APPENDIX

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[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13480

Non-Argument Calendar

OCTAVIUS MCLENDON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket Nos. 1:16-cv-20664-FAM,
1:12-cr-20276-FAM-3

Before LAGOA, BRASHER, and MARCUS, Circuit Judges.

PER CURIAM:

Octavius McLendon, a federal prisoner, appeals following the district court's denial of his 28 U.S.C. § 2255 motion to vacate. In 2012, a grand jury charged McLendon and two codefendants -- Henry Bryant and Daniel Mack -- with certain drug offenses ("Count 1-3"), as well as possession of a firearm in furtherance of drug trafficking, in violation of 21 U.S.C. § 846 and 18 U.S.C. §§ 924(c)(1)(A) and 2 ("Count 4"). The jury convicted McLendon and the others on all counts. They appealed, but we affirmed. *United States v. Mack*, 572 F. App'x 910 (11th Cir. 2014) (unpublished).

In 2015, McLendon moved for a new trial as to all counts, under Fed. R. Crim. P. 33 and *Brady v. Maryland*, 373 U.S. 83 (1963). In support, he alleged that, while his appeal was pending, the government had acknowledged that a law enforcement agent who testified at his trial was under investigation for certain instances of misconduct. After the district court denied his new trial motion, he appealed. We affirmed the rejection of his *Brady*-based claims as to his drug convictions, but declined to address a *Brady*-based claim as to his firearm conviction, having concluded that the latter was not adequately presented on appeal. *United States v. Bryant*, 780 F. App'x 738, 747–48 (11th Cir. 2019) (unpublished).

McLendon then filed the present § 2255 motion raising a *Brady*-based challenge to his firearm conviction (Count 4). The

district court denied it as procedurally defaulted, based on our 2019 ruling. In this appeal, McLendon argues that: (1) the district court erred when it failed to address the merits of his claim that a *Brady* violation tainted the jury's consideration of his co-defendant/principal's culpability for illegally possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c), and, therefore, precluded his culpability as an aider-and-abettor to an identical charge; and (2) by denying his requests for an evidentiary hearing and limited discovery, the district court erroneously deprived him of the opportunity to provide support for his *Brady* claim. After thorough review, we affirm.

I.

When reviewing the denial of a § 2255 motion, we review questions of law *de novo* and findings of fact for clear error. *Thomas v. United States*, 572 F.3d 1300, 1303 (11th Cir. 2009). We review the denial of an evidentiary hearing for abuse of discretion. *Aron v. United States*, 291 F.3d 708, 714 n.5 (11th Cir. 2002). We may affirm on any ground supported by the record, regardless of the ground stated in the district court's order or judgment. *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016).

II.

First, we are unpersuaded by McLendon's argument that the district court erred when it failed to address the merits of the *Brady* claim he'd raised in his § 2255 motion. Section 2255 allows federal prisoners to obtain post-conviction relief on the basis that a

sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a).

In reviewing rulings on § 2255 motions, we distinguish between claims that are procedurally barred and claims that are procedurally defaulted. A claim is procedurally barred when a movant raises the same claim in a § 2255 motion that he raised, and we rejected or otherwise disposed of, on direct appeal. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014); *see also United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) ("Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under [§] 2255") (quotations omitted, alteration adopted).

By contrast, a movant generally procedurally defaults a claim under § 2255 if he failed to raise it on direct appeal, but he may overcome that default with a showing of cause and prejudice or actual innocence. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). Procedural default is not jurisdictional, but rather an affirmative defense that the government must raise. *See Howard v. United States*, 374 F.3d 1068, 1071–73 (11th Cir. 2004). We have not applied procedural default in a context where a claim was unavailable on direct appeal, but available and not raised, on appeal from the denial of a post-trial, post-appeal Rule 33 motion for a new trial. Importantly, however, we've held that we may skip procedural default issues if the claim would fail on the merits. *See Dallas v. Warden*, 964 F.3d 1285, 1307 (11th Cir. 2020) (addressing a 28

U.S.C. § 2254 petition), *cert. denied sub nom. Dallas v. Raybon*, 142 S. Ct. 124 (2021).

A *Brady* violation of a defendant's due process rights occurs where the government suppresses material evidence favorable to the defendant, regardless of the government's good or bad faith. *Brady*, 373 U.S. at 87; *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1303 (11th Cir. 2014). To establish a *Brady* violation, the defendant must show:

> (1) the government possessed favorable evidence to [him]; (2) [he] does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to [him], there is a reasonable probability that the outcome would have been different.

United States v. Stein, 846 F.3d 1135, 1145–46 (11th Cir. 2017) (quotations omitted).

Under 18 U.S.C. § 924(c), any person who either knowingly uses or carries a firearm during and in relation to any drug trafficking crime or who possesses a firearm in furtherance of any such crime shall be sentenced to a term of imprisonment not less than five years. *See* 18 U.S.C. § 924(c)(1)(A)(i). Further, a person who aids or abets the commission of a federal offense is punishable as a principal. *Rosemond v. United States*, 572 U.S. 65, 70 (2014); 18 U.S.C. § 2. A defendant is criminally liable for aiding and

abetting a § 924(c) offense when he actively participates in a criminal scheme knowing that one of his confederates will carry a gun. *Rosemond*, 572 U.S. at 77.

Here, it is unnecessary for us to address whether the district court properly concluded that McLendon's *Brady* claim concerning Count 4 was procedurally defaulted by his failure to raise it on direct appeal following the denial of his motion for a new trial. This is because we conclude that McLendon cannot satisfy his burden under *Brady* for his firearm conviction (Count 4). *See Dallas*, 964 F.3d at 1307. Specifically, he cannot establish that, had the law enforcement agent's misconduct been disclosed, there is a reasonable probability that the outcome of his firearm charge would have been different. *Stein*, 846 F.3d at 1145–46.

These basic facts came out at trial. In the charged conspiracy, McLendon and his co-defendant Bryant had acted as narcotics couriers, and co-defendant Mack, a police officer, had provided protection for the transport while in uniform and with his firearm. Testimony about their scheme came in at trial from several members of law enforcement, and the jury also heard audio recordings and watched video recordings of the conduct in question.

At trial, Dante Jackson, a Federal Bureau of Investigation ("FBI") special agent who had worked the case undercover, testified. He told the jury that while he was posing as the general manager of a South Beach nightclub, he met with one of the defendants on trial, Bryant, to discuss transporting drugs in Miami. Bryant agreed to provide police officers to escort the drug transports. In a

recording of one of their early conversations that was played for the jury, Bryant called co-defendant McLendon (the appellant in this appeal) his "point man" and "brother" and said that the two would split whatever Jackson paid Bryant, while Bryant would pay the officers he hired $3,500 each. Baltimore Police Detective Kay-Tee Tyson also testified, explaining that he was brought into the investigation to play the role of Jackson's drug-trafficking friend.

Later, in another video played for the jury, Detective Tyson was shown marking nine "bricks" of sham cocaine with a marker and handing each one to Agent Jackson to place inside a duffel bag, all in the presence of Bryant and McLendon, who visibly moved closer to see the "bricks" in the bag. On video, Tyson told Bryant and McLendon that there could be "no deviation, no taste, no test," and asked if either of them "get high?" According to Tyson's testimony, they appeared to be insulted and McLendon made a sound as though he was upset with the question. The jury also saw video of Bryant and McLendon returning to Jackson's office on the same day to receive a cash payment for the delivery of the sham cocaine and Bryant and McLendon counted the money in Jackson's office.

Before the second transportation of sham cocaine, Agent Jackson, Detective Tyson, Bryant and co-defendant Mack (who arrived in his police car and wore his police uniform) met all together at a restaurant and a video of the meeting was played for the jury. Detective Tyson testified that at the meeting, he noticed that Mack was carrying a pistol attached to his gun belt. In a video from later that day -- also played for the jury -- Agent Jackson filled a duffel

bag with ten "bricks" of sham cocaine in the nightclub, again in Bryant and McLendon's presence. Bryant and McLendon subsequently returned to the nightclub to collect a cash payment for the delivery of the sham cocaine, as shown in yet another video played for the jury. The jury also saw photographs of the sham cocaine from the second transport, the duffel bag used to carry the sham cocaine, and the actual "bricks" of sham cocaine used.

In addition, FBI Special Agent Scott McDonough testified at trial that he had observed, from an airplane, the first transport of sham cocaine. As part of a Mobile Surveillance Team, McDonough had watched two individuals walk into Jackson's nightclub, emptyhanded, and, shortly thereafter, walk out of it and place a black duffel bag in the rear-seat of a black vehicle. The aerial surveillance plane then followed the vehicle for about ten miles, and during the course of that trip, Special Agent McDonough saw a marked Miami-Dade patrol cruiser following the vehicle the whole way. At the second transport of sham cocaine, FBI Special Agent David Rogers was part of the Mobile Surveillance Team. He testified, similarly to Special Agent McDonough, that he had watched two individuals in a PT Cruiser, traveling on I-95, followed by a marked police car. He observed the police car approximately 5 to 6 cars behind the PT Cruiser for about 10 miles, and then both vehicles pulled into a parking lot, and the marked police car eventually continued out of sight. Ihosvany Cuervo, a detective for the City of Miami Internal Affairs Anti-Corruption Unit, had conducted stationary surveillance for both transports. He told the jury that

during the second transport, he heard radio communication between the marked police car and the PT Cruiser.

Following jury deliberations, McLendon, Bryant and Mack were convicted of conspiracy to distribute cocaine. Also, Mack was convicted as a principal of possession of a firearm in furtherance of a drug trafficking crime, and McLendon and Bryant were convicted as aiders and abettors.

The question currently before us is whether -- based on the government's failure to disclose prior to trial that Special Agent Jackson had engaged in misconduct both before and during the defendants' trial -- there is a reasonable probability that the outcome of McLendon's firearm charge would have been different if the exculpatory evidence had been disclosed. *Stein*, 846 F.3d at 1145–46. We do not believe that there is, because the record reflects that there was ample evidence -- besides Special Agent Jackson's testimony -- to support McLendon's firearm conviction. As we've just detailed (and as a panel of this Court expressly noted in reviewing McLendon's direct appeal), there was testimony from several agents conducting surveillance indicating that a marked patrol car trailed McLendon and Bryant's vehicle for both drug transactions. *Mack*, 572 F. App'x at 913–14. There also was radio communication between the patrol car and McLendon and Bryant's vehicle during the second escort, further showing that McLendon and Bryant were aware of its presence. Plus, Detective Tyson testified that he had seen a firearm in Mack's gunbelt when he was with Bryant earlier in the day of the second transport, and in a recording the

jury heard, Bryant referred to McLendon as his "point man" and "brother" and said they'd share payments, suggesting that McLendon was fully in on the plans. On this record, it was more than reasonable to conclude that McLendon believed that the marked police cruiser following his vehicle closely during a drug transport for eight to ten miles was driven by an armed officer.

As for Jackson's testimony, it is unclear what testimony he offered that would have been material to McLendon's firearm conviction. Jackson told the jury that the only communication he'd had with McLendon was during their in-person meetings on the dates of the two sham drug transfers. Notably, both of these interactions were recorded and played before the jury. We simply do not see how his testimony was relevant to the firearm conviction.

In short, even if Special Agent Jackson's misconduct been disclosed, the other evidence at trial still showed that McLendon knew that Mack would carry a gun during the drug transactions, and we can see no reasonable probability that the result of the proceeding would have been different. Accordingly, we affirm as to this issue.

III.

We also find no merit in McLendon's claim that the district court abused its discretion by denying his requests for an evidentiary hearing and limited discovery. An evidentiary hearing must be held on a motion to vacate "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled

to no relief." 28 U.S.C. § 2255(b); *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014). "[A] district court need not hold a hearing if the allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record." *Winthrop-Redin*, 767 F.3d at 1216 (quotations omitted).

In McLendon's appeal from the denial of his new trial motion, a prior panel of this Court expressly said -- concerning McLendon's drug convictions -- that "had Agent Jackson's misconduct been disclosed, there is not a reasonable probability that the result of the proceeding would have been different." *Bryant*, 780 F. App'x at 747. In that decision, we affirmed the district court's finding that the verdict against McLendon was amply supported by recordings of his interactions with Jackson and Tyson, and thus held, even absent Jackson's testimony, that he likely would have been convicted of the drug charges. As for the firearm charge at issue in this appeal, even if we assume it is not procedurally defaulted, McLendon's *Brady* argument fails for the reasons we've already detailed above. Thus, because there is no amount of additional evidence of Jackson's misconduct that would have created the reasonable probability of a different outcome for McLendon's drug or firearm convictions, the district court did not abuse its discretion by denying McLendon's *Brady* claim without first allowing limited discovery or an evidentiary hearing on the status of the investigation. *See Winthrop-Redin*, 767 F.3d at 1216.

Accordingly, we also affirm in this respect.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13480-DD

OCTAVIUS MCLENDON,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: LAGOA, BRASHER, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Octavius McLendon is DENIED.

ORD-41

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Case Number: 16-20664-CIV-MORENO

OCTAVIUS MCLENDON,

Movant,

vs.

UNITED STATES OF AMERICA,

Defendant.

_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND DENYING MOTION TO VACATE

THE MATTER was referred to the Honorable John J. O'Sullivan, United States Magistrate Judge, for a Report and Recommendation on Motion to Vacate, filed on **February 23, 2016** and supplemented on **September 30, 2020**. The Magistrate Judge filed a Report and Recommendation **(D.E. 46)** on **March 30, 2021**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge John O'Sullivan's Report and Recommendation is **AFFIRMED** and **ADOPTED**. Accordingly, it is

ADJUDGED that the motion to vacate sentence pursuant to 28 U.S.C. § 2255 is DENIED for the reasons stated in the Report and Recommendation.

DONE AND ORDERED in Chambers at Miami, Florida, this 9 of August 2021.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:
United States Magistrate Judge John J. O'Sullivan

Counsel of Record

2021 WL 3518205
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United States District Court, S.D. Florida.

Octavius MCLENDON, Movant,
v.
UNITED STATES of
America, Respondent.

CASE NO. 16 20664 CIV
MORENO/O'SULLIVAN
|
Signed 03/30/2021

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REPORT AND RECOMMENDATION

JOHN J. O'SULLIVAN, CHIEF UNITED STATES MAGISTRATE JUDGE

***1** THIS MATTER comes before the Court on the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (DE# 1, 2/23/16) filed by Octavius McLendon (hereinafter "movant" or "Mr. McLendon"). This matter was referred to the undersigned by the Honorable Federico A. Moreno, United States District Judge. See Order of Referral to Magistrate Judge O'Sullivan Regarding Movant's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE# 3, 3/3/16). Having reviewed the applicable filings and the law, the undersigned respectfully RECOMMENDS that the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (DE# 1, 2/23/16) be **DENIED** for the reasons stated herein.

PROCEDURAL HISTORY

A. Underlying Criminal Prosecution

On June 28, 2012, a federal grand jury returned a superseding indictment against Mr. McLendon, Henry Lee Bryant and Daniel Mack, in Case No. 12-cr-20276-FAM. See Superseding Indictment (DE# 38 in Case No. 12-cr-20276-FAM, 6/29/12). The Superseding Indictment charged all three defendants with conspiracy to possess with intent to distribute cocaine in violation of Title 21, United States Code, Section 846 (Count 1), attempt to possess with intent to distribute cocaine on December 21, 2011 in violation of Title 21, United States Code, Section 846 (Count 2), attempt to possess with intent to distribute cocaine on January 14, 2012 in violation of Title 21, United States Code, Section 846 (Count 3) and using and possessing a firearm during and in relation to a drug trafficking crime in violation of Title 21, United States Code, Section 924(a)(1)(A) (Count 4). Id.

The charges in the Superseding Indictment stemmed from an undercover investigation wherein Mr. Bryant and Mr. McLendon transported nine kilograms of sham cocaine on December 21, 2011 and ten kilograms of sham cocaine on January 14, 2012. See

Discussion, infra. Mr. Mack, a police officer, used his marked police vehicle to escort the sham cocaine. Id.

B. Evidence Presented at Trial

During a four-day trial, the jury heard testimony that FBI Special Agent Dante Jackson (hereinafter "Agent Jackson") was working undercover as the general manager of a South Beach nightclub. Trial Transcript (DE# 144 at 73 in Case No. 12-cr-20276-FAM, 1/14/13) (hereinafter "Trial Transcript DE# 144"). On December 2, 2011, Agent Jackson met with Mr. Bryant at Agent Jackson's office at the nightclub. Trial Transcript (DE# 145 at 14 in Case No. 12-cr-20276-FAM, 1/14/13). The audio and video equipment failed to record the December 2, 2011 meeting. Id. at 16.

At trial, Agent Jackson testified that the December 2, 2011 meeting:

> was the first discussion we had about the transporting of drugs. I discussed with Mr. Bryant that I had an associate in New York who was a childhood friend that was involved in drug trafficking. I was laundering [this friend's] money through the nightclub, and [the friend] had proposed a deal to me to assist him with laundering some drug proceeds, and in exchange, I would be paid for that.

***2** Trial Transcript DE# 145 at 14. Agent Jackson testified that Mr. Bryant "was fine with it" and had stated that "he had some associates who could assist and that he would be willing to proceed with it." Id. at 14-15.

At trial, Agent Jackson described the plan as follows:

> The initial plan was to transport the drugs from a point in Miami to another destination, and [Mr. Bryant] would provide police officers to assist with escorting the drugs. The whole thing I presented to him was I didn't want the drugs being picked up by police, so we wanted police escorts to make sure the drugs made it from Point A to Point B.

Trial Transcript DE# 145 at 15. Agent Jackson testified that he "was very specific. [He] told [Mr. Bryant] that [he] wanted police officers with units and that they need[ed] to be in police uniform in case there [were] officers that would interdict the loads." Id.

Agent Jackson met with Mr. Bryant again on December 4, 2011. Trial Transcript DE# 145 at 16. The December 4, 2011 meeting was audio/visually recorded. The video of the December 4, 2011 meeting was played at trial. Id. at 16-17 (noting that video was played). During this meeting Mr. Bryant reported that he had recruited police officers to provide assistance, stating: "I got four and they said that they could give whoever I need[ed]. They all county guys. Plus, I got two Beach guys." Id. at 17-18.

On December 9, 2011, Agent Jackson and Mr. Bryant met at the nightclub. The December 9, 2011 meeting was audio/visually recorded and played for the jury. Trial Transcript DE# 145 at 25 (noting that video was played). During this meeting, Mr. Bryant told Agent Jackson that he had two police officers who would provide security for the transportation of the drugs. Mr. Bryant stated that his "brother," meaning Mr. McLendon, would be involved. During the December 9, 2011 meeting with Mr. Bryant,

Agent Jackson referred to the drugs as "keys," "kilos" and used the word "cocaine."

On December 10, 2011, Agent Jackson called Mr. Bryant. During this phone call, Agent Jackson used the word "dope" and Mr. Bryant abruptly hung up on him. This telephone call was recorded and played for the jury. Trial Transcript DE# 145 at 45 (noting that recording was played).

During a meeting on December 15, 2011, Mr. Bryant explained that the reason he had hung up on Agent Jackson was because Agent Jackson had used "the Coca Cola word." Agent Jackson expressed surprise and told Mr. Bryant that he usually used the word "t-shirts." The December 15, 2011 meeting was audio/visually recorded and played for the jury. Trial Transcript DE# 145 at 55 (noting that video was played).

The first transportation of sham cocaine took place on December 21, 2011. Baltimore Police Detective KayTee Tyson was brought into the investigation to play the role of Agent Jackson's drug trafficking friend.

Agent Jackson introduced Detective Tyson to Mr. Bryant at a restaurant on December 21, 2011. Later that day, Mr. Bryant arrived at Agent Jackson's office with Mr. McLendon. The purpose of this meeting was for Mr. Bryant and Mr. McLendon to pick up the sham cocaine which they would be delivering to a parked car in a mall parking lot. The December 21, 2011 meeting was audio/visually recorded and played for the jury. Trial Transcript DE# 145 at 72 (noting that video was played).

***3** During this meeting Detective Tyson told Mr. Bryant and Mr. McLendon that they "needed to make sure that all nine of these get there," referring to the nine "bricks" of sham cocaine. Trial Transcript DE# 145 at 193-94. Detective Tyson also stated "[c]ause this money see what am saying." At trial, Detective Tyson explained that his "money" comment meant that:

> these nine kilograms of cocaine is worth a lot of money to me. So I need to make sure that when I'm giving them to you, that they need to get there. No ifs, ands, or buts about it. If you're telling me that you can do it, you need to be able to go through with it.

Id. at 194. The jury also heard testimony from Detective Tyson that the nine kilograms of cocaine would be worth approximately $300,000.00. Id.

The video of the December 21, 2011 meeting showed Detective Tyson marking the nine "bricks" of sham cocaine with a marker and handing each one to Agent Jackson to place inside a duffel bag. This handoff took place in the presence of Mr. Bryant and Mr. McLendon. At one point, Mr. Bryant and Mr. McLendon moved towards the desk where the duffel bag was resting so they could get a closer look at the "bricks" inside the duffel bag.

Detective Tyson again emphasized to Mr. Bryant and Mr. McLendon that he wanted the "bricks" to arrive exactly as they were packaged, stating "[n]o deviation, no taste, neither one of y'all get high right?" At trial, Detective Tyson explained why he had asked that question:

> That question was for, to make sure that -- I didn't want a person that gets high to transport my drugs for me, because at that point they could decide to go in, take some more, test it for themselves to see what it was, if it was good, if it wasn't.
>
> So I wanted to make sure that, look, I'm telling you already not to go into them. So I'm making sure now, you don't get high, so it won't be no discrepancy with or any problems with getting to the point they need to get to.

Trial Transcript DE# 145 at 196.

The video played for the jury at trial showed Agent Jackson handing the duffle bag containing the nine "bricks" of sham cocaine to Mr. Bryant. Mr. Bryant and Mr. McLendon then left Agent Jackson's office with the duffel bag. The jury was shown photographs of the sham cocaine from the December 21, 2011 meeting. Trial Transcript DE# 145 at 195 (noting the publishing of photographs of the kilograms of sham cocaine used on December 21, 2011).

The jury also saw video of Mr. Bryant and Mr. McLendon returning to Agent Jackson's office on the same day to receive a cash payment for the delivery of the sham cocaine. Trial Transcript DE# 145 at 198 (noting that video was played). The video showed Mr. Bryant and Mr. McLendon counting the money in Agent Jackson's office.

At trial, Detective Tyson explained why he had marked each "brick" of sham cocaine:

> With the marker what I was trying to do with the kilos were put initials on them, just to imply that, look, I'm putting this mark on them, putting this mark on them, so when they get to where they're going to, that's how they better arrive. So if this marker is gone off of there, then I know that something happened to the kilos because that's not how I gave them to you.

Trial Transcript DE# 145 at 193-94.

Detective Tyson testified that cocaine and heroin are packaged in the same manner as the sham cocaine had been packaged and that money was not usually packaged in this manner. Trial Transcript DE# 145 at 201-03. Detective Tyson explained that "[w]hen you're delivering money to anyone, people want to make sure that what they're getting there is money." Id. Detective Tyson also testified that based on his experience, you would not leave large sums of money in a parked car in a mall parking lot in the drug business. Id. at 203-04.

***4** The second transportation of sham cocaine took place on January 14, 2012. On the morning of January 14, 2012, Agent Jackson, Detective Tyson and Mr. Bryant met outside a restaurant. At this meeting, Agent Jackson and Detective Tyson would be introduced to Mr. Mack. While they were waiting for Mr. Mack to arrive, Agent Jackson expressed concern about whether Mr. Mack knew what was going on and Mr. Bryant assured Agent Jackson that Mr. Mack knew about it. A recording of this meeting was played for the jury at trial. Trial Transcript DE# 145 at 83 (noting that recording was played).

Mr. Mack arrived in his police car. He wore his police uniform but no name tag. Trial Transcript DE# 145 at 206. Mr. Bryant introduced Mr. Mack using the pseudonym

"James." Id. Mr. Mack's firearm was attached to his uniform belt. Id. at 207.

The restaurant was crowded that morning and the meeting was moved to another restaurant. Trial Transcript DE# 145 at 207. Detective Tyson and Mr. Bryant rode together to the second restaurant. Id. at 207-08. During the car ride, Mr. Bryant expressed concern to Detective Tyson about the December 10, 2011 phone call wherein Agent Jackson had used the word "dope." Mr. Bryant also relayed to Detective Tyson his past experience: "Well, what, what I'm saying is, these guys, these guys used to move, we talkin' about kiloton .... You know what I'm saying? And, I've been doing this since I've been a f*cking shorty." Detective Tyson explained to the jury that Mr. Bryant meant, he'd moved a lot of cocaine and that he'd been doing this for a long time. Id. at 214. The conversation between Mr. Bryant and Detective Tyson was audio recorded and played for the jury at trial. Id. at 208 (noting that recording was played).

Agent Jackson, Detective Tyson, Mr. Bryant and Mr. Mack sat at a table at the second restaurant. At trial, Detective Tyson testified that the purpose of the meeting was for Mr. Bryant to introduce the members of his team. Trial Transcript DE# 145 at 209. The meeting at the second restaurant was recorded and played for the jury at trial. Id. at 218 (noting that recording was played).

In the afternoon of January 14, 2012, Mr. Bryant and Mr. McLendon arrived at Agent Jackson's office at the nightclub. The meeting was audio/visually recorded and played for the jury at trial. Trial Transcript DE# 145 at 94 (noting that video was played). The video showed Agent Jackson placing a duffel bag on his desk and proceeding to fill the duffel bag with ten "bricks" of sham cocaine in Mr. Bryant and Mr. McLendon's presence. Mr. McLendon counted the "bricks" and commented that he "appreciated the smaller [bag] size" because it had "[b]etter maneuverability, less attention getter too." Agent Jackson handed the duffel bag containing the sham cocaine to Mr. McLendon. Mr. Bryant and Mr. McLendon confirmed their plans with Detective Tyson and Agent Jackson concerning where to deliver the duffel bag. Mr. Bryant and Mr. McLendon then left Agent Jackson's office. Id.

Later that day, Mr. Bryant and Mr. McLendon returned to the nightclub to collect a cash payment for the delivery of the sham cocaine. The audio/visual recording of Mr. Bryant and Mr. McLendon returning to Agent Jackson's office and collecting the cash payment was played for the jury at trial. Trial Transcript DE# 145 at 97-98 (noting that video was played).

At trial, the government introduced into evidence photographs of the sham cocaine from the January 14, 2011 meeting, the duffel bag used to carry the sham cocaine and the actual "bricks" of sham cocaine used on January 14, 2012. Trial Transcript DE# 145 at 96-97 (publishing the aforementioned evidence).

C. The Defendants' Convictions

***5** The jury convicted Mr. Bryant and Mr. McLendon on all four counts of the Superseding Indictment. See Verdicts (DE# 85, 87 in Case No. 12-cr-20276-FAM, 10/11/12). With respect to the firearm count, the jury found that Mr. Bryant and Mr. McLendon "possessed

a firearm in furtherance of the drug-trafficking crime." Id. at 3. The jury convicted Mr. Mack on the conspiracy count, the January 14, 2012 attempt count and using a firearm during and in relation to the drug-trafficking crime. See Verdict (DE# 86 in Case No. 12-cr-20276-FAM, 10/11/12). Mr. Mack was acquitted of the December 21, 2011 attempt count. Id.

D. Sentencing

Mr. McLendon was sentenced to a total term of imprisonment of 248 months followed by a five-year term of supervised release. See Judgment in a Criminal Case (DE# 123 at 2-3 in Case No. 12-cr-20276-FAM, 12/21/12).

E. Direct Appeal

All three defendants filed notices of appeal. Mr. Bryant appealed his conviction and sentence. Mr. McLendon and Mr. Mack appealed only their convictions. On July 24, 2014, the Eleventh Circuit issued an opinion affirming the proceedings below. See United States v. Mack, 572 F. App'x 910 (11th Cir. 2014).

The Eleventh Circuit found that the evidence presented at trial was sufficient to support the defendants' convictions for both the drug charges and the firearm charge. Mack, 572 F. App'x at 917-26.

With respect to Mr. Mack's firearm conviction, the Eleventh Circuit noted that Mr. Mack was carrying a firearm on January 14, 2012, approximately two hours before the drug transportation, knew of the illegal nature of the conspiracy, understood his police officer status was necessary for his participation in the deal and that carrying a service weapon was necessary to facilitate the drug transportation "regardless of whether its purpose was to avoid interdiction from law enforcement or also to provide security for the cargo from potential thieves." Mack, 572 F. App'x at 922.

With respect to Mr. Bryant and Mr. McLendon, the Eleventh Circuit stated: "we have no trouble concluding that the evidence against Bryant and McLendon was sufficient to sustain a guilty verdict for their aiding and abetting in Mack's section 924(c) offense." Mack, 572 F. App'x at 924. The Eleventh Circuit noted that Mr. Bryant knew in advance that a firearm would be carried. Mr. Bryant recruited Mr. Mack when Agent Jackson asked for uniformed police officers and Mr. Mack arrived at the restaurant on the morning of January 14, 2012 with a visible service weapon on his person. Id. at 924-25. With respect to Mr. McLendon, the Eleventh Circuit stated that "a reasonable jury could have concluded that McLendon, to whom Bryant referred as his 'point man' to the police officers and who was in a vehicle that was loaded with the drugs, believed that the police cruiser following closely over the course of eight or ten miles was driven by an armed police officer." Id. at 925.

The Eleventh Circuit issued its mandate on November 12, 2014. See Mandate (DE# 168 in Case No. 12-cr-20276-FAM, 11/12/14). The defendants sought certiorari review from the Supreme Court of the United States. The Supreme Court denied Mr. Bryant's petition on February 23, 2015 and Mr. McLendon and Mr. Mack's petitions on February 27, 2015. See Denials of Writs of Certiorari (DE# 174 in Case No. 12-cr-20276- FAM, 2/25/15); (DE# 175, 176 in Case No. 12-cr-20276-FAM, 3/2/15).

F. Motion for New Trial Based on Agent Jackson's Misconduct

During the pendency of the appeal, the government disclosed to the defendants that Agent Jackson was under investigation for allegations arising out of his relationship with a former FBI confidential source. The former confidential source was later identified as Mani Chulpayev.

***6** On October 8, 2015, Mr. Bryant and Mr. Mack filed motions for a new trial based on the government's disclosure of Agent Jackson's misconduct. See Defendant Henry Lee Bryant's Rule 33 Motion for New Trial Based on Newly Discovered Evidence with Incorporated Memorandum of Law, and Motions for Full Discovery, for an Evidentiary Hearing, and to Adopt the Corresponding Motions Filed or to be Filed by and on Behalf of Codefendants Mack & McLendon (DE# 181 in Case No. 12-cr-20276-FAM, 10/8/15); Defendant Daniel Mack's Motion for New Trial Pursuant to Fed. R. Crim. P. Rule 33 and Brady v. Maryland, 373 U.S. 83 (1963), and Request for Hearing (DE# 182 in Case No. 12-cr-20276-FAM, 10/8/15). Mr. McLendon filed his motion for new trial on October 13, 2015. See Defendant McLendon's Motion for New Trial and an Evidentiary Hearing and Supporting Memorandum of Law (DE# 187 in Case No. 12-cr-20276-FAM, 10/13/15).

On May 31, 2016 and June 2, 2016, the undersigned held an evidentiary hearing on the motions for new trial. See Minute Entries (DE# 252 in Case No. 12-cr-20276-FAM, 5/31/16); (DE# 255 in Case No. 12-cr-20276-FAM, 6/2/16). Following the evidentiary hearing, the undersigned allowed the parties to file supplemental briefs.

On October 27, 2016, the undersigned issued a Report and Recommendation recommending that the motions for new trial filed by Mr. Bryant and Mr. McLendon be denied. See Report and Recommendation (DE# 291 in Case No. 12-cr-20276-FAM, 10/27/16) (hereinafter "R&R"). The undersigned further recommended, that the motion for new trial filed by Mr. Mack be granted. Id.

The undersigned recommended that the Court deny Mr. Bryant and Mr. McLendon's motions for new trial because Mr. Bryant and Mr. McLendon had failed to meet the materiality prong of Brady. The undersigned noted that " '[t]he prejudice or materiality requirement is satisfied if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " R&R at 49-50 (quoting Allen v. Sec'y, Florida Dep't of Corr., 611 F.3d 740, 746 (11th Cir. 2010)).

The undersigned determined that Mr. Bryant could not meet the materiality prong. R&R at 52. The undersigned noted that the decision to change the focus of the investigation to a narcotics case was made without Agent Jackson's involvement, Detective Tyson testified at trial concerning the two transportations of sham cocaine and the jury was shown audio and video recordings of Mr. Bryant's statements and actions. Id. at 50-51. Thus, "a significant amount of evidence that was presented at trial against Mr. Bryant was not dependent on Agent Jackson's credibility." Id. at 51.

Similarly, the undersigned concluded that Mr. McLendon was not entitled to a new trial under Brady because Mr. McLendon could not show that the newly disclosed evidence of Agent Jackson's misconduct was material in his case. R&R at 58. The undersigned noted that "there was ample evidence through audio-visual recordings and Detective Tyson's testimony to support the jury's verdict against Mr. McLendon even without Agent Jackson's testimony." Id.

With respect to Mr. Mack, however, the undersigned determined that "there [was] a reasonable probability that had evidence of Agent Jackson's misconduct been disclosed, the outcome of the trial would have been different ...." R&R at 61. The undersigned noted that "[t]he only reference to 't-shirts' made in Mr. Mack's presence occurred during a conversation between Mr. Mack and Agent Jackson." Id.

The undersigned rejected other arguments raised by the defendants. The undersigned found that Agent Jackson's misconduct did not undermine the quality of the investigation as a whole, noting that the decision to change the nature of the investigation to a narcotics investigation was made by agents other than Agent Jackson. R&R at 63-64. Although there was an equipment malfunction on December 2, 2011 which failed to record a meeting between Mr. Bryant and Mr. Jackson, the undersigned noted that other recorded meetings and conversations showed that Mr. Bryant was aware that he would be delivering narcotics on December 21, 2011 and January 14, 2012. Id. at 64. The undersigned found that Agent Jackson vouching for the existence of the sham cocaine at trial was not material because another agent testified that she collected the evidence and gave it to the case agent at the conclusion of the investigation and the jury was shown photographs of the sham cocaine from December 21, 2011 and January 14, 2012. Id. at 64-65. The undersigned also found that there was no evidence of improper conduct by Detective Tyson. Id. at 65-66.

***7** The defendants also sought relief under Rule 33 of the Federal Rules of Criminal Procedure. R&R at 66. The undersigned rejected the argument that the defendants were entitled to a new trial under Rule 33 because:

> all of the defendants ha[d] failed to show that evidence of Agent Jackson's misconduct was more than merely impeachment evidence. Additionally, Mr. Bryant and Mr. McLendon ha[d] failed to show that the withheld evidence was material to the issues before the Court and that it was such that a new trial would probably produce a different result.

Id. at 67.

Lastly, the undersigned rejected Mr. Bryant and Mr. McLendon's argument that if Mr. Mack was granted a new trial, Mr. Bryant and Mr. McLendon would also be entitled to a new trial on their firearm convictions. R&R at 74. The undersigned determined that Mr. Bryant and Mr. McLendon would not be entitled to a new trial because they "had not shown that confidence in their guilty verdicts for the firearm charge (Count 4) would be undermined," noting that "Mr. Mack would not be acquitted, he would merely be receiving a new trial." Id. at 74-75.

On December 16, 2016, the Court adopted the Report and Recommendation as to Mr. Bryant and Mr. McLendon only and denied Mr. Bryant and Mr. McLendon's motions for new trial. See Orders Adopting Report and Recommendation and Denying Motions for New Trial (DE# 300, 301 in Case No. 12-cr-20276-FAM, 2/16/16). The Court did not adopt the Report and Recommendation with respect to Mr. Mack. See Order Granting Defendant's Motion for New Trial on Counts 1 and 3 and Further Granting the Government's Motion to Dismiss the Same Counts 1 and 3 and Vacating the Sentences on Counts 1 and 3 (DE# 324 in Case No. 12-cr-20276-FAM, 4/25/17). The Court's Order stated as follows:

> **Without adopting the Magistrate Judge's Report and Recommendation**, the Court accepts the joint agreement by the defendant and the government to grant the new trial. The Court also grants the government's motion to dismiss Counts 1 and 3. However, **the conviction and sentence of 60 months on Count 4 shall remain**. For clarity, an amended judgment on Count 4 shall be entered.

Id. (emphasis added). Thus, Mr. Mack's conviction and sentence on the firearm charge were not disturbed.

G. Appeal of Order Denying the Motions for New Trial

Mr. Bryant and Mr. McLendon appealed the denial of their motions for new trial. On July 3, 2019, the Eleventh Circuit affirmed the proceedings below. See United States v. Bryant, 780 F. App'x 738 (11th Cir. 2019), cert. denied sub nom. McLendon v. United States, 141 S. Ct. 383, 208 L. Ed. 2d 102 (2020).

On appeal, Mr. Bryant and Mr. McLendon argued that they were entitled to a new trial on their firearm convictions because the Report and Recommendation had recommended that co-defendant Mack be granted a new trial on his firearm conviction. Bryant, 780 F. App'x at 743. Mr. Bryant and Mr. McLendon also argued that the District Court had erred in its determination that the evidence of Agent Jackson's misconduct was not material under Brady. Id. The Eleventh Circuit rejected both arguments.

With respect to the first argument, the Eleventh Circuit noted that Mr. Mack was not granted a new trial on the firearm charge. Bryant, 780 F. App'x at 743. Instead,

> ***8** [t]he Government and Mack agreed that Mack's § 924(c) conviction would stand, and the district court entered an order to this effect. Although the district court adopted the R & R in Defendants' cases, the district court never adopted the R & R in Mack's case. Instead, the district court's order accepting the Joint Resolution Agreement explicitly state[d] it was not adopting the R & R in Mack's case.

Id. The Eleventh Circuit found that the fact that Mr. Mack was not granted a new trial was "fatal" to Mr. Bryant and Mr. McLendon's argument. Id.

As to the materiality argument, the Eleventh Circuit noted that Agent Jackson's misconduct was unrelated to Mr. Bryant and Mr. McLendon's case. Bryant, 780 F. App'x at 744. The Eleventh Circuit found this fact "highly relevant and worth emphasizing," though not dispositive. Id. The Eleventh Circuit noted

that while the evidence of Agent Jackson's misconduct "would not have been admitted as substantive evidence at Defendants' trial," it "could have potentially [been used by the defendants] ... to impeach Agent Jackson." Id. Nonetheless, the Eleventh Circuit noted that in the instant case, "there [was] very little for which the jury had to take Jackson's word because they heard the recordings themselves." Id.

With respect to Mr. Bryant, the Eleventh Circuit concluded that "[t]he likelihood of a different result, had Agent Jackson's misconduct been disclosed, [was] not nearly great enough to undermine ... confidence in the jury verdict regarding Defendant Bryant's drug convictions." Bryant, 780 F. App'x at 745. The Eleventh Circuit noted that the evidence against Mr. Bryant was "overwhelming" and cited the December 9, 2011 recorded meeting where Agent Jackson made comments to Mr. Bryant about moving "ten kilos," indicated that "they were 'dealing with ten keys,' which Agent Jackson stated was 'not a [sic] incre-, incredible amount of cocaine' " and that "Bryant ended up transporting 'nine' ['bricks'] on December 21, 2011, and then another ten wrapped in similar packaging on January 14, 2012." Id. (quoting record) (emphasis in opinion). Additionally, Detective Tyson provided testimony at trial. Based on the nature of the evidence against Mr. Bryant, the Eleventh Circuit concluded that "[t]o the extent Agent Jackson's trial testimony corroborated this evidence, it was cumulative." Id.

As to Mr. McLendon's drug convictions, the Eleventh Circuit similarly found that "had Agent Jackson's misconduct been disclosed, there [was] not a reasonable probability that the result of the proceeding would have been different." Bryant, 780 F. App'x at 747. The Eleventh Circuit observed that "[g]iven there was a plan to transport 'cocaine' and Bryant recruited McLendon to help execute this plan, the evidence [was] strong that McLendon knew they were attempting to transport cocaine." Id. The Eleventh Circuit noted that "McLendon in fact showed up for both transports, where he watched Agent Jackson load wrapped 'bricks' of sham cocaine into a duffel bag. McLendon clearly saw and counted the bricks. He completed the transports and returned to the office to receive his payment." Id. The jury also heard testimony from Detective Tyson that money would not have been packaged in the same manner the sham cocaine had been packaged because " '[w]hen you're delivering money to anyone, people want to make sure that what they're getting there is money' " and that "one package like what McLendon and Bryant transported usually represents one kilogram of cocaine or heroin." Id. (quoting Trial Transcript DE# 145 at 202-03). Lastly, the Eleventh Circuit noted that during the December 21, 2011 meeting, "[Detective] Tyson asked Defendants, '[n]o deviation, no taste, no test, neither one of y'all get high right?,' " which "would not have made sense had Defendants thought they were transporting money, as money is not 'tasted' or 'tested' even figuratively." Id. The jury heard testimony from Detective Tyson explaining why he had made that comment: " '[I] didn't want a person that gets high to transport my drugs for me, because at that point they could decide to go in, take some more, test it for themselves to see what it was, if it was good, if it wasn't.' " Id. In light of the evidence against Mr. McLendon, the

Eleventh Circuit concluded that the disclosure of Agent Jackson's misconduct did not support a reasonable probability of a different result. Id.

***9** The Eleventh Circuit did not address the issue of whether Agent Jackson's misconduct was material under Brady with respect to Mr. Bryant and Mr. McLendon's firearm convictions because "[n]ot once [did] Defendants make the separate argument that, had Agent Jackson's misconduct been disclosed, there [was] a reasonable probability that the result of the proceeding in regard to Defendants' gun convictions would have been different or engage in the fact-specific analysis required to make this argument." Bryant, 780 F. App'x at 748.

The Eleventh Circuit issued a mandate on February 18, 2020. See Mandate (DE# 358 in Case No. 12-cr-20276-FAM, 2/18/20). Mr. Bryant and Mr. McLendon sought a writ of certiorari from the Supreme Court. On October 5, 2020, the Supreme Court denied the petition for writ of certiorari. See Denial of Writ of Certiorari (DE# 365 in Case No. 12-cr-20276-FAM, 10/8/20).

H. The Instant Proceedings

In the interim, on February 23, 2016, Mr. McLendon filed the instant Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (DE# 1, 2/23/16) (hereinafter "Motion"). On September 30, 2020, Mr. McLendon filed a Supplement to Claim for Relief under 28 U.S.C. § 2255 (DE# 39, 9/30/20) (hereinafter "Supplement"). The government filed its response in opposition on December 15, 2020. See United States' Response in Opposition to Defendant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (DE# 44, 12/15/20) (hereinafter "Response"). Mr. McLendon filed a reply on January 4, 2021. See Reply to Government's Response to 28 U.S.C. § 2255 Motion (DE# 45, 1/4/21) (hereinafter "Reply").

This matter is ripe for adjudication.

REQUEST FOR AN EVIDENTIARY HEARING

In his Motion, Mr. McLendon requests, in a conclusory manner, an evidentiary hearing. See Motion at 14 (requesting that the Court "vacate [Mr. McLendon's] conviction and sentence and conduct an evidentiary hearing). In his Supplement, Mr. McLendon asks for "a further hearing on the issue of relief solely on the § 924(c) count, where the government did not previously oppose Movant's argument on this point." Supplement at 9.[1] In his Reply, Mr. McLendon states that the Court should either hold an evidentiary hearing on the status of the government's investigation of Agent Jackson or "in lieu of a further evidentiary hearing, the Court should direct the government to provide a comprehensive update on any further developments in the investigation that was still on going as of the time four years ago when the hearing was conducted on the motion for new trial." Reply at 9.

The government objects to Mr. McLendon's request for an evidentiary hearing. Response at 16. The government states that no evidentiary hearing is warranted because the record

establishes that Mr. McLendon's claims lack merit. Id. at 16-17.

"The standard for determining [the movant's] right to an evidentiary hearing is 'whether the [movant's] allegations, if proved, would establish the right' to habeas relief." United States v. Godwin, 910 F. Supp. 596, 602 (M.D. Fla. 1995) (quoting Birt v. Montgomery, 725 F.2d 587, 591 (11th Cir. 1984) (en banc)). "[A] district court is not required to grant ... an evidentiary hearing if the § 2255 motion 'and the files and records of the case conclusively show that the [movant] is entitled to no relief.' " Rosin v. United States, 786 F.3d 873, 877 (11th Cir. 2015) (quoting 28 U.S.C. § 2255(b)).

***10** The undersigned finds that Mr. McLendon is not entitled to an evidentiary hearing because, as discussed below, the record reveals that he is not entitled to the relief sought.

Mr. McLendon is also not entitled to an evidentiary hearing to obtain an update on the government's investigation of Agent Jackson. The Court, in adopting the Report and Recommendation as to Mr. McLendon and denying Mr. McLendon's motion for new trial, already determined that Agent Jackson's misconduct was not material to Mr. McLendon's case because "there was ample evidence through audio-visual recordings and Detective Tyson's testimony to support the jury's verdict against Mr. McLendon even without Agent Jackson's testimony." R&R at 58 (adopted as to Mr. McLendon in Order Adopting Report and Recommendation and Denying Motion for New Trial (DE# 301 in Case No. 12-cr-20276-FAM, 2/16/16)). This materiality finding was affirmed by the Eleventh Circuit on appeal as to Mr. McLendon's drug convictions. See Bryant, 780 F. App'x at 747 (stating that "had Agent Jackson's misconduct been disclosed, there [was] not a reasonable probability that the result of the proceeding would have been different" as to the drug convictions).[2] Mr. McLendon has not demonstrated how an evidentiary hearing or an updated disclosure on the investigation of Agent Jackson's misconduct would affect his conviction or sentence.

Accordingly, no evidentiary hearing will be held in this case and the undersigned will not recommend an updated disclosure of the investigation into Agent Jackson's misconduct.

ANALYSIS

In his Motion, Mr. McLendon raised two grounds for relief: (1) the government's nondisclosure of Agent Jackson's misconduct and (2) the government's nondisclosure of money laundering activities at the nightclub. Motion at 4-5. In his Supplement, Mr. McLendon added that because the undersigned had recommended that Mr. Mack receive a new trial on the counts for which Mr. Mack had been convicted, Mr. McLendon was likewise entitled to a new trial on the firearm charge because the jury had convicted Mr. McLendon as an aider and abettor to Mr. Mack, who had been convicted as the principal. Supplement at 3-9. The undersigned will address these arguments below.

A. Ground One: The Government's Non-Disclosure of Agent Jackson's Misconduct

1. Request for New Trial Based on Agent Jackson's Misconduct

In Ground One, Mr. McLendon argued that "[t]he government concealed crucial exculpatory and impeaching evidence concerning" Agent Jackson's misconduct. Motion at 4. Mr. McLendon asserted that the nature of Agent Jackson's misconduct "went beyond mere impeachment to undermine the foundations of the investigation and prosecution." Id.

***11** As noted above, on October 27, 2016, the undersigned issued a Report and Recommendation recommending that Mr. McLendon's motion for new trial based on Agent Jackson's misconduct be denied. R&R at 75. The Report and Recommendation found that evidence of Agent Jackson's misconduct was impeachment evidence only and "that Mr. McLendon was not entitled to a new trial under Brady because Mr. McLendon could not show that the ... evidence of Agent Jackson's misconduct was material in his case." Id. at 41, 58. The Report and Recommendation noted that "there was ample evidence through audio-visual recordings and Detective Tyson's testimony to support the jury's verdict against Mr. McLendon even without Agent Jackson's testimony." Id. The District Court adopted the Report and Recommendation as to Mr. McLendon. See Order Adopting Report and Recommendation and Denying Motion for New Trial (DE# 301 in Case No. 12-cr-20276-FAM, 2/16/16).

Mr. McLendon had a full and fair opportunity to raise errors on appeal. The Eleventh Circuit did not overturn the District Court's denial of Mr. McLendon's motion for new trial based on Agent Jackson's misconduct. See United States v. Bryant, 780 F. App'x 738 (11th Cir. 2019). Thus, the issue of whether confidence in the jury's verdict against Mr. McLendon was affected by Agent Jackson's misconduct has been fully adjudicated and Mr. McLendon cannot revisit this issue in the instant section 2255 proceeding. See United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000) (stating that "[o]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255.") (internal quotation marks omitted).

Mr. McLendon is not entitled to relief on this ground.

2. Request for New Trial Based on Mr. McLendon's Conviction as an Aider and Abettor

In his Supplement, Mr. McLendon added an additional argument to Ground One. See Supplement at 3-9. Mr. McLendon argued that because the Report and Recommendation had recommended that Mr. Mack (the principal) receive a new trial, Mr. McLendon (who was convicted of aiding and abetting Mr. Mack) is also entitled to a new trial on the firearm charge. The government asserts that this argument is untimely and lacks merit. Response at 1.

i. Timeliness

The government moves to strike the Supplement as an improper amendment to Mr. McLendon's section 2255 Motion. Response at 1. The government argues that the Supplement:

> is nothing more than an unveiled attempt to have this [C]ourt re-hash the lengthy and thorough evidentiary hearing held in the criminal case, seeks to have this [C]ourt reverse it's [sic] decision denying [Mr. McLendon]'s motion for new trial, and place in question the [D]istrict [C]ourt's order, which denied [Mr. McLendon]'s motion for new trial, and granted Mack's motion for new trial on the drug charges (Counts 1 and 3), but not as to Count 4 the firearm (§ 924(c)) conviction.

Id. at 1-2. The government asserts that the Supplement "is time barred and does not relate back to the initial [Motion]." Id. at 7.

In his Reply, Mr. McLendon maintains that his supplement is not time barred. Reply at 5. Mr. McLendon argues that (1) "this issue ... is a core component of the claim of materiality and prejudice resulting from the constitutional violation;" (2) "the § 2255 motion, even before it was supplemented by events occurring since the filing of the motion ... clearly articulated that the prejudice of the due process violation affected the evidence as to all counts, not just those resting on the Movant's personal commission of conduct, but the § 924(c) conviction as well;" (3) "it is exactly the same Brady violation [as asserted in the initial Motion], but the need for further consideration arises from the fact that the vicarious liability component addressed in the Report [and Recommendation] was not resolved by the district court and thus is appropriate for reconsideration at this time and (4) "the entirety of the Brady violation claim (including the vicarious liability component) is part of one core set of operative facts—one Brady violation." Reply at 5-6.

***12** An amended claim relates back to the date of the original pleading if it "arose out of the conduct, transaction, or occurrence set out or attempted to be set out -- in the original pleading...." Fed. R. Civ. P. 15(c)(1)(B). The Eleventh Circuit has noted that "Congress intended Rule 15(c) to be used for a relatively narrow purpose; it did not inten[d] for the rule to be so broad to allow an amended pleading to add an entirely new claim based on a different set of facts." Farris v. United States, 333 F.3d 1211, 1215 (11th Cir. 2003).

The undersigned finds that the argument raised in Mr. McLendon's Supplement relates back to his original Motion. Both the argument raised in the Motion and the argument raised in the Supplement stem from the government's nondisclosure of Agent Jackson's misconduct. The argument raised in the Motion addresses how Agent Jackson's misconduct would have directly affected Mr. McLendon's drug and firearm convictions. The argument raised in the Supplement addresses how Agent Jackson's misconduct would have directly affected Mr. Mack's firearm conviction, and by extension, Mr. McLendon's firearm conviction, as the aider-and-abettor. Accordingly, the Court should consider the argument raised in Mr. McLendon's Supplement.

Although the Court should consider the argument raised in Mr. McLendon's Supplement, this argument does not entitle Mr.

McLendon to relief for the reasons discussed below.

ii. Merit

Mr. McLendon asserts that:

> [b]ecause the [D]istrict [C]ourt has not yet ruled on the question of whether, as found by the Magistrate Judge's report, the Brady violation in this case tainted the convictions of co-defendant Mack (and particularly Mack's § 924(c) conviction on Count 4 of the indictment), the United States Court of Appeals for the Eleventh Circuit held that the unresolved issue of whether the Magistrate Judge's ruling on the § 924(c) conviction entered against co-defendant Mack was correct precluded reliance by the Movant on the Magistrate Judge's finding of a Brady violation undermining Mack's conviction.

Supplement at 2 (citing Bryant, 780 F. App'x at 743).

The undersigned disagrees with Mr. McLendon's summary of the Bryant decision to the extent Mr. McLendon suggests that matters related to the motions for new trial remain pending before this Court. The Eleventh Circuit stated in its decision that Mr. McLendon and Mr. Bryant could not rely on the Report and Recommendation's recommendation that Mr. Mack be granted a new trial, because the Report and Recommendation was never adopted by the District Court:

> Defendants Bryant and McLendon appeal the district court's order adopting the magistrate judge's R & R, arguing the district court erred in two ways. First, Defendants argue that because the magistrate judge recommended that Mack be granted a new trial on the § 924(c) charge, Defendants are entitled to a new trial on that charge as well. Mack was charged as the principal of the § 924(c) charge, while Defendants were charged on an aiding and abetting theory. Defendants argue "the alleged 'principal' has been granted a new trial and so also should the alleged 'aiders.' "... **Fatal to this claim, however, is the fact that Mack was not granted a new trial on the § 924(c) charge.** The Government and Mack agreed that Mack's § 924(c) conviction would stand, and the district court entered an order to this effect. **Although the district court adopted the R & R in Defendants' cases, the district court never adopted the R & R in Mack's case. Instead, the district court's order accepting the Joint Resolution Agreement explicitly states it was not adopting the R & R in Mack's case.** This first argument, therefore, fails.

***13** Bryant, 780 F. App'x at 743 (emphasis added; citation to the record omitted).

There are no matters pending before the District Court which relate to the motions for new trial. As previously noted, the District Court adopted the Report and Recommendation as to Mr. McLendon and Mr. Bryant only. See Orders Adopting Report and Recommendation and Denying Motions for New Trial (DE# 300, 301 in Case No. 12-cr-20276-FAM, 2/16/16). The District Court expressly stated that it was not adopting the Report and Recommendation as to Mr. Mack. See Order Granting Defendant's Motion for New Trial on Counts 1 and 3 and Further Granting the Government's Motion

to Dismiss the Same Counts 1 and 3 and Vacating the Sentences on Counts 1 and 3 (DE# 324 in Case No. 12-cr-20276-FAM, 4/25/17). While Mr. McLendon is technically correct that the District Court "did not adopt or overrule the Report [and Recommendation] with regard to the conclusions concerning co-defendant Mack," Supplement at 2, that does not mean that there are unresolved issues in the underlying criminal proceeding for the District Court to decide.

"A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). In the underlying criminal proceeding, the District Court chose to adopt the Report and Recommendation as to Mr. McLendon and Mr. Bryant and not to adopt the Report and Recommendation as to Mr. Mack. The District Court thus disposed of all pending motions for new trial and there is no reason for the District Court, at this juncture, to revisit the Report and Recommendation.

Mr. McLendon also argues that:

> [t]he government may not use a constitutional violation affecting its case as to the principal's guilt in order to obtain a conviction of an aider/abettor. **The constitutional violation in proving the principal's crime clearly affects the jury's evaluation of the evidence against the person charged merely with vicarious liability**.
>
> Thus, the government cannot use the happenstance of a joint trial to deny the defendant charged as an aider/abettor due process on the question of the principal's liability.

Reply at 3 (emphasis added); id. at 7 ("[g]iven the constitutional violation affecting the jury's consideration of the evidence against [Mr. Mack], the conviction of accused aider/abettor McLendon simply cannot stand.").

The undersigned's Report and Recommendation, which was adopted as to Mr. McLendon, carefully reviewed the evidence presented at trial and found that "[b]ecause Mr. Bryant and Mr. McLendon ha[d] failed to show that evidence of Agent Jackson's misconduct was material in their case, they ha[d] not shown a Brady violation." R&R at 66. The Report and Recommendation specifically addressed Mr. Bryant and Mr. McLendon's argument that if Mr. Mack was granted a new trial, Mr. Bryant and Mr. McLendon would also be entitled to a new trial on their firearm convictions. Id. at 74. The undersigned determined that Mr. McLendon and Mr. Bryant would not be entitled to a new trial because they "had not shown that confidence in their guilty verdicts for the firearm charge (Count 4) would be undermined," noting that "Mr. Mack would not be acquitted, he would merely be receiving a new trial." Id. at 74-75. The undersigned further determined that "confidence in Mr. Bryant and Mr. McLendon's convictions [did] not hinge on Mr. Mack's conviction." Id. at 75.

***14** To the extent that Mr. McLendon disagreed with the Report and Recommendation as adopted by the District Court—in particular, the Report and Recommendation's determination that "confidence in Mr. Bryant and Mr. McLendon's convictions [did] not hinge on Mr. Mack's

conviction," R&R at 75—Mr. McLendon had an opportunity to raise this issue on appeal. Therefore, Mr. McLendon may not raise this argument in the instant section 2255 proceeding. See Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (stating that "a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding").[3]

Mr. McLendon is not entitled to relief on this ground.

B. Ground Two: The Government's Non-Disclosure of Money Laundering Activities at the Nightclub

In Ground Two, Mr. McLendon argued that the government should have disclosed that "the champagne bar from which [Mr. McLendon] transported packages he believed contained money ... was heavily involved in non-drug money laundering that was to be prosecuted by the government." Motion at 5. According to Mr. McLendon this "money laundering evidence would have shown to the jury how reasonable it was for a person ... to believe that it was likely tax evasion and money laundering that created the need to remove casino-like under-the-table profits from the club via covert means." Id.

The government maintains that Ground Two is procedurally barred because it was already addressed by the District Court and the Eleventh Circuit:

> The Court also addressed and rejected the basis for Petitioner's claim that [the] government failed to disclose exculpatory evidence that Club Dolce was a non-drug money laundering operation. The Court reviewed the trial testimony of Detective Tyson and the presented audio-visual recordings at trial and found that such evidence, independent of UC Jackson's testimony, supported the jury's guilty verdict that [Mr. McLendon] believed that the packages he transported contained cocaine not money. In its R&R, the Magistrate Judge stated that the jury heard and was free to rely upon testimony from Det. Tyson ... "(1) that cocaine is packaged in the same way as the sham cocaine was packaged in the instant case; (2) money would not be packaged [that] way and (3) large sums of money would not be left in a parked car in a mall parking lot in the drug business." (DE CR 291 at 57). The district court adopted the R&R as to Petitioner McLendon and Bryant and entered an order denying defendants' motion for new trial. (DE CR 300, 301). The Court of Appeals affirmed the [D]istrict [C]ourt's order finding no Brady Violations.

Response at 12-13.

Mr. McLendon is not entitled to relief on Ground Two. In the Report and Recommendation, the undersigned noted that the jury heard argument that Mr. McLendon believed he was transporting money:

> nothing precluded Mr. McLendon from making the argument at trial that he believed he was transporting money, not drugs. In fact, Mr. McLendon's counsel told the jury in closing argument that the government had failed to show Mr. McLendon knew he was transporting drugs and cited to the "this is money" statement by Detective Tyson. See Trial Transcript (DE# 147 at 111,

1/14/13). At trial, Detective Tyson provided an explanation for his statement "this is money," see Trial Transcript (DE# 145 at 194, 1/14/13), and the jury was entitled to believe Detective Tyson's explanation.

***15** R&R at 57, n. 38. The undersigned determined that "there was ample evidence through audio-visual recordings and Detective Tyson's testimony to support the jury's verdict against Mr. McLendon even without Agent Jackson's testimony" and that "Mr. McLendon ha[d] failed to show a reasonable probability that the outcome of the trial would have been different." Id. at 58. The undersigned's Report and Recommendation was adopted as to Mr. McLendon. See Order Adopting Report and Recommendation and Denying Motion for New Trial (DE# 301 in Case No. 12-cr-20276-FAM, 2/16/16). The Eleventh Circuit did not overturn the District Court's denial of Mr. McLendon's motion for new trial. See United States v. Bryant, 780 F. App'x 738 (11th Cir. 2019).

Mr. McLendon is not entitled to relief on this ground.

RECOMMENDATION

Based on the foregoing, the undersigned respectfully RECOMMENDS that the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (DE# 1, 2/23/16) be **DENIED**.

The parties will have fourteen (14) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in the Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C § 636(b)(1); Harrigan v. Metro Dade Police Dep't Station #4, 977 F.3d 1185, 1191-1192 (11th Cir. 2020); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

All Citations

Slip Copy, 2021 WL 3518205

Footnotes

1 It is unclear whether Mr. McLendon is requesting an evidentiary hearing or a non-evidentiary hearing in his Supplement.

2 The Eleventh Circuit did not have the opportunity to address the materiality argument with respect to Mr. McLendon's firearm conviction because "[n]ot once [did] Defendants make the separate argument that, had Agent Jackson's misconduct been disclosed, there [was] a reasonable probability that the result of the proceeding in regard to Defendants' gun convictions would have been different or engage in the fact-specific analysis required to make this argument." Bryant, 780 F. App'x at 748.

3 There are two exceptions to the procedural bar rule. "Under the first exception, a defendant must show cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error." Lynn, 365 F.3d at 1234. The second exception requires a showing of actual innocence. Id. The record does not support either exception.

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780 Fed.Appx. 738
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36 2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff Appellee,
v.
Henry Lee BRYANT and Octavius McLendon, Defendants Appellants.

No. 17 10010
|
(July 3, 2019)

Synopsis

Background: Defendants, who were convicted of multiple drug charges and a gun charge, filed motions for new trial after government disclosed that an undercover FBI agent who investigated defendants and testified against them at trial was under investigation. The United States District Court for the Southern District of Florida, Federico A. Moreno, J., adopted magistrate judge's report and recommendation, 2016 WL 8732411, that the motions be denied. Defendants appealed.

The Court of Appeals, Baldock, J., held that state's failure to disclose, that an undercover FBI agent who investigated defendant and testified against him was under investigation, to defense was not a *Brady* violation.

Affirmed.

Attorneys and Law Firms

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Appeals from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:12-cr-20276-FAM

Before JORDAN, GRANT, and BALDOCK,* Circuit Judges.

Opinion

BALDOCK, Circuit Judge:

***739** In October 2012, a jury convicted Defendants Henry Bryant and Octavius McLendon each of multiple drug charges and a gun charge. After trial, the Government disclosed to Defendants that an undercover FBI agent who investigated Defendants and testified against them at trial was under

investigation himself for obstructing an unrelated murder investigation and maintaining an improper relationship with a former FBI confidential source. Based on this new information, Defendants filed motions for a new trial. After an evidentiary hearing, a magistrate judge issued a thorough Report and Recommendation (R & R) recommending that Defendants' motions be denied. The district court adopted the R & R in Defendants' cases and denied the motions. Defendants timely appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In 2012, the FBI received a tip that a Miami Beach fire inspector was extorting the owner of Club Dolce, a nightclub in Miami Beach. The FBI began investigating this matter, with FBI Agent Matthew Fowler as the lead agent, and began running part of its operation out of Club Dolce with the owner's permission. An FBI undercover coordinator determined FBI Agent Dante Jackson "fit the persona of a nightclub manager" and referred him to Agent Fowler for the case. Agent Jackson became the primary undercover agent, posing as Club Dolce manager "Kevin Johnson."

Agent Fowler testified that during the code compliance investigation, "there was always this underlying theme that ... there's all this other corruption going on...." Doc. 257, at 106–07. In light of the potential for additional corruption, as the code compliance case was winding down, Agent Fowler and another case agent began brainstorming different ideas on how "to weed out ... corruption in Miami Beach." *Id.* at 106. Agent Fowler testified that at this point the investigation turned into a "drug investigation." *Id.* at 104.

In this drug investigation, Agent Fowler remained the lead case agent, meaning it was his job to "start[ ] the initial investigation[,] ... come up with a plan, go over specific targets, [and] work the investigation to get to a prosecution." *Id.* at 87. Agent Jackson remained in his undercover role as Club Dolce manager Kevin Johnson. Another undercover officer, FBI Task ***740** Force Officer KayTee Tyson III, joined the investigation. Tyson posed as Kevin Johnson's drug-trafficking friend "Tony Woods" or "T" from the Northeast who needed people to transport drugs in the Miami area and needed police cover for the transport. Although only Agent Jackson and Officer Tyson participated in undercover roles, numerous other FBI agents assisted in this investigation.

In his undercover capacity, Agent Jackson presented the drug-trafficking plan to Defendant Bryant, a Miami Beach fire inspector whom Agent Jackson met a couple months earlier in the code compliance investigation. Agent Jackson explicitly told Defendant Bryant they initially needed to transport "ten keys" of "cocaine." Government Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 20. Defendant Bryant agreed and recruited others, including Defendant Octavius McLendon and Miami-Dade police officer Daniel Mack, to participate. Eventually, two transports occurred on December 21, 2011, and January 14, 2012. Both times, Agent Jackson loaded bricks of sham cocaine into a duffel bag in the office of Club Dolce in Defendants'

presence; Defendants took and transported the bag to the agreed upon location; a marked police car followed closely behind Defendants' car during the transport; and Defendants returned to the office to get paid. Neither Bryant nor McLendon carried a gun during the transports, although there was evidence Mack, who was the police escort during at least one of the transports, carried his gun during the transport.[1]

Defendant Bryant, Defendant McLendon, and Mack were arrested and charged with conspiracy to possess with intent to distribute cocaine (Count 1); attempt to possess with intent to distribute cocaine on December 21, 2011 (Count 2); attempt to possess with intent to distribute cocaine on January 14, 2012 (Count 3); and possession of a firearm in furtherance of drug trafficking (Count 4). After a four-day jury trial in October 2012, the jury convicted Defendants on all four counts and convicted Mack on Counts 1, 3, and 4. Defendant Bryant, Defendant McLendon, and Mack received total terms of imprisonment of 264 months, 248 months, and 180 months, respectively. All three appealed their convictions, arguing among other things the evidence was insufficient on all counts. The Eleventh Circuit affirmed. *United States v. Mack*, 572 F. App'x 910 (11th Cir. 2014) (unpublished).

* * *

As it turns out, the investigative team aiming "to weed out ... corruption" included an agent with his own integrity issues: Agent Jackson. Unbeknownst to the rest of the team and the FBI, Agent Jackson maintained an improper relationship with a former FBI confidential source and ex-Russian mobster, Mani Chulpayev. In March 2014, after Defendants' direct appeal was briefed but before the Eleventh Circuit ruled on it, the Government notified Defendants' attorneys that Agent Jackson was under investigation for allegations arising out of his relationship with Chulpayev. After the appeal concluded, Defendants sought additional information about the Jackson investigation. In July 2015, the Government responded that the Department of Justice Office of the Inspector General ("OIG") received a complaint in March 2013, "which alleged that Jackson obstructed an ongoing murder investigation." Doc. 182-2, at 1. The OIG also received allegations "that Jackson had unauthorized ***741** contacts with a closed confidential source, accepted gifts from the closed source, and engaged in other potential criminal and administrative violations involving the closed source." *Id.* Agent Jackson was under investigation for these allegations but, at that point, "there [had] been no findings of misconduct or other impropriety." *Id.* at 2.

Armed with this information, all Defendants filed a motion for a new trial pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Fed. R. Crim. P. 33. The magistrate judge held an evidentiary hearing, and during this hearing, OIG investigator Susan Howell testified to the following facts about Chulpayev and Agent Jackson's misconduct. Mani Chulpayev was "involved in a bunch of crimes" in the late 1990s in New York. Doc. 257, at 170. The FBI arrested him for these crimes around 1998, after which Chulpayev began cooperating with the government and became a registered FBI

source. He moved to Atlanta and assisted the FBI there, until he was arrested for vehicle-related crimes. When he was released from prison, he expressed to an FBI agent that he wanted to cooperate with the government again. In January 2010, Chulpayev became a registered FBI source once again, and Agent Jackson became Chulpayev's FBI "handler." In February 2011, however, Chulpayev stopped being a registered FBI source because he was leaving the Atlanta area.

Agent Dante Jackson's Chulpayev-related misconduct, which occurred after Chulpayev was no longer a registered source, falls into two categories: (1) receiving improper gifts from Chulpayev and (2) improperly intervening on Chulpayev's behalf. At the evidentiary hearing, the Government did not contest that Agent Jackson received multiple items of value not related to his performance of undercover FBI work, including Miami Heat tickets on four occasions, a room at the Fontainebleau Hilton Hotel, use of an Audi A8 for three days, and a $3500 payment to Agent Jackson's credit card covering the majority of a $4256.12 charge from Bamboo Nightclub. Additionally, the Government did not contest that Chulpayev provided Agent Jackson with work-related items of value, including Heat tickets on one occasion and the use of luxury vehicles on twelve occasions. Howell testified that, as a result of his connections, Chulpayev also provided Agent Jackson with discounts on shoes, jewelry, and lunches at an Italian restaurant. On another occasion, Chulpayev provided Agent Jackson with $1500 cash as a part of an investigation, and Chulpayev was eventually reimbursed. These actions violated FBI policy.

In addition to receiving gifts from Chulpayev, Agent Jackson also attempted to intervene on Chulpayev's behalf with regard to his serious legal issues—both of which relate to Chulpayev's luxury vehicle "business." Agent Jackson's first intervention on Chulpayev's behalf concerns an agreement Chulpayev entered into with Amanda Smith. Smith acted as a straw purchaser for Chulpayev and bought luxury vehicles. Smith then allowed Chulpayev to lease the cars, and Chulpayev would pay Smith the monthly car payment plus an extra fee for Smith. Chulpayev eventually stopped paying Smith, prompting Smith to hire an attorney. Agent Jackson contacted Smith's attorney. At some point, Smith's attorney told Agent Jackson he knew Chulpayev was an FBI source, he knew Chulpayev was involved with vehicle fraud, and he would report Chulpayev and Agent Jackson. According to Smith's attorney, Agent Jackson then told him, "If you do that, I'll have you arrested for extorting a federal agent." These actions, of course, violated FBI policy.

***742** Jackson intervened a second time on Chulpayev's behalf regarding a far more egregious legal issue, which began at Chulpayev's birthday party on June 2, 2012, in Miami.[2] One of Chulpayev's drug-trafficking friends, Decensae White, attended the party. White told Chulpayev that Melvin Vernell III, an Atlanta-based rapper also known as "Lil' Phat," stole marijuana from White. At some point, White asked Chulpayev if Vernell was in one of Chulpayev's cars. As an investor in Chulpayev's business, White knew Chulpayev's cars had GPS trackers in them. Chulpayev told White that Vernell was in his

car and gave White either the coordinates to where Vernell was located or the login information to access the car's location. On June 7, as Vernell waited in a hospital parking garage while his girlfriend had her baby, Vernell was murdered in a car he was leasing from Chulpayev. Chulpayev later testified that when he gave the information to White, he did not think White would kill Vernell.

The next day, Chulpayev called Sandy Springs Police Department to give them information about White's potential involvement in the murder, but the officer did not call Chulpayev back or was not interested. Chulpayev then called Agent Jackson and told him that he thought White and White's associate Gary Bradford were involved in Vernell's murder. Agent Jackson instructed Vernell to not talk to anyone about the murder. On June 11, Agent Jackson called the Sandy Springs Police Department and told Detective J.T. Williams that his "source" told him that White and Bradford might be involved in the murder. Detective Williams wanted to interview the source, but Agent Jackson told Detective Williams that he was very protective of his source. Agent Jackson also told Detective Williams narcotics were involved and that it could become a federal case.[3]

At some point, Agent Jackson indicated to Detective Williams that Chulpayev gave White the coordinates to the hospital where Vernell was murdered. Detective Williams asserted that would make Chulpayev a co-conspirator in the murder. Upon hearing this, Agent Jackson attempted to recover by saying actually Chulpayev gave White the coordinates to where Vernell was staying. In October 2012, Agent Jackson provided Chulpayev to Detective Williams for an interview. This interview eventually led to Chulpayev's arrest for his involvement in the murder.[4] In January 2013, Agent Jackson called Detective Williams to confess that Chulpayev was no longer a registered FBI source and that he had not been one for a while. Detective Williams reported this disclosure up his chain of command, and the Sandy Springs Police Department eventually notified the FBI. At the time of the evidentiary hearing, the OIG's investigation was still ongoing, but Jackson was no longer actively working for the FBI.

* * *

After the evidentiary hearing and further briefing on the foregoing information about Jackson's misconduct, the magistrate ***743** judge issued a thorough R & R addressing Defendants' *Brady* claims and Rule 33 motions. For the *Brady* claim, Defendants had the burden to show:

> (1) the government possessed favorable evidence to the defendant[s]; (2) the defendant[s] [did] not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant[s], there is a reasonable probability that the outcome would have been different.

United States v. Stein, 846 F.3d 1135, 1145–46 (11th Cir. 2017). The R & R stated Defendants satisfied their burdens on the first three *Brady* elements. As to the fourth materiality element, the R & R stated neither Defendant Bryant nor

Defendant McLendon satisfied their burden. The R & R engaged in a similar analysis as to Defendant Bryant's and Defendant McLendon's Rule 33 claims. The R & R stated Mack, however, satisfied his burden and was entitled to a new trial on all counts for which he was convicted. Lastly, the R & R stated that even though Defendant Bryant and Defendant McLendon were convicted of the § 924(c) charge on an aiding and abetting theory and Mack was entitled to a new trial on the § 924(c) as the principal, the court should deny Defendant Bryant's and Defendant McLendon's motions for a new trial on their § 924(c) charges.

On December 16, 2016, the district court adopted the R & R in Defendant Bryant's and Defendant McLendon's cases. The district court, however, deferred ruling and required further oral argument in Mack's case. On April 21, 2017, the Government and Mack entered into a Joint Resolution Agreement, whereby Mack's § 924(c) conviction would stand but the Government would dismiss the other counts against Mack. In a written order, the district court accepted this agreement and explicitly stated it was not adopting the magistrate judge's R & R.

II.

Defendants Bryant and McLendon appeal the district court's order adopting the magistrate judge's R & R, arguing the district court erred in two ways. First, Defendants argue that because the magistrate judge recommended that Mack be granted a new trial on the § 924(c) charge, Defendants are entitled to a new trial on that charge as well. Mack was charged as the principal of the § 924(c) charge, while Defendants were charged on an aiding and abetting theory. Defendants argue "the alleged 'principal' has been granted a new trial and so also should the alleged 'aiders.' " Op. Br. at 38. Fatal to this claim, however, is the fact that Mack was *not* granted a new trial on the § 924(c) charge. The Government and Mack agreed that Mack's § 924(c) conviction would stand, and the district court entered an order to this effect. Although the district court adopted the R & R in Defendants' cases, the district court never adopted the R & R in Mack's case. Instead, the district court's order accepting the Joint Resolution Agreement explicitly states it was not adopting the R & R in Mack's case. This first argument, therefore, fails.

Second, Defendants argue the district court erred in determining the withheld evidence—information about Agent Jackson's improper relationship with Chulpayev—was not material under *Brady*. We review this determination *de novo*. *United States v. Scheer*, 168 F.3d 445, 452 (11th Cir. 1999). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***744** *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.' " *Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d

490 (1995)). Notably, the materiality test under *Brady* is not a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434–35, 115 S.Ct. 1555.

At the outset, we note Agent Jackson's conduct —while egregious—was not related to the instant case. Although this fact is not in itself dispositive, it is highly relevant and worth emphasizing. No facts regarding Agent Jackson's misconduct overlap with the facts leading to Defendants' prosecutions. Both Officer Tyson and OIG Investigator Howell testified Chulpayev was not involved in this case. Agent Fowler, the one in charge of the drug investigation, had not even heard of Chulpayev prior to OIG's investigation of Jackson. The information, therefore, would not have been admitted as substantive evidence at Defendants' trial. The timing of Agent Jackson's conduct, however, is relevant to how its disclosure might have affected the proceedings. While Agent Jackson did not receive a majority of the gifts from Chulpayev until after the trial in this case, a few gifts were received before and during trial. Specifically, Agent Jackson received Heat tickets on one occasion and used Chulpayev's luxury vehicles on six occasions prior to Defendants' trial, and Jackson used Chulpayev's 6 series BMW during Defendants' trial in which Agent Jackson testified. Agent Jackson's interventions on behalf of Chulpayev, which possibly could severely undermine his credibility, occurred after the investigation but before trial. Therefore, had this information been disclosed to Defendants, they could have potentially used the information to impeach Agent Jackson.

Defendants take it a step further and argue that, not only could this information have been used as impeachment evidence, but it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Op. Br. at 39 (citing *Arnold v. McNeil*, 622 F. Supp. 2d 1294, 1316 (M.D. Fla. 2009), *aff'd and adopted sub nom. Arnold v. Sec'y, Dep't of Corr.*, 595 F.3d 1324 (11th Cir. 2010)). Defendants also argue the disclosure "would have caused the government to refrain from calling Jackson as a witness altogether." Op. Br. at 50. The disclosure would have perhaps prevented Jackson from testifying, but even so, we do not agree that the disclosure would have "put the whole case in such a different light as to undermine confidence in the verdict." In *Arnold*, the district court held a jury verdict was unworthy of confidence when an investigator, who was the only person able to confidently identify the defendant, engaged in egregious misconduct around the same time he was testifying against the defendant at trial. 622 F. Supp. 2d at 1316–18. The critical distinction between *Arnold* and the instant case is that here, Agent Jackson was not the sole source of vital information at trial. Almost every interaction Agent Jackson testified about at trial was also recorded. In other words, in sharp contrast to the investigator in *Arnold*, there is very little for which the jury had to take Jackson's word because they heard the recordings themselves. The relevant exception is the initial meeting Agent Jackson had with Defendant Bryant about the drug-transporting plan, in which Agent Jackson testified that the recording device failed. This initial meeting will be discussed more below.

***745** A.

Keeping in mind that the alleged *Brady* material—Agent Jackson's misconduct—was unrelated to this case and most of Agent Jackson's trial testimony was corroborated by recordings, we first consider the effect the disclosure of Agent Jackson's misconduct would have on Defendant Bryant's drug convictions. Defendant Bryant barely makes any argument that there is a reasonable likelihood of a different result, perhaps because of the overwhelming evidence against him. To state just one example of the evidence against Defendant Bryant, the jury heard a recording of Agent Jackson telling Defendant Bryant "what's gonna be moving" is "ten kilos." Government Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 7–8. They also heard Agent Jackson tell Defendant Bryant they were "dealing with ten keys," which Agent Jackson stated was "not a incre-, incredible amount of *cocaine*." *Id.* at 20 (emphasis added). Defendant Bryant's response was "Okay" and "I understand, I understand." *Id.* Defendant Bryant ended up transporting "nine" on December 21, 2011, and then another ten wrapped in similar packaging on January 14, 2012. These facts were evident from, not only the recordings, but also Officer Tyson's testimony. To the extent Agent Jackson's trial testimony corroborated this evidence, it was cumulative. The likelihood of a different result, had Agent Jackson's misconduct been disclosed, is not nearly great enough to undermine our confidence in the jury verdict regarding Defendant Bryant's drug convictions.

B.

We now turn to the effect such disclosure would have had upon Defendant McLendon's drug convictions. At trial, McLendon argued he did not have the requisite intent for the drug-trafficking crimes because he thought they were transporting money rather than cocaine. Even though there was no evidence that the word "cocaine" was used in McLendon's presence, the jury did not accept this defense and found McLendon guilty. Now, McLendon essentially argues that without Agent Jackson's testimony, there is a reasonable probability the jury would have believed his defense that he thought he was transporting money. Specifically, McLendon argues "Jackson's repeated opinions that McLendon was talking about drugs was the damaging part of the evidence for the jury." Op. Br. at 45.

In their opening brief, Defendants point to two of such occurrences that involve understanding McLendon's comments. First, the jury heard a recording of McLendon expressing that he did not want to use the SunPass lane during the transport "[c]ause it takes pictures." Government Exhibit 53 at Tab F, Transcript of 12/21/11 Meeting at 9. The Government then asked Agent Jackson what he understood that comment to mean. Agent Jackson responded, "He didn't want any evidence of the actual *drug transaction*." Doc. 145, at 74 (emphasis added). He also stated McLendon "didn't want to get on the SunPass lane fearful that the cameras on the SunPass lane would take pictures of the car with them in it with the cocaine." *Id.* Second, the jury heard a recording of McLendon stating something about them "not using the

same pattern." *Id.* at 81. The Government asked Agent Jackson what his understanding of the comment was, and Agent Jackson responded that McLendon meant "they would change the officers out for *each subsequent deal* that we did."[5] *Id.* (emphasis added). In parentheticals ***746** in their reply brief, Defendants point to additional occurrences that involved Agent Jackson's understanding of McLendon's recorded comments. Specifically, Defendants note that "Jackson characterizes meeting with McLendon as 'the actual drug deal' "; "Jackson opines McLendon meant to say 'when you're carrying 10 kilograms of cocaine, you want the bag to be as small as possible ...' "; and "Jackson opines it was 'everybody's plan' that the job involved cocaine." Rep. Br. at 13–14 (citing Doc. 145, at 72, 95, 107).

Agent Jackson's comments at trial about McLendon's involvement in "the actual drug transaction" or "each subsequent deal," however, were not nearly the only evidence that established McLendon knew they were transporting drugs. First, Agent Jackson explicitly told Bryant they were transporting "cocaine." Bryant recruited "his brother" McLendon to help with the job. McLendon argues Agent Jackson and Bryant originally planned to transport money and apparently Bryant did not tell McLendon of the change of plans. To support this argument, McLendon points to one sentence of Jackson's trial testimony, in which he described the first meeting with Bryant where the recording device failed:

> I discussed with Mr. Bryant that I had an associate in New York who was a childhood friend that was involved in drug trafficking. I was laundering his money through the nightclub, and he had proposed a deal to me to assist him with laundering some drug proceeds, and in exchange, I would be paid for that.

Doc. 145 at 14. Bryant was "fine" with this proposal. *Id.* Agent Jackson's very next statement about this first meeting, however, describes the plan:

> *The initial plan was to transport the drugs from a point in Miami to another destination*, and he would provide police officers to assist with *escorting the drugs*. The whole thing I presented to him was I didn't want the drugs being picked up by police, so we wanted police escorts to make sure the drugs made it from Point A to Point B.

Id. at 15 (emphases added).[6] Unfortunately for McLendon, had Agent Jackson's misconduct been disclosed, Agent Jackson might not have testified at all and there would have been no money-laundering testimony. Thus, McLendon would have had even less of a basis for arguing he thought he was transporting money. Even if this same testimony was elicited, however, it is unclear whether Jackson expected Bryant ***747** to launder money. What is clear is Agent Jackson needed to "transport the drugs" and Bryant "would provide police officers to assist with escorting the drugs."[7] If any doubt remained, later recorded conversations make clear they were transporting "cocaine." Given there was a plan to transport "cocaine" and Bryant recruited McLendon to help execute this plan, the evidence is strong that McLendon knew they were attempting to transport cocaine.

Second, McLendon in fact showed up for both transports, where he watched Agent Jackson load wrapped "bricks" of sham cocaine into a duffel bag. McLendon clearly saw and counted the bricks. He completed the transports and returned to the office to receive his payment. While McLendon argues that the packaging of the sham cocaine was consistent with the packaging of money, Tyson testified at trial that he had "never" seen money packaged the way the sham cocaine was packaged in this case. *Id.* at 202–03. He explained: "When you're delivering money to anyone, people want to make sure that what they're getting there is money." *Id.* at 202. In his experience —which includes eight years on the FBI's Safe Streets Task Force "investigat[ing] large drug trafficking organizations," *id.* at 187–88— one package like what McLendon and Bryant transported usually represents one kilogram of cocaine or heroin. *Id.* at 203.

Third, during the December 21 transport before Defendants took the duffel bag, Tyson asked Defendants, "No deviation, no taste, no test, neither one of y'all get high right?" Government Exhibit 53 at Tab G, Transcript of 12/21/11 Meeting at 11. Defendants were "insulted" at the comment and McLendon responded only with "Pstt." *Id.*; Doc. 145, at 196. Tyson's comment simply would not have made sense had Defendants thought they were transporting money, as money is not "tasted" or "tested" even figuratively. Further, Tyson explained the meaning of this interaction at trial. He testified that he "didn't want a person that gets high to transport my drugs for me, because at that point they could decide to go in, take some more, test it for themselves to see what it was, if it was good, if it wasn't." Doc. 145, at 196.

In light of the evidence showing McLendon thought he was transporting cocaine, Agent Jackson's multiple statements at trial about McLendon thinking he was participating in a "drug transaction" or "deal" were not crucial enough to put the whole case in such a different light as to undermine our confidence in McLendon's drug convictions. Therefore, had Agent Jackson's misconduct been disclosed, there is not a reasonable probability that the result of the proceeding would have been different.

C.

Lastly, we turn to the effect the disclosure of Agent Jackson's misconduct would have had on Defendants' gun convictions. Although in their header Defendants indicate their argument is about the effect of the disclosure of Agent Jackson's misconduct "on all Counts," Defendants write only one sentence in this section about the gun charges, which refers back to section A of their brief. Op. Br. at 38, 49–50 ("[F]or both Bryant and McLendon, because the district court correctly found that Jackson's testimony to find Mack's guilty knowledge was key to the verdict on the § 924(c) count, a new trial on the § 924(c) charge is required is [sic] to all the defendants (as explained in section A, ***748** above)."). Section A of their brief, however, only makes the argument that as a matter of law, it is inconsistent for Mack to receive a new trial as the principal and McLendon and Bryant to not receive a new trial as the aiders and abettors. We have already addressed this argument above. *See supra* pp. 742–43. Not once do Defendants make the separate

argument that, had Agent Jackson's misconduct been disclosed, there is a reasonable probability that the result of the proceeding in regard to Defendants' gun convictions would have been different or engage in the fact-specific analysis required to make this argument. We, therefore, do not address this issue.

Agent Jackson's unethical conduct was not worthy of an FBI agent. For the foregoing reasons, however, his misconduct was not material because the likelihood of a different result in Defendants' cases had the misconduct been disclosed is not great enough to undermine our confidence in the jury's verdict. Accordingly, we **AFFIRM**.

All Citations

780 Fed.Appx. 738

Footnotes

* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

1 The parties are aware of the facts surrounding the transports of sham cocaine and the evidence presented at trial. We will refer to this evidence only as it becomes relevant below. For a full rendition of the evidence presented at trial, see Doc. 291, at 11–29.

2 Howell testified to the following information based on Sandy Springs Police Department's interviews of Chulpayev.

3 White and Bradford were under FBI investigation at this point for drug trafficking. Jackson served as the case agent on this investigation, and Officer Tyson was undercover for this investigation.

4 After spending two years in jail, Chulpayev won a motion to suppress certain statements he made regarding Vernell's murder. *State v. Chulpayev*, 296 Ga. 764, 770 S.E.2d 808 (2015). He then pleaded guilty to a lesser charge and was released.

5 Defendants also give the example of when the jury heard a recording of Bryant saying he had "been in this thing together" (assumedly with McLendon) since they were eight years old. Doc. 145, at 44. At trial, the Government asked Jackson what he understood by that comment. Describing this moment, Defendants now state that "Agent Jackson thereby turned 'this thing' into cocaine trafficking...." Op. Br. at 12. Defendants must not understand that we, too, read the record, which reveals Agent Jackson did *not* "turn[ ] 'this thing' into cocaine trafficking." *Id.* Rather, Agent Jackson testified he understood it to mean, "Just that they were partners. They've just been together since they were eight years old, just partners, family." Doc. 145, at 44. When pressed further, Jackson said, "I just understood it to mean they were partners. I mean, they were just in it together." *Id.* Absent from Jackson's answers is any mention of drugs, let alone "cocaine trafficking."

6 Defendants state that in this conversation, Jackson never "impl[ied] that he or his Club Dolce were involved in the Maryland drug trafficking." Op. Br. at 7. This statement is only correct insofar as Jackson did not mention the state of Maryland—a fact of no consequence. The statement is otherwise incorrect, as Jackson did not only imply he was involved in drug trafficking, he *stated* he was involved and needed help escorting the drugs.

7 Agent Fowler—the case agent who came up with the plan—testified at the hearing on the motion for a new trial that the plan all along was to "move the drugs through the club" and that money laundering was never a part of the plan. Doc. 257, at 137–39.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-20276-CR-MORENO
(Civil Case No. 16-20664-CV-MORENO)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OCTAVIUS MCCLENDON,
Defendant.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION AND DENYING MOTION FOR NEW TRIAL

THIS CAUSE came before the Court upon defendant's motion for new trial **[D.E. #187]** and the Court being fully advised in the premises, it is

ORDERED and ADJUDGED that the Court **ADOPTS** the Report and Recommendation of Magistrate Judge O'Sullivan **[D.E. #291]** and after a De Novo Review, the motion for new trial is **DENIED.**

DONE and ORDERED in Miami-Dade County Florida this 16th day of December, 2016.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

All counsel of record

2016 WL 8732411
Only the Westlaw citation
is currently available.
United States District Court, S.D. Florida.

UNITED STATES of America, Plaintiff,
v.
Henry Lee BRYANT, Daniel Mack
and Octavius McLendon, Defendants.

Case No. 12 cr 20276
MORENO/O'SULLIVAN
|
Signed 10/27/2016

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

JOHN J. O'SULLIVAN, UNITED STATES MAGISTRATE JUDGE

***1** THIS MATTER is before the Court on Defendant Henry Lee Bryant's Rule 33 Motion for New Trial Based on Newly Discovered Evidence with Incorporated Memorandum of Law, and Motions for Full Discovery, for an Evidentiary Hearing, and to Adopt the Corresponding Motions Filed or to Be Filed by and on Behalf of Codefendants Mack & McLendon (DE# 181, 10/8/15) (hereinafter "Bryant's Motion for New Trial"), Defendant Daniel Mack's Motion for New Trial Pursuant to Fed. R. Crim. P. Rule 33 and Brady v. Maryland, 373 U.S. 83 (1963), and Request for Hearing (DE# 182, 10/8/15) (hereinafter "Mack's Motion for New Trial") and Defendant McLendon's Motion for New Trial and an Evidentiary Hearing and Supporting Memorandum of Law (DE# 187, 10/13/15) (hereinafter "McLendon's Motion for New Trial").[1]

Having reviewed the parties' filings and having conducted an evidentiary hearing on May 31, 2016 and June 2, 2016, the undersigned RESPECTFULLY RECOMMENDS that Bryant's Motion for New Trial (DE# 181, 10/8/15) and McLendon's Motion for New Trial (DE# 187, 10/13/15) be **DENIED** and that Mack's Motion for New Trial be **GRANTED** for the reasons set forth below.

BACKGROUND

A. The Defendants' Convictions

Henry Lee Bryant, Daniel Mack and Octavius McLendon were charged with conspiracy to possess with intent to distribute cocaine in violation of Title 21, United States Code, Section 846 (Count 1); two counts of attempting to possess with intent to distribute cocaine in violation of Title 21, United States Code, Section 846 (Counts 2 and 3) and possession of a firearm during and in relation to a drug trafficking crime in violation of Title 21, United States Code, Section 924(a)(1)(A) and 2 (Count 4). See Superseding Indictment (DE# 38, 6/29/12). The trial in this case began on October 2, 2012 and continued through October 10, 2012. During the trial, the government presented the testimony of FBI Special Agent Dante Jackson (hereinafter "Agent Jackson")

and Baltimore Police Detective KayTee Tyson, among other witnesses.

On October 10, 2012, the jury returned guilty verdicts against Mr. Bryant and Mr. McLendon on all charges. See Judgments in a Criminal Case (DE# 121, 123, 12/21/12). Mr. Mack was convicted of all charges except one count of attempting to possess with intent to distribute cocaine. See Judgment in a Criminal Case (DE# 122, 12/21/12).[2]

B. The Appeal

The defendants appealed their convictions. Mr. Bryant also appealed his sentence. On July 24, 2014, the Eleventh Circuit affirmed the defendants' convictions and Mr. Bryant's sentence. See United States v. Mack, 572 Fed.Appx. 910 (11th Cir. 2014). The Eleventh Circuit found that there was sufficient evidence to support the defendants' convictions for the drug charges and the firearm charges.[3]

***2** In addressing the drug charges, the Eleventh Circuit considered "the sufficiency of the evidence that Defendants knew that the transaction involved drugs." Id. at 917. With respect to Mr. Bryant, the Eleventh Circuit stated that:

> **The record is rife with evidence of Bryant's knowledge that the contents of the cargo consisted of drugs**. On December 9, 2011, Agent Jackson told Bryant "it's **ten keys** ..., I mean that's what gonna be moving." Bryant responded, "okay." Jackson repeated himself, to be clear that Bryant understood, "[j]ust so you know. Uh, its **ten kilo's**." Bryant again said, "okay." Bryant acknowledged that moving the drugs was "a huge risk" and that the police he had recruited to do the job "usually get paid four, five gran' a piece."
>
> Later in the conversation, Agent Jackson stated, "it's not a incre-, incredible amount of **cocaine**, I mean so it ain't a ton. Know what I mean?" Bryant replied, "I understand, I understand." Jackson also said that "**cocaine prices isn't what it used to be** ...." Bryant hung up when Jackson, on one occasion, referred to the **"coke"** during a telephone conversation with him, and later chided Jackson for using that term on the telephone. Bryant suggested that Agent Jackson could use many other terms to refer to cocaine. **There can be no doubt that Bryant knew exactly what he had agreed to transport**. Thus, his conviction on the drug charges must be upheld.

Id. at 917-18 (emphasis added; footnote omitted).[4]

As to Mr. McLendon, the Eleventh Circuit stated that:

> **The evidence is ample with respect to McLendon's knowledge that the offense involved drugs**. Bryant stated to Agent Jackson that McLendon would serve as his "point man" to the police officers on the transaction and that he and McLendon have been "in this thing" since they were children.
>
> In addition, McLendon's knowledge of the drugs is supported by independent evidence. McLendon was present at the nightclub office on December 21, 2011 when Det. Tyson marked each of the nine brick-shaped items, counted them, and placed them in a

> duffel bag. Det. Tyson then handed the bag to McLendon and told him that "there's nine in there" and that "[they] need[ed] to make sure all nine of these get there."
>
> McLendon contends that he was not told what was contained in the "opaque, brick-shaped, shrink-wrapped items that were placed in a duffel bag by the undercover agents and given to him and Bryant to transport." But **Det. Tyson instructed both Bryant and McLendon that there can be "no deviation, no test, no taste" and asked "neither one of y'all get high right?"**
>
> McLendon points out that Det. Tyson himself told McLendon and Bryant that they were transporting money, not drugs, by making the statement "cause this money, see what I'm saying?" However, that statement was made immediately after Tyson had counted the nine brick-like objects and after he had handed the bag to McLendon, cautioning him that they needed to make sure the cargo reaches its destination intact. Thus, this statement is consistent with Tyson's testimony that he sought to communicate to McLendon and Bryant that the nine kilograms of cocaine were worth a lot of money to him. In sum, **the evidence in the record fully sustains McLendon's conviction on the drug charges**.

***3** Mack, 572 Fed.Appx. at 918-19 (emphasis added).

Finally, with respect to Mr. Mack, the Eleventh Circuit acknowledged that "the evidence of Mack's knowledge of the drugs [wa]s not overwhelming." Mack, 572 Fed.Appx. at 919. Nonetheless, the Eleventh Circuit determined that there was sufficient evidence to support Mr. Mack's conviction on the drug charges. Id. Specifically, the Eleventh Circuit noted that Mr. Mack arrived at a meeting on January 14, 2012 wearing his full police uniform, but no name tag, and had a visible weapon in its holster. Id. Approximately two hours later, FBI agents observed Mr. Mack's marked police vehicle closely following the vehicle Mr. Bryant and Mr. McLendon were using to transport the sham cocaine. Id. The Eleventh Circuit noted that it "ha[s] held that [a defendant's] 'repeated presence at the scene of the drug trafficking ... can give rise to a permissible inference of participation in the conspiracy' " and that "[a]lthough 'mere presence,' standing alone, is insufficient to support a conviction for a drug-related offense, it is 'a material and probative factor' that may be considered by the jury in reaching the verdict." Id. (citing United States v. Calderon, 127 F.3d 1314, 1326 (11th Cir. 1997) and United States v. Baptista-Rodriguez, 17 F.3d 1354, 1374 (11th Cir. 1994)). The Eleventh Circuit stated that "Mack's presence extend[ed] not only to his participation in the January 14, 2012 meeting, but to his subsequent escort of the drugs later that day." Mack, 572 Fed.Appx. at 919. The Eleventh Circuit further stated that "the record reflect[ed] additional proved circumstances that support the inference of Mack's guilty knowledge" and cited a conversation between Mr. Mack and Agent Jackson during the January 14, 2012 meeting:

> The undercover agents told Mack that, as a result of the police officer layoffs, they would be able to do more business in Miami and would "get rich" because Miami would be "wide open." Agent Jackson then confided in Mack that Miami was "new territory" for him and Tyson, and that they

> had "this many t-shirts coming through you know what I mean, we just want to make sure everything is right you know what I mean." Mack stated that he understood and respected that.

Id. at 920. The Eleventh Circuit noted "[a]lthough Mack did not say much during the meeting, '[a]n illegal agreement may be inferred from the conspirators' conduct and other circumstantial evidence.' " Id. (quoting Baptista-Rodriguez, 17 F.3d at 1374).

The Eleventh Circuit rejected Mr. Mack's "conten[tion] that there [wa]s no direct evidence of his knowledge that 't-shirts' [wa]s one of the many code words for drugs," noting that "Agent Jackson, who [wa]s an agent on the drug squad, testified that 't-shirts' was a very common word for cocaine 'not just [in] Atlanta, ... but everywhere'; it was also a term [Agent Jackson] had used with Bryant in reference to the drugs involved in this case." Id. at 920. The Eleventh Circuit reasoned that:

> In light of Mack's 16-year experience on the Miami-Dade police force, the jury could reasonably have inferred that Mack knew exactly what Jackson was referring to and that he knew that the indubitably criminal activity in which he was about to participate involved drugs.
>
> ***4** Finally, Bryant made numerous statements to the undercover agents assuring them that Mack knew everything. These statements likely bolstered the government's case against Mack on the drug charges. However, they are not necessary to sustain a guilty verdict. Even absent these statements, the cumulative effect of the circumstantial evidence discussed above is sufficient to show Mack's knowledge of the drugs. Accordingly, taken in the light most favorable to the verdict, we cannot say that the record reveals a lack of substantial evidence from which a factfinder could find guilt beyond a reasonable doubt.

Id. at 920-21 (footnotes omitted).

The Eleventh Circuit also determined that there was sufficient evidence to support the firearm charge (Count 4). "The jury found Mack guilty of carrying a firearm during and in relation to the drug trafficking crime, in violation of 18 U.S.C. § 924(c)" and "Bryant and McLendon were found guilty of possessing a firearm in furtherance of the drug trafficking crime, in violation of 18 U.S.C. §§ 924(c) and 2." Mack, 572 Fed.Appx. at 921. With respect to Mr. Mack, the Eleventh Circuit noted that:

> It [wa]s undisputed that Mack was carrying his firearm approximately two hours before the actual drug transportation. He knew of the illegal nature of the conspiracy, and he understood that his police officer status was a necessary condition to his participation in the deal. In light of this evidence, it was reasonable for the jury to conclude that Mack carried a firearm in relation to the drug trafficking conspiracy.

Id. at 922. As to Mr. Bryant and Mr. McLendon, the Eleventh Circuit concluded that there was sufficient evidence to support their guilty verdicts for aiding and abetting in Mr. Mack's section 924(c) firearm offense. Id. at 924-25.

During the pendency of the appeal, the government disclosed to the defendants that Agent Jackson was under investigation for allegations arising out of his relationship with a former FBI confidential source. The former

source was later identified as Mani Chulpayev. There is no record evidence that the case agent was aware of Agent Jackson's misconduct[5] prior to trial. The parties have stipulated that the two Assistant United States Attorneys who prosecuted the case were also unaware of Agent Jackson's misconduct prior to trial.

C. The Instant Motions for New Trial

On October 8, 2015, Mr. Bryant and Mr. Mack filed motions for new trial. See Bryant's Motion for New Trial (DE# 181, 10/8/15); Mack's Motion for New Trial (DE# 182, 10/8/15). On October 13, 2016, Mr. McLendon also filed a motion for new trial. See McLendon's Motion for New Trial (DE# 187, 10/13/15).

On November 2, 2015, the government filed an omnibus response to the defendants' motions for new trial. See United States' Omnibus Response to New Trial Motions Filed by Defendants Bryant [D.E. 181], Mack [D.E. 182], and McLendon [D.E. 187] (DE# 191, 11/2/15) (hereinafter "Government's Omnibus Response").[6] The defendants filed replies to the Government's Omnibus Response on November 16, 2015. See Defendant Henry Lee Bryant's Reply to the Government's Omnibus Response to the Motions for New Trial (DE# 195, 11/16/15) (hereinafter "Bryant's Reply"); Defendant Mack's Reply to United States' Omnibus Response to New Trial Motions [DE191] (DE# 194, 11/16/15) (hereinafter "Mack's Reply"); Defendant McLendon's Reply to Response to Motion for New Trial, Discovery, and Evidentiary Hearing (DE# 196, 11/15/16) (hereinafter "McLendon's Reply"). On January 11, 2016, the government filed a Notice of Filing Supplemental Authority (DE# 202, 1/11/2016).

***5** On May 31, 2016 and June 2, 2016, the Court held an evidentiary hearing. The defendants called Baltimore Police Detective KayTee Tyson (hereinafter "Detective Tyson"), FBI Special Agent Matthew Fowler (hereinafter "Case Agent Fowler") and Department of Justice Office of Inspector General Special Agent Susan Howell (hereinafter "Agent Howell") as witnesses. See Transcripts (DE# 257, 6/7/16; DE# 268, 6/22/16).[7]

Following the evidentiary hearing, the Court allowed the parties to file supplemental briefs. On June 30, 2016, Mr. Mack filed a Memorandum of Law in Support of Defendant Daniel Mack's Motion for New Trial and Motion to Vacate (DE# 272, 6/30/15) (hereinafter "Mack's Supplemental Memorandum"). Mr. McLendon filed his post-hearing memorandum on July 1, 2016. See Defendant McLendon's Supplemental Memorandum of Law (DE# 276, 7/1/16) (hereinafter "McLendon's Supplemental Memorandum"). On July 2, 2016, Mr. Bryant filed his supplemental memorandum. See Defendant Bryant's Supplemental Memorandum in Support of his Rule 33 Motion for a New Trial (DE# 277, 7/2/16) (hereinafter "Bryant's Supplemental Memorandum").

The government filed its supplemental memorandum on July 25, 2015. See United States' Supplemental Memorandum of Law in Opposition to Defendant's Motions for New Trial (DE# 281, 7/25/15) (hereinafter

"Government's Supplemental Memorandum"). Mr. Mack and Mr. McLendon filed their supplemental replies on September 6, 2016. See Defendant Mack's Reply to United States' Supplemental Memorandum of Law (DE# 289, 9/6/16) (hereinafter "Mack's Supplemental Reply"); Defendant McLendon's Reply to Government's Response to Defendants' Supplemental Memoranda of Law (DE# 290, 9/6/16) (hereinafter "McLendon's Supplemental Reply"). Mr. Bryant did not file a supplemental reply. This matter is ripe for adjudication.

FACTS

A. The Criminal Investigation

Haim Turgman was the owner of Club Dolce, a Miami Beach nightclub. In the summer of 2011, Mr. Turgman complained to the FBI about numerous Miami Beach code enforcement inspectors who were demanding payment in exchange for overlooking code violations. Based on Mr. Turgman's assertions, the FBI began an investigation into the allegations of extortion by these code enforcement inspectors. As part of its investigation, the FBI took over the operation of Club Dolce. The FBI used an undercover employee, Agent Jackson, to pose as the manager of the nightclub and make bribe payments to the corrupt code enforcement inspectors. Mr. Bryant, a fire inspector, was one of the code enforcement inspectors who had been extorting money from Club Dolce.[8]

At some point, the FBI changed the focus of its investigation from an extortion investigation to a narcotics investigation. The decision to change the focus of the investigation was made by Case Agent Fowler and other Miami agents. It was not made by Agent Jackson.

***6** The FBI's investigation included telephone records, recorded telephone calls, audio and visual recordings of meetings at Agent Jackson's office in Club Dolce,[9] meetings at restaurants and surveillance of the transport of sham cocaine on two occasions. The substance of these meetings is discussed below in the summary of the evidence presented at trial. The FBI's investigation concluded in late January 2012.

There is no record evidence that Mani Chulpayev was involved in the investigation or prosecution of Mr. Bryant, Mr. McLendon and Mr. Mack. Additionally, there is no record evidence of Agent Jackson's misconduct prior to the conclusion of the investigation in late January 2012.[10]

B. The Evidence Presented at Trial

On December 2, 2011, Agent Jackson had a meeting with Mr. Bryant at Club Dolce. The audio/visual equipment failed to record that meeting.

On December 4, 2011, Agent Jackson had a follow up meeting with Mr. Bryant at Club Dolce. The December 4, 2011 meeting was audio/visually recorded.[11] During this meeting Mr. Bryant reported that he had recruited police officers to provide assistance, stating: "I got four and they said that they could give whoever I need. They all county guys. Plus, I got two Beach guys." Trial Transcript (DE# 145 at 17-18, 1/14/13).

On December 9, 2011, Agent Jackson and Mr. Bryant met at Club Dolce. During this meeting, Mr. Bryant told Agent Jackson that he had two police officers who would provide security for the transportation of drugs. See Government's Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 5-6.[12] Mr. Bryant stated that his "brother," meaning Mr. McLendon, would be involved. Id. at 5-6, 10-11. Specifically, Mr. Bryant stated that Mr. McLendon was "gonna ride with me. He's gonna be pickin' up the bag, with me." Id. at 10. Mr. Bryant further stated that Mr. McLendon was "being sort of the escort guy for" Mr. Bryant because he and Mr. McLendon had "worked it out many times before and that[was] the easiest way." Id. at 11.

During this meeting, Agent Jackson used the words "keys" and "kilos" to refer to the drugs being transported:

> [Agent Jackson]: Exactly, I wanted, that's kind of why I wanted to meet your guys, and make sure every, cause we've done this before in Vegas, and we had some sh*t pop off because what we found out was, the guy we were payin' wasn't payin' his guys properly. And then [SC][13]
>
> [Henry Bryant]: Well see, that, we had already discussed, my guys had already discussed that part [SC]
>
> ***7** [Agent Jackson]: Well, what, what, how, what's the going, what's the going rate here? I mean, what are they, kind of, what are they, what, what kind of numbers are they throwin' out to you, and we can kind of figure out what's what. **Cause right now it's ten keys [PH], I mean that's what's gonna be moving**.
>
> [Henry Bryant]: Okay.
>
> [Agent Jackson]: Just so you know. Uh, **it's ten kilo's**.
>
> [Henry Bryant]: **Okay**.
>
> [Agent Jackson]: **Uh, that's what's gonna be movin.'**
>
> [Henry Bryant]: **Okay.**

Government's Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 7-8 (emphasis and footnote added). Agent Jackson also referred to the drugs as cocaine:

> [Agent Jackson]: Now, now, let me, right now we're only dealing with **ten keys** [PH].
>
> [Henry Bryant]: Okay.
>
> [Agent Jackson]: So um, it's not a incre-, incredible amount of **cocaine**, I mean so it ain't a ton. Know what I mean?
>
> [Henry Bryant]: I understand, I understand.

Id. at 20. (emphasis added).

In explaining why he was offering to pay the officers $3,500 each, Agent Jackson cited a downturn in cocaine prices:

> [Agent Jackson]: So, and, and the amount of money on **cocaine** prices isn't what it used to be as far as you know, [SC]
>
> [Henry Bryant]: Yeah.
>
> [Agent Jackson] ... making up the difference and all that, so. My guys gotta be ... you know what I'm sayin?' Cause, I got to pay you, I got to pay the two runners, you know, before

> it's over with, you know, we twelve, twelve out [of] the whole and we only makin' cer- a certain amount of profit. You know what I mean? So, I'm not tryin,' tryin,' to short change you or anythin' but I want you to, you to get taken' and I want those two guys, you orchestrated the whole thing, you know what I mean?
>
> [Henry Bryant]: Right.

Government's Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 21-22 (emphasis added). Mr. Bryant told Agent Jackson that his "brother" (Mr. McLendon) would receive half of what Mr. Bryant was paid and stated:

> because that's why I told him, I said listen your takin' just as much with your ass on the line as I am ... And I said, you got just as much to lose as I do ... I said, but you know, like I said, we've been in this thing together for, since we've been eight years old.

Id. at 22. Agent Jackson offered Mr. Bryant $4,000 to split with Mr. McLendon. Id. at 23.

On December 10, 2011, Agent Jackson called Mr. Bryant. See Government's Exhibit 53 at Tab D, Transcript of 12/10/11 Phone Call at 2. During this phone call, Agent Jackson used the word "dope" and Mr. Bryant abruptly hung up on him.

On December 15, 2011, Mr. Bryant met with Agent Jackson at Club Dolce and expressed concern that their conversations could be overheard by law enforcement:

> [Henry Bryant]: Okay. The reason why I'm asking you stupid questions because I'm trying to figure out okay most of the time when we have conversation[s], you know, when you're in this type of field you don't have straight out conversations.
>
> [Agent Jackson]: Mhm.
>
> [Henry Bryant]: The reason why that is because everybody knows that you can be almost bugged anywhere and the problem with that is that if you picked up, if you picked up a bug you know any little word that you say can be conscruted [sic] as conspiracy, can be conscruted [sic] as ok well this is one of the players with regard to major, minor whatever the case may be and then that's when you pick up tails. You know.
>
> ***8** [Agent Jackson]: Mhm.
>
> [Henry Bryant]: That's why you got a dial tone.

Government's Exhibit 53 at Tab E, Transcript of 12/15/11 Meeting at 3.

Mr. Bryant explained that the reason he hung up on Agent Jackson was because of the word Agent Jackson had used:

> [Henry Bryant]: Well, well the, the word the word that you caused to trigger the hang up on was the Coca Cola word.
>
> [Agent Jackson]: Oh okay.
>
> [Henry Bryant]: And you said it outright and I'm like what the f**k?
>
> [Agent Jackson]: I said that, outright?
>
> [Henry Bryant]: Yeah and I was like what the f**k is he thinking?
>
> [Agent Jackson]: Cause usually I say t-shirts or

> [Henry Bryant]: No, you, no
>
> [Agent Jackson]: I said it, said it straight out?
>
> [Henry Bryant]: Straight out and that's why you got the dial tone.

Government's Exhibit 53 at Tab E, Transcript of 12/15/11 Meeting at 4. During this exchange, Agent Jackson told Mr. Bryant that he usually used the word "t-shirts." Id. Agent Jackson was the only person who testified at trial that the word "t-shirts" was a code word for cocaine.

Detective KayTee Tyson was brought into the investigation as an undercover agent.[14] He played the role of a drug dealer from the Northeast who was the owner of the drugs that would be transported from Club Dolce. On December 21, 2011, Agent Jackson met Mr. Bryant at a restaurant in Miami Beach. During this meeting, Agent Jackson introduced Detective Tyson to Mr. Bryant.

Later that day, Mr. Bryant arrived at Agent Jackson's office in Club Dolce with Mr. McLendon. The purpose of this meeting was for Mr. Bryant and Mr. McLendon to pick up the sham cocaine which they would be delivering to a parked car in the Aventura Mall parking lot. During this meeting, Mr. McLendon expressed concern about using a route which would require them to pass through a SunPass tollbooth:

> [Mr. McLendon]: This right there is uh what you call that sh*t? Sunpass.
>
> [Agent Jackson]: Right.
>
> [Mr. McLendon]: Don't want that.
>
> [Henry Bryant]: Cause it takes pictures.
>
> [Mr. McLendon]: So, the best way is Collins [Avenue].

Government's Exhibit 53 at Tab F, Transcript of 12/21/11 Meeting at 9.

During this meeting, the following exchange took place:

> [Detective Tyson]: **We need to make sure that all nine of these get there**.
>
> [Henry Bryant]: Don't worry about that. Do what you do.
>
> [Detective Tyson]: Yeah I know you['re] saying don't worry about that but I got to be worried about that.
>
> [Henry Bryant]: (SC) I understand but ... you gonna be right behind me so don't worry ... about it ...
>
> [Detective Tyson]: Cause **this money** see what am saying ...
>
> [Henry Bryant]: I understand, I understand, I understand. (Pause) I have no problem with that ...

Government's Exhibit 53 at Tab G, Transcript of 12/21/11 Meeting at 10 (emphasis added). At trial Detective Tyson explained that when he stated "[w]e need to make sure that all nine of these get there," he was talking about that nine kilograms of cocaine. See Trial Transcript (DE# 145 at 194, 1/14/13). He explained his "this money" comment as follows:

> ***9** What I'm implying that this is money, meaning that these nine kilograms of cocaine is worth a lot of money to me. So I need to

> make sure that when I'm giving them to you, that they need to get there. No ifs, ands, or buts about it. If you're telling me that you can do it, you need to be able to go through with it.

Id. Detective Tyson testified that nine kilograms of cocaine was worth approximately $300,000. Id.

Detective Tyson proceeded to mark the nine "bricks"[15] of sham cocaine with a marker and handed each one to Agent Jackson to place in a duffel bag resting on top of a desk.[16] This handoff took place in Mr. Bryant and Mr. McLendon's presence. See Government's Exhibit 9 at Clip 2 (Video Clip).

Detective Tyson told Mr. Bryant and Mr. McLendon that the bricks needed to arrive at their destination exactly as they were packaged: "How they how they are now, I need to get a phone call later that's how they need to be when they pick em up." Government's Exhibit 53 at Tab G, Transcript of 12/21/11 Meeting at 11. Mr. Bryant and Mr. McLendon then moved towards the desk where the duffel bag was resting so they could get a closer look at the bricks inside the duffel bag. Mr. McLendon stated, "Come in here for a second, I want you all to see how they is so I know exactly. We were here, we're here to do our job that's it." Government's Exhibit 53 at Tab G, Transcript of 12/21/11 Meeting at 11; Government's Exhibit 9 at Clip 2, (Video Clip).

***10** Detective Tyson again emphasized to Mr. Bryant and Mr. McLendon that he wanted the bricks to arrive exactly as they were packaged:

> [Detective Tyson]: So how they are now that's how they got to be.
>
> [Octavius McLendon]: That's how they will be[.]
>
> [Detective Tyson]: **No deviation, no taste, neither one of y'all get high right?**
>
> [Octavius McLendon]: **Pstt.**
>
> [Detective Tyson]: **Alright just saying you, I gotta ask that question.**

Government's Exhibit 53 at Tab G, Transcript of 12/21/11 Meeting at 11 (emphasis added). Agent Jackson then handed the duffel bag to Mr. Bryant. See Government's Exhibit 9 at Clip 2, (Video Clip). Mr. Bryant and Mr. McLendon left Agent Jackson's office with the duffel bag.

At trial Detective Tyson explained why he asked Mr. Bryant and Mr. McLendon if either of them "get high:"

> That question was for, to make sure that —I didn't want a person that gets high to transport my drugs for me, because at that point they could decide to go in, take some more, test it for themselves to see what it was, if it was good, if it wasn't.
>
> So I wanted to make sure that, look, I'm telling you already not to go into them. So I'm making sure now, you don't get high, so it won't be no discrepancy with or any problems with getting to the point they need to get to.

Trial Transcript (DE# 145 at 196, 1/14/13). Detective Tyson testified that Mr. Bryant and Mr. McLendon "were like insulted" by that question. Id.

At approximately 7:38 PM on December 21, 2011, Mr. Bryant and Mr. McLendon returned to Agent Jackson's office at Club Dolce. See Government's Exhibit 9 at Clip 3, (Video Clip). Detective Tyson tossed to Mr. Bryant bundles of cash totaling $10,500. Id.; see also Trial Testimony (DE# 145 at 198, 1/14/13). Mr. Bryant and Mr. Tyson counted the money in Agent Jackson's office. See Government's Exhibit 9 at Clip 3, (Video Clip).

The police car that assisted Mr. Bryant and Mr. McLendon in making the December 21, 2011 delivery was assigned vehicle number 1929A. This was the same vehicle number that was assigned to Mr. Mack's police car. See Government's Exhibit 33, Trial Transcript (DE# 145 at 184, 1/14/13). Mr. Bryant and Mr. Mack exchanged text messages and met up on December 21, 2011. See Government's Exhibit 35d, Metro PCS Subscriber Information.[17]

On the morning of January 14, 2012, Agent Jackson, Detective Tyson and Mr. Bryant were outside a restaurant. This was the first time that Agent Jackson and Detective Tyson would be meeting Mr. Mack. While they were waiting for Mr. Mack to arrive, the following exchange took place between Agent Jackson and Mr. Bryant:

> [Agent Jackson]: So, what's the, what's the story? So we can get this thing moving?
>
> [Henry Bryant]: Well, I'm ready to go. He'll be here in two minutes.
>
> [Agent Jackson]: Alright, so what you was talking about? Cause we can talk now, you know. On the phone you was saying something about.
>
> [Henry Bryant]: **What, what I'm saying is, is that, he knows exactly what we're doing. So, so there's no secrets to him.**
>
> ***11** [Agent Jackson]: Okay.
>
> [Henry Bryant]: **You know, the only thing about it is, is that, his thing of it is that, the, the less he knows, the better off he is.**
>
> [Agent Jackson]: Right, right, right.

Government's Exhibit 53 at Tab I, Transcript of 1/14/12 Meeting at 5 (emphasis added). Agent Jackson expressed concern about whether Mr. Mack knew what was going on and Mr. Bryant assured Agent Jackson that Mr. Mack was aware:

> [Henry Bryant]: So, he's only a minute away, oh I was gonna say, what the f*ck I do with my phone.
>
> [Agent Jackson]: Yeah cause you had me a little worried when you was, like ...
>
> [Henry Bryant]: No, no, no, no. But, ...
>
> [Agent Jackson]: ... you was like, ...
>
> [Henry Bryant]: ... I'm not gonna sit there and talk in front of LEOs
>
> [Agent Jackson]: you know no, no, no. You was like, he do, but he don't know. That's all I was ...
>
> [Henry Bryant]: No, no, no, no, he, **he knows about it**.
>
> [Agent Jackson]: Oh.

[Henry Bryant]: But, like I said, the less ... Government's Exhibit 53 at Tab I, Transcript of 1/14/12 Meeting at 7-8 (emphasis added).

Mr. Mack arrived in his police car (vehicle number 1929A). He wore his full police uniform but no name tag. See Trial Transcript (DE# 145 at 206, 1/14/13). Mr. Bryant introduced Mr. Mack using the pseudonym "James." Id. Mr. Mack was wearing his sidearm. Id.

The restaurant was crowded that morning and so they moved their meeting to another restaurant. See Trial Transcript (DE# 145 at 207, 1/14/13). Detective Tyson and Mr. Bryant rode together to the second restaurant. Id. at 207-208. During the car ride, Mr. Bryant expressed concern to Detective Tyson about the December 10, 2011 phone call when Agent Jackson used the word "dope." Government's Exhibit 53 at Tab J, Transcript of 1/14/12 Meeting at 9-10. Mr. Bryant also relayed to Detective Tyson his past experience: "Well, what, what I'm saying is, these guys, these guys used to move, we talkin' about **kiloton** .... You know what I'm saying? And, I've been doing this since I've been a f*cking shorty." Id. at 10 (emphasis added). Detective Tyson explained to the jury that Mr. Bryant meant, he'd moved a lot of cocaine and that he'd been doing this for a long time. See Trial Transcript (DE# 145 at 214, 1/14/13). During the car ride, Mr. Bryant also relayed to Detective Tyson, Mr. McLendon's role:

> You understand what I'm saying? And that's the reason why he's so important. The other part of that is, the reason why he's so important is, is because we're carrying, we're carrying not only weight, we're carrying weapons as well.... And I don't make that no secret. I tell 'em everywhere I go, just like my, my guys carry weapons. I got my weapons on me."

Government's Exhibit 53 at Tab J, Transcript of 1/14/12 Meeting at 12. Mr. Bryant also gave assurances to Detective Tyson that Mr. Mack knew what was going on:

> [Detective Tyson]: Well, like I said, **let's just you saying everybody knows, everybody knows because, you know, I can't take that risk that you say** ...
>
> [Henry Bryant]: **I understand. I understand**.
>
> [Detective Tyson]: **If this dude know but he don't know that he get there and like well, yo, I ain't down for that. And, then, he rolls out, then we jammed**. I ain't...
>
> ***12** [Henry Bryant]: **No, no**.
>
> [Detective Tyson]: ... I can't deal with you no more if that was that.
>
> [Henry Bryant]: Right. No. That's not, ha, **but that's why I brought my guys to meet you**.
>
> [Detective Tyson]: Okay. Alright.
>
> [Henry Bryant]: **You understand what I'm saying? 'Cause normally, my guys don't show faces at all. None of them**.
>
> [Detective Tyson]: Right, right.

[Henry Bryant]: **And this guy here has more to lose than anybody else, 'cause he's a sergeant**.[18]

[Detective Tyson]: Okay.

[Henry Bryant]: You understand? 'Cause he's got his guys up underneath him. **That's why I brought him, instead of the little guy. Because whatever I say to him, goes, period**.

[Detective Tyson]: Right.

[Henry Bryant]: **And he makes it happen. Just like last time he made it happen.**

[Detective Tyson]: Okay.

[Henry Bryant]: But, I, I said that, you know,

[Detective Tyson]: And that's, that's, you know, I mean, that's, the part of cause that's for you to work out.

[Henry Bryant]: Right.

[Detective Tyson]: **I just wanted make sure that they know**.

[Henry Bryant]: **They do know**. And, like I said...

[Detective Tyson]: That's what I'm saying.

[Henry Bryant]: ...**that's the reason why I'm telling you that they know and then you can talk to them to make sure he knows. 'Cause I don't have a problem with that**.

[Detective Tyson]: Alright, well tell ...

[Henry Bryant]: But, but, I wanted to make,

[Detective Tyson]: On my own, **they need to know exactly what it is because if you, if you got somebody that's coming that don't know and at the end, and at the end of the day, the Friday like I ain't come, I can't do. Everything is done. Now I'm, now I'm jammed up because now I'm looking at you sideways**.

[Henry Bryant]: **Right**.

[Detective Tyson]: **Because, oh, we bring somebody don't know**.

[Henry Bryant]: Right.

[Detective Tyson]: It's all supposed to be worked out. **I can't risk somebody not knowing and trying to show up then turn around and say, no, I can't do it**. Then, now, they know who I am.

[Henry Bryant]: Right. Well, that's ...

[Detective Tyson]: I can't, I can't have them know who I am.

[Henry Bryant]: ... that was ...

[Detective Tyson]: That was the whole, that was the whole thing where I like, yo,

[Henry Bryant]: ... that was...

[Detective Tyson]: ... I told him, say, yo, I need to know who these people are to make sure they on board for real.

Id. at 16-17 (emphasis and footnote added).

Agent Jackson, Detective Tyson, Mr. Bryant and Mr. Mack sat at a table at the second restaurant. At trial, Detective Tyson described the purpose of the meeting as follows:

> Q. Now, what was the purpose of this meeting?
>
> A. The purpose of this meeting was for Henry [Bryant] to introduce other members of his team, specifically law enforcement that will be escorting the drugs from our club to the drop car.
>
> Q. Why is it important for the drug dealers to meet the law enforcement?
>
> A. Well, for us in this situation, **in this role, it was important for me to meet him, well, because once I know that this guy knows exactly what he's doing, so if we get caught, he's just in trouble as we are**, but we needed that law enforcement's presence, so that if we would get pulled over or the car was to get pulled over, that they could intervene. You know, say they are doing something or they're doing some kind of investigation just to throw the regular cops off from stopping our vehicle.
>
> ***13** Q. And so based on your experience, when, if ever, would someone who's transporting cocaine on behalf of someone else invite a cop to a meeting with the people he's transporting cocaine for?
>
> A. Never, really.
>
> Q. **What would it indicate to you?**
>
> A. **That this cop, he's dirty**.

Trial Transcript (DE# 145 at 209, 1/14/13) (emphasis added).

During this meeting, Detective Tyson reiterated the importance of everyone having the same knowledge of the transaction:

> [Agent Jackson]: Yeah, so we appreciate you getting with us.
>
> [Daniel Mack]: Not a problem.
>
> [Agent Jackson]: **You know, what I'm saying, with things like they are you know, we gotta make sure, everybody good you know what I mean. So, you don't want you don't want no mistakes when you know things like this in order you know what I mean? Everybody gotta be move as one, you know what I mean**.
>
> [Daniel Mack]: **That's true**.
>
> [Agent Jackson]: So, **that's one of the main thing**, we just wanted...
>
> [Detective Tyson]: The thing, the thing is, that's my, that's my man that's my man of my man, alright? Can't have them go down without me, cause I'm the overseer. I'm a use the (UI) make sure the thing is straight. The reason **why I was stressing you know cause we gotta to make sure everybody is on the same, on the same point, on the same tuning**. **Because, if somebody get there and all of sudden decide to change their mind, I'm f*cked.** Ain't nothing going down. I ain't dealing with Yo, I'm cutting everybody off.
>
> [Daniel Mack]: **Right.**

[Detective Tyson]: **'Cause I can't risk that I'm coming down here, this suppose to be set up and everybody on point till somebody get there and they feeling a little shaky**, like, well, I don't wanna do this now, whatever. Well, then, they say, they gonna roll out, they roll out, I'm done and that's it. I can't deal with Yo, I ain't, I can't have him call (UI). I can't have him contact you no more because now, they know who I am. If we know all we all know each other. If that person decides to go somewhere else, that's like, yo, he, he plan on robbing me. He plan on taking something from me.

[Daniel Mack]: **You right**.

[Detective Tyson]: So, I can't get down like that. So, if you got somebody that ain't, that ain't gonna keep it hundred trying to roll the honey with, ain't nobody, ain't nothing going down. It ain't doing nothing. Ain't nothing ain't nobody making no moves. Ain't nobody making no money. It ain't nothin' happenin'. That's, that's just the bottom line. I, I, no, I ain't try to come off as more hard but, I got business I gotta do. You know what I mean?

[Daniel Mack]: I don't think it's hard, I think is firm. So, I'm not worried about that.

[Agent Jackson]: Yeah.

[Detective Tyson]: So that's, that's, that's the bottom line. If, if somebody ain't right, ain't nothing going down. Walk away nice to meet y'all. If y'all see me come through, don't give me no ticket.

(Laughter)

[Detective Tyson]: That's it, that's it, you know, no hard...

[Daniel Mack]: You got my one spot and you ain't gonna be riding in it.

(Laughter)

[Detective Tyson]: No, ain't no hard feelings. Government's Exhibit 53 at Tab K, Transcript of 1/14/12 Meeting at 23-24 (emphasis added).

Detective Tyson and Mr. Mack also discussed police officers in Miami being laid off. See Government's Exhibit 53 at Tab K, Transcript of 1/14/12 Meeting at 37-39. Mr. Mack told Detective Tyson and Agent Jackson that the police department was "slated to lose a hundred and fifty-four people at the end of the month" and that they were already down 600. Id. at 39. Detective Tyson stated, "[w]e ready to get rich," in response to the news that there were a significant number of police layoffs. Id. at 39. Detective further stated, "Nobody down here be working. We can, be here all the time." Id. Agent Jackson stated "It's gonna be wide open." Id.

***14** At trial, Detective Tyson explained his remarks as "[m]eaning that I was going back home to tell my boss that, look, all the drugs, whatever we need to move through here, we good to go. Police getting laid off down here." Trial Transcript (DE# 145 at 220, 1/14/13).

Detective Jackson walked out of the restaurant with Mr. Mack and the following conversation took place:

> [Agent Jackson]: You know what I'm saying, trying to make it work and you know, if you don't like the way something going or you know, let us know cause **this new territory for us** you know.
>
> [Daniel Mack]: Okay.
>
> [Agent Jackson]: So, you know, we got this many, this many **t-shirts** coming through you know what I mean, we just want to **make sure everything is right you know what I mean**.
>
> [Daniel Mack]: I don't hate, so that's why I respect and understand everything that he mentioned.
>
> [Agent Jackson]: Right, cause ain't nobody trying to get locked up you know what I mean, you hear me.
>
> [Daniel Mack]: You know how they do us.
>
> [Agent Jackson]: ... You hear me[.]
>
> [Daniel Mack]: ... They do (UI)
>
> [Agent Jackson]: Hey, hey, hey, it ain't gonna be no question, you know what I mean, they gonna do us bad, you know what I mean, like "you got how many on you?"
>
> [Daniel Mack]: You right. Be safe to you man.

Government's Exhibit 53 at Tab L, Transcript of 1/14/12 Meeting at 61 (emphasis added).[19]

In the afternoon of January 14, 2012, Mr. Bryant and Mr. McLendon arrived at Agent Jackson's office in Club Dolce. See Government's Exhibit 13 at Clip 1 (Video Clip). Agent Jackson placed a duffel bag on his desk and proceeded to fill the duffel bag with ten "bricks" of sham cocaine in Mr. Bryant and Mr. McLendon's presence. Mr. McLendon counted the bricks and commented that he "appreciated the smaller [bag] size" because it had "[b]etter maneuverability, less attention getter too." Government's Exhibit 53 at Tab L, Transcript of 1/14/12 Meeting at 3. Agent Jackson handed the duffel bag containing the sham cocaine to Mr. McLendon. Mr. Bryant and Mr. McLendon confirmed their plans with Detective Tyson and Agent Jackson concerning where to deliver the duffel bag. See Government's Exhibit 13 at Clip 1 (Video Clip). Mr. Bryant and Mr. McLendon then left Agent Jackson's office. Id.

Surveillance photographs taken on January 14, 2012 show a marked police vehicle with the number 1929A painted on it (Mr. Mack's police vehicle) following Mr. Bryant and Mr. McLendon's car. See Government's Exhibit 39a-d. The duffel bag was delivered to a parked car in a parking lot on January 14, 2012. See Government's Exhibit 20a-d. Mr. Bryant and Mr. McLendon then returned to Club Dolce to collect a cash payment for the delivery of the sham cocaine. See Government's Exhibit 13 at Clips 2 and 3 (Video Clips).

C. The DOJ-OIG's Investigation of Agent Jackson

***15** In April 2013, the Department of Justice Office of Inspector General ("DOJ-OIG") began its investigation of Agent Jackson.[20] As part of its investigation, DOJ-OIG obtained documents and interviewed witnesses. The focus of the DOJ-OIG investigation was Agent

Jackson's improper relationship with former FBI registered source Mani Chulpayev. The relevant time frame of the investigation was from January 2012 through April 2013.[21]

Mr. Chulpayev was a Russian mobster based in New York. In the late 1990s, he was arrested for crimes he committed in New York. Mr. Chulpayev was convicted and sentenced to a term of imprisonment. He cooperated with the government and, for a time, was an FBI source.

In the mid-2000s, while serving as an FBI source, Mr. Chulpayev was involved in vehicle-related crimes, including stolen vehicles, vehicle identification number ("VIN") fraud and subleasing. He was convicted and served a term of imprisonment.

In January 2010, Mr. Chulpayev became a registered source for the FBI in Atlanta. He remained a registered source until February 3, 2011.[22] During this time, Agent Jackson became Mr. Chulpayev's handler.

Mr. Chulpayev owned a luxury car rental business. Agent Jackson learned that, from time to time, Mr. Chulpayev would get in trouble with the local police because someone was either stopped in one of Mr. Chulpayev's cars or there was an issue related to the car's registration or VIN number.

1. Agent Jackson's Investigation of Decensae White and Gary Bradford

In 2012, Agent Jackson was the case agent in an undercover narcotics investigation targeting suspected drug traffickers Decensae White and Gary Bradford. Mr. Chulpayev was assisting Agent Jackson with the undercover investigation. Mr. White was an associate of Mr. Chulpayev and had invested approximately $150,000 to $160,000 into Mr. Chulpayev's business.

The narcotics investigation originated out of Atlanta, but a meeting with Mr. White and Mr. Bradford was scheduled for Memorial Day weekend in Miami. Prior to traveling to Miami, Agent Jackson had prepared a memorandum to the FBI field office in Miami advising that he would be traveling to Miami. The memorandum stated that there would be an undercover agent involved in the investigation. It also stated that there was a source or a confidential source who would be making introductions. The memorandum did not identify the source by name. By that time, Mr. Chulpayev had not been a registered source for the FBI in over a year.

Detective KayTee Tyson was the undercover agent who participated in the investigation. Detective Tyson was playing the undercover role of a drug dealer. Detective Tyson flew to Miami to attend the Memorial Day weekend meeting. Mr. Chulpayev introduced Detective Tyson to Mr. White and Mr. Bradford at the meeting. Agent Jackson told Detective Tyson that Mr. Chulpayev was a source.

Agent Jackson provided Detective Tyson with a convertible BMW 6 Series[23] to use during his stay in Miami. Detective Tyson did not ask Agent Jackson where he got the car. It was not unusual for the FBI to provide high-end cars for Detective Tyson to use during an investigation. Detective Tyson later learned that this car had been provided by Mr. Chulpayev. Mr.

Chulpayev had also provided Agent Jackson with a second convertible BMW 6 Series for Agent Jackson to use for that weekend. Agent Jackson was the case agent and had no need for a luxury automobile to support his role in the case. There is no evidence that Mr. Chulpayev was reimbursed by anyone for the use of those vehicles.

***16** In addition to use of a convertible BMW 6 Series, Agent Jackson provided Detective Tyson with $1,500 in cash. Detective Tyson did not ask Agent Jackson where he got this money. It is not unusual for the FBI to provide undercover agents with cash to use during an investigation. During the DOJ-OIG investigation, Detective Tyson learned that the money came from Mr. Chulpayev. At some point, Agent Jackson sought reimbursement of the $1,500 from the FBI. Agent Jackson paid back that money to Mr. Chulpayev.

Under FBI policy, it is improper for an FBI agent to obtain use of vehicles and money from a source. Detective Tyson was required to file an FBI-302 report in connection with his trip to Miami. He did not file the FBI-302 report until November 7, 2012, approximately five months later.

2. Agent Jackson's Involvement in the Vernell Murder Investigation

In April 2012, Melvin Vernell, an Atlanta-based rapper, was arrested for driving a stolen vehicle. Mr. Vernell had leased that vehicle from Mr. Chulpayev. Mr. Vernell intended to fight the charge and raise the defense that the vehicle was not stolen, it was leased from Mr. Chulpayev. Mr. Vernell's attorney, who was also Mr. Chulpayev's attorney, tried to present a copy of the lease agreement in court. The prosecutor wanted the attorney to produce the original lease agreement. Mr. Vernell's attorney called Mr. Chulpayev and Mr. Chulpayev was upset about being contacted by telephone in open court.

In June 2012, Mr. Chulpayev hosted a party in Miami to celebrate his birthday. He invited Decensae White. During the party, Mr. White confided in Mr. Chulpayev that he believed Mr. Vernell had stolen marijuana from Mr. White. Mr. White was upset with Mr. Vernell over the theft and wanted to know if Mr. Vernell was using one of Mr. Chulpayev's vehicles. Mr. White knew that Mr. Chulpayev's vehicles were equipped with GPS trackers. Mr. White wanted to locate Mr. Vernell. At some point, Mr. Chulpayev gave Mr. White either the password to the GPS login or the GPS coordinates for the vehicle driven by Mr. Vernell.[24]

On June 7, 2012, Mr. Vernell was murdered in a hospital parking garage in Sandy Springs, Georgia. Mr. Vernell was murdered in a vehicle leased from Mr. Chulpayev. At the time of his murder, Mr. Vernell's criminal case for driving a stolen vehicle was still open.

Mr. Chulpayev and Agent Jackson spoke on the telephone and exchanged text messages “a lot ... before the murder [and] after the murder.” Transcript (DE# 257 at 306, 6/7/16). Mr. Chulpayev told Agent Jackson that the Sandy Springs police were trying to interview him about Mr. Vernell's murder.[25] Mr. Chulpayev also told Agent Jackson that Mr. Chulpayev believed Mr. White was involved in the murder.

***17** On June 11, 2012, Agent Jackson contacted the Sandy Springs Police Department and spoke with Detective J.T. Williams. Agent Jackson told Detective Williams that Agent Jackson had a source with information about who was involved in the murder. Agent Jackson also told Detective Williams that the source was Agent Jackson's source and that the source was more comfortable speaking with Agent Jackson because the source had issues with local law enforcement in the past. Agent Jackson told Detective Williams that he was going to help the Sandy Springs Police Department, but he was not going to provide them with direct access to this source. Agent Jackson also told Detective Williams that there was a narcotics component to Mr. Vernell's murder and suggested that the murder investigation of Mr. Vernell could possibly be turned into a federal investigation.

Agent Jackson notified his supervisors of Mr. Vernell's murder and met with the United States Attorney's Office in Atlanta. Agent Jackson told them that he would be investigating Mr. Vernell's murder, meaning the FBI was going to try to tie Mr. Vernell's murder in with the narcotics investigation. As part of its investigation into Mr. Vernell's murder, the FBI interviewed a witness in Alabama, obtained pen registers and tried to obtain a phone tap.

On July 30, 2012, Agent Jackson interviewed Mr. Chulpayev with an FBI task force officer present.[26] During the interview Mr. Chulpayev told Agent Jackson that he did not provide the GPS coordinates to the hospital parking garage where Mr. Vernell was murdered. Rather, Mr. Chulpayev provided the password for the GPS tracker and the password was used to trace Mr. Vernell to the hotel where he was staying.

In October 2012, Agent Jackson met with detectives at the Sandy Springs Police Department to discuss the murder investigation. Agent Jackson revealed to the Sandy Springs detectives for the first time that he had interviewed Mr. Chulpayev in July 2012. The detectives became upset with Agent Jackson for not disclosing this information. During this meeting, Agent Jackson also revealed that Mr. Chulpayev had provided the GPS coordinates to the hospital where Mr. Vernell was murdered. The Sandy Springs police detectives responded that if that was what Mr. Chulpayev had done, then Mr. Chulpayev was a co-conspirator to the murder. Agent Jackson then retracted his statement and said that what he meant was that Mr. Chulpayev had provided the GPS coordinates to the hotel where Mr. Vernell was staying.

On October 24, 2012, Agent Jackson allowed the Sandy Springs detectives to interview Mr. Chulpayev. Agent Jackson did not participate in that interview, but required the Sandy Springs Police Department to interview Mr. Chulpayev at the FBI office in Atlanta.[27]

On January 25, 2013, Agent Jackson called Detective Williams of the Sandy Springs Police Department and told Detective Williams he had to tell him something, but he wanted to keep it between them. Agent Jackson then disclosed to Detective Williams that Mr. Chulpayev was not an FBI source and had not been an FBI source for some time. As soon as the call ended, Detective Williams reported this information

to his chain-of-command and it was ultimately reported to the FBI in Atlanta.

At some point, Mr. White, Mr. Bradford and two other individuals were arrested for the murder of Mr. Vernell. Mr. Chulpayev was also arrested and charged with various crimes arising from Mr. Vernell's murder. Mr. Chulpayev sought to suppress statements he provided to Agent Jackson and law enforcement officers. See Government's Exhibit 63. The court held a hearing on Mr. Chulpayev's motion to suppress. Id. at 5. Agent Jackson was called to testify at the suppression hearing. Id. Agent Jackson invoked his Fifth Amendment rights and did not provide testimony. Id. The court suppressed Mr. Chulpayev's statements made during the July 2012 interview with Agent Jackson and the October 2012 interview with the Sandy Springs detectives. Id. at 9-10. The court "conclud[ed] that Agent Jackson's involvement in procuring ... [the] interview[s] significantly taint[ed] said interviews." Id.

3. Agent Jackson's Interactions with Amanda Smith's Attorney

***18** Mr. Chulpayev had used Amanda Smith as a straw buyer to purchase vehicles for his business. Ms. Smith would purchase luxury vehicles and allow Mr. Chulpayev to sublease them. Under their agreement, Mr. Chulpayev would make the loan payments on the vehicles. When Mr. Chulpayev stopped paying loans, Ms. Smith hired an attorney.

In the summer of 2012, Agent Jackson called Ms. Smith's attorney on behalf of Mr. Chulpayev. Agent Jackson acted as an intermediary between the attorney and Mr. Chulpayev. Ms. Smith's attorney told Agent Jackson that Mr. Chulpayev's fraud had to be reported and that if Agent Jackson did not report the fraud, the attorney would report it to internal affairs. Agent Jackson told the attorney that he could have the attorney arrested for extorting a federal agent.

Under FBI policy, it is improper for an agent to contact someone on behalf of a source. It is also improper to threaten someone with arrest for seeking to make a report to internal affairs. Agent Howell testified that she believes Ms. Smith's attorney filed a civil suit against the FBI based on what occurred in the summer of 2012.

4. Items of Value Provided to Agent Jackson by Mr. Chulpayev[28]

For purposes of the instant motion, the government does not dispute that Mr. Chulpayev provided Agent Jackson with the following items of value which were unrelated to Agent Jackson's undercover work: (1) tickets to Miami Heat games on four occasions (May 28, 2012, June 17, 2012, December 1, 2012 and February 10, 2013); (2) a room at the Fontainebleau Hilton Hotel in Miami Beach from February 16-18, 2013; (3) use of an Audi A8 from February 16-18, 2013 and (4) a $3,500 cash payment made by Mr. Chulpayev on or about January 12, 2013 to the account for Agent Jackson's undercover credit card.[29] See Government's Exhibit 58a.

The government also does not dispute that Mr. Chulpayev provided Agent Jackson with the following items of value which were related to Agent Jackson's undercover work:[30] (1) tickets to Miami Heat game on December 15, 2012;

(2) use of a BMW from May 25-28, 2012 (Mr. Chulpayev also provided Detective Tyson with use of a BMW during this time, see Memorial Day weekend 2012 discussion above); (3) use of a Cadillac from July 13-15, 2012; (4) use of a Mercedes from August 2-5, 2012; (5) use of a vehicle from August 23-27, 2012; (6) use of a BMW X6 from September 13-15, 2012 (Agent Jackson was in Miami for trial preparation in the instant case);[31] (7) use of a BMW X6 and M35 Infiniti from September 18-21, 2012 (Agent Jackson was in Miami for trial preparation in the instant case); (8) use of a 6 Series BMW from September 30-October 5, 2012 (Agent Jackson was in Miami for trial preparation and for the trial in the instant case); (9) use of a vehicle from October 27-29, 2012; (10) use of a vehicle from November 10-13, 2012; (11) use of a vehicle from November 30-December 2, 2012; (12) use of a Lamborghini from December 12-17, 2012 (Mr. Chulpayev also provided Detective Tyson with use of a Mercedes during this time period) and (13) use of a vehicle from December 29-January 1, 2013. See Government's Exhibit 58b.

***19** Additionally, on November 5, 2012, Mr. Chulpayev purchased a $2,000 wedding band on behalf of Agent Jackson. The band was purchased from a friend of Mr. Chulpayev who was a jeweler and was obtained at close to fair market value. In December 2012, Mr. Chulpayev purchased a designer watch on behalf of Agent Jackson. The watch was purchased from a jeweler who was a friend of Mr. Chulpayev at a "good customer discount." On several occasions in 2012 or 2013, Mr. Chulpayev purchased shoes on behalf of Agent Jackson at a discounted price. Agent Jackson reimbursed Mr. Chulpayev for the wedding band, the watch and the shoes. Beginning in the summer of 2012, Agent Jackson would eat meals at an Italian restaurant owned by a friend of Mr. Chulpayev and would only pay for the tip. Mr. Chulpayev would also lend Agent Jackson high-end watches to wear when Agent Jackson was in Miami.

At the end of 2012 or at the beginning of 2013, Agent Jackson's supervisors told him to stop having contact with Mr. Chulpayev. Agent Jackson continued to have contact with Mr. Chulpayev.

Although he has not yet been terminated, Agent Jackson has been relieved of his duties as an FBI agent. As of the date of completion of the parties' briefs, the DOJ-OIG's investigation into Agent Jackson's misconduct was ongoing and Agent Jackson had not yet been charged with any misconduct. Detective Tyson is not under investigation by the DOJ-OIG.

During the May 31, 2016 evidentiary hearing, Agent Howell testified that if Agent Jackson were to be charged with obstruction of justice in connection with the murder of Mr. Vernell, that misconduct by Agent Jackson would rank 10 out of 10. Case Agent Fowler testified that he would not have used Agent Jackson in this investigation if he had known that Agent Jackson had integrity issues. Transcript (DE# 257 at 128, 6/7/16).

ANALYSIS

The defendants argue that they are entitled to a new trial under Brady v. Maryland, 373 U.S. 83 (1963) and Rule 33 of the Federal Rules

of Criminal Procedure. The undersigned will address the requirements of Brady and then proceed to address Rule 33.

A. Brady Violation

Under Brady,

> the defendant must show that (1) the government possessed favorable evidence to the defendant; (2) the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different.

United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002) (citing United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989)). The government does not dispute that the second element of Brady—that the defendants did not possess and could not have obtained the evidence of Agent Jackson's misconduct through reasonable diligence—is met here. See Government's Omnibus Response (DE# 191 at 12, 11/2/15). Accordingly, the undersigned will only address the three remaining elements of Brady: (1) the government possessed evidence favorable to the defendant; (2) the prosecution suppressed the favorable evidence and (3) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different.

1. Whether the Government Possessed Favorable Evidence to the Defendants

The first prong of Brady is whether the government "possessed" evidence favorable to the defendants. This prong has two components: the withheld evidence must be both favorable to the defendants and in the government's possession. The defendants easily meet the favorable evidence requirement because "[e]vidence favorable to the accused includes impeachment evidence." United States v. Newton, 44 F.3d 913, 918 (11th Cir. 1994) (citing United States v. Bagley, 473 U.S. 667, 682 (1985)). Here, evidence of Agent Jackson's misconduct could have been used to impeach Agent Jackson's credibility at trial.

***20** The second component of the first prong —the government's possession of the evidence —is contested by the parties. In the instant case, it is undisputed that the two prosecutors and Case Agent Fowler were unaware of Agent Jackson's misconduct at the time of trial. Thus, the government's "possession" of the favorable evidence turns on whether Agent Jackson's knowledge of his own misconduct can be imputed on the prosecution.

The parties agree that the issue of whether Agent Jackson's knowledge can be imputed on the prosecution is governed by Arnold v. McNeil, 622 F. Supp. 2d 1294, 1297 (M.D. Fla. 2009), aff'd and adopted sub nom. Arnold v. Sec'y, Dep't of Corr., 595 F.3d 1324 (11th Cir. 2010). However, the parties disagree on whether the facts of Arnold are analogous to the instant case. As such, a detailed discussion of Arnold is merited.

In Arnold, the defendant was convicted of the sale or delivery of cocaine based, in part, on the testimony of Detective Sinclair, the state's "principal investigator and witness." 622 F. Supp. 2d at 1297-98. At trial, the jury heard

testimony that on May 27, 1998, Detective Sinclair and another officer, Detective Thomas, had been working undercover. Id. at 1316-17. On that day, Detective Thomas was posing as a drug user/buyer. Id. at 1316. Detective Thomas testified that shortly after he had completed a drug transaction, a man later identified as the defendant passed by on a bicycle and briefly conversed with Detective Thomas. Id. Detective "Thomas asked the [man] to sell cocaine" to Detective Sinclair who was waiting nearby in an undercover vehicle "so that [Detective] Sinclair could also see [the seller]." Id. at 1317. Detective Thomas then observed "the seller ride his bicycle to the passenger side of the undercover vehicle, make eye contact with [Detective] Sinclair and then 'hastily' ride off on his bicycle in the other direction, calling out to [Detective] Thomas in response to his shouts that he [the seller] would return later." Id. Both Detective Thomas and Detective Sinclair testified at trial that the defendant had been the seller. Id. However, it was Detective Sinclair who had provided Detective Thomas with the defendant's name.[32] There was also evidence that on the day in question, Detective Thomas only saw part of the seller's face. Id. Thus, Detective Sinclair was "the only person to identify [the defendant] at the scene as the seller of the cocaine." Id. at 1310. At trial, Detective Sinclair testified that he "knew it was [the defendant] who had made the sale that day because he had known [the defendant] for at least twenty years." Id. at 1318. In closing argument, "the prosecutor suggested to the jury ... that if the jury 'still had any doubt' based on [Detective] Thomas' identification [of the defendant], they need do no more than rely on the credible testimony of Detective Sinclair, who had known [the defendant] for twenty years." Id. The defendant was convicted of the drug charge.

***21** Approximately three years after the defendant's conviction, Detective Sinclair pled guilty to "conspiracy to commit a civil rights violation leading to the murder of [a bank customer], conspiracy to distribute cocaine and conspiracy to obstruct justice." Arnold, 622 F. Supp. 2d at 1302. Detective Sinclair had engaged in these criminal acts at approximately the same time as the defendant's arrest and trial. Id. at 1310. In light of Detective Sinclair's criminal acts, the defendant sought habeas relief based on a Brady violation.

The court granted the defendant's habeas petition finding that all four prongs of Brady had been met. Arnold, 622 F. Supp. 2d at 1310-11, 1319. The court determined that: (1) the evidence of Detective Sinclair's criminality was favorable to the defendant and was in "possession" of the government; (2) the defendant could not have possessed the evidence or obtained it through reasonable diligence; (3) the government "suppressed" the evidence and (4) the evidence was material under Brady. Id.

In Arnold, as in the instant case, the prosecutor did not have actual, personal knowledge of Detective Sinclair's misconduct at the time of the defendant's trial. 622 F. Supp. 2d at 1312. Nonetheless, the court recognized that the prosecutor's lack of personal knowledge did not end the inquiry because "Brady applies to exculpatory and impeachment information that is in the possession of the 'prosecution team,' which includes investigators and the police." Id. at 1312 (citing Kyles v. Whitley, 514

U.S. 419, 437 (1995)). The court determined that the government both "possessed" and "suppressed" favorable evidence because Detective Sinclair was a member of the prosecution team: "Sinclair's knowledge of his own criminal conduct, constituting evidence that would be favorable to the defense, demonstrates that the prosecution both 'possessed' favorable evidence, in satisfaction of Brady's first prong, and 'suppressed' exculpatory or impeachment evidence, in satisfaction of Brady's third prong." Id. at 1316 (footnote omitted).

The court in Arnold noted that "[t]he facts of [the defendant]'s prosecution [we]re distinguishable from ... other cases ... in which no Brady violation occurred" because:

> **the nature of the information known to Sinclair about his own contemporaneous illegal involvement with local drug dealing** (i.e., threatening, shaking down, and otherwise co-opting local drug dealers) **was the same as the nature of the evidence the prosecutor needed and secured from Sinclair to convict [the defendant] at trial** for the sale and delivery of cocaine. Moreover, ... it was Sinclair's ability to identify [the defendant] that was the key to the prosecution's case against [the defendant].

622 F. Supp. 2d at 1315 (emphasis added). The court noted that in closing argument, the prosecutor had used Detective Sinclair's testimony to bolster Detective Thomas' identification of the defendant as the person who purchased the narcotics. Id. (stating "if there's still any doubt ... whether or not Detective Thomas was able to make a positive identification [of the defendant], which he told you he was positive, [if] you still have any doubt that he made a positive identification, you have Detective Sinclair's identification when he told you that there's no mistake, it was [the defendant], I've known him for 20 years."). The court in Arnold reasoned that:

> Given the necessity of [Detective] Sinclair's information to the prosecution of [the defendant] and the similarity of [Detective] Sinclair's criminal activities to the nature of the evidence used to convict [the defendant], [the defendant] ha[d] adequately demonstrated that [Detective] Sinclair was a member of the prosecution team and his information should be imputed to the prosecutor.

***22** Id. at 1316 n.23.

The defendants argue that Agent Jackson was a member of the prosecution team[33] in the same manner as Detective Sinclair was a member of the prosecution team in Arnold.

The government maintains that the instant case is distinguishable from Arnold because "[Agent] Jackson's testimony was corroborated in all material respects due to the cumulative nature of the overwhelming evidence in this case and the allegations against [Agent] Jackson in no way relate to the evidence that was relied on by the prosecution at trial." Government's Omnibus Response (DE# 191 at 17, 11/2/15). For these reasons, the government argues that Arnold is inapplicable and that the prosecution team consisted only of the two AUSAs and Case Agent Fowler.

The undersigned finds that Agent Jackson's misconduct is sufficiently related to the

instant case to meet the first prong of Arnold. The instant case was a narcotics investigation. Mr. Chulpayev often provided information to Agent Jackson about drug dealers. He also provided money and the use of high-end vehicles to assist Agent Jackson with these undercover narcotics investigations. Mr. Chulpayev even participated in the Memorial Day weekend investigation by introducing Detective Tyson to the targets of the investigation, suspected drug traffickers Decensae White and Gary Bradford. Additionally, Mr. Vernell's murder was motivated by a belief that Mr. Vernell had stolen drugs from Mr. White and Mr. White was already the target of Agent Jackson's narcotics investigation at the time of Mr. Vernell's murder. Agent Jackson proceeded to protect Mr. Chulpayev from the murder investigation by lying to Detective Williams and withholding information from the Sandy Springs Police Department. Additionally, at least with respect to Mr. Mack, the jury heard Mr. Mack being referred to as a "dirty cop," while at the same time, Agent Jackson was himself engaging in misconduct.

Importantly, Agent Jackson's misconduct was contemporaneous with the instant prosecution. This is not a case where an agent's bad acts took place years before an investigation or trial. There was an overlap between Agent Jackson's misconduct and his testimony as a government witness in the trial in this matter. Here, the record evidence shows that after the government had concluded its investigation of the defendants, but before and during the trial of the defendants, Agent Jackson was engaged in protecting Mr. Chulpayev from the murder investigation while at the same time receiving things of value from Mr. Chulpayev. At the outset, Agent Jackson lied to Detective Williams of the Sandy Springs Police Department leading Detective Williams to believe that Mr. Chulpayev was a registered source for the FBI. Agent Jackson sought to protect Mr. Chulpayev by initially withholding Mr. Chulpayev's name from the Sandy Springs Police Department and not providing Mr. Chulpayev to the Sandy Spring Police Department for an interview. Instead, Agent Jackson interviewed Mr. Chulpayev himself in July 2012 and did not disclose the occurrence of the interview (or information provided Mr. Chulpayev during the interview) to the Sandy Springs Police Department until October 2012, after the trial in this matter. Agent Jackson's involvement in the investigation of Mr. Vernell's murder was ultimately damaging to the prosecution of Mr. Chulpayev for crimes related to Mr. Vernell's murder and resulted in the suppression of two of Mr. Chulpayev's statements.

***23** Additionally as in Arnold, Agent Jackson's undercover work in the instant case was clearly important to the investigation and to the evidence presented at trial. In his undercover capacity, Agent Jackson established a relationship with Mr. Bryant which led Mr. Bryant to solicit the assistance of Mr. McLendon and Mr. Mack in transporting sham cocaine from Club Dolce. Much of the audio-visual evidence used at trial was recorded at Agent Jackson's office in Club Dolce. Agent Jackson was an important government witness at trial and was the only witness who testified that the word "t-shirts" was commonly understood to be a code word for cocaine. For these reasons, the undersigned

concludes that under Arnold, Agent Jackson was a member of the prosecution team. Agent Jackson's knowledge of his own misconduct should therefore be imputed on the government.

The defendants also cite Moon v. Head, noting that "[t]he Eleventh Circuit has expressly defined the term 'prosecution team' to 'includ[e] both investigative and prosecutorial personnel." ' Mack's Supplemental Reply (DE# 289 at 2, 9/6/16) (quoting Moon v. Head, 285 F.3d 1301, 1309 (11th Cir. 2002)). In Moon, the defendant failed to show that an investigator for the Tennessee Bureau of Investigation ("TBI") was a member of the prosecution team in Georgia. The Eleventh Circuit explained that:

> (1) there was "no evidence that Tennessee law enforcement officials and Georgia prosecutors engaged in a joint investigation of the [murder of Thomas] DeJose...." (2) "the Georgia and Tennessee agencies shared no resources or labor" and "they did not work together to investigate the DeJose or Callahan murders. Nor is there evidence that anyone at the TBI was acting as an agent of the Georgia prosecutor;" (3) [the TBI Investigator] was not under the direction or supervision of the Georgia officials, and, had he chosen to do so, could have refused to share any information with the Georgia prosecutor" and (4) "[a]t most, the Georgia prosecutor utilized [the TBI investigator] as a witness to provide background information to the Georgia courts."

Id. at 1310 (footnote omitted). The Eleventh Circuit concluded that these facts were "insufficient to establish [the TBI Investigator w]as part of the Georgia 'prosecution team.' " Id.

By contrast, in the instant case, Agent Jackson played an important role in the investigation of the defendants. As noted above, most of the recorded meetings took place in Agent Jackson's office at Club Dolce. Agent Jackson's office was also the pick up site for the sham cocaine on December 21, 2011 and January 14, 2012 and the location where Mr. Bryant and Mr. McLendon were paid for their work. Additionally, it is clear that while the investigation ended in January 2012 and two of the defendants (Mr. Bryant and Mr. Mack) were arrested in April 2012,[34] shortly thereafter in May 2012, Agent Jackson began engaging in misconduct which continued through the trial in the instant case.

Significantly, unlike the TBI investigator in Moon whose testimony served merely to provide the court with background information, Agent Jackson was an important government witness. The government used Agent Jackson to provide substantive testimony at trial. Thus, Agent Jackson falls within the definition of "prosecution team."

For these reasons, the undersigned concludes that Agent Jackson was part of the prosecution team and as such, Agent Jackson's knowledge of his own misconduct should be imputed on the government.

To meet the first prong of Brady, the defendants must show "that the Government possessed evidence favorable to the defendant (including impeachment evidence). The defendants have met this prong. The record is undisputed that the two prosecutors and Case Agent Fowler had no personal knowledge of Agent

Jackson's misconduct at the time of trial. Nonetheless, Agent Jackson was a member of the prosecution team, and as such, Agent Jackson's knowledge of his own misconduct should be imputed on the government. Thus, the defendants have shown that the government was in "possession" of evidence of Agent Jackson's misconduct. Moreover, evidence of Agent Jackson's misconduct was favorable to the defendants for impeachment purposes because it would have undermined Agent Jackson's credibility as a witness.

2. Whether the Prosecution Suppressed Favorable Evidence

***24** Having determined that Agent Jackson was a member of the prosecution team, the undersigned further finds that the prosecution suppressed favorable evidence. It is undisputed that the defendants were not provided with evidence of Agent Jackson's misconduct at any time before trial. Accordingly, this prong is met.

3. Whether There Is a Reasonable Probability That the Outcome Would Have Been Different

Lastly, the defendants must show that the withheld evidence was material. "The prejudice or materiality requirement is satisfied if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Allen v. Sec'y, Florida Dep't of Corr., 611 F.3d 740, 746 (11th Cir. 2010) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). "Materiality is determined by asking whether the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." Id. (citing Kyles v. Whitley, 514 U.S. 419, 436-37 & n.10 (1995)). "To prevail on his Brady claim, [a defendant] need not show that he more likely than not would have been acquitted had the new evidence been admitted," rather "[h]e must show only that the new evidence is sufficient to undermine confidence in the verdict." Wearry v. Cain, 136 S.Ct. 1002, 1006 (2016) (citation and internal quotation marks omitted).

Because there are differences in the evidence presented at trial against each defendant, the undersigned will address each defendant individually.

a. Mr. Bryant

Mr. Bryant argues that his "conviction is irreparably tainted because S/A Jackson was pivotal to both the sting operation which resulted in [Mr.] Bryant's criminal conduct, and the prosecution which resulted in his conviction." Bryant's Supplemental Memorandum (DE# 277 at 2, 7/2/16). According to Mr. Bryant, "Agent Jackson's integrity and credibility were ... paramount to the government's case. The evidence of Agent Jackson's improper behavior, in his official capacity as an FBI agent, at the time of the trial, would have put the entire case in a different light." Bryant's Motion for New Trial (DE# 181 at 16, 10/8/15).

Importantly, it was not Agent Jackson who changed the focus of the undercover investigation from extortion to narcotics. At the evidentiary hearing, Case Agent Fowler[35] testified that the decision to change the focus

of the investigation was made by Case Agent Fowler and Miami agents. Additionally, Agent Jackson was not the only undercover agent in the instant case. Detective Tyson was present during the two meetings where Mr. Bryant and Mr. McLendon took possession of the sham cocaine. Both meetings, as well as numerous other meetings and conversations were recorded and played for the jury at trial. Thus, a significant amount of evidence that was presented at trial against Mr. Bryant was not dependent on Agent Jackson's credibility.

***25** Mr. Bryant also raises the issue of entrapment and argues that:

> There exists a real, credible and even likely chance that Bryant was entrapped, given S/A Jackson's untrustworthiness and history of dishonesty, coupled with the fact that he orchestrated the sting that ensnared Bryant, by engaging in unmonitored conversations for which no one but S/A Jackson can account.

Bryant's Supplemental Memorandum (DE# 277 at 3-4, 7/2/16).

Mr. Bryant's entrapment defense is unsupported by the record evidence. "An entrapment defense has two elements: (1) the government induced the crime and (2) the defendant lacked predisposition to commit the crime before the inducement." United States v. Toussaint, 627 Fed.Appx. 810, 814 (11th Cir. 2015). The "defendant bears the initial burden of production as to the element of governmental inducement." Id. A defendant may meet this initial burden:

> by ... producing evidence sufficient to create a jury issue "that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it." United States v. Brown, 43 F.3d 618, 623 (11th Cir. 1995) (quotation marks omitted). The defendant meets this burden if he **produces evidence that the government's conduct included some form of persuasion or mild coercion**. Id. **The defendant may show persuasion with evidence that he "had not favorably received the government plan, and the government had to 'push it' on him, or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate."**

Id. at 814 (quoting United States v. Ryan, 289 F.3d 1339, 1344 (11th Cir. 2002) (emphasis added)).

Here, there is no record evidence to support the element of inducement. At no point in the recordings did Agent Jackson employ "persuasion or mild coercion." Additionally, and as previously noted, the only evidence of an unrecorded conversation between Mr. Bryant and Agent Jackson was the December 2, 2011 meeting. That conversation was not recorded due to an equipment failure. Mr. Bryant has presented no evidence as to the content of that conversation which would support an entrapment defense. Importantly, the audio-visual recordings which were presented to the jury show that Mr. Bryant knowingly and willingly participated in Agent Jackson's plan to transport cocaine from Club Dolce on two separate occasions. At no point in the audio-visual recordings did Mr. Bryant express reluctance to participating in this criminal activity.

Mr. Bryant's Brady claim fails because he cannot show that the withheld evidence of Agent Jackson's misconduct was material. "[M]ateriality is not a sufficiency of evidence test." Dennis v. Crews, No. 13-21064-CIV-ZLOCH, 2015 WL 7777274, at *10 (S.D. Fla. Dec. 3, 2015) (citing Kyles, 514 U.S. at 434). "To satisfy Brady's materiality standard, [a defendant] must demonstrate that, had the favorable evidence been disclosed to the defense, there is a reasonable probability that the result of the proceeding would have been different." Arnold, 622 F. Supp. 2d at 1319. As to Mr. Bryant, there is no reasonable probability that the result of the trial would have been different. Even without Agent Jackson's testimony, the trial evidence against Mr. Bryant was overwhelming. Recorded conversations conclusively establish that Mr. Bryant agreed to transport what he believed was cocaine on December 21, 2011 and on January 14, 2012.

***26** The audio-visual evidence presented to the jury reveals multiple instances where Agent Jackson spoke openly to Mr. Bryant about transporting cocaine. For example, during the December 9, 2011 meeting, Agent Jackson used the words "keys" and "kilos" in Mr. Bryant's presence to refer to the drugs that would be transported from Club Dolce. See Government's Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 7-8, 20. During that same meeting, Agent Jackson told Mr. Bryant that "the amount of money on **cocaine** prices isn't what it used to be as far as you know." Id. at 21 (emphasis added). Mr. Bryant even hung up on Agent Jackson when Agent Jackson used the word "dope" in a conversation on December 10, 2011. See Government's Exhibit 53 at Tab D, Transcript of 12/10/11 Phone Call at 2. A few days later, Mr. Bryant explained to Agent Jackson that the reason Mr. Bryant had hung up was because Agent Jackson had used "the Coca Cola word." Government's Exhibit 53 at Tab E, Transcript of 12/15/11 Meeting at 4. Agent Jackson told Mr. Bryant during this conversation that he usually used the code word "t-shirts."[36] Agent Jackson continued to use the word "t-shirts" in other recorded conversations with Mr. Bryant. Over a month later, Mr. Bryant was still concerned enough about the December 10, 2011 hang-up, that he relayed the incident to Detective Tyson on January 14, 2012. See Government's Exhibit 53 at Tab J, Transcript of 1/14/12 Meeting at 9-10.

Importantly, Mr. Bryant was present when Agent Jackson placed "bricks" of sham cocaine into a duffel bag on December 21, 2011 and January 14, 2012. During the December 21, 2011 meeting, Detective Tyson expressly stated to Mr. Bryant and Mr. McLendon: "No deviation, no taste, neither one of y'all get high right?", Government's Exhibit 53 at Tab G, Transcript of 12/21/11 Meeting at 11, a statement that would be consistent with the "bricks" being cocaine. At trial Detective Tyson testified based on his experience in law enforcement that cocaine was packaged in the same manner as the sham cocaine was packaged in the instant case. See Trial Transcript (DE# 145 at 201-203, 1/14/13). He further explained that money would not be packaged in that manner because "[w]hen you're delivering money to anyone, people want to make sure that what they're getting there is money." Id. at 202. Detective Tyson also testified that based on his experience, you would not leave large sums of money in a

parked car in a parking lot in the drug business. Id. at 203-204.

In light of the aforementioned trial evidence, the undersigned concludes that Mr. Bryant has failed to meet the materiality prong of Brady. Detective Tyson's testimony and the audio-visual evidence presented at trial clearly show —independent of Agent Jackson's testimony— that Mr. Bryant believed he was transporting cocaine for Agent Jackson. As such, Mr. Bryant has not shown entitlement to a new trial under Brady.

b. Mr. McLendon

Mr. McLendon also argues that evidence of Agent Jackson's misconduct was material in the instant case. Mr. McLendon argues that "[a]ny attempt by the government to merely excise Jackson from the case would be fatal to the prosecution of McLendon." McLendon's Supplemental Memorandum (DE# 276 at 2, 7/1/16). Mr. McLendon notes that "[a]bsent Agent Jackson, there was no evidence of any mention of drugs in the presence of Mr. McLendon." McLendon's Reply (DE# 196 at 4, 11/16/15) (footnote omitted). Mr. McLendon further asserts that the audio/video recordings of Mr. McLendon "counting packages and [Detective Tyson] questioning [Mr.] McLendon insultingly about whether he gets high" are "fringe ambiguities" which "mean virtually nothing absent discussions that Agent Jackson larded into his conversations with codefendant Bryant." Id. at n.2. Accordingly to Mr. McLendon, "[a]bsent [Agent] Jackson['s testimony], the jury could not have rationally understood the full context of the dealings between [Agent] Jackson and [Mr.] Bryant and thus could not have known what second-hand knowledge could credibly have trickled down to [Mr.] McLendon." McLendon's Supplemental Memorandum (DE# 276 at 3, 7/1/16). However and as indicated above, the recorded statements between Agent Jackson and Mr. Bryant unmistakably show that Agent Jackson and Mr. Bryant spoke about transporting drugs. During the December 9, 2011 conversation, Agent Jackson used the words "kilos," "keys" and "cocaine." See Government's Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 7-8, 20, 21-22. Additionally, when Agent Jackson used the word "dope," Mr. Bryant abruptly hung up the phone. See Government's Exhibit 53, Tab D at 2. Mr. Bryant later explained to Agent Jackson that the reason Mr. Bryant had hung up the phone was because Agent Jackson had used the "Coca Cola word." Government's Exhibit 53 at Tab E, Transcript of 12/15/11 Meeting at 4. Over a month later, Mr. Bryant relayed the incident to Detective Tyson. See Government's Exhibit 53 at Tab J, Transcript of 1/14/12 Meeting at 9-10. Moreover, Agent Jackson expressly told Mr. Bryant that Agent Jackson usually used the word "t-shirts" when referring to drugs. See Government's Exhibit 53 at Tab E, Transcript of 12/15/11 Meeting at 4. Thus, there is no merit to Mr. McLendon's argument that without Agent Jackson's trial testimony, the jury would not have understood that in the recorded conversations Agent Jackson and Mr. Bryant were discussing the transportation of drugs.

***27** The government argues that Mr. McLendon is not entitled to a new trial "[b]ecause Detective Tyson was the key

witness [that] secured the evidence and gave the testimony that incriminated McLendon." Government's Supplemental Memorandum (DE# 281 at 21-22, 7/25/15).

At trial, the government presented audio-visual recordings of Mr. McLendon on December 21, 2011 and January 14, 2012. On both occasions Agent Jackson filled the duffel bag with "bricks" of sham cocaine in Mr. McLendon and Mr. Bryant's presence. Mr. McLendon and Mr. Bryant even moved closer to get a better look at the contents of the duffel bag. As noted above, during the December 21, 2011 meeting, Detective Tyson expressly stated to Mr. Bryant and Mr. McLendon: "No deviation, no taste, neither one of y'all get high right?" Government's Exhibit 53 at Tab G, Transcript of 12/21/11 Meeting at 11. This statement that would be consistent with the "bricks" being cocaine.[37] On both occasions Mr. Bryant and Mr. McLendon returned to Agent Jackson's office at Club Dolce to obtain payment after making the deliveries. The jury also heard testimony from Detective Tyson, based on his experience as a law enforcement office, that: (1) cocaine is packaged in the same way as the sham cocaine was packaged in the instant case; (2) money would not be packaged this way and (3) large sums of money would not be left in a parked car in a mall parking lot in the drug business. See Trial Transcript (DE# 145 at 201-204, 1/14/13).[38]

***28** As set forth above, there was ample evidence through audio-visual recordings and Detective Tyson's testimony to support the jury's verdict against Mr. McLendon even without Agent Jackson's testimony. In light of the presentation of evidence (other than Agent Jackson's testimony) to the jury, Mr. McLendon has failed to show a reasonable probability that the outcome of the trial would have been different. Based on the foregoing, the undersigned concludes that Mr. McLendon has not shown entitlement to a new trial under Brady.

c. Mr. Mack

Mr. Mack argues that the government's failure to disclose Agent Jackson's misconduct entitles Mr. Mack to a new trial. Specifically, Mr. Mack argues that "[b]ecause 't-shirts' ... was the only purported reference to drugs ever made in front of Mack, [Agent Jackson's] testimony was critical to the government's case, both in front of the jury, and on appeal." Mack's Reply (DE# 194 at 4, 11/16/15).

The government maintains that Mr. Mack is not entitled to a new trial and notes that "Detective Tyson conducted ***all*** of the incriminating discussions with Mack during [the January 14, 2012] breakfast [meeting] that corroborated ... Bryant['s] assurances that Mack knew cocaine was involved." Government's Supplemental Memorandum (DE# 281 at 17, 7/25/15) (emphasis in original). The government further notes that "Tyson testified that, based on all of his experience, nobody transporting cocaine on behalf of someone else would invite a cop to a meeting with the people he's transporting cocaine for unless it was a 'dirty cop.' " Id. (citing Trial Transcript (DE# 145 at 209, 1/14/13)). However, Mr. Mack would still be a "dirty cop" if he believed he was transporting money in order to assist in the laundering of drug proceeds. It was only Agent Jackson who

testified that the word "t-shirts" is commonly understood to be a code word for cocaine. See Trial Transcript (DE# 145 at 93, 1/14/13).

The government focuses on Mr. Mack's knowledge of his participation in a criminal act:

> [Mr.] Mack, an armed 16-year police veteran in full uniform, had breakfast with two complete strangers who flat out told Mack they were criminals, reveling in the thought of police layoffs so they could come down to a wide-open Miami and get rich, all because of conversation Tyson initiated during Breakfast and explained at trial. Mack was not surprised, or even upset, when they admitted they were criminals because Mack was aware they were drug dealers long before the breakfast meeting. Mack knew beforehand that Bryant was going to use the fake name "James" to introduce him which is why he was not surprised and did not correct Bryant and is also why he [was not wearing] his name tag. Mack fully understood cocaine was involved because he calmly agreed with Tyson's street-talk admonishment that Tyson would be "f*cked" if Mack got "shaky" and subsequently changed his mind and that Tyson would be concerned about being "robbed" by Mack, so the drug deal would be cancelled and "ain't nobody making money."

Government's Supplemental Memorandum (DE# 281 at 17-18, 7/25/15). The record evidence is clear that Mr. Mack knew he was engaged in illegal activity. See supra. He did not object to the use of a pseudonym and showed up to the January 14, 2012 breakfast meeting in full uniform, but no name tag, among other things. The issue here is whether Mr. Mack knew he was conspiring to possess with intent to distribute cocaine (Count 1); attempting to possess with intent to distribute cocaine (Count 3) and possessing a firearm in furtherance of drug trafficking (Count 4)—the crimes which the jury found Mr. Mack guilty.

***29** The government further argues that Mr. Mack would not have wanted to impeach Agent Jackson regarding the meaning of the word "t-shirts:"

> Most notably, Mack neglects to mention that Jackson repeatedly testified at trial that he had no idea whether Mack knew, or even had a "clue," that t-shirts was a code word for cocaine (GX53:O:115, 126). This portion of Jackson's testimony is critical because it completely undercuts Mack's argument that newly discovered evidence would have successfully impeached Jackson's "t-shirt" testimony. Mack would not even want to impeach Jackson's testimony that he did not have a "clue" whether Mack knew "t-shirts" was a code word for cocaine because Jackson's testimony in this regard was very favorable to Mack. Attempting to impeach Jackson's personal knowledge that "t-shirts" was a common code word for cocaine would have been equally ineffective because Jackson told Bryant he "usually" uses this code word during their recorded meeting on December 15th (GX53:E:4). And, to be perfectly clear, Jackson specifically testified that he was not imputing Bryant's knowledge of Jackson's code word to Mack (GX53:O:115).

Government's Supplemental Memorandum (DE# 281 at 19, 7/25/15) (emphasis in original). Mr. Mack responds that "[Agent] Jackson still provided the only evidence from which the jury could find—and from which the government argued—that [Mr.] Mack must

have known that "T-shirts" meant drugs" and "the Eleventh Circuit cited this testimony in sustaining ... [Mr. Mack's] conviction," thereby proving that this testimony was material. See Mack's Supplemental Reply (DE# 289 at 12, 9/6/16) (citing Mack, 572 Fed.Appx. at 920).

Mr. Mack further notes that "Agent Jackson was also the only witness who testified that [Mr.] Mack conducted 'counter-surveillance' when he pointed out a car in the restaurant parking lot—an allegation as subjective as it was incriminating." Mack's Reply (DE# 194 at 4-5, 11/16/15). The government minimizes the importance of this evidence, noting that Agent Jackson was only asked two questions on this subject and "[t]he government's closing argument made a very brief reference to this testimony." Government's Supplemental Memorandum (DE# 281 at 19-20, 7/25/15). The government maintains that "[g]iven the conversation that occurred in the restaurant and upon leaving the restaurant, the brief and insignificant nature of this evidence makes it cumulative, if even that, and in no way supports Mack's request for a new trial." Id. at 20.

The undersigned agrees with the government that the "counter-surveillance" evidence is insignificant and does not provide a basis for a new trial. Nonetheless, based on Agent Jackson's other testimony, the undersigned concludes that there is a reasonable probability that had evidence of Agent Jackson's misconduct been disclosed, the outcome of the trial would have been different with respect to Mr. Mack. Arnold, 117 F.3d at 1317-18. The only reference to "t-shirts" made in Mr. Mack's presence occurred during a conversation between Mr. Mack and Agent Jackson. See Government's Exhibit 53 at Tab L, Transcript of 1/14/12 Meeting at 61 (stating "So, you know, we got this many, this many t-shirts coming through"). After a clip of this conversation was played to the jury, Agent Jackson told the jury that he used the word "t-shirts" in that conversation to refer to cocaine.[39] Detective Tyson was not present during this conversation.

***30** The government correctly notes that the jury could have considered Mr. Bryant's numerous recorded statements to Agent Jackson and Detective Tyson as evidence that Mr. Mack knew Mr. Bryant and Mr. McLendon were transporting cocaine for Agent Jackson on January 14, 2012. See, e.g., Government's Exhibit 53 at Tab I, Transcript of 1/14/12 Meeting at 5, 7-8; Government's Exhibit 53 at Tab J, Transcript of 1/14/12 Meeting at 16-17. However, to satisfy the materiality prong of Brady, Mr. Mack is not required to show that had the evidence of Agent Jackson's misconduct been disclosed, Mr. Mack would have been acquitted. " 'The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence;' thus, [a defendant] may demonstrate a Brady violation by 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " Arnold, at 1316 (quoting Kyles, 514 U.S. at 434). Given that Agent Jackson was the only witness who testified that the word "t-shirts" was commonly understood as a code word for cocaine, the

undersigned is persuaded that confidence in Mr. Mack's guilty verdict had been undermined.

In sum, the undersigned concludes that Mr. Mack has met all of the Brady prongs and is entitled to a new trial.[40] Mr. Bryant and Mr. McLendon have failed to show a reasonable probability that the outcome would have been different and are therefore not entitled to a new trial under Brady.

d. Miscellaneous Arguments

The defendants raise numerous additional arguments which are not persuasive. The undersigned rejects the argument that Agent Jackson's misconduct undermines the quality of the investigation as a whole. See, e.g., Mack's Supplemental Memorandum (DE# 272 at 13-14, 6/30/15). Case Agent Fowler testified that the decision to change the focus of the investigation from extortion to narcotics was made by the case agent and other Miami agents and was not made by Agent Jackson. Additionally, the only evidence of a recording malfunction occurred on December 2, 2011 during a meeting between Agent Jackson and Mr. Bryant. As discussed in this Report and Recommendation, Mr. Bryant's own recorded statements show that Mr. Bryant was well aware that the December 21, 2011 and January 14, 2012 deliveries were of cocaine. Additionally, Mr. Mack and Mr. McLendon were not present at the December 2, 2011 meeting. Thus, there is no record evidence to support the argument that the December 2, 2011 audio/visual equipment failure would have been material as to any of the defendants.

***31** The defendants note that "Agent Jackson also vouched for the existence of the sham cocaine, which had gone missing prior to trial." Mack's Supplemental Memorandum (DE# 272 at 14, 6/30/15); see also McLendon's Supplemental Memorandum (DE# 276 at 14, 7/1/16) (referring to "the important fact of the unexplained loss of crucial evidence: the supposed sham cocaine packages from the initial transportation and at least one recorded conversation between Jackson and Bryant.").[41] However, as the government points out, another agent, Agent Wanda Mitial, "testified she had collected this evidence and [gave] it to the case agent on the day the operation was concluded." Government's Omnibus Response (DE# 191 at 15, 11/2/15) (citing Trial Transcript (DE# 146 at 114-121, 1/14/13). The jury was shown audio-visual evidence of Agent Jackson placing the sham cocaine into a duffel bag on December 21, 2011 and on January 14, 2012. See Government's Exhibit 9 at Clip 2 (Video Clip); Government Exhibit 13, Clip 1 (Video Clip). Additionally, the government introduced into evidence photographs of the sham cocaine. See Government's Exhibits 18a-d and 20a-d. Thus, Agent Jackson's testimony vouching for the existence of the sham cocaine was not material.

The undersigned also rejects the argument that "evidence of Jackson's improper relationship with Chulpayev would have also raised questions about the character of KayTee Tyson." Mack's Supplemental Memorandum (DE# 272 at 14, 6/30/15); Mack's Supplemental Reply (DE# 289 at 2 n.1, 9/6/16) (asserting that "Tyson's close friendship with Jackson as well as his repeated partnership with both Jackson and Chulpayev would have

provided grounds for defense counsel to question Tyson's integrity right along with that of Jackson."); McLendon's Supplemental Memorandum (DE# 276 at 14, 7/1/16) (arguing that "Tyson's exaggerations of the evidence ... in his testimony at the evidentiary hearing and his suggestions of defense of Jackson, show that it was consistent with his friendship with Jackson to cover for Jackson's failure to clearly eliminate the notion of a money laundering operation as the subject of the two trips to Aventura."). There is no record evidence of any wrongdoing by Detective Tyson. Detective Tyson did not know and had no reason to know that Mr. Chulpayev was the source of the money and cars provided to Detective Tyson by Agent Jackson. With respect to Detective Tyson's alleged "exaggerations" at the evidentiary hearing, the defendants have failed to show that Detective Tyson exaggerated his testimony at trial or had reason to testify at trial in a manner that favored Agent Jackson, particularly since there is no record evidence that Detective Tyson knew of Agent Jackson's misconduct at the time of trial. Detective Tyson's friendship with Agent Jackson does not affect the undersigned's determination that the jury was permitted to rely on Detective Tyson's testimony at trial.

In sum, Brady prohibits "the suppression by the prosecution of evidence favorable to an accused ... where the evidence is material either to guilt or to punishment...." Brady, 373 U.S. at 87. Mr. Mack has met all four prongs of Brady and is entitled to a new trial. Because Mr. Bryant and Mr. McLendon have failed to show that evidence of Agent Jackson's misconduct was material in their case, they have not shown a Brady violation.

B. Rule 33

Alternatively, the defendants argue that they are entitled to a new trial under Rule 33. To obtain a new trial based on newly discovered evidence under Rule 33, the defendants must show:

> (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result.

United States v. Brinson, 628 Fed.Appx. 1018, 1020-21 (11th Cir. 2015). "The failure to satisfy any one of these elements is fatal to a motion for a new trial." Id. (citation and internal quotation marks omitted).

***32** In the instant case, the government concedes two elements: (1) that the evidence was newly discovered and had been unknown to the defendants at the time of trial and (2) that the failure to learn of the evidence was not due to a lack of due diligence on the part of the defendants. See Government's Omnibus Response (DE# 191 at 22, 11/2/15). With respect to the remaining factors, the government relies on the arguments raised in response to the asserted Brady violation. Id.

For the reasons stated below, the undersigned finds that all of the defendants have failed to show that evidence of Agent Jackson's misconduct was more than merely impeachment evidence. Additionally, Mr. Bryant and Mr. McLendon have failed to show that the withheld evidence was material to the

issues before the Court and that it was such that a new trial would probably produce a different result.

Because the defendants must satisfy all five elements of Rule 33 to obtain a new trial, the Court should DENY the defendants' motions on this ground.

1. Whether Evidence was Not Merely Cumulative or Impeaching

The undersigned finds that evidence of Agent Jackson's misconduct constitutes impeachment evidence. Therefore, the defendants have failed to meet this element of Rule 33.

The defendants argue that the evidence of Agent Jackson's misconduct was more than mere impeachment evidence because the government would not have called Agent Jackson to testify at trial had the evidence of the misconduct been made public at that time. See Mack's Supplemental Memorandum (DE# 272 at 16-17, 6/30/16). The defendants note that: (1) Case Agent Fowler testified that he would not have used Agent Jackson if issues concerning Agent Jackson's integrity had been known at that time; (2) Special Agent Howell testified that Agent Jackson has not been used as a witness in any FBI case since allegations of his misconduct became public and (3) it has been established that Agent Jackson would have asserted his Fifth Amendment rights if called to testify had the evidence of his misconduct been disclosed to the defendants at the time of trial. Id. at 16-17.

The government maintains that "arguments that Jackson would have asserted his rights under the Fifth Amendment had the criminal investigation commenced prior to trial serve no purpose" because "[t]he criminal investigation had not started and no evidence exists that one would have started given the facts that existed in October of 2012." Government's Supplemental Memorandum (DE# 281 at 26, 7/25/15).

The defendants rely on United States v. Jones, 84 F. Supp. 2d 124, 126-27 (D.D.C. 1999) for the proposition that evidence is more than mere impeachment where it would have prevented a witness from testifying at trial. See Mack's Supplemental Memorandum (DE# 272 at 16-17, 6/30/16). The government argues that Jones is distinguishable from the instant case because the evidence in Jones was not merely impeaching, but also false. See Government's Supplemental Memorandum (DE# 281 at 26, 7/25/15). The government notes that there is no evidence that Agent Jackson's testimony was false. Id.

In Jones, the defendant was convicted on a single count of possession with intent to distribute heroin. Jones, 84 F. Supp. 2d at 124. During the trial, the government called Detective Brown, a narcotics expert, to provide expert testimony. Id. The defendant's counsel stipulated to Detective Brown's qualifications as an expert and "Detective Brown did not testify at [the defendant's] trial about his qualifications." Id. In a subsequent, unrelated proceeding, Detective Brown's credentials were called into question and it was discovered that Detective Brown had "in the past ... held himself out as having a degree in pharmacology" when he held no such degree. Id. at 124. In light of this newly discovered evidence, the defendant moved for a new

trial under Rule 33. Id. The court granted the defendant's motion. It found that not only would this newly discovered evidence have impeached Detective Brown's credibility, it "would have kept [Detective] Brown from taking the stand at all." Id. at 126. The court further found that Detective Brown's testimony "filled in all of the gaps of the government's case and was clearly material to the jury's determination." Id. Notably, the defendant was not caught with drugs on his person. Rather, the defendant had "offered something called 'Party with the stars' " to a plainclothes police officer. Id. at 125. The court noted that the defendant's "offering of 'Party with the stars' to [the plainclothes police officer was] damning because [Detective] Brown identified 'Party with the stars' as a brand of heroin." Id. at 126. Additionally, the defendant was found with $25.00 in his possession and Detective Brown provided "testimony that a small bag of heroin costs between $20 and $25" and Detective "Brown's testimony alone allowed the jury to imply that [the defendant] received $25 for the sale of a small bag of heroin." Id. The court also noted that "[h]ad that evidence been available at the time of [the defendant's] trial, it is inconceivable that [Detective] Brown would have been offered as a witness by the government." Id. at 126-27.

***33** The undersigned does not agree with the reasoning in Jones and Jones is not binding on this Court. In addition, Jones is distinguishable from the instant case because it involved the testimony of an expert. Evidence of Detective Brown's lack of a pharmacology degree and his prior false statements about that degree would have raised questions about Detective Brown's qualifications as a narcotics expert. Moreover, unlike in Jones, evidence of Agent Jackson's misconduct is not "such that a new trial would probably produce a different result" with respect to Mr. Bryant and Mr. McLendon. This is because the other evidence presented at trial—audio-visual recordings and Detective Tyson's testimony—support Mr. Bryant and Mr. McLendon's convictions for the reasons already stated in this Report and Recommendation. There is nothing in the Jones decision that relieves Mr. Bryant and Mr. McLendon from the burden of establishing the probability of a different result. In Jones, the trial court noted that not all convictions obtained in cases where Detective Brown's testified as an expert would be overturned. Id. at 127 ("The Court is mindful of the problem now facing the government in the many cases where Detective Brown gave expert witness testimony on the drug trade in this city.... This Court is permitted only to consider this case, on the facts before it.") (footnote omitted). The court noted that at least one judge had denied a new trial in a case where Detective Brown had testified because "the remaining evidence was overwhelming against the defendant." Id. at 127 n.1. The same is also true for Mr. Bryant and Mr. McLendon.

The defendants further argue that evidence of Agent Jackson's misconduct is more than mere impeachment evidence because the government itself has questioned Agent Jackson's integrity and is currently pursuing a criminal investigation into Agent Jackson's misconduct. See Mack's Supplemental Memorandum (DE# 272 at 18, 6/30/15). Mr. Mack cites Espinosa-Hernandez, 918 F.3d 911 (11th Cir. 1990) and Mesarosh v. United States, 352 U.S. 1 (1956) "for the

proposition that when the government itself has cause to question the credibility of a government agent (or the equivalent thereof, in the Mesarosh case) newly discovered evidence may be more than merely impeaching." Id. at 19 (internal quotation marks omitted). The undersigned is unpersuaded by this argument and in any event Mr. Bryant and Mr. McLendon have failed to overcome the other elements of a Rule 33 motion for new trial.

The defendants also argue that it would have been unlikely that the government would have been able to authenticate the audio-visual evidence without Agent Jackson's testimony. See Mack's Supplemental Memorandum (DE# 272 at 16-17, 6/30/16); Bryant's Supplemental Memorandum (DE# 277 at 5, 7/2/16) (stating that "[t]here are several recordings of conversations between S/A Jackson and Bryant that the Government would ... be unable to authenticate if S/A Jackson was unavailable to testify.").

The defendants' authentication argument lacks merit. The December 21, 2011 and January 14, 2012 meetings where Mr. Bryant and Mr. McLendon took possession of the sham cocaine and the January 14, 2012 breakfast meeting could have been authenticated at trial by Detective Tyson because he was present at those events. Although Detective Tyson was not present for the numerous recorded conversations between Agent Jackson and Mr. Bryant which took place in December 2011, the government could have still authenticated this evidence through Detective Tyson. In United States v. Ligambi, 891 F. Supp. 2d 709 (E.D. Pa. 2012), an informant had passed away and was therefore unavailable as a witness. The government was nonetheless permitted to authenticate the voices on the tape recordings made by the informant through "both direct and circumstantial evidence ... including voice identification, surveillance team identification, and self-identification by various participants." Id. at 718. Similarly here, the government could have used Detective Tyson to authenticate the voices on the December 2011, recordings of Mr. Bryant and Agent Jackson. Detective Tyson was clearly familiar with both Mr. Bryant and Agent Jackson's voices. Detective Tyson personally met and spoke with Mr. Bryant on December 21, 2011 and January 14, 2012. Additionally, Detective Tyson was a long time friend of Agent Jackson and was therefore competent to identify Agent Jackson's voice. Most of the December 2011 conversations between Agent Jackson and Mr. Bryant were visually recorded (in addition to audio). Thus, Detective Tyson could have also identified both men by sight. The defendants' argument that the government would not have been able to authenticate the audio-visual and recorded evidence without Agent Jackson lacks merit.[42]

***34** Finally, the defendants argue that the withheld evidence is more than mere impeachment evidence because of the seriousness of Agent Jackson's misconduct:

> The evidence in this case meets this standard. It cannot be forgotten that this was a **public corruption case**, where the government repeatedly accused Mack of being a "dirty cop." The fact that Agent Jackson, who was the central figure in the undercover investigation, has since been proven to be a '10 out of 10' on the corruption scale, would have turned the government's

> case on its head, and goes well beyond "merely" impeaching the testimony of a single witness.

Mack's Supplemental Memorandum (DE# 272 at 20, 6/30/16) (emphasis in original). The undersigned disagrees with the characterization of the instant case as a public corruption case. None of the defendants were charged with public corruption in this case. Moreover, it is clear that the public corruption component of the investigation had ended by the time Mr. Mack and Mr. McLendon became targets of the investigation. By that time, the case had become a narcotics investigation. In any event, Mr. Bryant and Mr. McLendon cannot show that the evidence of Agent Jackson's misconduct was such that a new trial would probably produce a different result.

2. Whether the Evidence is Material to the Issues Before the Court

The defendants argue that Agent Jackson's testimony was highly material at trial. According to the defendants, Agent Jackson's trial testimony "filled in the gaps in the government's case" because Agent Jackson "was permitted to testify as to what he understood the highly ambiguous audio visual evidence in the case to mean." Mack's Supplemental Memorandum (DE# 272 at 17, 6/30/15). The government characterizes Agent Jackson's "comments about portions of the videos [as] self-explanatory." Government's Supplemental Memorandum (DE# 281 at 26, 7/25/15). The undersigned rejects the argument that Agent Jackson's testimony was material to securing the convictions of Mr. Bryant and Mr. McLendon for the reasons already stated in this Report and Recommendation. Additionally, it is not necessary to reach the Rule 33 argument with respect to Mr. Mack because he is entitled to a new trial under Brady.

3. Whether the Evidence Is Such That a New Trial Would Probably Produce a Different Result

The last element under Rule 33 is "substantially similar" to the materiality inquiry under Brady. United States v. Phillips, 177 Fed.Appx. 942, 959 (11th Cir. 2006) (noting that "the materiality inquiry under the Brady test is substantially similar to the final step of the Rule 33 test."). For the reasons already stated in the Brady analysis, Mr. Bryant and Mr. McLendon have not shown that a new trial would probably produce a different result. The undersigned has already determined that Mr. Mack is the only defendant who has met the materiality requirement of Brady. For the reasons already stated, Mr. Mack is also the only defendant who meets the final element of Rule 33.

In sum, none of the defendants have shown entitlement to a new trial under Rule 33 because they have failed to show that evidence of Agent Jackson's misconduct was more than mere impeachment evidence. Additionally, Mr. Bryant and Mr. McLendon have failed to show that a new trial would probably produce a different result.

C. Mr. Bryant and Mr. McLendon's Convictions for Aiding and Abetting

***35** The defendants also argue that "[i]f Mack's conviction was improperly obtained, [Mr. Bryant and] McLendon's § 924(c) conviction was likewise improperly obtained." McLendon's Supplemental Memorandum (DE# 276 at 16, 7/1/16) (citing United States v.

Martin, 747 F.2d 1404, 1408 (11th Cir. 1984)). The government did not address this argument.

Mr. Bryant and Mr. McLendon have not shown that they would be entitled to a new trial on the firearm charge (Count 4), if Mr. Mack is granted a new trial. Mr. Bryant and Mr. McLendon have failed to show that confidence in their guilty verdicts for the firearm charge (Count 4) would be undermined. If this Report and Recommendation is adopted, Mr. Mack would not be acquitted, he would merely be receiving a new trial. Moreover, confidence in Mr. Bryant and Mr. McLendon's convictions does not hinge on Mr. Mack's conviction. See United States v. Raffone, 693 F.2d 1343, 1348 (11th Cir. 1982) (noting that "[i]n Standefer v. United States, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed. 2d 689 (1980), the Supreme Court ruled that the acquittal of a charged principal does not foreclose the subsequent conviction of an aider and abettor."). Accordingly, the Court should deny Mr. Bryant and Mr. McLendon's motion for new trial on this ground.

RECOMMENDATION

In accordance with the foregoing, the undersigned respectfully RECOMMENDS that the Defendant Henry Lee Bryant's Rule 33 Motion for New Trial Based on Newly Discovered Evidence with Incorporated Memorandum of Law, and Motions for Full Discovery, for an Evidentiary Hearing, and to Adopt the Corresponding Motions Filed or to be Filed by and on behalf of Codefendants Mack & McLendon (DE# 181, 10/8/15) and Defendant McLendon's Motion for New Trial and an Evidentiary Hearing and Supporting Memorandum of Law (DE# 187, 10/13/15) be **DENIED** and that Defendant Daniel Mack's Motion for New Trial Pursuant to Fed. R. Crim. P. Rule 33 and Brady v. Maryland, 373 U.S. 83 (1963), and Request for Hearing (DE# 182, 10/8/15) be **GRANTED**.

The parties shall have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in Chambers, at Miami, Florida, this **27th** day of October, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 8732411

Footnotes

1 The defendants adopt the arguments raised in each other's filings.

2 “Mack was specifically convicted of carrying a firearm during and in relation to the drug trafficking crime, McLendon and Bryant were convicted of possessing a firearm in furtherance of the crime (on an aiding-and-abetting theory).” United States v. Mack, 572 Fed.Appx. 910, 924 n.14 (11th Cir. 2014).

3 The Eleventh Circuit reviewed the evidence in the light most favorable to the government. Mack, 572 Fed.Appx. at 917.

4 The Eleventh Circuit's opinion states that Mr. Bryant hung up the phone when Agent Jackson used the word “coke.” However, the transcript of the December 10, 2011 conversation shows that Agent Jackson used the word “dope.” See Government's Exhibit 53, Tab D at 2.

5 To the undersigned's knowledge the DOJ-OIG's investigation of Agent Jackson is still ongoing and Agent Jackson has not yet been charged with any crime or policy violation. Nonetheless, and for purposes of the instant motion, the government does not dispute some of the misconduct by Agent Jackson. See Government's Supplemental Memorandum (DE# 281 at 2-3, 7/25/15) (stating that “[w]hile Jackson has been neither charged nor convicted with doing [these alleged acts], a comprehensive review of the DOJ-OIG's investigation objectively revealed policy violations which the government did not contest for purposes of the evidentiary hearing.”).

6 On December 3, 2015, the government filed a notice correcting a sentence in its omnibus response. See Notice of Filing (DE# 197, 12/3/15).

7 Mr. McLendon sought to call Agent Jackson as a witness at the evidentiary hearing. Following a status hearing on June 16, 2016, the parties stipulated to certain facts on the record and Mr. McLendon withdrew his request for Agent Jackson's testimony. See Order (DE# 261, 6/16/16).

8 Mr. Bryant pled guilty to conspiracy to commit extortion under color of official right, in violation of Title 18, United States Code, Section 1951(a) and was sentenced to a 27-month term of imprisonment to run concurrently with the term of imprisonment imposed in the instant case. See United States v. Bryant, Case No. 12-cr-20279-RNS.

9 The audio/visual equipment failed to record a meeting on December 2, 2011 between Agent Jackson and Mr. Bryant.

10 The focus of the DOJ-OIG's investigation into Agent Jackson's misconduct was from January 2012 through April 2013.

11 The video of the December 4, 2011 meeting was played at trial, but not at the evidentiary hearing. See Government's Supplemental Memorandum (DE# 281 at 9, 7/25/15); Trial Transcript (DE# 145 at 16-17, 1/14/13).

12 The defendants maintain that they believed they were transporting money, not drugs. During the December 9, 2011 meeting with Mr. Bryant, Agent Jackson referred to the drugs as “keys,” “kilos” and twice used the word “cocaine.” See Government's Exhibit 53 at Tab C, Transcript of 12/9/11 Meeting at 7-8, 20, 21-22. Thus it is clear, at least with respect to Mr. Bryant, that Mr. Bryant knew he was being paid to transport drugs. The extent of Mr. McLendon and Mr. Mack's knowledge of the drugs is discussed below.

13 The abbreviation “[SC]” stands for “Simultaneous Conversation.” See, e.g., Government's Exhibit 53 at Tab D, Transcript of 12/10/11 Phone Call.

14 Detective Tyson worked with Agent Jackson on a total of five cases and considers Agent Jackson a friend.

15 At trial, Detective Tyson testified that this was the manner in which cocaine was packaged:

Q. When, if ever, have you seen money packaged in this manner?

A. You would never see money packaged in that manner.

Q. Why?

A. For one, it's money. When you're delivering money to anyone, people want to make sure that what they're getting there is money. So if I'm delivering you some money, I'm not wrapping it up, covering and concealing it, because whoever I'm giving it to, the first thing they're going to say is, is this really what—

* * *

THE WITNESS: You really want to count what you're getting. You just don't want someone to hand you something wrapped up in a shape of cocaine or the shape of something that you don't know what it is.

So because if you give that to them, then what's to say that what's in that package is actually money?

* * *

Q. I'm showing you a part of Government's Exhibit Number 19. When, if ever, have you seen money packaged that like?

A. Never.

Q. What is packaged like that in your training and experience?

A. Cocaine and heroin.

Q. What does that represent?

A. A kilogram.

Q. Why is it packaged in kilograms?

A. When you're doing a large amount, typically the person is trying to make as much money off of it as they can. So the average drug dealer, the first thing they try to do is try to make it to a kilo. If they can make it to a kilo, they know that they can take that money and flip it and make another or buy other kilos off of it.

So in order—it wouldn't be worth my time to come all the way down here to Miami to be moving anything less than a kilo.

Trial Transcript (DE# 145 at 201-203, 1/14/13). Detective Tyson also testified that based on his experience, you would not leave large sums of money in a parked car in a mall parking lot in the drug business. Id. at 203-204.

16 At trial, Detective Tyson explained why he marked the bricks:

With the marker what I was trying to do with the kilos were put initials on them, just to imply that, look, I'm putting this mark on them, putting this mark on them, so when they get to where they're going to, that's how they better arrive. So if this marker is gone off of there, then I know that something happened to the kilos because that's not how I gave them to you.

Trial Transcript (DE# 145 at 194, 1/14/13).

17 The jury did not find Mr. Mack guilty of attempting to possess with intent to distribute cocaine with respect to the December 21, 2011 delivery. See Verdict (DE# 86 at 2, 10/11/12).

18 Mr. Mack states that he was not a sergeant. See Mack's Supplemental Reply (DE# 289 at 17 n.5, 9/6/16).

19 As previously noted, Agent Jackson was the only witness at trial who testified that the word “t-shirts” was commonly understood to mean cocaine:

Q. And you also say, “This many, this many T-shirts coming through.” What are you talking about there?

> A. The cocaine. I was very specific with the term I used just because of the previous event that happened with Henry Bryant, and I worked drugs in Atlanta. That's what I do. I'm an agent on the drug squad. **And T-shirts is a very common drug term used in Atlanta for drugs. So that's the terminology I knew to use**.

Trial Transcript (DE# 145 at 93, 1/14/13) (emphasis added). During cross-examination, Agent Jackson clarified that the code word "t-shirts" was used "[n]ot just Atlanta ... but everywhere." Id. at 115.

20 The investigation was first assigned to Agent Phil Van Nimwegen, an agent in Atlanta. In November 2013, Agent Susan Howell took over the investigation.

21 At the evidentiary hearing, Agent Howell explained that DOJ-OIG's investigation into Agent Jackson's misconduct was limited to these dates because Agent Jackson received items of value from Mr. Chulpayev in May 2012 and Mr. Chulpayev was incarcerated in 2013.

22 Mr. Chulpayev was terminated as a registered source because he left the Atlanta area.

23 Agent Howell testified that the vehicle may have been a Mercedes.

24 The record is inconsistent concerning whether Mr. Chulpayev provided to Mr. White the GPS password, the GPS coordinates to the hotel where Mr. Vernell was staying or the GPS coordinates to the hospital or hospital parking garage where Mr. Vernell was murdered. These factual discrepancies are not material for purposes of ruling on the instant motions.

25 Agent Howell later testified that it was Mr. Chulpayev who was trying to contact the Sandy Springs Police Department because Mr. Vernell was murdered in one of Mr. Chulpayev's vehicles. See Transcript (DE# 257 at 311, 6/7/16). The order on the motion to suppress filed by Mr. Chulpayev in the state court proceeding states that Mr. Chulpayev contacted the Sandy Springs Police Department shortly after learning of the murder, identified himself and attempted to provide information pertinent to the vehicle and the investigation. See Government's Exhibit 63 at 2.

26 Agent Howell later testified that a third person, an FBI agent, was present in the room during Mr. Chulpayev's interview. See Transcript (DE# 257 at 319, 6/7/16). She also agreed with the government that all three officers—Agent Jackson, the task for officer and the FBI agent—interviewed Mr. Chulpayev. Id.

27 The order on the motion to suppress filed in Mr. Chulpayev's criminal case states that Agent Jackson entered the room towards the end of the interview. See Government's Exhibit 63 at 7 n.7.

28 The parties dispute the relevant time frame of Agent Jackson's misconduct. The government argues that "[t]he trial of this case concluded on October 10, 2012, making relevant any misconduct by Jackson that was not disclosed prior to the end of trial." Government's Supplemental Memorandum (DE# 281 at 3, 7/25/15). Mr. Mack maintains that December 19, 2012 is the relevant cutoff date because that was the date the trial court stated it was denying Mr. Mack's renewed motion for severance. See Mack's Supplemental Memorandum (DE# 272 at 2 n.2, 6/30/15); Mack's Supplemental Reply (DE# 289 at 6 n.2, 9/6/16) (stating that "because the government has a continuing Brady obligation, Mr. Mack maintains all those gifts and benefits improperly accepted [by Agent Jackson] prior to the date of sentencing—when the district court ruled on the last pending motion for new trial—are relevant to the instant motion."). In any event, the undersigned finds that Agent Jackson was engaged in misconduct while the instant action was pending including through trial and the sentencing hearing of the defendants on December 19, 2012. There is no record evidence that Agent Jackson was engaged in misconduct during the investigation of the instant case which ended in January 2012.

29 On December 31, 2012, Agent Jackson made a $4,256.18 purchase at Bamboo Nightclub in Miami Beach using his undercover credit card. Mr. Chulpayev's $3,500 cash payment was made to offset that purchase.

30 The defendants maintain that the purpose for which Mr. Chulpayev gave Mr. Jackson gifts is immaterial "since the gifts were nonetheless improper." Mack's Supplemental Memorandum (DE# 272 at 6, 6/30/15). The undersigned agrees with the defendants that the purpose for which Mr. Chulpayev gave Mr. Jackson gifts does not lessen the fact that Agent Jackson's actions violated FBI policy.

31 Although Agent Jackson had other open cases in South Florida at the time, Agent Howell found no evidence he was working on those cases when he came to Miami for trial preparation in the instant case.

32 Detective Sinclair told Detective Thomas about the defendant:

> [Detective] Sinclair explained to [Detective] Thomas that [Detective] Sinclair and the seller recognized each other and that the name of the individual who sold [Detective] Thomas the crack cocaine was Darryl Arnold.... Based on [Detective] Sinclair's supplying the name, on the following day [Detective] Thomas was able to locate a prior photograph of [the defendant].... [Detective Thomas] testified that when he looked at the photograph, he made a positive identification, with no doubt in his mind at all.

Arnold, 622 F. Supp. 2d at 1317 (citations to the record omitted).

33 In his supplemental memorandum, Mr. Mack also argued that the government conceded that Agent Jackson was a member of the prosecution team based on a statement made by the AUSA at a status hearing on January 11, 2016. See Mack's Supplemental Memorandum (DE# 272 at 9, 6/30/15) (citing Transcript 1-11-16 Status Hearing (DE# 222 at 106, 2/26/16)). However, in its supplemental response, the government did not concede the issue. See Government's Supplemental Memorandum (DE# 281 at 2, 7/25/15). Accordingly, the undersigned will address the merits of whether Agent Jackson was a member of the prosecution team.

34 Mr. McLendon was not arrested until June 21, 2012, after Agent Jackson was already engaging in misconduct.

35 Mr. Bryant suggests that there were unmonitored conversations between Agent Jackson and Mr. Bryant because Case Agent Fowler testified that he relied on Agent Jackson's integrity and therefore did not closely monitor Agent Jackson the way he would monitor a civilian source. See Bryant's Supplemental Memorandum (DE# 277 at 2-3, 7/2/16). The only record evidence of an unrecorded conversation between Agent Jackson and Mr. Bryant took place on December 2, 2011 due to an equipment failure. Mr. Bryant has not presented any evidence refuting the substance of this conversation or shown a deliberate failure by Agent Jackson to record this conversation. Mr. Bryant's remaining claims of unreported/unrecorded conversations between Agent Jackson and Mr. Bryant are unsupported.

36 Even without Agent Jackson's trial testimony that “t-shirts” was a commonly understood code word for cocaine, the audio-visual evidence shows that Agent Jackson directly communicated to Mr. Bryant that Agent Jackson customarily used the word “t-shirt” to refer to cocaine. See Government's Exhibit 53 at Tab E, Transcript of 12/15/11 Meeting at 4.

37 Mr. McLendon argues that:

> [Detective] Tyson's ambiguous hints about people who get high or about tampering with the packages was ... insufficient —particularly absent the context provided by Jackson, not merely as to the McLendon interactions, but also the recordings of the Jackson-Bryant conversations. That Tyson told the defendants that there could be no deviation, test, or taste was remarkably ambiguous. Deviation has nothing to do with drugs and speaks merely to doing the job as specified. Testing (in the sense of chemical testing) was not an intelligible request as there was not a drug sale in this case, such that there was no basis for chemical or other actual testing. Testing in any slang sense could have meant no more than checking or examining the contents—to see what was inside. And the ambiguous term “taste” was clearly used in a slang manner—people generally do not taste cocaine as that is an extremely unproductive way of experiencing its effects; it is a drug that is usually inhaled directly or by smoking, and is only rarely injected, but not tasted, by users. So “taste,” as a slang term, simply meant ‘take some.’ Moreover, getting a ‘taste’ of illicit proceeds is at least as well known a use of the term as getting an actual taste of cocaine.

McLendon's Supplemental Memorandum (DE# 276 at 9-10, 7/1/16) (footnote omitted). At trial, Detective Tyson provided an explanation for why he asked Mr. Bryant and Mr. McLendon if they “get high,” see Trial Transcript (DE# 145 at 196, 1/14/13), and the jury was entitled to credit that explanation.

38 Mr. McLendon argues that:

> [G]iven the government's admission that the back story for using Club Dolce was that it was involved in a money laundering operation, DE145:257, and given that a lounge on South Beach is an odd place to store, or traffic in, large

> quantities of cocaine, but an excellent vehicle for laundering cash, the mixed message of referring to the packages as money meant the context and explanation offered by [Agent] Jackson was essential to the government.

McLendon's Supplemental Memorandum (DE# 276 at 5, 7/1/16). However, nothing precluded Mr. McLendon from making the argument at trial that he believed he was transporting money, not drugs. In fact, Mr. McLendon's counsel told the jury in closing argument that the government had failed to show Mr. McLendon knew he was transporting drugs and cited to the "this is money" statement by Detective Tyson. See Trial Transcript (DE# 147 at 111, 1/14/13). At trial, Detective Tyson provided an explanation for his statement "this is money," see Trial Transcript (DE# 145 at 194, 1/14/13), and the jury was entitled to believe Detective Tyson's explanation.

39 At trial, Agent Jackson testified as follows:

> Q. And you also say, "This many, this many T-shirts coming through." What are you talking about there?
>
> A. The cocaine. I was very specific with the term I used just because of the previous event that happened with Henry Bryant, and I worked drugs in Atlanta. That's what I do. I'm an agent on the drug squad. And T-shirts is a very common drug term used in Atlanta for drugs. So that's the terminology I knew to use. So I referred to the cocaine as T-shirts to avoid using cocaine or coke or one of those words that would cause an event.

Trial Transcript (DE# 145 at 92-93, 1/14/13). During cross-examination, Agent Jackson clarified that the word "t-shirts" was used "[n]ot just Atlanta ... but everywhere." Id. at 115.

40 In his supplemental memorandum, Mr. Mack argues that in addition to Brady, the government also violated Giglio and Bagley. See Mack's Supplemental Memorandum (DE# 272 at 15, 6/30/15) (stating that "the government's failure to disclose the evidence violated Brady, Giglio, and Bagley, as well as the Due Process Clause of the Fifth Amendment, and should result in a new trial."). In this Report and Recommendation the undersigned finds that Mr. Mack is entitled to a new trial under Brady. Therefore it is unnecessary to address Mr. Mack's arguments concerning other violations. To the extent Mr. Bryant and Mr. McLendon are seeking to rely on Giglio, Bagley and the Due Process Clause, the undersigned finds that Mr. Bryant and Mr. McLendon are not entitled to relief. There is no Giglio violation here: while Agent Jackson's credibility is at issue, there is no record evidence that Agent Jackson presented perjured testimony at trial. See Hammond v. Hall, 586 F.3d 1289, 1306-07 (11th Cir. 2009) (stating that "[a] Giglio claim involves an aggravated type of Brady violation in which the suppression of evidence enabled the prosecutor to put before the jury what he knew was false or misleading testimony ... or allowed the prosecutor himself to make a false statement to the jury.") (citations omitted). Mr. Bryant and Mr. McLendon are not entitled to relief under Bagley because they cannot show materiality for the reasons discussed in this Report and Recommendation. See Kyles, 514 U.S. at 434-438 (discussing materiality under Bagley). Finally, the undersigned concludes Mr. Bryant and Mr. McLendon have not shown a due process violation because they cannot show materiality.

41 Mr. McLendon also raises "[t]he unexplained failure to pursue charges against another officer, Taurus Barron," McLendon's Supplemental Memorandum (DE# 276 at 14, 7/1/16), but fails to link that decision to Agent Jackson.

42 Additionally, the presentation of the audio-visual recordings of Agent Jackson would not have violated the Confrontation Clause if Agent Jackson had not testified at trial. In United States v. Price, 792 F.2d 994, 996 (11th Cir. 1986), the defendant delivered hashish oil to a confidential informant. "[The informant] made consensual tape recordings of telephone conversations and meetings with [the defendant]." The informant died a few months later. Id. The government presented the recorded conversations as evidence at trial and secured the defendant's conviction. Id. On appeal, the Eleventh Circuit rejected the defendant's argument that his "Sixth Amendment right of confrontation and to present a defense was violated when the court allowed the introduction of these taped conversation between [the informant] and [the defendant] into evidence." Id. The Eleventh Circuit reasoned that:

> Because [the informant]'s statements were not hearsay, but rather were offered to put into context those statements of [the defendant], [the informant was] not subject to impeachment under the first part of that rule. Nor were [the informant]'s statements admitted against [the defendant] and were not statements by an agent, a person authorized,

> or a co-conspirator under FRE 801(d)(2), (C), (D), or (E). Therefore, FRE 806 does not apply to allow impeachment of [the informant].

Id. at 996-97. Here, Agent Jackson's statements in the audio-visual recordings would have also been introduced to provide context.

572 Fed.Appx. 910
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36 2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff Appellee,
v.
Daniel MACK, Octavius McLendon, Henry Lee Bryant, Defendants Appellants.

No. 12 16602.
|
July 24, 2014.

Synopsis

Background: Defendants were convicted by jury in the United States District Court for the Southern District of Florida, No 1:12–CR–20276–FAM–2, of, inter alia, conspiracy to possess with intent to distribute five kilograms or more of cocaine and possession of a firearm in furtherance of a drug trafficking crime. All three defendants appealed their convictions, and one defendant appealed his sentence.

Holdings: The Court of Appeals, Orinda D. Evans, District Judge, sitting by designation, held that:

evidence was sufficient to support defendants' convictions on all counts;

district court did not abuse its discretion by denying police officer defendant's motion to sever;

district court did not abuse its discretion by denying defendant's motion for new trial based on newly discovered evidence;

district court did not commit plain error by failing to admit codefendant's post-arrest statements regarding police officer defendant's lack of knowledge of drugs to impeach his inconsistent co-conspirator statements to undercover agents;

cumulative effect of purported prosecutorial misconduct, improper government witness testimony, and erroneous judicial rulings did not warrant reversal; and

defendant's 264–month total sentence was not procedurally or substantively unreasonable, and district judge did not abuse his discretion by denying defendant's request for downward variance.

Affirmed.

Attorneys and Law Firms

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Law Offices of Sheryl Lowenthal, Richard Carroll Klugh, Jr., Law Offices of ***912** Richard C. Klugh, Miami, FL, for Defendants–Appellants.

Appeals from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:12–cr–20276–FAM–2.

Before MARCUS, Circuit Judge, PROCTOR and EVANS, District Judges.*

Opinion

EVANS, District Judge:

Defendants/Appellants (hereinafter "Defendants") Daniel Mack ("Mack"), Henry Lee Bryant ("Bryant"), and Octavius McLendon ("McLendon") were convicted of, inter alia, conspiracy to possess with intent to distribute five kilograms or more of cocaine and possession of a firearm in furtherance of a drug trafficking crime. They appeal, raising numerous issues related to their convictions. Bryant also appeals his sentence. We affirm.

I. Background

A. The Evidence

The following is the evidence construed in the government's favor.[1] *United States v. Harris,* 20 F.3d 445, 452 (11th Cir.1994) (citation omitted).

In 2011, the Federal Bureau of Investigation (the "FBI") initiated an investigation in Miami Beach, Florida. As part of that investigation, undercover FBI agent Dante Jackson ("Agent Jackson") posed as "Kevin Johnson," the general manager of a Miami Beach nightclub called Dolce UltraLounge ("Dolce"). While acting as the nightclub manager, Agent Jackson was introduced to Defendant Bryant, a veteran Miami Beach fire inspector.

During a meeting at the nightclub office on December 2, 2011, Agent Jackson told Bryant that he was helping a drug-trafficker friend from New York by transporting drugs. Agent Jackson proposed a plan to move some of the friend's drugs from the Miami Beach nightclub to the Aventura Mall in north Miami–Dade County, and asked Bryant whether he could provide police protection for the transport. Jackson specifically insisted that the officers be in uniform and drive marked police cruisers to avoid interdiction by other law enforcement.

On December 4, 2011, Bryant told Agent Jackson that he had "four County guys" and "two Beach guys" who would escort the drugs. He added that he would bring in Defendant McLendon, to whom Bryant referred as his "brother." Bryant described McLendon as "the point man" who would communicate the plans to the officers.

On December 6, 2011, Agent Jackson called Bryant and attempted to arrange a meeting with the officers who had been enlisted by Bryant to provide the escort. Bryant did not bring his "guys" to his follow-up meeting with Jackson that took place on December 9, 2011; however, he assured Agent Jackson in a recorded conversation that "[the police officers] gonna know what's gonna on, cause [Bryant was] gonna tell them [what the deal was] straight up." Bryant also commented that he and McLendon had been "in this thing

together for, since [they]'ve been eight years old."

Agent Jackson and Bryant had several additional conversations in which they discussed the details of the transportation of ***913** the drugs. During a telephone call on December 10, 2011, Agent Jackson referred to the "dope" that they would be transporting, and Bryant immediately hung up. Later, Bryant reprimanded Jackson stating he had thought that Jackson had said "coke." Bryant instructed Jackson not to use the word "coke" over the telephone because their conversations could be intercepted by law enforcement.

December 21, 2011 was the date of the first of two drug transportation trips. On that day, Agent Jackson introduced Bryant to his drug-trafficking friend from New York, who was played by Detective KayTee Tyson ("Det. Tyson"), at a restaurant on South Beach. At approximately 4:30 p.m. that afternoon, Bryant, accompanied by McLendon, arrived at Dolce to collect the cocaine.[2] Agent Jackson and Det. Tyson were present in their undercover roles.

Bryant and McLendon began discussing the route that they were going to take. McLendon stated that they should not use the SunPass toll lane, and Bryant clarified that this was because the camera on the toll lane takes pictures. Det. Tyson then told Bryant and McLendon that "there's nine in there," referencing the quantity of cocaine in kilograms, and stated that "we need to make sure that all nine of these get there." McLendon nodded his head in agreement. Det. Tyson added, "cause this money, see what I'm saying?"

In front of both Bryant and McLendon, Det. Tyson then marked each of the nine packaged bricks of sham cocaine with a marker, and Agent Jackson placed the packages into a duffel bag. After Bryant and McLendon counted or partially counted the nine kilograms of sham cocaine, Det. Tyson told them that there may be "no deviation, no taste, no test," and asked if either of them "get high?" According to Det. Tyson, they appeared to be insulted and McLendon made a sound as though he was upset with the question.

FBI agents on the ground and in a surveillance aircraft observed Bryant and McLendon driving away from the nightclub. Bryant and McLendon's vehicle drove to Aventura Mall. Their vehicle was escorted by a marked police patrol car with the numbers 1929A painted on its roof. There is no express evidence as to who was driving that vehicle, but the patrol car was assigned to Defendant Mack.[3] Mack's vehicle kept going past the mall and did not reappear. Bryant was paid $10,500 for the job.

On the morning of January 14, 2012, the date of the second drug transportation trip, the undercover agents met with Bryant and Defendant Mack at a restaurant. Mack had been a police officer with the Miami–Dade police department for sixteen years. He had been scheduled to work that day, but had requested the day off.

Before Mack arrived, the undercover agents attempted to confirm with Bryant that "everybody was on the same page [about what they were doing]." Bryant assured Tyson that

Mack "[knew] exactly what [they were] doing" and that "there's no secrets."

Mack arrived in his Miami–Dade police patrol car. He wore his police uniform and badge, but not his name tag. His firearm was visible, holstered at his waist. When Mack arrived, Bryant stated, "James, T." Jackson interpreted this as Bryant introducing Mack by the name "James."

***914** Due to lack of seating at the restaurant, the group decided to move the meeting to another restaurant. Det. Tyson and Bryant rode together in Bryant's vehicle. They were followed by Agent Jackson. Mack met them at the second restaurant. At the new restaurant location, they sat together.

During the meeting at that restaurant, which began at about 9:05 a.m., Agent Jackson and Det. Tyson did not mention the words "cocaine" or "drugs." Det. Tyson emphasized that it was important that Mack understood what was going on and that he was "on the same point."[4] Mack did not ask any questions while Tyson was speaking. He gave brief affirmative responses when spoken to, such as, "[t]hat's true," "[r]ight," "[y]ou right," and "[y]eah." He asked no questions.

At some point, while they were still in the restaurant, Mack and Det. Tyson began discussing the county's plan to reduce the police force by laying off hundreds of police officers, to which Tyson replied "[w]e ready to get rich." Tyson also commented that "[n]obody down [in Miami] be working" and that "we" could be in Miami "all the time," and Mack confirmed that "[t]here won't be [anybody working]." Jackson then added that Miami would be "wide open." Mack said nothing in response to that statement.

As the group left the restaurant, Agent Jackson said "[h]ey but I appreciate it man[,]" to which Mack replied "[n]o problem." Jackson told Mack that they were "trying to make it work" because Miami was "new territory for us." He also stated that they had "many t-shirts coming through you know what I mean, we just want to make sure everything is right you know what I mean." Mack responded, "I don't hate, so that's why I respect and understand everything he mentioned." Jackson then remarked that "ain't nobody trying to get locked up." Mack responded "[y]ou know how they do us" and gestured as though he was handcuffed, which Jackson interpreted to mean "the government against two black guys." The meeting broke up at 10:18 a.m.

Less than two hours later, Bryant arrived at the nightclub with McLendon. There, McLendon counted ten brick-shaped packages of cocaine as they were packed into a duffel bag. There is no evidence that Mack was present when the packages were counted and packed. A little after 12:03 p.m., Bryant and McLendon transported the 10 kilograms of sham cocaine in their car to Aventura. Their vehicle, a PT Cruiser, was followed closely for about eight to ten miles by the same marked patrol car that was observed escorting the December 21, 2011 transport. The marked patrol car kept going behind Bryant and McLendon's vehicle until it entered a Publix parking lot in Aventura. FBI agents testified that throughout the surveillance, there was radio

communication between the marked patrol car and the PT Cruiser.

Bryant, McLendon, and Mack were arrested on April 11, 2012.

All three Defendants were indicted on four counts: (1) conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846 (Count One); (2) attempt to possess with intent to distribute cocaine on December 21, 2011, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), 846, and 18 U.S.C. § 2 (Count Two); (3) attempt to possess with intent to distribute cocaine on January 14, 2012, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), 846, and 18 U.S.C. § 2 ***915** (Count Three); and (4) possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count Four).

B. Procedural History

On September 13, 2012, the government filed a motion *in limine* to exclude testimony at trial concerning Bryant's and Mack's statements at the time of their arrest. According to the government's pretrial motion, Bryant and Mack each stated to the arresting officers that Mack was led to believe he was escorting money, not cocaine. The motion does not detail the content of the post-arrest statements, and the government did not attach any copies of said statements. Although there is nothing in the record for us to determine what precisely the statements were, there does not appear to be any dispute that statements of this nature were made.

Mack did not file a pretrial motion for severance. On the Friday preceding the trial, which began on Tuesday, October 2, 2012, Bryant made additional statements to the prosecutors, asserting that he had led Mack to believe that the transportation involved money, not drugs. Those statements were not recorded or otherwise made a part of the record. At the outset of trial, the court granted the government's motion *in limine* to bar Mack's and Bryant's statements to the arresting officers. The court also ruled that exculpatory statements are inadmissible hearsay. Mack then orally moved to sever the trials. The court inquired whether Bryant was going to testify in the joint trial, but Bryant's counsel stated he could not confirm that he would. The district judge denied the motion as premature, and stated that if Bryant did not testify in the joint trial, Mack could move to sever at that time. Defense counsel did not offer information that Bryant would testify on Mack's behalf at a separate trial. Neither did the court inquire whether this would be the case.

The government's case concluded on Thursday, October 4, 2012. All three Defendants made motions for judgments of acquittal pursuant to Rule 29 on the ground that there was insufficient evidence to prove that they knew what was being transported was cocaine and to prove that any firearms were possessed or carried in connection with the drug transportation. No renewed severance request was made by Mack. The court questioned the prosecutor closely concerning the sufficiency of evidence as to Defendant Mack. She outlined the government's evidence. At a couple of points the court interjected, expressing some skepticism about whether there was enough

evidence to support the government's case against Mack. At the conclusion of that colloquy, the court denied Mack's motion for judgment of acquittal but stated that "it's a close question." The court specifically stated, "I assume at the end of the defense case, it will be raised again." The court then inquired of Mack's counsel "Mr. Rouviere, what are you going to do in front of the jury?" Mack's counsel stated that "... in light of the court's deep analysis of the judgment of acquittal, I would like a couple of minutes to discuss it with my client." The court stated: "Oh, I'm not telling you what I'm going to do." After hearing from counsel for the two other Defendants, who stated that they would not be presenting any evidence, the court inquired again of Mack's counsel who stated his client would not be testifying. Then the court affirmed with Mack individually that he understood that no witnesses would be called on his behalf and that he had made a decision not to testify in his own behalf.

At that point the jury was brought in and counsel for all Defendants announced ***916** that they rested. After the jury retired from the courtroom, the following colloquy occurred:

> THE COURT: All right. You're renewing your motions for judgment of acquittal pursuant to Rule 29, right, Mr. Stonick?
>
> MR. STONICK: Correct, Judge, and I'd also restate and renew all previous objections for appellate purposes, if necessary.
>
> THE COURT: Mr. Rouviere.
>
> MR. ROUVIERE: Yes, Judge. I'm renewing my Rule 29 motion and maintaining all prior objections.
>
> THE COURT: Mr. Walker.
>
> MR. WALKER: And also, same Rule 29 and maintaining all the prior objections that I made during the course of the trial.

The court denied Bryant's and McClendon's motions. It announced it would take Mack's motion under advisement, and suggested to Mack's counsel that he file a brief over the long weekend. We do not construe Mack's reference to "maintaining all prior objections" as a renewed request for severance.

The court recessed until Tuesday, October 9, 2012. After closing arguments on October 9, 2012, the district court orally denied Mack's Rule 29 motion for judgment of acquittal.

On October 10, 2012, a jury found Bryant and McLendon guilty of all four counts. Mack was found guilty of Counts One, Three, and Four, but not guilty of Count Two (the attempt charge related to the December 21, 2011 drug transportation). On October 17, 2012, the district court issued a written order once again denying all Defendants' renewed motions for judgment of acquittal on the ground that the evidence was sufficient to support a jury finding.

On October 17, 2012, Mack filed a renewed motion for judgment of acquittal, or alternative motion for new trial. That motion specifically mentioned the district court's failure to sever Mack's case for trial as a reason to grant a new

trial. On the same date, Mack filed a motion for leave to file an affidavit that he anticipated receiving from Bryant, in which Bryant was expected to affirm that he would have provided exculpatory statements for Mack in a separate trial. The court denied both motions in an order entered on October 24, 2012.

On November 12, 2012, Mack filed a second renewed motion for a new trial or in the alternative, motion to alter, amend, or correct order denying motion for a new trial and judgment of acquittal. That motion was also based on the court's denial of severance. An affidavit of Bryant dated November 5, 2012 was attached to the motion. It stated that Bryant had not told Mack that the transaction involved drugs.

On December 18, 2012, McLendon filed a motion adopting Mack's motion for new trial. McLendon subsequently submitted an affidavit of Bryant dated November 15, 2012 concerning McLendon's lack of knowledge that cocaine would be involved in the transaction. Mack's second renewed motion was denied in an order entered on November 15, 2012, and McLendon's motion was denied during the December 19, 2012 sentencing proceedings.

On December 19, 2012, McLendon and Mack were sentenced to 188 and 120 months' imprisonment, respectively, on each of the drug counts they were convicted of, all terms to be served concurrently, followed by 60–months' imprisonment for Count Four, to be served consecutively. The court also imposed a five-year supervised ***917** release term on all of the counts, to be served concurrently.

On the same date, after his request for a downward variance based on sentencing factor manipulation was denied, Bryant was sentenced to 204 months' imprisonment for Counts One, Two, and Three, and to a consecutive 60–month term on Count Four, followed by ten years of supervised release on all counts, to be served concurrently.

II. Issues on Appeal

Defendants challenge the denial of their motions for a judgment of acquittal. Mack appeals the district court's denial of his oral motion made on the first day of trial and of his written post trial motion pertaining to severance. Both Mack and McLendon attack the district court's denial of their respective motions for new trial. All Defendants challenge the district court's failure to admit Bryant's post-arrest statements for impeachment purposes. They further contend that the cumulative effect of purported prosecutorial misconduct, improper government witness testimony, and erroneous judicial rulings warrant a reversal in this case. Only Bryant appeals his sentence.

III. Sufficiency of the Evidence

A. Standard of Review

All Defendants assert that their convictions were not supported by sufficient evidence. We review de novo the question whether sufficient evidence supports a jury verdict. *United States v. Calderon,* 127 F.3d 1314, 1324 (11th Cir.1997) (citing *Harris,* 20 F.3d at 452). On review of a guilty verdict, “the evidence

is viewed in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor." *Id.* The verdict must be upheld "if there is substantial evidence to support it, that is 'unless no trier of fact could have found guilt beyond a reasonable doubt.' " *Id.* (quoting *United States v. Battle,* 892 F.2d 992, 998 (11th Cir.1990)).

We first address the district court's denial of Defendants' Rule 29 motion for acquittal with respect to the conspiracy and attempt charges (Counts One through Three). We then turn to the sufficiency of the evidence on the 18 U.S.C. § 924(c) charge (Count Four). We find that the evidence presented to the jury was sufficient to support Defendants' convictions on all counts.

B. The Conspiracy and Attempt Charges

The conspiracy charge requires the government to prove beyond a reasonable doubt that: "(1) a conspiracy existed; (2) [Defendants] knew the essential objectives of the conspiracy; and (3) [Defendants] knowingly and voluntarily participated in the conspiracy." *Calderon,* 127 F.3d at 1326 (quoting *Harris,* 20 F.3d at 452 (internal quotation marks omitted)). To find Defendants guilty of attempt, the jury had to find beyond a reasonable doubt (1) that they acted with the culpability required for the commission of the crime, and (2) that they took a substantial step toward to the commission of the crime. *United States v. Ohayon,* 483 F.3d 1281, 1285 (11th Cir.2007). At issue for both the conspiracy and the attempt charges (hereinafter "the drug charges") is the sufficiency of the evidence that Defendants knew that the transaction involved drugs.

1. Bryant's Knowledge

The record is rife with evidence of Bryant's knowledge that the contents of the cargo consisted of drugs. On December 9, 2011, Agent Jackson told Bryant "it's ten keys ..., I mean that's what gonna be moving." Bryant responded, ***918** "okay." Jackson repeated himself, to be clear that Bryant understood, "[j]ust so you know. Uh, its ten kilo's." Bryant again said, "okay." Bryant acknowledged that moving the drugs was "a huge risk" and that the police he had recruited to do the job "usually get paid four, five gran' a piece."

Later in the conversation, Agent Jackson stated, "it's not a incre-, incredible amount of cocaine, I mean so it ain't a ton. Know what I mean?" Bryant replied, "I understand, I understand." Jackson also said that "cocaine prices isn't what it used to be...." Bryant hung up when Jackson, on one occasion, referred to the "coke" during a telephone conversation with him, and later chided Jackson for using that term on the telephone. Bryant suggested that Agent Jackson could use many other terms to refer to cocaine. There can be no doubt that Bryant knew exactly what he had agreed to transport. Thus, his conviction on the drug charges must be upheld.[5]

2. McLendon's Knowledge

The evidence is ample with respect to McLendon's knowledge that the offense involved drugs. Bryant stated to Agent Jackson

that McLendon would serve as his "point man" to the police officers on the transaction and that he and McLendon have been "in this thing" since they were children.

In addition, McLendon's knowledge of the drugs is supported by independent evidence. McLendon was present at the nightclub office on December 21, 2011 when Det. Tyson marked each of the nine brick-shaped items, counted them, and placed them in a duffel bag. Det. Tyson then handed the bag to McLendon and told him that "there's nine in there" and that "[they] need[ed] to make sure all nine of these get there."

McLendon contends that he was not told what was contained in the "opaque, brick-shaped, shrink-wrapped items that were placed in a duffel bag by the undercover agents and given to him and Bryant to transport." But Det. Tyson instructed both Bryant and McLendon that there can be "no deviation, no test, no taste" and asked "neither one of y'all get high right?"

McLendon points out that Det. Tyson himself told McLendon and Bryant that they were transporting money, not drugs, by making the statement "cause this money, ***919** see what I'm saying?" However, that statement was made immediately after Tyson had counted the nine brick-like objects and after he had handed the bag to McLendon, cautioning him that they needed to make sure the cargo reaches its destination intact. Thus, this statement is consistent with Tyson's testimony that he sought to communicate to McLendon and Bryant that the nine kilograms of cocaine were worth a lot of money to him. In sum, the evidence in the record fully sustains McLendon's conviction on the drug charges.

3. Mack's Knowledge

Mack asserts that there was no evidence from which a reasonable jury could find, beyond a reasonable doubt, that he knew the conspiracy involved drugs, instead of money. He points out that he was not involved in any of the negotiations or preparations for the offense. He was not present when the drugs were loaded into the vehicle driven by Bryant and McLendon, and he drove away before they were unloaded. He never saw the sham cocaine or the bag in which it was carried. He adds that, on the morning of the second drug transportation trip, the undercover agents were still trying to confirm that he knew that he was escorting drugs.

Even though the evidence of Mack's knowledge of the drugs is not overwhelming, it is sufficient to support his conviction on the drug charges. Mack appeared at the January 14, 2012 meeting in full uniform; he was wearing his badge but not his name tag. His weapon was visible and was holstered on his person. Approximately two hours later, FBI agents observed his marked police car following closely the vehicle driven by Bryant and McLendon. We have held that "repeated presence at the scene of the drug trafficking ... can give rise to a permissible inference of participation in the conspiracy." *Calderon,* 127 F.3d at 1326 (citations omitted). Although "mere presence," standing alone, is insufficient to support a conviction for a drug-related offense, it is "a material and probative factor" that may be considered by the jury

in reaching the verdict. *Id.* (internal quotation marks and citations omitted); *United States v. Baptista–Rodriguez,* 17 F.3d 1354, 1374 (11th Cir.1994).

Mack argues that the "permissible inference" does not apply in his case because he was never present around the drugs and his presence at the scene was not recurring. Contrary to Mack's contentions, a co-conspirator's presence around the drugs involved in the offense is not the only way to trigger the permissible inference. Rather, the inference of participation in the conspiracy can arise from a co-conspirator's presence at meetings related to the conspiracy. *See Baptista–Rodriguez,* 17 F.3d at 1374 (the defendant challenging the sufficiency of his conviction was present at two "key meetings" involving the conspiracy). In the present case, Mack's presence extends not only to his participation in the January 14, 2012 meeting, but to his subsequent escort of the drugs later that day.[6]

Moreover, the record reflects additional proved circumstances that support the inference of Mack's guilty knowledge. *See United States v. Hernandez,* 141 F.3d 1042, 1053 (11th Cir.1998) (" 'a conspiracy conviction will be upheld ... when the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him' ") ***920** (quoting *Calderon,* 127 F.3d at 1326). We find the conversation between Mack and Agent Jackson to be significant in that regard. The undercover agents told Mack that, as a result of the police officer layoffs, they would be able to do more business in Miami and would "get rich" because Miami would be "wide open." Agent Jackson then confided in Mack that Miami was "new territory" for him and Tyson, and that they had "this many t-shirts coming through you know what I mean, we just want to make sure everything is right you know what I mean." Mack stated that he understood and respected that.

Although Mack did not say much during the meeting, "[a]n illegal agreement may be inferred from the conspirators' conduct and other circumstantial evidence." *Baptista–Rodriguez,* 17 F.3d at 1374 (citations omitted) (concluding that the evidence was sufficient to support the defendant's conviction, despite the absence of evidence showing that he verbally assented to the scheme); *cf. United States v. Kelly,* 749 F.2d 1541, 1548–49 (11th Cir.1985) (reversing a defendant's conviction of drug-related conspiracy because the defendant's proven involvement in the conspiracy was limited to his presence at another conspirator's house, at which the defendant could have been present as a social guest, particularly where "[n]o evidence exist[ed] that the affairs of the ... schemes were discussed with [the defendant]").

Mack contends that there is no direct evidence of his knowledge that "t-shirts" is one of the many code words for drugs. However, Agent Jackson, who is an agent on the drug squad, testified that "t-shirts" was a very common word for cocaine "not just [in] Atlanta, ... but everywhere"; it was also a term he had used with Bryant in reference to the drugs involved in this case. In light of Mack's 16–year experience on the Miami–Dade police force, the jury could reasonably have inferred that Mack knew exactly what Jackson was referring

to and that he knew that the indubitably criminal activity in which he was about to participate involved drugs.

Finally, Bryant made numerous statements to the undercover agents assuring them that Mack knew everything.[7] These statements likely bolstered the government's case against Mack on the drug charges. However, they are not necessary to sustain a guilty verdict. Even absent these statements, the cumulative effect of the circumstantial evidence discussed above is sufficient to show Mack's knowledge of the drugs.[8]

***921** Accordingly, taken in the light most favorable to the verdict, we cannot say that the record reveals a lack of substantial evidence from which a factfinder could find guilt beyond a reasonable doubt. *Calderon,* 127 F.3d at 1324. Thus, we affirm Bryant's, McLendon's, and Mack's convictions on the drug charges.[9]

C. The "Firearms Charge"

18 U.S.C. § 924(c)(1)(A) provides in part:

> any person who, *during and in relation to any crime of violence or drug trafficking crime* ... for which the person may be prosecuted in a court of the United States, *uses or carries a firearm,* or who, *in furtherance of any such crime, possesses a firearm,* shall, in addition to the punishment provided for such crime of violence or drug trafficking crime ... be sentenced to a term of imprisonment of [a minimum of 5 years].

18 U.S.C. § 924(c)(1)(A)(i) (emphasis added). Accordingly, to prove the firearms charge, the government must show that the defendant (1) knowingly used or carried a firearm during and in relation to any drug trafficking crime for which he could be prosecuted in a court of the United States, or (2) possessed a firearm in furtherance of such a crime. *United States v. Woodard,* 531 F.3d 1352, 1362 (11th Cir.2008); *United States v. Haile,* 685 F.3d 1211, 1217 (11th Cir.2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 1723, 185 L.Ed.2d 785 (2013) and *cert. denied,* —— U.S. ——, 133 S.Ct. 1724, 185 L.Ed.2d 785 (2013) (stating that "the enhanced penalties [under the statute] are triggered in one of two ways: under the 'during and in relation to ... uses or carries' prong, or under the 'in furtherance of ... possesses' prong.)" *Id.*

All Defendants were charged with carrying a firearm during and in relation to a drug trafficking crime and with possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c) and 2. The district judge instructed the jury on aiding and abetting under 18 U.S.C. § 2 for the section 924(c) charge. The jury found Mack guilty of carrying a firearm during and in relation to the drug trafficking crime, in violation of 18 U.S.C. § 924(c). Bryant and McLendon were found guilty of possessing a firearm in furtherance of the drug trafficking crime, in violation of 18 U.S.C. §§ 924(c) and 2.

1. Sufficiency of the Evidence as to Mack

Mack argues that there is no evidence that he carried a firearm during and in relation to the drug trafficking crime. In order to show that a person carried a firearm "in relation to" a crime, the firearm must have "facilitate[d], or [had]

the potential of facilitating, the drug trafficking offense"; "its presence or involvement cannot be the result of accident or coincidence." *United States v. Novaton,* 271 F.3d 968, 1013 (11th Cir.2001) and *United States v. Timmons,* 283 F.3d 1246, 1251 (11th Cir.2002) (both citing *Smith v. United States,* 508 U.S. 223, 237–38, 113 S.Ct. 2050, 2058–59, 124 L.Ed.2d 138 (1993)). "The phrase 'in relation to' is expansive." *Novaton,* 271 F.3d at 1013; *see also Timmons,* 283 F.3d at 1251–52 (noting that the "during and in relation to" requirement "was intended to be a limiting phrase to 'prevent the misuse of the statute [from] ***922** penaliz[ing] those whose conduct does not create the risks of harm [—i.e., combining drugs and guns—] at which the statute aims' ") (quoting *Muscarello v. United States,* 524 U.S. 125, 132, 118 S.Ct. 1911, 1916, 141 L.Ed.2d 111 (1998)).

We conclude there was sufficient evidence to support Mack's conviction on the firearm charge. It is undisputed that Mack was carrying his firearm approximately two hours before the actual drug transportation. He knew of the illegal nature of the conspiracy, and he understood that his police officer status was a necessary condition to his participation in the deal. In light of this evidence, it was reasonable for the jury to conclude that Mack carried a firearm in relation to the drug trafficking conspiracy.

Mack argues that the firearm had no role in the offense, and that, even if he carried a firearm, it was solely an incident of his wearing his police uniform. Our holding in *Novaton* defeats this argument. In that case, we found that a police officer, who admitted to carrying his service firearm during the events at issue, "furthered the drug trafficking conspiracy by providing protection for and escorting co-conspirators to and from the Novaton residence while [the co-conspirators] were transporting drugs or drug proceeds." *Novaton,* 271 F.3d at 1013. Similarly, Mack's carrying his service firearm was necessary to facilitate the drug transportation in the present case, regardless of whether its purpose was to avoid interdiction from law enforcement or also to provide security for the cargo from potential thieves. Even if Mack carried the firearm merely as a necessary accessory to his police uniform, he did so with the recognition that his carrying his "police-issued service firearm," *id.,* combined with his full uniform and his marked police cruiser, would signal to other law enforcement officers that he was one of them—just another police officer on legitimate business. At the very least, the presence of the firearm had the potential for facilitating the conspiracy. *See id.* (finding that the defendant's police-issued service firearm "facilitated, or had the potential for facilitating" the conspiracy).[10] Accordingly, the jury verdict finding Mack guilty of carrying a firearm during and in relation to the drug trafficking crime, in violation of 18 U.S.C. § 924(c), must be upheld.[11]

***923 2. Sufficiency of the Evidence as to Bryant and McLendon**

Bryant contends that there is no evidence that either he or his co-defendants possessed or carried a firearm. We have already concluded that a reasonable jury could find that Mack carried a firearm on January 14, 2012. Accordingly, Bryant's culpability on the firearm charge turns on proof of his aiding and

abetting in Mack's firearm offense under 18 U.S.C. § 2.[12]

18 U.S.C. § 2(a) provides that "[w]hoever ... aids, abets, counsels, commands, induces or procures [a crime's] commission, is punishable as a principal." 18 U.S.C. § 2(a). To prove aiding and abetting in a section 924(c) case in this circuit, the government must show that (1) the substantive offense was committed; (2) that the defendant associated himself with the underlying criminal venture; and (3) that he committed some act that furthered the crime. *See Bazemore v. United States,* 138 F.3d 947, 949 (11th Cir.1998) (citing *United States v. Hamblin,* 911 F.2d 551, 557 (11th Cir.1990)). In addition, the defendant must have known that a firearm was being used or carried by a co-conspirator. *Id.; see also Rutledge v. United States,* 138 F.3d 1358, 1359 (11th Cir.1998).[13]

The United States Supreme Court recently clarified the showing of intent required for conviction of an aiding and abetting violation under section 924(c). *Rosemond v. United States,* —— U.S. ——, 134 S.Ct. 1240, 188 L.Ed.2d 248 (Mar. 5, 2014). *Rosemond* involved a "drug deal gone bad," after either the defendant (Rosemond) or one of his confederates (it was unclear who) fired a gun at the putative drug buyers. *Id.* at 1243. Rosemond was charged with violating 18 U.S.C. § 924(c) by using or carrying a firearm in connection with a drug trafficking offense, or, in the alternative, aiding and abetting that crime under 18 U.S.C. § 2. *Id.* At trial, the district judge rejected Rosemond's proposed instructions that a guilty verdict required the jury to find that the defendant "intentionally [facilitated or encouraged the firearm's use], as opposed to [merely] the predicate drug offense." *Id.* at 1244. Instead, the jury was instructed that Rosemond was guilty of aiding and abetting a section 924(c) offense if "(1) [he] knew his cohort used a firearm in the drug trafficking crime, and (2) [he] knowingly and actively participated in the drug trafficking crime." *Id.* (internal quotation marks and citation omitted). He was convicted by the jury, and the United States ***924** Court of Appeals for the Tenth Circuit affirmed. *Id.* at 1244–45.

The United States Supreme Court reversed Rosemond's § 924(c) conviction. *Id.* at 1252. Writing for the majority, Justice Kagan first concluded that the district court correctly instructed the jury that Rosemond could be convicted of aiding and abetting, even if he facilitated only the drug element, not the gun element, of the section 924(c) offense. *Id.* at 1247–48. Justice Kagan then clarified the proof necessary for the intent element of aiding and abetting a section 924(c) violation —i.e., the defendant's knowledge that a co-conspirator will carry a gun. *Id.* at 1249. "[The d]efendant's knowledge of a firearm must be advance knowledge"—that is, knowledge at a time when the accomplice "can attempt to alter [the] plan, ... withdraw from the enterprise[, or] go ahead with his role in the venture." *Id.* An accomplice's knowledge of "a confederate's design to carry a gun" is not "advance" if it does not afford him "a realistic opportunity to quit the crime." *Id.* Accordingly, Justice Kagan concluded that the district court's jury instructions were erroneous because they did not direct the jury to determine when Rosemond obtained the requisite knowledge and to decide whether Rosemond knew about

the gun in sufficient time to withdraw from the crime. *Id.* at 1251–52.

We are now called upon to determine the effect of *Rosemond* on the analytical framework employed in cases alleging aiding and abetting a section 924(c) offense. The literal meaning of the requirement that the defendant's knowledge of the firearm be "advance" is obvious. In addition, *Rosemond* 's holding that "the affirmative" act or "facilitation" requirement for aiding and abetting a section 924(c) violation is met by the defendant's participation in the drug deal itself and that no act directed to the use of the firearm is required makes clear that the government is not required to show that the defendant "committed some act related to the gun" (as opposed to the substantive offense). *See Rosemond,* 134 S.Ct. at 1247–48.

Applying the familiar framework, as modified by *Rosemond,* to the present case, we have no trouble concluding that the evidence against Bryant and McLendon was sufficient to sustain a guilty verdict for their aiding and abetting in Mack's section 924(c) offense. First, the substantive offense was committed by Mack carrying a firearm during and in relation to the drug trafficking crime.[14] Next, it is evident that Bryant knowingly associated himself with the drug trafficking conspiracy. And, we have already concluded that the evidence showing McLendon's knowledge of the drug transport was sufficient to sustain his guilty verdict. Third, there is ample evidence of various "affirmative acts," by both Bryant and McLendon which furthered the drug conspiracy. *Id.* at 1247–48. Bryant organized the transportation of large quantities of narcotics and enlisted police officers to assist him. McLendon was the "point man" to the police officers, and he actively participated in the scheme by collecting and dropping off the drugs on two occasions.

Finally, Bryant knew well in advance that a firearm would be carried; in fact, he recruited Mack to participate in the offense based on Agent Jackson's explicit request for uniformed policemen. Mack ***925** arrived at the January 14, 2012 meeting in full uniform; his service weapon was holstered at his waist. The breakfast ended approximately two hours before Bryant, accompanied by McLendon, picked up the drugs. It is obvious that Bryant had advance knowledge "that enable[d] him to make the relevant legal (and indeed, moral) choice." *Rosemond,* 134 S.Ct. at 1249.

Unlike Bryant, McLendon was not present at the January 14, 2012 meeting, and could not have observed Mack's openly displayed firearm. Nevertheless, according to the testimony of agents conducting the surveillance, Mack's marked patrol car trailed the vehicle in which Bryant and McLendon were riding, and was either directly behind or a few cars behind it from the moment that vehicle left Miami Beach and drove north to the drop-off location. Furthermore, there was telephone communication between the patrol car and Bryant and McLendon's vehicle throughout the duration of the escort. Accordingly, a reasonable jury could have concluded that McLendon, to whom Bryant referred as his "point man" to the police officers and who was in a vehicle that was loaded with the drugs, believed that the police cruiser following closely over the course of eight or ten miles was driven by an armed police officer.

The question, under the *Rosemond* test, is whether McLendon's knowledge that Mack was carrying a firearm, was "advance," such that it gave McLendon sufficient time to walk away from the crime. This inquiry implicates the practical difficulties of delineating the exact contours of *Rosemond* 's "advance knowledge" directive.

As to McLendon, we answer the question in the affirmative. After the conclusion of the morning meeting (which McLendon did not attend), Bryant and McLendon jointly collected the drugs that were to be moved. Moreover, McLendon knew that they were transporting drugs that afternoon, that the drugs would be escorted by a police officer (as was the case during the first transportation on December 21, 2011), and that the participation of a uniformed (and likely armed) officer was essential to the success of the drug conspiracy. McLendon had a realistic opportunity to either not enter the vehicle at all, or to exit it before it embarked upon its route. He made a conscious choice to proceed. His knowledge of the gun was sufficiently advance. *Compare* these circumstances *with* the illustration in *Rosemond* involving a defendant in a section 924(c) prosecution who "agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange" and whose knowledge is not sufficiently "advance" for purposes of conviction if one of his confederates arrives at the meeting carrying a concealed gun in his jacket. *Rosemond,* 134 S.Ct. at 1251. As a result, Bryant's and McLendon's guilty verdicts for aiding and abetting in Mack's firearm offense under section 924(c) are affirmed.

IV. Mack's Motion to Sever

A. Standard of Review

Mack argues that because Bryant's testimony would have contradicted the government's case and exonerated Mack, the district court's refusal to sever the trials was an abuse of discretion which deprived Mack of a fair trial. We review the denial of a motion for severance for abuse of discretion. *United States v. Kennard,* 472 F.3d 851, 858–59 (11th Cir.2006). "Appellate courts are reluctant to second-guess trial court refusals to grant a severance." *United States v. Pepe,* 747 F.2d 632, 650–51 (11th Cir.1984) (citations omitted).

*926 *B. Discussion*

Bryant's "exculpatory statements" concern Mack's alleged lack of knowledge of the contents of the cargo escorted by Mack. They consist of (1) Bryant's statements to the arresting officers,[15] and (2) the additional statements he made to the prosecutors before trial, in which he asserted that Mack was told he was following cash, not drugs.

At the outset of trial, the court ruled that post-arrest statements "that include inculpatory statements about other defendants" could not be used in opening statements or otherwise mentioned by counsel. The district judge cautioned counsel that failure to abide by the *Bruton* rule[16] would have dire consequences for counsel, including contempt sanctions and jail time. The judge emphasized, on several occasions, the importance of counsel's compliance with his ruling. Mack points to the

following colloquy between the district court and counsel for Mack:

> THE COURT: ... So there will be no mention by a defense lawyer of any statement that inculpates another defendant. You, of course, can talk about your own client and what he did.
>
> Any question about that? Unless you want free room and board, that's the way it's going to be.
>
> MR. ROUVIERE: Your Honor, may I address the Court?
>
> THE COURT: Do you understand what I said?
>
> MR. ROUVIERE: I do understand, Your Honor, but that raises—
>
> THE COURT: Then just abide by it.
>
> MR. ROUVIERE: But Judge, it raises another issue that needs to be raised.
>
> THE COURT: I don't want to deal with another issue. I want to deal with these issues first.
>
> MR. ROUVIERE: Well, it is with this issue, Judge.
>
> THE COURT: What didn't you understand about how I ruled?
>
> MR. ROUVIERE: Exculpatory statements made—
>
> THE COURT: I haven't gotten to that yet.
>
> MR. ROUVIERE: Okay. Well, Judge, it may lead to a motion to sever, because some things happened over the weekend.
>
> THE COURT:.... Exculpatory statements cannot come in because they're hearsay. A defendant's own exculpatory statements made after arrest cannot come in, because it's rank hearsay.
>
> [...]
>
> But you cannot bring in a defendant's inculpatory statement that includes guilt of another defendant, and you cannot bring in a defendant's exculpatory statement.
>
> Any problems with that? Any misunderstanding? Because I'm serious about this. Not only would there be a mistrial, the reason there will be a mistrial is because the lawyer is going to have a lot of time of consultation with a client if the client is in jail. If the client is not in jail, we're going to have the reverse. The client is going to have to seek permission to see the lawyer in jail. ***927** So don't violate this when I've been giving you a warning. Please don't do it.
>
> [...]
>
> THE COURT: What are you going to say that you think is questionable that may impinge upon your liberty?
>
> MR. STONICK: Nothing, Judge.
>
> THE COURT: Okay. No, if there is, ask me now because I mean it.

MR. ROUVIERE: Judge, I do have a question.

THE COURT: Okay.

MR. ROUVIERE: A statement from one codefendant exculpating another codefendant—

THE COURT: Can't come in, cannot come in. It's hearsay.

MR. ROUVIERE: Your Honor, then at this point in time I would—

[...]

MR. ROUVIERE: Your Honor, at this time on behalf of Daniel Mack, I would make a motion to sever Daniel Mack from this trial, and I need to explain to the Court on the record why.

THE COURT: Well, why didn't you do it before?

MR. ROUVIERE: Well, Your Honor—

THE COURT: That's the first thing you need to explain.

MR. ROUVIERE: Well, Your Honor, I sent an email. I knew that a statement was made post arrest. However—

THE COURT: What statement? It can't come in. Even in a separate trial, it can't come in.

MR. ROUVIERE: Well, Judge, only if I can call the other defendant as a witness in a separate trial. Because at this time, he has a Fifth Amendment right to remain silent.

THE COURT: And he also has a Fifth Amendment right afterwards. MR. ROUVIERE: Not if his case is over, Judge.

[...]

THE COURT: What if he's found guilty?

MR. ROUVIERE: He can still testify, Judge.

THE COURT: He can also say, I ain't testifying, I'm going to take an appeal, or I'm not going to testify.

[...] (discussing the duration of a defendant's appeal and the filing of a petition for writ of certiorari to the United States Supreme Court)

MR. ROUVIERE: Judge, however, apparently on Friday evening, there was a meeting between the Government, the agents, Mr. Bryant wherein in that statement, he made a statement—

THE COURT: In what statement?

[...]

MR. ROUVIERE: Mr. Bryant made a statement to the Government and the agents that, in fact, my client was told that what was in the car at the time was cash.

THE COURT: Who told him?

MR. ROUVIERE: Mr. Bryant.

THE COURT: So Mr. Bryant says that he told Mr. Mack, ...

THE COURT: He's following cash. Okay.

MR. ROUVIERE: Yes, sir. And that was made in a post arrest statement. However, now it's been made in a secondary meeting with the Government and I believe Judge under Rule—

THE COURT: Well, is Mr. Bryant going to testify in this trial?

MR. ROUVIERE: I don't know if Mr. Bryant is going to testify.

THE COURT: Have you asked his lawyer?

***928** MR. ROUVIERE: They weren't able to tell me yes or no at this point.

THE COURT: Well, how about if I ask him? Okay. Mr. Stonick, is your client going to testify?

MR. STONICK: Judge, at this point we reserve our right to testify or not. I cannot indicate if my client will testify.

THE COURT: There you go. So then you can ask him all you want about that. Just don't mention it until he testifies. Resolved. Motion for severance denied.

The defendant has indicated that he's going to testify. And then if he doesn't bring it up, you can cross-examine him and even lead him if you want....

[...]

THE COURT: Do you have a severance motion?

MR. ROUVIERE: An oral one, Judge. My system has been down.

THE COURT: It doesn't have to be in writing unless you knew before.

What would be the possible grounds? Defendant says he's going to testify. You question him. If he doesn't testify, then you can make it at that point, but as of now, it's denied as premature.

As noted above, Mack's alternative motion for new trial based on the denial of severance and his motion for leave to file an affidavit that he expected to receive from Bryant were filed on October 17, 2012, a week after the conclusion of the trial. Mack submitted Bryant's November 5, 2012 affidavit to the district court on November 12, 2012, in conjunction with Mack's second renewed motion for a new trial or in the alternative, motion to alter, amend, or correct order denying motion for a new trial and judgment of acquittal.[17]

In this circuit, the rule about joint trials is that "defendants who are indicted together are usually tried together." *United States v. Browne,* 505 F.3d 1229, 1268 (11th Cir.2007) (citing, inter alia, *Zafiro v. United States,* 506 U.S. 534, 537–38, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993)). "That rule is even more pronounced in conspiracy cases where the refrain is that 'defendants charged with a common conspiracy should be tried together.' " *United States v. Lopez,* 649 F.3d 1222, 1234 (11th Cir.2011) (citations omitted).

A severance should be granted if "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." *Zafiro,* 506 U.S. at 539, 113 S.Ct. at 938. "[A] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Id.* (citing *Tifford v. Wainwright,* 588 F.2d 954 (5th Cir.1979)); *see also* ***929** *United States v. Cobb,* 185 F.3d 1193, 1197 (11th Cir.1999) ("To justify severance, the defendant must 'demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his defense.' ") (citation omitted). A defendant's burden of demonstrating "compelling prejudice" stemming from the denial of a motion to sever is a heavy one. *Pepe,* 747 F.2d at 651.

As part of that "heavy burden," a movant seeking severance in reliance on the exculpatory testimony of a co-defendant must show: (1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and the effect of the desired testimony; and (4) that the co-defendant would indeed have testified at a separate trial. *Novaton,* 271 F.3d at 989 (quotation marks and citation omitted). After the defendant makes that showing, the district court must still weigh the significance of the testimony against considerations of judicial economy. *Id.* Whether severance is proper in light of concerns of judicial administration requires the court to assess (1) the significance of the testimony in relation to the defenses, (2) the extent of the prejudice caused by the absence of the testimony, (3) the effect of severance on judicial economy and the administration of justice, and (4) the timeliness of the motion. *United States v. DiBernardo,* 880 F.2d 1216, 1228 (11th Cir.1989) (quotation marks and citation omitted).

We consider Mack's challenge to the district court's denial of his oral motion made at the opening of the trial in light of the district judge's knowledge of the facts at the time he ruled on the motion. *Byrd v. Wainwright,* 428 F.2d 1017, 1018 (5th Cir.1970).[18] With that in mind, we turn to the four elements set forth in this circuit's framework for analyzing a motion to sever, and conclude that the first three requirements are met here.

First, it cannot seriously be doubted that Mack had a bona fide need for Bryant's testimony and that Bryant's proposed testimony would have had an exculpatory effect. Indeed, Mack needed that testimony to contradict the numerous statements confirming Mack's knowledge of the details of the offense which Bryant made to the undercover officers and which were presented to the jury.

As to the substance of Bryant's testimony, we note that, at the time of the motion, a movant is required to make a concrete showing of what the co-defendant would say if he took the stand in a separate trial. *See Pepe,* 747 F.2d at 652 (affirming the district court's denial of the defendants' severance motions because, inter alia, the defendants did not "proffer what [the co-conspirator's] testimony would be [if they were tried separately].") We will assume, for purposes of assessing the specificity of Bryant's proffered testimony only, that Bryant's proposed testimony was reflected in his post-trial affidavit. The government characterizes the statements contained in that

affidavit as "conclusory and selfserving" and as "lacking strong credibility." As we explained in *Novaton,* the conclusory nature of an affidavit consists of "bare exculpatory denials [of the charges in the indictment], devoid of any specific exonerative facts." *Novaton,* 271 F.3d at 990 (internal quotation marks and citation omitted) (rejecting as "conclusory" the co-conspirator's affidavit that stated only that the police officer who provided protection for the drugs in that case "did not conspire with me, or to ***930** my knowledge with anyone else, to possess with intent to distribute cocaine"). *Id.* By contrast, Bryant's affidavit specifically states that "during the events that have lead to this case, I never discussed with Daniel Mack anything about dealing in narcotics or escorting narcotics," that "Daniel Mack, at all times, was lead [sic] to believe, by me, that the item in the car he was escorting was money and money only," and that Bryant would have testified to that effect in a separate trial. Therefore, the substance of Bryant's proposed testimony is not unduly conclusory.

There are, however, legitimate concerns with respect to the credibility of Bryant's affidavit. That is not because, as the government suggests, the affidavit is utterly devoid of statements contrary to Bryant's penal interest. *See Pepe,* 747 F.2d at 651 (rejecting an affidavit by a co-defendant that, in addition to being conclusory, was "of dubious credibility because it was in no way contrary to [the co-defendant's] own [penal] interests"); *see also Novaton,* 271 F.3d at 990–91 (same). Rather, two other facts substantially undermine the credibility of the statements contained in Bryant's affidavit: (1) he did not submit the affidavit until the trial was over; and (2) he submitted a similar affidavit in favor of McLendon, even though Bryant's statements to the arresting officers and to the prosecutors concerned only Mack's knowledge.[19]

Notwithstanding our observations, we need not decide whether the "dubious credibility" of Bryant's affidavit is outcome determinative with respect to Mack's motion to sever. This is so because Mack has not shown that he established a likelihood Bryant would have testified in a separate trial.

A movant "must establish ... that the designated co-defendant will in fact testify at a separate trial." *United States v. Morrow,* 537 F.2d 120, 135 (5th Cir.1976). "Movant ... need only demonstrate a 'likelihood' of future testimony by his co-defendant...." *Id.* n. 9 (citations omitted); *see also Cobb,* 185 F.3d at 1199 ("Our concern with whether a co-defendant will testify for the defendant in a separate trial is limited to determining whether the co-defendant is *likely* to testify, not whether he is certain to do so.") (emphasis in original) (citations omitted). "The court is not required to sever where the possibility of the codefendant's testifying is merely colorable"; the possibility of such testimony must be "more than a gleam of possibility in the defendant's eye." *Byrd,* 428 F.2d at 1022.

It is clear from the transcript of the October 2, 2012 jury trial proceedings that Mack's counsel did not advise the district court judge that Bryant would testify for Mack in a separate trial. Instead, counsel engaged in a theoretical debate with the district court over whether a defendant, whose trial was over, could testify for a co- ***931** defendant in a separate trial.

Counsel then brought Bryant's statement to the prosecutors to the court's attention. At no time did counsel state or even imply that Bryant would, or might, testify for Mack at a separate trial. *Cf. Cobb,* 185 F.3d at 1199–1200 (reversing the district court's denial of the defendant's motion for severance because the co-conspirator's counsel stated that he was willing to testify on the defendant's behalf in a separate trial, even though his own conviction was awaiting appeal). While the statements (or lack thereof) of Mack's counsel at the outset of the jury trial reflected a "merely colorable" possibility that Bryant may testify in a separate trial, they fall short of establishing a likelihood of such testimony.[20]

Apparently relying on *Cobb,* 185 F.3d 1193, Mack faults the district court for not inquiring *sua sponte* whether Bryant would testify for Mack in a separate trial. In *Cobb,* we considered the district court's inquiry whether the coconspirator would be willing to testify on the defendant's behalf only to examine the district court's interpretation of the co-conspirator's offer to testify "as conditioned on [the co-conspirator's] case being tried first." *Id.* at 1198. Nothing in *Cobb* supports Mack's sweeping presumption that any part of the burden in a motion to sever, that is specifically allotted to the movant, *see Novaton,* 271 F.3d at 989, should be shifted to the district judge. Similarly, Mack's reliance on certain language contained in *Byrd* is misguided. *See Byrd,* 428 F.2d at 1019 n. 1 (remarking that there may be error if, "in a sufficiently extreme case of prejudice, [the trial judge fails] on his own motion to reopen the question of severance, where, after denial, the circumstances have sufficiently changed"). In the present case, the circumstances concerning the likelihood of Bryant's testimony in a new trial did not change conclusively until November 12, 2012 —the date on which Mack filed his second renewed motion for a new trial, along with Bryant's affidavit. This was a full month after the conclusion of the joint trial. *Cf. id.* at 1019 (discussing events that occurred at the trial).

The district court did ask whether Bryant was going to testify in the joint trial. The judge noted that if Bryant did testify, his statements could be addressed during cross-examination, and that if he did not take the stand, Mack could make his motion to sever at that time. Mack did not renew his motion to sever during the trial. His alternative motion for new trial based on the denial of severance was filed a week after the jury returned a guilty verdict. *Cf. Cobb,* 185 F.3d at 1197 (where the district court denied the defendant's motion on the morning of the trial and the defendant renewed it at the close of the government's case). Importantly, Mack did not even file his motion for leave to file an affidavit until a week after the conclusion of the trial. And, he did not produce Bryant's affidavit until a month after he ***932** had filed the motion for leave. *Cf. Pepe,* 747 F.2d at 650 (where the district court noted that there was "some likelihood" that the co-defendants would testify for the defendant based on the co-defendants' affidavits from their grand jury testimony); and *Byrd,* 428 F.2d at 1022 (noting that "[t]he unsupported possibility that (exculpatory testimony of a co-defendant) might be forthcoming does not make the denial of a motion for severance erroneous") (internal quotation marks and citation omitted); *see also United States v. Neal,* 27 F.3d 1035, 1047 (5th Cir.1994) (holding that the defendants

demonstrated that a co-defendant would have testified on their behalf in a separate trial when that co-defendant submitted an affidavit in favor of the defendants and "extensively testified in camera" that one of the defendants did not participate in the controlled substance conspiracy).

Because Mack has not made the requisite showing that severance in the present case was proper, we need not address the judicial economy considerations. We feel compelled to point out, however, that, were we to examine those factors, we would have grave doubts whether Mack's motion to sever was timely. Even though Bryant's statements to the prosecutors were made on the Friday before the trial, his motion was based, in part, on his statements to the arresting officers, of which counsel for Mack knew well in advance of trial. Counsel conceded that "[he] knew a statement [that Mack was told by Bryant that he was following cash] was made post arrest." The district judge inquired whether counsel for Mack had filed a severance motion and invited him to explain why he had not done so. After the judge stated that "[the motion] doesn't have to be in writing unless you knew before," he considered, and ultimately denied, counsel's oral motion.

Mack correctly points out that the district court did not deny his motion on timeliness grounds, although he easily could have done so, in light of counsel's advance knowledge of the statements to the arresting officers. *See Cobb,* 185 F.3d at 1200 (noting that the district court would likely have been justified in finding that the severance motion was untimely because the defendant amended his initial motion, which was filed well before trial, with his intention to seek the coconspirator's exculpatory statement on the morning of trial). Although we held in *Cobb* that a district court's failure to deny a motion for severance on untimeliness grounds requires us to review the district court's decision on the merits, *id.,* the circumstances in the present case are distinguishable. The district court apparently assumed that counsel had just learned of the grounds underlying the motion (i.e., Bryant's statements to the prosecutors). Thus, he did not question counsel's failure to file a motion to sever based on Bryant's statements to the arresting officers, and counsel did not bring this omission to the court's attention.

Our comments on the timeliness of Mack's motion only buttress our conclusion that this is not "one of those rare cases," in which the defendant raises "a compelling argument that he suffered 'prejudice resulting in the denial of a fair trial flow[ing] from the failure to grant the motion' for severance." *Cobb,* 185 F.3d at 1197–98 (concluding that the defendant presented such an argument where the sole evidence against him consisted of another defendant's testimony). Accordingly, we hold that district court did not abuse its discretion by denying Mack's motion to sever.

V. Mack's and McLendon's Motions for New Trial

As noted, one week after the trial, Mack renewed his motion for judgment of acquittal, ***933** or alternative motion for new trial based on the denial of severance. After that motion was denied, Mack filed a second

renewed motion for a new trial, or in the alternative, motion to alter, amend, or correct order denying motion for a new trial and judgment of acquittal. McLendon also filed a motion, adopting Mack's motion to overturn the jury verdict and to grant a new trial.[21] In support of their respective motions, both Mack and McLendon presented the aforementioned affidavits from Bryant. Mack and McLendon challenge the district court's denial of their respective motions for new trial.

A. Standard of Review

This court reviews the denial of a motion for new trial for abuse of discretion. *United States v. Campa,* 459 F.3d 1121, 1151 (11th Cir.2006).

B. Discussion

To succeed on a motion for a new trial based on newly discovered evidence, the movant must establish that (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. *United States v. Gates,* 10 F.3d 765, 767 (11th Cir.1993), *modified on reh'g in part,* 20 F.3d 1550 (11th Cir.1994) (citation omitted). "The failure to satisfy any one of these elements is fatal to a motion for a new trial." *United States v. Lee,* 68 F.3d 1267, 1274 (11th Cir.1995) (citation omitted).

The subject evidence in the instant case was not discovered after trial. The defense knew of the substance of Bryant's exculpatory statements as early as the government's pretrial motion *in limine* and Mack's oral motion to sever made on October 2, 2012, the first day of the trial. *See DiBernardo,* 880 F.2d at 1225 (reiterating that newly-available exculpatory testimony of a co-defendant is not synonymous with newly discovered evidence sufficient to grant a Rule 33 motion where the defendants benefitting from the exculpatory testimony were well aware of the proposed testimony prior to trial); *cf. Gates,* 10 F.3d at 767–68 (concluding that the "newly discovered" evidence requirement was met when the defendant did not discover until six months after the trial that his co-conspirator would exculpate him, and where there was no evidence in the record that the defendant "knew or had access to knowledge that [the co-conspirator] would exculpate him").

The defense argues that *DiBernardo* is distinguishable because it involved a pretrial affidavit. 880 F.2d at 1219. But both Mack and McLendon knew of the substance of Bryant's exculpatory testimony prior to the inception of the trial. Mack's counsel argued at the sentencing proceedings on December 19, 2012 that he made the oral motion to sever on the first day of trial because "we had believed that Mr. Bryant would testify as he did when he was arrested and as he also did in the meeting with the Government the Friday night before the trial...." Similarly, during the same proceedings, McLendon's counsel stated that he joined in Mack's oral motion to sever "when we were doing our pretrial arguments for the reason that clearly Mr. Bryant could have been a witness ***934** [... and] because I was under the impression that he might be able to get an exculpatory [affidavit]." Furthermore, in

his motion for leave filed only a week after the joint trial was over, Mack stated that he anticipated obtaining an affidavit from Bryant regarding Mack's lack of knowledge of the drugs. This timing further buttresses Mack's and McLendon's knowledge of the proposed testimony before the trial was over. Thus, the exculpatory statements in Bryant's affidavits do not qualify as "newly discovered" evidence for purposes of Rule 33.

In addition to Mack's and McLendon's failure to show that the evidence was discovered after the trial, we are not persuaded that Bryant's proposed testimony would probably produce a different outcome in McLendon's case. *Gates,* 10 F.3d at 767.[22] A jury might not be receptive to Bryant's proffered testimony, which is inconsistent with the multiple statements he gave to the undercover agents. As already noted, the credibility of Bryant's proposed testimony is further called into question by his failure to refer to both Mack and McLendon in, at least some of, his post-arrest statements.[23] *See id.* at 768 (cautioning that "post-trial exculpatory statements given by a convicted co-defendant must be viewed with care" because "a jury might find [the co-defendant] to be not a credible witness").

Because Mack and McLendon have not shown that Bryant's statements were "newly discovered evidence" and that they would probably lead to a different outcome, at least in McLendon's case, we do not address the other elements required to establish entitlement to a new trial.

VI. The District Court's Failure to Admit Bryant's Exculpatory Statements

Mack[24] asserts that Bryant's post-arrest statements regarding Mack's lack of knowledge of the drugs were admissible, under Federal Rule of Evidence 806, to impeach Bryant's inconsistent co-conspirator statements to the undercover agents. The problem for Mack and McLendon is that they never presented this argument to the district court.

A. Standard of Review

A district court's evidentiary rulings are generally reviewed for abuse of discretion. *United States v. Baker,* 432 F.3d 1189, 1202 (11th Cir.2005). Absent contemporaneous objection to evidentiary matter, "we do not apply the customary abuse of discretion standard"; rather, we limit our review to "a search for 'plain error.' " *Calderon,* 127 F.3d at 1334; *see also United States v. Sorondo,* 845 F.2d 945, 949 (11th Cir.1988) ("the plain error rule must apply when, as here, a party states an inaccurate objection just as when a party states no objection at all").

"Plain error occurs where (1) there is an error; (2) that is plain or obvious; (3) affecting the defendant's substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial ***935** proceedings." *United States v. Johnson,* 694 F.3d 1192, 1195 (11th Cir.2012) (internal quotation marks and citation omitted).

B. Discussion

Federal Rule of Evidence 806 states:

> When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Fed.R.Evid. 806.

The record shows that numerous out-of-court statements made by Bryant to the undercover agents were entered into evidence and used by the government to establish Mack's guilty knowledge. We have no difficulty concluding that Bryant's post-arrest statements—that he told Mack that they were transporting money and that he had never discussed narcotics with Mack—were inconsistent, as required by Rule 806, with the recorded statements (which were played for the jury), in which Bryant said that Mack "knows exactly what we're doing" and which were used to convict Mack of the drug charges. *See United States v. Grant,* 256 F.3d 1146, 1153–55 (11th Cir.2001).[25]

It bears repeating that the discussion at the opening of the trial concerning Bryant's remarks to the arresting agents and the prosecutor was general and hypothetical in nature. There was no formal proffer of evidence or offer of a stipulation. Thus, Bryant's counsel had no opportunity to object. We are not at all confident that Bryant's counsel would not have objected to any mention of his (Bryant's) prior statement to the jury because the statements are at least mildly inculpatory as to Bryant—he was telling the agents and the prosecutor that he had never told Mack that drugs would be involved in the deal; only cash would be involved. The question which must be asked is: how would Bryant know what was going to be involved in the deal unless he was himself culpable? Finally, we note that there was no formal tender of evidence for the district court to rule on. Mack has failed to demonstrate plain error by the district court.

VII. Defendants' Cumulative *936 Error Argument[26]

Defendants contend that a number of instances of prosecutorial misconduct, combined with improper government witness testimony and erroneous judicial rulings, amount to a cumulative error, impairing their fair trial and due process rights under the Fifth and Sixth Amendments to the United States Constitution and warranting reversal of the jury verdict.

A. Standard of Review

The question whether cumulative errors have deprived the defendant of a fair trial is reviewed de novo. *United States v. Dohan,* 508 F.3d 989, 993 (11th Cir.2007) (citation omitted). "In addressing a claim of cumulative error, we must examine the trial as a whole to determine whether the [defendant] was

afforded a fundamentally fair trial." *Calderon,* 127 F.3d at 1333 (citation omitted).

B. Discussion

In order to establish cumulative error warranting reversal, each incident must constitute error in itself. *United States v. Waldon,* 363 F.3d 1103, 1110 (11th Cir.2004) ("If there are no errors or a single error, there can be no cumulative error.") (internal quotation marks and citation omitted). We consider (1) whether each complained of incident constitutes error; and (2) if so, whether the cumulative effect of all errors mandates a reversal.

1. Prosecutorial Misconduct

" 'To find prosecutorial misconduct, a two-pronged test must be met: (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant.' " *United States v. Epps,* 613 F.3d 1093, 1100 (11th Cir.2010) (quoting *United States v. Eyster,* 948 F.2d 1196, 1206 (11th Cir.1991)). "[R]emarks prejudicially affect the substantial rights of the defendant when they 'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.' " *Eyster,* 948 F.2d at 1206 (citation omitted).

Defendants contend that the prosecutorial misconduct in this case consists of, inter alia, the following burden-shifting statements:

> (1) In its closing argument, the government commented on the lack of evidence that Mack and McLendon believed they were transporting money (as opposed to cocaine), and that Mack was just trying to help a friend move money.
>
> (2) In its rebuttal closing argument, the government denigrated defense counsel and characterized Mack and McLendon's defense of "lack of knowledge" as a "red herring."
>
> (3) At the very conclusion of its rebuttal, the prosecutor stated:
>
> Finally, ladies and gentlemen, all three defense counsel dealt with this instruction here. And they said: Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs.
>
> [...]
>
> I think an important affair in life would be the choice to transport drugs. That's life changing. You could go to jail for a very long, very short time, who knows. But it could maybe take you away from your family. But it could also bring you riches. That's one of the most important of your own affairs. Am I going to act legally or am I going to act illegally? ...

***937** (followed by McLendon's counsel objecting and the court overruling the objection). The prosecutor continued by stating:

> The most important of your own affairs was the choice to bring a co-conspirator and not a witness.
>
> [...]

> The most important affairs of your life, ladies and gentlemen, were those choices that Henry Bryant made. Those actions, ladies and gentlemen, coupled with all of the other recordings prove beyond a reasonable doubt that all three of these men are guilty.

McLendon again objected to these comments, and his objection was again overruled.

During closing arguments, "prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence." *United States v. Simon,* 964 F.2d 1082, 1086 (11th Cir.1992) (citation omitted). However, "prejudice from the comments of a prosecutor which may result in a shifting of the burden of proof can be cured by a court's instruction regarding the burden of proof." *Id.* (citations omitted).

There is no error as to the first and second "burden-shifting" statements. The government prefaced its statement that no evidence was presented concerning Mack's and McLendon's knowledge that the transport involved money by stating:

> *The defendant has no burden whatsoever.* He doesn't have to produce any such evidence, but there's no evidence in this case that Daniel Mack thought they were transporting money. That's speculation. That's conjecture, and reasonable doubt is not speculation. It's not conjecture.

(emphasis added).

However, in the third instance, the district court improperly overruled the objection by McLendon's counsel because the prosecution asked the jury to equate their own situation to Defendants' respective situations. However, the court properly instructed the jury on the burden of proof, and nothing in the record indicates that the jury disregarded the court's instructions. *See Simon,* 964 F.2d at 1087 ("a prejudicial remark may be rendered harmless by curative instructions to the jury") (internal quotation marks and citations omitted). Accordingly, there is no reason to think that the remarks prejudicially affected the substantial rights of Defendants.

2. Improper Government Witness Testimony

We turn next to Defendants' enumeration of incidents involving improper government witness testimony.

(1) Agent Jackson "vouched" for the government during his testimony about the "disappearance" of the sham cocaine when he stated: "I don't know where it's at.... I'm sure the FBI has it in custody. We don't let kilograms of cocaine walk ... I'm sure it could be provided."

Defense counsel did not object at the time of the "improper vouching." In addition, defense counsel asked Agent Jackson about the whereabouts of the sham cocaine six times (in one form or another), even after Jackson had already told counsel that he himself did not know where the sham drugs were and that counsel would have to direct that question to the case agent. This is not the kind of "improper vouching taint[ing] the trial" that we have held may constitute a reversible error. *See Eyster,* 948 F.2d at 1207–08 (reversing based

on the prosecutor's improper vouching for the credibility of a government witness).

***938** (2) Det. Tyson testified that "you would never see money packaged in that manner," even though he acknowledged that his prior investigatory experience is in drug trafficking, not money laundering. The court overruled defense counsel's objection on the basis of Tyson's experience in other undercover drug deals. The court then pointed out that the defense could cross-examine Tyson as to his experience in money laundering operations. We find no error.

(3) Det. Tyson criticized defense counsel in front of the jury when counsel questioned him about his statement to McLendon and Bryant that "this [is] money." Counsel finds the following statement by Tyson to be objectionable: "[s]ee, what we have, ladies and gentlemen, the attorney is trying to say that—."

A careful review of the transcript shows no improper criticism of the defense counsel by the agent or by the court. Defense counsel objected to Tyson's statement as being "not responsive to the question." When the court attempted to clarify what the question was, defense counsel withdrew the question. There is no error.

3. Erroneous Judicial Rulings

Two of the three judicial rulings challenged by Defendants concern the district court's exclusion of Bryant's post-arrest statements and the denial of Mack's motions to sever and for new trial and of McLendon's motion for new trial. We have previously found no abuse of discretion as to those two rulings as discussed in Parts IV, V, and VI.

The final purportedly erroneous judicial ruling concerns the cross-examination of Agent Jackson concerning Taurus Barron. Barron was an unindicted police officer who was involved in escorting the transportation of sham cocaine during the same period as Defendants. Defendants argue that the district court restricted Jackson's cross-examination concerning Barron's purported statements to other law enforcement officers that Barron was told he was escorting money, not drugs.

We conclude that the district court did not improperly restrict Agent Jackson's cross-examination concerning statements made by Barron. The transcript shows that defense counsel asked Jackson whether he knew that Barron asserted that he was told the transportation involved cash. The government objected on the grounds of hearsay. The court asked defense counsel whose statements counsel wanted to introduce. Counsel stated that he was talking about "the statement of the other police officers," and Jackson confirmed that he was present at the time the statement was made.[27] The court then inquired of the prosecutor whether she had introduced a "statement of that agent," to which she responded that she had only introduced statements made by Jackson and Tyson. After confirming with defense counsel that the statements he was attempting to introduce were not Jackson's or Tyson's, but were in fact Barron's, the court sustained the hearsay objection. We find no abuse of discretion.

Defense counsel then proceeded to question Jackson about Jackson's knowledge concerning whether Barron had ever been charged in the case. Jackson stated that he did not know because he did not conduct surveillance during the operation and was not involved in any arrests in the case. The government objected to that line of questioning because any additional answer ***939** Jackson could have given would have been hearsay. The court properly sustained the objection.

In sum, most of the purported errors enumerated by McLendon are not errors at all.[28] The cumulative effect of the sole remaining error involving the prosecutor asking the jury to put themselves in Defendants' positions does not come close to requiring a reversal.

VIII. Bryant's Sentence

A. Standard of Review

We review the reasonableness of a sentence under an abuse of discretion standard. *United States v. Kuhlman,* 711 F.3d 1321, 1326 (11th Cir.2013). The abuse of discretion standard "allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Id.* (internal quotation marks and citation omitted).

B. Discussion

Bryant first argues that his 264–month total sentence is procedurally unreasonable because the court denied his motion for a downward departure below the applicable 248–to 295–month range based on the government's sentencing factor manipulation. He further argues that his total sentence is substantively unreasonable because it is excessive.

The sole basis of Bryant's procedural unreasonableness claim is that the government engaged in sentencing factor manipulation when it conducted the reverse-sting operation in an outrageous and reprehensible manner. Bryant submits that the government's conduct was outrageous because of the large amount of sham cocaine that was used and the fact that the agents allowed Bryant to complete a second run instead of arresting him after the first one.

We have never vacated a sentence based on alleged sentencing factor manipulation. *See United States v. Docampo,* 573 F.3d 1091, 1097–98 (11th Cir.2009) (reiterating that courts in this circuit have yet to "recognize[ ] a defense of sentencing factor manipulation or [to] permit[ ] its application") (citations omitted); *see also United States v. Ciszkowski,* 492 F.3d 1264, 1271 (11th Cir.2007) (listing examples of conduct held not to constitute sentencing factor manipulation).

Bryant acknowledges that the authority in this circuit weighs heavily against his ***940** position. Moreover, he concedes that the government's conduct in this case does not amount to sentencing manipulation under this circuit's precedent. *See United States v. Sanchez,* 138 F.3d 1410, 1414 (11th Cir.1998) (the government's decision as to the drug quantity in a sting operation does not amount to sentencing manipulation); *Ciszkowski,* 492 F.3d at 1271 (the government did not engage in sentencing manipulation when it provided a defendant with a silencer-equipped firearm

in a sting operation involving murder-for-hire, although the gun triggered a mandatory 30–year minimum sentence where the gun or the silencer was not completely unrelated to the criminal act). Nevertheless, Bryant argues that we should reconsider our position and "set limits on how far the government may go to create crimes and prosecute people." Bryant cites no authority, nor can he, in support of that argument, and he fails to explain why his case warrants such a shift. Accordingly, his "procedural" challenge to his sentence is rejected.

Bryant's 264–month total sentence is also substantively reasonable. It is near the low end of the applicable 248– to 295–month total range, as well as the low end of the underlying Sentencing Guidelines sentence. Thus, this court would ordinarily expect the sentence to be reasonable. *See United States v. Hunt,* 526 F.3d 739, 746 (11th Cir.2008) (a sentence falling within the Guidelines range is not automatically presumed to be reasonable; however, such a sentence ordinarily is expected to be reasonable). In addition, Bryant's sentence is well below the statutory maximum penalty of life imprisonment—another indication that it is reasonable. *United States v. Gonzalez,* 550 F.3d 1319, 1324 (11th Cir.2008).

Finally, the record shows that the district court considered the section 3553(a) factors and the facts of the case, and declined to vary below the Guidelines range, stating:

> [a]fter having heard from all parties and having adopted the guidelines ... I don't think a sentence below the guideline is appropriate at all. So my question here is, where within the guidelines between 188 and 235 months [on Counts 1–3] I should sentence the defendant. I'm not going to go below the guidelines to 180 months, because I don't think it would be appropriate in the exercise of my discretion.
>
> But by the same token, the top of the guidelines with the other 60 months would be 24 years and 7 months, I think that's too much under the facts of this case, and it doesn't really serve the interest of society under 3553(a).

The seriousness of Bryant's criminal conduct supports that decision: he organized the transportation of large quantities of serious narcotics, and enlisted police officers to assist him. Moreover, he did so as an active public servant whose job was to protect the public, not to foster criminal elements within it. In light of the foregoing, Bryant's bare assertion that his guidelines-range sentence is excessive is insufficient to demonstrate an abuse of discretion by the court. Accordingly, the district judge did not abuse his discretion by denying Bryant's request for a downward variance, and Bryant's sentence is affirmed.

IX. Conclusion

We affirm the district court's denial of Defendants' Rule 29 motions, and affirm Defendants' convictions. We also affirm the district court's denial of Mack's motion to sever and of Mack's and McLendon's motions for new trial. We hold that the district court's refusal to admit Bryant's post-arrest statements for impeachment purposes does not constitute plain error. ***941** We further find no

cumulative error warranting reversal. Finally, we affirm the district court's denial of Bryant's request for a downward variance and affirm Bryant's sentence.

All Citations

572 Fed.Appx. 910

Footnotes

* The Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, and Orinda D. Evans, United States District Judge for the Northern District of Georgia, sitting by designation.

1 Much of the evidence was recorded, and the recordings were played for the jury.

2 That meeting was video recorded.

3 The government and Defendant Mack stipulated that vehicle number 1929A was assigned to Mack.

4 That meeting was recorded.

5 Bryant also contends that the "outrageous government conduct" warrants an acquittal. That argument was not presented to the district court. Issues raised for the first time on appeal are reviewed only for plain error. *See United States v. Kelly,* 888 F.2d 732, 739 n. 12 (11th Cir.1989) (a defendant's claim of outrageous government conduct that was not raised at trial is reviewable only for plain error).

An acquittal on grounds that the government engaged in outrageous conduct requires a showing by the defendant that, based on the totality of the circumstances, the government's conduct and over-involvement violated that "fundamental fairness, shocking to the universal sense of justice" mandated by the Due Process Clause of the Fifth Amendment to the United States Constitution. *Wilcox v. Ford,* 813 F.2d 1140, 1147 (11th Cir.1987) (quoting *United States v. Russell,* 411 U.S. 423, 432, 93 S.Ct. 1637, 1647, 36 L.Ed.2d 366 (1973) (internal quotation marks omitted)). The defense can be raised only in the "rarest and most outrageous circumstances." *United States v. Tobias,* 662 F.2d 381, 387 (5th Cir. Unit B 1981), *cert. denied* 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982).

According to Bryant, the government's conduct was outrageous because this "egregious reverse sting" involved two drug transportation trips instead of one. We disagree. The second run enabled agents to meet and collect evidence against Mack, one of the police officers who assisted Bryant and who was charged as a co-conspirator. Thus, the government's decision in conducting two runs, instead of one, was not "fundamentally unfair."

6 Mack was found not guilty of the attempt offense charged in Count Two, which stemmed from the December 21, 2011 drug transport.

7 These statements include: "They gonna know what's going on because I'm gonna tell them straight out"; "My guys are all on board"; "He knows exactly what we're doing; there's no secrets"; "They ain't talking cheap"; "[H]e knows about it"; "These guys, they know exactly what's going on, 'cause I, I'm straight forward with all of them"; and "They do know." Agent Jackson did testify, however, that while they were waiting for Mack on the morning of January 14, 2012, Bryant stated that the less the officers knew, the better off they were.

8 Mack contends that this case is indistinguishable from *United States v. Martinez,* 83 F.3d 371 (11th Cir.1996), in which we reversed the convictions on, inter alia, drug charges of one of the defendants (Gomez). *Id.* at 377. Gomez claimed that he was told that he was going to a house to steal money, as opposed to cocaine. *Id.* at 374.

We find *Martinez* distinguishable. There, the entirety of the evidence showing Gomez's knowledge of the drugs consisted of a co-defendant's statement to the undercover agents that he (the co-defendant) "had men ready to steal the cocaine [from a house]." *Id.* In contrast, here, even if Bryant had led Mack to believe that he was escorting money, Mack's

subsequent conversation with the undercover agents, coupled with his 16 years of experience as a police officer in Miami–Dade County, amounts to sufficient evidence to support Mack's conviction.

9 Mack does not argue that the evidence was insufficient as to whether he took a substantial step toward the commission of the crime. The evidence presented to the jury concerning Mack's knowledge of the drugs also supports Mack's conviction on the attempted possession count.

10 Mack attempts to distinguish *Novaton,* in which there was evidence that the officer was responsible for directly protecting the drugs and drug proceeds. *See* 271 F.3d at 982. Mack asserts that his whole role was limited to driving his police car. Mack's argument misses the mark. It is clear that the evidence of the involvement of the police officer in *Novaton* exceeded the threshold of proof required to show that the firearm was carried "in relation to" the offense. In the present case, Agent Jackson told Bryant that Jackson wanted uniformed officers in marked police vehicles "in case there was officers that would interdict the loads." Mack's appearance (in full uniform and armed) and his conduct (escorting the drugs according to plan) clearly had the potential for facilitating the offense.

11 Mack contends that we should analyze the "during" and "in relation to" elements of section 924(c) separately. He argues that there is no evidence that he carried the firearm while he was actually escorting the drugs. Our analysis in *Novaton* and in *Timmons* focused exclusively on the "in relation to" requirement because in both of those cases, there was no question that the firearm was carried during the drug trafficking offense. *See Novaton,* 271 F.3d at 1013 (the defendant admitted that he carried his firearm "during the events involved in this case"); *Timmons,* 283 F.3d at 1251 ("[t]here is little question that ... [the defendant carried the firearm "during" the drug trafficking offense] as the gun was sold along with the drugs"). Even though Mack denies carrying his firearm during the actual transportation, it is undisputed that he carried his weapon during the January 14, 2012 meeting; thus, he was armed "during the events involved in this case." *See Novaton,* 271 F.3d at 1013.

12 Although there is some evidence in the record suggesting that Bryant may have carried a firearm on January 14, 2012, we affirm the district court's denial of Bryant's Rule 29 motion on an aiding and abetting theory.

13 In *Rutledge* we phrased the third element of aiding and abetting as a requirement to show that the defendant "committed some act related to the gun," as opposed to some act which facilitated the crime. 138 F.3d at 1359; *cf., e.g., United States v. Pareja,* 876 F.2d 1567, 1570 (11th Cir.1989). We derived this requirement from cases discussing the need to link the defendant to the gun. *Bazemore,* 138 F.3d at 949 (explaining that "section 924(c) does not permit 'guilt by association.' ") (citation omitted). In *Bazemore,* we effectively subsumed the proof necessary to show that the defendant facilitated the carrying of a firearm in the evidence required to establish the defendant's knowledge of the firearm. *Id.* at 950 ("[O]nce knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element.") (internal quotation marks and citation omitted). We have held that the "facilitation element" can be met by the defendant "knowingly benefit[ting] from the protection afforded by the firearm." *Id.*

14 While Mack was specifically convicted of carrying a firearm during and in relation to the drug trafficking crime, McLendon and Bryant were convicted of possessing a firearm in furtherance of the crime (on an aiding-and-abetting theory). These verdicts are not necessarily inconsistent. Based on the particular facts in this case the evidence of Mack's conduct supports both types of firearm offense convictions.

15 Mack also made post-arrest statements averring that he thought he was following cash, not drugs. Mack's statements to the arresting officers are not at issue here.

16 The *Bruton* rule bars the admission of incriminating statements made by nontestifying co-defendants at a joint trial. *See United States v. Thayer,* 204 F.3d 1352, 1355 (11th Cir.2000) (explaining the *Bruton* rule) (citing *Bruton v. United States,* 391 U.S. 123, 135–36, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

17 In his affidavit, Bryant averred as follows:

> 1. My name is Henry Bryant and I am a co-defendant in the above styled case and this affidavit is based upon my own personal knowledge.

2. At all times between December 1, 2011 to April 4, 2012, during the events that have lead to this case, I never discussed with Daniel Mack anything about dealing in narcotics or escorting narcotics.

3. Daniel Mack, at all times, was lead [sic] to believe, by me, that the item in the car he was escorting was money and money only.

4. If I was not a co-defendant and my trial had taken place first and had been called to testify at a separate trial for Daniel Mack, I would have testified on behalf of Daniel Mack that he was never advised or told by me that the items he was to escort were narcotics.

5. I presented myself to the AUSA's Waugh and Dwyer Friday, September 28, 2012 before trial and expressed to them that at no time did I ever have any conversation about narcotics with Daniel Mack.

6. Upon my arrest in this case, I advised the agents who interviewed me that I had told Daniel Mack that he was escorting cash for a Miami Beach night club owner.

18 In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding all decisions of the former Fifth Circuit issued on or before September 30, 1981.

19 As to McLendon, Bryant's affidavit states that, during the events at issue, Bryant did not discuss with McLendon anything about drugs. Bryant also avers that he led McLendon to believe he was transporting money, and that he would have testified to that effect in a separate trial. From this point on, the contents of Bryant's affidavit as to McLendon begin to differ from those submitted in support of Mack's motion. Specifically, Bryant affirms that he told his attorney “numerous times” that he never discussed transporting drugs with McLendon. He further states that, upon his arrest, he advised the agents that he had “told [his] alleged CoDefendants [(without mentioning McLendon's name)] that they believed it was cash for a Miami Beach Night Club owner.” In contrast, in the affidavit that he submitted for Mack, Bryant specifically states that he made the exculpatory statements to the arresting officers *and* the prosecutors concerning *Mack's* knowledge (emphasis added).

20 Mack's contentions that the mere existence of Bryant's statements to the arresting officers and to the prosecutors establish a likelihood of future testimony in a separate trial are unsupported by any authority. In addition, *United States v. Martinez,* 486 F.2d 15 (5th Cir.1973) upon which Mack relies is inapposite. There, our predecessor court quoted an observation made by the United States Court of Appeals for the Fourth Circuit that “ ‘a severance is obligatory where one defendant's case rests heavily on the exculpatory testimony of his co-defendant, *willing to give such testimony* but for the fear that by taking the stand in the joint trial he would jeopardize his own defense.” ’ *Martinez,* 486 F.2d at 23 (quoting *United States v. Shuford,* 454 F.2d 772, 776 (4th Cir.1971)) (emphasis added). In the present case, at the time of the motion, it was by no means clear that Bryant was willing to testify in the joint trial; in fact, Bryant's counsel stated that he could not indicate if his client would testify.

21 McLendon did not join in Mack's oral motion to sever that was made at the outset of trial.

22 We make no determination in this regard in Mack's case.

23 In his affidavit in support of McLendon's motion for new trial, Bryant does not state, as he did with respect to Mack, that he told the prosecutors that he had never discussed drugs with McLendon.

24 In his brief, McLendon also challenges the exclusion of Bryant's exculpatory statements as to Mack, and adopts the arguments made by Mack on that issue. McLendon argues that the exculpatory statements would have established Mack's innocence, which in turn would have vitiated the grounds for McLendon's conviction of the firearm charge.

25 We agree with Mack that *Grant,* 256 F.3d 1146, which involved a drug trafficking conspiracy, squarely resolves the inconsistency issue here. In *Grant,* we considered a challenge to the district court's refusal to admit a co-conspirator's exculpatory affidavit introduced by the defendant (Wilson) for impeachment purposes. The district court had found that the statements in the affidavit were not sufficiently inconsistent with the co-conspirators inculpatory statements admitted through the testimony of a Customs Service agent. *Id.* at 1153. We disagreed, and concluded that the government had used Wilson's co-conspirator statements to establish the existence of a conspiracy, and the statements in Wilson's

affidavit were “inconsistent with the existence of any conspiracy at all, and for that reason were inconsistent with his co-conspirator statements.” *Id.* at 1154–55.

Similarly here, the prosecution used Bryant's statements admitted through the agents to demonstrate that Mack knew the conspiracy involved drugs. Bryant's post-arrest statements directly contradict Bryant's statements to the undercover agents concerning Mack's knowledge of the drugs.

26 This argument, raised by McLendon, was also adopted by Mack and Bryant.

27 Despite defense counsel's use of the plural form, it does appear that defense counsel was referring to Barron's statement concerning his knowledge, not that of other police officers.

28 This conclusion applies to the following additional incidents briefly mentioned by Defendants. First, Defendants highlight the prosecutor's comment in opening statement: “[I]f anyone watches t.v., you see cocaine. It's packaged in a brick form, kilogram square form, wrapped in tape.” Although this comment was not proper, there was no objection, and no harm was done.

Second, Defendants point to Agent Jackson's testimony as to defendant Bryant's “belief” and “knowledge” concerning the drugs. As Defendants point out, however, the district court did sustain the motion to strike as well as the ensuing objection by Bryant's counsel, and the government discontinued the line of questioning concerning Bryant's “belief” and “knowledge.”

Third, the government elicited testimony from Det. Tyson about the value of cocaine without establishing any foundation for Tyson's knowledge. Defense counsel did not object to Tyson's statement, and we find no error. *See United States v. Costa,* 691 F.2d 1358, 1361 (11th Cir.1982) (testimony from an experienced D.E.A. agent regarding the street value of cocaine is not prejudicial error, even in light of the failure to qualify the agent as an expert).

Finally, Defendants object to the prosecutor's attempt to clarify to whom Bryant was referring when he told Jackson “[w]e've been in this thing together for—since we've been eight years old.” Defense counsel's objection was overruled. A close review of the transcript reveals that the prosecutor's question concerned Agent Jackson's understanding of Bryant's statement. Thus, the district court did not err in overruling defense counsel's objection.