

No. _____

In The
Supreme Court of the United States

MITCHELL DANYELL BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

George E. Crump, III
Counsel of Record
ATTORNEY AT LAW
P.O. Box 1523
Rockingham, NC 28380
(910) 997-5544
georgecrump@bellsouth.net

Counsel for Petitioner
Mitchell Danyell Banks

APPENDIX:

Opinion of the United States Court of Appeals for the Fourth Circuit Re: Affirming district court judgment entered January 20, 2023	1a
Judgment of the United States Court of Appeals for the Fourth Circuit Re: Affirming district court judgment entered January 20, 2023	7a
Transcript of Trial Proceedings Before the Honorable William L. Osteen, Jr. on June 15 , 2022	8a
Findings of District Court as to Admissibility of Destroyed Evidence (JA 723-731).....	9a
Testimony of Adam Lewis as to Destroyed Evidence (JA 732- JA 740)	18a
Direct Examination by Mr. Barrett.....	18a
Cross Examination by Mr. Doorasamy	24a

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 23-4032

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MITCHELL DANYELL BANKS,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:21-cr-00344-WO-1)

Submitted: May 31, 2024

Decided: June 14, 2024

Before AGEE, WYNN, and HEYTENS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: George E. Crump, III, LAW OFFICE OF GEORGE E. CRUMP, III, Rockingham, North Carolina, for Appellant. Sandra J. Hairston, United States Attorney, Margaret M. Reece, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Mitchell Danyell Banks of conspiracy to distribute cocaine base and cocaine hydrochloride, in violation of 21 U.S.C. §§ 841(b)(1)(C), 846 (Count 1); possessing with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Counts 2 & 12); possessing with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Counts 3 & 13); maintaining drug involved premises, in violation of 21 U.S.C. § 856(a)(1), (b) (Counts 4, 8, & 14); possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Counts 5 & 9); being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2018)¹ (Counts 6 & 10); possessing with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Count 7); and possessing with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Count 11). Banks contends that the district court erred in denying his motions to suppress and in allowing the Government to present evidence about drugs destroyed in 2018. Finding no reversible error, we affirm.²

¹ Section 924(a)(2) was amended and no longer provides the penalty for § 922(g) convictions; the new penalty provision in 18 U.S.C. § 924(a)(8) sets forth a statutory maximum sentence of 15 years' imprisonment for a § 922(g) offense. *See Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(c), 136 Stat. 1313, 1329 (2022).* The 15-year statutory maximum does not apply in this case, however, because Banks committed the offense before the June 25, 2022, amendment of the statute.

² Banks argues that there would have been insufficient evidence to convict him without the evidence he challenges. Because we reject those challenges on the merits, this argument also fails.

“When reviewing a district court’s ruling on a motion to suppress, we review factual findings for clear error and legal determinations *de novo*,” construing “the evidence in the light most favorable to the prevailing party.” *United States v. Lull*, 824 F.3d 109, 114-15 (4th Cir. 2016) (internal quotation marks omitted). “[T]he Fourth Amendment specifically provides that ‘no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’” *United States v. Jones*, 952 F.3d 153, 158 (4th Cir. 2020) (quoting U.S. Const. amend. IV).

Banks first challenges a search of his residence conducted in February 2020 pursuant to a search warrant, arguing that it is tainted by a prior illegal search. “The exclusionary rule generally renders inadmissible evidence recovered during an unlawful search.” *United States v. Hill*, 776 F.3d 243, 250 (4th Cir. 2015) (internal quotation marks omitted). “Derivative evidence, or fruit of the poisonous tree is evidence that has been come at by exploitation of an illegality instead of means sufficiently distinguishable to be purged of the primary taint.” *United States v. Lentz*, 524 F.3d 501, 522 (4th Cir. 2008) (cleaned up). Conversely, “evidence need not be suppressed if it is somehow attenuated enough from the violation to dissipate the taint.” *Id.* (cleaned up).

One way to purge the taint of a prior unlawful search is through the independent source doctrine. *Hill*, 776 F.3d at 251. “This doctrine applies when a search pursuant to a warrant was in fact a genuinely independent source of the information and tangible evidence that would otherwise be subject to exclusion because they were found during an earlier unlawful search.” *Id.* (cleaned up). “To find the search with a warrant genuinely

independent, the unlawful search must not have affected (1) the officer’s decision to seek the warrant or (2) the magistrate judge’s decision to issue it.” *Id.* (cleaned up).

The district court correctly applied the independent source doctrine. The officer’s decision to seek the warrant was based on the evidence that Banks had committed an assault—only one paragraph referenced the illegally seen drug evidence. On the second prong, we follow *Franks v. Delaware*, 438 U.S. 154 (1978), and “examine[] the search warrant affidavit absent the illegally-obtained information, to determine whether the untainted portion of the affidavit set forth probable cause.” *United States v. Walton*, 56 F.3d 551, 554 (4th Cir. 1995). Excluding the drug evidence and the shell casings, there is ample evidence remaining in the affidavit to establish probable cause that evidence of the assault would be found at the residence.

Next, Banks argues that the January 2021 search warrant application relied on stale evidence. However, he does not challenge the district court’s alternative basis for denying this motion to suppress—that the *Leon*³ good-faith exception applied. Thus, Banks has “waived appellate review of that separate ground for denying his motion” to suppress, and we may “affirm on that basis.”⁴ *United States v. Ebert*, 61 F.4th 394, 402 (4th Cir.), *cert. denied*, 144 S. Ct. 149 (2023).

³ *United States v. Leon*, 468 U.S. 897 (1984).

⁴ Banks does take a passing shot at challenging the application of the good-faith exception in one sentence of his reply brief. Reply Br. at 10. But because the argument was not raised in his opening brief, *see United States v. Winfield*, 665 F.3d 107, 117 n.4 (4th Cir. 2012) (concluding that appellant’s failure to raise argument in opening brief waived the argument), and because even if this sentence had been included in his opening brief it would have been insufficient to preserve the issue for appellate review, *see Grayson*

Finally, as for the September 2021 search, Banks concedes that probable cause was established because the officers smelled the odor of marijuana coming from his residence. “[W]e have repeatedly held that the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place.” *Jones*, 952 F.3d at 158 (internal quotation marks omitted). While Banks asks us to reconsider this precedent, “one-panel cannot overrule another.” *United States v. Runyon*, 994 F.3d 192, 201 (4th Cir. 2021) (internal quotation marks omitted).

Banks also argues that the district court erred in allowing the Government to introduce testimony about drugs destroyed in 2018, before he was indicted. A defendant may establish “a due process violation based on the prosecution’s failure to preserve evidence if the evidence possesses an exculpatory value that was apparent before the evidence was destroyed and if it is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *United States v. Johnson*, 996 F.3d 200, 206 (4th Cir. 2021) (cleaned up). But “when the lost evidence can only be said to be ‘potentially useful’ to the defendant because the contents of the evidence are unknown,” “[a] showing of bad faith is required.” *Id.* (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (holding “that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law”)).

O Co. v. Agadir Int'l LLC, 856 F.3d 307, 316 (4th Cir. 2017) (providing that a party must develop an argument to avoid waiver, not merely take a passing shot at the issue), we nonetheless conclude the argument was waived.

Bad faith “requires that the officer have intentionally withheld the evidence for the purpose of depriving the [accused] of the use of that evidence during his criminal trial.” *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring in the judgment). The negligent destruction of evidence, without more, is not bad faith. *See Youngblood*, 488 U.S. at 58 (finding no due process violation where failure of police to preserve evidence “can at worst be described as negligent”).

The district court correctly found that there was no bad faith. The evidence was available for use in Banks’s prior state criminal trial. After he entered an *Alford*⁵ plea to resolve that case, a state judge then ordered the evidence destroyed. And this occurred before the federal indictment was filed and before the first search tied to the substantive counts.⁶

Accordingly, we affirm Banks’s convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

⁵ *North Carolina v. Alford*, 400 U.S. 25 (1970).

⁶ To the extent Banks challenges the admission of testimony regarding the destroyed evidence as irrelevant and unduly prejudicial, such challenges are similarly without merit. Testimony that drugs were seized from Banks in 2017 is plainly relevant to establishing Banks’s involvement in a years-long drug conspiracy. We also disagree with Banks that the Government’s failure to present the physical drug evidence alongside this testimony somehow rendered the testimony as unduly prejudicial.

FILED: June 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4032
(1:21-cr-00344-WO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MITCHELL DANYELL BANKS

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

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2 MIDDLE DISTRICT OF NORTH CAROLINA
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TRANSCRIPT OF JURY TRIAL DAY 3
BEFORE THE HONORABLE WILLIAM L. OSTEEN, JR.
UNITED STATES DISTRICT JUDGE

10 | APPEARANCES:

11 For the Government: CLIFF BARRETT
12 MARY ANN COURTNEY
13 OFFICE OF THE U.S. ATTORNEY
14 101 S. EDGEWORTH STREET, 4TH FLOOR
15 GREENSBORO, NORTH CAROLINA 27401

14 For the Defendant: ALAN DOORASAMY, SR.
15 LAW OFFICE OF ALAN DOORASAMY, SR.
16 214 N. SPRING STREET
WINSTON-SALEM, NORTH CAROLINA 27101

21 Court Reporter: Joseph B. Armstrong, FCRR
22 324 W. Market, Room 101
Greensboro, NC 27401

1 that within the Firearms Section.

2 Q Okay. So based on your expertise, when a firearm is
3 discharged, you could get residue on the clothing or the hands
4 of the person who fired that shot, correct?

5 A That's correct, yes.

6 **MR. DOORASAMY:** I have no further questions, Your
7 Honor.

8 **THE COURT:** Anything?

9 **MR. BARRETT:** Nothing on redirect.

10 **THE COURT:** You may step down, ma'am.

11 **THE WITNESS:** Thank you.

12 (At 12:12 p.m., witness excused.)

13 **THE COURT:** Next witness.

14 **MR. BARRETT:** Your Honor, we call Adam Lewis.

15 Your Honor, may we approach briefly?

16 **THE COURT:** You may.

17 (Bench conference as follows:)

18 **MR. BARRETT:** I apologize I should have told the
19 court about this at the recess. So in the 2017 case, the
20 evidence after the conviction in state court was destroyed. So
21 Mr. Lewis is going to be testifying without an actual exhibit.
22 He's testifying from a property record that has the case
23 number, which is the same as his report, but there's not an
24 exhibit actually that goes with that, and I just wanted to
25 alert the court to that fact before I proceeded.

1 THE COURT: Did you want to be heard on that?

2 MR. DOORASAMY: Yeah, I will object to that evidence.

3 **THE COURT:** Step back. I'm going to send the jury
4 out for lunch.

5 (Bench conference concluded.)

6 **THE COURT:** Ladies and gentlemen, this is going to
7 take just a few minutes. I'm going to go ahead and excuse you
8 for a luncheon recess and ask you to come back at 1:45. The
9 jury is excused until 1:45.

10 (At 12:14 p.m., jurors excused.)

11 **THE COURT:** All right. Mr. Doorasamy, so at the
12 bench the Government indicated that -- let's see -- Adam Lewis
13 of the North Carolina State Crime Lab is the individual who
14 conducted the analysis of the item seized in 2017. The actual
15 physical items themselves have been destroyed, but the records
16 of the analysis remain, and the defendant indicated there's an
17 objection to the testimony.

18 So, Mr. Doorasamy, I'll let you -- I'll hear from you
19 on your grounds for the objection.

20 **MR. DOORASAMY:** Yeah. Your Honor, we would like to
21 challenge him on what he looked at and made the judgment,
22 because there's enough evidence in this case that a lot of the
23 substances that were found, especially the creatine and
24 other -- they were the most of all the substances that were
25 found on the various occasions. So he needs to testify as to

1 what item he looked at and made that judgment call. Did he
2 look at two rocks, or did he look at 264 grams of creatine?
3 And I think it's important that he tender that evidence.

4 And the fact that was destroyed is also another
5 issue, Your Honor. If the Government knew it was going to be
6 prosecuting Mr. Banks, that should have been kept in safe
7 keeping for presentation to the members of the jury.

8 **THE COURT:** Can I see that report?

9 **MR. BARRETT:** Your Honor, so I don't have -- this has
10 actually been received, which is the evidence log from the 2017
11 case. I just can't recall the number. It's a document that's
12 been received.

13 **THE COURT:** Okay.

14 **MR. BARRETT:** And I have Mr. Lewis's report.

15 **THE COURT:** All I want to see is Mr. Lewis's report.

16 **MR. BARRETT:** Your Honor, the reason the property
17 receipt is, I think, relevant is because it matches up the
18 numbers.

19 **THE COURT:** So he's got on there your item 37817-1,
20 -2, and -3. Those are the Guilford County Sheriff's Office
21 numbers?

22 **MR. BARRETT:** Yes, Your Honor.

23 **THE COURT:** And if I recall, there's photos of those.

24 **MR. BARRETT:** That's correct, Your Honor.

25 **THE COURT:** And the Government contends the testimony

1 is admiss -- I'll let you say whatever you want to say in
2 response.

3 **MR. BARRETT:** I would just say, Your Honor, that I
4 think the law in this area is if the evidence was not destroyed
5 in bad faith, and certainly -- this is not evidence that was
6 destroyed after the indictment, it's evidence that's been
7 destroyed for some time in state court -- the evidence is
8 admissible even though it's been destroyed in the normal course
9 of business, and that would be our argument as to its
10 admissibility.

11 **THE COURT:** All right. Do we need to have a voir
12 dire on this, Mr. Doorasamy, in terms of the destruction of the
13 evidence?

14 **MR. DOORASAMY:** Well, the other problem that the
15 Government has raised is a list of evidence. Well, who created
16 that list?

17 **THE COURT:** Okay. So this is a 2017 search, and let
18 me just say what I understand just to make sure -- when did
19 Evans -- when was -- oh, 2017. So the -- let me make sure.
20 Which -- okay. Gordon was the 2017.

21 **MR. BARRETT:** That's correct.

22 **THE COURT:** Yeah, so the way I understood the
23 testimony, Gordon was the case agent for the -- or was present
24 for the 2017 search and handled the inventory of the items. We
25 didn't have a separate -- I don't recall a separate forensic

1 person being called for that. He inventoried the items. So we
2 have -- so I'm not sure what your point is.

3 **MR. DOORASAMY:** About the inventory, Your Honor?

4 **THE COURT:** Um-hum.

5 **MR. DOORASAMY:** Yeah, I don't believe he tendered
6 that inventory.

7 **MR. BARRETT:** Your Honor, it had been received as
8 153. I don't know -- it was at the very end of Gordon's
9 direct.

10 **THE COURT:** I have right before cross-examination
11 Government's Exhibit 153 is admitted, a printout of the
12 packaged evidence....That's what I wrote down.

13 **MR. BARRETT:** Yes, Your Honor, that's this exhibit.

14 **MR. DOORASAMY:** Your Honor, I'm going to leave my
15 objection just as it is and let the court rule.

16 **THE COURT:** That's fine. That's fair. We'll double
17 check, but I think in the absence of any bad faith -- and this
18 was a 2017 case investigated by the state -- at least as I
19 understand the facts, this was a 2017 case investigated by the
20 State of North Carolina. I think this is the one where there
21 may have ultimately been some kind of Alford plea to resolve
22 the matter?

23 **MR. DOORASAMY:** Yes, Your Honor.

24 **THE COURT:** So --

25 **MR. DOORASAMY:** Actually, a jury trial in which there

1 was a hung jury that was followed by an Alford plea.

2 **THE COURT:** Okay. So we had an Alford plea that
3 resolved the case, and if I -- I remember us going around on
4 the prior convictions, but 2017-2018 is the time frame of when
5 that conviction became final, so I'm assuming whoever -- who
6 destroyed the evidence ultimately?

7 **MR. BARRETT:** The Sheriff's Office destroyed it, Your
8 Honor. I don't want to make -- okay. I want to make this
9 part of a record, but I did communicate with them in an attempt
10 to get the evidence and was informed it was destroyed. I did
11 not ask the date of the destruction, but I can do that.

12 **THE COURT:** Yeah, I think -- I think the date of
13 destruction should be shared with the defendant. So if
14 you'll -- maybe you can get it over lunch, maybe later.

15 But in the interim period of time, given the
16 procedural history of the case, I do not see any indication of
17 any type of bad faith here. I certainly understand in terms of
18 cross-examination missing evidence and that type of thing that
19 there's a lot of fodder for cross-examination, but I think
20 ultimately the destruction of the evidence, the reliability of
21 the analysis, and all those matters go to the weight of the
22 evidence, not necessarily a foundation, because when deputies
23 testified about the seizures, the case numbers at least appear
24 to match. That deputy -- based on the testimony given
25 previously in terms of that Government's Exhibit 153. So I

1 think there's a sufficient foundation laid, and in the absence
2 of any bad faith I think the witness will be allowed to
3 testify.

4 We'll look at the good faith/bad faith. I saw
5 Ms. Jorgenson return. Did she come back with a weight, or are
6 we waiting?

7 **MR. BARRETT:** I have not spoken with her, Your Honor.

8 **THE COURT:** Why don't you check with her and see if
9 we got a weight. Ms. Courtney, you can pick up that lab
10 report.

11 **MS. COURTNEY:** Yes, Your Honor.

12 **MR. BARRETT:** Your Honor, I would report to the court
13 that Ms. Jorgenson did take these four exhibits back to the
14 laboratory, and they examined the exhibits from the exterior
15 and determined that because of the -- kind of the degradation
16 and because of the way in which the controlled substance had
17 attached itself to the plastic bags, there's no way to get an
18 accurate weight, so we're declining to do that, Your Honor.

19 **THE COURT:** I think -- we took a quick look, and I
20 think that net weight may be, at least arguably, may be expert
21 testimony and may be a little tricky. That's the first time
22 I've ever seen a crime lab come up with a gross weight
23 including packaging. Who knew? So we'll address -- we'll deal
24 with that at the close of the Government's evidence to the
25 extent necessary.

1 All right. If you find anything in terms of the
2 standard and you want to be heard further, we'll take it up
3 right before the jury comes back in. But, otherwise, I'll
4 allow the witness to testify as to the items analyzed from the
5 2017 search. We'll be in recess until 1:45.

6 (At 12:27 p.m., break taken.)

7 (At 1:46 p.m., break concluded.)

8 **THE COURT:** We took a look at lunch time AT
9 destruction of evidence, and there's a whole line of cases,
10 *Youngblood, Fischer*, Fourth Circuit cases addressing this
11 issue, also *Johnson*, 996 F.3d 200, and I think the standard is
12 right. In talking about a due process violation, there are
13 several tiers to that *Youngblood* test in terms of exculpatory
14 evidence, but principally the focus is on the bad faith
15 involved in the destruction of the evidence, even though
16 there's several prongs to the test.

17 And here, in the absence of any evidence of bad
18 faith, and I think based on the facts before the Court, the
19 argument is that it was a good faith destruction, that the
20 state prosecution had concluded -- I don't know when the
21 federal investigation began, but the 2017 conviction occurred
22 well before certainly any indictment was issued in this case.
23 And so in the absence of some evidence of bad faith, I find --
24 unless the parties wish to be heard further, I find that the
25 evidence is admissible, or at least the testimony about the

1 evidence is admissible, and the weight to be assigned that
2 testimony is for the jury. Yes, sir?

3 **MR. DOORASAMY:** No, I don't have anything.

4 **MR. BARRETT:** Your Honor, the only thing I would put
5 on the record is we were able to get the destruction orders.
6 So the order for the destruction of the controlled substance,
7 as I could see it, was in March of 2018. I provided
8 Mr. Doorasamy a copy. Judge Lindsey Davis --

9 **THE COURT:** Signed off on the order --

10 **MR. BARRETT:** The sexual assault kit and other sexual
11 evidence was destroyed later, but as relates to this case
12 that's what I see from the documentation, Your Honor.

13 **THE COURT:** Okay. Destroyed based upon the order of
14 a superior court judge. I don't think there's any evidence of
15 bad faith involved there.

16 All right. Who is the next witness then?

17 **MR. BARRETT:** Adam Lewis from the SBI.

18 **THE COURT:** So he can come on down to the courtroom,
19 and we'll bring the jury in.

20 **MR. BARRETT:** Your Honor, does the Court have any
21 objection to me referring to "destroyed evidence" when I
22 examine the chemist?

23 **THE COURT:** Um-um. I mean, you have to lay the
24 foundation for it through the witness; but once the witness has
25 testified -- well, let me see. Do you have any objection to

1 that?

2 **MR. DOORASAMY:** Yeah, I'm going to formally just put
3 my objection on the table, but also ask that, you know, we be
4 allowed to cross-examine on that issue.

5 **THE COURT:** Certainly.

6 (At 1:51 p.m., jurors arrive.)

7 **THE COURT:** You may call your next witness.

8 **MR. BARRETT:** Your Honor, the Government calls Adam
9 Lewis.

10 (Witness sworn by the clerk.)

11 **ADAM LEWIS,**
12 **GOVERNMENT'S WITNESS, SWORN AT 1:51 P.M.**
13 DIRECT EXAMINATION

14 **BY MR. BARRETT:**

15 Q Can we have your name for the record, please.

16 A Adam Lewis.

17 Q Mr. Lewis, how are you employed?

18 A I'm employed by the North Carolina State Crime Laboratory
here in Greensboro.

19 Q And in what capacity?

20 A I'm a forensic scientist.

21 Q What kind of training and experience do you have in the
field?

22 A I have a -- I took part in the 10-month in-house training
program with the North Carolina State Crime Laboratory covering
both theory and techniques involving drug chemistry analyses as

Lewis - Direct

94

1 well as the laboratory policy and procedures. I also have -- I
2 have worked over -- I worked around 5,000 cases since I've been
3 with the crime lab over the last eight years.

4 Q Have you previously been qualified as an expert in the
5 field of forensic chemistry?

6 A Yes, sir, I have.

7 Q On approximately how many occasions?

8 A Forty-two before now.

9 Q And earlier this week in another court, is that correct?

10 A Yes, sir, yesterday.

11 **MR. BARRETT:** Your Honor, we tender Mr. Lewis as an
12 expert in the field of forensic chemistry specializing in the
13 identification of controlled substances.

14 **THE COURT:** All right. Any --

15 **MR. DOORASAMY:** No objection, Your Honor.

16 **THE COURT:** All right. Mr. Lewis may testify as an
17 expert in the field of forensic chemistry specializing in the
18 identification of controlled substances.

19 **BY MR. BARRETT:**

20 Q Mr. Lewis, I'm going to hand you a document that's been
21 marked for purposes of identification as Government's
22 Exhibit 160 and ask if you recognize that.

23 A Yes, sir, I do.

24 Q What do you recognize it to be?

25 A This is a copy of my curriculum vitae, my CV.

1 **MR. BARRETT:** Move the admission of Government's 160,
2 Your Honor.

3 **THE COURT:** All right.

4 **MR. DOORASAMY:** No objection.

5 **THE COURT:** Government's Exhibit 160 is admitted.

6 **BY MR. BARRETT:**

7 Q I'm going to hand you two additional documents. The first
8 is marked for identification as Government's Exhibit 153. It's
9 an item that's been received by the Court. It's a property log
10 from a 2017 drug case. You've seen that outside of court, have
11 you not?

12 A Yes, sir.

13 Q And I'm going to hand you a document I've marked as 154
14 and ask you just generally without telling us what the results
15 are.

16 A This is the laboratory report summary produced by -- that
17 I produced for this case.

18 Q Okay. Related to this case, this is a case from 2017 that
19 you parole worked and did some testing on, is that correct?

20 A Yes, sir.

21 Q And has it been brought to your attention that the
22 property that was seized in that case has been destroyed in the
23 normal course of business?

24 A Yes, sir.

25 Q Have you made an attempt to ensure that the item that you

1 actually examined for this case was actually the item that was
2 submitted from that case, which is the log?

3 A Yes, sir.

4 Q Could you tell us how you did so, please.

5 A I've looked at the log here, and there are three items of
6 evidence in the log, one of them described as white
7 powder/rock, and the other two each described as off-white
8 substance. These items have numbers associated with them. So
9 for the first one it is 3537817, and then it says Item 1. I
10 have an item here that was listed in the submission information
11 submitted by the submitting agency to the laboratory as Item
12 37817-1, and then they added an additional number to it, which
13 is 35. And then for the second one, it is 37817, No. 2, and
14 then has No. 36 next to. And then for the third one is 37817
15 Item No. 3 and has a 37 next to it, which corresponds to the
16 submitting information from the agency in this case.

17 Q There was a third item that you actually ended up not
18 testing, is that correct?

19 A Yes, sir, there were three total items submitted, and I
20 tested two of them.

21 Q Are you confident that you tested the item that is
22 reflected in this log?

23 A Excuse me?

24 Q Are you confident that you tested the items that were
25 submitted as a result of this log?

1 A Yes, sir.

2 Q When you received the items in this case, exactly how did
3 you go about testing them? What were your first steps in the
4 analysis?

5 A The first thing I do is I open the outer packaging from
6 the agency, and I take an inventory of what's inside and
7 describe all the evidence.

8 The next thing I do is the items I select for
9 analysis, I remove them from all of their packaging and weigh
10 them with just the material and no packaging present.

11 And then I -- from there I continue my analysis.
12 That generally consists of some sort of preliminary test
13 followed by confirmatory tests in the form of instrumental
14 analysis.

15 Q And based on your testing in this particular case, did you
16 form an opinion as to what the two items were that you tested?

17 A Yes, I did.

18 Q Can you tell the jurors what that is, please?

19 A In this case, Item 1 I found to be the Schedule II
20 controlled substance cocaine hydrochloride, and Item 2 I found
21 to be the Schedule II controlled substance cocaine base, also
22 known as crack cocaine. The net weight of Item 1 was 27.88,
23 plus or minus 0.02 grams, and the net weight of Item 2 was
24 11.20 plus or minus 0.02 grams.

25 Q And these are the items that are -- this is the actual

Lewis - Direct

98

1 weight of the material without any packaging, is that correct?

2 A That's correct.

3 Q Okay. Now, you said there was a third item sent.

4 Generally, what was that sample? What was the appearance of
5 that item?

6 A That item was a plastic bag containing off-white hard
7 material.

8 Q Is there a reason you didn't test that?

9 A Yes, sir.

10 Q What is that reason?

11 A So in the drug chemistry section, we're allowed to select
12 items of evidence for analysis based on what we perceive to be
13 the most valuable item to the case. In this case, the most
14 important thing here was I was -- I was -- it was of my opinion
15 at the time that the material in it could possibly meet a
16 statutory threshold, so I worked the first two items, and those
17 two were able to meet that threshold, but I did not think that
18 the third item would put me above the next threshold.

19 Q And you're talking about thresholds in North Carolina
20 State courts, is that correct?

21 A Yes, sir. Per the North Carolina general statutes, the
22 threshold I was talking about was 28 grams.

23 Q And in looking at Government's Exhibit 154, is that a
24 final report you drafted as a result of your testing?

25 A Yes, sir. This is the report summary.

1 Q Okay. And is it accurate to the best of your knowledge?
2 A Yes, sir.

3 **MR. BARRETT:** Your Honor, I move admission of
4 Government's 154.

5 **MR. DOORASAMY:** No objection.

6 **THE COURT:** Government's Exhibit 154 is admitted.

7 **MR. BARRETT:** Request to publish, Your Honor.

8 **BY MR. BARRETT:**

9 Q And, again, Mr. Lewis, this is the results of the
10 examination of that material, 27.88 grams of hydrochloride and
11 11.20 grams of base, is that correct?

12 A Yes, sir.

13 **MR. BARRETT:** Thank you. No further questions, Your
14 Honor.

15 **THE COURT:** Cross-examination?

16 **MR. DOORASAMY:** Thank you.

17 CROSS-EXAMINATION

18 **BY MR. DOORASAMY:**

19 Q Is it correct that 28 grams is the threshold amount --

20 A Yes, sir.

21 Q -- for trafficking?

22 A Pardon?

23 Q For trafficking?

24 A For the state -- for the state -- for the North Carolina
25 General Statutes, yes, 28 grams.

1 Q And this was less than a trafficking amount of cocaine,
2 correct?

3 A The first item -- either item by itself, yes, but combined
4 it would be over that trafficking amount.

5 Q Yeah, but they're two separate substances, correct?

6 A Yes, sir.

7 Q So cocaine hydrochloride, as they would call it in state
8 court just cocaine, that's 27.88 grams, and that's less than
9 the trafficking amount of 28 grams, correct?

10 A Yes, sir, that's correct.

11 **MR. DOORASAMY:** I have no further questions.

12 **THE COURT:** Redirect.

13 **MR. DOORASAMY:** Sorry, just one more.

14 **BY MR. DOORASAMY:**

15 Q Now, you indicated that you tested these items in 2017,
16 correct -- '18?

17 A No, sir, I tested these in -- just a moment. I tested
18 these in 2018. They were submitted to the lab in 2017.

19 Q Okay. And these items are no longer available, correct?

20 A I've been informed that they were destroyed, yes, sir.

21 Q So you are not in a position today to look at it, refresh
22 your memory, and say that these are the items that you looked
23 at when it first came to you, correct?

24 A No, sir. I can't look at the physical evidence itself. I
25 can only look at this inventory sheet and compare the case

Johnson - Direct

101

1 numbers from that inventory sheet to the case numbers that were
2 submitted to me. I can't look at the physical evidence itself.

3 And if I may just clarify from one of my previous
4 answers, The State General Statutes don't make any distinction
5 between cocaine base and cocaine hydrochloride. It's just
6 listed as cocaine for the trafficking threshold.

7 **MR. DOORASAMY:** Okay. I have no further questions.

8 **THE COURT:** Anything?

9 **MR. BARRETT:** Nothing on redirect.

10 **THE COURT:** All right. You may step down, sir.

11 **THE WITNESS:** Thank you, Your Honor.

12 (At 2:01 p.m., witness excused.)

13 **MR. BARRETT:** Your Honor, may Mr. Lewis be released?

14 **MR. DOORASAMY:** No objection.

15 **THE COURT:** He may.

16 **MR. BARRETT:** Thank you. Your Honor, we call Paul
17 Johnson.

18 (Witness sworn by the clerk.)

19 **PAUL JOHNSON,
GOVERNMENT'S WITNESS, SWORN AT 2:03 P.M.
DIRECT EXAMINATION**

21 **BY MR. BARRETT:**

22 Q Could we have your name, please.

23 A Yeah, my name is Paul Johnson.

24 Q How are you employed?

25 A I'm a special agent with the ATF out of the Greensboro