

Appendix

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 24 2023

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 22-30156

Plaintiff-Appellee,

D.C. No.

v.

2:20-cr-00128-TOR-2

BRADLEY DALE HULL,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Argued and Submitted October 4, 2023
Seattle, Washington

Before: WARDLAW and M. SMITH, Circuit Judges, and MATSUMOTO,**
District Judge.

Bradley Hull appeals from the district court's denial of his motion to suppress and from his conviction and sentence for two counts of possession with intent to distribute controlled substances. We have jurisdiction pursuant to 28

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

** The Honorable Kiyo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

U.S.C. § 1291. We affirm in part, reverse in part, and remand for resentencing.

1. The district court did not err in denying Hull's motion to suppress. Assuming without deciding that Hull has standing to contest the search, we conclude that the search was supported by probable cause. *See United States v. Elmore*, 917 F.3d 1068, 1074 (9th Cir. 2019). Taken together, the facts recited in Detective Melton's affidavit created more than a "fair probability" that evidence of drug trafficking would be found in the trunk of Ms. Haynes's car. *Elmore*, 917 F.3d at 1074. These facts include: the confidential informant's statements that Hull and Ms. Haynes were involved in selling heroin and methamphetamine; law enforcement's controlled buys of heroin from Haynes; Hull's prior drug-related felony charges; the confidential informant's observations regarding drug paraphernalia in Haynes's residence; statements by residents of Haynes's home expressing concern regarding her drug sales; Detective Melton's observation of an individual hurriedly carrying a bag from Hull's residence to the trunk of Haynes's car just after law enforcement executed a warrant at Haynes's residence; law enforcement's recovery of a meth pipe from Haynes during the traffic stop and the subsequent field test of that meth pipe; and Haynes's responses to officers at the scene of the traffic stop regarding the contents of the grocery bag.

Further, Hull's post-trial showing was insufficient to warrant a *Franks*

hearing. *Franks v. Delaware*, 438 U.S. 154 (1978).¹ While Hull identifies inconsistencies between officers' accounts as to whether they conducted the field test of the meth pipe at the scene of the traffic stop or upon returning to the jail, this discrepancy does not rise to the level of a "substantial preliminary showing" that "(1) the affiant officer intentionally or recklessly made false or misleading statements or omissions in support of the warrant, and (2) the false or misleading statement or omission was material, i.e. necessary to finding probable cause." *United States v. Norris*, 942 F.3d 902, 910 (9th Cir. 2019) (citing *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017)).²

2. The district court erred by admitting Hull's April and May 2020 text messages at trial as "inextricably intertwined" evidence outside the scope of Federal Rule of Evidence 404(b). *See United States v. Anderson*, 741 F.3d 938, 949 (9th Cir. 2013) ("Other act evidence that is inextricably intertwined with a charged offense is independently admissible and is exempt from the requirements of Rule

¹ Because the government does not contend that Hull's post-trial *Franks* motion was untimely, *see* Fed. R. Crim. P. 12(b)(3), we assume, without deciding, that he made the requisite showing of "good cause" to bring his post-trial motion and proceed to the merits. *Id.*

² Alternatively, we find that law enforcement lawfully conducted the search pursuant to the good faith exception. *See United States v. Leon*, 468 U.S. 897, 926 (1984). Detective Melton's affidavit was far from "barebones." *See United States v. Underwood*, 725 F.3d 1076, 1085 (9th Cir. 2013).

404(b).” (internal quotations omitted)). The April and May text messages are separated by a period of months from, and bear no other connection to, the events of February 7, 2020. Thus—as the government concedes on appeal—the text messages are not “inextricably intertwined” with the counts of conviction.

However, we conclude that the district court’s error was harmless. Hull contends that the jury impermissibly relied on the text messages to establish his intent. But the text messages constituted admissible evidence for precisely that purpose under Rule 404(b).³ *United States v. Mehrmanesh*, 689 F.2d 822, 832 (9th Cir. 1982) (“We have consistently held that evidence of a defendant’s prior possession or sale of narcotics is relevant under Rule 404(b) to issues of intent, knowledge, motive, opportunity, and absence of mistake or accident in prosecutions for possession of, importation of, and intent to distribute narcotics.”).⁴ Moreover, the district court correctly found post-trial that “Defendant has not shown that the

³ This was the purpose for which the government initially proffered the evidence and for which it provided pretrial notice.

⁴ Hull contends, citing *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978), that intent was not a material issue in this case because, in opening statement, he conceded that the drugs discovered in Haynes’s trunk were of distribution quantity. But we have previously rejected the language Hull cites from *Powell* as dicta and held that “knowledge and intent [are] material issues in the case simply because the government ha[s] to prove them.” *United States v. Mayans*, 17 F.3d 1174, 1182 (9th Cir. 1994). Here, in light of the government’s burden to prove Hull’s specific intent to distribute heroin and methamphetamine, the texts satisfy the materiality prong of the 404(b) analysis. See *United States v. Beckman*, 298 F.3d 788, 794 (9th Cir. 2002).

evidence was unduly prejudicial.”

3. The district court did not clearly err in finding that additional drug transactions from the fall of 2019 constituted “relevant conduct” at sentencing. Hull contends that the conduct charged in the later-dismissed “Clark Counts” lack the similarity, regularity, and temporal proximity to be considered part of the “same course of conduct” for purposes of U.S.S.G. § 1B1.3. *See* U.S.S.G. § 1B1.3 cmt. n. 5(B)(ii); *United States v. Hahn*, 960 F.2d 903, 907 (9th Cir. 1992). However, we agree with the district court that the conduct described in the Clark Counts, which included multiple instances of drug trafficking at or near Hull’s mother’s residence, established sufficient regularity and similarity to support a finding of relevant conduct. *Cf. Hahn*, 960 F.2d at 911 (“Regularity is wanting in the case of a solitary, temporally remote event, and therefore such an event cannot constitute relevant conduct without a strong showing of substantial similarity.”). Similarly, the four-month gap between the Clark Counts and the offenses of conviction does not so undermine the district court’s findings of similarity and regularity as to constitute clear error. *Id.* at 910. (“We cannot formulate precise recipes or ratios in which these components must exist in order to find relevant conduct.”).

4. The district court did not err by denying Hull’s request for a mitigating role reduction at sentencing. Hull’s contention that the district court must explicitly consider the U.S.S.G. § 3B1.2 factors on the record is unavailing. It is “well

established that a district court need not tick off sentencing factors to show that it considered them, because we assume that the district court knows and applies the law correctly.” *United States v. Diaz*, 884 F.3d 911, 914–15 (9th Cir. 2018). Hull relies on *United States v. Quintero-Leyva*, a case the district court decided before the guidelines were amended to require consideration of all the § 3B1.2 factors. 823 F.3d 519, 523 (9th Cir. 2016). But “if the denial of a minor-role adjustment is challenged and the defendant’s sentencing occurred after the Amendment’s effective date . . . our caselaw requires that we assume the district judge knew the law and understood his or her obligation to consider all of the sentencing factors.” *Diaz*, 884 F.3d at 916. Further, Hull fails to identify any facts in the record to contravene the district court’s conclusion that he “presented no evidence to show that he’s either a minor or a minimal participant in the drug distribution scheme.”

5. The district court did not err by applying a two-level increase for obstruction of justice pursuant to U.S.S.G. § 3C1.1. We reject Hull’s contention that a heightened quantum of proof requirement—namely, the common law “two witness” rule—should apply. *See, e.g. United States v. Brandyberry*, 438 F.2d 226, 227 (9th Cir. 1971). Rather, a “sentencing judge need only find by a preponderance of the evidence that the defendant committed perjury.” *United States v. Armstrong*, 620 F.3d 1172, 1176 (9th Cir. 2010).

6. The district court erred by awarding Hull a criminal history point for

his state law misdemeanor conviction for negligent driving in the first degree. Based upon a comparison of negligent driving in the first degree, Wash Rev. Code § 46.61.5249, with negligent driving in the second degree, Wash. Rev. Code § 46.61.525(1)(a), and reckless driving, Wash. Rev. Code § 46.61.500(1), we conclude that negligent driving in the first degree is an offense “similar to” “reckless or careless driving” for purposes of U.S.S.G. § 4A1.2(a)(1).⁵ *See United States v. Grob*, 625 F.3d 1209, 1213 (9th Cir. 2010) (applying “common sense” approach to similarity).

Negligent driving in the first degree criminalizes substantially the same driving conduct as the comparator offenses. The additional element of “exhibit[ing] the effects of having consumed liquor,” which requires less than intoxication, is insufficient to render the offenses dissimilar. Further, the penalties applicable to each offense show that negligent driving in the first degree falls between the applicable punishments for the comparator offenses and thus does not indicate significantly more serious or culpable conduct. *See Grob*, 625 F.3d at 1213 (comparing the punishments imposed and considering the “perceived seriousness of the offense as indicated by the level of punishment”).

Therefore, Hull’s conviction for “negligent driving in the first degree” could

⁵ Where, as here, there is no federal definition for the offense at issue, we “may look to either state law or the Model Penal Code.” *Grob*, 625 F.3d at 1215.

only merit a criminal history point if his sentence was for a term of probation of more than one year or a term of imprisonment of at least thirty days. U.S.S.G. § 4A1.2(a)(1). Because Hull's sentence was one day of incarceration and 12 months of probation, the district court should not have awarded an additional criminal history point for that conviction.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRADLEY DALE HULL,

Defendant-Appellant.

No. 22-30156

D.C. No.

2:20-cr-00128-TOR-2

Eastern District of Washington,
Spokane

ORDER

Before: WARDLAW and M. SMITH, Circuit Judges, and MATSUMOTO,*
District Judge.

The panel unanimously votes to deny the petition for panel rehearing (Dkt. 55). Judges Wardlaw and M. Smith vote to deny the petition for rehearing en banc, and Judge Matsumoto so recommends (Dkt. 55). The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Kiyoo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRADLEY DALE HULL,

Defendant.

NO: 2:20-CR-0128-TOR-2

ORDER DENYING MOTION FOR
NEW TRIAL AND RENEWED
MOTION TO SUPPRESS EVIDENCE

BEFORE THE COURT are Defendant's Motion for New Trial and renewed Motion to Suppress Evidence. ECF Nos. 290, 291. The United States filed its responses, ECF Nos. 293, 294, and Defendant filed his replies, ECF Nos. 295, 296. Pursuant to LCivR 7(i)(3)(B)(iii), the Court determines that oral argument is unnecessary. The Court has reviewed the record and files herein, the completed briefing, and is fully informed. For the reasons discussed below, Defendant's motions are denied.

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ORDER DENYING MOTION FOR NEW TRIAL AND RENEWED MOTION
TO SUPPRESS EVIDENCE ~ 1 10

BACKGROUND

First, Defendant seeks a new trial based on the admission of Government Exhibits 38, 39, 40, 41, and 43, text messages taken from Defendant's cell phone. ECF No. 290 at 3. He also contends that the introduction of pictures of gold coins in collector cases (Ex. 35, 36, and 37) from his cell phone were prejudicial. *Id.* at 6.

The Government contends it introduced the evidence in order to prove its case – the elements of the charged offenses and that the evidence is relevant and not prejudicial.

Second, Defendant renews his motion to suppress all evidence obtained as a result of the search of the vehicle where he was the passenger. ECF No. 291. He contends the Government proved his standing at trial, even though he testified that he did not place any items in the trunk of Misty Haynes automobile. He also contends he is entitled to a *Franks* hearing because the meth pipe taken from Misty Haynes was not field tested as the warrant represents.

The Government contends that Defendant has not established standing to contest the search, probable cause supports the search warrant, the testimony at trial established that the meth pipe field tested positive for methamphetamine, and in any event, the good faith exception to suppression applies.

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DISCUSSION

I. Motion for New Trial

Pretrial, Defendant objected to the introduction of test messages obtained from his cell phone that supported his intent to distribute drugs. These texts were dated several weeks after the drugs in Counts 5 and 6 were seized. The government sought to introduce the texts under Federal Rule of Evidence 404(b) to show intent, knowledge, absence of mistake, etc. At the pretrial conference the Court ruled that the text messages could be introduced because they were inextricably intertwined with Defendant's drug dealing. The Government then clarified further that they had the burden of proof and they sought to introduce the evidence under Rule 404(b). After the Government made its record, the Court allowed the evidence to be introduced.

Defendant now complains that he did not contest that whoever possessed the drugs certainly had the intent to distribute. However, the Defendant never so stipulated at trial and the Court instructed the jury on all the necessary elements that the Government had to prove beyond a reasonable doubt in order to convict Defendant. Further, the Defendant never sought a limiting instruction.

Because the Government always has the burden of proof and Defendant never stipulated to any of the elements of the offenses charged, introduction of Defendant's text messages were properly admitted, were probative of the elements

1 the Government had to prove and no undue prejudice accrued. It is critical to
2 observe that Defendant's defense rested on his testimony that he did not place the
3 drugs in the trunk of Misty Haynes' automobile and the testimony of one of his
4 witnesses to corroborate that assertion. That issue was thoroughly testified to by
5 the Government's witnesses. Defendant has not shown that the evidence was
6 unduly prejudicial. Defendant's motion for new trial on this ground is denied.

7 Next, Defendant complains that the Government introduced pictures of
8 collector coins from Defendant's cell phone that were strikingly similar to collector
9 coins found in the bag with the drugs, the subject of Counts 5 and 6. The
10 Government introduced this evidence as it was probative of who possessed the
11 drugs. Defendant testified that he was a collector of coins. Thus, no undue
12 prejudice accrued with respect to this probative evidence as Defendant already
13 admitted he was a collector of coins. Defendant's motion for new trial on this
14 ground is also denied.

15 **II. Renewed Motion to Suppress**

16 The court fully ruled on Defendant's prior motion to suppress. The Court
17 hereby **reincorporates its entire prior ruling** at ECF No. 199 in once again
18 denying the motion to suppress and for a *Frank's* hearing.

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1 **1. Standing**

2 Defendant now contends that the Government has proved his standing by
3 introducing evidence that he placed the drugs in the trunk of the automobile,
4 despite that he testified under oath that he did not do so.

5 Defendant has the burden of establishing standing, not the Government. *See*
6 *United States v. Singleton*, 987 F.2d 1444, 1449 (9th Cir. 1993) (defendant's
7 burden of proof as established by the Supreme Court). Defendant affirmatively
8 testified that he did not place the drugs in the trunk of the car. Thus, he has not
9 established standing to contest the search of Ms. Haynes' automobile.

10 The Petitioners in *Rakas v. Illinois*, 439 U.S. 128 (1978), urged the Supreme
11 Court to "relax or broaden the rule of standing" enunciated in *Jones v. United*
12 *States*, 362 U.S. 257 (1960), so that any criminal defendant at whom a search was
13 "directed" would have standing to contest the legality of that search and object to
14 the admission at trial of evidence obtained as a result of the search. The Supreme
15 Court declined to extend the rule of standing in Fourth Amendment cases in the
16 manner suggested by petitioners. "Fourth Amendment rights are personal rights
17 which, like some other constitutional rights, may not be vicariously asserted."
18 *Rakas v. Illinois*, 439 U.S. at 132 (citation omitted). "The automatic standing rule
19 of *Jones* has outlived its usefulness in this Court's Fourth Amendment
20 jurisprudence." *United States v. Salvucci*, 448 U.S. 83, 95 (1980). "The doctrine

1 now serves only to afford a windfall to defendants whose Fourth Amendment
2 rights have not been violated. . . . The respondents relied on automatic standing
3 and did not attempt to establish that they had a legitimate expectation of privacy in
4 the areas [] where the goods were seized.” *Id.*

5 Without standing, Defendant’s motion to suppress is denied. Even if
6 Defendant has standing, the Court has found sufficient probable cause for the
7 issuance of the search warrant. ECF No. 199.

8 **2. Request for *Frank*’s Hearing**

9 Defendant contends that the search warrant affidavit falsely claims the meth
10 pipe field tested positive for methamphetamine.

11 The Government points out that Detective McCrillis testified at trial, on
12 cross-examination that the meth pipe field tested positive for methamphetamine.
13 *See* Trial Transcript, ECF No. 284 at 140-42; *see also id.* at 111. The meth pipe
14 was taken from Haynes when she was arrested and moreover, she provided
15 statements that inferred the Defendant had drugs in the car (“I didn’t put any drugs
16 in the car”; “Brad put the grocery bag in the car.”). ECF No. 168 at 4-5.

17 Defendant’s assertions are not supported by the record and the requested
18 *Franks* hearing is denied.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 2 1. Defendant's Motion for New Trial, ECF No. 290, is **DENIED**.
- 3 2. Defendant's renewed Motion to Suppress Evidence, ECF No. 291, is
- 4 **DENIED.**

5 The District Court Executive is directed to enter this Order and furnish

6 copies to counsel.

7 DATED July 25, 2022.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,) Case No. 2:20-cr-00128-TOR-2
4)
5 Plaintiff,) May 16, 2022
6) Spokane, Washington
7 vs.)
8) Jury Trial - Day 1
9 BRADLEY DALE HULL,)
10) Volume No. I
11 Defendant.) Pages 1 - 160
12

13 BEFORE THE HONORABLE THOMAS O. RICE
14 UNITED STATES DISTRICT COURT JUDGE

15 APPEARANCES:

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31 Proceedings reported by mechanical stenography; transcript
32 produced by computer-aided transcription.

1 (Court convened on May 16, 2022, at 8:38 a.m.)

2 THE COURTROOM DEPUTY: The matter now before the Court
3 is the *United States of America v. Bradley Dale Hull*, Case No.
4 2:20-cr-0128-TOR-2. This is the time set for a jury trial.

5 Counsel, please state your appearances for the Court and
6 record, beginning with the Government.

7 MR. ELLIS: Good morning, your Honor. Michael Ellis
8 for the United States, and with me at counsel table is Cassandra
9 Hughes, a law clerk with my office and recent Gonzaga Law grad,
10 and Special Agent David Clyde with the DEA.

11 THE COURT: Good morning.

12 MR. HORMEL: Your Honor, Steve Hormel for Bradley
13 Hull, also represented by Zachary Ayers as well, present in the
14 courtroom, your Honor.

15 THE COURT: Good morning to all of you.

16 This is the time set for the pretrial conference. There's
17 a few matters we need to discuss. First, I want to indicate for
18 the record, Counsel, you've received the lineup of jurors and
19 the juror questionnaires. Since Thursday or Friday, we've been
20 continually getting sick requests, people coming in that appear
21 to have COVID, have other health issues, didn't have
22 transportation to drive here. So those people that aren't on
23 your list but you have the juror questionnaires have been
24 excused because of illnesses and other reasons.

25 The next thing I wanted to discuss is, in a sense, the

1 Motion in Limine, and let me give you my preliminary thoughts,
2 and then I'll hear from you if you have any argument.

3 First of all, the Government seeks to introduce, if
4 necessary, is the way I understand it, the defendant's prior
5 conviction for a drug conviction. That conviction is not
6 admissible unless the defendant takes the witness stand and
7 opens the door. If he takes the witness stand, his conviction
8 is admissible as a felony, but we can't identify the type of
9 crime it is because the jury would then say, oh, he's been
10 convicted of a prior drug offense, he's a drug dealer. And that
11 would be too prejudicial.

12 So if he takes the witness stand, you can impeach him with
13 a prior felony offense, because that goes to truth and veracity,
14 only if he opens the door, and we'll have to see what the
15 testimony is if he testifies. Only if he opens the door for
16 those other reasons that we could identify the actual crime as a
17 drug offense would it be admissible.

18 So anybody want to speak on that? Mr. Ellis?

19 MR. ELLIS: Yes, your Honor. Thank you. The
20 Government actually is -- would only be offering that conviction
21 under 404(b). The Government would not attempt to use the
22 conviction under 609 because of the issue concerning the
23 guideline range in Washington State court. The guideline for
24 that conviction did not exceed a year and a day, and that's how
25 the 609, given how that *Valencia-Mendoza* case, the *McAdory* case,

1 given how the Ninth Circuit has been applying those, those
2 precedents have not yet been applied to Rule 609, but in the
3 abundance of caution, I wouldn't want this to be the first case
4 where the Government uses it as 609, and then there's an appeal
5 and the Ninth Circuit says you weren't supposed to do that and
6 it was prejudicial because of the nature of what it is.

7 So the Government does not intend, should the defendant
8 testify, to use that conviction under 609. The only way the
9 Government would intend to use that conviction is if, as we
10 discussed during one of our pretrial hearings, if the door is
11 essentially opened to absence of mistake, lack of intent, one of
12 the various permissible purposes under Rule 404(b). If that
13 happens -- and if that happens, frankly, your Honor, given the
14 nature of what that evidence is, I would probably ask for a very
15 brief hearing outside the presence of the jury to just confirm
16 that the Court was in agreement that that door had been opened.
17 So that is the only scenario in which the Government would
18 intend to use that conviction.

19 THE COURT: All right. I understand. Thank you.

20 MR. HORMEL: So we're just talking about the
21 conviction right now, correct?

22 THE COURT: Yes.

23 MR. HORMEL: I agree with everything he said.

24 THE COURT: All right. That's fine.

25 The next issue is the Government seeks to introduce the

1 text messages on the defendant's phone. The defense seeks to
2 exclude those, and the Court has gone through those.

3 And I'm confused, Mr. Ellis, because the text messages, if
4 you can attribute the conversation to the defendant of actually
5 having the conversation, then it's a prior statement against his
6 interest. And part of this problem is I go through the
7 exhibits, and I'm pulling up the first one. I believe it's
8 Exhibit 38. And if I'm reading this correctly, it's in April of
9 2020.

10 Part of the problem is the indictment charged a conspiracy
11 to distribute drugs, and it included this date, but now we're on
12 trial for Counts 5 and 6. So if he has conversations during
13 this period of time, it is relevant or inextricably intertwined
14 with the charged conduct of being a drug dealer during these
15 months, but it's his -- but it's his statements that are
16 admissible, and it's the other statements that provide the
17 context, so they're admissible.

18 But then as I go through the exhibits -- for instance, 38
19 is outgoing, so there it's inferred or implied that the
20 defendant sent those. 39 has incoming and outgoing, so those in
21 context are admissible. 40 has incoming and outgoing. Those
22 are admissible. Exhibit 41 has incoming and outgoing. Those
23 are admissible.

24 Exhibit 42 is two incoming. So there's no context here,
25 and there's no admission by the defendant. They're just merely

1 incoming text messages at Government Exhibit 42. So I don't see
2 a basis or a foundation for the admission of Exhibit 42 because
3 they're merely incoming text messages, which isn't an admission
4 or a statement of the defendant.

5 Exhibit 43 is an outgoing one. It would be admissible
6 because it's a statement or admission by the defendant.

7 Exhibit 44 is an incoming one, and again, it's -- there's
8 no context for it, and it's not an admission by the defendant,
9 so it's not admissible.

10 Mr. Ellis, what's your thought on the Government's (sic)
11 ruling there?

12 MR. ELLIS: Your Honor, Government is comfortable
13 proceeding without Exhibit 42 and 44, just to clear it up. I
14 think, you know, the Government's theory was that these are
15 messages being sent to the defendant using drug jargon, and that
16 has certain implication to it, but given the concern raised by
17 your Honor, the Government is comfortable just not introducing
18 or referencing 42 or 44, I guess with the caveat that if the
19 defendant testifies and somehow opens the door to those, then
20 maybe I would get into it, but I'm comfortable proceeding in
21 case in chief without 42 and 44.

22 THE COURT: All right. Mr. Hormel?

23 MR. HORMEL: Yes, your Honor. I think this is
24 probably going to be the critical issue in relation to the
25 evidence that comes in or doesn't come in for the entire

1 proceedings. I did a brief in response to the United States'
2 trial brief, or I did a memorandum in response to the United
3 States, and I cited a case *United States v. Powell*. And *United*
4 *States v. Powell* is pretty clear that if knowledge, intent, and
5 any theory of admissibility under 404(b) is not an issue in the
6 case, then 404(b) evidence doesn't come in. It doesn't even
7 apply.

8 THE COURT: Well, these aren't 404(b) evidence. This
9 is inextricably intertwined evidence during a period that the
10 Government has charged drug distribution.

11 MR. HORMEL: He's -- Mr. Hull is not charged and on
12 trial for a conspiracy in this case. He's charged with two
13 counts of possession with intent to distribute on activity the
14 Government claims he was involved in with Misty Haynes.

15 THE COURT: I understand that.

16 MR. HORMEL: And so they're not inextricably. In
17 fact, there are not even discussions between he and Misty Haynes
18 or anybody associated with them.

19 THE COURT: All right.

20 MR. HORMEL: That's where the prejudice comes in. And
21 I don't know how they're admissible unless there's a rule of
22 admissibility, and inextricably intertwined is too broad of a
23 principle to declare these relevant in these particular counts.

24 THE COURT: Okay.

25 MR. HORMEL: It's just so -- it's a broad use of the

1 inextricably intertwined because the characters aren't even the
2 same. All it is is chatter about drugs that would lead a jury
3 or prejudicially lead a jury to believe that he was involved
4 with the activity with Misty Haynes on February 7th, 2020. And
5 that's really the whole issue in this case, your Honor, is was
6 he involved with Misty Haynes with the bag of drugs, the bag of
7 money, the scales, and everything else in the car on February
8 7th, 2020.

9 If you expand that into a later period after this
10 particular incident happened, it's extremely prejudicial with no
11 probative value, other than Mr. Hull has a cell phone where
12 there's -- or may have a cell phone where there's drug chatter.

13 THE COURT: All right. You've made your record and
14 I've read your brief. The ninth -- Rule 404(b) allows the
15 introduction for the listed purposes, but the exception to Rule
16 404(b) is inextricably intertwined with the charged offense.
17 That evidence is independently admissible and is exempt from the
18 requirements of Rule 404(b) under *United States v. Anderson*, a
19 Ninth Circuit 2013 case, because such intrinsic evidence
20 includes evidence constituting a part of the transaction that
21 serves as the basis for the criminal charge. This includes
22 contemporaneous uncharged drug transactions.

23 I'll cite to *United States v. Dorsey*, Ninth Circuit 2012.
24 The only caveat is a transaction distant in time from the
25 charged transaction cannot be considered a part of the charged

1 transaction. But in this case, if you look at the entire
2 superseding indictment, he is charged with distribution during
3 this entire period. He wasn't arrested in the interim, and
4 these last two transactions, Counts 4 and 5, are the culmination
5 of the seizure of possession with intent to distribute drugs.
6 So the Government is entitled to introduce inextricably
7 intertwined transactions prior to that date that show his
8 intent.

9 So therefore, the Court's ruling is these fall outside of
10 404(b) and are therefore admissible.

11 All right. That deals with the -- the next one is --

12 MR. ELLIS: Your Honor, if I may briefly address the
13 text messages?

14 THE COURT: Yes.

15 MR. ELLIS: So, your Honor, my memory of the
16 superseding indictment is that it actually -- so the
17 Government's theory for admitting these text messages, it was
18 not dependent upon the inextricably intertwined exception. The
19 Government's theory was simply under a long line of Ninth
20 Circuit case law that says that evidence outside the immediate
21 conduct of intent to distribute is admissible to show intent
22 under 404(b). That's like the *Martinez* case, the *Robles Ramirez*
23 case. There are a number of them, all of which hold the same
24 thing, that evidence of intent is relevant to show that -- in
25 this case, for example, that Mr. Hull intended to further

1 distribute the controlled substances that the Government alleges
2 were in his possession.

3 To the extent that the *Powell* case says that if the defense
4 doesn't contest an element the Government doesn't get to put
5 evidence on about it, that flies in the face of how criminal
6 trials work. The Government has to prove every element beyond a
7 reasonable doubt to the jury.

8 And so the Government -- my memory of the superseding
9 indictment is that the superseding indictment conspiracy charge
10 does not extend to May of 2020, and the Government's theory of
11 admission here is that these text messages where the defendant
12 is basically negotiating drug transactions are indicative of the
13 defendant's intent and therefore are admissible for that limited
14 purpose, to show intent concerning the drugs -- concerning the
15 intent element that the Government has to prove beyond a
16 reasonable doubt to the jury.

17 So I just wanted to clarify what the Government's theory of
18 admissibility was concerning these text messages. It's intent
19 and the defendant's intent to further distribute drugs.

20 THE COURT: All right. You've made your record.

21 MR. ELLIS: Thank you.

22 MR. HORMEL: May I make a record also based on that?

23 THE COURT: Go ahead.

24 MR. HORMEL: Your Honor, I agree with Mr. Ellis
25 because the ending of the conspiracy is at least three months

1 prior to this chatter that Mr. Hull's -- or the cell phone that
2 the Government claims came from Mr. Hull's phone, and so it
3 isn't inextricably intertwined during the events that are
4 charged even in the conspiracy. And the Government is correct
5 they are intending -- they are offering these text messages to
6 prove intent under 404(b) and the *Powell* case is right on point.

7 If the defendant is claiming he had nothing to do with the
8 criminal activity, intent is not an issue. And we're going to
9 tell the jury in the opening statement that whoever put the bag
10 in the car knew that the drugs that were in that bag were
11 intended for distribution because there's gobs of money, gobs of
12 drugs, and there's a scale secreted in Misty Haynes' car. So
13 intent to distribute is not even an issue.

14 THE COURT: All right. You've made your record.

15 The next issue is the photographs of the gold or silver
16 coins in collector cases. If I'm reading this right -- I'm
17 looking at the date -- these photographs are three days prior to
18 the seizure of the bag of money, including collector coins in
19 the bag of money. And so, by inference, they're admissible
20 under that theory.

21 MR. ELLIS: And, your Honor, again, I just want to --
22 so, these photographs -- the dates are an international or
23 European style format and so it's -- based on my understanding
24 of how these read, these photographs were taken, appear on the
25 phone actually on April 2nd as opposed to February 4th. So I

1 heroin far exceed what a typical user of those substances would
2 have for day-to-day use.

3 And you'll have heard that ultimately, there was this -- as
4 I mentioned, this kind of series of events. You'll have heard
5 Detective Melton testify about Person No. 1 leaves the house.
6 Goes to the car. Back in the house. You'll have heard
7 Detective Melton testify that Person No. 2, a different person,
8 female person, runs out of the house, driver's seat, and back.
9 And you'll hear Detective Melton testify that both those people,
10 Person No. 1 and Person No. 2, run to the car. One of them
11 is -- the man is the person he saw first. The woman is the
12 person he saw second. They both run to the car. The man,
13 person seen first, falls down in the snow.

14 So at the end of this trial, the evidence will show you
15 that the defendant had that bag, put that bag in the car, and
16 therefore committed possession with intent to distribute both
17 heroin and methamphetamine. Thank you.

18 THE COURT: Mr. Hormel.

19 MR. AYERS: And your Honor, I'll go ahead and present
20 opening.

21 THE COURT: All right. Mr. Ayers.

22 MR AYERS: Members of the jury: Again, I'm Zack
23 Ayers, and with me is my cocounsel, Stephen Hormel, and we
24 represent Bradley Hull in this matter.

25 The Government is going to attempt to try and prove beyond

1 a reasonable doubt that the crimes charged against Mr. Hull
2 through the testimony of several law enforcement officers.
3 Mr. Hull has a witness he will provide that will testify in this
4 case that upends the Government's narrative. Her name is
5 Kristen Fanning, but before I talk about Ms. Fanning, I want to
6 tell you a little bit about Mr. Hull.

7 Mr. Hull was born in Mountlake Terrace, Washington, on the
8 west side of the state. He dropped out of high school at age
9 15. He ended up getting his GED and went to school for music to
10 pursue a career as a professional musician.

11 Sometime later, in the '80s, he joined a heavy metal rock
12 band by the name of Forced Entry. That band toured the country.
13 They signed with a record label. The band eventually broke up,
14 and he became a machinist by trade on the west side of the
15 state.

16 Later -- and later on in 2011, he was -- had the
17 opportunity to join a second heavy metal band by the name of
18 Sanctuary. In 2015, he was -- between 2011 and 2015, he was
19 both working as a machinist during the weekdays and world
20 touring with his band on weekends. They would go to places such
21 as Greece, Italy, Japan, and so on, even Costa Rica.

22 But in 2015, everything changed. He got a call from his
23 mother. She -- his mother's name is Lillie Hull. She was 80
24 years old at the time. She was calling him in a dire panic
25 because she had learned that she was diagnosed with Stage IV

1 renal disease. So Mr. Hull decided to quit his band, which he
2 was making great money at, quit his job on the west side of the
3 state, and move over to Spokane, Washington where his mother
4 lived, the house that will be in question at 7721 North Wilding.

5 In 2019, roughly around there, Mr. Hull met a woman by the
6 name of Misty Haynes. There is no hiding the fact that
7 Mr. Haynes -- or Ms. Haynes and Mr. Hull are both addicts.
8 In 2019, they both entered a relationship together, and it was
9 an unhealthy one. By late 2019, Mr. Hull was trying to get
10 clean and Misty Haynes was not.

11 Now, where does Ms. Fanning come into play? Well, roughly
12 around the same time, Ms. Fanning and -- was dating a man by the
13 name of Jason Dick, who had been friends with Mr. Hull for 30
14 years. They came and moved over and Ms. Fanning became back-up
15 caretaker for Ms. Hull while Mr. Hull was the primary caregiver
16 of his mother, Lillie Hull.

17 Ms. Fanning was able to view the events of February 7th,
18 2020. She was able to live there in exchange for her caregiver
19 services. And when she observed the events of February 7th, she
20 can testify to those events. She can -- she'll testify that she
21 woke up to a loud noise that morning, that she checked, went out
22 to see the front door, that the door was wide open, and that she
23 was worried that the dogs would have escaped, that she -- and
24 when she went to the front door, she saw two people on the
25 driver's side of Misty Haynes' 2006 Chevrolet Malibu. One was

1 Misty Haynes, and the other was another person living in the
2 house by the name of Marcus Mueller.

3 She also saw them, after being on the driver's side of the
4 vehicle, come back into the house, go into Marcus's room, then
5 saw Marcus come back out with a bag in hand, going out to the
6 2006 Chevrolet Malibu and put the bag in the trunk of Misty's
7 car. And then with Misty Haynes coming back out as well.

8 Then she saw them go right back into Marcus Mueller's room
9 and Marcus Mueller stayed in his room, and then she saw Misty
10 head towards Bradley Hull's room, which is across the hall on
11 the opposite side of the basement of the Hull residence.

12 Moments later, Ms. Fanning will -- saw Misty Haynes quickly
13 go up the stairs, out the front door, followed by Bradley Hull
14 fully clothed, barefoot, no -- and holding his shoes. She saw
15 him follow Misty Haynes out, and she saw him go across the front
16 lawn which was full of snow on it, wet snow, and he slipped and
17 fell in the snow and got into the -- and got into the vehicle,
18 in the passenger side of Misty Haynes' vehicle while she got in
19 the driver's side and drove off.

20 Ms. Fanning, before seeing Bradley Hull walk up after
21 Misty Haynes, will testify that she had not seen Bradley Hull
22 that morning prior to that point.

23 I ask you, ladies and gentlemen, that you pay close
24 attention to the evidence and the testimony in this trial. And
25 listen carefully, especially to what the officers testify to and

1 what they don't testify to.

2 Mr. Hull did not know what drugs -- that there were drugs
3 in that car or that there was a bag in that car. There is no
4 doubt that Misty Haynes was dealing drugs and that those drugs
5 were intended for the distribution because there was heroin in
6 there, there was methamphetamine, there was a scale, and there
7 were other drug paraphernalia.

8 Mr. Hull had nothing to do with it.

9 At the end of this trial, ladies and gentlemen, after the
10 close of all the evidence, we will urge you to find Mr. Hull not
11 guilty. Thank you.

12 THE COURT: Mr. Ellis, your first witness?

13 MR. ELLIS: Yes, your Honor. The Government calls
14 Shannon McCrillis.

15 (Witness enters.)

16 THE COURT: Mr. McCrillis, could you stop there, raise
17 your right hand and be sworn by the clerk first?

18
19 WILLIAM SHANNON McCRILLIS,
20 called as a witness by the Plaintiff,
21 having first been duly sworn,
22 testified under oath as follows:

23 THE COURT: All right. Come over and adjust the
24 microphone and speak loud and clear into the microphone. I'll
25 have you state your full name for the record.

1 search warrant return, inventory and receipt of property that
2 you prepared on the execution of the search of the 2006
3 Chevrolet Malibu, correct?

4 A. That's what it show, yes, sir.

5 Q. Yep. And the first page is just the front page that shows
6 that the search related to the premises and files searched was
7 the vehicle, Washington, it was the 2006 Chevrolet Malibu,
8 correct?

9 A. Yes.

10 Q. So every item seized during the execution of that search
11 was itemized by you or somebody else that may have done it on
12 that property sheet, correct?

13 A. That's correct.

14 Q. The one that apparently couldn't be located, right, the
15 handwritten one?

16 A. Apparently. Yes. I don't know about that.

17 Q. The second page of the property return has two pages of the
18 actual items that were seized, correct?

19 A. Yes.

20 Q. I'm not going to go through each one of the items seized,
21 but certainly the heroin that was seized is a large amount of
22 heroin likely to be distributed had you not caught the person
23 with the heroin, correct?

24 A. Yes.

25 Q. Same with the methamphetamine. Seemed bound for

1 distribution, correct?

2 A. Yes.

3 Q. And that's evidenced by the fact it's around a lot of
4 money, correct?

5 A. Yes.

6 Q. And also secreted in the glove box of Misty Haynes' car is
7 a digital scale, correct?

8 A. Yes.

9 Q. And you didn't find that digital scale until you opened the
10 glove box in Misty Haynes' car, correct?

11 A. Right.

12 Q. Now, scales -- this one looked like it was plastic. Do you
13 remember what it was made of?

14 A. It looked plastic. Could have been metal. I don't know.

15 Q. So plastic items can leave fingerprints?

16 A. Depends on the texture. I don't know if you could lift it.

17 Q. You didn't submit this scale for fingerprinting, did you?

18 A. I don't remember.

19 Q. If you had submitted it for fingerprinting, you would have
20 made a report of that, correct?

21 A. Yes.

22 Q. There would have been a request by you to the Spokane
23 forensic unit?

24 A. Yes.

25 Q. And then there would have been a report back from the

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,) Case No. 2:20-cr-00128-TOR-2
4)
5 Plaintiff,) May 17, 2022
6) Spokane, Washington
7 vs.)
8) Jury Trial - Day 2
9 BRADLEY DALE HULL,)
10) Volume No. II
11 Defendant.) Pages 161 - 420

12 BEFORE THE HONORABLE THOMAS O. RICE
13 UNITED STATES DISTRICT COURT JUDGE

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produced by computer-aided transcription.

1 before answering it, which may take some time. You may continue
2 your deliberations while waiting for an answer to any question.

3 Remember that you are not to tell anyone, including me, how
4 the jury stands numerically or otherwise on any questions
5 submitted to you, including the question of guilt of the
6 defendant, until after you have reached a unanimous verdict or
7 have been discharged.

8 All right. Mr. Ellis, we're ready for your closing
9 argument.

10 MR. ELLIS: Thank you, your Honor.

11 Ladies and gentlemen, museums around the world often have
12 what's called a grab list. What a grab list is is a list of
13 items that if disaster strikes -- fire, flood, earthquake,
14 whatever -- staff will know which items among the many valuable
15 items are going to be grabbed first. So if Paris is on fire,
16 you can pretty much make a safe bet someone is going to take out
17 the Mona Lisa.

18 The same is true for anyone else. If your house is on fire
19 and you have a safe opportunity, what might you grab? A pet? A
20 photo album? Something precious.

21 This was a situation that the defendant, Bradley Hull, and
22 his then-girlfriend, Misty Haynes, found themselves in on
23 February 7th of 2020. Now, as I said in opening, it's a
24 different kind of disaster. It's not a fire. It's not a flood.
25 Spokane isn't falling apart. But the police know what they've

1 been up to and the police are coming to Brad Hull's house. So
2 what do they grab? They grab their drugs, they grab their cash,
3 and Mr. Hull even grabs his coin collection on the way out the
4 door.

5 When you take a look at your jury instructions,
6 Instructions 12 and 15 both outlined the elements that the
7 Government has to prove to prove beyond a reasonable doubt that
8 Mr. Hull committed the offenses of possession with intent to
9 distribute of both a mixture or substance containing a
10 detectable amount of heroin and methamphetamine. So I want to
11 talk about those a little bit. Some of them are pretty
12 straightforward. On or about a certain date. All the testimony
13 from everyone was that this all took place on the early morning
14 on February 7th of 2020.

15 There's a location, the Eastern District of Washington.
16 And you heard from Special Agent Clyde that Spokane where this
17 took place is within what we call the Eastern District of
18 Washington.

19 Intent to distribute. So as opening defense essentially
20 conceded that this amount of drugs in association with this
21 amount of money is what would typically be associated with
22 intent to distribute, but nonetheless I want to outline some of
23 the evidence for you because the Government still bears the
24 burden of proving that beyond a reasonable doubt.

25 So as Special Agent Clyde testified to, that amount of

1 heroin, 640 grams, those amounts of methamphetamine, the two
2 baggies which had just over 70 grams of methamphetamine in them,
3 both of those are amounts that a typical user wouldn't have.
4 Those amounts are associated with distribution. Because if you
5 have that much, what are you doing with it? It's like a mom
6 with Girl Scout cookies. If you have 1,000 boxes of Thin Mints,
7 chances are you've got a kid who is going to be selling them,
8 not just eating them all yourself. So again, the amount
9 matters.

10 The association with the money matters. Drug dealing is
11 not -- it's not something you go to the bank for. You can't
12 have your money in a bank. It's all-cash business. So what do
13 you have? You end up with a lot of cash. And that's what
14 happened here. In this bag you have a big amount of heroin, big
15 amounts of methamphetamine, and almost \$14,000 in bills, which
16 is quite a bit of money just to be carrying around.

17 And then in terms of the defendant's own intent, that's
18 where you can look at things like those text messages that were
19 found on his phone that Detective McCrillis sees in May of 2020.
20 And you can read into those that -- you can evaluate those as
21 part of your analysis concerning whether the defendant intended
22 to further distribute the drugs in that bag. And you'll have
23 them back in evidence. We went through them with Special Agent
24 Clyde. I urge you to read through them for yourself.

25 Knowledge of what's in the bag. Again, these are items

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRADLEY DALE HULL,

Defendant.

CASE NO: 2:20-CR-0128-TOR-2

QUESTION RECEIVED FROM JURY
DURING TRIAL PROCEEDINGS

QUESTION # ①

YOUR HONOR, WE HAVE THE FOLLOWING QUESTION:

Based off of the arrest / traffic stop on Feb 7, 2020

Is this the specific day we are to determine

guilty / not guilty for intent to sell / distribute,

or, ~~is it later evidence to~~ are we to determine

based off of later evidence he had intent to

sell / distribute?

Are we just to determine guilty / not guilty
for Feb 7, 2020?

DATED May 18, 2022.

TIME: 10:46 Am

Juror No. 11, 7, 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRADLEY DALE HULL,

Defendant.

CASE NO: 2:20-CR-0128-TOR-2

COURT RESPONSE TO JURY
QUESTION DURING TRIAL
PROCEEDING

Question No. 1 Received by Court on May 18, 2022, at 10:46 am.

ANSWER FROM COURT:

The two counts Defendant is charged with are alleged to have occurred on or about February 7, 2020. You are to determine whether the Government has proved he committed those crimes on or about that date.

DATED: May 18, 2020



Thomas O. Rice
THOMAS O. RICE
United States District Judge