No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

SHAKEEN DAVIS, et al.

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

_____

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

_____

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Appendix

A. *United States v. Banks*, 104 F.4th 496 (4th Cir. 2024)

B. United States District Court, District of Maryland Written Opinion (D. Md. May 9, 2022)

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4620

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RANDY BANKS, a/k/a Dirt,

Defendant – Appellant.

No. 19-4826

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JAMAL LOCKLEY, a/k/a T-Roy, a/k/a Droid,

Defendant – Appellant.

No. 20-4193

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

CORLOYD ANDERSON, a/k/a Bo,

Defendant – Appellant.

No. 20-4250

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

SHAKEEN DAVIS, a/k/a Creams,

Defendant – Appellant.

No. 20-4266

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DANTE D. BAILEY, a/k/a Gutta, a/k/a Almighty, a/k/a Wolf,

Defendant – Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, Senior District Judge. (1:16-cr-00267-CCB-5; 1:16-cr-00267-CCB-8; 1:16-cr-00267-CCB-11; 1:16-cr-00267-CCB-20; 1:16-cr-00267-CCB-1)

Argued: May 7, 2024 Decided: June 12, 2024

Amended: July 3, 2024

Before AGEE and WYNN, Circuit Judges, and Gina M. GROH, United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Judge Agee wrote the opinion in which Judge Wynn and Judge Groh joined.

ARGUED: Stuart A. Berman, LERCH, EARLY & BREWER, CHARTERED, Bethesda, Maryland; Lauren Nicole Beebe, ALLEN OVERY SHEARMAN STERLING US LLP, Washington, D.C.; Gerald Thomas Zerkin, Richmond, Virginia; Carmen D. Hernandez, LAW OFFICES OF CARMEN D. HERNANDEZ, Highland, Maryland, for Appellants. Jefferson McClure Gray, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Allen H. Orenberg, THE ORENBERG LAW FIRM, PC, Potomac, Maryland, for Appellant Jamal Lockley. Adam B. Schwartz, ALLEN OVERY SHEARMAN STERLING US LLP, Washington, D.C., for Appellant Dante Bailey. Erek L. Barron, United States Attorney, Brandon K. Moore, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

AGEE, Circuit Judge:

Five members and associates of a Baltimore-based gang appeal multiple components of their convictions and sentences. As discussed below, because Shakeen Davis' two felon-in-possession convictions were obtained in violation of *Rehaif v. United States*, 588 U.S. 225 (2019), we reverse those convictions and remand for entry of a corrected judgment. As for all the other challenged convictions and sentences, we affirm.

I.

Recounted in the light most favorable to the Government, the evidence adduced at trial showed the following: Over a decade ago, Dante Bailey founded Murdaland Mafia Piru (MMP) as a branch of the Bloods gang operating throughout Baltimore City and County, Maryland. The so-called "5200 boys" operated alongside MMP members, earning their moniker from the 5200 block of Windsor Mill Road, which was considered MMP's headquarters. MMP had a hierarchical structure and adopted many features of the Italian mafia. Bailey was its "Don" or "Godfather." Subordinates operated MMP's extensive drug-trafficking operation involving the distribution of heroin, cocaine, cocaine base, fentanyl, marijuana, and other controlled substances. MMP required non-gang members who wanted to distribute drugs in its territory to pay "taxes."

In addition to MMP's drug-trafficking endeavors, it also undertook various enforcement measures—often violent ones—to ensure its operations ran smoothly and to maintain control of its territory. Bailey (and MMP generally) took any sign of disrespect seriously, leading to punishment of MMP members and non-members alike. In furtherance

of its operations, MMP members and affiliates were responsible for the attempted murders and murders of multiple individuals.

Federal, state, and local authorities investigated MMP's illicit activities for many years, eventually amassing extensive evidence against a network of street-level dealers all the way to Bailey himself. This evidence took many forms, from recorded controlled buys and surveillance footage to wiretap conversations, cellphone data, and the statements of cooperating witnesses.

The investigation into MMP led to indictments charging over two-dozen defendants with a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, a narcotics conspiracy, and related offenses. All but six individuals pleaded guilty. At issue before us is the appeal from the joint, six-week trial against five defendants: Dante Bailey, Shakeen Davis, Corloyd Anderson, Jamal Lockley, and Randy Banks.[1]

Bailey was convicted of conspiracy under RICO, in violation of 18 U.S.C. § 1962(d); conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846; murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1), (2); and possession with intent to distribute controlled substances, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. For these four convictions, Bailey was sentenced to concurrent terms of life imprisonment. Bailey was also convicted of possession of a firearm and ammunition as a

[1] A sixth defendant, Sydni Frazier, was initially part of this trial, but was severed after his attorney could not proceed in the joint trial. He was subsequently convicted in a separate trial and his appeal is pending in this Court, Case No. 22-4368, but it is not part of this appeal.

convicted felon, in violation of 18 U.S.C. § 922(g), for which he received a 20-year sentence, to run concurrent to the life sentences.

Davis was convicted of both conspiracies, for which he was sentenced to a term of 300 months' imprisonment for each count, to run concurrent to each other. In addition, he was convicted of two counts of possession of a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g), for which he was sentenced to 120 months' imprisonment, to run concurrent to the sentence for the conspiracies. Davis was also convicted of one count of distribution and possession with intent to distribute controlled substances, in violation of 21 U.S.C. § 841, for which he received a 240-month sentence, to run concurrent with the previously mentioned sentences. Lastly, Davis was convicted of one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c), for which he received a 60-month term of imprisonment, to run *consecutive* to his other sentences.

Anderson was convicted of both conspiracies, for which he received a sentence of 264 months' imprisonment on each count, to run concurrent to each other. He was also convicted of one count of possession of a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g). But in light of the Supreme Court's later-issued decision in *Rehaif*, the Government stipulated to the dismissal of that conviction.

Lockley was convicted of both conspiracies, for which he was sentenced to a 360-month term of imprisonment on each count, to be served concurrent to each other. In addition, he was convicted of one count of distribution and possession with intent to distribute controlled substances, in violation of 21 U.S.C. § 841, for which he was

sentenced to 120 months' imprisonment, to run concurrent to the sentences for the conspiracy convictions.

Lastly, Banks was convicted of the narcotics conspiracy, for which he was sentenced to a total term of 216 months' imprisonment. The jury returned a verdict of not guilty on the RICO conspiracy charge.

After trial, but before the Defendants' sentencing hearings, it came to light that one of the law enforcement officers who had been part of the investigation had—many years prior and in an unrelated incident—obtained proceeds from the sale of controlled substances seized at the scene of a crime. That (now-former) officer later pleaded guilty to an offense arising from the investigation into that misconduct. And because this former officer had been the affiant on several wiretap applications and search warrants during the MMP investigation, the Defendants moved for a new trial, arguing that the officer's misconduct tainted evidence that had been obtained and introduced against them. The district court denied the motion, concluding that the former officer's misconduct did not implicate the trial evidence or otherwise undermine confidence in the verdict.

The Defendants noted timely appeals, and we consolidated their cases for briefing and oral argument. We exercise jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II.

On appeal, the Defendants raise fifteen discrete issues challenging their convictions and sentences, and even more arguments in support of those issues. We note at the outset

that we have considered all these arguments, even if we do not directly address them in the discussion that follows.

A. Challenges to the Trial and Convictions

1. Motion for New Trial

The Defendants argue that the district court erred in denying their motion for a new trial based on former Baltimore City Police Officer Ivo Louvado's role in the MMP investigation. We review the denial of a motion for a new trial for abuse of discretion. *United States v. Robinson*, 627 F.3d 941, 948 (4th Cir. 2010).

a. Background Facts

The record shows that in 2009, while Louvado was a police officer, he and other corrupt police officers "stole and resold three kilograms of cocaine," splitting the proceeds of the sales between them. *United States v. Bailey*, No. CCB-16-267, 2022 WL 1451653, *1 (D. Md. May 9, 2022). Direct evidence of Louvado's crime came to light in April 2019, during the middle of the MMP trial and as a result of a separate investigation into corruption within the Baltimore City Police Department. Following a confidential investigation, Louvado was charged in March 2020 with one count of lying to investigators about the drug theft. He pleaded guilty to that offense in November 2020. *Id.* at *4.

Louvado became involved in the MMP investigation while he was on a detail with the federal Bureau of Alcohol, Tobacco, and Firearms (ATF). Before addressing his specific role, we note its context within the broader investigation that led to this trial: State and local authorities had been investigating MMP for a long time before the ATF joined the investigation, and the ATF's investigation predated Louvado's own involvement. This

extensive "pre-Louvado" investigation spanned numerous law enforcement entities and involved traffic stops, searches, seizures, wiretaps, and intercepted jail calls that already implicated numerous MMP members, including Bailey, Davis, and Lockley, in the charged conduct. *Id.* at *2.

As for Louvado's role in the investigation, the Government identified—and the Defendants do not dispute—that after Louvado joined the MMP investigation, he acted "outside the presence of other officers" on just two occasions. *Id.* On the first occasion, he was the sole law enforcement officer to check a confidential informant before a controlled buy that was itself recorded. But this particular controlled purchase was not introduced into evidence at trial. *Id.* On the second occasion, "Louvado surveilled Lockley as Lockley exited his home, got into a car, and drove away." *Id.* But this entire surveillance was captured on video recording, and it was not a material part of the evidence against Lockley.

In addition to those two occurrences, Louvado was the direct or cross-referenced law-enforcement signatory for several search warrants and wiretap authorizations during the MMP investigation. *See id.* at *2–3. For example, he applied for warrants to search Frazier's and Davis' cell phones and Davis' Instagram account. He applied for warrants to search several MMP-associated locations, including Lockley's home, Anderson's home and business, and Davis' home. And he was the sole affiant to obtain authorization to wiretap the phones of two other co-conspirators. On each of these occasions, however, the probable cause underlying the applications and affidavits was based on information that did not originate from or otherwise involve Louvado. Instead, the probable cause to obtain the requested authorizations originated from independent evidence, including recorded

controlled buys, publicly available social media posts, and arrests for other specific offenses.

As the investigation into MMP continued, a separate federal investigation began looking into corruption within the Baltimore Police Department's Gun Trace Task Force. Louvado had never been a member of that task force, but in July 2017, a witness in that investigation admitted to stealing money during a 2009 drug search. He named two other officers who had also participated in the theft. He did not name Louvado as a participant in the theft, but he implied that Louvado may have participated by mentioning that Louvado had purchased a boat shortly after the theft. *Id.* at *4.

The following month, the task force investigators met with the MMP trial team to summarize what they knew at that point—that no one had identified Louvado as someone who had stolen drug money, that Louvado had not yet been questioned, and that they had no evidence of his participation in the theft (for example, his financial records did not point to having received large cash deposits around that time). *Id.*

In March 2018, another witness in the task force investigation relayed his second-hand impression that Louvado had been involved in the 2009 drug theft. But that witness had not been present and could not otherwise corroborate his suspicion, so investigators still had no direct evidence that Louvado had committed a crime. *Id.*

During May 2018 and February 2019 interviews with task force investigators, Louvado denied knowing about any relevant criminal activity. *Id.*

In April 2019, a witness for the task force investigation provided the first concrete evidence of Louvado's criminal involvement. Namely, he admitted seeing Louvado steal drugs in February 2009. *Id.*

At that time, the MMP trial was in its third week. Investigators reported this evidence to supervisors, but the U.S. Attorney's office determined that the MMP trial attorneys had no *Giglio*[2] obligation to disclose the witness's statement about Louvado for three reasons: "(1) Louvado was not a trial witness; (2) the information in [Louvado's affidavits and applications] was independently verifiable; and (3) the [task force] investigation was still underway with potential covert steps to be taken." *Id.*

The investigation into Louvado's criminal conduct culminated in a March 2020 criminal information against him for lying to investigators about the drug theft, and he pleaded guilty to that offense months later.

b. Governing Law

The Defendants argued in favor of a new trial because of Louvado's separate criminal acts under two separate theories. First, they alleged that they satisfied Federal Rule of Criminal Procedure 33, which authorizes a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." When considering whether to grant relief under Rule 33, courts look to five factors to determine whether "justice" demands a new trial: "(a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the

[2] *Giglio v. United States*, 405 U.S. 150 (1972).

movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Robinson*, 627 F.3d at 948 (cleaned up).

Second, and independently, the Defendants asserted that a *Brady* and *Giglio* violation warranted a new trial. Those cases state that a defendant's due-process rights are violated when the prosecution suppresses evidence "favorable to an accused" or for impeachment purposes. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio*, 405 U.S. at 153–54. To secure a new trial under this theory, a defendant must show that (1) the undisclosed evidence was favorable to him; (2) it was material, i.e., caused him prejudice; and (3) the prosecution possessed the evidence, yet failed to disclose it. *United States v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001).[3]

c. Analysis

The Defendants cannot prevail under either theory to a new trial because they cannot show at least one element common to both: that evidence relating to Louvado's criminal misconduct was material. Though the precise ambit of what materiality entails varies

[3] We have never held that *Brady* and *Giglio* apply to evidence bearing on the warrant-application stage as opposed to evidence admitted at trial. To the contrary, when previously confronted with a similar argument, we observed that caution should be exercised before "importing the panoply of *Brady* protections from trial practice into warrant application proceedings." *United States v. Colkley*, 899 F.2d 297, 302 (4th Cir. 1990). We need not elaborate on the different concerns at issue or definitively reject the applicability of *Brady*/*Giglio* to the warrant-application stage to resolve this case. The lack of materiality is so clearly shown, even in the unlikely event that *Brady*/*Giglio* would apply in this context, that it is unnecessary to address this threshold point.

according to the particular pathway to relief, the concept generally requires the Defendants to demonstrate that not knowing about Louvado's crime at the time of the trial somehow prejudiced them. *Compare Robinson*, 627 F.3d at 950 (holding that evidence of police misconduct is not material for purposes of a Rule 33 motion for a new trial when it "says little about [a defendant's] guilt or innocence on the[] [charged] counts"), *with United States v. Fulcher*, 250 F.3d 244, 254–55 (4th Cir. 2001) (holding that newly discovered evidence was material for purposes of a Rule 33 motion because it went to the heart of the defendants' defense); *compare also Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (stating, for purposes of *Brady* claims, that "evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"), *with United States v. Bagley*, 473 U.S. 667, 680 (1985) (holding that, for *Giglio* purposes, impeachment evidence is immaterial if "failure to disclose it would be harmless beyond a reasonable doubt").[4] At bottom, the Defendants argue that Louvado tainted the

[4] The Defendants' *Brady*/*Giglio*-based argument isn't a true *Brady*/*Giglio* claim because the newly discovered evidence is not exculpatory and, while it may have been of some theoretical impeachment value, Louvado did not testify at their trial. To argue around this problem, they assert that had Louvado's misconduct been disclosed earlier, they would have sought a *Franks* hearing to challenge the admissibility of the evidence obtained as a result of the search warrants and wiretap authorizations that he played a role in obtaining. *See Franks v. Delaware*, 438 U.S. 154 (1978). Even accepting this look-through approach, during a *Franks* hearing, the defendant carries the burden of showing materiality, which in this context requires showing that the omitted information undermines the probable-cause determination. *See United States v. Moody*, 931 F.3d 366, 371 (4th Cir. 2019) ("[T]he defendant must show materiality—that is, that the false statements were necessary to the finding of probable cause. A district court may not hold a *Franks* hearing where, after stripping away the allegedly false statements, the truthful portions of the warrant (Continued)

trial evidence because had he disclosed his own criminal conduct from 2009 in the affidavits and applications he signed, no judge would have approved those requests. That may well be true, but it does not satisfy the Defendants' burden of showing materiality.

To be clear, the Defendants do not identify any evidence that Louvado manufactured nor do they claim that he was ever in a position to manufacture evidence against them such that a fair inference of manufactured evidence could arise. Their briefing does not assert that he had a history of that type of misconduct in other cases. Nor do they argue that the affidavits or applications Louvado signed contained any false statements or omissions bearing directly on the probable-cause determination needed to grant the requests. Their argument thus does not align with the circumstances in which we and other courts have held that an investigating officer's own misconduct cast sufficient doubt on the case against the defendant so as to warrant a new trial. *See United States v. Fisher*, 711 F.3d 460, 466 (4th Cir. 2013) (recounting the "highly uncommon circumstance[]" presented "in which gross police misconduct goes to the heart of the prosecution's case" because a law enforcement officer described events in a search warrant affidavit that did not occur and described statements by a confidential informant who "had no connection to the case"); *see also Milke v. Ryan*, 711 F.3d 998, 1000–01, 1018 (9th Cir. 2013) (holding that evidence of a police officer's undisclosed "long history of lying under oath and other misconduct" was

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application would still support probable cause." (cleaned up)). Thus, the same materiality problem thwarts the Defendants' ability to show the likely success of a *Franks* motion. *See United States v. Lull*, 824 F.3d 109, 118 (4th Cir. 2016) (concluding that an affiant's omission of a confidential informant's past unreliability was material because the informant's statements were essential to establish probable cause and so the informant's reliability was important when assessing the existence of probable cause).

material to the verdict because the evidence at "trial was, essentially, a swearing contest between" the defendant and the police officer, making the officer's "credibility . . . crucial to the state's case").

Instead, the purported basis for a new trial is entirely unrelated to (1) the evidence establishing probable cause for any evidence obtained as a result of the wiretaps or searches, *and* (2) the evidence introduced to establish the Defendants' guilt at trial. Their sole point in raising Louvado's criminal conduct is to argue that he was a corrupt officer with suspect credibility. (And since he did not testify at trial, Louvado's credibility only comes into play in this case to the extent it swayed a judge to issue the requested warrants and wiretap authorizations. Put differently, they assert that no judge who knew this information about Louvado would have approved a request bearing his signature.) But we have previously held that evidence which is "merely impeaching" "does not generally warrant the granting of a new trial." *United States v. Custis*, 988 F.2d 1355, 1359 (4th Cir. 1993). To the contrary, "motions for a new trial based on impeaching evidence discovered after trial should be granted 'only with great caution and in the most extraordinary circumstances," as "'[t]here must be a real concern that an innocent person may have been convicted.'" *Id.* at 1360 (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d. Cir. 1992)). That principle from the Rule 33 context is also consistent with the Supreme Court's recognition in the *Giglio* context that when the Government's case does not depend on a particular government witness, then undisclosed information that would impeach that witness is immaterial as it does not create a reasonable probability of a different result at trial. *Strickler v. Greene*, 527 U.S. 263, 292–96 (1999). And both this Court and our sister

circuit courts have recognized under similar circumstances that the materiality requirement is not satisfied when a law enforcement officer's misconduct is tangential to the evidence establishing a defendant's own culpability. *E.g.*, *Robinson*, 627 F.3d at 950, 952–53 (holding that a new trial was not warranted under either Rule 33 or *Brady*/*Giglio* because the misconduct evidence "would do little to undermine the largely separate investigation's result" and did not "cut into a somewhat thin and entirely circumstantial government case," while also observing the strength and independence of the government's evidence gleaned "from other sources"); *United States v. Jones*, 399 F.3d 640, 647–48 (6th Cir. 2005) (holding the same because evidence that members of the investigating law-enforcement unit had "engaged in widespread misconduct" did not prejudice the defendant "[g]iven the overwhelming evidence of guilt"); *United States v. Williams*, 985 F.2d 749, 757 (5th Cir. 1993) (holding the same because evidence that the crime lab chemist "pilfer[ed] drugs from the lab" did not call into question evidence that the substance the defendants possessed was "cocaine or crack" when the stolen drugs were of a different kind and were entirely unrelated to the defendants' case).

In this case, the district court reasonably concluded that Louvado played only a minor role in the MMP investigation as a whole and that his unrelated prior criminal conduct—while serious—did not call into question the evidence against the Defendants or the validity of their convictions. Indeed, the bulk of the Government's case at trial did not involve Louvado at all. Of the small part of the Government's case that Louvado had a minor role in, he was either accompanied by other law enforcement officers or documentary evidence corroborated events. And the one controlled buy during which

Louvado was unaccompanied for a time with the confidential informant was not introduced at trial. Moreover, each time Louvado played a role in obtaining a search warrant or wiretap authorization, the probable cause establishing the basis for those requests was based on third-hand evidence unrelated to Louvado personally. He may have signed the requests, but that personal attestation mattered little to the underlying support for obtaining authorization to proceed. As the district court aptly observed in describing the limited impeachment value Louvado's misconduct had, "there is a wide gap between deliberate but tangential omissions about an affiant's general credibility and deliberate falsehoods with real factual nexus to the case itself." *Bailey,* 2022 WL 1451653, at *7. Further, "[e]xcluding any declarations from Louvado as to his personal honesty or including the omitted information about the 2009 theft still leaves sufficient confidential informant and other information to justify probable cause for the wiretaps and searches." *Id.* at *9.

Because Louvado's criminal misconduct was immaterial to the evidence establishing the Defendants' criminal culpability, the district court did not err in denying their motion for a new trial.

2. Motion to Enforce Plea Agreement (Bailey)

Just days before the trial began, Bailey moved for enforcement of a plea agreement that would have avoided exposing him to a mandatory sentence of life imprisonment. The district court denied the motion after finding that there had been no meeting of the minds between Bailey and the Government and thus no plea agreement. At the broadest level, the court looked to the communications as a whole and concluded that none set out essential terms of an enforceable plea agreement. For further support, the court observed that the

Government's emails had repeatedly indicated that certain of its offers "were contingent on [four other] defendants pleading guilty, which did not happen." J.A. 7688. In addition, the court pointed out that the Government's emails showed that the Government framed its discussions in contingent language that had to be submitted to supervisors for approval, which was never given.

On appeal, Bailey reiterates his belief that the Government failed to honor either of two offers that he contends he accepted. In view of that perceived breach, he argues that the district court committed reversible error in proceeding to trial rather than holding the Government to its word.[5] First, Bailey asserts that the Government offered a plea deal for 27-40 years' imprisonment in August and October 2018, which he supposedly accepted in October 2018. Second, he claims that the Government offered him another plea deal for a "straight" term of 37 years' imprisonment in January 2019, which he contends he accepted the following month.[6]

[5] Alternatively, Bailey argues that the circumstances presented show that trial counsel was ineffective in failing to procure a signed plea agreement and that this error is "conclusively establishe[d]" on the record such that it is cognizable on direct appeal. *See United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010). We disagree that he has met this high standard and so reject this argument.

[6] On appeal, Bailey relies on two affidavits from trial counsel that were submitted *after* the district court denied his motion and which were not part of any motion to reconsider the court's decision. At oral argument, we explored with counsel the unusual posture in which those affidavits were made part of the district court record and questioned the propriety of considering them on appeal. Ultimately, we need not resolve this question. The bulk of their contents was already provided to the district court as part of the motion and hearing process. And even if we considered their additional contents, the district court still did not err in determining that a plea agreement did not exist.

We disagree. The district court did not err in concluding that the parties never entered into an enforceable plea agreement. "[J]udicial interpretation of plea agreements is largely governed by the law of contracts." *United States v. Martin*, 25 F.3d 211, 216–17 (4th Cir. 1994). While oral agreements can be made, we have strongly "suggest[ed] that lower courts require all . . . plea agreements be reduced to writing." *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997). Before a plea agreement can be enforced, then, the party seeking enforcement must show that a binding contract has been formed. And "[t]he essence of contract formation is . . . a meeting of the minds of the contracting parties." *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) (cleaned up).

Turning to the first alleged "agreement," emails exchanged between the relevant parties throughout August and October 2018 show initial negotiations and Bailey's attempt to "accept" an offer on terms that did not reflect the Government's most recent offer. Rather than recite all the permutations of the partially documented discussions, we focus on the evidence of where everyone stood just before Bailey allegedly accepted a plea deal "on or around October 9, 2018." Opening Br. 42. In an October 5 email from the AUSA, the Government rejected Bailey's "counter proposal," stating that it "would accept a plea to a range of 27-40, or a straight 37, if [four co-defendants] plead guilty. Unfortunately, they are all still at the table at this point." J.A. 6580. The AUSA then acknowledged that this position was "not what you want to hear" and expressed her willingness to talk further. J.A. 6580. Later that evening, in response to Bailey's counsel asking if the AUSA could "write up the 27 to 40 [agreement] for [Bailey's counsel] to take to [Bailey]" on Monday,

October 8, when she planned to visit him, the AUSA apologized and said that she "can't get approval for a plea by Monday." J.A. 6581. Bailey's counsel continued to push for a written plea agreement to take to Bailey on Wednesday, October 10, but the AUSA again indicated that she was "sorry to say I'm not going to be able to get you a plea offer in time for tomorrow's visit." J.A. 6582. On October 10, Bailey's counsel apparently discussed the terms of a *potential* plea deal with Bailey, communicating later that day to the AUSA that "we cleared 27 to 40 with our client who asked us to request a specific number – 35 or 37. He knows you will be asking for 40. Our understanding was that 35 was 'No' and 37 was only if we could get the others to take the offer made to them. . . . We believe there is a much better chance . . . if . . . the plea is done. We could have had a signed deal . . . last week and still can get one if we could get something to sign!!" J.A. 6583. Bailey's counsel closed the email by saying, "We feel like we have a sure thing that keeps slipping away as the time passes." J.A. 6583.

All this to say, before Bailey is even alleged to have accepted any offer, his counsel had heard multiple times from the AUSA that there was no firm offer to present to Bailey. Bailey's counsel's own statements to the AUSA at the time reflect her recognition of that basic fact: the parties were still discussing the terms and no final agreement had been reached. In fact, Bailey's counsel was continuing to tweak terms on October 10 when she sought the Government's approval of a *different* term of imprisonment than the range Bailey had purportedly "cleared" earlier that day. On this record, the district court did not err in determining the parties never reached a meeting of the minds such that there was any plea deal for Bailey to accept "on or around October 9."

We reach the same conclusion as to the negotiations that took place in January 2019, which culminated with Bailey's purported "acceptance" on February 18, 2019. The record shows that *after* the Government communicated to Bailey's counsel that it would *not* offer a plea to thirty-seven years' imprisonment unless four other co-defendants pleaded guilty, Bailey's counsel unilaterally drafted a document incorporating standard language of a plea agreement in that district. The document stated that the parties agreed to a thirty-seven year term of imprisonment without mentioning anything about the deal being contingent on other co-defendants pleading guilty. On February 18, 2019, Bailey and his counsel signed this document. Counsel then sent the document, along with a letter recounting the plea negotiations, to the Government. Particularly instructive here, the letter acknowledges that the Government's most recent communication had said "that although we had reached agreement on the terms of a plea agreement for Mr. Bailey, you would not extend a formal written offer unless and until [four co-defendants] pled." J.A. 6589. The letter asked the Government to "agree that permitting Mr. Bailey to plead guilty to the terms on which we have agreed is the appropriate resolution of the charges against him, whether or not his co-defendants plead, and that you will execute the agreement we are providing." J.A. 6589. The record could not be clearer—Bailey sought to unilaterally change the conditions under which the Government had indicated it would be willing to accept a plea deal. Plainly there was no meeting of the minds. Bailey could not "accept" a plea based on terms the Government never offered to him. And the Government never accepted the terms Bailey presented to it.

Because a plea agreement was never formed, the district court properly denied Bailey's motion to enforce a (non-existent) plea agreement.

3. *Rehaif* Error (Davis)

This trial took place before the Supreme Court issued its decision in *Rehaif*, so neither the district court nor the parties had the benefit of that ruling, which "brought a sea change to [§ 922(g)(1)] cases." *United States v. Gallman*, 57 F.4th 122, 130 (3d Cir. 2023). In *Rehaif*, the Supreme Court held that the statutory term "knowingly" applied to the defendant's conduct *and* status. 588 U.S. at 229. And as had been the situation in so many cases brought before *Rehaif* was decided, the jury here was not specifically instructed that the Government had to come forward with proof that those defendants charged with a § 922(g)(1) offense knew that they fell within a class prohibited from possessing firearms.

Although the Government moved to dismiss Anderson's § 922(g)(1) conviction after *Rehaif*, it did not do the same with respect to Davis' two § 922(g)(1) convictions (Counts 16 and 30). Nonetheless, at sentencing, the Government noted the possibility that Davis' § 922(g)(1) convictions may be reversed on appeal in light of *Rehaif* and it asked the district court to specify whether it would have imposed the same sentence for Davis' convictions on the other counts regardless of whether his § 922(g)(1) convictions were later reversed on appeal. The district court readily agreed to do so, stating that it would impose the same sentence, irrespective of any *Rehaif* error as to Davis' § 922(g)(1) convictions.

On appeal, the parties agree that *Rehaif* error occurred. Their dispute is limited to whether Davis can establish relief on plain-error review, specifically whether the error affected his substantial rights. *United States v. Barronette*, 46 F.4th 177, 198 (4th Cir.

2022) (reiterating that this requires a defendant to show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different"). On this point, since *Rehaif*, the Supreme Court has recognized that the mere fact that a defendant has a prior felony conviction is not dispositive to proving whether he knew of his status, though "common sense" suggests that an individual who is a convicted felon "*ordinarily* knows he is a felon." *Greer v. United States*, 593 U.S. 503, 506, 508 (2021) (emphasis added). That typical scenario gives way, however, when the defendant "can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms." *Id.* at 509.

In assessing whether a defendant satisfies plain-error review in a *Rehaif* context, our decision in *United States v. Barronette* is instructive. There, we held that a § 922(g)(1) defendant had satisfied his burden on plain-error review of a *Rehaif* error. The defendant had prior state-law convictions for offenses classified as misdemeanors under state law but which met the technical requirements to be classified as felonies for purposes of § 922(g)(1). 46 F.4th at 198–99. Although the defendant had been sentenced to more than one term of imprisonment over one year long, most of the sentences had been suspended such that he served only one stint in prison that lasted slightly more than one year. *Id.* at 199. In those circumstances, we concluded that "there [was] a lack of record evidence that [the defendant] knew that he was convicted of a state crime [that met the federal definition of a felony for § 922(g)(1) purposes], especially when his crimes were labeled as misdemeanors," leading us to hold that "the *Rehaif* error affected his substantial rights"

and satisfied plain-error review. *Id.*; *see also id.* at 200–01 (distinguishing *Greer* and explaining this conclusion further).

Barronette counsels the same result here. While that defendant had multiple prior convictions that met the federal definition of a "felony," Davis had a single prior state conviction that did so. In both *Barronette* and here, the state conviction was labeled under state law as a "misdemeanor." And while the defendant in *Barronette* had actually served time in prison for more than one year, Davis' entire sentence had been suspended. Given *Barronette*'s conclusion, Davis has shown even more clearly "that, but for the *Rehaif* error in the jury instructions, there is a reasonable probability that a jury would have acquitted him" of the § 922(g)(1) counts. *Greer*, 593 U.S. at 510; *see also Barronette*, 46 F.4th at 198–201.[7]

Despite Davis satisfying the other elements of plain-error review, we only afford relief "if the error had a serious effect on the fairness, integrity or public reputation of judicial proceedings." *Barronette*, 46 F.4th at 201 (cleaned up). As we did in *Barronette*, we hold the *Rehaif* error had a serious effect on Davis' § 922(g)(1) conviction. Specifically, Davis has shown "why a jury in an error-free trial might have reasonable doubts as to the knowledge-of-felon-status element, thus calling into question whether a jury would have convicted [him] had they been required to find beyond a reasonable doubt that he knew at

[7] Arguing against this result, the Government points to a single jailhouse phone call in which Davis stated that he had stashed firearms in the woods but was not going to retrieve them because of a police presence. The Government asks too much of that evidence to cast it as proving that Davis knew of his felon status at the time this statement was uttered.

the time of his" possession offense that he also knew of his felon status. *Id.* (cleaned up). These circumstances combine to effect "a miscarriage of justice" should we affirm his § 922(g)(1) convictions. *Id.* (citation omitted). We therefore reverse Davis' § 922(g)(1) convictions (Counts 16 and 30).

The question then becomes the scope of our remand instruction. Given the sentencing transcript, we believe justice is best served by remanding for entry of an amended judgment without the need for a plenary resentencing. During sentencing, the district court specifically engaged the question of whether it would impose the same sentence if the § 922(g)(1) convictions were reversed. It unequivocally responded that it would impose the identical sentence regardless of this outcome, stating:

> [A]bsolutely, Counts 16 and 30, if for some reason those 10-year sentences had to be vacated, I would still believe that the 25 years on the other counts, followed by the five years on Count 32, would be reasonable and sufficient without being greater than necessary.

J.A. 6527. Reviewing the nature of Davis' remaining convictions and the district court's explanation at sentencing for the sentence it imposed, we conclude that this statement adequately addresses the basis for Davis' sentence and eliminates the need for resentencing.

4. Admissibility of Evidence

The Defendants raise various objections to the district court's rulings authorizing the admission of certain evidence at trial. First, all of the Defendants challenge on plain-error review the district court's decision to allow the Government to admit certain music videos, music lyrics, and social media posts created by the Defendants, which they claim

did not prove any element of any offense and were unfairly prejudicial under Federal Rule of Evidence 403. Next, Bailey argues that the district court abused its discretion in allowing the introduction of expert testimony concerning a "match" in firearms evidence because that testimony conflicted with the district court's pre-trial ruling limiting the scope of the expert testimony. Lastly, Davis and Anderson argue that because their felon-in-possession convictions cannot stand under *Rehaif*, evidence that was admissible only in support of that offense—namely, evidence of their felon status—was otherwise unfairly prejudicial and requires vacatur of their remaining convictions.

a. Music Videos, Lyrics, & Social Media Evidence

The Government introduced into evidence music videos, lyrics, and social media posts generated by and depicting the Defendants and others, which the Defendants contend on appeal were irrelevant and unduly prejudicial because they did not prove any element of any offense and were inherently inflammatory. They argue that this evidence should not have been admitted under a proper assessment of Rules 401, 402, and 403. And they argue that the error prejudiced them such that their convictions should be vacated and the case remanded. We disagree.

As an initial matter, we note two procedural concerns before turning to the merits. First, the parties disagree on whether this issue was preserved in the district court and how that affects our standard of review. We need not resolve that question, however, because even assuming that the Defendants adequately preserved the issue when Davis (acting alone) raised it in a motion in limine, they have not demonstrated the district court abused its discretion in allowing the admission of this evidence.

Second, we note that by attacking distinct categories of evidence in cursory fashion on appeal, the Defendants have painted their challenge with such a broad brush that they arguably fell short of the requirements of Federal Rule of Appellate Procedure 28(a), which requires meaningful engagement with the record and applicable case law. *See* Fed. R. App. P. 28(a)(8); *see Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (noting that to adequately raise an issue on appeal, parties are required to take more than "a passing shot at [an] issue"). Instead, the Defendants challenge the admissibility of everything from social media posts and images to music videos and lyrics collectively, using only a few examples to support their sweeping argument that the admission of this evidence wholistically impacted the entire trial. We need not rely on this procedural deficiency, however, and instead employ a similarly broad-brush approach rather than a piece-by-piece review. Undertaking this review, we discern no error in the district court's decision to admit these categories of evidence.

The challenged evidence was not clearly irrelevant nor was it unfairly prejudicial. First, it met the "relatively low" threshold for establishing relevancy in that it had "'*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Powers*, 59 F.3d 1460, 1465 (4th Cir. 1995) (quoting Fed. R. Evid. 401 (emphasis added)). In the specific context of social media posts and music lyrics, we have previously recognized that such evidence "can be relevant if [it] match[es] details of the alleged crime" or "show[s] a defendant's knowledge or motive." *United States v. Recio*, 884 F.3d 230, 235 (4th Cir. 2018). Some of the evidence was relevant to the charged conspiracies because

it helped the Government to establish identity and relationships given that the Defendants and co-conspirators are depicted together. Still more of this evidence lent additional support for components of the charged conspiracies. For example, they feature the Defendants surrounded by firearms or cash; making MMP hand signals or wearing MMP clothing; and flaunting a violent, drug-fueled lifestyle with specific lyrics and images connecting these acts specifically to MMP's turf. In short, we find no reversible error occurred under Rule 401's standards.

Nor have the Defendants shown plain error under Rule 403's grounds for admissibility. Under this rule, district courts have broad discretion to "exclude relevant evidence if its probative value is substantially outweighed by a danger of," *inter alia*, "unfair prejudice." Fed. R. Evid. 403. But this rule "generally favor[s] admissibility." *United States v. Wells*, 163 F.3d 889, 896 (4th Cir. 1998). Yet again, we are guided by our prior recognition that while there are times that "in some cases courts have excluded lyrics, finding they primarily served to paint the defendant in an unflattering light," "[t]his is not such a case." *Recio*, 884 F.3d at 236. The Defendants were charged for their conduct arising from a multi-year RICO and drug conspiracy involving the MMP, and evidence of the music videos, lyrics, and social media posts went to that point without being unfairly prejudicial as to matters beyond making that connection. Further, given the extensive evidence demonstrating each of the Defendants' own connection to specific acts within the conspiracies and other offenses, the admission of the challenged evidence—which went more broadly to big-picture matters in the case—was harmless. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be

disregarded."); Fed. R. Evid. 103(a) (stating that evidentiary errors require reversal only if they "affect[] a substantial right").

In short, the admission of this evidence does not constitute reversible error.

b. Firearms-Match Evidence (Bailey)

Before James Wagster, an expert in firearms identification, testified on behalf of the Government, Bailey moved to exclude or limit his testimony on the ground that it was impossible to say with one-hundred-percent certainty that firearms and ballistics evidence "matched" each other. The district court ruled that Wagster could offer his opinion that something was a match, stating: "I'm not going to prevent him from saying that, in his opinion, it came from the same gun or that it is a match within a reasonable degree of certainty in the field of ballistics." J.A. 3858. The court also indicated that it would give a limiting instruction that "the fact that someone is allowed to testify as an expert does not mean that the jury has to accept that opinion." J.A. 3863.

At the outset of Wagster's testimony, the district court gave that limiting instruction. Wagster then testified about how he conducted comparisons of firearms and ammunitions components, the industry standards he uses in conducting his comparisons, and how his office runs cross-checks on their conclusions. Wagster then testified about ballistics evidence recovered from the scenes of two crimes allegedly involving Bailey: (1) a shooting on February 8, 2015, at a BP gas station, and (2) the murder of James Edwards on February 12, 2015. Wagster described the six casings and one live round recovered from the BP gas station shooting as all having been fired from "the same unknown firearm," a .40 caliber Smith & Wesson. J.A. 3883–88. He described casings and live rounds recovered

from the scene of Edwards' murder, stating that they too were fired from a .40 caliber Smith & Wesson and had all come from "the same firearm, same unknown firearm." J.A. 3888–90. Lastly, he testified that the casings and live rounds recovered at the BP gas station and the scene of Edwards' murder were all fired from "the same unknown firearm." J.A. 3890–92. On direct and cross-examination, Wagster reiterated the bases for making his comparisons and his conclusion about them. J.A. 3892–900. Bailey did not object to Wagster's testimony about his comparison conclusion at the time it was given.

On appeal, Bailey argues that the district court committed reversible error by allowing Wagster to testify in contradiction to the pre-trial ruling limiting the degree of certainty to which he could opine that the ballistics evidence matched. Bailey asserts that Wagster's testimony that the evidence was the "same" or a "match" expressed an impermissible level of certainty and was prejudicial because it served as the linchpin of the Government's case connecting Bailey to Edwards' murder. As such, he requests that this Court reverse his conviction for murder in aid of racketeering.

We discern no plain error in the admission of this evidence. At the outset, on appeal, Bailey does not challenge the district court's initial ruling on his motion in limine but instead argues that the court erred in allowing Wagster to testify outside the scope of that ruling at trial. It was Bailey's responsibility to object if he believed that this had occurred, yet he did not do so. Accordingly, we review his objection for plain error. *See United States v. Williams*, 81 F.3d 1321, 1325 (4th Cir. 1996) (stating that the Court reviews for plain error when the "motion in limine was not based upon [and did not seek] a ruling on the *precise* issue [the defendant] now seeks to raise" (emphasis added) (cleaned up)).

Bailey's argument is predicated on a misapprehension of the district court's initial ruling and Wagster's actual testimony. The district court ruled that Wagster *could* testify that, in his opinion, the firearms evidence recovered from the scene of the BP gas station and Edwards' murder "matched." It could not have been clearer in rejecting Bailey's contention that such testimony veered into presenting opinion testimony as certitude, stating: "I think that saying that something is the same or a match, in his opinion, is not the same as saying, 'And I'm a hundred precent convinced that my opinion is correct.'" J.A. 3858. The Court then elaborated that it was "not going to prevent [Wagster] from saying that, in his opinion, it came from the same gun or that it is a match within a reasonable degree of certainty in the field of ballistics." J.A. 3858. Wagster's testimony fell within those parameters, providing his *opinion* that the crime-scene firearms/ballistic evidence from the BP gas station and Edwards' murder stemmed from the same firearm. The Government's questions on this point were framed in a broad manner so as to solicit Wagster's opinion without seeking the degree of certainty he had that his opinion was correct—*e.g.*, "what conclusions were you able to draw . . . ?," J.A. 3891, and "does that mean that you concluded . . . ?," J.A. 3893.

Not only did Wagster's testimony *not* express a degree of certitude in his opinion, but the district court's limiting instruction reinforced that point to the jurors, reminding them that although Wagster was permitted to offer opinion testimony on the firearms evidence, they were still charged with the duty to determine what weight to give it:

> I will remind the jury, as I think I said at the very outset of the case, the fact that a witness is found qualified to give you opinion testimony, it's still up to you whether to accept that testimony. It's up to you to listen; to consider the

> reasons, the training and experience; and then you give an expert's opinion the weight, if any, that you believe it should have, just as you do with any other witness.

J.A. 3877. We generally presume the jurors follow such limiting instructions. *Samia v. United States*, 599 U.S. 635, 646 (2023) ("[O]ur legal system presumes that jurors will attend closely the particular language of such instructions in a criminal case and strive to understand, make sense of, and follow them." (cleaned up)); *United States v. Johnson*, 54 F.3d 1150, 1160–61 (4th Cir. 1995). No juror following this instruction would mistake Wagster's opinion testimony for certitude. Thus, considering both the substance and context of Wagster's testimony against the district court's pre-trial ruling, we reject Bailey's argument that reversible error occurred.

c. Felon-Status Evidence (Anderson and Davis)

The final issue arising from the admission of evidence stems from the reversals of Anderson's and Davis' felon-in-possession convictions. As noted, after the trial and in light of *Rehaif*, the Government moved to dismiss Anderson's § 922(g) conviction. And, we have now held that Davis' § 922(g) convictions must also be reversed in light of *Rehaif*. Because the § 922(g) charges were at issue during the trial, the Government was permitted to introduce evidence of Anderson's and Davis' prior felony convictions. That evidence likely would not have been admissible without the § 922(g) charges. Anderson and Davis contend that the admission of that evidence had a prejudicial spillover effect that requires reversal of their remaining convictions.

To prevail on an assertion of prejudicial spillover effect, defendants must show two things: (1) "that the challenged evidence would have been inadmissible at trial without the

vacated count," and (2) that the challenged evidence "prejudiced his convictions on the remaining counts." *United States v. Hart*, 91 F.4th 732, 741 (4th Cir. 2024).

Anderson and Davis cannot show prejudice for at least three reasons. First, the evidence of a prior, *non-violent* felony conviction was introduced in a Sergeant Joe Friday "just the facts" manner—briefly and without any description of the underlying offense conduct. So, the jury could glean very little from the evidence before it that might tempt them to infer culpability for the charged offenses just as a consequence of any prior convictions. Second, the evidence showing Anderson's and Davis' culpability for the remaining convictions was extensive, amply supporting the jury's guilty verdicts beyond a reasonable doubt. Third, a jury instruction mitigated the risk of prejudicial spillover. Specifically, this Court has previously recognized that "concerns of prejudicial spillover [can be] mitigated by the district court's explicit instruction that the jury must consider each count separately." *United States v. Barringer*, 25 F.4th 239, 249 (4th Cir. 2022) (cleaned up). The district court gave that instruction here, and, absent evidence to the contrary, we can presume that the jury followed it. For these reasons, we conclude that Anderson and Davis have not shown any prejudicial spillover arising from the admission of their prior convictions.

5. Banks' Verdict Form

Banks raises two arguments in support of his contention that his drug conspiracy conviction should be reversed because of a perceived flaw in the verdict form.

The charged conspiracy under 21 U.S.C. § 846 was an agreement to violate the terms of 21 U.S.C. § 841(b)(1)(C), which prohibits the distribution of certain controlled

substances, subject to a "term of imprisonment of not more than 20 years." That baseline offense is subject to two aggravated variations of the offense, which trigger different statutory punishments. Offenses involving "28 grams or more" of cocaine base are subject to a term of five years to forty years' imprisonment. § 841(b)(1)(B)(iii). And offenses involving "280 grams or more" of the same are subject to a term of imprisonment of ten years to life. § 841(b)(1)(A)(iii).

If the jury found Banks guilty of the drug conspiracy offense (as it did), then the jury was asked to "determine unanimously the quantity of cocaine base ('crack') reasonably foreseeable to him." J.A. 6356. The verdict form provided two options with a line for the jury to place a "check" next to its finding. One option was for an amount of "280 grams or more" and the other was for "[l]ess than 280 grams." J.A. 6356. The jury checked "[l]ess than 280 grams." J.A. 6356. Consistent with that verdict, the district court sentenced Banks to less than twenty years' imprisonment.

Banks first contends that the verdict form is erroneous, requiring reversal of his drug conspiracy conviction. As support, he argues that the statute divides the offense based on three drug weights—"less than 28 grams," "28 grams or more," and "280 grams or more" of cocaine base—and the verdict form impermissibly diverges from this language to create a new offense based on the drug weight of "[l]ess than 280 grams." Banks asserts that the verdict form's departure led to a conviction for a "judicially created, and, thus, constitutionally invalid offense," which must be vacated. Opening Br. 79.

Contrary to Banks' argument, this is not a case where the verdict form permitted the jury to convict a defendant of an offense that does not exist. To the contrary, §§ 841 and

846 permit a conviction based on evidence that the defendant entered into the charged conspiracy to distribute a controlled substance regardless of the specific type of narcotic or drug weight attributable to Banks personally. *See United States v. Collins*, 415 F.3d 304, 314 (4th Cir. 2005) ("Guilt of the substantive offense defined in § 841(a) is not dependent upon a determination of the amount or type of narcotics distributed."). Here, the operative indictment alleged a drug conspiracy to distribute, *inter alia*, 280 grams or more of cocaine base. The jury found Banks guilty of participating in that conspiracy. That's sufficient to sustain his conviction.

The verdict form's two choices for the jury's finding as to how much cocaine base to attribute to Banks was relevant solely for purposes of establishing what statutory penalties would apply to him as a result of that conviction. The baseline § 841 offense for distributing *any* amount of cocaine base—including amounts less than 28 grams—carries a penalty of zero to twenty years' imprisonment, and that's the range within which Banks was sentenced. Certainly, there are also two aggravated forms of the offense that subject a defendant to a higher statutory range based upon a jury's finding that the offense involved 28 grams or more or 280 grams or more. And under Supreme Court case law, findings that increase the *statutory* penalty to which a defendant is exposed must be submitted to the trier of fact and found beyond a reasonable doubt. *See United States v. Promise*, 255 F.3d 150, 154–57 (4th Cir. 2001) (en banc). But neither of those findings are *required* for the jury to find a violation of §§ 841 and 846 in the first instance. Rather, those findings as to drug weight were required strictly to determine whether the statutory penalty would be adjusted beyond the baseline statutory penalty. *See Collins*, 415 F.3d at 314–15; *see also*

United States v. Brooks, 524 F.3d 549, 558 (4th Cir. 2008) ("[A] jury . . . must determine the threshold drug quantity used to establish a defendant's statutory sentencing range under § 841(b).").

Here, the verdict form limited the statutory penalty to two options, one consistent with sentencing under the baseline penalty ("less than 280 grams," which would subject Banks to zero to twenty years' imprisonment) and one consistent with one of the enhanced penalty ranges ("280 grams or more," which would subject him to punishment between ten years' and life imprisonment). Far from a judicially crafted offense, this reflects a valid way to articulate the § 841 offense and a potentially applicable punishment variation had the jury made the requisite finding to support it. The jury did not find an amount of 280 grams or more attributable to Banks, so the district court's sentence needed to be—and was—within § 841's baseline statutory penalty for possession of *any* amount of cocaine base: zero to twenty years' imprisonment.

Next, Banks contends that the verdict form was flawed because the jury should have been permitted to hold him responsible for the lesser-included offense of participating in a conspiracy involving less than 28 grams of cocaine base. He contends that had the jury been instructed properly, it is likely that it would have found him responsible for that lesser quantity because the record evidence did not support a finding of 28 grams or more, just as it did not support a finding of 280 grams or more. This omission matters, he asserts, because the district court would have had to attribute less than 28 grams of cocaine to him for purposes of calculating his Guidelines offense level, which in turn may have resulted in a lower sentence.

We reject this argument based on the principles already discussed. Had the verdict form provided the jury with the option of finding "less than 28 grams" attributable to him, that would not have altered in any way the statutory penalty to which he was subject. And Banks' argument that this lesser option might have affected the Guidelines calculation is irrelevant. As we have repeatedly recognized, "[o]nce this maximum [statutory] penalty is established, a fact (sentencing factor) that may increase the actual sentence imposed *within* that maximum is not subject to" being found beyond a reasonable doubt by a jury. *Promise*, 255 F.3d at 156 n.5. Instead, at sentencing, the district "court is entitled to find individualized drug quantities by a preponderance of the evidence, as part of its calculation of an advisory Guidelines range, so long as its resulting sentence is within the relevant statutory range." *Brooks*, 524 F.3d at 562. That's exactly what the district court did here—it sentenced Banks consistent with the statutory penalty that would apply for a violation of § 841 involving *any* amount of cocaine base, and then, when calculating the advisory Guidelines range, it made findings about an individualized drug quantity to attribute to Banks using a preponderance-of-the-evidence standard. At bottom, the district court was not required to submit permutations involving the *Sentencing Guidelines*' assessment of drug weight to the jury because that is a separate function that occurs *after* the trier of fact establishes the defendant's *statutory* sentencing exposure.

Because the purported error Banks complains of would not alter the validity of his conviction, he has not shown error requiring reversal of his drug conspiracy conviction.

* * * *

To recap the issues related to the Defendants' convictions, we hold that Davis has shown reversible *Rehaif* error as to his § 922(g)(1) convictions but that the Defendants' remaining arguments challenging their convictions lack merit.[8] Next, we turn to the Defendants' challenges to their sentences.

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[8] We have also considered the Defendants' other trial-oriented objections and conclude that they can each be rejected without lengthy discourse.

First, Davis and Anderson both challenge the sufficiency of the evidence to prove their participation in the two charged conspiracies. Our review of the record confirms ample evidence for the jury to find each element of the charged conspiracy was satisfied. Critically, the Government was not required to show that either defendant "knew the particulars of the conspirac[ies]" so long as the record shows that each defendant "joined with an understanding of the unlawful nature thereof and willfully joined in the plan on one occasion even if he played only a minor part" or was involved in only one aspect of it. *United States v. Tillmon*, 954 F.3d 628, 640 (4th Cir. 2019). Nor must the record "exclude every reasonable hypothesis of innocence" to provide sufficient evidence of guilt, "provided the summation of the evidence permits a conclusion of guilt beyond a reasonable doubt." *Id.* (cleaned up). On this standard, in light of the extensive evidence put forward at trial, we hold that the evidence was sufficient to support the jury's verdicts.

Next, Banks, Anderson, and Davis assert that the district court abused its discretion in refusing to give a multiple conspiracies instruction. But that instruction "is not required unless the proof at trial demonstrates that [they] were involved *only* in separate conspiracies *unrelated* to the overall conspiracy charged in the indictment." *United States v. Squillacote*, 221 F.3d 542, 574 (4th Cir. 2000) (cleaned up). And the failure to give a multiple conspiracies instruction constitutes reversible error only upon showing that "the evidence of multiple conspiracies [was] *so* strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count[s] had it been given a cautionary multiple-conspiracy instruction." *United States v. Bartko*, 728 F.3d 327, 344 (4th Cir. 2013) (cleaned up). On this high standard and the evidence put forward at trial, we find no reversible error as to this issue.

Lastly, Anderson claims that his convictions should be reversed because the Government's arguments at closing contradicted the terms of a pre-trial stipulation. We have considered the underlying facts, including the terms of the stipulation and the Government's argument at closing, and conclude that Anderson's argument is predicated on an interpretation of the stipulation that goes beyond its actual language. Moreover, once Anderson objected at trial, he agreed to resolving his concern through clarifying statements (Continued)

B. Sentencing Challenges

The Defendants raise several issues challenging the procedural or substantive reasonableness of their sentences, which we review under a highly deferential standard of review. *United States v. Provance*, 944 F.3d 213, 217 (4th Cir. 2019); *see Gall v. United States*, 552 U.S. 38, 46 (2007) (instructing that appellate review of a sentence "is limited to determining whether they are 'reasonable'"). The Court's first duty is to "ensure that the district court committed no significant procedural error," *Gall*, 552 U.S. at 51, such as by "failing to properly calculate the applicable Sentencing Guidelines range, failing to consider the 18 U.S.C. § 3553(a) factors, and failing to adequately explain the sentence—'including an explanation for any deviation from the Guidelines range,'" *Provance*, 944 F.3d at 218 (quoting *Gall*, 552 U.S. at 51). Only upon assuring ourselves that the sentence is procedurally reasonable do we turn to the question of substantive reasonableness, which requires "taking into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* at 219 (cleaned up).

1. Davis

Davis challenges the substantive reasonableness of his sentence, arguing that it was predicated on a criminal history assessment that was too high. He notes that his three past offenses consisted of "a juvenile adjudication and two minor convictions, none of which resulted in a sentence of imprisonment," making a criminal history category of III unreasonable. Opening Br. 91. He asserts the district court should have recognized that

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to the jury, which were given. We therefore find no basis for reversing his convictions as a result of these circumstances.

the resulting Guidelines range over-represented his criminal history, making a sentence within that range substantively unreasonable.

We have reviewed the record and disagree with Davis. On appeal, we afford Davis' within-Guidelines sentence a presumption of substantive reasonableness. *See United States v. Yooho Weon*, 722 F.3d 583, 590 (4th Cir. 2013). Davis has not come forward with anything that rebuts that presumption. To the contrary, our review of the record and sentencing transcript confirms that the district court's chosen sentence was reasonable and adequately explained.[9]

2. Anderson

Anderson challenges the procedural and substantive reasonableness of his sentence, arguing (1) the district court clearly erred in imposing U.S.S.G. § 2D1.1(b)(1)'s firearm offense-level enhancement because no evidence connected Anderson's possession of a firearm to his role in the drug conspiracy, and (2) the district court did not adequately

[9] In his reply brief, Davis adds a second argument to support his contention that his sentence is substantively unreasonable based on over-representation of his criminal history. Citing newly enacted and retroactively applicable amendments to the Guidelines (Amendment 821), he observes that the version of § 4A1.1(d) (2018) that had been used to assess one criminal history point apiece for two of his prior state convictions was repealed. Davis contends that the replacement language, which is retroactively applicable and found in § 4A1.1(e) (2024), is narrower and would not apply to him, resulting in two fewer criminal history points and a lower criminal history category. This change, he contends, further supports his position that his sentence should be vacated and remanded for resentencing based on his Guidelines range's over-representing his criminal history.

We decline Davis' invitation to address this Guidelines change now, but note that nothing prohibits him from arguing for relief based on Amendment 821 in a motion for a sentence reduction under 18 U.S.C. § 3582(c)(2).

explain the basis for imposing an upward variant sentence. Neither of these arguments has merit.

The court did not clearly err in calculating Anderson's offense level to include § 2D1.1(b)(1)'s firearm enhancement. That enhancement applies when a defendant possesses a "dangerous weapon (including a firearm)" during the course of the drug trafficking offense, "unless it is clearly improbable that the weapon was connected with the offense." § 2D1.1(b)(1) & cmt. n.11(A). The district court reasonably held that the enhancement applied here given the extensive trial evidence that Anderson "suppl[ied] large quantities of heroin in other areas, traveling around, perhaps, to do that. . . . [And it] makes a great deal of sense that [the loaded, stolen handgun found in his possession] was for the purpose of . . . protecting himself and drugs in the course of the conspiracy." J.A. 6774–75.

We also reject Anderson's contention that the district court failed to adequately explain the basis for an upward-variant sentence. In imposing Anderson's sentence, the district court recapped his offense conduct, highlighting particular § 3553(a) factors and individual characteristics that drove its sentencing decision. It was not required to do more. The court's explanation for the sentence it selected shows "a rationale tailored to the particular case at hand and adequate to permit meaningful appellate review," "lea[ving] no doubt regarding the court's reasons for selecting the particular sentence." *United States v. Allmendinger*, 706 F.3d 330, 343 (4th Cir. 2013); *United States v. King*, 673 F.3d 274, 283 (4th Cir. 2012) (tethering the adequacy of the district court's sentencing explanation, including any deviation from the Guidelines range, to providing an "individualized

assessment" that "need not be elaborate or lengthy" so long as the court gives "serious consideration" to its decision (citations omitted)).

3. Lockley

Lockley argues that his sentence is procedurally and substantively unreasonable because (1) it relied in part on his participation in a murder that the jury had specifically rejected finding him responsible for, and (2) it selected a sentence unreasonably aimed to avoid a sentencing disparity between co-defendants when they were far more culpable than he was. Having reviewed the record, we discern no error.

Under the preponderance-of-the-evidence standard applicable at sentencing, the district court found that Lockley was aware of other conspirators' violent acts, including having witnessed a murder, even though the jury determined that the evidence did not show beyond a reasonable doubt that murder was reasonably foreseeable to him in furtherance of the racketeering conspiracy. As we have previously recognized in a different, but comparable, context, "an acquittal does not necessarily establish the criminal defendant's lack of criminal culpability, and a jury cannot be said to have necessarily rejected any facts when it returns a general verdict of not guilty. Instead, the different standards of proof that govern at trial and sentencing enable the sentencing court to find a fact by a preponderance of the evidence that the jury may not have found beyond a reasonable doubt." *United States v. Jinwright*, 683 F.3d 471, 484 (4th Cir. 2012) (cleaned

up).[10] The district court thus did not err in considering Lockley's role in the murder despite the jury's finding.

We also reject Lockley's argument that his sentence is substantively unreasonable. In so arguing, he seriously understates the record evidence as to his role in the offense conduct. The district court ably supported the basis for the sentence it imposed, setting out in detail the offense conduct and other § 3353(a) factors that led to its decision. Moreover, the district court—which was intimately familiar with the specific nuances in each of the co-defendants' conduct—acted within its "sizeable discretion" to assess the Defendants' relative culpability in considering the statutory instruction to impose sentences that avoid unwarranted sentencing disparities. *United States v. Abu Ali*, 528 F.3d 210, 266 (4th Cir. 2008); *see* 18 U.S.C. § 3553(a)(6) (stating that one of the factors to consider in sentencing is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *United States v. Engle*, 592 F.3d 495, 500 (4th Cir. 2010) ("Given the institutional advantages of district courts with regard to sentencing matters, all sentences, including sentences significantly outside the

[10] We note that on April 17, 2024, the United States Sentencing Commission announced amendments to the Guidelines that will "prohibit" acquitted conduct from being used in calculating the Guidelines range. U.S. Sentencing Comm'n News Release, *Commission Votes Unanimously to Pass Package of Reforms Including Limit on Use of Acquitted Conduct in Sentencing Guidelines* (April 17, 2024), https://www.ussc.gov/about/news/press-releases/april-17-2024 (last visited June 5, 2024) [https://perma.cc/3MTH-XRGC]. Assuming Congress does not alter them, those amendments do not go into effect until November 1, 2024. *Id.* For that reason, those amendments have no bearing on our review.

Guidelines range, must be reviewed under a deferential abuse-of-discretion standard." (cleaned up)).

4. Banks

Banks contends that his sentence is procedurally unreasonable because the district court held him responsible for at least 196 grams of cocaine base, which he contends was too much and thus made his offense level too high. He argues that the district court's drug-weight calculation was inconsistent with the jury's verdict because the jury's rejection of a drug weight of "280 grams or more" necessarily means that it did not believe him to be responsible for some of the drug quantity that the district court later relied on at sentencing. He also contends that the district court improperly speculated about the drug weight for which to hold him responsible by engaging in random extrapolations rather than focusing on precise testimony to support the amounts.

We review for clear error the district court's calculation of drug weight for purposes of establishing a defendant's Sentencing Guidelines offense level. *United States v. Randall*, 171 F.3d 195, 210 (4th Cir. 1999). The Guidelines notes instruct that when no known amount of drugs can be relied on to establish a defendant's attributable drug weight, the district court must "approximate the quantity of the controlled substance" at issue. U.S.S.G. § 2D1.1 cmt. n.5. In undertaking that task, district courts "enjoy considerable leeway" and "may give weight to any relevant information before it, including uncorroborated hearsay, provided that the information has sufficient indicia of reliability to support its accuracy." *United States v. Williamson*, 953 F.3d 264, 273 (4th Cir. 2020) (cleaned up); *see also United States v. Kiulin*, 360 F.3d 456, 461 (4th Cir. 2004)

(observing that "a district court need not 'err[]' on the side of caution or otherwise; it must only determine that it was more likely than not that the defendant was responsible for *at least* the drug quantity attributed to him"). Further, "sentencing courts may consider acquitted conduct in establishing drug amounts for the purpose of sentencing, so long as the amounts are established by a preponderance of the evidence." *Perry*, 560 F.3d at 258. That said, courts must "exercise caution in estimating drug quantity at sentencing, and [must] not attribute speculative or scantily supported amounts to defendants." *Williamson*, 953 F.3d at 273.

Wherever the line between a proper estimate and speculation lies, it is far removed from what the district court did here. As the district court recounted, holding Banks responsible for 196 grams was a conservative estimate based on the evidence before it. Banks had participated in a multi-year conspiracy where he supervised others also engaged in the distribution of cocaine base. The district court reasonably extrapolated an approximate amount of cocaine base attributable to Banks based on his role in the narcotics conspiracy. It did not clearly err in that calculation, nor is any plain error otherwise evident from the record.[11]

[11] This argument fails for another reason too. Even if Banks were correct that the district court miscalculated the drug weight, any error at sentencing would have been harmless. At sentencing, the district court repeatedly stated that the Guidelines were just one factor in determining Banks' sentence, and it also expressly stated that "regardless of any error that I may have made in calculating the guidelines," "[t]he sentence that I have announced is the sentence that I believe is reasonable" based on the totality of the § 3553(a) analysis. J.A. 6438. So even assuming error occurred, we can be confident that the sentence would not have changed as a result of the drug-weight calculation and his sentence is otherwise reasonable.

III.

For the reasons set out above, we reverse Davis' § 922(g) convictions (Counts 16 and 30) for *Rehaif* error that is cognizable on plain-error review. We vacate and remand his criminal judgment solely for the district court to enter an amended judgment and sentence consistent with this decision without the need for plenary resentencing. As to the Defendants' other arguments, we reject them and thus affirm their convictions and sentences.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	Criminal Action No. CCB-16-267
v.	*	
	*	
DANTE BAILEY, *et al.*	*	
	*	
	*	
	*****	

AMENDED MEMORANDUM

The defendants in this case were convicted of a variety of racketeering conspiracy, conspiracy to distribute controlled substances, firearm possession, and murder charges. Now pending are a motion to reopen the suppression hearing and for a new trial for defendant Sydni Frazier (ECF 1502) and a motion for a new trial for remaining defendants Dante Bailey, Randy Banks, Jamal Lockley, Corloyd Anderson, and Shakeen Davis (ECF 1505). The defendants also submitted a supplemental memorandum (ECF 1514) in support of their motion, offering additional evidence. The government opposed these motions in one consolidated response (ECF 1554), and the defendants replied in support of their original motions (ECF 1609; ECF 1622). Other supplemental memoranda have been filed and are considered in this opinion.[1]

The defendants argue that a police officer involved in the investigation failed in 2016 and 2017 to disclose his past misconduct (not directly related to their case) in search warrant affidavits that produced evidence used against them; they argue that this evidence is tainted and that they should all get new trials. A supplemental memorandum (ECF 1691) identifies two 2009 cases in which, they say, the officer lied. The government responds that the misconduct in question is mere impeachment evidence that does not contradict the substantive facts used to

[1] The court also has considered the various motions to seal, which are not opposed. Finding that sealing is justified based on the well-documented risk public identification poses to cooperating witnesses in criminal cases, particularly those involving violence such as this one, the motions will be granted.

support probable cause for those searches; regardless, he did not testify at trial, and evidence tied to him was amply corroborated.

The issues have been briefed, and no oral argument is necessary. Local Rule 105.6 (D. Md. 2021). For the reasons stated herein, the court will deny the defendants' motions.

BACKGROUND

Detective Ivo Louvado was a corrupt Baltimore City police officer who, while executing a search in February 2009 with a squad including certain other corrupt BPD officers, stole and resold three kilograms of cocaine — a fact that did not surface with direct evidence until April 2019. In 2010, he was detailed to a task force with the Bureau of Alcohol, Tobacco, and Firearms (ATF). While on the ATF task force, he participated in an investigation of the defendants' criminal enterprise. The relevant details of that investigation, the defendants' prosecution, and the investigation into Louvado follow.

Investigation

The MMP investigation: Homeland Security (2015) and ATF (2016–17)

In March 2016, the ATF became involved in an investigation of a Bloods gang subset known as the Murdaland Mafia Piru (MMP). But key evidence used in the eventual MMP prosecutions was generated even before the ATF's involvement.

The investigation of MMP was years in the making, and it was conducted by over a hundred federal, state, and local law enforcement officers even before Louvado's and the ATF's involvement. Before ATF's involvement, law enforcement officers from Homeland Security Investigations and Baltimore County and City police investigated MMP. Officers conducted traffic stops and searches from February through May of 2015, the evidence from which was used to obtain authorization in June and July 2015 for wiretaps of the gang's heroin supplier —

ultimately, there were eight wiretaps. Based on these intercepted communications (in which the heroin supplier discussed drug trafficking, guns, and violence with MMP members including defendants Bailey and Lockley), investigators conducted more traffic stops and searches, seizing drugs and other evidence in the summer of 2015. This investigation wound down that summer and included Bailey's July 2015 arrest.

Outside of the 2015 HSI/BCPD/BPD investigation, routine police work also yielded evidence supporting the MMP prosecutions, much of it predating Louvado's and the ATF's involvement. Service calls, traffic stops, and seizures in 2012, 2014, 2015, and 2016 led to the recovery of drugs, guns, and cash from the defendants.

After the ATF's involvement, which began in March 2016, investigators conducted four wiretaps in July and August 2016. They used confidential informants to engage in recorded controlled narcotics purchases, going on to search Bailey's home in May 2016 and his iCloud account in August 2016 as well as 36 seized phones and electronic devices and social media accounts in January 2017. A February 2017 arrest of Davis yielded drugs, a gun, $1,373 in cash, and four cell phones. Intercepted jail communications in September 2017 revealed that Bailey had ordered a hit on a cooperating witness, and a search of the assigned hitman's home yielded guns, a bulletproof vest, cell phones, and the hit letter itself. Jail calls throughout this period implicated the defendants in a wide variety of criminal activity, and forty-five such calls were introduced at trial. The evidence at trial was overwhelming.

Louvado's participation in the ATF investigation

Louvado was part of the MMP investigation after the ATF joined. There were two instances in the 18-month investigation where Louvado acted outside the presence of other officers in a moment or manner germane to the MMP case.

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- First, he participated in a July 2016 controlled narcotics purchase in which he was unaccompanied while he checked the confidential informant beforehand to make sure the informant did not have any contraband. The actual transaction, however, was audio- and video-recorded, and other officers were involved in the buy itself and the recovery of the evidence. Evidence of this controlled buy was not introduced at trial, nor was information about it included in any search warrant.
- Second, in August 2016, Louvado surveilled Lockley as Lockley exited his home, got into a car, and drove away. Louvado captured video corroborating his observations.

Other than these two instances, there are no records of Louvado being alone with evidence or in a position to fabricate information used later in the investigation.

The focus of the defendants' motions is Louvado's role in certain wiretaps and search warrants between June 2016 and March 2017:

- Louvado was the sole affiant for wiretaps of Dwight Jenkins (TT1) and Jacob Bowling (TT2), approved in June 2016. (ECF 1505-4, TT1/TT2 Wiretap Application). The probable cause was based on a series of four audio- and video-recorded controlled buys and text messages with informants in May and June 2016. Louvado wrote the report for one of the controlled buys but was accompanied at all times by other officers; he did not participate at all in the others.
- That same affidavit was incorporated by reference into an ATF lead investigator's July 2016 application for a wiretap of Lockley (TT3). (ECF 1505-5, TT3 Wiretap Application). The application discussed two calls from the TT1 wiretap, but the TT3 probable cause was mainly based on a March 2016 controlled buy that Louvado was not involved in. (*Id.* at 39–43). TT1 and TT2 information and the Louvado affidavit was similarly incorporated by reference into an ATF investigator's August 2016 application for a wiretap of Anderson (TT4). (ECF 779-5, TT4 Wiretap Application ¶ 51).
- Louvado applied in September 2016 for a warrant to search several residences and vehicles, including Lockley's home, Anderson's home and business, and Davis's home. (ECF 1505-7, Takedown Warrant). The probable cause was based on wiretap calls, a recorded controlled buy (during which Louvado was accompanied at all times), and a confidential informant.
- Louvado applied in February 2017 for a warrant to search Frazier's cell phones; the probable cause was based on ballistic and DNA evidence from a homicide investigation Louvado was not part of and testimony about Frazier's arrest, given by someone other than Louvado. (ECF 1505-8 ¶¶ 13, 18–19, Frazier 1/25/17 Cell Phone Warrant). So, too, for a February 2017 warrant application to search Frazier's Instagram account, the probable cause for which was based on public Instagram posts, the aforementioned homicide investigation, and a recorded jail call. (ECF 1505-9, Frazier @Getmneyboy Instagram Warrant).

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- Louvado applied in March 2017 for a warrant to search Davis's cell phones; the probable cause was based on the circumstances of Davis's arrest, which Louvado was not involved in. (ECF 1505-10, Davis 2/24/17 Cell Phone Warrant).
- Louvado applied in March 2017 for a warrant to search Davis's Instagram, based on Davis's arrest and public Instagram posts. (ECF 1554-1, Davis @fh_dinero Instagram Warrant).

The defendants do not allege any specific false statements of substantive fact. Instead, they take issue with Louvado's statements of his own veracity, since he did not disclose his February 2009 drug thefts in these 2016 and 2017 affidavits and applications. For example, in affidavits supporting search warrant applications for Frazier's cell phones and Instagram account and Shakeen Davis's cell phones, Louvado declared that he had not "excluded any information known to [him] that would defeat a determination of probable cause." (ECF 1505-8, Frazier 1/25/17 Cell Phone Warrant 5 ¶ 11). The defendants argue that Louvado's omission of his 2009 theft and resale of cocaine constitutes an omission that would have defeated probable cause.

The MMP prosecutions

These investigatory efforts led to September 2016 and June 2017 federal grand jury indictments of the defendants for racketeering conspiracy, a variety of drug and gun offenses, and murder in aid of racketeering. (ECF 46, Indictment Sep. 22, 2016; ECF 515, Indictment June 1, 2017).

Frazier moved in August 2017 to suppress evidence from the searches of his cell phone and Instagram account. (ECFs 590–94). There was no evidentiary hearing, and the motions were denied in August 2018. (ECF 875). Anderson and Lockley moved to suppress evidence from the searches of their homes and evidence from the ATF wiretaps. (ECF 399, 398, 492, 493). Notably, Davis did not move to suppress evidence from the searches of his cell phones or

Instagram account. (*See* ECFs 385–91, 689–90, 694, 746). None of the defendants requested *Franks* hearings to challenge Louvado's sworn statements.

There were two hearings on pretrial motions, the first in June 2018 (ECF 800) and the second in August 2018 (ECF 873). Louvado testified at the first hearing, exclusively addressing a custodial statement made by defendant Dent during a transport ride. He did not testify at the second hearing.

The defendants went to trial in March 2019 and all were convicted in April 2019 (ECFs 1149–77, 1180), except for Frazier; due to a medical emergency his counsel experienced mid-trial, Frazier's case was severed via mistrial, and he was convicted in March 2020 after a retrial. (ECF 1453).

The investigation of Louvado

Unbeknownst to the MMP defendants, at the same time as their case was progressing, the United States Attorney's Office was investigating corruption within BPD's Gun Trace Task Force, since then the subject of significant media coverage. Members of the GTTF were indicted for racketeering and racketeering conspiracy in February 2017, five months after the MMP indictment.

Louvado, however, was not a member of the GTTF, and his name had not come up in the GTTF investigation until July 2017, when a GTTF member admitted in a proffer that he and another officer had stolen money while executing a February 2009 search; he suspected that a third officer had also stolen that night. (ECF 1554-6, 7/17/17 Jenkins Proffer). That GTTF member did not name Louvado in the same way as he named himself and two others as potential thieves; he noted only that shortly after that, Louvado had bought a boat. (*Id.* at 3, 5). He did not offer direct evidence that Louvado had participated in the misconduct, but rather seemed to have

inferred from Louvado's presence at the February 2009 search and from his purchase of a boat that Louvado had participated. (*Id.* at 5). In August 2017, USAO supervisors and GTTF prosecutors met with the MMP trial AUSAs to summarize the developments, and they explained that the GTTF officer had not seen Louvado steal money, had never talked to Louvado about it, and did not know whether Louvado had participated. (ECF 1554 at 41). Subpoenas of Louvado's financial records did not show large cash deposits shortly after the February 2009 search. (*Id.* at 43–44).

Months later, in March 2018, a former bail bondsman close to a GTTF officer told investigators that Louvado had "got proceeds" from the February 2009 search, but that bail bondsman was not present at the search (ECF 1554-8, Stepp Proffer), so his knowledge was second-hand. When GTTF investigators interviewed Louvado first in May 2018 (ECF 1554-10, Louvado Interview) and again in February 2019 (ECF 1554-12, Louvado Interview), he denied any knowledge of criminal activity.

Federal GTTF investigators did not have direct evidence of Louvado's misconduct until a witness's April 2019 proffer (three weeks into the MMP trial), in which he recounted that he had seen Louvado steal the drugs in February 2009. (ECF 1554-13, Gladstone Proffer). The GTTF investigators notified USAO supervisors of the direct evidence of Louvado's misconduct, but the USAO's *Giglio* officers advised the MMP trial AUSAs that no *Giglio* obligation existed because (1) Louvado was not a trial witness; (2) the information in Louvado affidavits was independently verifiable; and (3) the GTTF investigation was still underway with potential covert steps to be taken. (ECF 1554 at 48–49).

The April 2019 proffer's direct evidence led to further investigation and the January 2020 official opening of a confidential matter against Louvado as a criminal target. The government

filed a March 2020 criminal information against Louvado for lying to investigators about the drug theft, and he pled guilty on November 6, 2020. (ECF 8 in *United States v. Louvado*, Crim. No. 20-cr-0098-CCB (D. Md. filed Mar. 11, 2020)).

Previous cases with suspected Louvado dishonesty

The defendants also raised concerns about two prior cases in which Louvado was an investigating agent. According to the defendants, these two cases gave the government reason to doubt Louvado's credibility as early as 2009.

First, the defendants raised a 2009 criminal case in which Louvado was an investigating agent. *United States v. Tyrone Powell and Gregory Fitzgerald*, Crim. No. L-09-0373 (now CCB-09-0373) (D. Md. criminal complaint filed June 22, 2009). The defendants filed a motion to suppress evidence from a car stop because of alleged lies by Louvado, but Judge Legg ruled in the Government's favor. (ECF 1554-16, Ex. 16, *Powell*/*Fitzgerald* Joint App'x at 169–96, 232). After the order, Powell pled guilty, and the Government elected in November 2009 to dismiss the charges against Fitzgerald. (ECF 63 (Nov. 10, 2009) in *Powell*; ECF 1554-16 at 251–60). Despite the dismissal, Judge Legg concluded that the defense had "chipped around the edges" of Louvado's testimony but had "not overcome . . . the credibility of [Louvado's] testimony" about the hand-to-hand drug transaction that had occurred. (ECF 1554-16 at 259). The Government dismissed the Fitzgerald case because Fitzgerald was under investigation in another matter and a separate, future indictment was possible. (*Id.* at 247–49). Fitzgerald was later indicted and pled guilty in *United States v. Fitzgerald*, WDQ-12-289 (D. Md. Filed May 15, 2012).

Second, the defendants raised in their supplemental memorandum another case, *United States v. Gerrod Davis*, Crim. No. CCB-09-0400 (D. Md. Filed July 21, 2009). Davis had filed a September 2009 motion to suppress evidence obtained pursuant to a search warrant sworn out by

Louvado, and he requested a *Franks* hearing. (ECF 1514-1, *Davis* ECF 15). The motion alleged that certain critical allegations were false, and it included witness and documentary evidence indicating that Louvado had actually been in Towson at a time when he said he had been observing the defendant sell drugs. (*Id.* at 3). The motion also accused Louvado of misstating information from an online database and of other misconduct. (*Id.* at 3–4). The Government did not respond to this motion to suppress, instead dismissing the indictment in December 2009. (ECF 1514-2, *Davis* ECF 18). No reason was stated in the dismissal motion or on the record.

Taken together, the defendants argue that these two cases show the Government knew or had reason to know that Louvado had a propensity for making false statements under oath, and they call for the production of documents and information to reveal what law enforcement agencies knew about Louvado, when they knew it, and why they permitted him to swear out wiretap and search warrant affidavits.

Moore EEOC action

Finally, in November 2021, the defendants submitted another supplemental memorandum (ECF 1692) in support of their motion for a new trial, this time discussing ATF Special Agent Timothy Moore's credibility rather than Louvado's. Moore's credibility was at issue because the government's opposition to the defendants' Louvado-focused motion for a new trial detailed how Moore and Special Agent Christian Aanonsen, rather than Louvado, were the key figures in the investigation.

The supplemental memorandum recounted the Government's April 2021 disclosure of an unrelated Equal Employment Opportunity Commission case whose final liability decision did not directly refer to Moore but did find for the complainant. (ECF 1692-3).

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ANALYSIS

The defendants have moved for a new trial under Rule 33 and *Brady*/*Giglio*. The court considers each in turn.

I. New evidence — Rule 33

Rule 33 of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial to the defendant if the interest of justice so requires." Fed. R. Crim. P. 33(a). Such motions should be awarded "sparingly," as "a jury verdict is not to be overturned except in the rare circumstance when the evidence 'weighs heavily' against it." *United States v. Smith*, 451 F.3d 209, 217 (4th Cir. 2006) (quoting *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003)). Whether to grant or deny a motion for a new trial is within the district court's broad discretion, which should be disturbed only in very limited circumstances. *Perry*, 335 F.3d at 320.

The Fourth Circuit has developed a five-part test for evaluating motions for a new trial based on newly discovered evidence. A motion for a new trial should only be granted if:

(1) the evidence is newly discovered;

(2) the movant exercised due diligence in discovering the evidence;

(3) the evidence is not merely cumulative or impeaching;

(4) the evidence is material to the issues; and

(5) the evidence would probably result in an acquittal at a new trial.

United States v. Chavis, 880 F.2d 788, 793 (4th Cir. 1989) (going on to note that the evidence of guilt from other witnesses was "overwhelming" and that the district court had properly denied the motion for mistrial). A motion for a new trial requires a defendant to establish each of the five elements. *United States v. Fulcher*, 250 F.3d 244, 249 (4th Cir. 2001).

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The defendants' core argument is that various judges would have denied key wiretaps and search warrants had Louvado disclosed his misconduct in the affidavits supporting those applications, because those judges would not have found his MMP-related statements credible. Louvado was the only affiant in those applications, and the defendants say the evidence resulting from those wiretaps and searches is tainted, effectively dismantling the government's case against all five defendants. Specifically, the defendants argue for the suppression of all evidence obtained as a result of the two wiretaps (TT1 and TT2) for which Louvado was the affiant; two additional wiretaps (TT3 and TT4) where the affidavit incorporated by reference Louvado's affidavit; and the 15 search warrants where Louvado was the affiant.

The defendants' Rule 33 motion hinges on the third, fourth, and fifth *Chavis* factors. The court finds that the evidence of Louvado's prior misconduct is impeachment evidence (*see* § I.A, *infra*) that is not material to the issues involved in this case and would not probably result in an acquittal at a new trial (*see* § I.B, *infra*).

A. Mere impeachment evidence

First, the evidence of Louvado's misconduct is mere impeachment evidence. It calls into question the credibility of Louvado's claim that he believed in the credibility of five confidential informants whom investigators had used to make controlled drug purchases. This statement from his affidavit in support of TT1 was later incorporated into the applications for wiretaps TT2, TT3, and TT4. Those wiretaps produced evidence that formed the core of September 2016 and February 2017 search warrant applications that Louvado swore out.

This is "classic impeachment evidence that cannot satisfy the third prong of the *Chavis* test." *United States v. Ali*, 991 F.3d 561, 571 (4th Cir. 2021). This evidence "does not directly support some alternate theory of the crimes, nor does it provide any legal justification for" the

defendants' actions. *Id.* (citation and quotations omitted). Rather, it merely calls into question Louvado's "honesty on an issue orthogonal to the defendant's guilt." *Id.* (citation omitted). While Louvado's theft and resale of cocaine represents a deplorable betrayal of the public trust, this misconduct is not directly relevant to the purpose of his initial affidavit, in which he vouched for the credibility of key informants. That substantive connection would have been stronger if his proven misconduct and his affidavit statements were more tightly connected — for example, if his misconduct was that he had been known to lie about informants' statements and his affidavit primarily recounted what informants did or said. But that is not the case here. As impeachment evidence, the evidence of his theft goes only to Louvado's credibility and does not warrant the grant of a new trial. *Ali*, 991 F.3d 561, 571 (citing *United States v. Custis*, 988 F.2d 1355, 1359 (4th Cir. 1993) ("Merely impeaching" evidence is ordinarily insufficient to justify a new trial) (cleaned up)). *See also United States v. Robinson*, 627 F.3d 941, 948–51 (4th Cir. 2010) (discussed at greater length in § I.B.3, *infra*).[2]

The defendants cite *United States v. Fisher* to argue that Louvado's misconduct is not mere impeachment evidence. 711 F.3d 460 (4th Cir. 2013). The case is similar at first glance: An officer-affiant who had committed fraud and theft lied in the sole sworn affidavit underpinning a search warrant for the defendant's residence and vehicle. *Id*. at 462. Those searches produced the evidence forming the basis of the charge — though the *Fisher* defendant pled guilty rather than go to trial. If the *Fisher* defendant had known of the officer-affiant's misconduct, he would have filed a motion to suppress that may have been successful. *Id.* at 463. The *Fisher* court held "that

[2] The same analysis applies regarding the 2009 *Powell*/*Fitzgerald* and *Davis* cases, where the defendants argue that the true, submerged motive for the dismissals was that Louvado had lied pretrial. While the Government provides a compelling alternative explanation for the dismissal in *Fitzgerald*, the reasoning for the *Davis* dismissal remains unclear. Regardless, the *Davis* dismissal (and, less critically, the *Fitzgerald* dismissal) is, at best, impeachment evidence that does not meet the third requirement of the *Chavis* test. Failing to meet this requirement of the Rule 33 analysis, the court will consider *Davis* again only in the *Brady*/*Giglio* context, in which impeaching evidence is not barred and it is relevant to inquire into the prosecution's imputed knowledge (*see* § II, *infra*).

the officer's affirmative misrepresentation, which . . . tinged the entire proceeding, rendered the defendant's pleas involuntary and violated his due process rights." *Id.* at 462.

But the facts of *Fisher* are distinguishable, and Bailey's case does not present "highly uncommon circumstances in which gross police misconduct goes to the heart of the prosecution's case." *Id.* at 466. Though the *Fisher* officer-affiant had, like Louvado, committed theft unrelated to the case, he had also committed misconduct directly related to the *Fisher* case. The officer-affiant had lied about the source of the information he used in the affidavit, falsely attributing that information to a particular confidential informant. *Id.* at 463. The *Fisher* court did not make much of the officer-affiant's theft not being noted in the affidavit; instead, the untruthful statements in question concerned the informants and information central to the probable cause determination in Fisher's case specifically.

While it need not be the case that a motion to suppress undoubtedly would have prevailed if the defendant had known of the officer's misconduct, there is a wide gap between deliberate but tangential omissions about an affiant's general credibility and deliberate falsehoods with real factual nexus to the case itself. The Louvado misconduct is mere impeachment evidence that does not warrant a new trial under Rule 33.

B. Materiality to the issues and probability of acquittal

This impeachment analysis bleeds into the other two key considerations: whether evidence of Louvado's misconduct was material to the issues of the defendants' case and whether the evidence would likely have resulted in an acquittal. The two questions are bound together closely.[3] Fourth Circuit caselaw does not provide an exact definition of materiality in

[3] In other Circuits applying the nearly identical *Berry* Test to analyze Rule 33 motions based on newly discovered evidence, "[t]he requirement that the evidence be material and not cumulative is closely related to the requirement that the evidence be such that it would probably produce an acquittal." 3 Charles Alan Wright & Arthur R. Miller,

the Rule 33 new evidence context, and the parties' briefs alternate between applying the materiality standards from *Brady*/*Giglio* nondisclosures[4] and *Franks* suppression hearings.[5]

Under either standard, however, the Louvado evidence was not material to this case.

1. Brady Analysis

The *Brady* analysis finds materiality where there "is a 'reasonable probability' of a different result" had the favorable evidence been disclosed, such that the undisclosed information "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). As discussed in § II, *infra*, the court finds that the evidence of Louvado's theft was not material.

2. Franks Analysis

A *Franks* materiality analysis looks at whether the omitted information was "necessary to the finding of probable cause." *Franks*, 438 U.S. at 156. The court considers the "totality of the circumstances," evaluating the affidavit as a whole and all circumstances set forth within. *Colkley*, 899 F.2d at 301–02. This includes the effect the omitted information had on the reliability of the affiant's information, whether the judge could properly consider the facts in the affidavit as a basis for probable cause, and whether sufficient information remains to justify

Federal Practice and Procedure § 584 n.20 (4th ed. 2021) (collecting cases). The *Berry* factors are: (1) the evidence is truly newly discovered; (2) the failure to learn of the alleged newly discovered evidence was not because of a lack of due diligence; (3) the new evidence is not merely impeaching or cumulative; (4) the alleged newly discovered evidence is material; and (5) the alleged newly discovered evidence is of such a nature that if introduced at trial it would probably produce an acquittal. *Id.* § 584 n.8; *see, e.g.*, *United States v. Forbes*, 790 F.3d 403, 406–407 (2d Cir. 2015).

[4] To prove materiality of a *Brady*/*Giglio* nondisclosure, the defendant must show "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (internal quotation marks omitted); *accord United States v. Robinson*, 627 F.3d 942, 951–52 (4th Cir. 2010).

[5] To prove materiality in a *Franks* suppression hearing, "the defendant must show that 'with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause.'" *United States v. Lull*, 824 F.3d 109, 114 (4th Cir. 2016) (quoting *Franks v. Delaware*, 438 U.S. 154, 156 (4th Cir. 2016)).

probable cause even after excluding the statements colored by the omitted information. See *United States v. Lull*, 824 F.3d 109, 118 (4th Cir. 2016).

The defendants rely heavily on *United States v. Lull*, in which the affiant omitted facts about his confidential informant's dishonest conduct during the controlled buy that substantiated a subsequent warrant application. *Lull*, 824 F.3d at 118. Much of the information in the affidavit came solely from that informant, and the magistrate could not accurately assess the reliability and the veracity (and thus the significance) of the informant's statements. *Id.* And when the *Lull* court removed the informant's information from the affidavit (considering only the information actually presented to the magistrate), "little remain[ed]" — nothing identifying the defendant specifically as the seller or connecting him to the drug transaction. *Id.* at 118–19, 119 n.3.

Lull is distinguishable from this case. As noted in § I.A, *supra*, the evidence of Louvado's thefts went to his credibility but did not directly relate to the facts of this particular case as declared in his affidavit. In contrast, the *Lull* court focused almost exclusively on the informant's theft of the controlled buy money, an action that was not "separate" from the controlled buy in the way Louvado's was. *Id.* at 116. Instead, the *Lull* informant demonstrated that he was unreliable "during the course of [that] very transaction." *Id.* The Lull court discussed the implications for the informant's reliability but largely ignored the officer-affiant's credibility, which is the focus of the defendants' claims about Louvado's misconduct. *Id.* at 118. Finally, eliminating the *Lull* informant's contributions to the search warrant application left the application facially insufficient. *Id.* at 119. Not so here; excluding every statement Louvado made as a remedy for misconduct that did not bear on the substantive, case-related information in his affidavit is not warranted. Excluding any declarations from Louvado as to his personal honesty or including the omitted information about the 2009 theft still leaves sufficient

confidential informant and other information to justify probable cause for the wiretaps and searches.

3. Corroboration and Louvado's involvement

As a coda on materiality and likelihood of acquittal, this court considers *United States v. Robinson*, where the Fourth Circuit found it immaterial that four officers who had participated in the investigation had been dismissed for misconduct unrelated to the particular case. 627 F.3d 941, 948–51 (4th Cir. 2010). Their misconduct, "while serious, did not relate to Robinson's case or to the truth-finding function of the criminal proceeding." *Id.* at 949.

In discussing the misconduct evidence's materiality and the likelihood of acquittal, the Fourth Circuit acknowledged the officers had played some role in obtaining evidence but noted that the defendant had overstated their impact on the trial. *Id.* at 950. The counts in question stemmed largely from a separate investigation not run by their office, an investigation where the four dismissed officers "played only bit parts" and would have been paired at all times with agents from another office not under scrutiny. *Id.* at 950. The court also pointed to "the impressive amount of evidence" from other sources. *Id.* at 950.

These same reasons apply here. Louvado did not engage in misconduct related to the defendants' case and did not affect the truth-finding function of the trial. The substance of his affidavit remains unchallenged as to the confidential informants he discussed. He was accompanied by other officers at all times during controlled drug buys and search warrant executions, and there is no indication that he was alone while making observations, taking statements, or recovering evidence.

Robinson is not a perfect analogy. The Fourth Circuit noted that even eliminating "*all traces of evidence from the dismissed officers*, there remain[ed] overwhelming evidence" of the

defendant's guilt. *Id.* at 950 (emphasis added). The defendants in this case urge this court to follow this dictum, taking a hatchet to the wiretaps and search warrants. But a scalpel is more appropriate given the tenuous connection between the misconduct and the case and given the tremendous corroboration available from confidential informants, other investigators, and trial witnesses. It is more appropriate to eliminate all traces of evidence *solely* from Louvado, paying attention — as in *Robinson* — to when he was paired with other officers as opposed to when he was alone with informants or solely responsible for evidence collection.

Finally, and with a view to the administration of justice overall, the *Robinson* court hesitated to invite credibility mini-trials motivated by unrelated misconduct evidence. Sharing these concerns, this court wishes to acknowledge Louvado's wrongdoing but still preserve the finality of criminal proceedings except where the interests of justice truly demand otherwise. Louvado's drug thefts are reprehensible but not material to the defendants' case, and knowledge of Louvado's misconduct would not likely result in acquittal at a new trial.

II. *Brady*/*Giglio*

The defendants maintain that the government's failure to disclose Louvado's crimes violated due process under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (expanding *Brady* from exculpatory evidence to impeachment evidence). To prove a *Brady* violation, a defendant must show that non-disclosed evidence was (1) favorable to the accused, either because it was exculpatory or impeaching; (2) material to the verdict at trial; and (3) suppressed by the prosecution (i.e., the prosecution had it but failed to disclose it). *Moore v. Illinois*, 408 U.S. 786, 794–95 (1972); *accord United States v. Chavez*, 894 F.3d 593, 600 (4th Cir. 2018), cert. denied, 139 S. Ct. 278 (2018). The Fourth Circuit has instructed courts to be "cautious . . . about importing the panoply of *Brady* protections from trial

practice into warrant application proceedings." *United States v. Colkley*, 899 F.2d 297, 302 (4th Cir. 1990).

Prosecutors are responsible for obtaining and disclosing evidence. Law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant. *See Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 846–47 (4th Cir. 1964); *see also Owens v. Balt. City State's Attorney's Office*, 767 F.3d 379, 396 (4th Cir. 2014), *cert. denied sub nom. Balt. City Police Dep't v. Owens*, 575 U.S. 983 (2015). Notably, in some circumstances, "the knowledge of some who are part of the investigative team is imputed to prosecutors regardless of the prosecutors' actual awareness." *United States v. Robinson*, 627 F.3d 941, 951 (4th Cir. 2010); *accord Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Nevertheless, there are no "hard and fast lines about the scope of *Brady* imputation . . . ." *Robinson*, 627 F.3d at 952.

The *Brady* right is, at its core, a "*trial* right." *United States v. Moussaoui*, 591 F.3d 263, 285–86 (4th Cir. 2010) (discussing but not ultimately resolving whether to extend the *Brady* right to exculpatory information, as distinguished from impeachment evidence, in the pretrial context of guilty pleas).[6] "It requires a prosecutor to disclose evidence favorable to the defense if the evidence is material to either guilt or punishment, and exists to preserve the fairness of a trial verdict and to minimize the chance that an innocent person would be found guilty." *Moussaoui*, 591 F.3d at 285.

[6] Though there is a well defined circuit split on the question, at least the First, Second, and Fifth Circuits have also expressed doubts about whether the *Brady* right is active pretrial, specifically in the guilty plea context. *See United States v. Mathur*, 624 F.3d 498, 506–07 (1st Cir. 2010) ("The animating principle of *Brady* is the avoidance of an unfair trial. It is, therefore, universally acknowledged that the right memorialized in *Brady* is a trial right." (internal citations and quotation marks omitted)); *United States v. Meza*, 843 Fed. App'x 592, 599 n.3 (5th Cir. 2021) (citing *Alvarez v. City of Brownsville*, 904 F.3d 382, 395 (5th Cir. 2018)); *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010). Unpublished cases are cited for persuasive reasoning, not binding precedent.

APPENDIX B

Neither the Supreme Court nor the Fourth Circuit has ruled on whether the right covers impeachment information at the search warrant stage. The Constitution does not require the government to disclose material impeachment evidence prior to a plea agreement. *United States v. Ruiz*, 536 U.S. 622, 629–33 (2002). In *Ruiz,* the Court noted first that impeachment information is special in relation to the fairness of a trial, not in relation to the voluntariness of a plea. *Ruiz*, 536 U.S. at 629. Second, the due process considerations that motivate *Brady*/*Giglio* factor in not only (1) the nature of the defendant's private interest in disclosure of impeachment information but also (2) the value of a disclosure requirement at that stage and (3) the adverse impact of such a disclosure requirement upon the government's interests. *Id.* at 631 (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). The *Ruiz* court additionally acknowledged the government's concern over premature disclosure of government witness information, which could disrupt ongoing investigations. *Id.* at 631–32.

Brady also imposes a materiality requirement. Evidence is "material" to the verdict at trial if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (internal quotation and citation omitted); *accord United States v. Robinson,* 627 F.3d 942, 950–52 (4th Cir. 2010). Thus, "*Brady* does not 'automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" *Burr v. Jackson*, 19 F.4th 395, 410 (4th Cir. 2021) (quoting *Bagley*, 473 U.S. at 677). The court must examine the trial record and evaluate the withheld evidence in the context of the entire record to make its determination as to the reasonable probability of a different result. *Turner v. United States*, 137

S. Ct. 1885, 1893 (2017) (cleaned up) (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976), and *Cone v. Bell*, 556 U.S. 449, 469–70 (2009)). "As a general matter," a showing that there is "evidence that merely impeaches those *who do not testify* lacks relevance, much less materiality." *United States v. King*, 628 F.3d 693, 703–04 (4th Cir. 2011) (citing *United States v. Sanchez*, 118 F.3d 192, 197 (4th Cir. 1997)) (emphasis added).

The core issues in this case are (1) whether *Brady* reaches search warrant impeachment omissions, and whether the government knew of (2) material impeachment information (3) in time for a disclosure that would affect the suppression hearings and therefore the trial.

The defendants argue that Louvado's misconduct affected their trial rights, because the outcome of the trial would have been more favorable to them had they or the warrant-issuing judges known of the misconduct in time for a *Franks* challenge. They say this as though the government's case depended entirely on Louvado's testimony — at least at the warrant application stage, even if not at trial. As with other arguments they make in their motion, their theory of the case relies on the notion that anything Louvado touched would be excluded from trial, effectively dismantling the government's case in one fell swoop.

The government, meanwhile, argues first that *Brady* applies only to trials and exists to preserve the fairness of a trial verdict and to prevent wrongful convictions. They note that *Ruiz*'s limitations on the *Brady* right should apply not just to the guilty plea stage but also to search warrant applications. They argue that courts have not expanded the *Brady*/*Giglio* obligation to search warrant affiants who did not testify at trial, especially not where the impeachment evidence is unrelated to the facts of the case. On the contrary, the Fourth Circuit has expressed caution about expanding *Brady* to warrant application proceedings. *United States v. Clenney*, 631 F.3d 658, 665 (4th Cir. 2011) (citing *Colkley*, 899 F.2d at 302–03). Requiring warrant

applications to disclose all potentially exculpatory or impeaching information would be overly burdensome given that the consequences of search or arrest are less severe and irremediable than *Brady*'s primary concern: conviction. *Colkley*, 899 F.2d at 301–03. Instead, a *Franks* analysis (*see* § I.B.2) should govern.

Even if *Brady* should extend backward to information that would impeach non-testifying search warrant affiants, there was no *Brady*/*Giglio* obligation here because there was no suppressed material information. Gun Trace Task Force investigators first learned of a direct allegation of Louvado's wrongdoing on April 9, 2019, three weeks into the MMP trial. They immediately relayed the information to USAO supervisors. At that point, the trial AUSAs, though not having been advised of any *Brady* or *Giglio* concerns with Louvado, had already determined not to call Louvado as a witness, according to the government's briefing (ECF 1554 at 47). After learning of the allegations of wrongdoing, the USAO supervisors saw no *Giglio* obligation: Louvado would not testify at trial; there was no suggestion of misconduct during the MMP investigation; the information in the Louvado-authored warrants could be independently verified by other officers and evidence; and the covert GTTF investigation remained active.

The defendants do not state a true *Brady*/*Giglio* claim. They ask that they be granted a new trial because the government did not (in time for June and August 2018 motions hearings) disclose information that neither the USAO nor GTTF investigators learned until April 2019. On the defendants' theory, *Brady*/*Giglio* was first triggered not by the April 2019 direct allegations of drug theft and resale (the focus of the defendants' motion) but rather by a July 2017 witness proffer circumstantially noting that Louvado had bought a new car and potentially a new boat sometime shortly after an illegal search warrant execution by the GTTF. This is especially tenuous given an August 2017 meeting with the same witness, who told USAO officials

(including the trial AUSAs) that he had not seen Louvado steal money and he did not know whether Louvado had participated. Summer 2018 subpoenas of Louvado's financial records at that time did not reveal any large cash infusions directly after the 2009 search, and Louvado denied knowledge of any criminal activity in a March 2018 interview. There was no corroborated accusation against Louvado at the time of the summer 2018 MMP motions hearings or the spring 2019 trial, but the defendants nonetheless argue for suppression.

And even if the government had known of Louvado's drug thefts at the time of the motions hearings or the trial, the information is not material under *Brady*. Considering the withheld evidence in the context of the entire record, this court concludes that "it is too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards." *Turner*, 137 S. Ct. at 1894. It is not reasonably probable that knowledge of Louvado's unrelated drug thefts could have led to a different result at trial, given the weakness of any hypothetical *Franks* challenge (*see* § I.B.2), the fact that Louvado did not testify at trial, and that there was ample corroboration for any information tied to Louvado. Confidence in the defendants' guilty verdict remains unshaken in the face of nondisclosure of this unavailable-at-the-time, non-case-related impeachment information about a non-testifying witness.

The defendants' last argument as to Louvado is that the dismissals of the 2009 *Davis* case and, less convincingly, the 2009 *Fitzgerald* case, are *Brady*/*Giglio* evidence that the United States Attorney's Office knew of and should have disclosed even before the April 2019 first direct misconduct allegations related to theft. Even assuming that *Brady*/*Giglio* obligated disclosure about non-testifying search warrant affiants (an unsettled question, as noted *supra*), this information is distinct from the kind of exculpatory or impeachment evidence that is most clearly contemplated by the *Brady*/*Giglio* regime. Although it is possible that someone other than

Louvado (that is, federal prosecutors who worked the 2009 cases) may have had some idea of Louvado's potential dishonesty and impropriety, the facts (1) that the affected officers and prosecutors worked across state/federal lines and (2) that the alleged dishonesty in *Davis* and *Fitzgerald* was unrelated to the investigation of the *Bailey* defendants together cut against a finding that knowledge of the 2009 *Fitzgerald* and *Davis* allegations should be imputed to the 2019 *Bailey* prosecutors and investigators. *See Robinson*, 627 F.3d at 952. Indeed, courts have

> routinely refused to extend *Brady*'s constructive knowledge doctrine where doing so . . . would require prosecutors to do full interviews and background checks on everyone who touched the case. And with good reason: it is one thing to require prosecutors to inquire about whether police have turned up exculpatory or impeachment evidence during their investigation. It is quite another to require them, on pain of a possible retrial, to conduct disciplinary inquiries into the general conduct of every officer working the case.

Id. (internal citations omitted). More importantly, the defendants' allegations of Louvado's 2009 dishonesty are circumstantial speculation at best and are not enough to justify the extraordinary remedy they seek in comprehensive production of documents and information about every detail of what law enforcement agencies knew about Louvado. Nor does this speculation warrant a new trial.

The defendants' final argument attacked Moore's credibility by raising evidence of an unrelated EEOC case Moore had been involved in. The final decision contained no cognizable finding of Moore's lack of credibility that would affect the reliability of his corroboration of the overwhelming evidence produced during the MMP investigation. No new trial is warranted on this basis.

III. Reopening Frazier's Suppression hearing

For the reasons articulated above, Frazier has failed to show that there is a basis to reopen his motion to suppress.

APPENDIX B

CONCLUSION

For the reasons discussed above, the defendants' motion for a new trial (ECF 1505) and Frazier's motion to reopen his suppression hearing (ECF 1502) will be denied. A separate Order follows.

May 9, 2022
Date

/s/
Catherine C. Blake
United States District Judge