

# Appendix

FILED

NOT FOR PUBLICATION

JUN 17 2022

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

No. 20-30210

Plaintiff-Appellee,

D.C. No.  
1:18-cr-00157-SPW-3

v.

RYAN MCGUIRE,

MEMORANDUM\*

Defendant-Appellant.

Appeal from the United States District Court  
for the District of Montana  
Susan P. Watters, District Judge, Presiding

Submitted June 9, 2022\*\*  
Seattle, Washington

Before: IKUTA and MILLER, Circuit Judges, and PREGERSON,\*\*\* District Judge.

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

\*\*\* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Ryan McGuire appeals from his convictions for (1) conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 and § 841(a)(1), and (2) distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Considering the evidence adduced at trial “in the light most favorable to the prosecution,” the evidence that McGuire conspired to distribute methamphetamine was “adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.” *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (cleaned up). The government presented evidence that Angela Killen was engaged in the sale of controlled substances; that Killen told the undercover agents she had a methamphetamine connection; that almost immediately after McGuire entered Killen’s house, the agents received a phone call regarding the methamphetamine; and that McGuire was present during the transaction, where he pulled a package of methamphetamine from his pocket and handed it to Killen, who then sold the methamphetamine to the agents. Based on this evidence, a rational jury could conclude that McGuire had conspired to distribute methamphetamine with Killen. *See United States v. Vgeri*, 51 F.3d 876, 879–80 (9th Cir. 1995).

The district court did not plainly err in not providing a specific buyer-seller instruction “focus[ing] specifically on the difference between a buyer-seller relationship and a coconspirator relationship,” because the district court provided other jury instructions that adequately conveyed that distinction. *United States v. Moe*, 781 F.3d 1120, 1128 (9th Cir. 2015).

The district court did not violate McGuire’s due process rights by sustaining the government’s hearsay objections to McGuire’s efforts to elicit Agent Osborne’s recollection of Killen’s out-of-court statements. Such testimony was not admissible under the state of mind hearsay exception, because Killen’s out-of-court statements identifying someone other than McGuire as the methamphetamine supplier were made years after the transaction, and were not spontaneous. *See United States v. Miller*, 874 F.2d 1255, 1264 (9th Cir. 1989). Rather, Killen’s out-of-court statements are more “statement[s] of memory or belief to prove the fact remembered or believed,” which do not fall within the state of mind hearsay exception. Fed. R. Evid. 803(3). Nor was such testimony admissible under *Kyles v. Whitley*, 514 U.S. 419 (1995), as out-of-court statements shedding light on the quality of a police investigation. *Kyles* establishes no such exception to relevant hearsay rules.

Further, the district court's exclusion of Agent Osborne's testimony as to Killen's out-of-court statements did not violate McGuire's right to present a complete defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973). Given the district court's determination that Killen was available to testify, and that McGuire could have called her as a witness and elicited her testimony directly, McGuire was not deprived of the ability to present his defense adequately.

**AFFIRMED.**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

AUG 23 2022

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
v.  
RYAN MCGUIRE,  
Defendant-Appellant.

No. 20-30210

D.C. No.  
1:18-cr-00157-SPW-3  
District of Montana,  
Billings

ORDER

Before: IKUTA and MILLER, Circuit Judges, and PREGERSON,\* District Judge.

The panel has unanimously voted to deny appellant's petition for panel rehearing. Judge Ikuta and Judge Miller voted to deny the petition for rehearing en banc and Judge Pregerson so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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\* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

**FILED**

**DEC 17 2019**

Clerk, U S District Court  
District Of Montana  
Billings

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**RYAN MCGUIRE,**

**Defendant.**

**CR 18-157-BLG-SPW-3**

**ORDER DENYING  
MOTION FOR NEW TRIAL**

The Defendant, Ryan McGuire, has filed a motion for a new trial in this matter. (Doc. 91.) The Court denies McGuire's motion.

**I. Background**

After a two-day trial, a jury found McGuire guilty of conspiracy to distribute methamphetamine and distribution of methamphetamine. (Docs. 77, 80.) McGuire timely filed a motion for a new trial (Doc. 91), and that motion is now ripe. McGuire states there are two bases for the Court granting his motion. (Doc. 92 at 2.)

First, McGuire argues the Court erred by sustaining an objection the Government made to admitting testimony McGuire's trial counsel attempted to illicit from Agent Joseph Osborne. McGuire's trial counsel planned to ask Agent Osborne about a statement one of McGuire's coconspirators, Angela Killen, made purportedly identifying a different individual as the one who supplied the meth for

the undercover buy that led to McGuire’s charges. The Government objected on hearsay grounds, and the Court sustained the objection. (*Id.*)

Second, McGuire argues the Court erred by granting the Government’s motion to compel McGuire to roll up his left sleeve during trial and display his tattoos to a witness for identification purposes. (*Id.* at 7–10.) Upon seeing McGuire the morning of trial, the Government alleged he had substantially changed his appearance since the time of his arrest. The Government therefore moved to compel McGuire to display the tattoos on his left arm and hands to witnesses and the jury. The Court granted the Government’s motion and required McGuire to display the tattoos on his left arm to the Government’s first witness, Special Agent Christopher Cavanaugh. After seeing the tattoos, Special Agent Cavanaugh was able to positively identify McGuire. McGuire contends (as he did at trial) that the Court’s ruling violated his Fifth Amendment rights and his right to present a defense. (*Id.*)

## **II. Legal Standard**

Fed. R. Crim. P. 33 governs motions for new trials and authorizes the Court, upon the defendant’s motion, to “vacate any judgment and grant a new trial if the interest of justice so requires.” The Court’s discretion when granting a motion for a new trial is much broader than when granting a motion for judgment of acquittal.

*United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992). “The district court need not view the evidence in the light most favorable to the

verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses.” *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980).

### **III. Discussion**

#### *1. The Government’s hearsay objection.*

Hearsay is “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). Hearsay is inadmissible unless the Federal Rules of Evidence, a federal statute, or another rule prescribed by the Supreme Court provide otherwise. Fed. R. Evid. 802.

Angela Killen’s statements to law enforcement are (and were) hearsay. McGuire attempted to admit Angela Killen’s statements through Agent Osborne to prove the truth of the matter asserted—that is, another individual provided the meth during the undercover buy, not McGuire. However, McGuire asserts two reasons for why the Court should have admitted the hearsay: first, the Government’s objection unlawfully suppressed exculpatory evidence; second, the Court’s refusal to admit the hearsay statements violated McGuire’s right of due process of law. (Doc. 92 at 4–7.)

McGuire relies on *Benn v. Lambert*, 283 F.3d 1040, 1052–53 (9th Cir. 2002) in support of his first argument. His reliance is misplaced. In *Benn*, the 9th Circuit affirmed a district court’s decision to grant a petition for a writ of habeas corpus

because state prosecutors had failed to disclose critical evidence favorable to the petitioner—i.e., *Brady* material under *Brady v. Maryland*, 373 U.S. 83 (1963). Nothing of the sort happened here, and McGuire does not allege the Government failed to turn over exculpatory evidence. McGuire plainly had access to Angela Killen’s statements. *Benn* and *Brady* are irrelevant.

For his second argument, McGuire relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973). Like his reliance on *Benn*, McGuire’s reliance on *Chambers* is misplaced. In *Chambers*, after Chambers was arrested for murder, another individual, McDonald, made but later repudiated a written confession to the crime. *Id.* at 288–89. On three separate occasions, McDonald also confessed to the murder in private conversations with friends. *Id.* Chambers proceeded to trial, but when Chambers called McDonald to testify, the trial court prevented him from cross-examining McDonald about the confessions because, under Mississippi’s *voucher* rule, he could not impeach his own witness. When Chambers attempted to introduce testimony of the three persons to whom McDonald confessed, the trial court ruled the testimony was inadmissible hearsay. *Id.* at 291–94.

The Supreme Court reversed Chambers’s conviction. It held the application of the *voucher* rule deprived Chambers of the right to contradict clearly adverse testimony. *Id.* at 297. It also held the trial court erred in excluding McDonald’s hearsay statements because they bore considerable assurances of reliability: they

were made spontaneously to close acquaintances shortly after the murder, they were corroborated by other evidence in the case, each confession was unquestionably against McDonald's interest, and McDonald was present during trial and available for cross-examination by the State. *Id.* at 300–02. Moreover, the Supreme Court issued the following limitation on its conclusion:

In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

*Id.* at 302–03.

*Chambers* is inapplicable here. McGuire was free to call Killen as a witness and could have cross-examined her about her prior statements. He chose not to. Further, Killen's statement bore none of the assurances of reliability present in *Chambers*. Nor do the facts and circumstances of McGuire's inability to admit Killen's hearsay statements indicate McGuire was deprived of a fair trial. Instead, Killen's statements were inadmissible hearsay, but McGuire was free to admit them through Killen herself.

## 2. *The Court's order for McGuire to display his tattoos.*

The Court has already ruled on the issue of whether McGuire could be compelled to display his tattoos in oral and written orders with specific findings of fact. *See* (Doc. 78). The Court concluded that compelling McGuire to display his

tattoos would neither be unduly burdensome, prejudicial, nor violative of his Fifth Amendment rights. (*Id.*) The Court's position remains unchanged. Despite McGuire's arguments about the orders' impact on his Fifth Amendment rights and his right to present a defense, the Court placed no restraint on McGuire's ability to testify. He had the opportunity to testify and call witnesses of his own, but he chose not to.

#### **IV. Conclusion**

For the foregoing reasons, the interest of justice does not require a new trial. *See* Fed. R. Crim. P. 33(a). Angela Killen's statements to law enforcement were inadmissible hearsay without an exception. Compelling McGuire to display the tattoos on his left arm did not violate his Fifth Amendment rights or his right to present a defense. Accordingly,

**IT IS HEREBY ORDERED** that the Defendant's Motion for a New Trial (Doc. 91) is DENIED.

DATED this 17<sup>th</sup> day of December, 2019.

  
SUSAN P. WATTERS  
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

**REDACTED** - Transcript of Trial With A Jury

Heard in Snowy Mountains Courtroom  
James F. Battin United States Courthouse  
2601 Second Avenue North  
Billings, Montana  
Tuesday - November 5, 2019  
9:05 a.m. - 4:34 p.m.

BEFORE THE HONORABLE SUSAN P. WATTERS  
UNITED STATES DISTRICT JUDGE

REBECCA M. SABO, RPR, CRR  
United States Court Reporter  
James F. Battin United States Courthouse  
2601 Second Avenue North, Room 4209  
Billings, Montana 59101  
rebecca\_sabo@mtd.uscourts.gov  
(406) 855-6410

Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

## JOE OSBORNE - CROSS-EXAMINATION BY MS. STRONG

09:30:40AM 1 A. (Reviewing document.)

09:31:08AM 2 Yes, that's correct, it says 40 times.

09:31:12AM 3 Q. And it also says that there was a query through Facebook

09:31:16AM 4 and identified with Facebook profile with someone with the

09:31:20AM 5 initials of T.C. Do you recall that?

09:31:23AM 6 A. Yes.

09:31:24AM 7 Q. And then there's some further identifying information in

09:31:26AM 8 that paragraph, correct?

09:31:27AM 9 A. That is correct.

09:31:28AM 10 Q. And then if we go to paragraph 29, we've got another cell

09:31:33AM 11 phone that ends -- we don't have the entire number -- 1457,

09:31:36AM 12 correct?

09:31:37AM 13 A. Yes.

09:31:39AM 14 Q. And that individual's phone was in contact with Angela

09:31:42AM 15 Killen's cell phone, the same date, 2 to 4 p.m., approximately

09:31:47AM 16 36 times, correct?

09:31:51AM 17 A. Yes.

09:31:52AM 18 Q. And that individual was identified with the Facebook

09:31:55AM 19 profile of T.C., correct?

09:31:57AM 20 A. Correct.

09:31:58AM 21 Q. And just turning to, I believe, prior testimony, I believe

09:32:04AM 22 Agent Cavanaugh or someone else had said that Mr. McGuire was

09:32:09AM 23 identified through his cell phone because there is some sort of

09:32:12AM 24 tie to the Facebook accounts that can be investigated and then

09:32:17AM 25 the cell phone can be linked to -- purportedly to the

## JOE OSBORNE - CROSS-EXAMINATION BY MS. STRONG

09:32:21AM 1 individual whose picture appears on the Facebook account,  
09:32:23AM 2 correct?  
09:32:24AM 3 A. Correct.  
09:32:25AM 4 Q. So you did further investigation -- first of all, did you  
09:32:30AM 5 determine whether or not the Facebook photos here for the  
09:32:35AM 6 individuals identified in 28 and 29, because they have the same  
09:32:39AM 7 initial, were they the same individual?  
09:32:42AM 8 A. This is not my report. You would have to ask the intel  
09:32:47AM 9 analyst, Nelson.  
09:32:48AM 10 Q. But you use this intelligence later on to identify --  
09:32:51AM 11 purportedly identify Mr. McGuire, correct?  
09:32:55AM 12 A. Yes.  
09:32:56AM 13 Q. And this intelligence was fully available to you as the  
09:32:59AM 14 lead case agent, correct?  
09:33:01AM 15 A. That is correct.  
09:33:03AM 16 Q. So you did not investigate who T.C. was before you went to  
09:33:08AM 17 the grand jury and testified about this case, correct?  
09:33:13AM 18 A. We had an idea who he was, we had no initial evidence of  
09:33:19AM 19 his involvement other than just the phone calls. Usually when  
09:33:23AM 20 we do these, there's more than just one thing that we're  
09:33:26AM 21 looking at to determine the involvement with someone. While we  
09:33:30AM 22 may suspect someone's involved, without further evidence,  
09:33:34AM 23 it's -- to go on, it's kind of hard.  
09:33:37AM 24 Q. But you yourself didn't -- certainly didn't seek him out,  
09:33:40AM 25 call him up, or try to investigate him further at that time,

## JOE OSBORNE - CROSS-EXAMINATION BY MS. STRONG

09:33:43AM 1 correct?

09:33:44AM 2 A. That is correct.

09:33:46AM 3 Q. And later on in the investigation, after the indictments  
09:33:51AM 4 were issued, you did speak with Angela Killen, didn't you?

09:33:54AM 5 A. That is correct.

09:33:56AM 6 Q. And Ms. Killen was interviewed by you in the course of  
09:34:01AM 7 what is called a proffer interview?

09:34:03AM 8 MS. ADAMS: Your Honor, we're going to object on  
09:34:05AM 9 hearsay.

09:34:12AM 10 THE COURT: I'm going to overrule that objection.  
09:34:13AM 11 She's a co-conspirator.

09:34:17AM 12 MS. ADAMS: Our response would be that this statement  
09:34:18AM 13 is not in furtherance of the conspiracy. The statement -- the  
09:34:22AM 14 exception to the hearsay rule is a party opponent. So  
09:34:26AM 15 Ms. Killen is not a party opponent of Mr. McGuire's, first of  
09:34:30AM 16 all; and, second of all, the statements she might have made in  
09:34:32AM 17 a subsequent interview were not in furtherance of the  
09:34:35AM 18 conspiracy; and, finally, Ms. Killen has not been called to  
09:34:38AM 19 testify in this trial, so it's hearsay.

09:34:40AM 20 THE COURT: Okay. That's true. You're right. She  
09:34:42AM 21 is not a party opponent, and that is the rule. So the  
09:34:46AM 22 objection is sustained. Thank you.

09:34:48AM 23 MS. STRONG: It's my position, I am not admitting it  
09:34:50AM 24 for the truth of the matter, but I'm admitting it for what his  
09:34:53AM 25 state of mind was and how he conducted the investigation.

## JOE OSBORNE - CROSS-EXAMINATION BY MS. STRONG

09:34:56AM 1 THE COURT: The objection is sustained.

09:35:00AM 2 Q. (By Ms. Strong) Well, at any time further in your

09:35:04AM 3 investigation, was an individual by the initials of T.C.

09:35:10AM 4 identified?

09:35:10AM 5 A. Yes, he was.

09:35:13AM 6 Q. But you didn't -- and can you tell us the name of that

09:35:17AM 7 individual?

09:35:18AM 8 A. His name is Anthony Costello.

09:35:23AM 9 Q. And in the course of your investigation, did someone --

09:35:26AM 10 did you actually go talk to Mr. Costello recently, interview

09:35:30AM 11 him?

09:35:31AM 12 A. Yes, I did.

09:35:31AM 13 Q. And he denied any involvement, correct?

09:35:33AM 14 A. Yes, he did.

09:35:35AM 15 Q. Did you pull Facebook photos of him after you --

09:35:37AM 16 A. I have looked at several photos of him, yes.

09:35:40AM 17 THE COURT: Okay. You have to let her finish her

09:35:41AM 18 question --

09:35:41AM 19 THE WITNESS: Oh, sorry.

09:35:42AM 20 THE COURT: -- before you answer.

09:35:43AM 21 THE WITNESS: Sorry, Judge. Sorry, Penny.

09:35:46AM 22 Q. (By Ms. Strong) And did he fit a description that had

09:35:48AM 23 been previously given to you of someone --

09:35:50AM 24 MS. ADAMS: I'm going to object on hearsay.

09:35:54AM 25 Q. (By Ms. Strong) -- who was present on September 21st --

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ATTORNEY FOR DEFENDANT

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

UNITED STATES OF AMERICA,	)	
	)	CR 18-157-BLG-SPW-3
Plaintiff,	)	
	)	<b>MOTION FOR NEW TRIAL</b>
v.	)	
	)	
RYAN MCGUIRE,	)	
	)	
Defendant.	)	
	)	

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Defendant, RYAN MCGUIRE, through his counsel of record, Penelope S. Strong, and pursuant to Fed. R. Crim Pro 33, and respectfully moves the Court for an Order granting a new trial in this matter.

The basis for this motion is that there are significant grounds to grant a new trial which are in the interest of justice.

Specifically, the Court's denial of a mistrial when it ordered the Defendant to partially disrobe and display his tattoos to the jury, during the Government's

case in chief, denied him Due Process and the sixth Amendment right to formulate, and present his defense. The Government's motions for such display was untimely, and denied the Defendant the opportunity to factor the Court's order that he stand and partially disrobe and then display certain tattoos to the jury, which tattoos were not visible without such disrobing, into his decision not to testify and also his decision not to present any witnesses, or evidence. The Government's argument that it could not, prior to his appearance for jury trial, observe his recent appearance, was specious as it knew his identification was a trial issue and it could have moved the Court, prior to the motions deadline of September 29, 2019, for relief that would require Mr. McGuire, through his pretrial supervision, to appear and display his tattoos and current appearance.

Next, the Government's objection to the cross examination testimony of DEA Agent Joseph Osborne, that Angela Killen, in her May 8, 2019 proffer interview, had identified a male person, with physical characteristics, that did not meet Mr. McGuire's physical description, made on the basis that such co-conspirator declaration was hearsay, and sustained by the Court on that grounds, was done to suppress critical exculpatory evidence as to the key issue of eyewitness identification of the identity of the male person whom provided the one ounce of methamphetamine to the undercover agents , on September 21, 2016, at the Angela Killen residence in Billings, Montana.

Thus, the jury was deprived of hearing this key testimony that one of the participants in the drug transaction identified a male, not fitting Mr. McGuire's physical description. The exclusion and suppression of this exculpatory evidence denied the Defendant his Due Process Right to a fair trial and to present his defense, and to cross examine witnesses.

This Motion is supported by the unsworn declaration of Attorney Penelope Strong and the Supporting Brief. This motion incorporates all the files and proceedings held heretofore in this case.

The Defense reserves the right to supplement this motion.

Opposing counsel was contacted for their position but such was not received, before the filing of this motion.

DATED this 19<sup>th</sup> day of November, 2019.

By: /s/ Penelope S. Strong  
Penelope S. Strong  
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Attorney for Defendant

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ATTORNEY FOR DEFENDANT

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

UNITED STATES OF AMERICA,	)	
	)	CR 18-157-BLG-SPW-3
Plaintiff,	)	
	)	<b>DECLARATION OF</b>
v.	)	<b>ATTORNEY PENELOPE S.</b>
	)	<b>STRONG IN SUPPORT OF</b>
RYAN MCGUIRE	)	<b>MOTION FOR NEW TRIAL</b>
	)	
Defendant.	)	
	)	

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NOW COMES Penelope S. Strong, counsel for the Defendant, and respectfully moves submit this unsworn Declaration in Support of the motion for a new trial.

1. I am counsel for the Defendant and represented him at the recently held jury trial on November 4-5, 2019, and I submit this unsworn declaration pursuant to 21 U.S.C. § 1746 to support the motion to for a new trial.

2. This matter, consisting of an indictment of one count of conspiracy to distribute methamphetamine and one count of possession with intent to distribute methamphetamine, was tried to a jury in the U.S. District Court for Montana, Billings Division, on November 4-5, 2019.
3. All pretrial motions were due on or before September 16, 2019.
4. A key issue at trial was whether or not the Defendant was correctly identified as the male who transferred the one ounce of methamphetamine on September 21, 2016, at the Angela Killen residence in Billings, Montana, to DEA undercover agent Gregory Brittain.
5. At the time of the drug transaction, the two agents who were present did not know the identity of that male, and he was identified in their report as an unidentified white male. No videotaped surveillance of the Killen residence occurred on September 21, 2016, as the DEA agent did not have his equipment up and running, so no such images were simultaneously preserved.
6. The Defendant had been present, outside the Killen residence the preceding day and briefly entered that residence, and spent considerable time sitting in a car. Agents videotaped him in and out of that vehicle on that date.
7. Angela Killen, in her first proffer interview on May 8, 2019, described a second male who was present, and that this male, who was stocky and Mexican or

Native, pulled something out of his jacket and she recalled giving this male the money. Such DEA report of this interview is attached as Exhibit A.

8. That interview was neither taped nor videotaped, so the exact words, tone of voice, and phrasing questions of the interrogating agents cannot be determined.
9. During that interview, Ms. Killen also stated that a couple from Las Vegas was there and they received a “cut “for attempting to help set up the meth deal. Id, p. 2-3, par.6.
10. Agents then suggestively displayed a single photo of Ryan McGuire, the Defendant herein, to her and she supposedly identified him as the male from Las Vegas. Id, p. 3, par. 8.
11. During a second proffer interview of Ms. Killen, on May 15, 2019, agents confronted her and inquired if anyone had asked her to provide false information to law officers and she denied that. However, on this occasion, she stated she could not recall if a short, stocky Native of Mexican male was there on September 21, 2016, the day of the “ meth “ deal, even though she had referenced him in her first interview.
12. She then related that the guy in the black leather jacket was the one who handed her the dope, and “it must have been McGuire “. Exh. B, 5-15-19 DEA proffer follow-up interview.

13. She was only questioned about phone calls with a phone registered to Ryan McGuire and not to calls between her phone and that of an Anthony, or " Tony " Costello.

14. DEA agents questioning her did not show her photos of Anthony Costello, even though they were available.

15. Previous DEA investigation and intelligence analysis of phone calls to and from Angela Killen's cell phone showed numerous calls between her phone and two individuals named " T. C. ". Exh. C, DEA 11- 8-18 Phone Intelligence report.

16. Anthony Costello was a contact in Mr. Killen's cell phone, with a nickname of "Satan ".

17. At trial, the defense strategy was to elicit inconsistent identifications that would show the main participant in the drug transaction, Angela Killen, had identified in her first interview, a male whose physical characteristics were dissimilar to those of Mr. McGuire.

18. Specifically, defense counsel intended to elicit through cross examination of DEA Agent Joe Osborne, the prior statement of Angela Killen in which she identified a short stocky Native or Mexican male was the person who brought the meth.

19. Assistant United State Attorney Cassady Adams objected, and then was prompted to assert as a basis that it was hearsay, when admitted against the government, pursuant to the applicable rule of evidence.
20. Defense counsel responded that this was state of mind evidence to show the progress of the lead agent's investigation, specifically as to how the eyewitness identification developed in his investigation. The Court sustained the objection.
21. The Government's counsel knew this was exculpatory evidence, which could serve to identify a prior identification of male whom was be Mr. McGuire, and thus which would support the defense theory Mr. McGuire did not transact the meth deal on September 21, 2016, and the agents had misidentified him. In so objecting, the government's objection served to suppress that exculpatory and key piece of evidence.
22. The government did not object when defense counsel questioned agent Osborne about following up in the investigation, to find and interview Anthony Costello. This was part of the progress and course that the agent decided to employ in the case, meaning that he unfairly focused on the Defendant, without timely checking out the other significant investigative leads about Anthony Costello.
23. Specifically, Anthony Costello's photos were never shown by DEA Agents to Angela Killen to see if she could identify that individual as complicit in the undercover drug buy.

24. The defense strategy was that Mr. McGuire would not testify, and would not present any witnesses, and would argue the faulty and suggestive eyewitnesses' identifications, and that there was significant reasonable doubt to support acquittal of the Defendant on both counts. Specifically, that another male, Anthony Costello, had been identified as being involved in the transaction, the agents knew about this person, but had not timely investigated his involvement.

25. On November 3, just prior to trial commencing AUSA Adams informed the Court that she believed Mr. McGuire had altered his physical appearance by using self-tanning lotion and a hair product, and moved the court verbally for an order that he be required to stand up and display certain tattoos on his arm and hands.

26. The Government's verbal motion was untimely as all pretrial motions and supporting briefs were due by September 16, 2019 per Doc. # 59, Scheduling Order.

27. The government knew identification of Mr. McGuire was an issue in May, 2019, for Ms. Adams and defense counsel specifically conversed about the Angela Killen interviews and the inconsistent statements she had given about Mr. McGuire and the second male Ms. Killen had identified.

28. The government could have sent agents to view Mr. McGuire, before trial commenced, in order to view his physical attributes and compare them to photos they possessed.
29. The government could also have moved the Court, prior to trial for an order that Mr. McGuire be required to appear and display those physical attributes, so they could compare them to the photos they possessed, from his Nevada driver's license and Facebook posts.
30. The Government did not timely avail itself of those available remedies.
31. Thus, the defense was severely prejudiced when the U.S. moved, just before trial in open court, for the order that Mr. McGuire partially disrobe and display his tattoos on his hands and arm.
32. The defense was not allowed to brief the issue or resist the remedy sought and most importantly, was denied a fair opportunity to factor the Court's decision that he display those tattoos to the jury, into his decision not to testify.
33. Although he had no Fifth Amendment Right not to display the tattoos and resist the Court's order, such order was a major factor in whether or not he would testify, a decision which was made well before trial.
34. If the ruling had been made in a timely fashion the Defendant would have reconsidered his decision, both not to testify and not to call any witnesses, and

would have testified as he and defense counsel felt the order for him to display himself was a decisive factor.

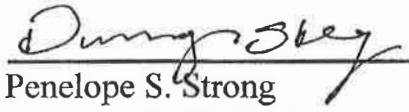
35. However, there was insufficient time to prepare him to testify and to call other witnesses, and also, at that very late hour, to make a major change in the defense trial strategy.

36. Defense counsel requested that the Court convene a hearing, in camera, to review the key issue of the Defendant's decision not to testify, in order to make a complete record, as is typically done, and to preserve Mr. McGuire's right to confidentiality.

37. However, the Court denied any such relief, which prevented the defense from making a complete record on this key issue. The Court also denied defense counsel's motion for a mistrial.

38. Defense counsel reserves the right to provide such confidential information and content and cannot do so herein, but if relief is granted, a proper record of all reasons for a change in the defendant's decision can be made.

DATED this 19<sup>th</sup> November, 2019.

By:   
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Attorney for Defendant