's trial, 2/13/2020)

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

JEREMIAH D. EDWARDS,
Defendant.

Case No. 18-CR-162-JDP-1

Madison, Wisconsin
February 13, 2020
8:48 a.m.

[REPRODUCTION OF] STENOGRAPHIC TRANSCRIPT OF FOURTH DAY OF JURY TRIAL HELD BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

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Also Present:
JEREMIAH D. EDWARDS, Defendant
Special Agent BETH BOXWELL, FBI

[Original transcription by]
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(Proceedings called to order at 8:48 a.m.)

THE CLERK: Case No. 18-CR-162-JDP-1, the United States of America v. Jeremiah Edwards. Court is called for a fourth day jury trial.

May we have the appearances, please.

MR. GRABER: Good morning, Your Honor. Dan Graber and Chad Elgersma on behalf of the United States. Seated with us at counsel's table is Special Agent Beth Boxwell with the FBI.

THE COURT: Good morning.

MR. JONES: Good morning, Your Honor. Mr. Edwards is here in person and with his attorney, William Jones.

THE COURT: Good morning to you.

I have a couple of things to address.

Would you grab me another legal pad?

First is I told Mr. Edwards that I would think about the exclusion of the juror overnight. I did that, and I'm reaching the same decision, and the reason is this: I think I articulated it last night, but a case like this requires me to make a lot of decisions about the evidence that will be presented in the case, and in doing that I have to consider what's relevant, and I have to consider the potential prejudice from certain kinds of evidence. So, for example, I didn't allow the testimony that Kanasha Woods had said that Mr. Edwards had said that he committed 60 robberies. I thought that was just too prejudicial, so that's an example of the kind of thing that I would

keep from the jury. Sometimes I make decisions about really basic fairness, and I determined that the government's technical evidence about cell phone towers and its computer forensics analysis of the photographs, that was unfair to the defense because they didn't have time to prepare a rebuttal to them.

But it's not really a kind of even match that I'm looking for. I don't take a chunk out of one side's case just so that it's an even fight. I have to be fair about the evidence that goes in. It is true that it was the misconduct of a government witness that leads us to this situation with the jury, but the jury is a special consideration, and I can't leave a juror on the jury if I think that that jury is going to be -- juror is going to be tainted by an improper consideration, even if it was the government's witness misconduct that led to this situation. The jury has to be able to decide the case based on the evidence, and I harbor misgivings about whether Juror [NO. 11] would be able to put out of his mind the conduct that he saw. And, again, I understand that the defendant is concerned that it was the government's conduct that led to this. All that's very true, but the jury is special. I have to give both sides a jury that is going to decide the case based on the evidence, and if I harbor some misgivings about a juror, I have to let that juror go.

We have 13 qualified jurors. I'm still going to have to excuse one of them as an alternate. And so it's just not appropriate to leave a juror on if I harbor misgivings about whether that juror can follow my instructions. And I want to be clear: This says nothing about the integrity of Mr. [NO. 11]. He has been a model of integrity as far as I'm concerned because he spoke up about something he saw that was improper, he

answered my questions honestly, and I believe that he sincerely believes that he could decide the case fairly, so I have nothing but respect for that juror. But, still, I harbor some misgivings about whether he would actually be able to put it out of his mind, and so the proper course is to excuse that juror. The other thing I wanted to address was the other acts evidence, and I'm not sure I was entirely clear in my ruling, but as we went through the jury instructions, the evidence that has been admitted about Mr. Edwards' drug distribution activities is, I think, clearly other acts evidence because the indictment charges only the possession on November 8th, so it is other acts evidence. It is admissible though under Rule 404. There is an expressly articulated exception for intent and for knowledge. Those are both elements of the possession with intent to distribute charge, and so these other activities go to Mr. Edwards' knowledge and intent on the date charged, but they are other acts evidence. So I said they were direct evidence of drug distribution, which they are, but it's drug distribution that is not charged in the indictment, so they have to be admissible under Rule 404(b). I believe they are. The list of exceptions is not exhaustive, but it does provide guidance, and those, knowledge and intent, are specifically mentioned. I'm always a little wary about the intent one because that can sweep in a lot of material with intent, but in this case I think it's appropriate to allow the other acts evidence. It's close in time, it's very closely related, and I think it is probative and not unfairly prejudicial of Mr. Edwards' knowledge of the materials that he had and his intent to distribute them. And so it's admissible as other acts evidence, so I want the basis of my ruling on that evidence to be clear.

The other thing I had was on the jury instructions, I've given you the updated versions. I made the changes that we identified. I made a few other just rhetorical, readability changes that are nonsubstantive. I did make one substantive change, and that is that there was an instruction on prior inconsistent statements that made reference to prior inconsistent statements that were made under oath. I don't think we had any evidence of those, so I took out that instruction, that part of that instruction. But I wanted to bring that to your attention and make sure that I didn't overlook anything. I don't think we had any prior statements that were under oath.

MR. GRABER: I don't believe so, Your Honor, no.

THE COURT: Mr. Jones?

MR. JONES: I'm unaware of any.

THE COURT: Yeah. So I didn't want to -- it's a little bit of a complicated rule. In civil cases I give a little bit more elaborate instruction on using prior inconsistent statements but -- because a prior statement under oath can be used as substantive evidence, but I just didn't want to have the jury confused by that reference to statements under oath. Those are the issues that I had. Anything else before we begin, Mr. Jones?

MR. JONES: Judge, I did have a couple motions.

THE COURT: Okay.

MR. JONES: The first would be for dismissal of the indictment as a sanction for the behavior of the government in this case as it relates to poisoning the jury pool and causing this issue. So I'd ask for a complete dismissal with prejudice.

THE COURT: Okay. I'm going to deny that motion, but you've made your record, and so --

MR. JONES: Okay. Judge, you've indicated that you feel the only thing that you can do is dismiss the juror. I disagree. You can also grant our motion for mistrial. I admit that the basis of it originally was for the behavior of Leslie Keith influencing the testimony or poisoning the testimony of Caleb Johnson and making it less credible, but now I'm asking for -- and I think you've ruled on that -- but now I'm asking for a mistrial as a sanction for the behavior of the government, and I think it's within your discretion to simply say this is a mistrial as a sanction.

THE COURT: Okay. Honestly, I considered that as well. I'm not going to do it, and the reason I'm not going to do it is kind of really the bottom line is I have to look at the level of misconduct, and I think it was very unprofessional conduct in the courtroom here, but I don't think that it was so serious that it would warrant the sanction of dismissal of this case, and I say that because I'm looking really at the culpability of Detective Keith. I do not believe that it was an intentional coaching of Detective Johnson. As I said, I think it was unprofessional for her not to maintain a sober demeanor during the trial, but I do not think that she had any intent to influence Mr. Johnson's testimony. And so it's kind of bad judgment, but I do not think that it affected the substantive presentation of the testimony, and I don't think it was so outrageous an act of misconduct that it would warrant the sanction of dismissal.

MR. JONES: I'm also asking for a mistrial for a sanction as well.

THE COURT: Yes. And so the same thing goes for the mistrial. That would be a severe sanction as well. I just don't think the conduct really rises to that level, and I don't think it was -- you haven't really specifically mentioned it, but I don't think it was so noticeable -- again, I said that I didn't observe it, which certainly it happened because she admitted it, but I also don't think it was so outrageous that it is inevitably going to taint the entire jury's consideration of the matter, so I'll deny your motion both for a mistrial and for dismissal as a sanction.

MR. JONES: Okay. As just -- in the interest of, as you mentioned, fairness and a complete record, would you indulge me at least to identify some of the things that I've observed so that there's a record --

THE COURT: Absolutely, and I think you're entitled to make --

MR. JONES: And I won't go long. I know the jury is waiting.

First, I note that the government fought tooth and nail to preclude Leslie Keith from the sequestration order, and I opposed it, and they insisted that she was essential. Instead, she came in here and acted completely unprofessional. They wanted her here. This is the one individual I said is not essential and doesn't need to be in here. She was under my subpoena, and out of courtesy, I had my direct with her. I could have had her -- well, she was apparently essential, and so after she testified she was going to be permitted in here anyway, but if she had been under a sequestration order, I could have had her sitting out here, and I guarantee if she or Caleb Johnson are ever a witness in any trial in my case, they will be subpoenaed, and they will be sitting outside because I'm not doing this again.

There's a period of testimony during which Caleb Johnson struggled through testimony as I cross-examined him about creating a photo lineup in the software. That is something that he shared in common, because there was an issue that you had, "Well, I don't really see how she could have been coaching him." There were times that he was struggling as I cross-examined him, and if it was during those periods of time, then it is, in the very least, support, but it could be telling --

THE COURT: Help me understand how -- what kind of coaching could she have given on that subject?

MR. JONES: Well, he was describing the software and how it worked and would cut people off, and if she's saying, yeah, you know, that could be, or, no, you know, that's not how the software works, he doesn't know how the software works. He has his own method, which is –

THE COURT: He picks his own pictures, yeah.

MR. JONES: Apparently to him takes away bias by him picking the photo. You heard that testimony. So I have no faith in whatever he says, but I'm just pointing out something that -- because we were wondering when could she have been coaching him. That might have been it. That's all I'm pointing out.

THE COURT: Okay.

MR. JONES: I also want to point out the irony that while we were at sidebar, Attorney Graber pointed out the only African-American male in the gallery and accused him of being Mr. Edwards' father, and he is not, and also influencing a witness on the stand. And I think the only response I would have to it is perhaps the

government could take their eyes off the minorities in the gallery and take a look at their own team, who are acting totally unprofessional, and maybe address that.

[NO. 11] is a former cop. We took a chance on that juror. Rarely does a defendant say, "Yeah, let's not strike that cop." We saw something in him, and we didn't take him off, and we took a big chance on that, and the government messed that up by acting totally inappropriately. And he came forward, and now he's going to leave thinking, "What the heck? I know what -- the next time that this happens, if I'm ever on a jury, I'm sure as heck not going to speak up." It's going to have a very negative effect on him.

I think about my client and how Kafkaesque this must be, the progression of this. His counsel was hamstrung from day one by an order that he could not share any discovery with him in jail. He was denied bail. We moved to suppress, and the judge, Your Honor, had an original order saying Caleb lied on the stand and then redlined it. He came here to pick a jury, and not only is there not a single African-American in the jury, there is not a single African-American in the jury pool. And he's the only African-American in this courtroom other than one witness, a Police Officer Patterson who is an African-American and testified about finding some marijuana. I can't imagine how just absolutely Kafkaesque this must feel for him, and now he's being told that the one juror who has given a tell that he may be on our side is being told to leave.

That's all I had to say. Thank you.

THE COURT: Mr. Graber, do you want to respond?

MR. GRABER: Well, he's made his record. To the extent that he makes the personal --

THE COURT: Get your microphone over a little bit.

MR. GRABER: To the extent that he makes the personal attack on me, my only response would be to remind the Court or the record when we were at sidebar with that anesthesiologist who started saying every time he had a problem with cases it was because it was a black person that was the suspect that was hurting the people that he was taking care of, and I was the one that moved to say, "Knock that guy off because he can't be fair to the defendant." That was me, and defense counsel said no until his client told him, "Hey, take him off." So to the extent that he's trying to race bait here, I would just point out that fact.

MR. JONES: Judge, that is not what that juror said. He said he has been the victim of discrimination --

THE COURT: His statement -- we don't need --

MR. JONES: -- as a Mexican-American.

THE COURT: That juror's --

MR. JONES: Long gone.

THE COURT: -- voir dire response -- he's long gone. I mean, I had misgivings about him. I, honestly, had a hard time making sense of exactly what he was trying to do. It seemed to me that he was trying to grasp at anything to suggest that he was prejudiced so he could get off the jury, and at the end of the day he wouldn't really -- he didn't endorse the idea that he could be fair, so that's why that juror went.

MR. JONES: Again, thank you for the indulgence. I just wanted --

THE COURT: I'm not indulging you really. You have the right to make a record. I think it's an important -- it's more than just venting, although it's probably that too, so I appreciate that.

As to the substantive rulings, I won't rehearse those. I gave my reasons for it. Judge Crocker gave his reasons in his Report and Recommendation.

I will say this about the jury pool: There are ways that we have available to us to select the jury pool, and we use those, and we would like to have more minority jurors in the pool. The way -- and, of course, it has to be a random selection, and what we have really just doesn't produce very many minority jurors. It is a random selected jury pool, and we produce what we produce, and there just isn't -- I think ultimately the brute fact is that the demographics of our district just don't produce very many minority jurors, and I regret that, but we still have to have -- we can't have a race-based selection of jurors, which is, I believe, what it would take to actually increase the minority participation in the jury pool.

We do things to -- for example, we don't draw from the entire district for our trial juries. We draw from Dane County and the counties that touch Dane County where there's a greater minority population than there is districtwide. Mostly that's done for the convenience of jurors because you don't want to have to have jurors travel from Ashland for a trial. We do it for grand juries, but for trials we don't do it. But it also has the benefit of increasing minority population to have juries drawn from Dane and Rock County rather than randomly throughout the whole district.

So that's a regrettable fact of life. I'm not giving up on the subject, but those are the means that we have available that are the lawful means of selecting a jury, and that's one of the results, again, given the demographics of our population here. So I understand. Whether that makes it Kafkaesque, I certainly agree that that is an unfortunate fact of life in this district with our jury pool.

So you made your record on the other things. Are we ready to begin with the instructions and closing arguments?

MR. JONES: Yes.

MR. GRABER: Yes.

THE COURT: Okay. All right. All right. Very good.

(Jury enters the courtroom at 9:07 a.m.)

APPENDIX C

Discussion and Argument Regarding the Excusal of Juror No. 11 and Colloquies with Juror No. 11 (excerpt from transcripts from the third day of Petitioner's trial, 2/12/2020)

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	Case No. 18-CR-162-JDP-1
-vs-	Madison, Wisconsin February 12, 2020
JEREMIAH D. EDWARDS, Defendant.	2:22 a.m.

[REPRODUCTION OF] STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL (AFTERNOON SESSION) HELD BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

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Also Present:
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Special Agent BETH BOXWELL, FBI

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(Called to order at 2:22 p.m.)

THE COURT: All right. Before we get started, a couple of issues. Thanks for your patience. I should have known that Jeremy Ryan would need more attention than a half an hour. It has been reported to me one of the jurors indicated that the -- somebody in the gallery was doing something that they perceived as coaching one of the witnesses. I'm not sure which witness it was. You don't know which witness it was? Yeah. So it concerns me. I'm sure none of you have really set that up, but I don't know if –

MR. GRABER: I don't know what -- can we know what was happening?

THE COURT: I didn't notice it, although I do think that I saw Detective Johnson standing in the vestibule during Mr. Mortimer's testimony.

MR. GRABER: Okay.

THE COURT: And he wasn't doing anything. And I'm not even a hundred-percent sure that it was Detective Johnson, although I think it was, because I could just kind of see a silhouette.

MR. GRABER: Okay. I guess I don't know how to. I don't know what's going on.

THE COURT: Well, now you know everything that I know. So I guess my question is, do I need to talk to the juror and find out what was going on?

MR. GRABER: It's up to them.

MR. JONES: I'm concerned, Your Honor.

THE COURT: Yeah.

MR. JONES: I guess I should consult with my client about whether he wants me to pursue it and look into a potential mistrial or move forward.

THE COURT: Yeah, if you can find out. And also I will talk to the juror if people think that's appropriate. I don't want to make a bigger issue out of it than it is, but I certainly didn't see --

MR. GRABER: The jurors may not understand the Court's ruling after Keith and Caleb testified. You said they could stay in afterwards. And so I don't know whether the juror understands that they're allowed to stay in and watch the rest of the trial, if it's that. And then if they're talking to people, I can't control. I mean, there's no orders from me or the team, my people that coach witnesses.

THE COURT: Yeah.

MR. GRABER: I don't need a reversal.

THE COURT: Of course not. Sometimes a case participant's natural enthusiasm gets the better of them I guess, but I don't -- I'd be surprised if any of it was going on. But whatever it was, it was enough to --

MR. JONES: So it was someone in the gallery --

THE COURT: What I know is somebody -- one juror communicated -- it was to you, correct, that they raised the issue?

MR. JONES: Sitting in the jury box looking out at the audience?

THE COURT: Yes, and perceived something what they thought to be was coaching. Now, they might have just been responding to the testimony and I'm not sure what witness it was.

MR. JONES: I don't know how you'd be coaching from there.

THE COURT: I don't either. I also don't want the juror to think that. Do you want to take a minute and consult with Mr. Edwards?

MR. JONES: We can take a minute, sure.

THE COURT: And if you want me to talk to the juror, if you think that's appropriate, I would do something off the -- it would be on the record, but just me and the juror.

MR. GRABER: Yeah. Do we want to talk to the bailiff first to hear it and then we can decide if we want to hear from the juror?

THE COURT: Sure. Can you come back to the robing room? Just tell me what you know.

(Brief recess.)

THE COURT: Okay. Now I've heard from the CSO he said everything that I've told you, nothing more. So it was a juror voiced concern that somebody in the gallery was reacting and perhaps coaching one of the witnesses. He thought it was inappropriate.

MR. JONES: Oh, sending a message to a witness who's testifying?

THE COURT: Yeah.

MR. JONES: I guess I would like to know what witness that was from the juror.

THE COURT: Okay. All right. We've got the court reporter set up here. So let's vacate the courtroom and we'll have the juror brought in and I'll just talk to him on the record, but with just us. You can stay, too.

GRABER: Parties stay or are the parties kicked out?

THE COURT: No, no, just me and the juror.

MR. JONES: You're just going to find out and then report?

THE COURT: Yeah.

(Parties out at 2:27 p.m.)

THE COURT: All right. Bring Mr. [NO. 11] in.

THE BAILIFF: Judge, where would you like him to sit?

THE COURT: Sit in the witness stand, if you would, only because there's a microphone there. I'm not going to put you under oath or anything like that, but I just wanted to hear what you had reported to the CSO about the witness and some conduct in the gallery. So if you would, just tell me what happened, what you saw.

JUROR [NO. 11]: Sure. Thank you for your time, Your Honor, and I'll try to make this brief. But I witnessed something that occurred in the courtroom and I felt compelled to bring it your attention. Specifically, while the Detective Caleb Johnson was in the last five minutes of his testimony, I just happened to look over and I saw the former witness, Detective Leslie --

THE COURT: Keith.

JUROR [NO. 11]: -- Leslie Keith, sitting directly behind the prosecution. And when I looked at her, she was in direct line of sight with Detective Caleb -- or Detective Johnson, and she was making animated facial gestures, shaking her head, nodding her head. It appeared to me that she was coaching the witness on the stand.

THE COURT: Okay.

JUROR [NO. 11]: She was nodding her head or shaking her head prior to him actually answering the question. So at worst, it looked like she was trying to get on the same page as the witness. At best, it just looked very unprofessional. They were trying to communicate from the audience, which seemed to be very inappropriate.

THE COURT: Okay. All right. Did any of your other colleagues on the jury mention it or --

JUROR [NO. 11]: I have not mentioned this to anybody else on the jury or mentioned it to anybody except this gentleman and yourself.

THE COURT: Yeah. And this is one of those things where I'd say don't share with the jury what you've brought to my attention. Maybe they didn't notice it --

JUROR [NO. 11]: Right.

THE COURT: -- and so I don't want to draw attention to it if they haven't seen it. I would like them and you to put it out of their mind. I will address this with the parties when they come back in and make sure that they're aware of what you told me. It is of course inappropriate to coach witnesses. But a lot of times case participants kind of -- can't help themselves, they respond to what they hear.

JUROR [NO. 11]: And I don't know if Leslie was, you know, assisting the prosecution with papers. It looked like there was a file, you know, a stack of papers behind them and they would hand them.

THE COURT: Yeah. The rule is that witnesses are sequestered until they testify. And so pretrial I said that everybody has to stay out of the courtroom until they testify. But then people who are involved in the case have a keen interest in it.

So once their testimony is done, they can come back into the courtroom. Of course they're just supposed to observe; they're not supposed to really do that.

JUROR [NO. 11]: Right.

THE COURT: The case agents of course assist the prosecution with the case by directing them to information, so that's all fine and appropriate. But they shouldn't be coaching a witness on the stand and I don't know that that happened.

JUROR [NO. 11]: I can't say for sure that that happened either, but it certainly looked as if it might be occurring.

THE COURT: Yeah. So I will convey this information to the counsel so they know and of course they'll instruct the witnesses to sit still and not react. So thank you for bringing it to my attention.

JUROR [NO. 11]: Thank you, Your Honor. Appreciate it.

(Juror out at 2:33 p.m.)

THE COURT: All right. You can bring counsel back in. In fact, bring everybody in. We'll be on the record now.

(Parties in at 2:33 p.m.)

THE COURT: All right. Here's what I know --

MR. JONES: Well, can we wait for my client?

THE COURT: Oh, of course. All right. Juror [NO. 11] observed that after Detective Keith was done testifying, she was in the courtroom. And during Detective Johnson's testimony, he observed her making animated facial expressions and

nodding and shaking her head, which he perceived as possibly an attempt to coach Detective Johnson's testimony. So that's what he reported.

I told him that coaching would be inappropriate, but that sometimes case participants -- and I explained the ruling about sequestration and that after the witness had testified, they were permitted to be in the courtroom for testimony; the case participant sometimes react and have a stake in the case and they get carried away, but that coaching was inappropriate.

And I told him that I would explain what had happened and that I would tell you that that would be inappropriate and that the case participants should sit quietly in the courtroom and they can observe. They can move around so they can help find exhibits, but they shouldn't be doing anything that might be perceived as coaching.

I don't know, I don't see Detective Keith here any longer.

MR. JONES: Okay.

THE COURT: Oh, there they are.

MR. GRABER: All right. Message received.

THE COURT: Okay.

MR. JONES: Judge, I would like to move for a mistrial.

THE COURT: Okay. And explain the basis for it.

MR. JONES: Well, it seems like the presentation of evidence has been influenced. A sequestered witness came in and was giving basically positive or negative responses to his answers. And that's the purpose of sequestration, so that a witness doesn't have prior

knowledge of what other people have testified to. And if Leslie Keith testified a certain way and then she continues to provide him information that assures that he testifies consistent with hers, that's, you know, influencing the actual testimony.

THE COURT: Okay.

MR. JONES: That would be my basis.

THE COURT: Here's what I think we should do: What I would like to do is after -- either tomorrow morning or tonight I'll take some testimony from Detective Johnson and Detective Keith to find out if there was some attempt to influence and whether Detective Johnson's testimony was influenced by Detective Keith's responses in the courtroom.

MR. GRABER: Did you also ask the juror whether he could be fair and impartial, because we've got two alternates. We can bounce him and go to an alternate.

THE COURT: The concern is not, especially as Mr. Jones raised it and the concern that I raise here that I believe is, that the witness was exquisitely sensitive to the fairness of the proceeding. Mr. Jones' concern is that Detective Johnson's testimony was influenced by Detective Keith. And that is not a problem with the jury's attitude; it's a problem with the evidence that's been presented.

MR. GRABER: Sure. I mean, I have no problem putting both of them on the stand and asking them the question --

THE COURT: Yeah.

MR. GRABER: -- if they acted properly. Ask them the question.

THE COURT: Yeah. I mean, the other -- it seems to me that the pertinent testimony from Detective Johnson did not overlap with the knowledge that Detective Keith had.

MR. GRABER: Correct. He was bringing in different pieces of evidence and doing drug expert, so that's why I needed to put both of them on. I couldn't put one on.

THE COURT: It's not like they're on the same page, because they're talking about different aspects of the evidence, but the concern is a serious one that I want to address. So we'll press on as long as the jury is here, because we won't have the jury here for it. So anyway, I'll reserve ruling on that motion, but we will press on. So let's bring the jury back and we will continue with your next witness.

(Jury in at 2:38 p.m.)

. . .

MR. GRABER: And then the other issue just is whether that one juror, I don't know whether, when the Court had its colloquy with him, whether, you know, two things: one, can he be fair; and two, did he talk to anybody else about it on the jury in terms of, you know.

THE COURT: I did ask him about whether he talked to anybody else and he said he had not, pursuant to my earlier instructions. And I told him not to talk about it with anybody else and I told him to disregard it. I did not ask him specifically if he thought he could still be fair. But I will call him in and ask him that if you think that's too -- if you want me to do that.

MR. GRABER: I would think, yeah, that would be --

THE COURT: Okay. Let's bring him back in for one second.

MR. GRABER: Do you want us to leave?

MR. JONES: Should we empty the courtroom? I don't want to make him feel like the spotlight is on him.

THE COURT: Yeah, why don't you clear out for a minute. Don't go far, because it won't take long.

(Parties out at 5:05 p.m.)

THE COURT: Bring him in. Yeah, come on back up. There's one follow-up question that I neglected to ask you when we were here before.

JUROR [NO. 11]: Yes, sir.

THE COURT: It's really this: Given what you have observed, do you think that it will affect your decision-making in this case? Can you still be fair to both sides and judge the case based on the evidence presented here in court, which does not include any of the miscellaneous activities in the gallery? That's not evidence. So can you still be fair to both sides and focus your attention on the evidence that's been presented and decide the case on that basis?

JUROR [NO. 11]: I believe that what I observed may affect my opinion as to the credibility of the witnesses.

THE COURT: Mm-mm.

JUROR [NO. 11]: But overall, I do not believe that it would affect my ability to be fair and impartial in the trial.

THE COURT: Okay. I'm going to ask you -- I'm going to instruct you to disregard what you saw behind the bar. And I know sometimes it's hard to disregard something that you've actually seen. But I can't have you decide the case if you're going to be affected by that activity which is not evidence. And if you think that it's still going to affect you, I'd excuse you.

JUROR [NO. 11]: I believe I understand what you're asking me Judge. And if you're asking me to disregard what I saw from behind the wall there --

THE COURT: Yep.

JUROR [NO. 11]: -- then I will follow your instructions.

THE COURT: Okay. And you think you can effectively do that and decide the case based on the evidence, which is only on this side of the bar?

JUROR [NO. 11]: Yes, sir.

THE COURT: Okay. Thank you.

JUROR [NO. 11]: Your welcome.

THE COURT: As soon as you get back in there, I'm going to call everybody back into the courtroom as soon as we get everybody back in, so we'll see you in just a minute.

(Juror excused at 5:06 p.m.)

THE COURT: Would you tell the folks they can all come back in?

THE BAILIFF: I will do that.

(Parties in at 5:08 p.m.)

THE COURT: All right. We're back on the record with everyone in the courtroom. I've talked to the juror. I've told him that that is not evidence, everything that happens behind the gallery 9 not evidence, and that he shouldn't consider it. And he said that he would follow my instruction and he would be able to decide the case fairly based on the evidence.

He did begin by suggesting that he was disturbed when he came back in. I asked him if it would affect his decision-making. And he said yes, he thought that it would affect the credibility of the witness. But I told him that it was not evidence and that he was instructed to disregard it and could he follow my instruction. And he said yes, he was confident he could follow my instruction.

So are you satisfied, because you can make a motion to have him struck if you want.

MR. GRABER: I think that's -- I think we should make the motion. I think that's, if he says that right out of the gate to you and you've tried to -- I mean, we weren't there -- you've tried to get it fixed.

THE COURT: We've got it on the record if you want to review on realtime what it was.

MR. GRABER: I think that most definitely he's got bias and I'd ask that he be struck. We've got alternates. I think that's what they're for.

THE COURT: Yeah.

MR. JONES: Judge --

THE COURT: Mr. Jones.

MR. JONES: -- I guess on a couple points. One is he told you it won't affect him. I think you can take his word for it. Second of all, this is a problem of the government's own making. I didn't have someone sit in the gallery coaching anybody. They want to behave that way back there, whatever they did, and I guess we'll find out, they can't then say, "Now let's get rid of the juror that saw it." If he told you he's not going to be influenced by it, he should stay on. He sat through this trial.

THE COURT: Based on my assessment of the juror, I think he's being honest and completely forthcoming. And I was very pointed in my question and he said he was confident that he could follow my instruction.

MR. GRABER: And I would just note for the record, both the FBI agent, myself, and Mr. Elgersma have been watching him since he noticed. He refuses to look at government table. He'll look at the defendant, he'll look at the defense, he'll look at the witness, but not us. And I think that shows bias, Your Honor.

And that's why I asked that you talk to him, because I've got a real concern. And then the first thing that comes out of his mouth before you try to rehabilitate him is, "Yeah, I think it's going to affect my ability to" --

THE COURT: I'll tell you what, I'm going to hear from the detectives and then you can renew your motion and then I'll -- I want to hear what I hear and then I'll decide about the juror and about the mistrial. So let's do that now.

. . . [The court examines the detectives] . . .

THE COURT: A couple observations here. First, I don't find it implausible that Detective Johnson didn't notice her in the courtroom, because he is paying attention to the questions and trying to answer questions, so his attention is not focused on people in the gallery. I don't find that implausible. The jurors are looking at everything, so they're looking around and they may notice things. And I will tell you this, that I didn't notice Detective Johnson. And I try to keep an eye on the people in the gallery. And if something is going on there that is large enough to attract my attention, I try to notice it. I did not notice her.

You know, the jury sometimes fixates on small little details and I don't think this is that. But I don't – I don't really think it's implausible for Detective Johnson to tell me that he didn't notice her.

That said, Detective Johnson's credibility has been called into question in this case before. And the larger point is little things, little acts of unprofessional conduct, affect the whole process and it degrades the sense that what we're doing is just and fair.

So even that one juror goes away thinking that this procedure is contaminated by bias because he perceived Detective Keith's conduct to be coaching. And it was serious enough that he left with this abiding conviction that now Detective Johnson's testimony is undermined.

And now that I have to have testimony from Detective Johnson that I have to accept, it's tainted by the fact that Judge Crocker found him to be incredible in another proceeding. And even if I credit his version of the events, which I have been

inclined to do, if I credit his version of the events, the slip, the inadvertent showing of the Edwards photograph during the Kanasha Woods interview, has caused a tremendous waste of time and it really does undermine our sense of the fairness of the process.

I'm not going to grant the motion for a mistrial because I think ultimately the question is whether Detective Johnson 9 (sic) really affected and coached by Detective Keith's conduct during the trial. I don't -- I'm not persuaded that that's true. I don't see significant enough overlap in his testimony or in his role in the investigation and hers, although they both are lead investigators so they both are comprehensively familiar with the evidence. But what I heard from Detective Johnson is consistent with all the other evidence and all the other presentation that I heard before.

So I can't see any answer that Detective Johnson gave that would have actually been affected by the coaching from Detective Keith. Bottom line is I don't think he needed to be coached. He had his answers and he gave his testimony, so I don't see any way that his testimony 9 (sic) really affected by Keith. I'm very unhappy that this happened. But I don't see how his testimony is affected.

I'm also not happy to have to strike this juror because he got a bad attitude about the government from the conduct of the government's witnesses. But I'm going to strike the juror because I do think he's got that abiding concern that his view of the credibility of the testimony is affected.

And I think it's unfortunate that the juror that is sympathetic to Mr. Jones's case is the one that gets struck, because, you know, if it were just a matter of what side it involved, it's the government's side that's at fault for it.

But it's not just a wrestling match. We have to have jurors that are willing to decide the case based on the evidence. And despite the fact Mr. [NO. 11] says that he is able to do it and is willing to do it in good faith, he has expressed his concern enough so that I am concerned about whether he's able to follow my instruction. We've got alternates, so I can have a juror that doesn't have that problem.

MR. JONES: Judge, just in perception, this is an award for bad behavior.

THE COURT: I agree.

MR. JONES: Incredible. What do we have to do, Judge? I mean, I'm trying to keep it together here. This has been a long three days and now we have you kicking off a juror who has given at least a tell as to where they are inclined to go on the evidence.

THE COURT: You have my sympathy.

MR. JONES: Well, it's not me, it's Mr. Edwards. I don't care what I feel.

THE COURT: You both have it.

THE DEFENDANT: Your Honor, please, please, don't do that. Like that's -- it's not fair to the fact just because the government made a mistake. It's not the juror's fault. He just 9 being honest reporting to you.

THE COURT: I need to be very clear, it's not his fault. He's doing what he's supposed to be doing and it's certainly not your fault or Mr. Jones's fault.

THE DEFENDANT: So, Your Honor, why are we being punished?

THE COURT: The reason is that the fact it is affecting his perception of the case is not something that's proper for him to consider.

THE DEFENDANT: But he told you it wouldn't affect his opinion.

THE COURT: Yeah, he did, he did. But it's just too salient for him. It's one of those things where sometimes there are people who tell me that they can do a good job and I think that they are sincere, but I just -- I don't think that it's appropriate when I have somebody who has identified a nonevidentiary fact that is very disturbing to them.

If I had known in voir dire he had said that he had known about something that he thought 9 (sic) inclined to affect his decision-making, I would have excused him from service. It happened during the trial and so it's unfortunate. And I get your disappointment because he's indicated doubt about the government's case, but it's because of something that's not evidence and not proper for him to consider.

MR. JONES: But you don't know that, why he has doubt about the case. He may have been fed up and that's why he's staring at the --

THE COURT: The only thing he has said about the government's case is that that incident affects his perception of the credibility of Detective Johnson.

MR. JONES: But he's also said it won't affect -- he'll ignore it.

THE COURT: Quite honestly, you can read the transcript if you want, but I do feel like it was an effort to rehabilitate him and I find it unfortunate. Now it's also true that you haven't lost everything, so I don't -- you know, because I excluded the

government's technical witnesses on the rebuttal evidence and the alibi evidence. I know it didn't ultimately come in, but I'm trying to do what's fair here.

THE DEFENDANT: This is not fair, Your Honor. And I got a lot of respect for you. I've heard good things about you as far as like, you know, you being appointed by Obama. And I'm -- I just want to talk to you, Mr. Peterson.

All I'm asking for is a fair trial. That's all I'm asking for. And excluding a juror that sat through everything, through the whole case, just based off him witnessing something that he felt wasn't fair, like getting rid of him, that's bias. To me, like that's not fair to the defendants.

THE COURT: Well, I think I have explained it already that it is not your fault and I understand that --

THE DEFENDANT: You still have a chance to make the decision not to alter the jury. You still, at this very moment, you still have a decision, a choice that you can make, not removing that juror, because before you wasn't going to remove him. You said you were going to keep him on, but it was after when the government asked you to consider it, removing him. Like you already said -- first you granted you were going to keep him on.

THE COURT: Yeah.

THE DEFENDANT: You brought him in two or three different times. Two or three different times you already had a decision to keep him on. Now, at the last minute, you're deciding to take him off. Like can you just go with your first decision? I don't see what would be a big difference.

Two times you said you were going to keep him on, you thought that he would be fair. Now it's this third time that you saying that you're not thinking he's going to be fair. You still can alter that decision. You still can keep him on.

THE COURT: I could do that and I understand how upset you are. But again I think it's because this is a juror who has expressed criticism of the government's case, but the criticism is based on a nonevidentiary concern. And my job at the beginning of the case is to give you 14 qualified jurors. And that includes two that are alternates, so I'm going to take two people off this jury no matter what happens tomorrow. And so this is – this just means that Mr. [NO. 11] is going to be one of them, because, in my view, I gave you 14 qualified jurors to begin the case. Now you've got 13 and so not all of them are going to serve.

THE DEFENDANT: But why this specific one?

THE COURT: This specific one, because he has indicated an inclination to disbelieve one of the government's witnesses because of something that's not proper for him to consider.

THE DEFENDANT: But he has a job as a citizen, as well, to judge fairly and he said that he is willing to judge fairly.

MR. JONES: I think the hang-up here, Judge, is if Mr. Edwards didn't like the way that the trial 9 (sic) going and he flipped this table over and the jury said, "Hey, that affects my thinking," would we just dismiss the jurors and have a new trial? It's behavior of the government that's getting him and getting me. If it was his family messing around, or someone, and it turned out it's something that was connected to

him, but this is the lead detective acting totally unprofessionally and now it's coming -- it's helping in the prosecution. It's so -- you should concern yourself with the perception. I think I've made that argument.

THE COURT: I've heard you.

MR. JONES: Thank you.

THE DEFENDANT: One more thing, Judge. Can you at least rethink your thoughts overnight? Can you not make that decision firm? Can you not like make it – a firm decision?

THE COURT: I will do that much for you, okay? But I don't want to get your hopes up, because I think that I've heard everything that I'm going to hear. But I will think about it, because it won't change anything else that we're doing, so I can do that. Nobody is counting on anything. I haven't excused anything tonight. I'll be doing it tomorrow morning after the instructions. So the mechanism that I will use for excusing Mr. [NO. 11] is just to hold him back when I hold back the alternate jurors. But it gives me the chance to think about it overnight. And I get it, I don't like the idea that I'm striking a juror who's tainted by the government's conduct, but I think I've made my thinking clear.

THE DEFENDANT: If it was the other way around, Your Honor, just put yourself, if I was up there and you were up here, just take a minute.

THE COURT: It's important to me that you have the sense that you have a fair trial. That's part of the process. Whatever the outcome is, I want you to feel like you had a fair shake. And I get it, you're going to feel bitter about this and I understand

it. And it's important to me that you have a feeling that you were fairly treated here. That's a very important consideration of mine. But again the reason this juror is attractive to your side of the case is that he's expressed misgivings that's based on something he shouldn't be considering. So that's the bottom line of my analysis on it. It's unfortunate that it plays out this way. Let's deal with the jury instructions. I have extra copies of the current draft if anybody needs them.

MR. JONES: If you have them, I'll grab them from you. No surprise I'm coming up to get them.

THE COURT: You've made the point you've got to do all of that on your own. All right. So we're looking at the post-trial instructions. I've numbered the paragraphs that I think are the alternate ones. My clerk who is working this case 9 (sic) out sick today. So usually I have them here to make sure that I keep track of everything that we've discussed before.

MR. GRABER: I don't have any objections.

THE COURT: We had, on page 11, we had the stipulation, which at the time 9 still in play. But now I think it's stipulated, so that's good. All right. Any other concerns?

MR. GRABER: Not from the government, Your Honor.

MR. JONES: No.

THE COURT: Okay. All right. Very good. I will see you at 8:30 just in case there's any last-minute stuff to come up. I promise to contemplate my decision on the juror overnight, so I'll let you know how I rule on that.

MR. JONES: Who 9 (sic) that juror again, Judge? Was it Kar --

THE COURT: [NO. 11].

MR. JONES: Kurt [NO. 11]. Got it.

THE COURT: Kurt [NO. 11], Juror No. 11.

MR. JONES: All right.

THE COURT: Thank you all. See you in the morning.

MR. JONES: Thank you.

(Adjourned at 5:51 p.m.)