No. 15-2371

United States Court of Appeals
for the Seventh Circuit

United States of America,
Plaintiff–Appellee,

v.

Miles Musgraves,
Defendant–Appellant.

Appeal from the United States District Court
For the Southern District of Illinois, East St. Louis Division
Case No. 3:13-cr-30276-MJR
The Honorable Michael J. Reagan

Brief of Defendant–Appellant Miles Musgraves

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Disclosure Statement

I, the undersigned counsel for the Defendant–Appellant, Miles Musgraves, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

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2. This party is not a corporation.

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Jurisdictional Statement

The United States District Court for the Southern District of Illinois had jurisdiction over Appellant Miles Musgraves's federal criminal prosecution pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on an indictment charging Musgraves with violations of 21 U.S.C. §§ 841, 846, 856, 860 and 18 U.S.C. §§ 922 and 924.

Musgraves's second superseding indictment was filed on June 17, 2014. (R.41.)[1] The case went to trial and a jury found him guilty on all five counts. On June 26, 2015, the district court sentenced Musgraves (A.45–54), and entered its judgment on June 30, 2015 (A.1). Musgraves filed his timely notice of appeal that same day. (R.158.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction of "all final decisions of the district courts of the United States" to their courts of appeal, and 18 U.S.C. § 3742, which provides for review of the sentence imposed.

[1] References to the sequentially paginated trial transcript shall be denoted as ([Date] Trial Tr. __), references to the sentencing hearing transcript as (Sent. Hr'g Tr. __), and references to the pretrial status hearings as ([Date] Hr'g. Tr. __). All other references to the Record shall be denoted with the appropriate docket number as (R.__). References to the material in the appendix shall be denoted as (A.__).

Statement of the Issues

I. Whether the government failed to prove that Musgraves was a member of a conspiracy to distribute cocaine, and that he possessed a handgun and distributed cocaine found in the presence and vehicle of another person.

II. Whether the July 2013 oral proffer agreement immunized Musgraves from statements he made to police in November 2013 when police officers proactively sought cooperation from Musgraves throughout this time period.

III. Whether the search warrant for Musgraves's home was not supported by probable cause when the officers omitted all information of the informants' credibility and reliability from the supporting affidavits to obtain the warrant.

IV. Whether the district court erred in relying on an unreliable prior conviction as a predicate offense for purposes of a Career Offender enhancement and a seven-fold increase in Musgraves's sentence.

Statement of the Case

The city of Alton, Illinois, is riddled with drug addiction, crime, and unemployment. (A.48–49; Sent. Hr'g Tr. 20); *see also, e.g.*, (3/17/15 Trial Tr. 3, 24, 64; 3/18/15 Trial Tr. 119); Kevin Hoffman, *The 25 Most Dangerous Illinois Cities*, REBOOT ILLINOIS (Dec. 5, 2014), http://www.rebootillinois.com/2014/12/05/editors-picks/kevin-hoffmanrebootillinois-com/25-most-dangerous-illinois-cities. In this community, family bonds can be strong but the lure of crime is often stronger. (Sent. Hr'g Tr. 20, 23.)

Appellant Miles "Lou" Musgraves typified this conflict. Like many in Alton, Musgraves's history is peppered with criminal activity, mostly for small-scale drug dealing and possessing a firearm as a felon. (R.138 at 4–5.) Notwithstanding his brief stints in prison, totaling less than 5 of his 42 years (R.138 at 4–5), he has played a central role in his three children's lives (Sent. Hr'g Tr. 24). He raised his eldest daughter, Ebony, when her mother became debilitated by drug addiction. (Sent. Hr'g Tr. 25.) His sisters also depend on him, and he was intimately involved in his mother's care during her fight with terminal cancer. (Sent. Hr'g Tr. 19.)

In this crime-riddled community, law enforcement has employed a variety of tactics to combat these problems. Chief among them was the use of confidential informants. *E.g.*, (3/16/15 Trial Tr. 39.) In August 2012 a drug user and repeat criminal offender named Thomas Tisdale contacted police, offering to buy drugs from a man he knew as "L"—later identified as Miles

Musgraves—in Tisdale's capacity as a confidential informant. (3/16/15 Trial Tr. 38–39; A.85.)

Alton police agreed, but poorly executed this "controlled buy." First, Tisdale's car was full of "junk" (3/16/15 Trial Tr. 124–25), which police acknowledged provided ample hiding places (3/16/15 Trial Tr. 130–31). And although police searched it before the undercover operation, officers left the car unlocked and unattended for a period after their search. (3/16/15 Trial Tr. 123–25.) During the buy, Tisdale broke police protocol by failing to travel directly between the police department and the buy location; his car ran out of gas, so he had to get a ride from a member of Musgraves's household to and from a gas station. (A.81–82; A.106–07; 3/16/15 Trial Tr. 54.) Then, the drugs police gathered from Tisdale were lost before trial—the casualty of an Alton Police evidence technician, who, in violation of police protocol, destroyed the sample after the Illinois State Police Crime Lab returned it from testing. (R.91 at 15–16.) Tisdale was arrested shortly after the buy and sent to prison. (3/16/15 Trial Tr. 85.)

Police did not immediately pursue Musgraves as a result of the Tisdale "controlled buy." Meanwhile, in late 2012, Romell Stevens, Musgraves' half-brother, was released from prison and returned to Alton. (3/17/15 Trial Tr. 4.) Stevens has a vast criminal record: 27 convictions, including at least five felonies during the ten years preceding the trial in this case, for crimes including drug distribution and possession of a firearm. (R.96 at 3–4.) Alton

community members and even Stevens's own sisters described him as an inveterate liar and opportunistic schemer. (3/18/15 Trial Tr. 92) (John Reynolds, former drug user turned minister, referring to Stevens and stating "if [his] mouth is open he is telling a lie"); (3/17/15 Trial Tr. 121) (Rhonda Musgraves testifying that she kicked Stevens out after she discovered that he was running his drug-dealing operation out of her basement). When Stevens was not living under the largesse of his family, he moved in with his drug buddies, buying, selling and using under their roofs, and generally creating trouble wherever he went. *See, e.g.*, (3/18/15 Trial Tr. 90–91, 123–24.)

Stevens moved in with Mark Gordon, a convicted felon and drug distributor. (3/17/15 Trial Tr. 3–4.) Stevens promptly began dealing drugs out of Gordon's apartment. (3/17/15 Trial Tr. 5.) Stevens repeatedly sold drugs to Donald Bock, another Alton drug user. (3/17/15 Trial Tr. 27.) On two occasions in early 2013, Stevens traded two of Bock's guns—one H&K handgun, and one AK-47-style rifle—for cocaine. (A.123–24.) After other residents in Gordon's building complained about Stevens (3/18/15 Trial Tr. 90–91), he moved into another home, this one owned by Kenneth Boner and his mother on Oscar Street in Alton (A.145). Both Boner and his mother sold pills from their home. (3/17/15 Trial Tr. 125.) Stevens resumed his drug sales there. (A.146.) Drug addicts, including prostitutes, frequently obtained drugs from Stevens at this home. (3/17/15 Trial Tr. 124.) This flurry of activity

surrounding Stevens eventually resulted in his arrest on July 9, 2013. (A.151.)

After his arrest, Stevens gave police information about illegal activity in Alton. (3/17/15 Trial Tr. 92–94) (Musgraves believed that Stevens alleged Musgraves was involved in illegal drug sales). Police interviewed Boner as a result of their investigation into Stevens. (2/6/15 Hr'g Tr. 71) (police acknowledged that a "separate investigation involving another defendant" led them to Boner, who implicated Musgraves in drug transactions). Although Stevens denied snitching on his brother (3/17/15 Trial Tr. 66), Alton police obtained a search warrant for Musgraves's home almost immediately after Stevens began talking.

Based on Boner's report and the prior Tisdale drug buy, police on July 10, 2013, sought a search warrant for Musgraves's home. (A.92; 3/16/15 Trial Tr. 101; R.61 at 10–13.) In support, the detective who prepared the application, Sergeant William Brantley, submitted two affidavits. The first, by Brantley himself, described the almost year-old "controlled buy" of drugs between Tisdale and Musgraves. (A.95–98; A.22–28; R.61 at 10–13.) Brantley identified Tisdale only by his confidential informant number—not by name—and did not disclose his criminal record. (A.89.) The issuing judge, James Hackett, would have known Tisdale if his name had been used in the affidavit because Judge Hackett had sentenced Tisdale several times. (R.61 at 12–13; A.89–90.) In addition to withholding Tisdale's identity, police did

not disclose that he had breached department protocol during the buy with his unplanned trip to the gas station. (A.81–85.) Regardless, as the government acknowledged, the controlled buy was too old to support probable cause on its own. (R.68 at 4.)

Like Tisdale, Boner was not identified in the second affidavit. (2/6/15 Hr'g Tr. 73, 79–80.) He was, instead, presented as a "John Doe." (2/6/15 Hr'g Tr. 63–65; A.71; A.77–88.) And although Boner appeared in person, the judge only asked Boner to affirm the contents of his affidavit—nothing more. (A.71.) Alton Police knew when they submitted the warrant application that Boner was often with Stevens when he cooked crack and sold it, and that he had even helped Stevens traffic drugs. (2/6/15 Hr'g Tr. 83–85.) The police did not disclose any of this to the court. In fact, Alton Police acknowledged that it was standard practice to include "just enough" information in affidavits to establish probable cause. (A.71–72.)

The judge issued the warrant and the police executed the search two days later, on July 12, 2013, at the home that Musgraves shared with his girlfriend at 1808 Sycamore Street. (A.92–94; R.68 at 1.) Although the warrant specified that police were allowed to search for controlled substances and related paraphernalia (A.92), police found no drugs, no paraphernalia, and no other evidence of drug dealing (R.61 at 5–6; R.41 at 2–3). Similarly, the search uncovered no "weapons of any form." (A.92.) Police did find three boxes of 9mm ammunition in a dresser that also contained some of

Musgraves's things. (R.61 at 6; 3/16/15 Trial Tr. 168.) Police arrested Musgraves because, as a felon, he was prohibited from possessing ammunition. (2/6/15 Hr'g Tr. 34; 3/16/15 Trial Tr. 29–30.)

Immediately following his arrest, Musgraves's attorney, Michele Berkel, went to the station and told the Alton Police that they should not interrogate Musgraves outside her presence. (2/6/15 Hr'g Tr. 12.) She learned that police were interested in obtaining information from Musgraves about criminal activity in Alton, and specifically about drugs and guns—their "highest priority." (2/6/15 Hr'g Tr. 14–16.)

Donald Boyce, the Assistant United States Attorney handling the case, was traveling the day of Musgraves's arrest. (A.56–57.) Police contacted Boyce on his cell phone, and Boyce indicated that if Musgraves wanted to cooperate under a proffer agreement, "it had to happen now." (A.56–57.) The Alton Police likewise were "absolutely adamant they wanted to proceed" and had "gone out of their way to make contact" with AUSA Boyce. (A.57–58.) Boyce told Berkel that she could "consider this to be a verbal proffer letter." (A.56–57.) Though hesitant at first, Berkel permitted Musgraves to enter into the oral proffer agreement that day. (A.56–59; *see also* A.15; R.60 at 2, 5.)[2] Brantley again spoke to Boyce via phone, and then explained the essence of the proffer agreement to Musgraves. Although Musgraves was not given full immunity, the Alton Police wanted him "to go do some work" for them and

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[2] Prosecutors later sent a written proffer agreement with additional terms and conditions, but Musgraves never signed it. (R.60 at 2–3.)

promised that as long as he cooperated, "all will be well." (A.58–59.) When Berkel pointed out that criminals in Alton might be suspicious of Musgraves given the search of his home and his arrest, Alton Police assured Berkel and Musgraves that they would give him until the end of the year to produce information. (A.59–60.) But within just a few weeks, lead Detective Kurtis McCray began pressuring Musgraves to provide information. (A.60–61.)

Between July and October 2013, Musgraves and McCray communicated frequently via phone and text messages; Musgraves even developed a code name for McCray: "Big Chief." (A.154–55.) For example, on September 17, 2013, Musgraves sent McCray a text message directing the police to an individual in possession of an assault rifle. (A.160–61.) On September 29, 2013, Musgraves assured McCray that he would have something soon. (A.161.) Later that day, McCray responded by telling Musgraves that the "time [had] come to either do something or not." (A.162.) McCray told Musgraves to "[t]hink long and hard about it" and that he had "a couple of weeks to figure it out." (A.163.) Musgraves continued to cooperate. On October 26, 2013, he provided McCray with the license plate of a car he believed contained a gun. (A.165.) McCray himself testified that Musgraves provided reliable information over the course of his cooperation. (3/18/15 Trial Tr. 24.)

Continuing this pattern of communication, on November 17, 2013, Musgraves again texted and called McCray with information. (R.67 at 3;

A.19.) This time, he reported that a man with a gun and cocaine was parked in a car in front of Musgraves's house. (R.67 at 3; A.19.) McCray was busy, so he suggested Musgraves call 911. (3/18/15 Trial Tr. 4–5.)

Someone called 911,[3] and when police arrived at the location they found Jesse Smith, a local drug user known to police, passed out, drunk, with crack cocaine in his pocket. (3/17/15 Trial Tr. 184–86; 3/18/15 Trial Tr. 5, 7, 30–31, 39.) Police arrested Smith. (3/18/15 Trial Tr. 9, 42.) Officers also found cocaine in a baggie in the car visor, but they did not find a gun during their initial search. (3/17/15 Trial Tr. 185–87.) Unbeknownst to the officers arresting Smith on November 17, police "had a sealed arrest warrant for Smith for illegal delivery of a controlled substance." (3/18/15 Trial Tr. 21–22.)

After McCray reported to Musgraves that police found drugs but no gun, Musgraves insisted that he had seen the man with a gun. (3/18/15 Trial Tr. 7–8.) McCray searched the car a second time at the impound lot, where officers finally uncovered a gun under the driver's seat. (3/18/15 Trial Tr. 9–12, 25–27.) Prosecutors initially charged Smith with two counts of possession with intent to distribute for the crack in his pocket and cocaine in his visor, but later dropped those, and instead charged Musgraves with one count related to the drugs in the visor and a second related to the handgun. (3/18/15 Trial Tr. 21, 45–46; 3/19/15 Trial Tr. 27–29.) The government's theory—one

[3] At trial, the government provided phone records indicating two 911 calls were placed from Musgraves's phone on November 17, 2013. (3/17/15 Trial Tr. 211–12.) Although the caller used the nickname "Big Chief" (3/17/15 Trial Tr. 215), McCray could not definitively identify the caller on the recording as Musgraves (3/18/15 Trial Tr. 23–24).

that dawned on McCray a few days after the incident (3/18/15 Trial Tr. 18–19)—was that Musgraves had "framed" Smith by placing those items in the car (A.183). McCray discovered that the serial number on the gun from Smith's car matched Bock's gun, which Bock had falsely reported stolen in early 2013. (3/18/15 Trial Tr. 14.) McCray then contacted Bock, who confessed to lying and admitted that he had actually traded the gun to Stevens for drugs. (3/17/15 Trial Tr. 28–38.) On November 15, 2013, police circled back to Stevens, who, pursuant to a proffer, told police that he had given Musgraves this gun in exchange for drugs. (3/18/15 Trial Tr. 2–3.)

On June 17, 2014, the government charged Musgraves in a five-count indictment with: (1) maintenance of a drug-involved premises near a school; (2) conspiracy to distribute cocaine; (3) felon in possession of ammunition; (4) felon in possession of a firearm; and (5) distribution of cocaine near a school. (R.41 at 1–3.) In November and December 2014, Musgraves filed a series of motions seeking to suppress the evidence from the July 12, 2013, search of his home, evidence from the Tisdale buy, and the statements made in the wake of his arrest. (R.60; R.61; R.65.) Relevant here, Musgraves claimed that his post-arrest statements to police were given under the promise that his statements would not be used against him. (R.60 at 3, 5.) Musgraves also sought to suppress the evidence obtained from the search because the affidavits supporting the warrant contained fatal factual deficiencies and omissions. (R.61 at 1, 15–20.)

The district court heard these motions on February 6, 2015. (A.9.) Berkel testified about the oral proffer agreement of July 12, 2013. (A.54–69.) McCray and Brantley explained their investigation of Musgraves, how they obtained the search warrant, the proffer agreement, and their contact with Musgraves in the months following it. (2/6/15 Hr'g Tr. 30–102.) The district court denied all of Musgraves's motions. (A.8–9.) The court accepted the government's representation that it would not seek to use Musgraves's July 12 statements, so it denied that motion as moot. (A.19.) As for the November 17 statements, the district court found no basis to suppress because Musgraves's statements were not made to a prosecutor, but rather to McCray. (A.21–22.) Finally, the court found the search warrant supported by probable cause and, even if not, Musgraves had not rebutted the presumption of officer good faith. (A.38–39.)

The case proceeded to trial. The government presented seventeen witnesses: six law enforcement officers; five forensic experts; and six lay persons, including four informants—Stevens, Bock, Boner, and Gordon. Each informant testified to using, buying, or selling drugs regularly. *E.g.*, (3/17/15 Trial Tr. 2, 24, 64, 157.) Stevens was the common link between these informants. He had lived with both Gordon and Boner, sold drugs from their homes, and frequently sold drugs to Bock. *E.g.*, (3/17/15 Trial Tr. 4–6, 26–28, 64.) These witnesses knew Stevens well and often engaged in illegalities with him. *E.g.*, (3/17/15 Trial Tr. 17–18, 43–44, 145.)

The informants, however, were generally or wholly unfamiliar with Musgraves. (3/17/15 Trial Tr. 20, 50–51.) Each witness testified that Stevens would sometimes get drugs from Musgraves and that when they went with Stevens to Musgraves's house—a total of five times among them—Stevens brought money or something else of value, such as guns or Vicodin, to buy a small amount of cocaine. (A.114–15; A.122–24; A.146–48.) None of the witnesses had ever been inside the house. (A.114–15; 3/17/15 Trial Tr. 50–51.)

Stevens played a central role at trial. Stevens vaguely estimated that he bought drugs from Musgraves ten to twenty times during early 2013. (A.131–32.) According to Stevens, Musgraves was interchangeable with many different sellers that Stevens also frequented. (A.132.)

The jury found Musgraves guilty on all five counts. (R.107–13.) During sentencing, as relevant here, Musgraves objected to the court's conclusion that he qualified as a Career Offender under the Guidelines. Musgraves claimed that one of the two convictions used for that sentencing enhancement—a conviction from 2006—was insufficiently reliable to serve as a predicate conviction. (R.131.) Specifically, although this prior count was charged as a Class X felony, requiring a minimum 9-year sentence, Musgraves was sentenced only to 25 months' imprisonment. (R.131.) According to Musgraves, because the sentence was either illegal or the felony mislabeled, the conviction was too confusing and indefinite to satisfy

Musgraves's due process right to be sentenced based on reliable information. (R.131 at 3.) The district court—and the government—recognized the confusion surrounding this conviction; for this reason the court opted not to use it for an Armed Career Criminal enhancement under 18 U.S.C. § 924(e). (A.47–48; A.189; A.195.) The district court also acknowledged the serious sentencing implications of applying the Career Offender enhancement, but nevertheless opted to apply it to Musgraves despite the collective confusion among the court, the government, and the defense and the uncertainty of the second predicate offense. (Sent. Hr'g Tr. 14, 35; A.192–95.)

Without Career Offender status, Musgraves's Guidelines range would have been 37 to 46 months' imprisonment, but applying the enhancement hoisted that range to 262 to 327 months, a nearly seven-fold increase. (A.46.) Finally, in imposing its sentence, the court relied on the government's theory that Musgraves framed Smith (Sent. Hr'g Tr. 33–34), and concluded that this was an aggravating circumstance that justified a high sentence (A.56) ("Of particular concern in this case is the framing of Jessie [sic] Smith. . . . And that behavior is simply dishonorable and unforgivable."). The district court sentenced Musgraves to 240 months' imprisonment. (A.1–3.)

Summary of the Argument

The government's case against Musgraves is filled with error and speculation. Therefore, this Court should vacate three of his five convictions, suppress evidence obtained in violation of the Fourth Amendment and a binding proffer agreement, and remand for resentencing.

First, the government failed to meet its burden in providing proof beyond a reasonable doubt on Counts 2, 4, and 5. The government based its conspiracy count on a handful of alleged drug transactions between Musgraves and his estranged half-brother, Stevens. But here, the government showed, at most, a buyer-seller relationship—not the more demanding evidence this Court requires for a drug distribution conspiracy.

The convictions on the two counts stemming from the cocaine and gun in Smith's car—felon in possession and distribution of a controlled substance—should be vacated due to a gaping deficiency in the evidence. Other than Musgraves's reporting of the contraband to police—pursuant to a proffer agreement—the government provided no evidence linking Musgraves to the gun or the cocaine on or around the date of the charged offenses. The government papered over this fatal deficiency by accusing Musgraves of "framing" Smith in order to meet the Alton Police's demands for information—a theory both unsupported and contradicted by the government's own evidence.

Second, the government's case against Musgraves was anchored in an unconstitutional search warrant. Officers knowingly omitted essential credibility

information from the affidavits used to obtain the warrant for Musgraves's home, and therefore the warrant was not supported by probable cause.

Third, even if the warrant was lawful, Musgraves entered into a proffer agreement with the government mere hours after the search, which continued through November 17, 2013. This proffer agreement prevents the government from using Musgraves's November 17 statements to police about the contraband found in Jesse Smith's car. The trial court erred in failing to suppress these statements that were made both at Alton Police's request and in fulfillment of his proffer agreement.

Finally, the district court erred in calculating Musgraves's sentence when it relied on a 2006 felony conviction to apply the Career Offender enhancement. The government, defense counsel, and court all agreed that the 2006 offense was unclear, confusing, and likely illegal. Applying an enhancement that increased Musgraves's sentence seven-fold based on an uncertain and unreliable offense violated Musgraves's constitutional right to due process.

In light of the insufficient evidence, the convictions on conspiracy to distribute cocaine, felon in possession, and distribution of cocaine should be vacated. At a minimum, this Court should remand for a new trial without use of Musgraves's statements. Finally, this Court should remand this case to the district court for resentencing without the Career Offender enhancement.

Argument

I. The government presented insufficient evidence to prove Musgraves guilty beyond a reasonable doubt of conspiracy, of being a felon in possession, and of drug distribution.

As the prosecutor conceded during closing arguments, "I told you at the beginning our case wasn't perfect. It is not." (3/19/15 Trial Tr. 16.) These "imperfections" led to so many gaps in the evidence that the jury's decision had to be based on speculation and conjecture. First, the conspiracy conviction was based on just a few quid pro quo transactions that, under this Court's cases, establish nothing more than a buyer-seller relationship. Second, the convictions for felon in possession of a firearm and drug distribution were founded on a convoluted framing theory—hatched by the government—with no basis in evidence.

A. The conspiracy conviction in Count 2 must be overturned because the government proved nothing more than a buyer-seller relationship between Musgraves and Stevens.

The government's indictment alleged that Musgraves and his half-brother Stevens engaged in a drug-distribution conspiracy. Yet its evidence at trial fell far short, pointing only to a handful of occasions over six months where Stevens bought small quantities of drugs from Musgraves and resold some of them to his own customers. At most, the evidence established a buyer-seller relationship, not the separate agreement required to sustain a conspiracy conviction. *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010) (holding that "a conviction for conspiracy to distribute drugs cannot be sustained *solely* on circumstantial evidence if the evidence contains no basis for the jury to distinguish the alleged conspiracy from

the underlying buyer-seller relationship") (emphasis original); *United States v. Pulgar*, 789 F.3d 807, 812 (7th Cir. 2015) (noting that in order to meet its burden of proof, the government "must prove an agreement to distribute drugs that is *distinct from* evidence of the agreement to complete the underlying drug deals") (emphasis original).

In carefully drawing the lines between buyer-seller relationships and conspiracies, this Court has required the government to prove at least some of the following factors: (1) sales on credit or "fronting"; (2) an agreement to look for other customers; (3) a payment of commission on sales; (4) an indication that one party advised the other on how to conduct business; and (5) an agreement to warn of future threats to each other's business stemming from competitors or law-enforcement authorities. *Johnson*, 592 F.3d at 755–56; *Pulgar* 789 F.3d at 810. The court considers these factors using a "totality of the circumstances approach"; factors are not necessarily accorded equal weight. *Pulgar*, 789 F.3d at 813; *see also Johnson*, 592 F.3d at 757 (explaining the importance of credit in distinguishing a conspiracy and giving less weight to mutual trust). Significantly, mere repeated transactions, resale of drugs to the buyer's own customers, and agreements to exchange drugs for money or something of value is **not enough** to sustain a conspiracy conviction. *See, e.g.*, *Johnson*, 592 F.3d at 755; *United States v. Kincannon*, 567 F.3d 893, 897 (7th Cir. 2009) ("An agreement to exchange drugs for money (or something else of value)—the crux of the buyer-seller transaction—is insufficient to prove a conspiracy."); *United States v. Colon*, 549 F.3d 565, 567 (7th

Cir. 2008) (finding that a "standardized" relationship between a seller and buyer whose "sales formed a regular pattern" was insufficient to sustain a conspiracy conviction).

The government's evidence coalesced around the very facts that this Court has held insufficient to establish a conspiracy, as the government's preview of the evidence during opening statements shows. (A.124) ("You will hear Romell would bring money over the house and come out with drugs. He would sometimes bring other things to the house and come out with drugs, things that the defendant would presumably be able to trade for something of value, things like different drugs, pills, things like that.") Further, the government did not prove any collection of the requisite factors in a way that would allow a rational juror to conclude that what occurred between Musgraves and Stevens was anything more than a mere buyer-seller relationship. Thus, at most, the government proved a few transactions and the exchange of money or other valuables for drugs.

Specifically, four witnesses testified to transactions between Stevens and Musgraves. Three of those witnesses described five distinct transactions over six months at the most. (A.114–15; A.123–25; A.146–48.) In each of these transactions, the witnesses testified only that money, pills, or, in one alleged instance, guns were traded for cocaine. (A.114–15; A.124–25; A.146–48.) Even the government's star witness, Stevens, only vaguely testified that he bought drugs a total of ten to twenty times from Musgraves. (A.132.) Significantly, he also testified that he purchased drugs from many different dealers; he did not maintain an exclusive or even

preferential relationship with Musgraves. (A.132) (Stevens testifying he "would go a lot of different places. There was a lot of different people who I could go to and get drugs from . . . a lot of times [Musgraves] wouldn't have any drugs so I would go other places to get drugs . . ."); *see also* (A.137–38) (Stevens testifying that he would frequently buy drugs from suppliers other than his brother when reselling to Bock because Bock did not like to wait). This Court has found this kind of supplier indifference indicative of a mere buyer-seller relationship. *Colon*, 549 F.3d at 567.

Not only did the government's evidence only support a mere buyer-seller relationship, none of its evidence established the critical factors that this Court has required to prove a conspiracy under a totality of the circumstances. ***First*,** the record is devoid of evidence of credit transactions or "fronting," which this Court has found essential—though not singly sufficient—to establish a conspiracy. *United States v. Long*, 748 F.3d 322, 326 (7th Cir. 2014) *cert. denied sub nom. Coprich v. United States*, 134 S. Ct. 2832 (2014) (explaining that fronting is significant because a supplier understands that the debtor will need to resell the drugs in order to pay his debt and thus creditor and debtor "share the common objective of reselling the drugs since resale is the means of closing out the credit transaction"). No evidence shows that Musgraves sold Stevens drugs on credit frequently, in large quantities, or at all. In fact, all the government's evidence weighs against the existence of any credit relationship. All five transactions illustrated by the government's witnesses show a quid pro quo transaction in which Musgraves sold drugs to Stevens for something of value in return, money, other drugs, or guns. Each transaction was

also for a small amount of cocaine. *See, e.g.*, (A.130–31) (Stevens testifying that he would get "small amounts" of cocaine from his brother: "maybe $50 or $100 worth, one gram, two grams"); (A.146–47) (Boner testifying that Stevens agreed to trade one gram of cocaine for some Vicodin pills).

Second**,** the government offered no evidence of an agreement that Stevens would search for more customers on Musgraves's behalf. This Court has repeatedly held that evidence showing that a drug purchaser resold the drugs to his "own customers" does not prove a conspiracy. *United States v. Vaughn*, 722 F.3d 918, 928 (7th Cir. 2013). Stevens testified that he sold drugs to various purchasers that he considered his own customers, which is exactly the type of evidence that this Court has held insufficient as proof of conspiracy. (3/17/15 Trial Tr. 129) (Stevens testifying "that [I] called them [my] customers").

Third, the government offered no proof of commissions on sales, which this Court has found indicative of a conspiratorial relationship. *Pulgar*, 789 F.3d at 813 (considering "payment of commission on sales" as circumstantial evidence of a conspiracy).

Fourth, Stevens never testified that Musgraves advised him on how to conduct his drug business. *Colon,* 549 F.3d at 568. To the contrary, Stevens emphasized that he ran his own business in his own way. (A.132; A.137.)

Finally, the government showed no agreement between the two to warn of threats during the pendency of the conspiracy. *Johnson*, 592 F.3d at 757 (considering this factor and finding that a "singular warning" or behavior consistent

with "self-preservation" are insufficient to establish a conspiracy). Although, there was some testimony of jailhouse communications between Stevens, Musgraves and assorted intermediaries (3/17/15 Trial Tr. 92), these communications occurred after the end of the alleged conspiracy (R.41 at 1). The government failed to establish any of the factors necessary to establish a conspiracy beyond a reasonable doubt. Considering the sum of the evidence, the government at most proved a mere buyer-seller relationship.

B. This Court should vacate Musgraves's convictions on the counts related to the contraband found in Smith's car.

The government's evidence against Musgraves on the two counts stemming from the contraband found in Smith's car—Count 4, felon in possession, and Count 5, cocaine distribution—was so lacking that the jury had to stack one speculative inference onto another in order to find Musgraves guilty beyond a reasonable doubt.

To withstand a challenge to the sufficiency of the evidence, each link in the chain of inferences the jury made must be "sufficiently strong to avoid a lapse into speculation." *United States v. Moore*, 572 F.3d 334, 337 (7th Cir. 2009) (quoting *United States v. Jones*, 371 F.3d 363, 366 (7th Cir. 2004)). Although this Court has labeled challenges to sufficiency of the evidence "nearly insurmountable," *United States v. Teague*, 956 F.2d 1427, 1433 (7th Cir. 1992), it does not hesitate to overturn convictions when the evidence falls short, either because of a wholesale failure to provide evidence of an element of the crime, or because the evidence on which the government relies is too attenuated or speculative to support a guilty verdict. *E.g.*, *United States v. Griffin*, 684 F.3d 691, 698–99 (7th Cir. 2012).

This is such a case. Counts 4 and 5 are premised on mere conjecture, a story that McCray conjured up in the middle of the night, and one that ignores contradictory evidence. (A.167–69.) No evidence showed that Musgraves exercised actual or constructive possession over the weapon on or around the date of the charged offense, so the government has failed to prove an element of Count 4. Nor is there a shred of evidence that the cocaine found mere feet from Smith, in his car's visor,[4] came from Musgraves. These convictions should be vacated.

1. *The government failed to prove that Musgraves actually possessed, on or around November 17, the handgun police found in Smith's car because the only evidence placing Musgraves within proximity of the gun occurred well before, and was four months after police searched his home and failed to find any firearms.*

Even though there was no evidence—not fingerprint, not DNA, and not witness testimony—placing the gun with Musgraves any time in the days, weeks, or month, leading up to its November 17 discovery, the government charged Musgraves with felon in possession. To find a defendant guilty of this crime, the government must prove three elements: (1) the defendant was previously convicted of a felony; (2) the defendant possessed a firearm; and (3) the firearm traveled in or affected interstate commerce. 18 U.S.C. § 922(g)(1); *United States v. Morris*, 349 F.3d 1009, 1013 (7th Cir. 2003). At issue here is the possession element, which can be either actual or constructive. *Morris*, 349 F.3d at 1014.

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[4] In its case, the government wholly ignored the drugs found in Smith's pocket, never accounting for its arbitrary decision to hold Musgraves accountable for just one of two sets of drugs found in the car. Trial testimony suggested the government charged only one of the counts because it tested only one of the substances found. (3/18/15 Trial Tr. 66–67) (Illinois State Police Crime Lab forensic scientist testifying that she tested only the powder substance because it "met the weight penalty").

Count 4 charged Musgraves with possessing the gun on or about November 17, 2013. (R.41 at 2–3.) Under its own theory—"that the defendant snuck out there that morning and framed Jesse Smith, put that gun underneath the seat"—the government was obligated to *prove,* not merely suggest, that Musgraves had the gun on or about that date. (A.188) (government's closing argument). The government relied on two inadequate facts in attempts to prove the possession element: (1) two witnesses' testimony that Stevens brought that same gun into Musgraves's house roughly nine or ten months before its discovery in Smith's car (A.138–44 (Stevens); A.123–25 (Bock)); and (2) Musgraves's report to police that a man in a car on his street had a gun and drugs—information about illegal activity that the police repeatedly sought from Musgraves in the prior three months (2/6/15 Hr'g Tr. 42–43; 3/18/15 Trial Tr. 4–8; R.67 at 3). Neither fact, standing alone or in concert, satisfies the government's burden of proving possession beyond a reasonable doubt. No rational juror could have concluded that a gun taken into Musgraves's home in early 2013 meant that it was still there nine or ten or eleven months later.

a. Jurors had to lapse into speculation to find Musgraves actually possessed the gun around November 17, 2013, because the government's own evidence indicated that he did not have the weapon for many months preceding its discovery.

There was no evidence of actual possession, which occurs when an individual "knowingly maintains physical control over an object." *United States v. Stevens*, 453 F.3d 963, 956 (7th Cir. 2006). The government's only evidence suggesting Musgraves ever had actual possession of the gun came from Bock and Stevens.

Even putting aside the dubious reliability of these two witnesses, hoping for leniency in their own cases in exchange for their testimony (3/17/2015 Trial Tr. 40, 108), they only placed Musgraves with the gun in early 2013, which is insufficient to sustain this conviction for possession many months later. *See United States v. Thomas*, 321 F.3d 627, 636 (7th Cir. 2003).

Bock falsely reported his gun stolen in March—a full nine months before police found it in Smith's car. The initial gun-for-drugs trade that Stevens alleged he made with Musgraves and Bock predated Bock's false police report.[5] To convict Musgraves on the possession count, the jury had to lapse into speculation at four different points, each of which undermines a finding that Musgraves had possession of the weapon on or around November 17, 2013.

First, jurors had to ignore Stevens's testimony that Musgraves told him he did not keep guns in his home and that he planned to get rid of it. (A.142) ("He said he didn't want to keep it. . . so he said he was going to get them out of there and especially he didn't want to keep guns around the house. He wasn't like that."). Stevens testified that Musgraves made these statements during the alleged initial trade in early 2013. Here, jurors had to both believe some of what Stevens said—the

[5] At trial, the government falsely intimated that only two days elapsed between when Stevens took the gun into Musgraves's home and when police searched Smith's car. (A.182) ("Romell told the police on [November] 15th . . . about how he gave the gun to Lou . . . . So on the 15th he says I gave that gun to Lou. On the 17th it shows up under Jesse's car seat in front of Lou's house. That is certainly enough to show that Lou possessed the gun.") Of course, although Stevens relayed the story to the police on November 15, he was describing an incident that had occurred in early 2013, before Bock's false police report in March of that year. (3/18/15 Trial Tr. 9.)

trade—and reject a different part of it, in which Musgraves told Stevens he was going to get rid of the weapon.

Second, police did not find any weapons[6] during their July 12, 2013, search of Musgraves's home. (R.60 at 1.) Thus, even if Musgraves took possession of the gun in early 2013, he did not possess it in July during the search. To convict, jurors had to conclude the Alton Police's unannounced search of Musgraves's home—which uncovered ammunition—somehow missed the weapon. (R.61 at 5–6); *see also* (3/16/15 Trial Tr. 148) (Brantley admitting during cross-examination that that the warrant was executed in a manner meant to surprise the residents).

Third, jurors had to believe Musgraves held on to the gun even when he knew police were scrutinizing him in the wake of his arrest, his agreement to collaborate with the police, and his hope of leniency. Possessing a gun would have jeopardized his agreement with the government and risked additional charges. The government provided no explanation of this unlikely reality, once again leaving jurors to speculate.

Finally, jurors had to believe that Musgraves planted the weapon and drugs in the hours between when Smith arrived at Musgraves's house for the party, sometime after 3 a.m., and when Musgraves began texting McCray around 9 a.m. (3/18/15 Trial Tr. 3, 43.) Yet the government never tried to explain how Musgraves could have spotted Smith passed out in the car, walked to the car, opened the front door, placed the drugs in the front visor, shut the front door, opened the back door,

[6] Police found neither the H&K handgun later recovered from Smith's vehicle, nor the AK-47 Bock also said he traded Musgraves for cocaine. (R.61 at 5–6.)

wedged the gun underneath the driver's seat[7], and closed the back door—all without disturbing Smith, who was inside. *See* (3/18/15 Trial Tr. 11–14) (government's witness testifying that the way the gun was found under the seat suggests that it was placed there from the backseat).

Guilt cannot be premised on such conjecture. *See Moore*, 572 F.3d at 341. The temporal remoteness between when Musgraves allegedly had the gun and the date of the felon in possession count, coupled with the intervening search of Musgraves's home, lays bare the fatal gaps in the government's case.

b. *No evidence showed Musgraves constructively possessed the handgun at or around the date of the charged offense.*

Nor was there evidence of constructive possession. A person constructively possesses an object if he has the ability and intention to exercise discretion or control over the object, either directly or through others. *Stevens*, 453 F.3d at 965. This Court demands the government establish a "nexus" between the defendant and the relevant item in constructive possession cases. *Morris*, 576 F.3d at 666. The "nexus" typically is shown in one of two ways, *id*. at 667, neither of which the government proved here.

The first way the government can prove the nexus is by demonstrating the defendant had exclusive control over the property where the contraband was discovered. *Id*. Exclusive control over the premises allows the jury to infer the individual had the knowledge and intent to control objects within it. *Griffin*, 684

[7] Detective McCray could not rule out that the gun had shifted positions between the initial search and towing process and when it was discovered three days later at the impound lot. (3/18/15 Trial Tr. at 26–27, 30.)

F.3d at 695. This rule precludes the mere proximity between the individual and the object as establishing possession.

But here, the nexus could not be established this way because Musgraves did not have exclusive control of Smith's car. Neither Smith's testimony nor any other evidence showed Musgraves had *any*—let alone *exclusive*—control of Smith's car. No evidence even showed that Musgraves entered the car. And Smith, who crawled into his car after a short stay at a party and presumably remained there until police found him passed out with the drugs in his pocket the next morning, did not say Musgraves—or anyone else—entered his car.

Furthermore, Musgraves's own text messages to McCray stated that he "saw" the gun, not that he had been in the car. Just as mere proximity to an object is insufficient to establish constructive possession, mere knowledge cannot establish it either.

In the absence of exclusive control, the government can establish the requisite nexus by showing the defendant had a "substantial connection" to both the location of the seized contraband and the contraband itself. *Griffin*, 684 F.3d at 696–97. A substantial connection is shown when the defendant had an established association or presence in the place where the contraband was found—not merely a fortuitous, simultaneous presence. *E.g.*, *United States v. Windom*, 19 F.3d 1190, 1200–01 (7th Cir. 1999).

Here, again, the government's case comes up short. No evidence suggested, let alone proved, that Musgraves had a "substantial connection" to Smith's car.

Musgraves's messages to McCray showed only his awareness of the vehicle parked on Sycamore Street. In addition, there was no substantial connection between Musgraves and the gun. *See Griffin*, 684 F.3d at 696–97. As discussed above, the only evidence connecting Musgraves to the weapon was stale by at least nine months.

The lack of proximity between Musgraves and the contraband fatally undermines a finding of constructive possession. In short, unsupported theories of frame-ups, conjured by police, cannot justify a conviction. This Court should vacate Count 4.

2. *The drug distribution conviction should be vacated because the government presented no evidence that Musgraves placed or caused the placement of the cocaine in Smith's car.*

The government provided *no* evidence showing that Musgraves distributed a controlled substance—the powder cocaine found in Smith's car visor. Even more than the felon-in-possession count, this count is based on mere speculation. *See Moore*, 572 F.3d at 341. The sole connection between Musgraves and the cocaine found in Smith's car was his report of it to police. But, again, Musgraves's communication with McCray showed nothing more than *knowledge* of the cocaine, not *distribution*.

To prove distribution of a controlled substance, the government must show that the defendant delivered or transferred possession of the substance, or that the defendant caused another person to deliver or transfer the substance to another. 21 U.S.C. § 841(a)(1). Here, the government contended Musgraves personally

distributed the cocaine found with Smith in his car—not that Musgraves caused another person to do so. (A.183) ("It is shameful, but he did that. He framed Jesse Smith . . . . A man who has his own problems, has a prior, has a pending case. Good target to frame a guy with a history passed out drunk in front of your house, your moment of opportunity."). Yet the suggestion that Musgraves distributed the cocaine in Smith's vehicle came solely from the government. *See United States v. Harris*, 230 F. 3d 1054, 1057 (7th Cir. 2000) (rejecting constructive possession of a weapon found in the place where defendant worked because the only suggestion that defendant exercised ownership, control, or dominion over the weapon came from the "mouth of the government's attorney").

The government alleged Musgraves "framed" Smith to alleviate the pressure McCray exerted on Musgraves to provide information pursuant to his proffer agreement, but this theory is undermined by the six-week delay between McCray's September 29, 2013, ultimatum and the Smith incident in November. (3/17/15 Trial Tr. 206; A.19.) The government piled the drugs found in Smith's car onto its framing theory, never explaining why Musgraves would plant a gun and drugs on Smith, when any one of them alone would have satisfied its framing theory. (A.182–83.) Musgraves's continued cooperation with McCray after the purported ultimatum in September also undercuts the government's theory that Musgraves orchestrated the incident in order to fulfill his obligations under the proffer. (A.165) (testimony regarding Musgraves's October 26, 2013, report to McCray of the license plate of a car which contained a gun).

In any event, the trial record contains no evidence that the drugs found in Smith's car originated with Musgraves, let alone that he planted them there. No witness testified that Musgraves had cocaine on or around November 17. And Stevens was the only person—aside from Tisdale in the unpursued controlled buy in 2012—who allegedly bought drugs from Musgraves. (A.171–74) (government, in closing, noting that none of its witnesses who alleged drug sales entered Musgraves's home or had any personal contact with him). Yet Stevens was in prison beginning in early July 2013. (3/17/15 Trial Tr. 91–92.) Furthermore, Alton Police's July 2013 search of Musgraves's home unearthed no drugs. (3/16/15 Trial Tr. 157–59.) Finally, no witness reported seeing Musgraves put the cocaine in Smith's car, or even approach it, as the government conceded. (A.184) (noting "[t]here were no witnesses" to the alleged planting). Police opted not to test the bags holding the cocaine—neither the crack in Smith's pocket, nor the powder in the visor—for DNA or fingerprints. (3/18/15 Trial Tr. 37.)

Not only did the government fail to produce sufficient affirmative evidence of Musgraves's guilt, it also failed to exclude the most likely source of the cocaine in the car visor: Smith himself. "[A] conjecture consistent with the evidence becomes less and less a conjecture, and moves gradually toward proof, as alternative innocent explanations are discarded or made less likely." *Moore*, 572 F.3d at 341. Smith was passed out, drunk, in his car when police arrived and found cocaine in his pocket and in his car's visor. (3/17/15 Trial Tr. 185; 3/18/15 Trial Tr. 44.) The government chose not to attribute the cocaine found in Smith's pocket to

Musgraves, probably realizing that the jurors would be less likely to believe that Musgraves reached into a man's pocket to plant drugs.

But the government's choice to ignore one set of drugs means that it also implicitly failed to disprove the most logical explanation of the presence of drugs in Smith's car: that Smith himself placed them there. After all, as the government explained to the jury, Smith is "[a] man who has his own problems, has a prior, has a pending [drug] case." (A.183.) And if he was responsible for the drugs in his pocket, the government should have explained why he was *not* responsible for the drugs in his car visor too.

Smith was of no help in this regard at trial. Although he denied knowing how drugs ended up in his pocket and his car visor, and how the gun got underneath his seat, it is undisputed that he had virtually blacked out. Smith recalled only going to Musgraves's house around 3 a.m., and leaving about twenty minutes later. (3/18/15 Trial Tr. 43, 49); *see also* (3/18/15 Trial Tr. 51) ("All I remember is getting in the car and I don't even remember nothing else."). Smith could not recall how he even got into his car. (3/18/15 Trial Tr. 51) ("I thought I fell asleep in the back seat. Come to find out, I was in the front seat."). With no evidence that Musgraves walked those drugs outside and put them in Smith's car, let alone touched them, the government failed to sustain its burden.

II. The district court erred in failing to suppress the November 17, 2013, statements made to Alton Police officers via phone and text message.

An oral proffer agreement entered into with police officers acting at the direction and as agents of the prosecutor exists for as long as the parties' reasonable

expectations support it. Here, the parties had a reasonable expectation that all of Musgraves's statements between the date of the agreement and November 17, 2013, were made pursuant to the agreement and as part of Musgraves's continued cooperation. And even if the proffer did not explicitly encompass the November 2013 statements, they should have nonetheless been suppressed as involuntary. This Court reviews the validity of a proffer agreement de novo. *See, e.g.*, *United States v. Bennett*, 708 F.3d 879, 885 (7th Cir. 2008).

A. Musgraves entered into a valid oral proffer agreement on July 12, 2013, with agents of the prosecutor that remained in effect through November 2013.

An oral proffer agreement with an agent of the prosecutor is valid and continues when the agent repeatedly requests information under the guise of that agreement. Proffer agreements are binding contracts, governed by basic principles of contract law. *United States v. $87,118.00 in U.S. Currency*, 95 F.3d 511, 516 (7th Cir. 1996); *see also United States v. Melvin*, 730 F.3d 29, 37 (1st Cir. 2013) ("[T]he meaning of a proffer agreement [is] . . . guided chiefly by contract-law principles."). A "promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct." RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981); *see also, e.g.*, *United States v. Williams,* 809 F.2d 1072, 1082 (5th Cir. 1987) (holding that an informal grant of immunity can be binding); *Padilla v. United States*, No. EP-10-CR-745-PRM-1, 2013 WL 8476167, at *5 (W.D. Tex. Oct. 24, 2013) ("A valid oral agreement is just as binding on the Government as a written proffer agreement.");

Bludson v. Superintendent, No. 9:06-cv-474, 2009 WL 704487, at *6 (N.D.N.Y. Mar. 16, 2009) ("[B]y their nature, many proffer agreements are entered into orally.").

Proffer agreements are contracts but of a special kind, "supplemented with a concern that the bargaining process not violate the defendant's rights to fundamental fairness under the Due Process Clause." *United States v. Farmer*, 543 F.3d 363, 374 (7th Cir. 2008). Therefore, to ensure the integrity of the bargaining process in proffer agreements, "[a]ny agreement made by the government must be scrupulously performed and kept." *United States v. Lyons*, 670 F.2d 77, 80 (7th Cir. 1982).

Whether written or oral, the existence and meaning of a proffer agreement is determined by the parties' reasonable expectations. *Carnine v. United States*, 974 F.2d 924, 930 (7th Cir. 1992). This Court has emphasized that "the essence of the particular agreement and the Government's conduct relating to its obligation in that case" are determinative. *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981).

Here, it is uncontested that Musgraves and the government entered into a valid and binding oral agreement under "standard proffer letter" terms, which granted Musgraves limited immunity. (A.15; R.60 at 2, 5.) Given the extraordinary implications of a proffer agreement, Musgraves's attorney expressed concerns about proceeding via verbal proffer. (A.56–57.) The government, however, insisted on proceeding urgently in this fashion, indicating that if Musgraves wanted to cooperate, he needed to do so at the station. (A.56–57.) Alton Police likewise exerted

pressure, "absolutely adamant" that Musgraves immediately proceed with the proffer. (A.57–59.) And Alton police officers did in fact interview Musgraves on July 12, 2013, pursuant to the oral proffer agreement (A.61.)

Alton police wanted Musgraves to provide assistance in their drug and gun enforcement efforts. (A.55–56.) The essence of the proffer agreement, as communicated to Musgraves by the Alton Police, was that the police wanted Musgraves "to go do some work for us and as long as [Musgraves] cooperate[d], all will be well." (A.59.) According to Musgraves's attorney, Musgraves "rel[ied] upon the assurances this was a verbal proffer letter" (A.59), and cooperated with police and prosecutors as a result.

1. *Alton Police and McCray acted as agents of the prosecutor during the July 2013 proffer interview.*

A police officer who serves as the direct intermediary for the prosecutor and the only point of contact for the defendant acts with apparent authority and is an agent of the prosecutor for statements made pursuant to a proffer agreement. An agent acts for the principal with apparent authority when a third party "reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006). When the principal does nothing to correct this manifestation, he is estopped from denying the existence of an agency relationship. *Id.* § 2.05. A principal is bound by the agreements of an agent when that principal holds the agent out to a third party as having the appearance of authority. *See id.* § 6.01.

This Court has recognized that federal common law of agency is in accord with the Restatement of Agency. *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1064 (7th Cir. 2000). These same principles apply in the context of proffer agreements. *See United States v. Millard*, 139 F.3d 1200, 1205 n.4 (8th Cir. 1998) (holding inadmissible statements made to a federal agent where the agent represented that he was working directly with a particular government attorney); *cf. United States v. Keith*, 764 F.2d 263, 266 (5th Cir. 1985) (recognizing that certain circumstances may "fall within [an] exceptional situation that might make plea negotiations with other than an attorney inadmissible," where the accused has a reasonable expectation to negotiate a plea at the time of the discussion).[8] "Without such an exception, government attorneys might attempt to avoid the operation of [Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410] by authorizing law enforcement officials to conduct plea negotiations." *United States v. Grant*, 622 F.2d 308, 313 (8th Cir. 1980).

This Court has previously rejected attempts to extend the scope of a proffer agreement to statements made to law enforcement rather than directly to the prosecutor. For example, this Court found there was no agency relationship when there was no evidence that the law enforcement agent purported to be working on behalf of the prosecutor and made only general statements regarding cooperation

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[8] Federal Rule of Criminal Procedure 11 states that the admissibility of "any related statement" to a plea discussion is governed by Federal Rule of Evidence 410. FED. R. CRIM. P. 11(f). Under Rule 410, a statement made during plea discussions "with an attorney for the prosecuting authority" is inadmissible. FED. R. EVID. 410(a)(4). As discussed here, because Musgraves made statements to agents of the prosecuting authority under the terms of a proffer, Rule 11 bars the introduction of any related statements.

leading to a "better outcome." *United States v. Brumley*, 217 F.3d 905, 910 (7th Cir. 2000). Similarly, statements made to police officers "with the hope for leniency" are not covered by the scope of a proffer agreement. *United States v. Springs*, 17 F.3d 192, 195 (7th Cir. 1994). Thus, a freely tendered statement with the unilateral and amorphous goal of obtaining leniency at some later point will not serve as the basis to extend Rule 11(f) to non-prosecutors. *See Brumley*, 217 F.3d at 910. But this rule is not absolute.

Courts have suppressed statements made to law enforcement agents on the basis of a proffer agreement when there is evidence that the agent is working on behalf of the prosecutor. *Millard*, 139 F.3d at 1205 & n.4. In *Millard*, the Eighth Circuit found that statements made to an agent rather than a prosecutor fell within the scope of the proffer agreement when the agent told one of the defendants "that we [the AUSA and the agent] would offer him a particular deal" if he was interested in cooperating, and telephoned the AUSA during the course of the conversations to discuss the deal. *Id.* at 1205 n.4. The court found it significant that the law enforcement agent represented to the defendants that he was working directly with a particular AUSA.

Here, Alton Police officers represented through their words and deeds that they were working directly with, and as agents of, AUSA Boyce. The Alton officers were extremely interested in Musgraves's assistance and cooperation, so much so that they insisted on proceeding immediately, contacting Boyce on his cell phone while he was traveling to secure the verbal proffer agreement. (A.57–58.) The

officers served as the direct contact to AUSA Boyce, pressured Musgraves to proceed with the proffer agreement, and discussed the agreement in the presence of Musgraves. (A.57–59.)

2. *McCray continued to act with apparent authority through November 2013 and actively sought information pursuant to the oral proffer agreement.*

Apparent authority exists for as long as it is still reasonable for the third party to believe that the agent is acting with actual authority. RESTATEMENT (THIRD) OF AGENCY § 3.11(2) (2006); *cf. Barco Urban Renewal Corp. v. Housing Auth. of the City of Atlantic City*, 674 F.2d 1001, 1009–10 (3d Cir. 1982) (reasoning that even though the parties did not specify the duration of a contractual right, the duration was to be a reasonable time as determined by the circumstances). It is well understood that "[v]alid contracts are often made which do not specify the time for performance," and any indefiniteness may be given meaning by the actions of the parties. RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. d (1981); *id.* § 33 cmt. a.

Here, the conduct of the Alton Police perpetuated the continuing operation of the oral proffer agreement through November 2013. Between July 2013 and October 2013, McCray and Musgraves stayed in regular contact via phone calls and text messages. (A.154.)

During the initial July 12, 2013, proffer interview, Alton Police conveyed "that their highest priority was the removal of guns from the streets." (A.55–56.) Musgraves's job was to provide information that would further that goal. (A.55–56.) And because the parties recognized in July 2013 that Musgraves would need time to

build trust on the streets following his widely known home search and arrest, the parties agreed that the exchange of information would take several months. (A.59–60.) Consistent with this understanding, on September 17, 2013, Musgraves directed McCray to an individual who had an AK-47 assault rifle. (A.161.) On September 29, 2013, Musgraves texted McCray, apologizing for a lack of recent communication due to family issues and telling McCray that he should have information within a week or two. (A.161.) Again, on October 26, 2013, mere weeks before the November 17, 2013, statements, Musgraves provided McCray with the plate number of a car that had a gun inside. (A.165.)

This pattern of cooperation and flow of information between McCray and Musgraves continued in the same manner through November 2013. On November 17, 2013, Musgraves once again attempted to assist the Alton Police by contacting them about the gun and drugs in Smith's car. (A.63–64; A.19.) McCray, too, "believed there was still a cooperative agreement" (A.67–68), and that Musgraves was "cooperating to assist the police and to assist himself as far as getting consideration on his case" (A.67). The only reasonable conclusion is that Musgraves expected the government to uphold its end of the bargain as well.

B. The November 17, 2013, statements Musgraves made to McCray were involuntary and should have been suppressed.

Even if the oral proffer agreement did not extend to November 2013, the November 17, 2013, statements should nonetheless be suppressed because Musgraves made them involuntarily. Voluntary statements are those deemed "freely given" under the totality of the circumstances. *United States v. Cahill*,

920 F.2d 421, 427 (7th Cir. 1990). A statement is not freely given when there is a promise made, or even a subtler form of coercion, that might flaw the defendant's judgment. *See id.* at 427 (stating when a defendant reasonably perceives that he is providing testimony under a grant of immunity, such statements are rendered involuntary); *cf. United States v. Watson*, 423 U.S. 411, 424–25 (1976) (finding consent to search a car was voluntary when no promise or threat was made by the officer). This Court makes an "independent determination of the voluntariness" of Musgraves's statements. *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990).

After the July 12, 2013, interview, McCray continued to use the promise of immunity and the threat of its revocation to coerce Musgraves into providing information about criminal activity. By the end of September 2013, McCray texted Musgraves that "[t]he time has come to either do something or not." (A.162.) By issuing this ultimatum, McCray forced Musgraves to either provide more information or risk losing the potential immunity that McCray held over his head. Any statement given under such coercive circumstances, where no meaningful choice exists, is not "freely given." The November events bolster this conclusion: the 911 caller explicitly informed the dispatcher that Musgraves was "working with the detective," that he made a deal with McCray to "put in some work," and that call was intended to fulfill that obligation. (A.184–86.) Without the carrot of immunity and McCray's recent ultimatum as the stick, Musgraves had no reason to provide

the November 2013 statements. As a result these coerced statements were involuntary and should have been suppressed.

III. The district court erred in denying Musgraves's requested *Franks* hearing because the affidavits used to support the search warrant omitted all credibility and reliability information, and the officers recklessly disregarded the truth in omitting the crucial information.

The two affidavits that the police submitted in support of their search warrant were insufficient to give rise to probable cause because each affidavit omitted information essential to evaluating credibility and reliability. First, Sergeant Brantley omitted known and crucial facts from his affidavit that would have revealed that the Tisdale controlled buy violated police protocol and created doubt regarding the Tisdale's credibility. Second, Boner's "John Doe" affidavit failed to test—or even mention—his credibility. This Court reviews legal conclusions de novo and factual findings for clear error. *United States v. Glover*, 755 F.3d 811, 815 (7th Cir. 2014). In addition, although this Court typically reviews the denial of a *Franks* hearing for clear error, when the district court fails to make any independent findings or rulings on the request,[9] this Court should independently assess whether such a hearing is warranted. *See United States v. Robinson*, 546 F.3d 884, 887 (7th Cir. 2008).

[9] Although the district court made undifferentiated references to dishonesty and recklessness, it is unclear whether the court made those determinations with respect to the request for a *Franks* hearing or as a part of the probable cause analysis. *See* (A.34–39.) However, the necessity of a *Franks* hearing is a distinct and antecedent inquiry, and demands a different standard of proof. *See United States v. McMurtrey*, 704 F.3d 502, 508–09 (7th Cir. 2013). The district court erred in eliding the *Franks* determination with the good-faith exception analysis.

A. The search warrant lacked probable cause because the supporting affidavits failed to include crucial information regarding the affiants' credibility and reliability.

The warrant requirement of the Fourth Amendment is animated and effectuated by the decision of a neutral and detached magistrate. *Glover*, 755 F.3d at 816 (citing *Illinois v. Gates*, 462 U.S. 213, 240 (1983)). Warrants are issued after a showing of probable cause, established with sufficient evidence to cause a reasonably prudent person to believe that the search will uncover evidence of a crime under the totality of the circumstances. *United States v. Sutton*, 742 F.3d 770, 773 (7th Cir. 2014). Generally, a magistrate's determination of probable cause is accorded great deference on review, justifying affirmance so long as there is substantial evidence in the record that supports the magistrate's decision. *Id.* at 773. But when the record suggests that critical omissions from the affidavits may have "undermined the issuing magistrate's ability to perform his role as a neutral arbiter of probable cause," this Court will reverse. *Glover*, 755 F.3d at 814.

Officers' barebones affidavits in support of their warrant applications are insufficient; they may not rely solely on conclusory allegations. *Sutton*, 742 F.3d at 773. When the affidavits come from informants, this Court requires information about their credibility and reliability because probable cause stands or falls on these facts. *Glover*, 755 F.3d at 814; *United States v. Bell*, 585 F.3d 1045, 1049–50 (7th Cir. 2009) (finding an informant's affidavit insufficient when it "fail[ed] to provide any information to establish [the informant's] reliability"). Put another way, this

Court will find an informant-based affidavit insufficient if it "omit[s] all information regarding the informant's credibility." *Glover*, 755 F.3d at 814.

Normally, then, the wholesale failure to present the magistrate with "crucial" information about "the informant's credibility or potential bias," *Glover*, 755 F.3d at 816, means that no probable cause exists. Such a complete omission of material adverse information is almost insurmountable. *Id*. In rare instances, however, officers can overcome this failure in one of two ways. First, the officers may rehabilitate an otherwise lacking affidavit if they are able to provide extensive corroboration of the informant's assertions. *Id*. (citing *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010)). Or second, if the government can show that the five factors that this Court considers in assessing an informant's affidavit strongly support a finding of credibility or reliability, this Court may sustain a probable cause finding. *Id.* These factors are: (1) the level of detail in the informant's affidavit; (2) the extent of the informant's firsthand observation; (3) the degree of corroboration; (4) the time lapse between the events reported and the subsequent warrant application; and (5) whether the confidential informant appeared or testified before the magistrate. *Id.*

The Brantley Affidavit is insufficient because it entirely omits the credibility or reliability of CI12-16 (Tisdale). But even more, the Brantley Affidavit cannot overcome this deficiency because the five factors considered by this Court do not sufficiently weigh in the government's favor. Chiefly, the Brantley Affidavit lacks any level of detail sufficient to support probable cause. Recall that when Tisdale

first exited Musgraves's house after the controlled buy, he was unable to leave because his car had run out of gas. (A.106.) Tisdale then returned to Musgraves's house for help, later went to his junk-filled car, rummaged in the back seat, walked to the front door, accepted "something" from Musgraves, and then got into another car parked in front of Musgraves's house. (A.106–07.) A woman then drove Tisdale to a nearby gas station where he went inside, paid for gas, put gas in a container, returned to Musgraves's house, put the gas in his car, and then finally left to return to the police department. (A.106–07.) None of these material facts were contained in the Brantley Affidavit, completely undermining the magistrate judge's ability to find probable cause.

Moreover, the police took no steps to corroborate the CI's statements that he had previously purchased cocaine from Musgraves. And although the Brantley Affidavit contained some firsthand knowledge of the CI, that information was stale. Eleven months elapsed between the time of the controlled buy and the search warrant. Such a lengthy interval, particularly in light of just a single alleged drug transaction, minimizes any potential value of that information and dispels any reasonable belief that a search would be fruitful. *See Sutton*, 742 F.3d at 774 (finding no bright line rule for determining staleness, but the age of a CI's information should be considered in light of the other factors). The final factor also weighs heavily against a finding of probable cause—the CI did not personally appear before the magistrate judge. This last factor is "significant." *Id*. at 773. Without an opportunity to assess the credibility or reliability of the CI in person,

the complete omission of relevant details thus undermines the role of the neutral and detached magistrate and is therefore fatal.

Boner's "Doe" Affidavit fares no better. Again, the Boner Affidavit lacked any information concerning the affiant's credibility or potential bias—crucial to the sufficiency of an affidavit supporting a search warrant. The Boner Affidavit is untested and unreliable, as it provides no corroborating facts or any detail regarding the relationship between Boner and Musgraves. In fact, the majority of the information provided is not based on firsthand observations, but rather on Boner's accompanying Stevens to various locations where Stevens—but not Boner—entered the location and later returned with drugs. Further, not only could Boner not name Musgraves initially (A.95), he also could not consistently describe Musgraves's physical appearance. In his affidavit, Boner stated that Musgraves was a "larger black male" (A.99), yet he previously told police the man he saw was "short and fat" (3/17/15 Trial Tr. 165). Boner's appearance before the magistrate judge did not cure these deficiencies. The magistrate judge did not ask Boner any questions to assess his credibility or reliability, and instead simply ensured that Boner affirmed the information in the affidavit. (2/6/15 Hr'g Tr. 73); *Glover*, 755 F.3d at 817 (finding confidential informant who appeared before magistrate but did not testify bolstered the reliability of the affidavit "only slightly"); *see also Bell*, 585 F.3d at 1050. The omission of information relating to Boner's credibility and this Court's other factors all strongly weigh against the sufficiency of the Boner Affidavit to support probable cause.

B. The good faith exception does not apply because the officers were reckless in omitting all credibility and reliability information.

The deterrent value underlying the exclusionary rule is strongest when police exhibit "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights," *Davis v. United States*, 131 S. Ct. 2419, 2427–28 (2011), or when there is evidence of "recurring or systemic negligence," *Herring v. United States*, 555 U.S. 135, 144 (2009). This Court has stated that officers act recklessly when they omit "known and substantial adverse information about the informant's credibility" or other important information material to the question of probable cause. *Glover*, 755 F.3d at 820.

This case exhibits the very kind of reckless behavior warned about in *Glover* and *Davis*. First, Brantley omitted all information relating to the CI's and Boner's credibility. Brantley knew, when relying on confidential informants, it was essential for the court to assess their credibility and reliability. (A.76–77.) Yet Brantley admitted that he had no prior contact with Boner, never verified the information Boner provided, and did not even run a criminal history check on him before submitting his affidavit. (A.77.) Brantley claimed he had "no reason to . . . doubt the information" he provided. (A.77.) But even when Brantley possessed substantial adverse information regarding Tisdale's credibility—namely, Tisdale's extensive criminal history—he still omitted that information. (A.84–88.) Brantley knew this information would impact Tisdale's reliability in the eyes of the magistrate—a judge who had sentenced him in other cases. (A.89.) By referring to Tisdale only by CI

number and not by name, and by omitting all credibility information from the affidavit, Brantley prevented the magistrate from making an informed probable cause determination. (A.88–89.)

Similarly, officers omitted all relevant adverse information from the irregularities surrounding the controlled buy. (A.95–98.) Finally, there was evidence of recurring and systematic negligence; officers testified that they routinely opted not to include the very reliability and credibility information that this Court held in *Bell*, and confirmed in *Glover*, is critical to the probable cause inquiry. It was Brantley's "typical practice" to include "just enough information to establish probable cause," and it was "standard practice" *not* to include criminal history information on an affiant. (A.72–74.)

The district court erred in interpreting the good-faith defense, in applying it here, and in failing to make explicit findings on Musgraves's request for a *Franks* hearing. First, the district court conflated the amount of detail contained in the affidavit with the *Glover* requirement that an informant's affidavit contain credibility and reliability information. (A.31–38.) That the affidavits were not "barebones" and may have "contained enough detail" in other respects (A.34), does not offset the fact that the affidavits completely omitted *any* details regarding credibility and reliability. The affidavit in *Glover* was also not barebones, but the lack of credibility information was nonetheless fatal. 755 F.3d at 819. Second, the district court failed to recognize that the officers' "standard procedure" was contrary to and in violation of this Court's precedent in *Bell* and *Glover* (which Musgraves

cited repeatedly in his motions). (A.35–37.) Though the district court recognized officers are charged with knowing and following clear precedent, it wrote off Brantley's dereliction because he "prepared his affidavits here the way he always had." (A.37.) An officer's standard practice—when it contravenes governing precedent—does not satisfy the good-faith exception.

Third, the district court did not even discuss the *Franks* standard or hold a pre-*Franks* hearing. There is no indication the district court considered whether the omission of credibility information itself supported a reasonable inference of reckless disregard for the truth. *Glover*, 755 F.3d at 820. Even if the district court had speculated that there were innocent explanations for the lack of credibility, a defendant need not disprove them before a *Franks* hearing. *Id.* Defendants only bear a burden of production to obtain a *Franks* hearing. *McMurtrey*, 704 F.3d at 509. The district court here, as in *Glover*, erred in relying solely on the assertions and explanations of the government for the omissions and denying Musgraves's request. Musgraves is entitled to test the omission of credibility and reliability information in a *Franks* hearing.

IV. The district court erred in concluding that Musgraves was a Career Offender under the Guidelines because of uncertainty regarding the propriety and legality of one of the predicate offenses.

The district court erroneously relied on a 2006 Illinois felony conviction as a "controlled substance" offense to justify applying the Career Offender enhancement to Musgraves at sentencing. The parties and the court agreed that discrepancies existed between what the state court labeled as the crime of conviction and

Musgraves's sentence for that crime. (A.189–95.) Specifically, although the change-of-plea document submitted from the Madison County court indicated that Musgraves pled guilty to unlawfully possessing with intent to deliver a controlled substance, a Class X felony under Illinois law, his sentence of 25 months is not one that can be given for that class of felony. (A.193–94.) Class X felonies require a minimum nine-year sentence. 720 ILCS 570/401(a)(1)(B). As defense counsel pointed out, the charge may have been reduced to a possession offense but not accurately reported on court documents. (A.192–93) (noting that the court document reflecting plea negotiations contained "standard boilerplate" language included on orders and judgments in Madison County regardless of what actually happens on the record). Felony possession under Illinois law is either a Class 4 or Class 1 felony depending on the amount of drugs, and each could carry the 25-months sentence that Musgraves received. A mere possession conviction would not serve as a controlled substance offense under the Career Offender Guideline, which requires some proof of distribution or intent to distribute. U.S.S.G. § 4B1.2. As the district court recognized, "either the judge was extraordinarily lenient or made a mistake, or it wasn't that class of a felony." (A.189.) The district court concluded, however, that the crime was a predicate for the Career Offender Guideline because either the state court judge gave an illegal sentence of 25 months for a Class X felony that qualifies as a controlled substance offense under the Career Offender Guideline, § 4B1.1, *or* "backing into the [25-months sentence given], the amount of drug quantity necessary to get there would also be a predicate offense as a distribution

amount." (A.195.) The district court did not address defense counsel's argument that the charge could have been reduced to a mere possession count and simply not properly recorded in the state court documents. Nor did the district court explicitly find the information on which it relied accurate and reliable. *Cf.* (A.189–92) (defense counsel emphasizing that "we are guessing as to what the conviction might have been or could have been" when the court was assigning a serious sentencing enhancement).

The district court's decision to accept the 2006 Madison County conviction under these circumstances was unreasonable. This Court reviews de novo whether a prior conviction qualifies as a predicate offense for sentencing enhancement as a Career Offender. *United States v. Womack*, 610 F.3d 427, 430 (7th Cir. 2010). Criminal defendants "have a due process right to have the court consider only accurate information when imposing sentence, and [this] right may be violated when the court considers information which is inaccurate." *United States v. Coonce*, 961 F.2d 1268, 1275 (7th Cir. 1992); *see also, e.g.*, *United States v. Salinas,* 62 F.3d 855, 859 (7th Cir. 1995) ("A defendant has the due process right to be sentenced on the basis of accurate information."). The court and the parties agreed that the information was inaccurate—either in the label of the crime or the sentence given—but the court nonetheless used it to impose a seven-fold Guidelines-range increase. (A.45–46) (district court reciting that the sentence would have been in the "37- to 46-month range" without Career Offender status, but was 262 to 327 months with the enhancement).

Furthermore, the district court's ad hoc justification for imposing the 240-month sentence even absent the Career Offender status does not salvage the sentence. The sentencing judge stated that "divorc[ing] myself from the career criminal status, I believe an appropriate sentence . . . would have been that of 240 months of incarceration," even though the judge calculated a guideline range of 37 to 46 months without the enhancement. (A.51–52.) The district court's alternative, non-Career Offender justifications supporting the 240-month sentence effectively serve as an improper alternate sentence. First, the Career Offender Guideline range likely anchored the court's perception of what sentence would be reasonable without the Career Offender status. *See* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 119 (2011). Second, a seven-fold increase would be unreasonable even if additional considerations warranted a departure above the Guideline range of 37–46 months. *Womack*, 610 F.3d at 430 (noting a sentence is only presumed to be reasonable if it is within a correctly calculated Guidelines range). Third, the alternate sentence is advisory; this Court has jurisdiction to review only "final judgments of the district courts" and sentences that were actually imposed. 28 U.S.C. § 1291; 18 U.S.C. § 3742. The alternate sentence is neither. This Court has held that a "sentence based on an incorrect Guideline range" is "plain error that seriously affect[s] the integrity of the proceedings." *United States v. Pineda-Buenaventura*, 622 F.3d 761, 767 (7th Cir. 2010). Because there is "no reason to believe its error in the application of the Guideline range did not affect its selection of the particular

sentence," the resulting prejudice to Musgraves requires a remand for resentencing. *United States v. Garrett*, 528 F.3d 525, 530 (7th Cir. 2008).

Conclusion

For the foregoing reasons, Appellant Miles Musgraves, respectfully requests that this Court vacate his convictions on Counts 2, 4, and 5, and remand for further proceedings.

Dated: November 23, 2015

Respectfully submitted,

Miles Musgraves
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No. 15-2371

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MILES MUSGRAVES,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Miles Musgraves, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 23, 2015, which will send notice of the filing to counsel of record in the case.

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Certificate of Compliance with
Federal Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 13,571 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

I, the undersigned, counsel for the Defendant-Appellant, Miles Musgraves, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

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Dated: November 23, 2015

No. 15-2371

United States Court of Appeals
for the Seventh Circuit

United States of America,
Plaintiff–Appellee,

v.

Miles Musgraves,
Defendant–Appellant.

Appeal from the United States District Court
For the Southern District of Illinois, East St. Louis Division
Case No. 3:13-cr-30276-MJR
The Honorable Michael J. Reagan

ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT MILES MUSGRAVES

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FILED
JUN 3 0 2015
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

UNITED STATES DISTRICT COURT

Southern District of Illinois

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
v.	)	Case Number: **13-CR-30276-MJR** USM Number: **11031-025**
MILES MUSGRAVES	)	**DANIEL R. SCHATTNIK** Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

☒ Was found guilty on count(s) 1 , 2, 3, 4 and 5 of the Second Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 856 856(a)(1) and (b) and 860	Maintaining Drug-Involved Premises Near a School	11/13	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 26, 2015
Date of Imposition of Judgment

Michael J. Reagan
Signature of Judge

Michael J. Reagan, Chief Judge, U.S. District Court
Name and Title of Judge

6/30/15
Date

DEFENDANT: MILES MUSGRAVES
CASE NUMBER: 13-CR-30276-MJR

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ (a)(1), (b)(1)(C) and 846	Conspiracy to Distribute Cocaine	07/13	2
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of Ammunition	07/12/13	3
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of a Firearm	11/17/13	4
21 U.S.C. §§ 841(a)(1),(b)(1)(C) and 860	Distribution of Cocaine Near a School	11/17/13	5

DEFENDANT: MILES MUSGRAVES
CASE NUMBER: 13-CR-30276-MJR

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
240 months total. This term consists of 240 on each of Counts 1, 2 and 5, and a term of 120 months on Count 3 and 4, all counts to be served concurrently with each other.

☒ The court makes the following recommendations to the Bureau of Prisons:
Under 18 U.S.C § 3621 (b) 4, the Bureau of Prisons, in designating a prisoner's place of imprisonment must consider "(4) any statement by the court that imposed the sentence–(A) concerning the purpose for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and... ."With this congressional mandate in mind, the court request the defendant be placed at FCI, Greenville, Illinois. Counsel for the defense, after completing BP-337, has represented the defendant meets the criterion of this requested facility and the court believes such placement is appropriate.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____________________ ☐a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ________________ to ___________________________________

at _________________________, with a certified copy of this judgment

____
UNITED STATES MARSHAL

By _____________________________________
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
6 years. This term consists of a term of 3 years on each of Counts 2 through 4 and a term of 6 years on each of Counts 1 and 5, all such terms to run concurrently.

MANDATORY CONDITIONS

The following conditions are authorized pursuant to 18 U.S.C. § 3583(d):

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court, not to exceed 52 tests in one year.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADMINISTRATIVE CONDITIONS

The following conditions of supervised release are administrative and applicable whenever supervised release is imposed, regardless of the substantive conditions that may also be imposed. These conditions are basic requirements essential to supervised release.

The defendant must report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons.

The defendant shall not knowingly possess a firearm, ammunition, or destructive device. The defendant shall not knowingly possess a dangerous weapon unless approved by the Court.

The defendant shall not leave the judicial district without the permission of the Court or the probation officer.

The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer.

The defendant shall respond to all inquiries of the probation officer and follow the instructions of the probation officer.

The defendant shall notify the probation officer at least ten days prior to, or within seventy-two hours after, any change in residence or employment.

The defendant shall not knowingly meet, communicate, or otherwise interact with a person whom the defendant knows to be engaged, or planning to be engaged, in criminal activity.

The defendant shall permit a probation officer to visit the defendant at a reasonable time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

SPECIAL CONDITIONS

Pursuant to the factors in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3583(d), the following special conditions are ordered. While the Court imposes special conditions, pursuant to 18 U.S.C. § 3603(10), the probation officer shall perform any other duty that the Court may designate. The Court directs the probation officer to administer, monitor, and use all suitable methods consistent with the conditions specified by the Court and 18 U.S.C. § 3603 to aid persons on probation/supervised release.

Although the probation officer administers the special conditions, final authority over all conditions rests with the Court.

The defendant shall participate in treatment for narcotic addiction, drug dependence, or alcohol dependence, which includes urinalysis and/or other drug detection measures and which may require residence and/or participation in a residential treatment facility, or residential reentry center (halfway house). The number of drug tests shall not exceed 52 tests in a one-year period. Any participation will require complete abstinence from all alcoholic beverages and any other substances if mandated by the program for the purpose of intoxication. The defendant shall pay for the costs associated with services rendered, based on a Court approved sliding fee scale and the defendant's ability to pay. The defendant's financial obligation shall never exceed the total cost of services rendered. The Court directs the probation officer to approve the treatment provider and, in consultation with a licensed practitioner, the frequency and duration of counseling sessions, and the duration of treatment, as well as monitor the defendant's participation, and assist in the collection of the defendant's copayment.

The defendant shall participate in any program deemed appropriate to improve job readiness skills, which may include participation in a Workforce Development Program or vocational program. The Court directs the probation officer to approve the program and monitor the defendant's participation.

The defendant shall not knowingly visit or remain at places where controlled substances are illegally sold, used, distributed, or administered.

The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.

The defendant is to comply with all active child support and alimony orders. This includes the payment of any arrearages.

While any financial penalties are outstanding, the defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation. The defendant shall notify the probation officer within 72 hours of the receipt of any indicated monies.

The defendant shall pay any financial penalties imposed which are due and payable immediately. If the defendant is unable to pay them immediately, any amount remaining unpaid when supervised release commences will become a condition of supervised release and be paid in accordance with the Schedule of Payments sheet of the judgment based on the defendant's ability to pay.

The defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorney's Office any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

The defendant's person, residence, real property, place of business, vehicle, and any other property under the defendant's control is subject to a search, conducted by any United States Probation Officer and other such law enforcement personnel as the probation officer may deem advisable and at the direction of the United States Probation Officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release, without a warrant. Failure to submit to such a search may be grounds for revocation. The defendant shall inform any other residents that the premises and other property under the defendant's control may be subject to a search pursuant to this condition.

DEFENDANT: MILES MUSGRAVES
CASE NUMBER: 13-CR-30276-MJR

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 7.

	Assessment	Fine	Restitution
TOTALS	$500.00	Waived	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss	Restitution Ordered	Priority or Percentage

☐ Restitution amount ordered pursuant to plea agreement $________________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
The court determined that the defendant does not have the ability to pay interest and it is ordered that:
☐ the interest requirement is waived for ☐ fine ☐ restitution.
☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MILES MUSGRAVES
CASE NUMBER: 13-CR-30276-MJR

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. ☐ Lump sum payment of $_________ due immediately, balance due
☐ not later than _____________, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below; or

C. ☐ Payment in equal ______ *(e.g., weekly, monthly, quarterly)* installments of $_______ over a period of _____ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D. ☐ Payment in equal _______ *(e.g., weekly, monthly, quarterly)* installments of $_________ over a period of________ *(e.g., months or years)*, to commence ___________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E. ☐ Payment during the term of supervised release will commence within ________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F. ☒ Special instructions regarding the payment of criminal monetary penalties:
All criminal monetary penalties are due immediately and payable through the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Heckler & Koch .40 caliber semiautomatic handgun, bearing serial number 26-101676; and 148 rounds of 9mm American Eagle brand ammunition

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Record 91, Sealed Memorandum and Order on Motions to Suppress

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 13-CR-30276-MJR
	)	
MILES MUSGRAVES,	)	*** FILED UNDER SEAL ***
	)	
Defendant.	)	

SEALED MEMORANDUM AND ORDER

REAGAN, Chief Judge:

A. Introduction and Procedural Overview

Miles Musgraves (Defendant) originally was charged herein with distribution of cocaine base (Count 1) and felon in possession of a firearm (Count 2). On the Government's motion, the Court dismissed Count 1 of the indictment. Two superseding indictments followed, necessitating trial continuances. Defendant now is charged via June 17, 2014 second superseding indictment (Doc. 41) with maintaining a drug-involved premises near a school from August 2012 to November 2013 (Count 1), conspiring to distribute cocaine from February 2013 to July 2013 (Count 2), being a felon in possession of ammunition on July 12, 2013 (Count 3), being a felon in possession of a firearm on November 17, 2013 (Count 4), and distributing cocaine near a school on November 17, 2013 (Count 5).

In June 2014, Musgraves waived arraignment on, and pled not guilty to, these charges before the Honorable Stephen C. Williams, United States Magistrate Judge.

In November 2014, Musgraves' appointed counsel, Daniel R. Schattnik, secured leave to file two late suppression motions. Ultimately, three suppression motions were filed by Defendant (Docs. 60, 61, 65) and responded to by the United States of America ("the Government")(Docs. 67, 68, 69). The Court conducted an evidentiary hearing on the motions on February 6, 2015 and took them under advisement. For the reasons stated below, the Court now denies all three motions.

B. Overview of Relevant Constitutional Provisions

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

The Fourth Amendment guarantees the right of citizens to be free from unreasonable searches and seizures (of a person, a thing, or a place), ***Bailey v. United States*, -- U.S. --, 133 S. Ct. 1031, 1035 (2013),** and subject to few exceptions requires officers to obtain a warrant before searching a home. ***United States v. Gutierrez*, 760 F.3d 750, 753 (7th Cir.), *cert. denied*, 135 S. Ct. 735 (2014), *quoting Kyllo v. United States*, 533 U.S. 27, 31 (2001).** "At the core of the privacy protected by the Fourth Amendment is the right to be let alone in one's home." ***Sutterfield v. City of Milwaukee*, 751 F.3d 542, 550-51 (7th Cir.), *cert. denied*, 135 S. Ct. 478 (2014). *Accord Vinson v. Vermilion County, Ill.*, -- F.3d --, 2015 WL 343673, *3 (7th Cir. Jan. 27, 2015), *quoting Florida v. Jardines*, -- U.S. --, 133 S. Ct. 1409, 1414 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals").**

Applied to the states through the Fourteenth Amendment, the Fourth Amendment imposes two express requirements. "First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." ***United States v. Henderson*, 748 F.3d 788, 790 (7th Cir.), *cert. denied*, 135 S. Ct. 708 (2014), *quoting Kentucky v. King*, -- U.S. --, 131 S. Ct. 1849, 1856 (2011).**

As to the reasonableness requirement: "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" ***Heien v. N. Carolina*, 135 S. Ct. 530, 536 (2014), *quoting Brinegar v. United States*, 338 U.S. 160, 176 (1949).** As to the particularity requirement, the "Supreme Court does not demand exact precision in a search warrant's description of the targeted premises. Instead, it has found the particularity requirement to be satisfied if the warrant's description 'is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended.'" ***United States v. Kelly*, 772 F.3d 1072, 1081 (7th Cir. 2014), *quoting Steele v. United States*, 267 U.S. 498, 503 (1925).** Probable cause is established if a search-warrant affidavit sets forth sufficient evidence to persuade a reasonably prudent person that there is a fair probability that a search will reveal evidence of criminal activity. ***United States v. Curry*, 538 F.3d 718, 729-30 (7th Cir. 2008).**

The essential protection of the Fourth Amendment's warrant provision lies in the requirement that the inferences drawn from evidence be made "by a neutral and detached magistrate instead of being judged by the officer engaged in the often

competitive enterprise of ferreting out crime." ***United States v. Glover*, 755 F.3d 811, 815-16 (7th Cir. 2014), *quoting Illinois v. Gates,* 462 U.S. 213, 240 (1983), and *Johnson v. United States,* 333 U.S. 10, 13-14 (1948).** A judge deciding whether to issue a warrant must make a "practical, common-sense decision about whether the evidence in the record shows a fair probability that contraband or evidence of a crime will be found in a particular place." ***United States v. Carroll,* 750 F.3d 700, 703 (7th Cir. 2014), *quoting United States v. Miller,* 673 F.3d 688, 692 (7th Cir. 2012).**

In ***Carroll,*** the United States Court of Appeals for the Seventh Circuit stressed that probable cause is a "fluid concept" which focuses on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Carroll,* 750 F.3d 703-04, *citing Gates,* 462 U.S. at 231.** Probable cause determinations require common-sense analysis of the facts available to the judicial officer who issued the warrant, and many factors (such as the recency of the information given to the judicial officer) factor into these determinations. ***Carroll,* 750 F.3d at 703.**[1]

A judicial officer's probable cause determination is entitled to "great deference on review, and the Fourth Amendment requires no more than a substantial basis for concluding that a search warrant would uncover evidence of a crime." ***Glover,* 755 F.3d**

[1] Where the officer applying for the warrant relies on an informant's tip, "as long as a reasonably credible witness or victim informs the police that someone has committed a crime, or is committing a crime, the officers have probable cause." ***Gibbs v. Lomas,* 755 F.3d 529, 537 (7th Cir. 2014) (discussing probable cause in context of arrest warrant), *quoting Matthews v. City of E. St. Louis,* 675 F.3d 703, 706-07 (7th Cir. 2012).**

at 816, *citing Gates*, 462 U.S. at 236. In reviewing a probable cause determination, the court's duty "is simply to ensure that the [issuing judge] had a 'substantial basis for concluding' that probable cause existed." ***United States v. Scott*, 731 F.3d 659, 665 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1806 (2014), *quoting Gates*, 462 U.S. at 238-39.**

As the Seventh Circuit emphasized four months ago in ***Kelly*, 772 F.3d at 1080,** the district court must not freshly assess, de novo, whether there was a fair probability that contraband or evidence of a crime would be found at the place to be searched. Rather, in reviewing the probable cause determination, the district court only evaluates whether the issuing judge had a substantial basis to conclude that probable cause existed, bearing in mind that:

> "Warrants may be issued even in the absence of direct evidence linking criminal objects to a particular site." *United States v. Orozco*, 576 F.3d 745, 749 (7th Cir. 2009) (citation and internal quotation marks omitted). And courts are "entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense, and specifically, in the case of drug dealers, evidence is likely to be found where the dealers live." *Id.*

Under ***United States v. Leon*, 468 U.S. 897 (1984),** even if probable cause for a search warrant was lacking, the evidence seized with the warrant should not be suppressed if the officers who executed the warrant relied in good faith on the issuing judge's probable cause finding. The officer's decision to obtain the search warrant is prima facie evidence that he was acting in good faith. ***United States v. Searcy*, 664 F.3d 1119, 1124 (7th Cir. 2011).** The defendant can rebut this presumption in three limited circumstances – one of which is by showing that the officers were dishonest or reckless in preparing the affidavit.

In ***Franks v. Delaware,* 438 U.S. 154 (1978)**, the Supreme Court acknowledged a criminal defendant's right to attack the veracity of a search warrant affidavit based on intentional misrepresentations made therein. The Fourth Amendment requires an evidentiary hearing on this issue (a "***Franks*** hearing") only if the defendant requests a hearing and makes a substantial preliminary showing that authorities deliberately or recklessly made material misrepresentations in the warrant application. ***United States v. Currie*, 739 F.3d 960, 963 (7th Cir. 2014).** ***See also United States v. Jones,* 208 F.3d 603, 607 (7th Cir. 2000).**

Franks applies to material omissions as well as material misrepresentations. ***See United States v. Harris*, 464 F.3d 733, 738 (7th Cir. 2006).** So a defendant may "challenge an affidavit by showing that the affiant intentionally or recklessly omitted material information." ***Id***. To make the required preliminary showing, the defendant must identify the alleged misrepresentation or omission with specificity and "submit sworn statements of witnesses to substantiate the claim of falsity." ***Harris,* 464 F.3d at 738.** ***Accord United States v. McMurtrey,* 704 F.3d 502, 508-09 (7th Cir. 2013).**

The Fifth Amendment to the Constitution provides that "no person shall be compelled in any criminal case to be a witness against himself." **U.S. CONST. amend. V.** A suspect must be informed of and voluntarily waive his Fifth Amendment rights before he is subjected to custodial interrogation. ***Miranda v. Arizona,* 384 U.S. 436, 444 (1966) (before subjecting a person in custody to interrogation, police must warn him that he has a right to remain silent, that his statements may be used against him, and that he has the right to the presence of an attorney).** Once an individual in custody

says he wants an attorney, all interrogation must cease until the attorney is present. ***United States v. Wysinger*, 683 F.3d 784, 793 (7th Cir. 2012). *See also United States v. Borostowski*, 755 F.3d. 851, 859 (7th Cir. 2014).**

C. Analysis of Pending Motions

DOC. 60 – "MOTION TO SUPPRESS AND BAR PROFFER STATEMENTS"

On July 12, 2013, relying on a search warrant issued at 4:55 pm on July 10, 2013 by Judge James Hackett of the Circuit Court of Madison County, Illinois, officers with the Alton Police Department searched a house at 1808 Sycamore Street in Alton, Illinois. The warrant authorized the seizure of, *inter alia*, controlled substances, weapons of any form, and United States currency (Doc. 63-4). Officers found six people in the residence, including Defendant Miles Musgraves (who lived there) and Mildred Parker (who owned the property). The officers searched the entire residence. They found no narcotics but seized numerous items including various boxes of ammunition (e.g., one box of 5.56 mm full metal jacket ammunition and three boxes of 9 mm ammunition, *see* Doc. 63-20), the latter being the subject of Count 3 of the second superseding indictment.

Defendant was arrested, placed in custody, booked, and transported to the Alton Police Department. Prior to any questioning of Defendant, attorney Michelle Berkel arrived at the police station, stated that she represented Defendant, and directed the police to not question Defendant. The police complied with this directive and allowed Berkel to confer with Defendant. Detective Kurtis McCray of the Alton Police Department's Narcotics Unit told attorney Berkel that Defendant was facing possible

federal charges (McCray did not provide specifics), that the name of the federal prosecutor handing the matter was Assistant United States Attorney Donald Boyce, and that Berkel could call Boyce. Ultimately, McCray gave Boyce's cell phone number to Berkel. Berkel telephoned Boyce.

Berkel and Boyce had discussions during which it was agreed that Defendant could be interviewed pursuant to a "standard proffer letter." Boyce (traveling in a car on a Friday afternoon headed out of Illinois) was not in a position to prepare a *written* proffer letter, but upon his return to the office on Monday was to furnish one confirming their oral agreement. The oral agreement (under the "standard proffer letter" terms) included assurances that whatever Defendant told police would not be used against him, i.e., he would have "limited immunity" as to this information. Defendant then made a statement to the Alton Police.[2]

Later that same day (July 12), Defendant was released. On Monday, July 15, 2013, prosecutor Boyce sent a standard proffer letter to attorney Berkel. The first three pages contain the terms of the proffer agreement; the fourth page is captioned "Acknowledgment and Agreement of Miles Musgraves." On July 22, 2013, Berkel returned the proffer letter initialed by her and Defendant Musgraves next to each paragraph/provision of the first three pages but missing the fourth page (*see* Doc. 67-1). Berkel never called or otherwise notified Boyce that there was a problem with any term of the agreement. She simply did not return an executed page four.

[2] That July 12, 2013 statement was memorialized in a report by Detective McCray, admitted in evidence at the February 2015 hearing as Government's Exhibit 1.

Defendant now moves the Court to bar the Government from using at trial any statements Defendant made to Alton police officers. These statements occurred on two dates: (1) the July 12, 2013 statement made by Defendant with his lawyer (Berkel) present at the Alton Police Department; and (2) statements made by Defendant via phone and text message on November 17, 2013. The Court construes Doc. 60 as seeking to suppress Defendant's statements made on July 12, 2013 and November 17, 2013.

→ **DEFENDANT'S JULY 12, 2013 STATEMENT**

At the time Defendant made his July 12, 2013 statement to police, his attorney (Berkel) and counsel for the Government had agreed that a standard proffer letter would be used, but no formal written agreement had been exchanged. Defendant agreed to the general terms explained to him and was willing to make a statement knowing it would not be used against him. The written proffer letter contained not only those terms (which Defendant read and initialed each paragraph of) but also an acknowledgment page (which Defendant did not sign). Current defense counsel (Schattnik) suggests that the written proffer letter included "additional rules and conditions" which Defendant did not accept (Doc. 60, pp. 2-3). Defense counsel does not clarify which term(s) Defendant rejected. Defendant and Berkel initialed each of the eight terms in the proffer letter but failed to sign the acknowledgment page.

Significantly, defense counsel *does **not** claim* there is no valid proffer agreement. Rather, defense counsel asserts that his statements made to Alton police officers are proffer statements covered and rendered inadmissible by application of Federal Rule of Criminal Procedure 11 and Federal Rule of Evidence 410.

Counsel further argues that Defendant made his statement without the benefit of ***Miranda*** warnings, relying on the assurances that what he told police in his proffer would not be used against him at trial. "Defendant was assured that he could provide statements that would not be used against him, having limited immunity in that fashion. Defendant agreed to the general terms of immunity as conveyed to him on that date [July 12, 2013]" (Doc. 60, p. 5). Thus, argues Defendant, the introduction into evidence against him of the information he told officers on July 12, 2013 would contravene the Rules mentioned above and his rights under the Fifth Amendment to the United States Constitution, as delineated in ***Miranda.***

Federal Rule of Criminal Procedure 11(f) states that the admissibility of plea discussions and related statements is governed by Federal Rule of Evidence 410. Federal Rule of Evidence 410(a) prohibits the use of certain evidence against a defendant, including "a statement made during the plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or … resulted in a later-withdrawn guilty plea." **FED. R. EVID. 410(a)(4).**

The ***Miranda*** argument is misplaced. Nothing the officers did on July 12, 2013 ran afoul of ***Miranda*** or violated Defendant's right to be free from self-incrimination. The testimony at the February 6, 2015 evidentiary hearing was contradictory as to whether ***Miranda*** warnings were administered to Defendant on July 12, 2013.[3] But the

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[3] Attorney Berkel testified (in response to several questions) that her client *had* been advised of his ***Miranda*** warnings; she did not specify by whom. Detective McCray testified that he did not read Defendant his

Court need not resolve that conflict, because Defendant was not interrogated in contravention of ***Miranda***. He was never questioned without counsel. To the contrary, Defendant made a voluntary statement with counsel at his side. Detective McCray, whom the Court finds to be a completely credible witness (believable, frank, devoid of embellishment in his testimony) testified that Defendant was not asked a single question before his lawyer (Ms. Berkel) arrived, met with him, agreed to a proffer, and allowed Defendant to make a statement.

More specifically, the chronology culminating in the July 12th statement was as follows. After his arrest and booking, Defendant was brought from jail to the police department, where Detective McCray was preparing to interview him. McCray placed Defendant in an interview room, left the room to turn on the video camera equipment, and before returning to the room or asking a single question, learned that attorney Michelle Berkel was at the police department and had instructed the officers to not question her client. McCray returned to the room and told Defendant that his attorney had arrived, after which attorney Berkel and Defendant conferred. No interview had occurred, no interrogation had commenced before that time. Defendant's July 12, 2013 statement was voluntarily made with his attorney present, pursuant to the proffer agreement with prosecutor Boyce. ***Miranda*** is not applicable here, and suppression of the July 12th statement is not merited on this ground.

Miranda warnings. Sergeant Brantley was not questioned as to whether Defendant was Mirandized on July 12, 2013.

As to Defendant's argument that Rule 410(a)(4) bars introduction of the July 12th statement made during plea discussions, the Government responds that it "intends to honor the terms of the proffer letter" (Doc. 67, p. 3) and will not introduce Defendant's July 12, 2013 statement in any way that violates the terms of the proffer agreement. In other words, the Government will not introduce the statement in its case in chief at trial, "unless one of the exceptions outlined in the letter presents itself. For example, the terms of the proffer letter would permit the government to introduce the statement if the Defendant were to offer testimony at trial that is materially different than the information in the statement," a scenario which could arise if Defendant testifies at trial (Doc. 67, pp. 2-3).

Because ***Miranda*** is inapplicable to Defendant's July 12, 2013 statement and the Government intends to honor the proffer terms which Defendant seeks to enforce (i.e., the Government will not offer the evidence Defendant seeks to bar), the Court **DENIES and DENIES AS MOOT** Doc. 60, as to Defendant's July 12, 2013 statement.

→ **DEFENDANT'S NOVEMBER 17, 2013 STATEMENTS**

On November 17, 2013, Defendant made statements to Detective Kurtis McCray of the Alton Police Department via text message and telephone. Defendant reported that a man parked in a car in front of his house had cocaine and a gun. Police responded, found a car occupied by Jesse Smith, and found cocaine in the car. Re-checking the car after additional discussion with Defendant, police found a gun under the driver's seat. They learned the gun had been reported stolen. Subsequent witness

interviews revealed that the gun had been traded to Defendant in exchange for crack cocaine.[4]

Defense counsel argues for exclusion of these statements (which led to the recovery of cocaine and a gun from the car in front of Defendant's house) under Federal Rule of Evidence 410 and ***Miranda.*** The Court rejects Defendants' arguments for suppression of the November 17th statements. First, Defendant's November 17, 2013 statements do not implicate ***Miranda***, because Defendant was neither in custody nor subject to interrogation when he made the statements to Detective McCray.

Evidence presented at the February 6, 2015 hearing established that on November 17, 2013, Defendant (who was not in custody in any way) initiated the call and text message exchange with McCray. On the morning of November 17th, McCray saw several missed calls – all *from* Defendant Musgraves *to* Detective McCray. Defendant and McCray exchanged texts. McCray saved the text messages from his phone. A disc with the messages (produced to defense counsel in discovery in this case) was admitted in evidence at the hearing as Government's Exhibit 2 and provided to the Court for review. Plainly, Defendant was not subject to custodial interrogation when he made the November 17, 2013 statements to Detective McCray. For Miranda's safeguards to apply, a suspect must be "in custody" *and* "subject to interrogation." ***United States v. Johnson*, 680 F.3d 966, 973-74 (7th Cir.), *cert. denied,* 133 S. Ct. 672 (2012).** Musgraves was neither. ***Miranda*** does not bar admission of those statements.

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[4] The Government's theory of the case is that Defendant put the gun and drugs in Jesse Smith's car in an effort to frame Smith. *See* Doc. 67, p.3.

Nor does Federal Rule of Evidence 410 bar the November 17, 2013 statements. Rule 410(a)(4) protects a defendant's statements made during plea discussions with an attorney for the prosecuting authority. ***United States v. Olson*, 450 F.3d 655, 680 (7th Cir. 2006) ("Statements made in the course of plea discussions with a prosecutor generally are inadmissible under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410.").** Here, Defendant has not identified any statement made on November 17, 2013 during plea discussions with an attorney for the prosecuting authority. Defendant texted, called, and talked to a police officer.

The law of this Circuit rejects the proposition that statements to law enforcement officers qualify as statements to "an attorney for the prosecuting authority." In ***Olson*, 450 F.3d at 681,** the Seventh Circuit reiterated that statements to law enforcement agents do *not* constitute statements to a government attorneys/prosecutors:

> Agent Craft was not an attorney for a prosecuting authority and did not purport to be speaking on behalf of the United States Attorney…. He made the general kinds of statements that law enforcement agents commonly make, that cooperation will likely lead to a better outcome for the defendant…. In short, nothing … Agent Craft did or said to [the defendant] led him to reasonably believe that the April 30 meeting was a plea discussion. The court was correct to deny the motion to suppress on that basis.

***See also United States v. Brumley*, 217 F.3d 905, 910 (7th Cir. 2000); *United States v. Lewis*, 117 F.3d 980, 984 (7th Cir.), *cert. denied*, 522 U.S. 1035 … (1997) (same).**

Likewise in the case at bar, Detective McCray was not an attorney for the prosecution.[5] He was a police officer who lacked authority to offer or grant immunity. Defendant's November 17, 2013 statements do not fall within the scope of Rule 410. Suppression of the November 17, 2013 statements is not warranted on this basis. The Court **DENIES** Doc. 60 to the extent it seeks to suppress Defendant's statements made on November 17, 2013.

DOC. 65 – MOTION TO SUPPRESS TESTIMONY (OR MOTION IN LIMINE)

In this motion, Defendant urges the Court to suppress all evidence regarding an alleged drug sale by Defendant to a confidential informant (CI 12-16, who is Thomas Tisdale) on August 14, 2012. This event was referenced in Detective McCray's testimony at the February 6th hearing. These are the details of the August 2012 incident relevant to this motion. While working with Alton Police, CI 12-16 identified Defendant in a photograph and said he (CI 12-16) had purchased cocaine from Defendant in the past. On August 14, 2012, the CI (wearing a hidden body video-recorder) participated with the Alton Police Narcotics Unit in a controlled purchase of $100 worth of crack cocaine from Defendant which CI 12-16 then turned over to Detectives McCray and Brantley. The substance given by CI 12-16 to the detectives tested positive for cocaine.

[5] The Government also argues that there was no charge pending against Defendant on November 17, 2013, so any statements he made to anyone that day were not made "*during plea discussions,*" as is required to fall within the scope of Rule 410(a)(4). The Court need not and does not reach this argument.

In his July 12, 2013 proffer statement, Defendant acknowledged that during this time frame or time period (August 2012) he was selling cocaine.[6]

The chain of custody for the substance purchased by CI 12-16 on August 14, 2012 is as follows. Detective McCray took the substance to the evidence vault at the Alton Police Department. Detective Michael Metzler was the Evidence Custodian at the Alton Police Department at that time. Metzler took the exhibit to the Illinois State Police crime lab on September 13, 2012, where it was received by Forensic Scientist Brian Stevenson. Stevenson tested the substance on October 1, 2012. It tested positive for cocaine base. Metzler retrieved the exhibit from the Illinois State Police crime lab on November 7, 2012 and returned it to the Alton Police Department evidence vault.

On July 1, 2013, Jonathan Forrler replaced Detective Metzler as Evidence Custodian. In January 2014, Forrler destroyed the drug exhibit from this case. An investigation revealed that Forrler destroyed exhibits from over 60 cases. The Government learned of this in April 2014. Defendant maintains that the Court must suppress any evidence or testimony relating to the August 14, 2012 drug transaction, because the destruction of the evidence deprived Defendant of the opportunity to independently test the evidence to determine if it, in fact, was cocaine.[7]

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[6] McCray's notes from the July 12, 2013 proffer (admitted as Gov't Exhibit 1) and McCray's testimony at the hearing are consistent that Defendant admitted he had been selling cocaine for a period of time encompassing August 2012, when CI 12-16 took part in the controlled buy.

[7] Defendant is not charged with distributing cocaine on August 14, 2012; that charge was dismissed with prejudice. But Count 1 of the second superseding indictment does charge him with maintaining a drug-

This argument misses the mark for several reasons. First, there is no need for the actual substance (the destroyed exhibit) to be introduced in evidence in this case. In ***Kelly*, 14 F.3d at 1174,** the Seventh Circuit reminded that "there is no need for a sample of the narcotics to be placed before the jury." The exhibit was tested at the Illinois State Police crime lab well before it was destroyed at the Alton Police Department, and Defendant does not argue that the scientist who tested the substance at the crime lab was in any way negligent in performing his duties.

Second, Defendant has the chance to thoroughly cross-examine any witness who offers testimony at trial about the August 14, 2012 controlled buy or the substance purchased during the buy. Defense counsel can adduce evidence regarding the destruction of the exhibit while in the custody of the Alton Police Department and raise questions regarding the quality of the police work and the inability to retest the drugs. The destruction of this exhibit does not block admission of all testimony about the August 14, 2012 controlled buy; it factors into the weight given any such testimony.

Third, Defendant's motion presents an undeveloped two-page argument for suppression which presents only a single "*See*" citation to two cases, devoid of application or explanation as to how they support suppression here.

Finally and most importantly, Defendant failed to shoulder his burden under ***Arizona v. Youngblood*, 488 U.S. 51, 58 (1988),** and ***California v. Trombetta*, 467 U.S. 479, 488 (1984),** of showing that the evidence had exculpatory value and was destroyed

involved premise near a school in the time period of August 2012 to November 2013.

in bad faith. In ***Youngblood****,* the police failed to refrigerate a sexual assault victim's clothing or perform tests on semen samples. "The Court held 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.'" ***McCarthy v. Pollard*****, 656 F.3d 478, 484 (7th Cir. 2011),** ***quoting Youngblood,*** **488 U.S. at 58.** Similarly, in ***Trombetta,*** **467 U.S. at 488,** the Court held that the California's failure to preserve "Intoxilyzer" breath samples was without constitutional defect, where there was no showing of "official animus towards [the defendant] or of a conscious effort to suppress exculpatory evidence."

It is important to note the nature of the destroyed evidence in the case at bar – it had no apparent exculpatory value. It had been promptly examined by a forensic scientist at a reputable lab and had tested positive for cocaine base. It was *inculpatory* evidence that had no apparent exculpatory aspect. In ***Illinois v. Fisher,*** **540 U.S. 544, 547-48 (2004)**, the Supreme Court carefully distinguished between the prosecution's failure to disclose potentially exculpatory evidence and the state's failure to preserve *potentially useful evidence*.

> [W]hen the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. *See Brady v. Maryland*, 373 U.S. 83 … (1963); *United States v. Agurs*, 427 U.S. 97 … (1976). In *Youngblood*, by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."….

> We concluded that the failure to preserve this "potentially useful evidence" does not violate due process "unless a criminal defendant can show bad faith on the part of the police." … The substance seized from respondent was plainly the sort of "potentially useful evidence" referred to in *Youngblood*, not the material exculpatory evidence addressed in *Brady* and *Agurs*. At most, respondent could hope that, had the evidence been preserved, a fifth test conducted on the substance would have exonerated him…. [And] police testing indicated that the chemical makeup of the substance inculpated, not exculpated, respondent….

The same reasoning applies here. No bad faith showing has been made, and the testing on the exhibit indicates the destroyed evidence inculpated not exculpated Defendant. In ***Fisher*, 540 U.S. 549,** the high Court concluded: "the applicability of the bad-faith requirement in ***Youngblood*** depend[s]not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between 'material exculpatory' evidence and 'potentially useful' evidence…. As we have held, … the substance destroyed here was, at best, 'potentially useful' evidence, and therefore ***Youngblood***'s bad-faith requirement applies."

In our case, the evidence destroyed by Detective Forrler was only potentially useful, so Defendant's constitutional right to due process was violated (and suppression is warranted) only if Defendant shows that "(1) the State acted in bad faith; (2) the exculpatory value of the evidence was apparent before it was destroyed; and (3) the evidence was of such a nature that the petitioner was unable to obtain comparable evidence by other reasonably available means." ***McCarthy*, 656 F.3d at 485 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1756 (2012), *citing Henry v. Page*, 223 F.3d 477, 481 (7th[h] Cir. 2000).** In this context, bad faith means a "conscious effort to suppress exculpatory evidence," ***United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir.),**

***cert. denied,* 531 U.S. 1026 (2000) *quoting Jones v. McCaughtry*, 965 F.2d 473, 477 (7th Cir. 1992).**

The parties argue over the characterization of Forrler's conduct in destroying the exhibit. Forrler has been charged in state court with reckless failure to perform a mandatory duty (a Class 3 felony under Illinois law). The Government points out that the prosecutor in the state court case describes Forrler's conduct as "negligent." Of course, the state's attorney's charging decision (and the adjective he uses to describe Forrler's conduct) do not control the decision as to whether Forrler's destruction of exhibits was intentional, deliberate, or negligent. But the record reveals that Forrler did not single out this case to destroy the exhibit. Rather, he did this as to 60 to 100 exhibits. And the evidence at the February 2015 evidentiary hearing (including Detective McCray's testimony regarding a thorough search of the Alton Police Department's "LAWMAN" database) indicated that Forrler had no contacts whatsoever with Defendant Musgraves.

The Court has reviewed *in camera* the records of the Internal Affairs investigation into Detective Forrler's destruction of evidence from the Alton Police Department vault as well as the records from the LAWMAN database.[8] Forrler claimed that he did not think he needed to retain exhibits if (a) lab results had been obtained on the evidence, or

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[8] Defendant sought these records via subpoena to the City of Alton which was quashed by Magistrate Judge Clifford J. Proud, to whom the motion was referred for disposition (*see* Docs. 81, 85). At the February 6th hearing, the undersigned denied Defendant's appeal from that ruling but agreed to in camera review the documents. Those documents were provided to the Court on February 20, 2015 and have been reviewed.

(b) charges had been disposed of in state court. This was incorrect, of course. But there is not a shred of evidence suggesting that Forrler acted in bad faith or consciously destroyed evidence he knew was exculpatory. There is not even any indication that Forrler knew Defendant Musgraves, targeted this evidence for some reason, or had any interest in the outcome of Musgraves' case. As noted above, the substance from the August 14, 2012 transaction had already tested positive for cocaine base at the Illinois State Police crime lab. ***Chaparro-Alcantara*, 226 F.3d at 624.** ***See also* United States *v. Folami*, 236 F.3d 860, 865 (7th Cir. 2001) (suppression not warranted where there was no evidence of bad faith in destruction of substance, the destroyed evidence was not exculpatory, there was no dispute that the evidence was heroin, and the government provided an explanation, albeit not comprehensive, for the destruction).**

Defendant Musgraves has not established bad faith in the destruction of the evidence or that the exculpatory value of the evidence was apparent before it was destroyed. The destruction of the evidence did not violate Musgraves' due process rights, and he has identified no other implicated right or basis for suppression. The motion to suppress testimony regarding the August 14, 2012 transaction is **DENIED**.

DOC. 61 – MOTION TO SUPPRESS EVIDENCE

Sergeant William Brantley, a 20-year veteran with the Alton Police Department, currently is in charge of the Department's Narcotics Unit. In 2013, the Alton Police arrested an individual named Romell Stevens. In the course of investigating Stevens, the police talked to Kenneth Boner, who had information about Stevens. That information included the fact that Stevens had obtained drugs from his/Stevens'

brother, Miles Musgraves. The day after interviewing Kenneth Boner, the Alton Narcotics Unit (Detective McCray and Sergeant Brantley) decided to apply for a search warrant. Sergeant Brantley drafted an application for a search warrant and presented it to the Madison County State's Attorney's Office for review. An Assistant State's Attorney suggested that Brantley divide the information in his draft affidavit into two *separate* affidavits – one from Brantley and a separate one from Kenneth Boner.

It was explained to Boner that both he and Sergeant Brantley would appear personally before the Judge in support of the search warrant application. Boner initially was hesitant to go to Court or have his name appear in court documents, so Brantley suggested they could refer to Boner as "John Doe" in the paperwork. At this time, Brantley had no prior dealings with Boner, knew of no previous contact between Boner and the Alton Police, and had no idea whether Boner had a criminal history.

Brantley revised the search warrant application as suggested by the Assistant State's Attorney and prepared two separate affidavits in support (Sergeant Brantley and John Doe). The Brantley Affidavit, sworn to on July 10, 2013, identified Miles Musgraves as a person known to sell cocaine in Alton and known to have two brothers involved in drug trafficking – Scottie M. Musgraves and Romell C. Stevens. The Brantley Affidavit described the August 14, 2012 controlled buy conducted by CI 12-16 at Defendant Musgraves' house at 1808 Sycamore in Alton. The Brantley Affidavit also described how on July 9, 2013, after Romell Stevens was arrested, John Doe came forward with information about Stevens and Stevens' brother. Doe did not know

Stevens' brother's name but readily picked him (Defendant Musgraves) out of a photographic lineup.

The Doe Affidavit described two events – one on July 6, 2013 and one on July 8, 2013. On July 6, 2013, Doe accompanied Stevens to 1808 Sycamore and watched Stevens enter his brother's house with a baggie containing prescription Vicodin and exit the house with cocaine. On July 8, 2013 around midnight (Doc. 63-3, p. 2), Doe was present when Stevens' brother arrived and gave Stevens powder cocaine in exchange for $100. Doe positively identified Miles Musgraves as Stevens' brother.

Both Sergeant Brantley and Kenneth Boner appeared personally before Judge James Hackett with the warrant application and supporting affidavits. Judge Hackett asked both men in turn whether they swore that the information contained in their affidavits was true and correct to the best of their ability to recall. Judge Hackett authorized issuance of the search warrant at 4:55 p.m. that day (July 10, 2013). The warrant was executed on July 12, 2013.

Defendant maintains that the search warrant for Defendant Musgraves' residence was not supported by probable cause, so all evidence obtained from execution of the warrant must be suppressed. Defendant catalogues a number of "deficiencies" in the affidavits. As to the Brantley Affidavit, Defendant argues that the information from CI 12-16 was old (describing events from 11 months prior), no reason was given for not disclosing the CI's identity (Thomas Tisdale), and the affidavit was misleading as to the description of the controlled buy (suggesting a carefully monitored event when it was not). As to the Doe Affidavit, Defendant contends the affidavit failed

to include relevant details about the incident at 3509 Oscar Street, no reason was given for withholding John Doe's true identity, and no information was provided as to Doe's reliability (whether police had prior dealings with him, or whether he had been involved in illegal drug activities), so the judge had no basis on which to form an opinion of Doe's trustworthiness.

The Court rejects Defendant's argument regarding the absence of probable cause to support the warrant. "Probable cause is established when, considering the totality of the circumstances, there is sufficient evidence to cause a reasonably prudent person to believe that a search will uncover evidence of a crime." ***Glover*, 755 F.3d at 816, *citing* *Gates*, 462 U.S. at 238, and *United States v. Etchin*, 614 F.3d 726, 735 (7th Cir. 2010), *cert. denied sub nom. Cole v. United States*, 131 S. Ct. 953 (2011).** If the warrant application here had included only the information from CI 12-16 (Tisdale) regarding the August 14, 2012 controlled buy, the Court would reach a different conclusion. Obviously, information regarding a sale nearly a year earlier would be too stale, standing alone, to support a probable cause determination. But the Brantley Affidavit contained additional information, *specific and recent in nature*, e.g., the July 9, 2013 information from John Doe, fleshed out after the arrest of Romell Stevens. This was buttressed by the Doe Affidavit, which delineated the details of the July 6, 2013 and July 8, 2013 events, in which Doe observed Stevens enter his brother's s house with Vicodin and exit with a baggie of cocaine (July 6th) and Doe was present when Stevens' brother gave Stevens powder cocaine in exchange for $100 (July 8th). Doe positively identified Stevens' brother as Defendant, Miles Musgraves.

The fact Kenneth Boner signed the paperwork under the name "John Doe" does not fatally flaw his affidavit. Nor did the fact that Boner had never been used before by Alton Police or proven himself reliable in supplying information. The affidavits contained sufficient detail to establish probable cause, and both affiants (Brantley and Doe) personally appeared before the judicial officer in support of the warrant application. As the Seventh Circuit summarized in ***United States v. Johnson*, 655 F.3d 594, 600 (7th Cir. 2011):**

> Where, as here, the issuing judge considered only the supporting affidavit when deciding whether to issue a search warrant, "the warrant must stand or fall solely on the contents of the affidavit." *United States v. Koerth,* 312 F.3d 862, 866 (7th Cir. 2002). And when an affidavit relies on information supplied by an informant, the issuing judge must consider whether the information is reliable.
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> The judge must look at a variety of factors, including the degree to which the police have corroborated the information, whether and to what extent the information is based on the informant's own observations, how much detail the informant provides, how much time elapsed between the events reported and the warrant application, and whether the informant personally appeared before the warrant-issuing judge. *United States v. Dismuke,* 593 F.3d 582, 586-87 (7th Cir. 2010). We take into account these and any other pertinent factors as a whole, and no one factor necessarily dooms a search warrant.

The Brantley and Doe affidavits included a sufficient degree of detail (e.g., Doe provided dates and locations of drug sales, even the time as to one "around midnight"), fresh information (events of July 6 – 9, 2013 used for a warrant application submitted July 10, 2013), firsthand information (Doe observed firsthand what he reported), and corroboration (Doe did not just say he saw Defendant engaged in drug transactions; he

identified Defendant in a photographic lineup, identified Defendant's car, and identified 1808 Sycamore as Defendant's house).

Plus, Doe personally appeared before Judge Hackett. Although Brantley, in his affidavit, did not attest to past reliability of John Doe, Judge Hackett could still find probable cause established, because reliability could be inferred from the totality of the circumstances. ***See, e.g., United States v. Lowe*, 389 Fed. Appx. 561, 563 (7th Cir. 2010) (unreported).**

As the Seventh Circuit remarked last month: "Here, the totality of the circumstances reveals an ample basis for finding probable cause." ***United States v. Olivo*, 2015 WL 137628, *3 (7th Cir. Jan. 12, 2015).** Judge Hackett had a substantial basis to conclude that a search of the residence would detect evidence of criminal activity. That is all that is required. ***See Kelly*, 772 F.3d at 1080 (district court does not engage in de novo review of issuing judge's conclusion that, based on all the circumstances, there was a fair probability that evidence of a crime would be found; rather, district court only evaluates whether issuing judge had substantial basis on which to conclude that probable cause existed).**

Furthermore, if the affidavits submitted to Judge Hackett failed to establish probable cause, the evidence obtained in the search is admissible under the good-faith exception to the exclusionary rule recognized in ***United States v. Leon*, 468 U.S. 897 (1984).** ***Leon*** held that evidence obtained in violation of the Fourth Amendment still is admissible if the officer who performed the search acted in good faith reliance on a search warrant. ***Id.*, 468 U.S. 922-23.**

A police officer's decision to obtain a search warrant is *prima facie* evidence that the officer acted in good faith. ***United States v. Reed,* 744 F.3d 519, 522 (7th Cir.), *cert. denied,* 135 S. Ct. 130 (2014).** A defendant may rebut this evidence of good faith only by demonstrating that (1) the issuing judge totally abandoned his detached and neutral role, (2) the officer was dishonest or reckless in preparing the affidavit, or (3) the warrant was so lacking in probable cause that the officer could not reasonably rely on the judge's issuance of it. ***Id., citing United States v. Miller,* 673 F.3d 688, 693-94 (7th Cir. 2012), *United States v. Bell,* 585 F.3d 1045, 1052 (7th Cir. 2009), and *United States v. Garcia,* 528 F.3d 481, 487 (7th Cir.), *cert. denied,* 555 U.S. 955 (2008).**

In the case at bar, the warrant application submitted by Sergeant Brantley was not the kind of "barebones" paperwork found deficient in other cases, and Defendant does not assert that Judge Hackett wholly abandoned his neutral role. Defendant endeavors to rebut the presumption of good faith under the second exception to ***Leon,*** arguing that Sergeant Brantley was dishonest or reckless in preparing the affidavits. Specifically, Defendant argues that Brantley withheld or omitted (a) certain details of the drug transactions referenced in the affidavits, (b) the identities of John Doe and CI 12-16, (c) information that John Doe had been involved with Romell Stevens in drug activity, (d) Romell Stevens' criminal history, and (e) CI 12-16's criminal history.

Defendant has not shown that this case fits within the exception. First, the affidavits contained enough detail. Defendant criticizes the Doe Affidavit, for instance, which discussed Romell Stevens' delivery of cocaine to a residence at 3509 Oscar Street

in Alton for not providing details that the transaction took place at midnight,[9] the transaction took place when a vehicle pulled into a dark driveway, the vehicle had tinted windows, and the house had no external lighting and had large trees in the yard (Doc. 61, p. 8). It is true that the affidavits do not contain all of these details, but assuming these details are material, Defendant has presented no evidence to show that Sergeant Brantley deliberately withheld them or was reckless or dishonest in omitting them. Brantley testified that in applying for this warrant he followed the same protocol and normal practice he has in many other applications – dozens of other affidavits for search warrants, most on narcotics cases, at least six of which were presented to Judge Hackett. His standard procedure was to include what he believed was "just enough information to establish probable cause." He did not include excessive details or list the kind of impeachment information Defendant contends should have been included. Brantley testified that he was not trying to "trick" Judge Hackett or hide information from Judge Hackett. He just followed his normal procedure in drafting the affidavits.

As to the information regarding CI 12-16 (Thomas Tisdale), Brantley was aware Tisdale had a couple of retail theft charges for which he had been incarcerated, but the failure to include that in the affidavit, again, was not dishonesty or recklessness.

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[9] Actually, the Doe Affidavit *does* state that the July 8th drug deal at 3509 Oscar Street occurred "around midnight" (Doc. 63-3, p. 2). Similarly unavailing is defense counsel's criticism that the Doe incorrectly described Stevens' brother (Defendant) as short, when Defendant is not short. The Doe Affidavit actually refers to Stevens' brother as a "larger black male" driving a black passenger vehicle, either a Nissan or Kia (*id*). Defendant in fact drove a 2010 Nissan Maxima. Doe *did* include these and other accurate details.

Brantley's standard practice was to *not* include such impeachment information. Nor was Brantley deliberately hiding from Judge Hackett CI 12-16's identity as Tisdale. Indeed, Brantley had no idea that Judge Hackett had previously sentenced Tisdale.

And Brantley was not, as the defense argues, purely relying on what Tisdale *reported* about the August 2012 drug sale. That controlled buy had been captured on video. Brantley was not taking Tisdale's word about the transaction; Brantley saw the video that showed Tisdale's information about the transaction to be accurate and true. This was further corroborated by the fact that during his proffer statement Defendant admitted to selling drugs during the time period in which the controlled buy occurred.

Additionally, Brantley testified that he was unaware that any court had ever found a materially similar affidavit to fail to establish probable cause. Police officers executing search warrants are charged with knowledge of well-established legal principles and are responsible to follow clear precedents. ***See United States v. Koerth,* 312 F.3d 862, 869.** The Seventh Circuit takes a narrow view when deciding whether a legal principle is well-established. Evidence seized pursuant to a search warrant should not be excluded unless the supporting affidavit is plainly deficient or "courts have clearly held that a materially similar affidavit previously failed to establish probable cause under facts that were indistinguishable from those presented in the case at hand." ***United States v. Mykytiuk,* 402 F.3d 773, 777 (7th Cir. 2005).**

> Thus, the evidence is admissible unless (1) courts have clearly held that a materially similar affidavit previously failed to establish probable cause under facts that were indistinguishable from those presented in the case at hand, or (2) the affidavit is so plainly deficient that any reasonably well-trained officer "would have known that his affidavit failed to establish

> probable cause and that he should not have applied for the warrant." Koerth, 312 F.3d at 869 (quoting Malley v. Briggs, 475 U.S. 335, 345, 106 S. Ct. 1092, 89 L.Ed.2d 271 (1986)).

***Searcy*, 664 F.3d at 1124.**

Here, the affidavits were not plainly deficient, and Brantley knew of no court ever holding that an affidavit materially similar to those he presented to Judge Hackett failed to establish probable cause. Nor has Defendant identified a case with indistinguishable facts that reached that conclusion. The Government provided, through Brantley's testimony, an explanation for the omission of the information Defendant claims should have been included. Brantley prepared his affidavits here the way he always had, including the level of detail and information he thought necessary to establish probable cause. That is *not* dishonesty or recklessness by the police. ***Leon***'s good faith exception applies.

Brantley's decision to seek the warrant is prima facie evidence of his good faith, and that conclusion is bolstered by the fact that Brantley consulted a prosecutor (an Assistant State's Attorney in Madison County, Illinois) in drafting the affidavits used in applying for the warrant. ***See United States v. Pappas*, 592 F.3d 799, 802 (7th Cir.) (consulting with a prosecutor prior to applying for a warrant "provides additional evidence of [an officer's] objective good faith."), *cert. denied,* 131 U.S. 594 (2010).** Defendant Musgraves has not rebutted the evidence of good faith.

> Probable cause to search a place exists when, based on all of the circumstances, a reasonably prudent person would be persuaded that evidence of a crime will be found there….
> When an informant … supplies the basis for probable cause we consider, among other things, whether police have corroborated the informant's

> statements; the degree to which the informant's knowledge is based on firsthand observation; the detail provided; and the interval between the events described and the application for a search warrant.

***Etchin*, 614 F.3d at 735-36, *citing United States v. Farmer*, 543 F.3d 363, 377 (7th Cir. 2008).** ***See also Glover*, 755 F.3d 811, 816 (7th Cir. 2014).**

Having carefully reviewed the record before it, this Court concludes that Judge Hackett had a substantial basis on which to conclude that a search of the residence would detect evidence of criminal activity. Probable cause supported the issuance of the warrant.

Assuming *arguendo* that probable cause was absent, ***Leon***'s good faith exception to the exclusionary rule applies. This case does not fall within any of the situations precluding application of ***Leon* --** the issuing judge totally abandoning his neutral role, the affidavit being utterly barebones such that reliance on it is unreasonable, or the police officer being dishonest or reckless in preparing the affidavits supporting the warrant.

D. Conclusion

Last year the Seventh Circuit reminded district courts that "the exclusionary rule is a 'judicially created remedy,' not a personal constitutional right," and exclusion is the option of last resort which is merited when police exhibit "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" but not if police conduct a search in good faith. ***United States v. Gutierrez*, 760 F.3d 750, 754 (7th Cir. 2014).** Here, Alton police searched Defendant's residence in good faith reliance on a search warrant issued by a judge. Suppression is not appropriate.

Nothing the law enforcement officers did on July 12, 2013 or November 17, 2013 contravened ***Miranda*** or violated Defendant's constitutional protection against self-incrimination.

Finally, as to the potentially useful evidence destroyed by the Alton evidence custodian, Defendant has not shown bad faith on the part of the police, official animus toward Defendant, or a conscious effort to suppress evidence with apparent exculpatory value. ***See McCarthy*, 656 F.3d at 484; *Youngblood*, 488 U.S. at 58; *Trombetta*, 467 U.S. at 488.** The record reveals no denial of due process or other basis on which to suppress the evidence regarding the August 14, 2012 controlled buy.

For all these reasons, the Court **DENIES** Defendant's motions to suppress (Docs. 60, 61, 65).

Trial will proceed, as scheduled, at 9:00 a.m. on Monday, March 16, 2015. Proposed jury instructions are due in chambers by 12:00 noon on March 3, 2015 (see Judge Reagan's web page for detailed instructions regarding submission of same or contact his law clerk at 618-482-9229 with any questions about jury instructions). The final pretrial conference and jury instruction conference remains set on **March 6, 2015** (see Doc. 58) but the **time is hereby advanced to 1:30 p.m.** (rather than 2:30 p.m.).

IT IS SO ORDERED.

DATED February 26, 2015.

s/ *Michael J. Reagan*
Michael J. Reagan
United States District Judge

March 18, 2015, Trial Transcript Vol. III, Defendant's Motion for Judgment of Acquittal [pp. 77–79]

1 case. We're on time to finish even earlier today than 2:00
2 o'clock and then what we would do is come back tomorrow,
3 probably read a few instructions, have closing arguments and
4 you would deliberate. Let's take our lunch break now and I
5 won't waste your time then. We will start up in 30 minutes
6 and things will go quickly. Let's take 30 minutes. Make it
7 to 11:15. You get 34 minutes.
8 (Whereupon a recess was taken. The following
9 proceedings were held in open Court, out of the presence of
10 the jury.)
11 THE COURT: We are in open Court, out of the presence
12 of the jury. The Government rests. Mr. Schattnik?
13 MR. SCHATTNIK: Your Honor, at this time I would do
14 two things. First, I would make a motion pursuant to Federal
15 Rule of Criminal Procedure 29 for Judgment of Acquittal at the
16 close of the Government's case.
17 The second thing that I am going to do is renew my
18 objections as articulated in my motions, number one,
19 Document 60, my Motion to Suppress and Bar Proffer Statements
20 of the Defendant Miles Musgraves for all of the reasons
21 articulated in my motion. Two, I would renew my Motion to
22 Suppress Evidence as listed in document number 60 for all of
23 the reasons contained therein. Three, my Motion at
24 Document 65 to Suppress Testimony and for all of the reasons
25 indicated in Document 65 consistent with my renewal of the

1 motion, would ask the Court to strike testimony that has come
2 in contrary to the motion and direct the jury not to listen to
3 it.
4 With regard to my Rule 29 Motion, it would be based
5 on, number one, that if you look at all of the evidence in the
6 light even most favorable to the Government that there is not
7 sufficient evidence to convict my client on any of the counts
8 and I would point the Court out, especially to the count
9 dealing with the firearm that was found in Mr. Smith's car and
10 the drug material found in Mr. Smith's car, and there is no
11 direct evidence to connect my client to a delivery of drugs
12 into that vehicle.
13 There is no direct evidence to connect my client to
14 putting a gun inside a vehicle and we would ask the Court
15 basically in terms of the credibility of the witnesses the
16 Government has put on that might try to raise inferences that
17 they are basically the people of Romell Stevens and Mr. Bock,
18 Mr. Boner and Mr. Gordon, they are all inherently unreliable
19 because of the biases and prejudice they have as articulated
20 on the witness stand, their admissions in terms of being drug
21 addicts and the fact that they have extensive criminal
22 histories.
23 MR. BOYCE: Our evidence has been presented as to
24 each element of each count. That evidence, when viewed in the
25 light most favorable to the Government, was sufficient to

1 establish the defendant's guilt as to each count.
2 Determinations of credibility are right in the heart of the
3 province of the jury. As to the specific Counts 4 and 5
4 regarding the drugs and the gun, there is plenty of
5 circumstantial evidence that leads to inferences that is
6 sufficient to convict the defendant.
7 THE COURT: Okay. The defendant's motion under Rule
8 29 at the close of the case is denied.
9 Under that rule, after the Government closes its
10 evidence or after the close of all the evidence, the Court, on
11 the defendant's motion, must enter judgment of acquittal of
12 any offense for which the evidence is insufficient to sustain
13 a conviction.
14 After reviewing the evidence in this case, the Court
15 concludes that a reasonable jury could find the defendant
16 guilty of Counts 1 through 5.
17 In terms of the defendant's renewed motion under
18 Document 60, 61, 65, collectively motions to suppress, I
19 reincorporate by reference my ruling at Document 91 in which I
20 specifically denied each of those in detail.
21 The next thing I need to address, Mr. Schattnik, is
22 your client, Mr. Musgraves, going to testify?
23 MR. SCHATTNIK: May I have one brief consultation?
24 He is not, Your Honor.
25 THE COURT: Okay. Mr. Musgraves, I think I told you

March 18, 2015, Trial Transcript Vol. III, Defendant's Renewed Motion for Judgment of Acquittal [pp. 153–154]

1 talks about individuals who are addicted to drugs. Mr. Boyce,
2 your objection to this instruction?
3 MR. BOYCE: I thought I already stated it, Your
4 Honor.
5 THE COURT: It is the same as to 46 then?
6 MR. BOYCE: Yes, Your Honor.
7 THE COURT: You reincorporate your objection to 46 as
8 to my 1. Given over objection by USA.
9 Your Rule 29 at the close of all the evidence,
10 Mr. Schattnik?
11 MR. SCHATTNIK: At this time I would renew my motion
12 now that all of the evidence is closed. I would renew it for
13 the same reasons I articulated at the end of the Government's
14 case.
15 MR. BOYCE: The only thing changed since the last
16 ruling is the defense's case. The defense submitted no
17 witnesses with any personal knowledge of the charged offenses.
18 The defense's case went to the credibility of the Government's
19 witnesses. That is a matter within the province of the jury.
20 THE COURT: I agree, so I either should have granted
21 the Rule 29 at the close of the Government's case or I was
22 correct and I will not change my mind because the defendant
23 offered no witnesses as to the substantive allegations in
24 Counts 1 through 5. So the Motion for Judgment of Acquittal
25 based upon the Rule 29 at the close of all the evidence made

1 by defense is denied.

2 Okay, anything else we need to do for you on the

3 record?

4 Government, there was one Exhibit 15 that you didn't

5 offer, or did you and I missed it?

6 MR. BOYCE: I thought I did.

7 THE COURT: Recording of 7-9-13, photo lineup.

8 MR. BOYCE: We played that, Your Honor, just the part

9 with the statement of identification.

10 THE COURT: All right, I just missed it.

11 MR. BOYCE: We only published the part that was the

12 statement of identification, not the whole recording.

13 THE COURT: Okay, so 15 is admitted, no objection,

14 with the understanding it was the part you played.

15 (Whereupon Government's Exhibit 15 was admitted.)

16 MR. BOYCE: Right.

17 THE COURT: Dan, are all of your exhibits in?

18 MR. SCHATTNIK: I know they are.

19 (Whereupon a discussion was held off the record. The

20 following proceedings were held in open Court, out of the

21 presence of the jury.)

22 THE COURT: Okay, back on the record. Government's

23 52 is given over objection of the defendant. It is based upon

24 *United States v. Kelly*, 14 F.3d, 1169, Seventh Circuit, 1994

25 case. It reads as follows: A narcotics violation need not be

June 26, 2015, Sentencing Hearing Transcript [pp. 50–58]

1 my client before I sit down?
2 *THE COURT:* Why don't you do that now? We'll take
3 about a 10-minute break.
4 *(Recess)*
5 *THE COURT:* Please be seated.
6 Mr. Musgraves, it is your turn to talk if you want to.
7 You don't have to, but I'm certainly interested in hearing
8 anything you have to say. Come on up.
9 *MR. MUSGRAVES:* I'd just like to say thank you, your
10 Honor, for your patience, and thank my family and all my loved
11 ones.
12 I appreciate y'all came here today, and everything
13 going to be all right. All right.
14 *THE COURT:* Okay. Thank you.
15 Linda, would you come here?
16 *(Conferring with probation.)*
17 *THE COURT:* I've reviewed the letters in support of
18 the defendant that are attached to Document 144. A sentence in
19 federal court begins with the Court's obligation to accurately
20 calculate the federal sentencing guidelines. In this case,
21 I've concluded that the defendant is a total offense level 34,
22 criminal history category VI, based upon his career offender
23 status, and that calls for an advisory range on Counts 1 and 5
24 of 262 months to 327 months; Count 2, 240 months; Count 3,
25 and 420 months.

1 If the defendant had not been a career offender, he
2 would be at a total offense level of 17, with a criminal
3 history category of IV, and that would be a 37- to 46-month
4 range, not considering any obstructive behavior. If he had
5 been charged with obstructing justice also and I had upheld
6 that, and that was not the case he would be at a total offense
7 level of 19, with a criminal history category of VI, of 46 to
8 67 months. So clearly the career offender is a significant
9 driving factor in the overall potential sentence under the
10 advisory sentencing guidelines.
11 Although I look at the guidelines as a starting point,
12 I actually sentence under a lower statute known as 18 United
13 States Code, Section 3553. Under that statute is my obligation
14 to impose a sentence that is sufficient but not greater than
15 necessary to meet the four purposes of sentencing in federal
16 court. They're, Number 1, the need for the sentence imposed to
17 reflect the seriousness of the offense, promote respect for the
18 law, and provide just punishment for the offense; second, to
19 afford adequate deterrence to criminal conduct; third, to
20 protect the public from further crimes of the defendant; and,
21 lastly, to provide him with any needed educational or
22 vocational training, medical care or correctional treatment in
23 the most effective manner.
24 In doing that, I consider the kinds of sentences
25 available. I endeavor to avoid unwarranted sentencing

1 disparities among defendants with similar records who have been
2 found guilty of similar conduct. And in doing all that, I
3 consider the nature and circumstances of the offense and the
4 history and characteristics of the defendant.
5 This is my habit. I intend to talk about a few of
6 these factors, but if, at the conclusion, either side wants me
7 to expand on one or more, please let me know. Otherwise, I'll
8 assume my explanation is legally and factually sufficient and
9 sufficient for meaningful appellate review.
10 In this case, the defendant distributed cocaine base
11 and powder cocaine from his residence, which was within
12 1,000 feet of a school. He also possessed firearms and
13 ammunition at his home. In addition he maintained the
14 residence for the purpose of distributing drugs.
15 His relevant conduct was determined to be
16 5.6 kilograms of marijuana equivalent. That is crack and
17 powder cocaine, and it's converted under the guidelines of
18 marijuana. However, he was determined to be a career offender,
19 which resulted in a much higher total offense level and
20 criminal history category.
21 He put the government to their burden of proof and was
22 found guilty by a jury. Therefore, he received no points for
23 accepting responsibility, and all these factors have been taken
24 into consideration under the guidelines.
25 Originally, there was a contention that he was an

1 armed career criminal with respect to the two firearm charges.
2 However, there was confusion regarding a sentence he received
3 in one of those prior drug cases, which resulted in the
4 enhancement not being applied, and I've not considered him an
5 armed career criminal.
6 His adjustment to previous terms of supervision has
7 been poor as he failed to pay court-ordered financial
8 obligations and committed various new felony offenses. He also
9 has a prior conviction for aggravated discharge of a firearm
10 and being a felon in possession of a firearm but did not
11 receive criminal history points due to their age.
12 He is 41 years old, has virtually no verifiable work
13 history. In mitigation his history of substance abuse, has
14 expressed an interest in participating in drug treatment. He
15 does not have a high school education and stated he would like
16 to obtain his GED.
17 First of all, in terms of the nature and circumstances
18 of the offense and the history and characteristics of the
19 defendant, there are five offenses here. They're serious.
20 Drugs and guns in this community -- and by that I mean the
21 Metro East area, which includes the Alton area where this
22 offense occurred -- are the scourge of our community.
23 We have severe unemployment, we have high crime, and
24 we have individuals who are addicted to drugs who cannot
25 maintain employment and who cannot lead productive lives

1 because of pervasiveness of drugs. He distributed cocaine,
2 including crack cocaine. Those are serious drugs, and very
3 concerning is the fact that he had firearms and ammunition.
4 Drugs and guns combine to create violence. So this is a
5 serious series of offenses in this case that exacerbates a
6 serious crime problem that we have in this particular
7 community.
8 In terms of the history and characteristics of the
9 defendant, defense counsel called five witnesses to testify as
10 to the defendant's character, and I listened to all of them,
11 and there is no question that they believe that he is a good
12 brother, son, father, and that he deserves a second chance. I
13 heard that at least three times. The problem with that request
14 is that he has had six second chances. This is his seventh
15 case. He first started a long time ago with his first case.
16 And he was given a second chance after that.
17 And as I look at the presentence report, I note that
18 he got his first chance back at age 20, in 1994, when there was
19 an aggravated discharge of a firearm in Madison County. He
20 didn't get any points for that. He was placed on probation.
21 But that didn't get his attention. And then in 1997, at age
22 23, unlawful possession of a weapon by a previously convicted
23 felon. That didn't get his attention. He was given another
24 chance. He is now on his third. In 1999, it involved a
25 possession of weapons by a felon; thirty months of probation.

1 That didn't get his attention. He was given another chance.
2 Paragraph 65, in 2000, unlawful delivery of a controlled
3 substance; eight years of imprisonment, but 98 days' credit for
4 time served. After that, he was given another chance. We are
5 on the fifth one now. July 2002, unlawful possession of a
6 controlled substance; three years of imprisonment, credit for
7 98 days' time served. Then he got a sixth chance.
8 September 2006, unlawful possession with intent to deliver. He
9 got 25 months of periodic imprisonment. And there were various
10 other charges in between. So he's had all the second chances
11 that he's entitled to and third chances and fourth chances and
12 fifth chances and sixth chances.
13 The sentence in this case must deter criminal conduct,
14 and it must deter him from committing other crimes, and it must
15 deter others considering committing other crimes. Deterring
16 him is specific deterrence, specifically deterring him.
17 Deterring others is general deterrence.
18 And I must impose a sentence that protects the public
19 from further crimes of the defendant. He has a rather
20 consistent history of committing drug or gun offense every two
21 to three years and interspersed with incarceration in between.
22 In my view, he is highly likely to recidivate, and the public
23 must be protected from him.
24 There are some services we can offer him in terms of
25 education and vocational training. He needs to obtain his GED,

1 and he needs to get some drug care and treatment, and we can
2 offer those services to him.
3 And I must avoid unwarranted sentence disparities
4 among defendants with similar records who have been found
5 guilty of similar conduct.
6 Of particular concern in this case is the framing of
7 Jessie Smith. This defendant was willing to work as an
8 informant for the Alton Police Department and placed drugs and
9 guns on another individual and let that person be exposed to
10 and, in fact, was charged with a felony that could have put him
11 in jail up to 30 years with a mandatory minimum of 6 years.
12 And that behavior is simply dishonorable and unforgivable.
13 So when I look at this case, as I always do when I
14 look at cases that are driven either by an armed career
15 criminal enhancement or, in this case, a career offender
16 enhancement, I look at the documents, and I come up with an
17 impression as to what would you do in this case if these
18 enhancements did not apply.
19 And I would look, then, at the fact that this
20 defendant, under the guidelines without these enhancements, has
21 a guideline calculation range of 37 to 46 months, based upon a
22 total offense level 17 and a criminal history category VI. And
23 I look at the fact that he sold drugs from his home with a
24 child present. He sold it near a school. The drug danger is
25 enhanced by the ammunition and the possession of the firearm.

1 He has two prior drug trafficking offenses, he has a prior drug
2 possession offense and two felon in possession offenses, a
3 limited education, doesn't work for a living, owes child
4 support -- certainly not to the extent that the PSR
5 indicates -- and that he commits offenses while released on
6 supervision.
7 So when I look at all of that and I divorce myself
8 from the career criminal status, I believe an appropriate
9 sentence in this case would have been that of 240 months of
10 incarceration. Anything less than that, I think, would not
11 meet the goals and purposes of 18 USC 3553.
12 Then I look at the guidelines, which suggest a higher
13 sentence than that, 262 to 327 months. That, again, is the
14 sentence that is advisory as a result of the career offender
15 status.
16 And I look at what's the difference between what I
17 would have done absent the career offender status and what
18 should I do, given the fact that there is career offender
19 status. And the only thing that distinguishes the sentence, in
20 my view, is the fact that the career offender sentence makes a
21 sentence within that range more likely to avoid unwarranted
22 sentencing disparity because other judges looking at this same
23 case, with this same set of facts, with these same guideline
24 calculations, and this same career offender status would look
25 at a starting point of 262 to 327. So that's how I analyze

1 this case.
2 And then I recognize the government's request to
3 300 months not unreasonable, given the history of the
4 defendant, given the aggravating factors in this case. And I
5 determine, after all things are considered, that an appropriate
6 sentence in this case is one that, in my view, meets all the
7 goals ands purpose of 18 USC 3553 without being any greater
8 than necessary to do so, recognizing that I believe that the
9 career offender status in this case simply leads to the
10 conclusion that the tail is wagging the dog too much. So I
11 don't think the career offender status in this case meets the
12 goals and purposes of 18 USC 3553.
13 So I'm going to sentence the defendant to 240 months
14 of incarceration. That's less than the guidelines. That's
15 less than the government requests. It is higher than the
16 guidelines absent career offender. It is less than the
17 guidelines with a career offender, but this is what the
18 sentence would have been had there not been a career offender
19 status, and I recognize that there is, and I think I ruled
20 appropriately on that.
21 I'm not going to fine the defendant because he does
22 have some child support obligations. The exact amount, I don't
23 know, but clearly he has some. There are four children listed
24 in the PSR. Additionally, he's going to have a $500 special
25 assessment to pay, and he has got no visual means of support,

No. 15-2371

United States Court of Appeals
for the Seventh Circuit

United States of America,
Plaintiff–Appellee,

v.

Miles Musgraves,
Defendant–Appellant.

Appeal from the United States District Court
For the Southern District of Illinois, East St. Louis Division
Case No. 3:13-cr-30276-MJR
The Honorable Michael J. Reagan

REQUIRED RULE 30(b) APPENDIX OF DEFENDANT-APPELLANT MILES MUSGRAVES

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1 conversations where he was attending to other matters or
2 attending to things that appeared to be related to
3 Mr. Musgraves.
4 Q. Without asking you the substance of any conversation,
5 were you able to see Mr. Musgraves at some point in time while
6 you were there?
7 A. Yes, eventually I was.
8 Q. When you saw him, did you see him in that initial
9 holding area or were you brought into the interior of the
10 department?
11 A. No, initially I was brought into the exterior area so
12 there was a glass between us.
13 Q. All right. Then ultimately were the police able to
14 provide you with more details as to what was at issue with
15 regard to Mr. Musgraves on that date?
16 A. As we continued to pull teeth, I eventually was given
17 information that a search warrant had been conducted at his
18 home and that certain items had been found. Eventually it was
19 disclosed that there were bullets or something of that nature.
20 I was never given any specific information with that regard.
21 Q. All right. What, if anything, did the police tell you
22 that they wanted from Mr. Musgraves on that date?
23 A. Eventually we came to speak a bit more freely. It was
24 clear this was a federal matter. At that time they indicated
25 that there was some interest in speaking with Mr. Musgraves

1 potentially about criminal activity in the area that he might
2 or might not have knowledge of.
3 Q. What kind of things did the police explore with you
4 with regard to the things that they might want Mr. Musgraves
5 to do?
6 A. Before or after we actually entered the conference
7 room?
8 Q. At any time did they give you information of what it
9 was they were seeking?
10 A. Not really, not until I had actually spoken again with
11 Mr. Musgraves about there being some issue with regard to
12 potential federal charges and a desire to explore this.
13 Subsequently, and I apologize, I am going to have to ask you
14 for the question again. I actually lost where I was at.
15 Q. Okay. With regard to that date, did you have -- did
16 the police want to talk to Mr. Musgraves?
17 A. They did. They wanted to talk to him about particular
18 criminal activity. Specifically they wanted to know whether
19 or not he could be of assistance with regard to heroin or
20 pills initially, which he indicated that he had no contacts or
21 no knowledge of any of those types of activities.
22 Subsequently there was some question with regard to purchases
23 of cocaine and the possibility of wearing a wire, which was
24 outright rejected as being entirely too dangerous. In
25 addition to that, eventually it was determined by the police

1 department that their highest priority was the removal of guns
2 from the streets.
3 Q. All right. With regard to these conversations with the
4 police before you permitted them to have conversations with
5 Mr. Musgraves, was there some concern on your part with regard
6 to him making statements to the police?
7 A. Oh, absolutely. I mean, obviously, these would be
8 potentially incriminating statements so I wanted to speak with
9 the prosecutor. If, in fact, it was a federal prosecutor, I
10 wanted to speak with whoever was handling the case.
11 Q. What did the police say to you as to what arrangements
12 or what efforts they would make in terms of getting an
13 appropriate prosecutor to speak with you?
14 A. Well, there was an additional amount of time that
15 transpired during which they said they were attempting to
16 contact someone. Eventually they did, in fact, contact Mr.
17 Boyce.
18 Q. All right. On that date did you speak with Mr. Boyce?
19 A. I did by cell phone.
20 Q. What was the essence of the conversation that you had
21 with Mr. Boyce?
22 A. Well, initially I expressed concern about the fact that
23 we were proceeding without an actual proffer letter. We
24 discussed the case and I was concerned about the urgency that
25 seemed to be in place at that time. I didn't like that it was

1 going so fast. He was speaking by car. He was traveling to a
2 destination and he indicated at that time he did not have the
3 means to actually transmit a written proffer, however, I could
4 consider this to be a verbal proffer letter and that the
5 urgency in going forward was that there was a grand jury
6 impanelled and if there was any cooperation that was going to
7 be had, that it had to happen now, otherwise the grand jury
8 indictments would go forward.
9 Q. Did you have any qualms about proceeding in this
10 fashion?
11 A. Yes, I did.
12 Q. What were they?
13 A. Well, for one, the fact that the proffer letter itself
14 is an extraordinarily dense document and quite often there are
15 many legal terms that we have to describe to the parties so
16 that they fully understand exactly what it is they have
17 entered into so there is no violation of the proffer order or
18 proffer agreement.
19 Q. In terms of the Alton Police Department, was there any
20 pressure from them or not with regard to getting things done
21 that night as opposed to going through the typical process of
22 scheduling a proffer session with a proffer letter?
23 A. Absolutely. Not only was there pressure from Mr. Boyce
24 with regard to the grand jury looming and that this would, in
25 fact, be proceeding with or without assistance and the Alton

1 Police were absolutely adamant they wanted to proceed. They
2 definitely had gone out of their way to make contact with Mr.
3 Boyce.
4 Q. Were there discussions with Mr. Musgraves in the
5 presence of the police officers with regard to what was being
6 contemplated with regard to an agreement?
7 A. Yes, there were. Actually, Sergeant Brantley
8 explained, in essence, anything he said at this time would
9 be -- it would be not held against him. He was not being
10 given full immunity. The decision as to whether to prosecute
11 or not to prosecute would be made at a later time, however,
12 anything he said that day would not be something -- as long as
13 he was truthful with them and cooperated and was honest, that
14 would be no problem.
15 Q. You are familiar with proffer letters?
16 A. Absolutely.
17 Q. You have gone over them with clients?
18 A. Yes, I have, on numerous occasions.
19 Q. Lots of specific details in the standard proffer
20 letter?
21 A. Absolutely.
22 Q. In terms of the discussions that took place with
23 Mr. Musgraves with the police officers in your presence, was
24 there any way to inform Mr. Musgraves of all the details that
25 might be contained within a proffer letter?

1 A. No.
2 Q. What was the reason for proceeding without the proffer
3 letter being signed on that night?
4 A. We were relying upon the assurances this was a verbal
5 proffer letter and it was a Friday, if I recall correctly, and
6 the following Monday I had, in fact, received the hard copy
7 that Mr. Boyce indicated that he would, in fact, forward.
8 Q. All right. What was the essence of the agreement as
9 conveyed to Mr. Musgraves by the police officers in your
10 presence then?
11 A. Testify honestly, nothing you say today will be held
12 against you, we want you to go do some work for us and as long
13 as you cooperate, all will be well.
14 Q. In terms of the time frame for the potential activities
15 of Mr. Musgraves, was there a concern voiced by you to law
16 enforcement on that date with regard to the immediacy of
17 activities on his part?
18 A. Yes. One of my largest concerns was since we had just
19 discovered there was a search warrant and it was apparently
20 widely known in the area that it had been executed at his
21 home, that if he were to subsequently promptly go out on the
22 street attempting to act on behalf of law enforcement, not
23 only would it be obvious, but that it could, in fact, be
24 detrimental to his health. I was concerned about him not
25 having any harm come to him as a result, and so I specifically

1 inquired as to what kind of time frame that we were looking
2 at. We were assured that if he didn't produce anything until
3 the end of the year, I believe it was approximately mid July
4 that this took place, that that would not be a problem.
5 Q. After that night, did the time frame that the police
6 were pushing seem to change?
7 A. Yes, it did.
8 Q. In what fashion?
9 A. I was contacted by Lou, who indicated that --
10 Q. I am not going to ask you anything that Mr. Musgraves
11 has indicated to you.
12 A. Very easy to do. Thank you.
13 Q. So basically did you have an occasion to come into
14 contact with the police department?
15 A. I did. I spoke with Detective McCray with regard to
16 slowing things down with regard to a request for information
17 regarding any potential criminal activity.
18 Q. Was this between the time of this July meeting but
19 before the end of the year?
20 A. Absolutely. It was approximately a couple of weeks
21 after our meeting.
22 Q. And so did your efforts with the Alton Police
23 Department bear fruit?
24 A. No.
25 Q. Did you have further contacts with any other members of

1 the Alton Police Department on that issue?
2 A. Yes, I did.
3 Q. With whom and when?
4 A. Sergeant Brantley subsequently, and I don't recall, but
5 it was within, again, a very short few week period.
6 Q. All right. With regard to your discussions with
7 Officer Brantley, what was resolved or not resolved with
8 regard to this timing issue?
9 A. He indicated that he would speak with Detective McCray
10 but that it was not his case and that it was up to Detective
11 McCray in terms of handling the particular situation.
12 Q. Did you remind Sergeant McCray of the fact that when
13 this was discussed initially there was a time frame that gave
14 you until the end of the year?
15 A. Absolutely.
16 Q. When you were involved then in discussions with the
17 police on that July date and Mr. Musgraves, did he, in fact,
18 talk to law enforcement about some things?
19 A. It is my understanding that he did.
20 Q. All right. When you were present there was some
21 conversations with Mr. Musgraves with the police on that date,
22 correct?
23 A. Yes.
24 Q. All right. Prior to that interview process on
25 July 12th of 2013, was Mr. Musgraves given his Miranda?

February 6, 2015, Suppression Hearing Transcript, Testimony of Kurtis McCray [pp. 41–44, 61–63]

1 Q. What about your contemporaneous notes?
2 A. I would have to review the notes, but I am assuming I
3 did.
4 Q. Detective McCray, what happens to your credibility if
5 you lie in a report like this?
6 A. It is gone, it is shot.
7 Q. Are you done as a police officer?
8 A. Pretty much, yes.
9 Q. So what was your assessment of Musgrave's proffer when
10 it was over?
11 A. He seemed like an informant, or I am sorry, a defendant
12 that was not necessarily giving all the facts of his drug
13 dealings. It just seemed like he wasn't gonna -- the outcome
14 of his cooperation was not necessarily going to result in a
15 positive outcome.
16 Q. Is that common, a defendant says just enough to get out
17 today and then doesn't follow up?
18 A. That's correct.
19 Q. Does the Alton Police Department have a formalized
20 confidential informant agreement, like a form?
21 A. Yes.
22 Q. Do you enter into those agreements with someone when
23 you anticipate them cooperating actively?
24 A. Yes, actively, yes.
25 Q. Did you do that with Miles Musgraves after the proffer

1 ended?
2 A. No, I didn't.
3 Q. Why not?
4 A. I didn't anticipate him fully cooperating. It appeared
5 that he was minimizing things and he didn't appear to be fully
6 cooperating.
7 Q. Okay. So you didn't make any new promises in the form
8 of a CI agreement?
9 A. No, I didn't.
10 Q. All right. When he left, did you make any promises to
11 Miles Musgraves?
12 A. No.
13 Q. Did you tell him that he was immune from anything?
14 A. No, I didn't.
15 Q. Did you tell him that any future statements he made --
16 let me rephrase that. Did you tell him any future statements
17 he made to you would not be used against him?
18 A. No, I didn't say that.
19 Q. Would it make any sense to immunize someone henceforth?
20 A. No, it wouldn't. I don't have no power anyway.
21 Q. Okay. So that was July. Going forward to November,
22 did Musgraves contact you by phone and text message?
23 A. Yes, he did.
24 Q. Okay. Just generally, what was the nature of those
25 contacts around November 17th of '13?

1 A. That was a Sunday morning, I believe, and he had
2 contacted me numerous times. I had saw missed calls. I then
3 texted him or we started exchanging text messages. He started
4 telling me about an individual who had a gun and drugs who was
5 sitting in the 1800 block of Sycamore by his house.
6 Q. Okay. Who initiated that contact, you or Musgraves?
7 A. It was missed calls from Mr. Musgraves.
8 Q. Was he in custody during that time?
9 A. No, sir, he wasn't.
10 Q. Was he responding to an interrogation from you?
11 A. No.
12 Q. Under those circumstances, do you think there was any
13 reason to inform him of his Miranda rights?
14 A. Not at all.
15 Q. Okay. Did you save the texts from Musgraves on your
16 phone?
17 A. Yes.
18 Q. Okay. Have those been downloaded onto a disk provided
19 in discovery?
20 A. Yes, sir.
21 Q. I am going to give you Exhibit 2. Is that a copy of
22 that disk?
23 A. That's correct.
24 MR. BOYCE: Your Honor I am going to offer the disk.
25 I don't think that the content of the text is really germane

1 today, but I would like the Court to have it in case the Court
2 decides to read the texts.
3 THE COURT: Any objections?
4 MR. SCHATTNIK: As long as it is an identical copy to
5 what I got in discovery I have no objection,
6 MR. BOYCE: It is a copy. I don't have the ability
7 to alter it.
8 (Whereupon Government's Exhibit 2 was admitted.)
9 MR. BOYCE: That is all of the questions I have for
10 this witness, Your Honor.
11 THE COURT: Mr. Schattnik?
12 MR. SCHATTNIK: Thank you, Your Honor.
13 CROSS EXAMINATION
14 Questions by Mr. Schattnik:
15 Q. Mr. Musgraves was arrested on July 12th of 2013?
16 A. Yes, sir.
17 Q. You received notice that he was represented by counsel
18 that day?
19 A. Yes, I did.
20 Q. How did you receive that?
21 A. It came from Jenny Fisher, our secretary.
22 Q. What did Jenny Fisher tell you?
23 A. She stated that the chief had called and said that he
24 had spoken to Miss Berkel and that she was not desirous of us
25 speaking with him.

1 A. Yes.
2 Q. Do you know, did Mr. Tisdale ever violate the terms of
3 the confidential informant agreement once he entered into it?
4 A. No.
5 Q. You don't know or he didn't?
6 A. I don't think -- if you are talking about what I know
7 to be in it, I know he got in trouble, but I don't know if
8 he -- he never violated in the presence of us while conducting
9 narcotics transactions, no.
10 Q. So is it your understanding that he has been fully
11 compliant with all terms of the confidential informant
12 agreement?
13 A. Yes.
14 Q. Likewise with regard to the production of this --
15 MR. SCHATTNIK: Your Honor, this is for another date
16 but I would ask that agreement with Mr. Tisdale be preserved.
17 MR. BOYCE: Fine, Judge. Tisdale will not be a
18 witness in this trial. If they want it preserved, we'll
19 preserve it.
20 THE COURT: Okay. Mr. Schattnik is seeing a second
21 shooter on the grassy knoll.
22 Questions By Mr. Schattnik:
23 Q. When you had these text messages that you exchanged
24 with Mr. Musgraves, was this during the time that you still
25 felt you were acting under the terms of whatever proffer

1 agreement might have been in force?

2 A. Rephrase that for me. I am sorry, ask it again?

3 Q. Sure.

4 A. Are you talking about the proffer agreement?

5 Q. With regard to the exchange of text messages with

6 Mr. Musgraves.

7 A. Yes.

8 Q. That was after the proffer discussions that you guys

9 had in July?

10 A. Correct.

11 Q. Was that continued, I guess process of information flow

12 between you and Mr. Musgraves, still pursuant to that initial

13 proffer arrangement?

14 A. I would say the proffer, the standard proffer letter

15 pertained to that particular day, that particular interview

16 and after that, no, I think he was just cooperating to assist

17 the police and to assist himself as far as getting

18 consideration on his case.

19 Q. So by the time that this exchange of text took place,

20 was it your belief or understanding there was no longer any

21 proffer agreement in play?

22 A. By proffer agreement, do you mean that the letters

23 still pertained or do you mean that he was still cooperating?

24 Q. Any cooperative agreement that was entered into in

25 July.

1 A. I believed there was still a cooperative agreement.
2 Q. You indicate with regard to your proffer notes with the
3 discussion of Mr. Musgrave's offense in August of 2012, just
4 for clarification, he did not state to you or admit to you
5 during that July proffer that he gave or sold drugs to Tom
6 Tisdale?
7 A. That's correct, he did not say that.
8 MR. SCHATTNIK: Your Honor, I have other questions of
9 this witness and ask that he be kept or if the Court wants me
10 to go on now with regard to what he might know with regard to
11 the search warrant or any of those involvements, if you want
12 to do those now?
13 MR. BOYCE: He is up there. You can do whatever you
14 want.
15 THE COURT: Why don't we take a five minute break
16 though.
17 (Whereupon a recess was taken. The following proceedings
18 were held in open Court.)
19 THE COURT: Okay, Mr. Schattnik?
20 Questions By Mr. Schattnik:
21 Q. Thank you. Officer, I want to get into some issues
22 with regard to the search warrant that was done for the
23 residence where Mr. Musgraves was in July and a couple of
24 questions. It looks like from what I see on the affidavits
25 and complaint for search warrant or all of that, that that

February 6, 2015, Suppression Hearing Transcript, Testimony of William Brantley [pp. 71–81, 87–98]

1 Q. All right. The next topic is the search warrant.
2 Already in the record at Document 63-1 through 63-4 are the
3 papers related to the search warrant for Musgrave's house. Do
4 you recognize all of that?
5 A. Yes, I do.
6 Q. That is all your work?
7 A. Yes.
8 Q. If you would describe to the Court what happened in the
9 run up to the search warrant?
10 A. In the run up to the search warrant, we had initially
11 conducted the one buy in 2012.
12 Q. Let me stop you there. So in 2013 was there any part
13 of you that thought a year old buy was sufficient to get a
14 search warrant?
15 A. Absolutely not.
16 Q. What happened after that?
17 A. Based on a separate investigation involving another
18 defendant, we arrested that defendant and happened upon a
19 young man by the name of Kenneth Boner who had information
20 about the person we arrested and he provided us that
21 information regarding that defendant obtaining drugs from the
22 defendant here, Miles Musgraves.
23 Q. Is the other defendant you're talking about Romel
24 Stevens?
25 A. Yes, it is.

1 Q. Musgrave's brother?
2 A. Yes.
3 Q. Kenneth Boner, is that the John Doe in the paperwork?
4 A. Yes, it is.
5 Q. It is all in the paperwork, but is what is in there the
6 information he gave you?
7 A. Yes, it is.
8 Q. Describe the actual process of getting the search
9 warrant.
10 A. The actual process of getting the search warrant after
11 we interviewed Mr. Boner we decided to, the next day, we
12 decided to draft a search warrant and present it to the
13 State's Attorney's office and Judge in Madison County.
14 Q. What happened when you presented it to the State's
15 Attorney?
16 A. I initially typed up the affidavit and one single
17 affidavit with all of the information that I had along with
18 the information that Mr. Boner had all in one affidavit. When
19 I forwarded that to our State's Attorney's Office, one of our
20 State's Attorneys reviewed it and decided that it would be
21 better put in two separate affidavits, each signed by us
22 before the Judge.
23 Q. So the affidavits are by you? Is that one?
24 A. Yes, he presented one. He revised my affidavit into
25 one affidavit with the information that pertained to the

1 knowledge that I had. Then in a separate affidavit from
2 Mr. Boner under the John Doe for him to swear to before the
3 Judge.
4 Q. Okay, then you went to Judge Hackett?
5 A. Yes.
6 Q. All right. Who went to swear out the affidavits?
7 A. Both myself and Kenneth Boner.
8 Q. It wasn't clear to me from the paperwork if Boner was
9 actually there present, but was he?
10 A. Yes, he was the John Doe affiant on the John Doe
11 portion of the search warrant.
12 Q. He went in person to see the Judge?
13 A. Yes, he did.
14 Q. Did the Judge ask you any questions about your portion
15 or your affidavit?
16 A. Just insuring that I swore to the information in the
17 affidavit that it was true and correct to the best of my
18 ability.
19 Q. Which you did?
20 A. Yes, I did.
21 Q. And what about Kenneth Boner? Did the Judge ask him
22 any questions?
23 A. Other than the same that he asked me, no.
24 Q. Generally what level of information do you typically
25 put in a search warrant affidavit?

1 A. Just enough information to establish probable cause for
2 the search warrant to be issued.
3 Q. Is that your typical practice?
4 A. Yes.
5 Q. Do you typically put in every conceivable fact of the
6 investigation?
7 A. No.
8 Q. Why not?
9 A. Because a lot of times we're on a time crunch or a lot
10 of those things aren't really necessary to establish the
11 probable cause for the search warrant and it would be in some
12 case extremely time consuming to put all of the details in a
13 search warrant.
14 Q. And you have seen people cross examined before, right?
15 A. Yes.
16 Q. Do you typically put in all of the facts that would
17 come out on cross examination?
18 A. No.
19 Q. Just enough to establish probable cause?
20 A. That's correct.
21 Q. Is it standard practice to put in criminal history
22 information on an affiant?
23 A. Not unless it is somehow related to the case as far as
24 probable cause goes, no.
25 Q. Okay. Again, is that all your standard practice?

1 A. Yes, it is.
2 Q. Just in general terms, about how many search warrants
3 do you think you presented to Madison County over the years?
4 A. Dozens.
5 Q. What about drug search warrants?
6 A. The majority of them have been drug search warrants.
7 There has been a few occasions where it has been violent
8 crimes, but the majority of those have been drug search
9 warrants.
10 Q. What about search warrants to Judge Hackett himself?
11 A. At least over half a dozen to a dozen just to that
12 particular Judge.
13 Q. In all of that prior course of practice, what levels of
14 information did you put into the prior warrants?
15 A. Substantially somewhat what is in this one. Just
16 enough to establish probable cause for the search warrant.
17 Q. In the past did you put in every conceivable detail of
18 every investigation?
19 A. No.
20 Q. In the past, did you put in every bit of potential
21 impeachment about any affiant?
22 A. No.
23 Q. Had any Judges in Madison County ever asked you for any
24 of those things?
25 A. No.

1 Q. Are you aware of any of your search warrants having
2 been suppressed?
3 A. No.
4 Q. At the trial level?
5 A. No.
6 Q. What about at the Court of Appeals?
7 A. Never been an issue. Never heard of one.
8 Q. Okay. So I am going to ask you right out of a case
9 here, are you aware that any Court had clearly held that
10 materially similar affidavit failed to establish probable
11 cause under facts that were indistinguishable to your case?
12 A. No.
13 Q. So when you put what you put into the affidavit, why
14 did you do it that way?
15 A. To establish probable cause that there was probable
16 cause to search the residence for illegal contraband being
17 drugs, narcotics being sold there.
18 Q. Did you think you were doing what you were supposed to
19 do in order to satisfy the Court?
20 A. Absolutely.
21 Q. In your view, were you withholding material
22 information?
23 A. No, I was not.
24 Q. Were you trying to trick Judge Hackett?
25 A. No, I was not.

1 Q. When you executed the search warrant, was it your good
2 faith belief that you were authorized to do so?
3 A. Yes, it was.
4 MR. BOYCE: Those are all of the questions I have,
5 Your Honor.
6 THE COURT: Mr. Schattnik?
7 CROSS EXAMINATION
8 Questions by Mr. Schattnik:
9 Q. So you have done dozens of search warrants at Madison
10 County and maybe six to 12 with Judge Hackett, correct?
11 A. Yes.
12 Q. Do you know what the percentage is of the cases where
13 you did search warrants where charges were issued versus not?
14 A. I would say the majority of those charges have been
15 issued in some way, shape or form. Obviously some aren't.
16 Depends on what type of case it is.
17 Q. All right. Have you ever testified at a suppression
18 hearing with regard to one of your search warrants?
19 A. I don't believe so.
20 Q. With regard to your search warrants, do you know, have
21 any of those cases gone to trial as opposed to being worked
22 out with plea agreements?
23 A. Yes, they have.
24 Q. Which ones have gone to trial?
25 A. I can't recall all of them, but several murder cases

1 that went to trial.
2 Q. Where you did the search warrants?
3 A. Yes.
4 Q. Which ones?
5 A. One in particular, most recent one was a search warrant
6 at 1000 Tremont Street in Alton. Young man by the last name
7 of Ballwin. It was a murder trial.
8 Q. Ballwin was the defendant?
9 A. Yes.
10 Q. Madison County murder trial?
11 A. Yes.
12 Q. Or Madison County search warrants that you have done
13 that have gone to trial?
14 A. I would say the majority of them don't go to trial. I
15 would literally have to go back and look at case by case.
16 Q. So is Ballwin the only one that you recall?
17 A. Most recently, yes.
18 Q. You indicate that your goal in formulating search
19 warrant information is to put in just enough to establish
20 probable cause?
21 A. Establish probable cause for the search, yes.
22 Q. Is it your goal when doing search warrants to make sure
23 that you disclosed to the Judge information that you have with
24 regard to the credibility of the person?
25 A. To a point, yes.

1 Q. So for example, if they are known to you to be reliable
2 and they have done things that make them reliable, you would
3 give the Court that information?
4 A. Yes.
5 Q. It would be important for the Court to make an
6 assessment of the reliability of confidential informants,
7 correct?
8 A. Normally when it is confidential informants, yes, we do
9 put that information in there.
10 Q. Likewise, the information that you give to the Court on
11 the reliability of a person upon whom you want the Court to
12 rely for the issuance of search warrant should be specific
13 enough so the Judge can make that decision knowing all the
14 facts?
15 A. In this particular case I had no prior contact with
16 Mr. Boner and hadn't even ran criminal history on him. I had
17 no reason to run criminal history on him or doubt the
18 information he was providing me.
19 Q. So first off, why use a false name for him in the
20 search warrant affidavit?
21 A. Initially he was hesitant about going into the Court
22 and that was a way for us to indicate to him that he would not
23 have to sign his name on that piece of paper.
24 Q. Did Judge Hackett inquire as to what his real name
25 would be?

1 A. No, he did not.
2 Q. Typically most search warrant applications are filed
3 under seal anyway, aren't they?
4 A. Typically, no.
5 Q. So typically in your case in your search warrants they
6 are not filed under seal in Madison County?
7 A. Not to my knowledge. You know, I don't work in the
8 courtrooms or courthouse, so I don't know how they are filed,
9 but typically I know once we file them, they are public
10 record.
11 Q. You have indicated basically that you provided no
12 information to the Court about prior dealings with Mr. Boner
13 because you had no such information, correct?
14 A. That's correct, prior to that, the day before.
15 Q. You had never dealt with him before?
16 A. No, sir.
17 Q. And had you done anything to either confirm or refute
18 whether or not the Alton Police Department had had contact
19 with him on a regular basis?
20 A. No.
21 Q. Had you ever talked to your chief as to whether or not
22 there had been contact with Mr. Boner by the Alton Police
23 Department on a regular basis?
24 A. No, sir.
25 Q. Did you ever talk to Jake Simmons about Mr. Boner at

1 all?
2 A. No.
3 Q. Were you aware Jake Simmons lived across the street
4 from Mr. Boner during the times relevant to this matter?
5 A. At the time, no.
6 Q. Did you learn that at some point in time?
7 A. Yes, it was --
8 Q. When did you learn that?
9 A. A little while after this investigation had kicked off
10 it was brought to my attention that the chief had rented a
11 house across the street.
12 Q. Who did you learn it from?
13 A. I don't recall if it was through a report or I believe
14 it was a report, some sort of disturbance that I had read in
15 our computer system where it showed that he was using that
16 address or they had moved to that address.
17 Q. Had the chief made any calls for Alton officers to come
18 out to that block on Oscar Street?
19 A. I believe that's what this report was about, him making
20 a phone call to our department or actually having some sort of
21 incident out there.
22 Q. Did you ever look into the incident?
23 A. No, it was after the fact that I actually saw the entry
24 into the computer.
25 Q. So basically when you came into contact with Mr. Boner,

1 A. No. At that point in our investigation we had no
2 physical evidence that Mr. Boner was involved in any of this
3 activity other than his words.
4 Q. When you presented the affidavit to Judge Hackett, did
5 you present him with information that there were statements
6 Mr. Boner made with regards to the identification of Miles
7 Musgraves that were inconsistent with information known to
8 you?
9 A. No.
10 Q. For example, isn't it true that Mr. Boner described
11 Miles Musgraves as short and fat?
12 A. I would have to refer to the actual video.
13 Q. And the line up photos that you have produced show that
14 Mr. Musgraves is six foot tall, correct?
15 A. I'm sure they do.
16 Q. Do you recall that during the interview that when asked
17 about complexion, he indicated that my client's complexion was
18 the same as his brother, Romel Stevens?
19 A. I do not recall that.
20 Q. And have you ever reviewed the video of Mr. Boner?
21 A. No, I have not.
22 Q. With regard to that, is it fair to say that my client
23 is significantly lighter than Romel Stevens?
24 A. Yes, he is.
25 Q. With regard to the affidavit that you provided to Judge

1 Hackett with regard to the other CI, that would be Thomas
2 Tisdale, correct?
3 A. Correct.
4 Q. That would have been the event of August 2012?
5 A. Yes.
6 Q. In the affidavit the information seems to indicate in
7 that affidavit that this was a typical monitored drug buy with
8 nothing unusual, correct?
9 A. There were things that -- there was one thing that was
10 unusual, yes. But, yes, you are correct.
11 Q. So there was something unusual because if you read the
12 reports, the early reports, and if you read the affidavit you
13 don't realize that basically Tisdale did leave the reservation
14 basically with regard to the normal protocol, correct, of a
15 CI? He is supposed to go from the police department to the
16 place to buy the drugs and then come right back, correct?
17 A. Correct.
18 Q. He went to the place directly, correct?
19 A. Correct.
20 Q. Was he under surveillance when he made the trip?
21 A. Yes, he was.
22 Q. When he gets to the place he is supposed to come right
23 back to the Alton Police Department, correct?
24 A. Correct.
25 Q. That didn't happen this time, did it?

1 A. No, it did not.
2 Q. He ran out of gas?
3 A. That's correct.
4 Q. Got a ride to a gas station?
5 A. That's correct.
6 Q. Got a ride back?
7 A. That's correct.
8 Q. And then came back?
9 A. That's correct.
10 Q. The fact that this created an additional opportunity
11 for there to be a problem with the drugs, that was not
12 disclosed to Judge Hackett, was it?
13 A. It was not put in the search warrant, no.
14 Q. With regard to the typical scenario, the report
15 indicates that you searched the vehicle before the person gets
16 into it to make sure there are no drugs in the vehicle?
17 A. That's correct.
18 Q. Is that something that you would have done?
19 A. That's correct.
20 Q. With regard to Mr. Tisdale's vehicle, when did you do
21 that in relation to when you sent him off on his journey?
22 A. We search it prior to him leaving the police department
23 and once he returns to the police department.
24 Q. So what do you do, wire him up, take him out to his
25 car, search the car?

1 A. Actually while he is being wired up, someone else
2 searches the car out on our parking lot and we insure that
3 there is nothing in the car as far as drugs, additional
4 moneys.
5 Q. So who searches Mr. Tisdale's car in August of 2012?
6 A. I would have to go back and look at the report. It
7 would have been either Detective McCray or I.
8 Q. At least as you sit here today, you don't recall who it
9 was?
10 A. I would probably assume it would have been myself while
11 he was wiring him up.
12 Q. How would you have secured the vehicle once you checked
13 it out and then came back into the police department to make
14 sure nobody tampers with it?
15 A. I actually stay outside with the vehicle until he is
16 brought outside with the camera equipment on.
17 Q. So you are outside the whole time this takes place?
18 A. We don't -- typically we don't leave the station until
19 things -- we're ready to go out. He is wiring up the guy and
20 right before he is done he tells me, hey, go search the car or
21 he let's me know it is time to go search the car. I go out,
22 search the car, and then as I finish up they will come
23 outside.
24 Q. So we won't see you --
25 A. We leave from that point.

1 Q. So we won't see you in the video with McCray during
2 that time leading up to the time of Mr. Tisdale leaving the
3 station?
4 A. There is a possibility of it.
5 Q. Was there a possibility that his car was left
6 unattended and unwatched between the time you searched it and
7 when he got into it?
8 A. There is a possibility of that.
9 Q. His vehicle was not locked up on your lot, was it?
10 A. I don't know if I locked the doors when I would have
11 walked away from it. I am pretty sure it is pretty secure on
12 our lot.
13 Q. You don't know if the doors were locked?
14 A. I couldn't recall that, no.
15 Q. Don't know if the windows were up or down?
16 A. It would show in the video of him approaching the car
17 whether they were up or down.
18 Q. Video shows they are down and it is unlocked. Have you
19 watched that video?
20 A. No, sir, I haven't reviewed any of this.
21 Q. Basically do you recall the condition of the interior
22 of his car that day in terms of cleanliness, non cleanliness,
23 what was inside, what was not inside?
24 A. No, sir.
25 Q. With regard to Mr. Tisdale, unlike Mr. Boner you were

1 aware that Mr. Tisdale had an extensive criminal record,
2 correct?
3 A. He had a criminal record, yes.
4 Q. Would it be fair to say that he had an extensive
5 criminal record?
6 A. Again, without going and running his criminal history
7 and looking at it, I wouldn't know the extent of it. I know
8 he is an older man and has been around awhile.
9 Q. You tell me what fits the description of significant
10 criminal record as opposed to not a significant criminal
11 record.
12 A. That would be a matter of opinion, sir.
13 Q. That is why -- you raised that. I want to know what
14 your opinion is. How many felony convictions would it take
15 for you to find somebody had significant criminal history?
16 A. It could also depend on the actual felony conviction in
17 and of itself. If you tell me someone has a conviction for
18 murder I would say significant criminal history. If someone
19 has a conviction for misdemeanor felony or theft second sub
20 and that is the only conviction, that is kind of minor. So I
21 mean there is --
22 Q. What is your best recollection as to how many felony
23 convictions Mr. Tisdale had at the time of the search warrant?
24 A. That I could not tell you.
25 Q. More or less than five?

1 A. I would not even know.
2 Q. More or less than ten?
3 A. No, I wouldn't be able to tell you.
4 Q. Do you know if Mr. Tisdale has been to prison before?
5 A. I'm sure he has.
6 Q. Do you know how many times he received sentences to the
7 Illinois Department of Corrections?
8 A. No, sir.
9 Q. With regard to Mr. Tisdale at the time he entered into
10 the confidential informant agreement, you would have been
11 aware that he had extensive criminal history, correct?
12 A. I would be aware that he had a history or that he had
13 criminal history, not the extent of it.
14 Q. All right. Is it fair to say with regard to
15 Mr. Tisdale, you were unaware that he had a 2012 Madison
16 County retail theft charge?
17 A. Yeah, we were aware of that.
18 Q. For which he got three years in DOC?
19 A. Yes.
20 Q. Were you aware that in Madison County, 12-CF-1720, he
21 had another retail theft charge?
22 A. We were aware he had a few open retail thefts.
23 Q. For which he went to IDOC?
24 A. Yes.
25 Q. Were you aware in 2008 he was convicted of aggravated

1 battery?
2 A. That I was not aware of.
3 Q. Are you aware he went to DOC for four years on that?
4 A. That I am not aware of, no.
5 Q. Were you aware he went to prison in 2008 for retail
6 theft in Madison County?
7 A. No, sir.
8 Q. Were you aware in 2006 he went to prison for retail
9 theft in Madison County?
10 A. No, sir.
11 Q. Basically were you aware that in cases from 1995 to
12 2005 that he had received an additional seven sentences to the
13 Illinois Department of Corrections?
14 A. No, sir.
15 Q. With regard to the information dealing with Mr. Tisdale
16 that you put in in support of the affidavit, is it fair to say
17 at least you were familiar with the fact that he had been to
18 prison and been to prison on multiple occasions at least for
19 thefts?
20 A. Yes.
21 Q. Basically is it your understanding that Mr. Tisdale is
22 more or less a professional shoplifter?
23 A. I wouldn't call him professional being that he keeps
24 getting caught.
25 Q. Professional enough to have been sent to the Illinois

1 Department of Correction 12 times?
2 A. I wouldn't call that professional.
3 Q. Due to him being caught, basically that is where he is
4 right now, is that correct?
5 A. That's correct.
6 Q. Would you agree that prior history of criminality might
7 impact the potential reliability of a person?
8 A. In some circumstances, yes.
9 Q. Would you agree that if you are giving information to a
10 judge and asking him to accept the reliability of an
11 informant, you should give the judge the information that you,
12 and by extension your agency, possessed with regard to this
13 individual?
14 A. In this particular case, they had access to that
15 information.
16 Q. They had access?
17 A. Kenneth Boner was standing in front of the judge. The
18 judge had the opportunity to ask him any questions that he
19 wished to ask him about his criminal history or what have you.
20 Q. We're talking about Tisdale right now.
21 A. Mr. Tisdale, I don't think -- it is not a secret to any
22 of the judges in Madison County of the history they have had
23 with him.
24 Q. But you didn't give the judge his name in the
25 affidavit, you gave it a CI number?

1 A. That's correct, that is how we operate as far as drug
2 deals.
3 Q. So the judge isn't going to get information as to who
4 that CI is because you won't identify it in your affidavit,
5 correct?
6 A. Of course, that is part of the process of us signing
7 people up as confidential informants and doing --
8 Q. So Judge Hackett didn't have any opportunity to assess
9 properly the reliability of Tisdale because he was not given
10 any information to identify him just by a CI number, correct?
11 A. Correct.
12 Q. Were you aware that Judge Hackett has actually
13 sentenced Tom Tisdale on a number of occasions?
14 A. No, sir.
15 Q. Are you aware that Judge Hackett has actually imposed
16 terms of drug probation on him and drug treatment because he
17 is an addict?
18 A. No, sir.
19 Q. Were you aware that Tom Tisdale was an addict?
20 A. I would assume. We deal with a lot of people in that
21 situation who --
22 Q. None of that was given to Judge Hackett?
23 A. No, sir.
24 Q. Any reason why you wouldn't have told Judge Hackett
25 that, disclosed that information to him?

1 A. Again, the information that we put in the search
2 warrants are to establish probable cause, nothing more,
3 nothing less.
4 Q. So you don't worry about the reliability of your
5 informant?
6 A. In this particular case we were on scene, we actually
7 had video to support the information that was given to us.
8 Q. Let me rephrase. You are not concerned about giving
9 the judge you're asking to issue the search warrant
10 information about the reliability of these people?
11 A. The judge has every opportunity to ask about the
12 informant.
13 Q. But you know they don't, do they?
14 A. No, sir.
15 Q. So they rely on you to keep them up to speed by your
16 affidavit as to whether a guy is or isn't reliable, don't
17 they?
18 A. I would say they weigh heavily on our opinion as to the
19 reliability of the person, yes.
20 Q. That is because they trust if you have that information
21 that impacts the reliability of that person that you will
22 share it in the affidavit so they can make a proper assessment
23 as to what a judge is supposed to do as an impartial
24 magistrate?
25 A. They have never requested that we put the information

1 in any of the search warrants or any of the warrants I have
2 ever done.
3 Q. Have you ever told them that you're withholding
4 information about the criminal histories, information about
5 the people, that you are withholding from them deficiencies in
6 the information you have provided?
7 A. I think they're aware of the information that is
8 provided on the search warrants and if there was lack of
9 anything they would address it with us.
10 Q. When you say they are aware, they get the affidavit you
11 give them, is that correct?
12 A. That's correct.
13 Q. That is the four corners of the affidavit, right?
14 A. That's correct.
15 MR. SCHATTNIK: Nothing further, Your Honor.
16 MR. BOYCE: Could I have leave of you and defense to
17 ask a few questions I forgot on direct before I do redirect?
18 THE COURT: Sure.
19 REDIRECT EXAMINATION
20 Questions by Mr. Boyce:
21 Q. You testified that you were present for the defendant's
22 proffer interview, is that right?
23 A. That's correct.
24 Q. You didn't write the report, but Detective McCray did,
25 right?

Complaint for Search Warrant

13-1047

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED
SEP 09 2013
CLERK OF CIRCUIT COURT #42
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

13MR500518

COMPLAINT FOR SEARCH WARRANT

Detective Sgt. William Brantley, COMPLAINANT, now appears before the undersigned Judge of the Circuit Court of the Third Judicial Circuit of Illinois, and requests the issuance of a Search Warrant to search the following described premises:

A one-story, single-family structure, commonly known as 1808 SYCAMORE STREET, Alton, Madison County, Illinois. Said structure is of wood frame with yellow vinyl siding. The structure has a pitched grey shingled roof. The front door of the structure faces east, with the main interior door opening inwards. The numerals one-eight-zero-eight are in black numerals and are affixed to the vinyl siding just north of the east front door.

and to there seize, secure, tabulate and make return thereof according to law, the following property or things:

Controlled substances of any form;

Weapons of any form;

Catalogues, magazines, brochures, books, manuals, and evidence of ordering the same, relating to equipment or materials used in the preparation to traffic Controlled Substances;

Paraphernalia, equipment and tools for packaging, cutting, weighing, distributing, storing, processing, Controlled Substances including, but not limited to the following, scales, baggies, timers, pipes, cooking utensils; secured safes/containers, lock boxes, storage trailers, and outbuildings;

Books, records, receipts, checks, check receipts, passbooks, bank statements and records, documentation reflecting an account at a financial institution, money drafts, letters of credit,

money orders, cashier's and bank checks, loan records, documents and/or keys relating to safety deposit boxes, credit card receipts, and other items of evidencing the obtaining, secreting, transfer, concealment and/or expenditure of money and other real or personal property;

Digital paging devices, digital and cellular phones, Personal Digital Assistant or other hand held devices capable of transmitting or receiving electronic messages, and the electronic messages contained therein;

Computers, including any peripheral devices connected thereto, as well as any and all hard disks, floppy disks, computer tapes, CD-ROM's, any and all information and data stored in the form of magnetic or electronic coding on computer media or on media capable of being read by a computer or with the aid of computer related equipment;

Maps, itineraries, papers, tickets, schedules, calendars, statements, lodging receipts, passports, visas and other items relating to interstate and/or foreign travel plans;

Addresses and/or telephone books and papers reflecting names, addresses and/or telephone numbers;

Records, ledgers, receipts and other papers relating to transporting, purchasing, distributing or possessing Controlled Substances;

United States Currency, precious metals, jewelry and financial instruments, including, but not limited to, stocks and bonds;

Indicia of occupancy, residency, use and/or ownership of the premises to be searched including, but not limited to, utility bills, telephone bills, canceled envelopes, keys, lease agreements, deeds;

and any instruments, articles, or things which have been used in the commission of or which may constitute evidence of the offenses in connection with which this warrant is issued, **being UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE and UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE.** The following facts having been sworn to by Complainant in support of the issuance of this Warrant (see attached Affidavits).

WHEREFORE, your Complainant requests that the Court issue a Search Warrant directing a search for and seizure of the property described above at the premises described above.

13-18492

Sgt. W. Brantley 9503
Complainant

Subscribed and sworn to before me on this 10th day of July, 2013.

JHanchet
Judge

Affidavit of William Brantley

13-18492

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

FILED
SEP 09 2013
CLERK OF CIRCUIT COURT #42
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

13MR500518

AFFIDAVIT

I, Detective Sgt. William Brantley, do hereby state and affirm as follows:

1. That I have been a police officer with the Alton Police Department for the past (18) eighteen years.
2. That I have been a Detective assigned to the Narcotics Unit for the past year and have (8) eight years prior experience as a General Case detective with the Alton Police Department.
3. That the address of 1808 Sycamore Street, Alton, Madison County, Illinois has been the subject of an illegal narcotics trafficking investigation.
4. That during this investigation, I participated in an undercover capacity and became aware of MILES L. MUSGRAVES (b/m, dob 09/11/73), who sells quantities of cocaine in Alton, Madison County, Illinois.
5. That MUSGRAVES is known to have (2) two brothers also involved in drug trafficking who are identified as SCOTTIE M. MUSGRAVES (b/m, dob 11/11/74) and ROMELL C. STEVENS (b/m, 09/04/63).
6. That on 07/09/13, John Doe was contacted after the arrest of STEVENS at 3509 Oscar Street, Alton, Madison County, Illinois for a parole violation warrant.
7. That John Doe informed officers that on 07/08/13 around midnight, he witnessed STEVENS purchase powder cocaine from STEVENS' brother who John Doe could not name.

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8. That John Doe described STEVENS' brother as a larger black male who was driving either a black Nissan or Kia passenger vehicle.
9. That John Doe said STEVENS called his brother on a telephone prior to the drug deal and requested powder cocaine be brought to 3509 Oscar Street, Alton, Madison County, Illinois.
10. That John Doe informed officers he was present when STEVENS' brother arrived at 3509 Oscar Street, Alton, Madison County, Illinois and provided STEVENS with powder cocaine in exchange for $100.
11. That John Doe also advised officers that on 7-6-2013 he accompanied STEVENS to STEVENS' brother's house off of State Street (1808 Sycamore Street) Alton, Madison County, Illinois in Alton so STEVENS could trade prescription pills for cocaine.
12. John Doe advised officers that on or about 7-6-2013 he witnessed STEVENS enter STEVENS' brother's residence with a baggie containing prescription Vicodin and exit the residence with cocaine.
13. That John Doe was shown a photographic line-up on 07/09/13 and positively identified STEVENS' brother as MILES L. MUSGRAVES (b/m, dob 09/11/73).
14. That John Doe directed Detective McCray and I to MUSGRAVES residence of 1808 Sycamore Street, Alton, Madison County, Illinois and identified the residence as that of STEVENS' brother.
15. That John Doe further pointed out and identified a black 2010 Nissan Maxima bearing Illinois "P312990" which was parked in front of the residence, as the vehicle MUSGRAVES was driving on 07/08/13.

16. That the Alton Police Department worked with a confidential informant 12-16 (CI12-16) who positively identified MUSGRAVES via booking photograph and CI12-16 stated he/she has purchased quantities of cocaine from MUSGRAVES in the past, which MUSGRAVES sells from his residence (1808 Sycamore Street).
17. That on 08/14/12, CI12-16 assisted the Alton Police Department Narcotics Unit in a controlled narcotics purchase of $100 worth of cocaine from MUSGRAVES.
18. That CI12-16 was strip searched by Alton Police Department personnel prior to the narcotics transaction and the strip search did not reveal any money or drugs.
19. That CI12-16's vehicle was also searched by Alton Police Department personnel prior to the narcotics transaction and that search did not reveal any money or drugs in the vehicle.
20. That during the narcotics transaction CI12-16 left the location of Narcotics Unit detectives and was observed by those detectives to travel directly to 1808 Sycamore Street, where he/she met with MUSGRAVES.
21. That CI12-16 provided MUSGRAVES the $100 of United States currency that was provided to CI12-16 as buy money.
22. That MUSGRAVES delivered approximately .9 grams of crack cocaine to CI12-16.
23. That CI12-16 was under constant surveillance by detectives and did not pick up anything from the ground.
24. That CI12-16 left 1808 Sycamore Street after receiving the crack cocaine and he/she met with Detective McCray and Detective Sgt. Brantley.
25. That CI12-16 provided the detectives with a substance that

13-18492

field tested positive for the presence of cocaine.

26. That CI12-16 advised detectives that he/she had purchased the cocaine from MUSGRAVES while at 1808 Sycamore Street.

27. That hidden body video recorders were utilized by the detectives during the narcotics transaction.

28. That the hidden body video recorders depict a true and accurate account of the narcotics purchase.

29. That probable cause existed for a Search Warrant to be conducted at the residence located at 1808 Sycamore Street, Alton, Madison County, Illinois 62002.

Further the Affiant sayeth not.

Sgt. D. Brantley 9503
Affiant

Subscribed and sworn to before me on this 10th day of July, 2013.

JHoward
JUDGE

Affidavit of "John Doe" (Kenneth Boner)

13-18492

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

AFFIDAVIT

I, John Doe, do hereby state and affirm as follows:

1. I am John Doe and on or about 7/09/13, I came into contact with the police after the arrest of ROMELL C. STEVENS at 3509 Oscar Street, Alton, Madison County, Illinois for a parole violation warrant.
2. On 07/08/13 around midnight, I witnessed STEVENS purchase powder cocaine at 3509 Oscar Street, Alton, Madison County, Illinois. from STEVENS' brother but I do not know his name.
3. ROMELL C. STEVENS' brother is a larger black male who was driving either a black Nissan or Kia passenger vehicle.
4. STEVENS called his brother on a telephone prior to the drug deal and requested powder cocaine be brought to 3509 Oscar Street, Alton, Madison County, Illinois.
5. I was present when STEVENS' brother arrived and provided STEVENS with powder cocaine in exchange for $100.
6. On or about 7-6-2013 I accompanied STEVENS to STEVENS' brother's house off of State Street (which I later identified as 1808 Sycamore Street, Alton, Illinois) so STEVENS could trade prescription pills for cocaine.
7. On or about 7-6-2013 I witnessed STEVENS enter STEVENS' brother's residence with a baggie containing prescription Vicodin and exit the residence with cocaine.
8. I was shown a photographic line-up on 07/09/13 and I positively identified STEVENS' brother as MILES L. MUSGRAVES (b/m, dob

13-18492

09/11/73).

9. I directed Det. Sgt. Brantley and Det. McCray to 1808 Sycamore Street, Alton, Madison County, Illinois and identified the residence as that of STEVENS' brother (being Miles Musgraves residence).

10. The 2010 Nissan Maxima bearing Illinois "P312990" which was parked in front of the residence, is the vehicle MUSGRAVES was driving on 07/08/13.

John Doe
Complainant

Subscribed and sworn to before me on this 10th day of July, 2013.

Judge

Search Warrant

13-18492

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED
SEP 09 2013
CLERK OF CIRCUIT COURT #42
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

COUNTY OF MADISON)
) SS
STATE OF ILLINOIS)

SEARCH WARRANT

ALL PEACE OFFICERS OF THE STATE OF ILLINOIS:

13MR500038

This day, Detective Sgt. William Brantley, having subscribed and sworn to Complaint for Search Warrant, I have under oath examined the Complainant, and am satisfied that probable cause exists.

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS, I command that you search the following described place:

> A one-story, single-family structure, commonly known as 1808 SYCAMORE STREET, Alton, Madison County, Illinois. Said structure is of wood frame with yellow vinyl siding. The structure has a pitched grey shingled roof. The front door of the structure faces east, with the main interior door opening inwards. The numerals one-eight-zero-eight are in black numerals and are affixed to the vinyl siding just north of the east front door.

and there to seize, secure, tabulate and make return thereof according to law, the following property or things:

Controlled substances of any form;

Weapons of any form;

Catalogues, magazines, brochures, books, manuals, and evidence of ordering the same, relating to equipment or materials used in the preparation to traffic Controlled Substances;

Paraphernalia, equipment and tools for packaging, cutting, weighing, distributing, storing, processing, Controlled Substances including, but not limited to the following, scales, baggies, timers, pipes, cooking utensils; secured safes/containers, lock boxes, storage trailers, and outbuildings;

Books, records, receipts, checks, check receipts, passbooks, bank statements and records,

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documentation reflecting an account at a financial institution, money drafts, letters of credit, money orders, cashier's and bank checks, loan records, documents and/or keys relating to safety deposit boxes, credit card receipts, and other items of evidencing the obtaining, secreting, transfer, concealment and/or expenditure of money and other real or personal property;

Digital paging devices, digital and cellular phones, Personal Digital Assistant or other hand held devices capable of transmitting or receiving electronic messages, and the electronic messages contained therein;

Computers, including any peripheral devices connected thereto, as well as any and all hard disks, floppy disks, computer tapes, CD-ROM's, any and all information and data stored in the form of magnetic or electronic coding on computer media or on media capable of being read by a computer or with the aid of computer related equipment;

Maps, itineraries, papers, tickets, schedules, calendars, statements, lodging receipts, passports, visas an other items relating to interstate and/or foreign travel plans;

Addresses and/or telephone books and papers reflecting names, addresses and/or telephone numbers;

Records, ledgers, receipts and other papers relating to transporting, purchasing, distributing or possessing Controlled Substances;

United States Currency, precious metals, jewelry and financial instruments, including, but not limited to, stocks and bonds;

Indicia of occupancy, residency, use and/or ownership of the premises to be searched including, but not limited to, utility bills, telephone bills, canceled envelopes, keys, lease agreements, deeds;

and any instruments, articles, or things which have been used in the commission of or which may constitute evidence of the offense in connection with which this warrant is issued, being **UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE** and **UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE**.

The following facts have been sworn to by Complainant in support of the issuance of this Warrant (see attached Complaint for Search Warrant, which is made a part of this Search Warrant by incorporation and express reference).

ISSUED UNDER MY HAND THIS 10h DAY OF July, 2013, AT THE HOUR OF

455 p.m.

J Hamidst
JUDGE

March 16, 2015, Trial Transcript Vol. I,
Testimony of William Brantley
[pp. 45–51]

1 A. Yes, that is basically a Google Maps printout of the
2 area which encompasses the defendant's residence and West
3 Elementary School, surrounding streets.
4 Q. Is the map accurate based on your knowledge of Alton?
5 A. Yes, it is.
6 MR. BOYCE: I offer 2 into evidence.
7 MR. SCHATTNIK: No objection.
8 THE COURT: 2 admitted, no objection.
9 (Whereupon Government's Exhibit 2 was admitted.)
10 MR. BOYCE: I ask to publish it.
11 THE COURT: Go ahead.
12 Questions By Mr. Boyce:
13 Q. Okay, Sergeant Brantley --
14 A. Yes.
15 Q. Looking at No. 2 here, I'll just use my pen. What is
16 this big building down here toward the bottom of the picture?
17 A. That would be West Elementary School.
18 Q. This oval shape right above that?
19 A. The football field that the high school uses for their
20 football games, track around it.
21 Q. Okay. What street is this here?
22 A. State Street.
23 Q. And this street here?
24 A. Is Sandborn.
25 Q. This street running north, south?

1 A. Sycamore.
2 Q. What is this right here on the corner of Sycamore and
3 Sandborn that I am pointing to?
4 A. The defendant's residence, 1808 Sycamore.
5 Q. You described Sycamore dead ending to the south, is
6 that right?
7 A. That's correct.
8 Q. So in this tree line right here, what is located there?
9 A. A little ways into the tree line is a fence that kind
10 of separates I guess part of the property, but the school
11 basically owns all of those woods and the area I guess you
12 would say to the east of that track.
13 Q. Okay. So the property line for the edge of the real
14 property of the school is right in these trees?
15 A. Yes.
16 Q. Okay. Later after this all occurred, did you and
17 Detective McCray actually go out and measure the distance from
18 the defendant's house down to the property line?
19 A. Yes, we did.
20 Q. How far is it?
21 A. 262 feet.
22 Q. So well within 1000 feet of the school?
23 A. Yes.
24 Q. All right. Back then to the events of August 14th of
25 2012. So you said you followed Tisdale over to this house

1 here in Exhibit 1, right?
2 A. Yes.
3 Q. Okay. What did you see Tisdale do when he went inside
4 or when he got out of his car?
5 A. When he got out of his car, he went inside of the
6 residence.
7 Q. How long was he in there?
8 A. Approximately the first time, maybe ten minutes.
9 Q. Okay. Then what happened after that?
10 A. Well, as he was on his way to this particular deal,
11 right before he was pulling up he apparently had started
12 having problems. He thought he was running out of gas, so
13 when he came out he actually called us. He got into his car
14 and attempted to start it to leave and his car apparently had
15 run out of gas. He called us to let us know he was having
16 this issue. So he said he was going to return back in and ask
17 the defendant for assistance in getting gas for his car.
18 Q. Where did you see him go after that?
19 A. He went back into the residence briefly.
20 Q. Then what?
21 A. Then he came back out and went to his car, rummaged
22 through the back end of his car and then went back over to the
23 front of the house where it appeared that he accepted
24 something from the defendant who was standing at the front
25 door and then he went and got into a black vehicle that was

1 sitting out front.
2 Q. Was there someone with him?
3 A. Yes, there was a black female.
4 Q. Where did the car go, the black car?
5 A. They left and drove up to the closest gas station,
6 being Hit and Run, which is located up north off of State
7 Street.
8 Q. What happened after that?
9 A. He went in and paid for gas, came out, put some gas in
10 a container and we followed them back to the residence. He
11 put some of the gas into his car and got it started and then
12 left.
13 Q. Where did he go?
14 A. He drove directly back to the police department.
15 Q. What happened when he got back to the police
16 department?
17 A. We followed him back to the police department. He
18 turned over the drugs that he purchased from the defendant.
19 Q. All right. From the time that the defendant, or I am
20 sorry, Tisdale, left the defendant's house the first time,
21 went to the gas station and so on, did you see him involved in
22 any hand to hand transactions with anyone?
23 A. No.
24 Q. Okay. When you got back to the station, what did
25 Tisdale give you?

1 A. Plastic baggy containing white chalky substance,
2 appeared to be crack cocaine.
3 Q. You said it appeared to you to be crack cocaine?
4 A. Yes.
5 Q. Are you familiar with powder versus crack cocaine?
6 A. Yes, I am.
7 Q. Would you explain to the jury first what powder cocaine
8 is, what it looked like, how people use it?
9 A. Powder cocaine is kind of brighter white that can be
10 kind of chunky depending on if it is bricked up and broken
11 off, but people normally use it to either snort or they
12 sprinkle it in things they smoke, that sort of thing. Crack
13 cocaine is basically powder cocaine that is cut with baking
14 soda and water and then it is cooked and it basically
15 increases the amount or the -- I don't know how I want to say
16 it. It takes the powder cocaine -- it takes less of the
17 powder cocaine. You actually get more yield off of the crack
18 and supposedly the high is better off the crack, that sort of
19 thing.
20 Q. It increases the potency?
21 A. Yes.
22 Q. What does crack look like compared to powder cocaine?
23 A. More of a rock like and more of a yellowish texture,
24 depending on how it is made.
25 Q. Again, the thing that Tisdale gave to you, which form

1 of cocaine did that look like?
2 A. Crack cocaine.
3 Q. Do you know what the chemical term for crack cocaine
4 is?
5 A. It is --
6 Q. Have you seen it called cocaine base?
7 A. Yes.
8 Q. So after Tisdale gave you the crack, was it packaged up
9 as evidence?
10 A. Yes, it was.
11 Q. Did you package it up under case 2012-018492?
12 A. Actually at that point when we got back to the station
13 he gave it to me, I secured it in my locker. It was a couple
14 of days later that my partner came to me. He was tagging some
15 other stuff, said hey, have you tagged it yet. I took it out
16 of the secured locker and he tagged it and put it into
17 evidence.
18 Q. The number you gave it for tracking, is it case
19 2012-08492?
20 A. Yes, it is.
21 Q. Was it eventually submitted to the lab?
22 A. Yes, it was.
23 Q. Were any other drug exhibits submitted to the lab under
24 that case number?
25 A. No.

1 Q. So after you got the drugs, did you take the recorders
2 off of Tisdale?
3 A. My partner did, yes.
4 Q. Okay. Did you eventually -- what do you do after you
5 take the recorders off to maintain the information on there?
6 A. We download the information onto a disk, onto
7 recordable CD and then submitted them into evidence.
8 Q. Did you review the disks from the August 14, '12 deal?
9 A. Yes, we did.
10 Q. I know you weren't there for every minute of it, but
11 the parts you were there for, was the recording accurate?
12 A. Yes, it was.
13 Q. In every way?
14 A. Yes.
15 Q. Video and audio?
16 A. Yes.
17 Q. Do you have any reason to believe the recorders weren't
18 working?
19 A. No.
20 Q. Okay. I am going to show you Government Exhibit 3. I
21 ask you if you know what Exhibit 3 is?
22 A. Yes, this is the disk that was submitted into evidence
23 or, one, it is a copy of all the cameras that we used on this
24 particular buy on that date.
25 Q. Is Government Exhibit 3 an accurate copy of what you

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1 A. Yes.
2 Q. Going to that time frame then of '12 to '13, I think
3 you said a minute ago Stevens got out of prison, is that
4 right?
5 A. Yes.
6 Q. Did you hook back up with Romell Stevens during that
7 time frame?
8 A. Yes, sir.
9 Q. Wait until I finish.
10 A. Yes, sir.
11 Q. What happened when you met back up with Romell Stevens?
12 A. He just moved in.
13 Q. Moved in where?
14 A. Into my apartment.
15 Q. On Mills?
16 A. Yes.
17 Q. Okay. When Romell moved in, what started happening?
18 A. He started dealing drugs.
19 Q. What kind of drugs did he deal?
20 A. Crack.
21 Q. To whom was he dealing, other drug dealers or drug
22 users?
23 A. Drug users.
24 Q. Where would these transactions occur?
25 A. In my apartment.

1 Q. All right. So did people come over to your apartment
2 looking for crack?
3 A. Yes.
4 Q. What would happen when the people came over?
5 A. Rome would collect the money and give them their dope.
6 Q. All right. Did he always have the drugs right there on
7 hand?
8 A. Yes.
9 Q. Were there times he didn't have the drugs ready?
10 A. Yes.
11 Q. What would Rome do when he didn't have the drugs
12 available for the users?
13 A. He would go to his brothers.
14 MR. SCHATTNIK: Objection, Your Honor, unless he has
15 firsthand knowledge. Otherwise it would be a basis for
16 hearsay.
17 THE COURT: Sustained.
18 Questions By Mr. Boyce:
19 Q. We'll get to that. So would Rome leave?
20 A. Yes.
21 Q. When he came back, what would he have with him?
22 A. Crack.
23 Q. What would he do with it?
24 A. Cook it.
25 Q. You said he came back with crack?

1 A. Yeah.
2 Q. Okay. Would he come back with powder cocaine?
3 A. Yes.
4 Q. What would he do with the powder?
5 A. Cook it.
6 Q. Into what?
7 A. Rocks.
8 Q. So he would cook powder into crack?
9 A. Yes.
10 Q. Okay. What would he do with the crack?
11 A. Sell it.
12 Q. All right. Now you said sometimes Romell would have to
13 leave, is that right?
14 A. Yes.
15 Q. Did you ever go with Romell?
16 A. Yes.
17 Q. When he had to leave?
18 A. Yes.
19 Q. Were these on occasions when users had come over
20 wanting cocaine?
21 A. Yes.
22 Q. You have to wait until I'm finished.
23 A. Yes, sir.
24 Q. About how many times did you go with Romell?
25 A. Three times.

1 Q. Did Romell have a car during this period?
2 A. No.
3 Q. So why did he go with you?
4 A. Because I drove. He needed somebody to drive him.
5 Q. Okay. Did you know where to take Romell?
6 A. No, he had to show me.
7 Q. He had to show you?
8 A. Yes.
9 Q. And did you go to the same place each time?
10 A. Yes.
11 Q. I'm going to show you Government Exhibit 1. I ask you
12 if you recognize Exhibit 1?
13 THE COURT: It will be on that screen in a moment.
14 Q. Do you recognize that?
15 A. Yes, sir.
16 Q. What is Exhibit 1?
17 A. I am sorry?
18 Q. What does Exhibit 1 show, the picture there?
19 A. His house, Lou's house.
20 Q. Is that the house where Romell directed you to go the
21 three times?
22 A. Yes.
23 Q. All right. So when you drove Romell to that house, who
24 went inside?
25 A. Rome.

1 Q. Did you go inside?
2 A. No.
3 Q. Okay. How long would Romell stay inside?
4 A. About ten to 15 minutes.
5 Q. All right. When he came out, what did you guys do?
6 A. Went home.
7 Q. What would Romell do when you got back home?
8 A. Cook it up.
9 Q. Cook up what?
10 A. Powder.
11 Q. Into?
12 A. Crack.
13 Q. Then what would he do with it?
14 A. Sell it.
15 Q. All right. You said you went to that house three
16 times?
17 A. Yes, sir.
18 Q. Was it the same house each time?
19 A. Yes.
20 Q. Was it the same scenario where Romell went in and came
21 out with drugs every time?
22 A. Yes, sir.
23 Q. Okay. Did you ever hear Romell tell any of the users
24 who he was getting the drugs from?
25 A. No.

1 MR. SCHATTNIK: I'll object, Your Honor, in terms of
2 he is asking him for a hearsay statement.
3 MR. BOYCE: This would be co-conspirator statement,
4 Your Honor. This is Romell explaining to his customers where
5 he is getting the cocaine.
6 MR. SCHATTNIK: It would have to be in the
7 furtherance of the conspiracy. Such a statement would not be
8 in furtherance.
9 THE COURT: Sustained.
10 MR. BOYCE: Okay.
11 Questions By Mr. Boyce:
12 Q. Now during the period that this was all going on, where
13 drug users were coming over and getting cocaine from Romell,
14 do you recall any conversations about trading guns for
15 cocaine?
16 A. Yes.
17 Q. Where did that conversation occur?
18 A. In my kitchen.
19 Q. All right. Do you know the name of the person who
20 suggested that?
21 A. No.
22 MR. SCHATTNIK: Objection, Your Honor. This, again,
23 is all down the hearsay path.
24 THE COURT: He said no, but sustained.
25

1 Questions By Mr. Boyce:
2 Q. The question was do you know the name of the person who
3 suggested that.
4 A. No.
5 Q. Okay. What did the person suggest?
6 A. He wanted to -- he said he had --
7 MR. SCHATTNIK: Objection, Your Honor, eliciting
8 hearsay statement of unspecified person.
9 MR. BOYCE: This is a request from a person who wants
10 to buy drugs to a drug dealer suggesting that the person can
11 trade guns for cocaine.
12 THE COURT: We don't know who the person is, right?
13 MR. BOYCE: We have said he is a buyer who is there
14 to attempt this transaction.
15 THE COURT: Objection sustained.
16 MR. BOYCE: Okay.
17 Questions By Mr. Boyce:
18 Q. Later that same day, did you see Romell with anything
19 in your kitchen?
20 A. Yes.
21 Q. What did he have?
22 A. A gun.
23 Q. Did you see a gun or did you see --
24 A. I just saw the case.
25 Q. What did the case look like?

1 A. Green.
2 Q. Sorry?
3 A. Green.
4 Q. How big was it?
5 A. About that big (indicating).
6 Q. You are indicating with your hands about three or four
7 feet long?
8 A. Yes.
9 Q. So it was not a pistol case?
10 A. No.
11 Q. It would have been a rifle?
12 A. Yes.
13 Q. Okay. Now at some point did Romell leave your
14 apartment on Mills?
15 A. Yes.
16 Q. Under what circumstances?
17 A. Police.
18 Q. So you had him evicted?
19 A. Yes, sir.
20 Q. Why did you do that?
21 A. Because it was either him or me.
22 Q. Okay. Was that around the middle of 2013?
23 A. Yes, sir.
24 Q. Now do you know that Romell was arrested in July of
25 2013?

1 A. Yes, sir.
2 Q. Have you been out to the jail to visit him?
3 A. No.
4 Q. Have you talked to him at all?
5 A. No, sir.
6 Q. In terms of what you are getting out of your testimony
7 here today, are you getting paid?
8 A. No.
9 Q. Are you working off charges?
10 A. No.
11 Q. Do you have any charges pending against you right now?
12 A. No, sir.
13 Q. Are you expecting any benefit at all?
14 A. No.
15 MR. BOYCE: No other questions, Your Honor.
16 THE COURT: Mr. Schattnik?
17 CROSS EXAMINATION
18 Questions by Mr. Schattnik:
19 Q. Mr. Gordon, you have indicated that you have not talked
20 to Rome at all. Isn't it true Rome would frequently make
21 phone calls to your house?
22 A. Yes, but I didn't answer them. I couldn't afford it.
23 Q. Well, but Keta was there and Keta --
24 A. Yeah, Keta --
25 THE COURT: One at a time and slow down.

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Testimony of Donald Bock [pp. 25–33]

1 County, right?
2 A. Yes, sir.
3 Q. Has that case been resolved yet?
4 A. No.
5 Q. You have an attorney handling it for you?
6 A. Yes, sir.
7 Q. All right. Do you have a valid Illinois Firearm Owners
8 ID card?
9 A. Yes, sir.
10 Q. How long have you had a FOID card?
11 A. Since I was 18, I believe.
12 Q. Okay. Have you owned guns in the past?
13 A. Yes, sir.
14 Q. In particular, have you owned an H & K 40-caliber
15 pistol?
16 A. Yes, sir.
17 Q. Have you owned an Arsenal 762 millimeter rifle?
18 A. Yes, sir.
19 Q. What does that rifle look like sort of colloquially?
20 A. It is all black. I guess it is described as an assault
21 rifle.
22 Q. What kind of gun does it look like to people?
23 A. Probably an AK-47.
24 Q. About when did you buy the H & K 40 caliber pistol?
25 A. I believe it was in like 2005 if I can remember right.

1 Q. What about the rifle?
2 A. Probably 2008.
3 Q. I want to direct your attention now to the spring of
4 2013. During that time period, were you actively using
5 cocaine?
6 A. Yes.
7 Q. And did you know Mark Gordon?
8 A. Yes, sir.
9 Q. Do you know where his apartment is?
10 A. Yes, sir.
11 Q. Where is that?
12 A. It is right across from East Elementary.
13 Q. In Alton?
14 A. In Alton, yes.
15 Q. Would people go to Mark Gordon's apartment?
16 A. Yes.
17 Q. You included?
18 A. Yes.
19 Q. For what purpose?
20 A. To get drugs.
21 Q. Okay. Who was the person there who would get you
22 drugs?
23 A. Romell.
24 Q. Romell. Do you know his last name?
25 A. I don't know his last name.

1 Q. But Romell?
2 A. Yeah, Romell.
3 Q. So what would happen when you went to Mark Gordon's
4 apartment and found Romell?
5 A. I would tell him what I wanted and he would go get it.
6 Q. Okay. Were you buying powder or crack cocaine at that
7 time?
8 A. Crack.
9 Q. Okay. What amounts were you buying?
10 A. It was like half grams, grams, somewhere in there.
11 Q. What does a half gram cost, about?
12 A. $50.
13 Q. What does a gram cost, roughly?
14 A. About 100.
15 Q. Now are those user amounts that you would use yourself?
16 A. Yes, sir.
17 Q. You are not redistributing?
18 A. No, sir.
19 Q. During that time period of early 2013, about how many
20 times all together do you think you got cocaine from Romell?
21 A. I can hardly remember, but roughly six to ten times I
22 would say.
23 Q. Okay. Some of those times did you pay cash?
24 A. Yes, sir.
25 Q. And you said after you paid the cash Romell would have

1 to go somewhere?
2 A. Yes, sir.
3 Q. All right. When he would come back, what would he
4 have?
5 A. The drugs.
6 Q. All right. Did he bring it back in powder or crack
7 form?
8 A. Crack.
9 Q. All right. Then he would give it to you?
10 A. Yes.
11 Q. Were there times when you wanted crack but didn't have
12 money?
13 A. Yes, sir.
14 Q. What did you propose to do in order to get crack?
15 A. Put up my firearm for collateral.
16 Q. What do you mean by put them up for collateral?
17 A. Let him hold them and he would give me the drugs and
18 then I would pay him the cash for it later.
19 Q. All right. How many guns did you do that with?
20 A. Two.
21 Q. Was one gun the AK-47 style rifle?
22 A. Yes.
23 Q. And was the other gun the H & K 40 caliber pistol?
24 A. Yes, sir.
25 Q. All right. How much cocaine did you get for offering

1 those guns as collateral?
2 A. Well, I think one time roughly a gram to two grams.
3 Q. Okay.
4 A. Then the same for the other one.
5 Q. All right. So a few grams of cocaine for those guns?
6 A. Yes.
7 Q. How much were you supposed to pay back in order to get
8 your guns back?
9 A. The cost of the coke, which was four to $500, roughly
10 that area.
11 Q. All right. So after you gave the guns to Romell, at
12 some point did you travel with him?
13 A. Yes, sir.
14 Q. And were you driving?
15 A. Yes, sir.
16 Q. Did you know where to go?
17 A. No, he showed me.
18 Q. He directed you where to go?
19 A. Yes, sir.
20 Q. Did he direct you to where, a house?
21 A. Yes, a house.
22 Q. Do you remember about where it was?
23 A. Yes it was behind West Elementary in Alton.
24 Q. Okay. I am going to show you Exhibit 1 and ask you if
25 you recognize it?

1 A. Okay.
2 Q. Do you recognize that picture?
3 A. Yes, sir, that is it.
4 Q. What is that a picture of?
5 A. He said it was his brother's house.
6 Q. Is that the house that Rome directed you to?
7 A. Yes, sir.
8 Q. And did Rome have one of -- did Romell have one of your
9 guns when you went to that house?
10 A. Yes, sir.
11 Q. What did he do with the gun?
12 A. He went in with it and come back out with the drugs.
13 Q. What drugs?
14 A. Crack.
15 Q. Okay. And you said that you had traded two guns for
16 drugs, right?
17 A. Yes, sir.
18 Q. Did you only go with Rome one of the times?
19 A. Yes, sir, one of the times.
20 Q. But this is the house you went to?
21 A. Yes, sir, that is it.
22 Q. Okay. You had said that you had put the guns up as
23 collateral, right?
24 A. Yes, sir.
25 Q. Did you eventually try to pay the money back to recover

1 your guns?
2 A. Yes, I did.
3 Q. And how much did you try to pay back?
4 A. I went back with the $500. I went back with $500 and I
5 was supposed to get both of them back.
6 Q. Who did you give the $500 to?
7 A. Romell.
8 Q. And what did Romell do?
9 A. He took off. He said he was going to his brother's
10 house to retrieve--
11 MR. SCHATTNIK: Objection with regard to what he said
12 as hearsay.
13 MR. BOYCE: Once again, Your Honor, I believe this is
14 co-conspirator's statement. We have ample evidence of this
15 trading guns for crack and --
16 THE COURT: What is the rule number, 803?
17 MR. BOYCE: It is one of the exceptions of things
18 that are not hearsay.
19 THE COURT: Right, so it would be 803.
20 MR. BOYCE: It is where it is defined as not hearsay
21 under (a) I believe.
22 THE COURT: Mr. Schattnik, look at 801(d)(2)(E).
23 MR. SCHATTNIK: Which one, Your Honor?
24 MR. BOYCE: 801(d)(2)(E).
25 MR. SCHATTNIK: Same objection, Your Honor, not made

1 in the course of a conspiracy. It sounds like an offhand
2 comment. The conspiracy is a drug conspiracy, not weapons
3 conspiracy.
4 THE COURT: Lay further foundation specifically with
5 the time and what conspiracy you're alleging.
6 MR. BOYCE: Well, I may have to ask you to hold off
7 on this ruling then, Your Honor. I can establish the
8 conspiracy better through Romell.
9 THE COURT: Okay.
10 MR. BOYCE: So if you wouldn't mind.
11 THE COURT: Objection sustained at this juncture.
12 Questions By Mr. Boyce:
13 Q. So after Romell left with your money to buy the guns
14 back, did he come back?
15 A. Yes, he come back.
16 Q. Did he have your guns?
17 A. No, he didn't.
18 Q. What did he have?
19 A. He had more crack.
20 Q. Okay. What did you do with it?
21 A. I was angry that he didn't get my property back and he
22 was oh, smoke this, you'll feel fine, you know, so I took it.
23 Q. So you smoked the crack?
24 A. Yes, I did.
25 Q. At that point did you think you had any real prospect

1 of getting your guns back?
2 A. No, I felt --
3 Q. You didn't?
4 A. No, I didn't.
5 Q. Okay. So at some point did you decide to contact the
6 police?
7 A. Yes.
8 Q. Who did you call?
9 A. I called Madison County Sheriff's Department.
10 Q. Was that the local police for your area?
11 A. Yes, sir.
12 Q. Why did you call them?
13 A. To report them stolen.
14 Q. Why would you do that?
15 A. Because I was worried about what was going to happen
16 with them.
17 Q. Can you explain what you mean by that?
18 A. Well, I didn't know, for one thing, if they were legal
19 gun owners or what they were going to do with them, so I was
20 worried.
21 Q. Okay. Was there some danger in your mind that these
22 guns might be used in a crime?
23 A. Yes, sir.
24 Q. And they were your guns?
25 A. Yes.

March 17, 2015, Trial Transcript Vol. II, Testimony of Romell Stevens [pp. 75–90]

1 A. I believe about, I don't know, maybe May of 2013, May
2 or April maybe, January. I don't know, some point. I was on
3 drugs back then.
4 Q. You were doing drugs, okay. Could it have been the
5 early part of 2013?
6 A. Yeah, somewhere around that time.
7 Q. Okay. Where did Mark live?
8 A. On 2354 Mills Street.
9 Q. In Alton?
10 A. In Alton.
11 Q. What was going on at Mark's?
12 A. What is still going on at Mark's; drugs, people coming
13 in buying drugs, smoking drugs.
14 Q. Okay.
15 A. I can say still going on. I was just told the other
16 night on the telephone that Mark is doing the same thing,
17 using drugs, smoking drugs and people coming through buying
18 drugs, dropping drugs off.
19 Q. All right. So what was your role?
20 A. When I was there I stayed there, I give Mark drugs to
21 live there and so, you know, when people would come by to buy
22 drugs, I would sell them drugs.
23 Q. So the people that came to buy drugs, were these drug
24 users or other drug dealers?
25 A. Drug users and yeah, drug users.

1 Q. What sort of drugs were they trying to get?
2 A. Crack cocaine most of the time.
3 Q. So what would you do when people came over?
4 A. I would go in and purchase the drugs when I didn't have
5 them, if I didn't have them myself.
6 Q. Would you gather up the money from the people?
7 A. Yeah.
8 Q. All right. Where would you go to purchase drugs?
9 A. A lot of different places.
10 Q. Where was one of the places?
11 A. I mean one of the places I would go to my brother's
12 house.
13 Q. Okay. The house there on Exhibit 1?
14 A. The house there on Exhibit 1.
15 Q. When you went in, who was the one who actually gave you
16 the drugs?
17 A. My brother gave me drugs. I told them that I gave him
18 drugs before. I told him that too.
19 Q. All right. Not to get too technical, but I know what
20 you said before right now. You are telling the jury what
21 happened. They are hearing it for the first time from you,
22 okay? They don't get to see all of your other statements.
23 They are just hearing from you.
24 A. All right.
25 Q. So what drugs were you getting from your brother?

1 A. Cocaine.
2 Q. Would you typically get it in powder or crack form?
3 A. Both.
4 Q. All right. If you got it in powder form, what would
5 you do with it?
6 A. I would go back to Mark's to cook it up.
7 Q. All right. You would give it to the customers?
8 A. Yeah, sell it to the customers or give it to the
9 customers.
10 Q. They had already paid or --
11 A. Yeah, some.
12 Q. Okay. What kind of amounts are we talking about here
13 like in terms of grams, ounce, kilos? What are we talking
14 about?
15 A. Small amounts, maybe $50 or $100 worth, one gram, two
16 grams, you know.
17 Q. Is one or two grams for powder amounts?
18 A. Yes.
19 Q. About how much does --
20 A. Either one.
21 Q. Powder or crack?
22 A. Yeah.
23 Q. So when you went to go get drugs from your brother,
24 where would you go?
25 A. The house right there.

1 Q. To 1808 Sycamore?
2 A. Yes.
3 Q. All right. How many times during the time frame of
4 early 2013 do you think you did that?
5 A. Maybe ten times. I mean, whatever. There was no -- I
6 would go a lot of different places. There was a lot of
7 different people who I could go to and get drugs from, you
8 know, I mean a lot of times he wouldn't have any drugs so I
9 would go other places to get drugs, so maybe ten to 20 times I
10 think is what I told the officer.
11 Q. Okay. Again, just testify from your own recollection.
12 Don't worry about what you told the officer before, okay?
13 A. All right.
14 Q. So is ten to 20 about right?
15 A. Right.
16 Q. Each time are you bringing back a gram or two?
17 A. Yes.
18 Q. All right. Who else lived at that house, do you know?
19 A. His girlfriend's family.
20 Q. Okay. Do you know his girlfriend's name?
21 A. Mildred Yvette.
22 Q. Mildred. Does she have kids?
23 A. I think it is Mildred. Yes, she has two daughters and
24 a son.
25 Q. Okay. Did Mark Gordon ever take you over to the house?

1 A. Yep. Mark had a license, so Mark had drove me over
2 there before, yeah.
3 Q. To the same house we're talking about?
4 A. Yeah, same house.
5 Q. When Mark would drive you over there, would he go in
6 with you?
7 A. No.
8 Q. So what would he do?
9 A. I would make him stay, park around the corner or
10 something like that or down the street, something like that.
11 Q. He would wait in the car?
12 A. Yeah.
13 Q. What would you do?
14 A. I would go in the house.
15 Q. Handle your business?
16 A. And come back out.
17 Q. So at some point did you move out of Mark's house?
18 A. Yeah, at some point after I had already been set up I
19 moved out of Mark's house. I didn't know I had been set up
20 already, but I moved into another house on Oscar Street,
21 another person that used drugs that said, hey, if you give me
22 drugs you can stay at my house. I was homeless, so I moved
23 over there.
24 Q. Whose house was that?
25 A. Uhm, you know, I forget those people's names. I forgot

1 their names. I only stayed there a few weeks.
2 Q. Was it a man or woman's house?
3 A. Lady's house. I can't remember her name.
4 Q. Did she have a son?
5 A. Yeah, she had a little drug addicted son.
6 Q. About how old?
7 A. Well, no, he is about 17 or 18 then.
8 Q. You don't remember their names? Its okay if you don't.
9 A. I can't remember. I mean I'm sure the memory will come
10 back. I can't remember the names right now.
11 Q. What were you doing while you were over at the Oscar
12 Street house?
13 A. Using drugs, selling drugs.
14 Q. Okay. Did you go, during the time you were at the
15 Oscar Street house, were you also getting drugs from your
16 brother?
17 A. Sometimes.
18 Q. Okay. During the time frame that you lived at the
19 Oscar Street house, did you take any trips over to the
20 Sycamore Street house?
21 A. Yeah.
22 Q. About how many times do you think you did that during
23 that time frame?
24 A. I was there a couple of weeks for maybe a month before
25 I got locked up, so I might have went to his house eleven, ten

1 or less than ten.
2 Q. Less than ten. Talking about the same thing, gather up
3 the money from users and take it to your brother?
4 A. Yeah. It was not a lot of users there. The people who
5 lived there was the users.
6 Q. Okay. Did your brother ever come to the Oscar Street
7 house to deliver drugs to you?
8 A. He came a couple of times to see me, yeah.
9 Q. When he came to the Oscar Street house, do you remember
10 what car he came in?
11 A. Yeah, black Nissan.
12 Q. Would he come into the house or how would that go?
13 A. He never came in the house.
14 Q. What would you do when the black Nissan arrived?
15 A. I would go get in the car.
16 Q. What happened in the car?
17 A. I got some drugs and I would go back in the house.
18 Q. We're still talking about cocaine?
19 A. Yeah.
20 Q. All right. You said that happened just a couple of
21 times maybe?
22 A. He only came over there maybe twice.
23 Q. Okay. Do you remember a night where somebody wanted to
24 trade Vicodin for drugs?
25 A. Yes.

1 Q. Where were you living when that happened?
2 A. Same place, Oscar Street.
3 Q. Oscar Street, okay. What did you do with the Vicodin?
4 A. I mean I called around to see if somebody wanted it. I
5 called to see if he wanted it. He didn't take them. I think
6 he was getting them for somebody who was chronically ill or
7 something.
8 Q. What did you do with the Vicodin?
9 A. I would try to take them and trade them to him.
10 Q. To who?
11 A. To my brother.
12 Q. Where did you go with the Vicodin?
13 A. To the house right there.
14 Q. Okay. What did you get in exchange for the Vicodin?
15 A. The drugs, cocaine.
16 Q. Cocaine, okay. All right. Do you remember a guy named
17 Donald Bock? You may have known --
18 A. Yeah, Don.
19 Q. You may have remembered him as Dave?
20 A. Dave, but it is Don. That is what we call him, yeah.
21 Q. Just so the jury knows we're talking about the same
22 person, what does he look like?
23 A. White guy about 35, kind of heavyset, almost fat, kind
24 of medium built like that.
25 Q. What about hair?

1 A. Bald headed I think.
2 Q. Okay. Where did you meet that guy, Donald Bock?
3 A. At Mark's house.
4 Q. In what context?
5 A. Coming over with some other guys that I knew to buy
6 drugs, to get high.
7 Q. Were you the one giving him drugs?
8 A. Yes.
9 Q. Not giving, but supplying drugs?
10 A. Yeah.
11 Q. What kind of drugs did he like?
12 A. Crack cocaine.
13 Q. All right. Did you sell him crack for cash a few
14 times?
15 A. Yes.
16 Q. About how many times do you think that happened?
17 A. Probably about five to ten times at least during the
18 time I known him.
19 Q. What amounts was he using?
20 A. Until he didn't have no more money. It didn't matter.
21 Sometimes he just go and go and go, you know, so he went from
22 three grams to five to ten grams, but, of course, I was not
23 getting that from my brother at the time. I was going
24 anywhere close by because he didn't like to wait, so, you
25 know, he was one of those guys that I had the closest person I

1 could get drugs from, I would go get them from. That was
2 right up the street on Walnut from where I stayed.
3 Q. Was there a point where Donald Bock wanted cocaine but
4 didn't have money?
5 A. Yes.
6 Q. What did he offer?
7 A. He called me. I was in Woodriver and he said that he
8 had -- he was bringing his guns, he would trade guns to me if
9 I would let him pawn it to me. I said yeah.
10 Q. Describe what you mean by pawn.
11 A. He wanted me to hold the AK-47 for him and just hold it
12 until he got his money from some sort of lawsuit.
13 Q. Okay. So he was expecting to be getting some money?
14 A. Yeah, he said he had got beat up at a club or something
15 and he was going to get money from it and he was going to get
16 his guns back, which anybody with any common sense know if you
17 trade guns, registered guns on a street to a drug dealer or
18 user, that you probably won't never see them again, but he did
19 it anyway.
20 Q. So what happened with the gun you described as the
21 AK-47?
22 A. I purchased that gun from him with drugs that I had had
23 at the time in Woodriver, and I had called my brother and he
24 didn't want it. He didn't want nothing to do with it. I told
25 the officer, well, as I told the officer before, my brother

1 really didn't do guns, he didn't really like guns around the
2 house. He didn't want the AK-47, so I bought the AK-47.
3 Q. All right. Before you took the AK-47 somewhere, did it
4 ever go to Mark Gordon's house?
5 A. Yeah, I did take it there, that is where I stayed at
6 first. Then Don said he was going to go get another gun, this
7 time a handgun.
8 Q. Before he got the other gun, where did the AK-47
9 actually go?
10 A. I took it from Woodriver to where I stayed on Mill
11 Street.
12 Q. Did you eventually take it over to your brother's
13 house?
14 A. Eventually, yeah, I did.
15 Q. What happened when you took it to your brother's house?
16 I know you said he didn't want it, but what happened?
17 A. I asked him would he let me leave it there until I came
18 back and got it.
19 Q. Did you get cocaine at that time?
20 A. Yeah, but not for that gun.
21 Q. I understand that you owed money for the cocaine, is
22 that right?
23 A. Yes.
24 Q. All right. So what was the arrangement on the AK-47?
25 A. That he would just hold it for me until I, you know,

1 paid him back.
2 Q. Okay. How much did you owe your brother on the cocaine
3 for the AK-47?
4 A. Well, I need to back up here. It is getting mixed up.
5 The AK-47, I had already paid for it. I didn't need to get
6 drugs, but the guy had another gun and that is the gun that --
7 Q. We'll get to that. Let's clarify the AK-47 first.
8 A. Yeah, okay. On that night I didn't need to get any
9 drugs from Lou, from my brother, on the AK-47. I brought the
10 other gun over and that's when I got some drugs from him.
11 That AK-47, I had already paid for it.
12 Q. Okay. When Bock traded you the AK-47 you gave him
13 cocaine that you already had?
14 A. Right, and I took them both at the same time. See, it
15 wasn't two separate times there.
16 Q. All right. So you got the two guns from Bock on two
17 different moments, right?
18 A. Yes.
19 Q. He didn't give them to you at the same time?
20 A. No. Yeah, he gave me -- no, not at the same time, but
21 I took them over there at the same time.
22 Q. Okay. So you got the AK-47 from Bock first?
23 A. Right.
24 Q. You gave him cocaine you already had?
25 A. Right.

1 Q. And then he used it, is that right?
2 A. Yeah, smoked it up.
3 Q. So he wanted more?
4 A. Yeah.
5 Q. So then what happened with the other gun?
6 A. Then he said he was gonna get another gun, so he went
7 and got another gun. I mean only place that I felt -- because
8 generally I was going to try to hold it for him, which, you
9 know, I mean I felt genuinely I was going to try, but I mean I
10 am an addict, so I know that at some point I probably -- he
11 wasn't gonna ever see those guns again. So I did ask my
12 brother did he want that gun and he said he would look at it.
13 I took them both over there.
14 Q. What did the other gun look like, not the AK-47?
15 A. I know what it look like, black 40-caliber.
16 Q. I am going to show you Exhibit 44 and just ask you,
17 what did that look like?
18 A. That looks like the gun.
19 Q. Okay. I know you can't be sure, but --
20 A. I can't be sure but that looks like the gun. They call
21 it small gun or compact or something.
22 Q. That looks like the second gun Donald Bock gave you?
23 A. Yeah, which I don't know how you got it, but yeah.
24 Q. The jury will hear how we got it. So what did you do
25 with this gun after Donald Bock gave it to you?

1 A. I got some cocaine. I left it with my brother.
2 Q. You left it with your brother?
3 A. Yeah.
4 Q. How much cocaine did you get for it?
5 A. Maybe two or three grams.
6 Q. All right. Where did you leave the AK-47?
7 A. With my brother at the house.
8 Q. Okay. Again, the house we're talking about is the one
9 in the picture?
10 A. On the screen.
11 Q. What was your brother's reaction to having guns in the
12 house?
13 A. He didn't want to keep it. He said he didn't want them
14 there, so he said he was going to get them out of there and
15 especially he didn't want to keep guns around the house. He
16 wasn't like that.
17 Q. He told you he was going to get them out of the house?
18 A. Yeah.
19 Q. You don't know where they went from there?
20 A. I don't know nothing. I don't know how you wind up
21 with that. Should have never been seen again. I mean the man
22 brought me $500 back to get the gun back the second time. I
23 went and bought drugs for him and then he never saw the gun,
24 so I just -- that was months later, so I just don't know how
25 that's back in play.

1 Q. You don't know how we found the gun. I understand.
2 The jury will hear how we found that gun.
3 A. Yeah.
4 Q. So you mentioned a minute ago after that deal where
5 Bock traded his guns for the cocaine, did he come back and try
6 to redeem the pawn?
7 A. Yes, with me, one time with me, yeah, he did.
8 Q. How much later was that?
9 A. About two months had went by. Even though he had me
10 coming by buying drugs in small amounts, but about two months
11 went by.
12 Q. How much did he offer to buy his guns back or redeem
13 the pawn, so to speak?
14 A. $500 he had he said he got from his brother.
15 Q. What did you do with the $500?
16 A. I went and bought cocaine.
17 Q. Where did you go?
18 A. I went to my brother's house.
19 Q. So did you even ask your brother if the guns were
20 there?
21 A. No.
22 Q. No?
23 A. No, because I know they wasn't. I mean I know this guy
24 wasn't never gonna get those guns back, I mean period. In
25 fact, we both felons, so we never want to have guns around us

1 anyway. I knew I was bogus for having a gun. I didn't want
2 to get caught with it. I'm sure he didn't want no guns around
3 him, so I am still baffled as to the guns should have never
4 ever --
5 Q. I get that gun should never have been recovered, but it
6 was.
7 A. Yeah. It is to my understanding that gun wasn't
8 recovered in July of 2013 when they went to my brother's
9 house, so I never told anybody about that gun.
10 Q. You are correct. Nothing you did led us to recover
11 that gun. Don't worry about that, okay. So after you took
12 the $500 and got the cocaine from your brother, what did you
13 do with the cocaine?
14 A. Went up, done smoke it, telling him that we gonna get
15 the guns later, the man ain't home, made all kind of excuses.
16 He was $500 in debt and now, you know.
17 Q. You kind of led him on about the guns?
18 A. Yeah, until he was $500 smoked up and then he was just
19 too gigged up, he didn't care no more. All he want was more
20 drugs with no money.
21 Q. All right. So you didn't give that gun to anybody
22 named Jesse Smith?
23 A. No. I don't even know who Jesse Smith is.
24 Q. Okay. Now you mentioned earlier you got arrested on
25 July 9th of 2013. Does that sound right?

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Testimony of Kenneth Boner
[pp. 144–166]

1 Q. Does that have anything to do with us?
2 A. No.
3 Q. Did that offense occur just a few months ago?
4 A. Yes.
5 Q. Was it actually after the things we're about to talk
6 about?
7 A. Yeah, it was after.
8 Q. Okay. So in 2013 where were you living?
9 A. I was in Alton.
10 Q. Where were you living?
11 A. Up Mill on Oscar.
12 Q. Who were you living with?
13 A. My mom.
14 Q. So in July of 2013, how old were you at that point?
15 A. I was 17.
16 Q. At some point did Romell Stevens move in?
17 A. Yes.
18 Q. Okay. How did you know Romell Stevens?
19 A. I met him through Chris Jernigen.
20 Q. How did Chris Jernigan know Romell?
21 A. I do not know.
22 Q. Was Chris Jernigan a drug user?
23 A. Yeah.
24 Q. Okay. What part of the house was Romell living in?
25 A. He was in the basement.

1 Q. And what was Romell doing when he moved into your
2 basement?
3 A. Selling drugs and using drugs.
4 Q. What drugs primarily was he selling and using?
5 A. Cocaine and crack cocaine.
6 Q. Were people coming around to the house?
7 A. Yes.
8 Q. What sorts of people were coming around?
9 A. Drug addicts.
10 Q. What did they want when they came over?
11 A. Drugs, cocaine, crack cocaine.
12 Q. All right. Would Romell sell them crack and powder
13 cocaine?
14 A. Yes.
15 Q. All right. Did he typically get cash?
16 A. Cash, pills, guns.
17 Q. Okay, you mentioned pills. Was there a time you recall
18 where people came over with Vicodin?
19 A. Yeah.
20 Q. What did the people want?
21 A. Cocaine.
22 Q. All right. So what did they offer in exchange?
23 A. A gram.
24 Q. A gram of?
25 A. Cocaine.

1 Q. They wanted a gram of cocaine?
2 A. Yes.
3 Q. What were they offering in exchange?
4 A. Pills, Vicodin.
5 Q. Okay. On that night did Romell have the cocaine?
6 A. No.
7 Q. Okay. Did he have to go get it?
8 A. Yes.
9 Q. Did you go with him?
10 A. Yes.
11 Q. Was it in your car?
12 A. No it was in the guy's car that needed the cocaine.
13 Q. Okay. And who drove?
14 A. Rome, Romell.
15 Q. Where did you go?
16 A. To his brother's.
17 Q. All right. I am going to put Exhibit 1 up on the
18 screen.
19 THE COURT: Are you needing the document camera?
20 MR. BOYCE: Yes, please, Your Honor.
21 Q. Do you recognize Exhibit 1?
22 A. No, or yes, yes.
23 Q. Look at it and be sure if you recognize it.
24 A. Yes.
25 Q. What is Exhibit 1?

1 A. It's the house we went to.
2 Q. Okay. Who did you go there with?
3 A. Romell.
4 Q. Were the other people that wanted the cocaine in the
5 car too?
6 A. No, they was at my house waiting.
7 Q. They stayed at your house?
8 A. Yeah.
9 Q. Okay. So did you go in the house?
10 A. No.
11 Q. You stayed in the car?
12 A. Yes.
13 Q. What did Romell take into the house?
14 A. Pills, Vicodin.
15 Q. What did he come out with?
16 A. Cocaine.
17 Q. All right. Where did you go from there?
18 A. Back home.
19 Q. What did Romell do when you got back home?
20 A. Gave them half of the product and did half of it and
21 then sold the other half.
22 Q. All right. Was that the only time you went over there
23 with Romell?
24 A. Yes.
25 Q. Were there other times that you saw Romell's supplier

1 come to your house on Oscar?
2 A. Yes.
3 Q. How would Romell's supplier get there?
4 A. He would drive.
5 Q. Did you see the supplier's car?
6 A. Yes.
7 Q. I am going to show you -- or what kind of car was it?
8 A. Blue Nissan.
9 Q. Okay. I am going to show you Defendant's Exhibit 25.
10 It is a better picture than I have. Do you recognize that?
11 A. Yes.
12 Q. What is that?
13 A. That's his car.
14 Q. All right. I mean that could be black?
15 A. Uh huh.
16 Q. Does that look like the car that the supplier would
17 come in?
18 A. Yes.
19 Q. All right. About how many times do you think the car
20 came over to your house on Oscar?
21 A. I would say about three or four times.
22 Q. Sorry?
23 A. Three or four times.
24 Q. All right. Did it come during the day, during the
25 night?

1 A. During the day and night.

2 Q. Okay. On at least one occasion did you see who was in

3 the car?

4 A. Yes.

5 Q. All right. When the car pulled up, did the person

6 driving get out and come into your house?

7 A. No.

8 Q. What would happen?

9 A. Romell would go out to the car.

10 Q. Sorry?

11 A. Romell would go out to the car.

12 Q. All right. What would happen?

13 A. He would get out of the car and he would have cocaine.

14 Q. What did he do with the cocaine?

15 A. Use it, sell it.

16 Q. So he would come back inside and sell cocaine?

17 A. Uh huh.

18 Q. After getting out of the car?

19 A. Yes.

20 Q. You said on at least one occasion you saw the person

21 who was driving the car?

22 A. Yes.

23 Q. Do you see the person here today?

24 A. Yes.

25 Q. Could you point him out?

1 A. There.
2 Q. Can you describe him?
3 A. Short, long hair, tattoos.
4 Q. Okay. The person sitting next to the man in the suit
5 at the defense table?
6 A. Yes.
7 Q. All right. Were you at your house on July 9th of 2013
8 when the police came and arrested Romell?
9 A. Yes.
10 Q. All right. What police department came and arrested
11 Romell?
12 A. Alton.
13 Q. All right. Was Detective McCray there?
14 A. Yes.
15 Q. And Sergeant Brantley?
16 A. Uh huh, yes.
17 Q. You got to say yes or no, or whatever the answer is.
18 So while Detectives McCray and Brantley were at your house
19 arresting Romell, did they come to you asking questions about
20 Romell or did you go to them?
21 A. They came to me.
22 Q. Did they ask you if you knew anything about Romell?
23 A. They knew about his past history and they came to me.
24 They already knew what was up and what was going on at my
25 house.

1 to me. All up to my mom.
2 Q. So if Rome said it was you and Chris Jernigan that got
3 that rolling, Rome is telling a lie?
4 A. Yes, that's all I did was give my mom a heads up that
5 Chris has somebody that wanted to move in, he didn't have
6 nowhere to go, he would pay on the rent every month and my mom
7 was like, yeah, because, you know, she didn't really have the
8 money like that to pay all the rent and buy food, all of that
9 stuff.
10 Q. When you told her this guy would pay money, in fact, he
11 was paying with crack?
12 A. He paid in both money and crack.
13 Q. If he says it was just crack, is he telling a lie?
14 A. He is telling a lie.
15 Q. When the police talked to you about the person that you
16 now say you saw one time in a car in front of your house, in
17 terms of the description the police asked you if the person
18 that you saw on that one occasion who supplied Rome was the
19 same complexion as Rome and you indicated that he was just
20 like Rome, only shorter?
21 A. Yes.
22 Q. So you described this guy as short, short and fat?
23 A. Yes.
24 Q. When you went to this house with Rome that Rome denies
25 you going with ever --

1 MR. BOYCE: Objection, Your Honor. That misstates
2 the testimony. Romell Stevens says he did not recall. He did
3 not deny it.
4 THE COURT: I don't recall the testimony. The jury
5 will recall. You can go ahead and ask your question.
6 Questions By Mr. Schattnik:
7 Q. So in terms of that, the single occasion you say you
8 went there, basically you didn't see anybody other than Rome
9 going in or out of the building, correct?
10 A. Rome was going in and out of my house to meet up with
11 his brother in my driveway.
12 Q. When you went to the building, you talked about you
13 never saw anyone other than Rome getting in and out of the
14 building?
15 A. It wasn't a building, it was a house.
16 Q. Houses are buildings. When you saw Rome go in and out
17 of the building, that was the only person you saw, Rome,
18 correct?
19 A. Yes, I seen him go to the house and come out with
20 cocaine.
21 Q. These people with the pills, were these your customers?
22 A. No.
23 Q. Sounds like you were brokering the deal. They came to
24 talk to you about moving the pills?
25 A. I didn't know none of the people he had come over to

March 17, 2015, Trial Transcript Vol. II, Testimony of Kurtis McCray [pp. 198–209]

1 Q. Okay. So when the defendant left uncharged, what did
2 he agree to do?
3 A. He basically was agreeing to try to assist us in
4 apprehending or gaining information about other criminal
5 activity.
6 Q. So he was going to work as a CI?
7 A. Yes, sir.
8 Q. In what areas was he supposed to give information about
9 people doing what?
10 A. Drugs and guns specifically.
11 Q. Was this defendant going to get paid?
12 A. No.
13 Q. What was his consideration going to be?
14 A. He would get consideration in his pending case.
15 Q. Now between July of 2013 and up to October of '13, not
16 getting into November yet, did you have a series of contacts
17 with the defendant?
18 A. Yes, I did.
19 Q. How would you two correspond?
20 A. I typically -- sometimes phone calls, but more often
21 text messaging.
22 Q. Were you using your work phone?
23 A. I was.
24 Q. What is your work phone number?
25 A. (618) 979-9937.

1 Q. At first, what phone number was the defendant using?
2 A. 618-530 -- I am having difficulty with the last four.
3 Q. Starting with the 530?
4 A. I believe so, yes.
5 Q. You guys would call and text each other?
6 A. Yes.
7 Q. Did you guys develop a code name?
8 A. Yes.
9 Q. What was the code name?
10 A. He would call me Big Chief.
11 Q. Why would you do something like that?
12 A. That way if like I called the house and his girlfriend
13 Mildred would answer the phone or something, I could say tell
14 him Big Chief called, just if he is around, I'll call you
15 later Big Chief, things like that. So it is a code name. He
16 doesn't have to call me McCray. Some people know me.
17 Q. Were your text messages between you and the defendant
18 saved on your phone?
19 A. Yes.
20 Q. Did you later download them onto a disk?
21 A. Yes.
22 Q. Did you review the download?
23 A. Yes, I did.
24 Q. Is the download accurate compared to what was on your
25 phone?

1 A. Yes. I should mention that actually Detective Pearson
2 downloaded it. It was my phone. I reviewed it and it is
3 accurate.
4 Q. I am showing you 38. What is that?
5 A. Looks like the disk containing text messages between
6 myself and Miles Musgraves.
7 Q. Is what is on here accurate compared to what was on
8 your phone?
9 A. Yes.
10 MR. BOYCE: All right, Your Honor, I offer 38 into
11 evidence.
12 MR. SCHATTNIK: No objection.
13 THE COURT: 38 admitted, no objection.
14 (Whereupon Government's Exhibit 38 was admitted.)
15 MR. BOYCE: At this point I would ask to publish it.
16 Q. Okay, Detective McCray, we're looking at -- is this the
17 first text message?
18 A. Yes.
19 Q. Okay. What is the date on this?
20 A. Looks like August 15th of 2013.
21 Q. That's what, about a month after the defendant was
22 released?
23 A. Yes. We had primarily been corresponding through his
24 home telephone number until he got this number.
25 Q. Okay. So what is the description there?

1 A. Incoming.
2 Q. What does it say in the description of the text?
3 A. I am sorry, I was looking at direction. Oh, there you
4 go. "Big Chief, this is my new number, 530-4287."
5 Q. What is the significance of Big Chief?
6 A. I knew that was Miles Musgraves because we had already
7 spoke about this Big Chief being our kind of code word.
8 Q. He is telling you this is his new number?
9 A. Yes.
10 Q. Did you use this number to correspond for awhile?
11 A. Yes.
12 Q. Could we turn it on for just a second? All right.
13 Going forward in time then looking at text number 85, who is
14 that to?
15 A. That is outgoing to the 530 number, which was Miles,
16 and I'm asking him, "Anything looking good?"
17 Q. What date was that?
18 A. August 19, 2013.
19 Q. What do you mean by "Anything looking good?"
20 A. I'm just asking him for any progress on any potential
21 information, any potential targets that he might have.
22 Q. And was there a response a little bit later?
23 A. Looks like I got an incoming right after that, "Am on a
24 couple of people. Let me get all the facts and I'll fill you
25 in."

1 Q. Is the next one up a duplicate?
2 A. Yes, looks like it.
3 Q. All right. You responded what in number 82?
4 A. I said, "Okay."
5 Q. That is from the 19th?
6 A. Yes.
7 Q. All right. Then there was an exchange on August 25th
8 and 26, text 81 to 74.
9 A. This one is me texting him saying on August 25th of
10 2013 saying, "Call you back in a few. Trying to get my kid
11 down for a nap."
12 Q. Was that in response to a phone call you got?
13 A. Apparently, yes.
14 Q. So were you guys at the point in addition to texting,
15 were you also talking on the phone?
16 A. Yes, but primarily texting I think.
17 Q. Okay. So then you got a response of "K"?
18 A. Correct.
19 Q. If we could scroll up? The request from the defendant
20 at that point was what on 78?
21 A. On 78, on August 26th of 2013 he texted me, "Call me
22 when you got a chance."
23 Q. All right, go up to the next one. So you are driving
24 on the 26th. If you could move up a little bit more?
25 "Driving. Give me a call at 75." Do you see that?

1 A. Yes.
2 Q. If you could move up a little more? So at 74, what
3 does the defendant say?
4 A. I believe that is me actually saying, "I tried calling
5 you back, man."
6 Q. So is this an example of you guys going back and forth
7 talking on the phone and texting?
8 A. I think we're playing phone tag, essentially, for lack
9 of a better term in this case.
10 Q. So do you recall during that period whether any
11 specific information was relayed other than you are trying to
12 get ahold of each other?
13 A. Yeah. I don't recall anything specific, no.
14 Q. Okay. All right then. Then at 73, who is that from?
15 A. That's from -- that is incoming, so it is from Miles,
16 530 number again. On September 10th of 2013 he says, "I'm
17 getting up with Jonathan Thursday to see what's up and trying
18 to get info on this guy with some guns. I'll keep in touch
19 this week."
20 Q. What was the defendant indicating to you with that one?
21 A. We had previously talked about a gentleman, I believe
22 Johnathan Lucas, on the phone. I believe we discussed that.
23 At what point we talked about it on the phone, I am not sure.
24 This is, obviously, him referring to Johnathan Lucas,
25 potentially him buying drugs from that individual, and he

1 probably did tell me about a guy with guns. I remember a
2 couple of times he spoke to me about guys with guns. I just
3 can't say for sure that is the people he is talking about
4 there.
5 Q. You responded at 72?
6 A. I said, "Keep me updated."
7 Q. If we could scroll up? 71, what is that about?
8 A. 71 is incoming still from the 530-4287. It's
9 9-13-2013. "Just checkin in. Call me when you can. Got to
10 talk to you about prices."
11 Q. What is that about?
12 A. Sounds like we hadn't talked about prices yet, but I am
13 assuming prices with Jonathan, price on the drugs.
14 Q. So what was the plan? What was the defendant going to
15 be doing with Jonathan?
16 A. He intended -- well, what we discussed was for the
17 defendant to purchase drugs from this individual.
18 Q. All right. What is number 70 on 9-17?
19 A. That's outgoing, so that would be me saying, "Hey, I
20 forgot to tell you to get me a name of that guy with the
21 chopper."
22 Q. What is chopper a name for?
23 A. Chopper is common street slang for an AK-47. I do
24 recall a conversation that me and the defendant had about an
25 individual with an AK-47 I believe in his trunk at Goldfingers

1 one night. I think he was trying to get ahold of me about it
2 and couldn't do so. I didn't answer at that time, so we later
3 discussed this matter.
4 Q. So sometime around September 17th the defendant was
5 trying to direct you to someone with an AK-47?
6 A. That's correct.
7 Q. That would have been part of his cooperation?
8 A. Yes.
9 Q. All right. Your response was?
10 A. I just said "K, I'm sorry." I think that is incoming,
11 yeah. I asked him about the chopper guy. I said give me a
12 name on the chopper guy. If you could go back up or down? I
13 am sorry. Yes, I am asking him to get me a name of the guy
14 with the chopper and he said okay.
15 Q. All right. Then the last group I want to ask you about
16 are the last ones from October here. 67, is that incoming?
17 A. That is incoming. It is on 9-29 of 2013. This is him
18 saying, "Sorry ain't been at you. Going through a lot with my
19 mom and her cancer, but I think I'll have something lined up
20 here in a week or two. Been hearing some stuff, making sure
21 it is all good." It is two texts separated.
22 Q. What date was that?
23 A. That is 9-29 of 2013.
24 Q. So was that basically the defendant apologizing for not
25 doing anything as an informant?

1 A. We went through periods where we wouldn't be in
2 contact. So, yes, sounds like we hadn't been in contact for a
3 week. I don't know how long, but a period of time, and he is
4 kind of making amends saying I am working on something, I'll
5 get ahold of you when I know more info.
6 Q. Then you respond on 9-29 of '13.
7 A. Correct. That is outgoing from me. I said, "The time
8 has come to either do something or not. I'm thinking the guy
9 you called about. Call you in two weeks. You have had plenty
10 of time."
11 Q. What were you trying to express to the defendant at
12 that point?
13 A. That I guess it had been two and a half months since
14 his release and we really haven't progressed at all, that we
15 haven't came any closer to actually getting something done.
16 Q. You told him it was time to do something or not?
17 A. Correct.
18 Q. His response on the 29th?
19 A. "I'm trying. So much going on around here. Nobody
20 trying to get with me and putting me on hold."
21 Q. What did you think that meant?
22 A. Putting me on hold would mean like we did do a search
23 warrant at his house. Putting him on hold, he is referring to
24 people not wanting to deal with him in reference to drugs
25 because he was released basically after a search warrant was

1 done at his house.
2 Q. And your response on the 29th would be in 63?
3 A. 63 is outgoing. That would be me. I am saying, "I
4 know a lot of people. I hear different. It's your decision,
5 man. I'm not going to push you to do something and I ain't
6 mad at you if you don't, but I gotta do what I gotta do.
7 Think long and hard about it. You got a couple of weeks to
8 figure it out."
9 Q. Basically the ultimatum?
10 A. I am just telling him I can't let his pending case hang
11 forever. I eventually have to move on and we aren't making
12 progress. It is his decision in the end. I am not going to
13 make him do something. I didn't make him do anything.
14 Q. All right. That was on September 29th of '13, right?
15 A. That's correct.
16 Q. All right. I think the next one, you said "okay".
17 A. Yes.
18 Q. That was the last contact until --
19 A. Until --
20 Q. What is the next one? Move above it, 61?
21 A. Until October 12th of 2013 looks like.
22 Q. And what is the difference here in terms of phone
23 number?
24 A. At that point he switched to (618) 225-0982. I believe
25 what happened here, he had called me from this number. I

1 particularly don't answer calls on my work phone that I don't
2 recognize. I asked him who is this.
3 Q. After you gave the ultimatum you better come up with
4 something, he switched phones?
5 A. Yes.
6 Q. So you said who is this and then you get the response
7 back from the 225 number?
8 A. "It's Lou."
9 Q. That is on October 12th?
10 A. Yes.
11 Q. Then there is more conversation about --
12 A. I explained why I asked him.
13 Q. Didn't recognize the number, all right. Let's go ahead
14 a little farther. Enjoy family time. All right, so now this
15 one, 56, who is that from?
16 A. That is outgoing, so that is me texting him. It is
17 October 16th of 2013. I asked him, "You know of a guy
18 nicknamed Whip?"
19 Q. All right. So at this point are you still trying to
20 gather information from Lou?
21 A. Yes, but I think that might have been pertaining to
22 another matter. I just thought Lou might be a good person to
23 ask. I was probably working a different case.
24 Q. All right. Lou wants to know what his real name is?
25 A. He asked me, "What's his real name?" I said, "That's

1 what I'm trying to figure out."
2 Q. So there is more back and forth about that. I think
3 that is it until -- no, it is not. So there are exchanges on
4 the 26th starting with 52?
5 A. Yes, it is October 26th of 2013 incoming, so that would
6 be him texting me. "At the warehouse," and on misspelled, but
7 I think he means Union, "gun plates number 1237371."
8 Q. What is gun plates number? What is that all about?
9 A. Well I mean at the time I didn't get it because it was
10 late at night, I believe, but after reading it in the morning
11 he is referring to a vehicle with a gun inside of it. He
12 gives me the plate.
13 Q. So he is trying to put you on to a car with a gun in
14 it?
15 A. Yeah.
16 Q. Giving you the number?
17 A. Correct.
18 Q. All right. So you say you got it too late?
19 A. This was -- and I should mention when reviewing these,
20 the time stamp on here is actually I believe an hour off, the
21 top time stamp, but yeah, I end up getting it, he is texting
22 me like 3:30 in the morning. I am dead asleep and it looks
23 like at some point during the next afternoon I tell him, "I
24 didn't get the message. I got the message early this morning.
25 It was a little late for me last night. I was asleep and did

March 18, 2015, Trial Transcript Vol. III, Testimony of Kurtis McCray [pp. 17–21]

1 A. Yes. When you run the gun, it gives you a report
2 number to refer to with the original agency, which would have
3 been Madison County Sheriff's Department.
4 Q. The day you found the gun, did you pull the underlying
5 report?
6 A. No.
7 Q. Now Jesse Smith, what happened to him?
8 A. Jesse got charged with two counts of possession of
9 controlled substance with intent to deliver within 1000 feet
10 of a school and we also began the process of seizing his
11 vehicle.
12 Q. Was that for forfeiture?
13 A. Yes, due to the drugs and the intended delivery drug
14 asset forfeiture.
15 Q. Are those -- was Jesse Smith charged in Madison County
16 with a state offense?
17 A. Yes, state offense.
18 Q. Was he charged with Class X offense?
19 A. Yes.
20 Q. Do you know if those are punishable by six to 30 years
21 in prison?
22 A. Yes, they are.
23 Q. So at that point the prosecutors in Madison County
24 issued charges against Jesse Smith?
25 A. That's correct. I believe they were doing it as we

1 were executing the search warrant on the car.
2 Q. So you had a gun and drugs and Smith is charged, right?
3 A. At that point when they issued charges, we only had the
4 drugs. We were in the process of recovering the gun.
5 Q. All right, but basically it could have ended there,
6 right?
7 A. Yes, it could have.
8 Q. So what happened when you went home the next night from
9 work?
10 A. So this would have been after November 19th, the day
11 following recovering the gun. I go home from work in the
12 morning hours, so now we're into November 20th around midnight
13 or 1:00 or something like that. I end up laying down for the
14 night thinking about, as most of us probably commonly do,
15 thinking about the things I have to do the next day. One of
16 the things would be the charging of the gun of Jesse Smith.
17 And lying awake going through my things to do list for the
18 next day, I started going through some of the circumstances of
19 this case, specifically with the gun, and something didn't
20 feel right to me because two days prior to this gun being
21 reported in Jesse Smith's car, I had talked to Romell Stevens
22 and he had described trading crack cocaine to a guy for a
23 handgun, some automatic handgun, and described that handgun
24 would have been reported stolen later on through Madison
25 County and that the last known person to have that gun was

1 Miles Musgraves, who was my reportee, and that an individual
2 who was unconscious in the vicinity of his house, unconscious
3 and incoherent, apparently drunk, we had found a gun which was
4 reported stolen out of Madison County. So I laid there in bed
5 for a couple of hours to the point to where I thought it was
6 kind of senseless to lay there and stay awake until 8:00 a.m.,
7 so about 3:00 a.m. I believe I put on my clothes and I went to
8 work.
9 Q. What did you do when you went to work at 3:00 a.m.?
10 A. The first thing that was bugging me the most, I needed
11 the police report from Madison County to tell me the specifics
12 of how this gun got reported stolen, so the first thing I did
13 was I got in contact with the Madison County Sheriff's
14 Department, requested the police report. Police report then
15 identified the individual who had reported the gun stolen as
16 being Donald Bock. It provided an address for Donald Bock
17 where he had reported the gun being stolen. It also gave
18 details that the H & K 40-caliber gun that we previously saw
19 was not the only gun stolen. There was also an Arsenal 762
20 gun, which is similar to an AK-47, that was also stolen.
21 That, to me, giving me further details confirmed from my
22 November 15th interview of Romell Stevens that there was a
23 second. He had reported that he also traded crack cocaine for
24 an AK-47.
25 Q. All right. So we're still talking about the early

1 morning hours of November 20th here?
2 A. Yes, about 3:46 to 4:00 a.m., somewhere around there.
3 Q. Okay. Did you have some contact with Romell's lawyer,
4 Judy Kuenneke?
5 A. Yes, when business hours came about and I had seen this
6 information about Donald Bock and now I am suspecting that
7 Donald Bock -- this was Donald Bock's -- we knew it was Donald
8 Bock's gun, but I needed to confirm with Romell Stevens that
9 the person he had traded crack cocaine for the handgun was, in
10 fact, Donald Bock. So I e-mailed previous booking photo of
11 Donald Bock to Romell's attorney, Judy Kuenneke, and she
12 subsequently showed it to Romell.
13 Q. Did that result in Exhibit 31?
14 A. Yes, that is what I received, an e-mail back from Judy
15 Kuenneke and in Romell's handwriting.
16 Q. So through this Romell confirmed that is the guy I got
17 the guns from?
18 A. Yes.
19 Q. All right. Is that still the morning of the 20th?
20 A. Yes. Now we're early business hours.
21 Q. After you had confirmed Romell's story, what did you do
22 in terms of Bock?
23 A. Obviously, I wanted to contact Donald Bock and Romell
24 had told me his story. I wanted to confirm that story was
25 true and accurate through Donald Bock.

1 Q. Did he confirm it?
2 A. Yes. Went to his house. He agreed to come to the
3 police department, subsequently did a video recorded interview
4 where he told me details that closely matched Romell Stevens'
5 story.
6 Q. Basically what he told us here in Court?
7 A. Yes.
8 Q. So at that point what did you decide to do in terms of
9 Jesse Smith?
10 A. I no longer believed that the charges on Jesse were
11 warranted, so I had all of the state charges relating to the
12 two counts of possession with intent of controlled substance,
13 I had them both dismissed and I also returned his vehicle, no
14 longer was seizing his vehicle due to the contradictory
15 evidence.
16 Q. Now did Jesse have a different case out there that
17 preceded the events of November 17th of '13?
18 A. Yes, unbeknownst to the patrol officer at the time, I
19 had a sealed arrest warrant for Jesse Smith for unlawful
20 delivery of controlled substance.
21 Q. So that was a drug case?
22 A. Yes, it was.
23 Q. Was that one of these where you used an informant to
24 buy drugs from Smith?
25 A. Yes.

March 19, 2015, Trial Transcript Vol. IV, Government's Closing Argument [pp. 17–29]

1 the Alton Police Department's internal policy. It was not,
2 however, a violation of state law, which required that
3 evidence in sexual assault cases be maintained. That is why
4 the old evidence officer is indicted for violating the state
5 law. Also, it wasn't violation of federal law. The federal
6 law is that a narcotics violation need not be proved by direct
7 evidence. There is no need for a sample of the narcotics
8 seized to be placed before the jury.
9 Would we have preferred to have been able to show you
10 the exhibit? Certainly. Is that a best practice by the
11 police department? Certainly not. But we have proven where
12 that exhibit went and that it was, in fact, crack cocaine.
13 Just as an example though, look at that picture.
14 Here is a different bag of cocaine, but it is a bag of
15 cocaine, and compare that to that. It sure looks the same,
16 doesn't it? The defendant was maintaining the premises for
17 selling cocaine. You have it right there on the video, right
18 there in the pictures.
19 You also have a whole lot of other evidence from
20 other people involved in the case. Of course, Mark Gordon
21 went over there, I think he said, three times with Romell.
22 Romell walked in with money or whatever and came out with
23 cocaine. He came out of that premises. We know that.
24 Boner went over there at least once. Romell had the
25 Vicodin, came out with the cocaine.

1 Donald Bock went over there at least once, went over
2 there with the gun, Romell came out with the cocaine.
3 Not going to tell you those are model citizens. You
4 wouldn't be voting for them for anything. These are people
5 who are involved in the drug trade and they have a lot of the
6 baggage that comes with people like that.
7 So just like it is the law to use your common sense,
8 it is also the law that you have to consider their testimony
9 with caution and great care. You have to follow that because
10 it is the law.
11 What I would suggest to you as you are weighing the
12 credibility of these types of witnesses is to look at the
13 parts of their testimony that is corroborated by things that
14 are undisputed, or you couldn't fake, you couldn't make up.
15 Things like, well, if you are lying about having been to the
16 house, how did you take the police there? When the police
17 said where is the house, how did they pick it out, out of all
18 of Alton? What are the odds? What are the odds they were all
19 able to do that. Things like that suggest even a person who
20 is impaired by drug use and criminal history, I mean a person
21 is still capable of telling the truth.
22 You look at the ways the police showed what they are
23 saying is likely true. I would ask you to think about this.
24 This is for you to decide. This goes to using your common
25 sense. Ask yourselves these questions in your deliberations.

1 How are they all telling the same story two years later right
2 on down the line? They all haven't talked to Romell Stevens
3 in two years. He has been in jail the whole time. How did
4 they get it all together? Do these seem like a bunch of
5 criminal master minds who could have hashed this evil plan to
6 frame Lou back in 2012 and '13 and are able to carry it out
7 through today? Your common sense should be telling you, no,
8 it doesn't seem like it.
9 Then ask yourselves again, applying your common
10 sense, what did these witnesses have to gain? Really, what
11 did they get out of this? Romell would like a sentence cut.
12 He said he is not expecting one. He is hoping for one. What
13 about the others? What did they get out of this? They had to
14 come down here, they had to lay bare their faults, which in
15 some cases are significant. They had to swear under oath to
16 all of these bad things they have done and what are they
17 getting in exchange? They get beaten up on cross examination
18 and that is the defense's job, not saying he shouldn't have
19 done that, but the witnesses had to go through that. They
20 knew they were going to have to go through that. They are not
21 getting paid. They are not working off charges. They are not
22 getting anything out of this. Why would anyone do that?
23 There is no bias they have against this defendant. They don't
24 have it in for him. Why would they come down and say that?
25 This is where you use your common sense and weigh the

1 credibility of their testimony.
2 Then think about Donald Bock. Not only did he not
3 get anything out of it, he got charged with a felony. If
4 Donald Bock had just said no, my guns were stolen, you can't
5 prove they weren't, that is it. That is the end of it. We
6 would never have been able to close the loop on the gun part
7 and Donald Bock wouldn't have been charged with a felony for
8 making a false report. Not only did Donald Bock have nothing
9 to gain, he significantly stands to lose by coming in here and
10 telling you the truth. So judging his credibility is up to
11 you, but those are things you should consider.
12 All of that evidence goes to the drug count. All of
13 those people saw money or other items, including Vicodin,
14 guns, etcetera, go into the house, and cocaine, crack, powder,
15 come out. Who was in the house? Who sells cocaine? We know
16 Lou does because we have pictures of him doing it and video of
17 him doing it.
18 Shantara Parker -- this might be one of the witnesses
19 where you thought what was that for -- she eliminated the
20 other suspects. You may have been able to do that anyway on
21 your own with your common sense. She did it for you. Who
22 lives in the house? Mildred. Does she sell crack and powder?
23 No. Is she aware of it? Certainly, but she was not selling
24 it. Did Shantara do it? No. Did Shantara's little sister do
25 it? No. Did her little brother do it? No. It was Lou. She

1 eliminated all of the other suspects for you and we have
2 pictures of him doing it.
3 Lou is the one who was maintaining the premises for
4 selling drugs within 1000 feet of a school. We have proven
5 all of the elements beyond a reasonable doubt. He should be
6 guilty of that.
7 Count 2 is the conspiracy. Much of the evidence
8 mirrors the evidence on Count 1 all about drug dealing. The
9 focus on the conspiracy isn't as to the place, it is as to the
10 people. The people are Lou and his brother Romell.
11 Again, there was exhaustive evidence presented about
12 this. I don't think it is disputed that Romell was selling
13 drugs. Everyone said that. The defense emphasized that quite
14 strongly, so Romell was selling drugs.
15 Was Romell involved in a conspiracy with Lou? That
16 is the question. Well, all of the evidence was that Romell
17 was going to Lou's house where Lou is the one known drug
18 dealer, to come out with cocaine. All of the evidence was
19 Romell would gather up the money of other drug users or
20 Vicodin or guns or whatever it took to get cocaine from his
21 brother Lou. Certainly seems like they are jointly involved
22 in selling cocaine together.
23 There is an instruction that I want to touch on here.
24 This is called a buyer seller instruction, or that is what we
25 refer to it as. This differentiates the difference between a

1 conspiracy and what I will call an arms length business
2 transaction. You will have to decide when Lou is selling
3 cocaine to Romell or giving cocaine to Romell to sell, is that
4 a joint criminal endeavor between the two of them, or is that
5 an arms length business transaction where Lou is just engaging
6 in business with Romell, but they are not working together.
7 First point on that is that if you are inclined to
8 think, well, Lou was selling Romell cocaine, but they weren't
9 working together, if you are to that point you have to have
10 convicted on Count 1, because if you believe Lou was selling
11 cocaine and you are just confused about whether or not it was
12 a conspiracy, all of the evidence is Lou was doing that at the
13 house. So it would be wholly inconsistent for you to think,
14 well, he was selling cocaine, maybe it was a conspiracy, but
15 to not have already convicted on Count 1. So be sure you
16 already checked off Count 1 before you talk about this.
17 There is ample evidence Lou was the supplier. All of
18 the people seen Romell going in and out of the house; Romell
19 telling you so, Boner telling you so too.
20 There is a quick point on Boner. Again, you will
21 weigh everybody's credibility. There was some substantial
22 evidence submitted in the case that Boner may not have been
23 fully truthful about his own cocaine use. He admitted that he
24 used pills and marijuana and drank. A lot of people also said
25 he also used cocaine. That is not what is at issue here.

1 What is at issue is was Lou Romell's supplier.

2 So looking at just what Boner tells you, just about

3 what is at issue, he says yeah, it was. How do you know that?

4 I went with Romell the one time to Lou's house and Lou came

5 over to my house a few times.

6 Now think about whether or not that is likely true or

7 false. If it was false, how did Boner pick Lou out of the

8 lineup in about a second? You remember that video of him

9 picking Lou out of this lineup in about a second? They put it

10 in front of him, he went that's the guy, I am 100 percent

11 sure. I guess you could say he had a one out of six chance,

12 great odds, but you saw it.

13 Take it farther though. If Boner was lying, how was

14 he able to take the police back to the house? How did he get

15 them there? Again, of all the houses in Alton, what were the

16 odds of that? So you don't have to believe everything Kenneth

17 Boner says about his own drug use, because what is important

18 is whether or not he really knows that Lou was the supplier.

19 That is what is at issue and that is confirmed by these other

20 things you can't fake. You can't fake his ID there and how

21 positive he was. You can't fake his ability to take the

22 police back to the house.

23 So Romell identified Lou as the supplier and so does

24 Kenneth. Likewise, you know Shantara has eliminated all of

25 the other suspects. You know that the drugs are coming out of

1 the house and Shantara has eliminated all of the other people.
2 Just at this point, is it a conspiracy or arms length
3 transaction? Here are some of the things to show these people
4 are working together.
5 Remember the September deal where Tisdale went back
6 and tried to buy drugs a second time and Romell chased him
7 off? Well, what did Romell do? He said he doesn't sell
8 drugs, I don't sell drugs. Nobody had even mentioned that.
9 Why are you coming at us like that, we're not doing that. He
10 is saying "us", "we". They are working together and Romell is
11 working to protect his partner, his brother. There is a level
12 of trust there and level of protection.
13 Likewise when Romell has the guns, he said the AK was
14 his, but he gave it to his brother to hold because of the
15 level of trust. Why is only Romell allowed to go into the
16 house and not the buyers? If Lou is running arms length
17 business, if there is a store front counter, can't anybody
18 come in and buy cocaine? No. Only the trusted one can. Only
19 Romell can. Those are signs that this is a joint venture,
20 these guys were working together, it is a conspiracy. Lou
21 joined it with the intent to further it. He is guilty.
22 Count 3 is the ammunition. This was seized during
23 the search warrant in July of 2013. It is in the drawer
24 there. There are several things to lead you to believe this
25 is Lou's ammunition. Now it wasn't in his hand, but there is

1 an instruction on joint possession. There is an instruction
2 about what we call actual versus constructive possession.
3 Constructive possession means the thing is yours, you
4 are exercising control over it, but you are not holding it.
5 You see me holding my penny? Put it down next to my things
6 and I walk away. I am still possessing it. This ammunition
7 is in Lou's bedroom in his dresser drawer. There is a picture
8 of it there. Underneath it is a picture of his girlfriend in
9 a convertible. Seems like the sort of thing a guy would keep
10 around, something personal to him. Underneath that is a
11 picture of Lou himself flashing his money. Again, it is a
12 picture of him. In the top drawer of that same dresser was
13 Lou's State ID. That is him. Clearly that is his.
14 There is also this jersey. I want to comment on that
15 quickly because it did come up in the defense's case. We
16 didn't make a big deal about the jersey in our case, just said
17 that looks like a man's shirt. Then you get the two sisters
18 coming on in the defense case, that is Carlos' shirt. Nobody
19 said Carlos lived there. It doesn't make much sense his shirt
20 would be in the dresser drawer. When questioned about how
21 they know it is his shirt, I remember, I remember. The one
22 was specific that he wore the shirt and blue jeans and red and
23 white Filas, like perhaps she had rehearsed that many times.
24 Asked what Carlos wore on other days, she had no idea, no
25 clue. The first one said I don't pay attention to what he

1 wears. She didn't catch where I was going with that. I mean
2 that testimony was a lie.
3 You can't fault a sister for trying to help out her
4 brother, especially when her other brother is already in jail
5 and perhaps beyond help. So it is not the lie I want you to
6 focus on, but I want you to focus on the fact that Lou thought
7 it was important. We hadn't said the jersey was a big deal.
8 It was important enough to him to make his sisters come in
9 here and lie about it.
10 MR. SCHATTNIK: Objection, Your Honor. No evidence
11 that Lou thought it was important. It was a decision by
12 counsel in a case and there is nothing with any inference with
13 regard to what my client's thought process was.
14 THE COURT: This is argument, folks. You understand
15 this is not evidence. You have heard the evidence.
16 MR. BOYCE: That is the inference you should draw,
17 Lou thought it was important, otherwise he would not ask his
18 sisters to come in here and lie about it.
19 The elements on this are that the defendant was a
20 felon. He stipulated to that, so that is not in question.
21 That the ammo traveled in interstate commerce, Agent Inlow
22 told you about that. It says right on it, made in Minnesota.
23 It had to cross state lines to get in Illinois. There was
24 expertise. He was also able to determine that.
25 The only thing at issue there, did he possess it, was

1 it his ammo. All of that shows it was his ammo. You know
2 what else does? His own acts. He got arrested, went to the
3 police station, booked, released. What did he do? Agreed to
4 cooperate as an informant. Why else would he do that?
5 Again, these are the questions you have to ask
6 yourselves in weighing this evidence, using your common sense.
7 Why did Lou agree to sign up as an informant if that wasn't
8 his ammo?
9 So that moves us on to Counts 4 and 5, which are
10 related. Could we switch real fast? Show the texts. Do you
11 remember the series of texts? Just the one I want to show
12 you.
13 This is the ultimatum from Detective McCray, friendly
14 ultimatum. It is nice. "I know a lot of people. I hear
15 different. It's your decision, man. I'm not gonna push you
16 to do something. I ain't mad at you, but I gotta do what I
17 gotta do. Think long and hard about it. You got a couple of
18 weeks to figure it out." So that's where Lou sits. He has to
19 do something or Detective McCray will do what he has to do.
20 So what does he do? He plants the drugs and gun on
21 Jesse Smith, felon in possession. We don't have to prove he
22 planted the gun. We have to prove that Lou possessed the gun
23 at some point, but he planted the gun.
24 The elements on that are, again, Lou was a felon.
25 That is stipulated. The gun traveled in interstate commerce.

1 Agent Inlow says the gun says on it made in Germany. Had to
2 come from Germany to the U.S. and went from Georgia to
3 Illinois.
4 So did Lou possess the gun? Well, we can trace the
5 gun by serial number from Donald Bock. Remember he had that
6 little envelope that came with the gun where he bought it? It
7 has the serial number on it. Donald Bock had that. Same
8 serial number on the gun. Follow the serial number. How did
9 it get there? How else did it get there? Well, Bock gave it
10 to Romell and watched Romell take it into Lou's house. We
11 know who the one is inside of the house doing all of this.
12 Romell was in jail after July 9th of 2013. Romell said that
13 Lou was going to get it out of the house because he didn't
14 want it around the kids, to his credit.
15 Romell told the police on the 15th, November 15th of
16 '13, about how he gave the gun to Lou. Romell's inability to
17 see the future has been an area of testimony. So on the 15th
18 he says I gave that gun to Lou. On the 17th it shows up under
19 Jesse's car seat in front of Lou's house. That is certainly
20 enough to show that Lou possessed the gun.
21 Do we have the 911 call? You heard the 911 call.
22 The caller said I am working with the police, I am working
23 with Big Chief. That's Detective McCray's code name.
24 The gun's under the driver's seat and the cocaine is
25 above the visor. Here is the cocaine that was above the

1 visor. There were two exhibits found. This was in Jesse's
2 pocket. This was above the visor, fell on the floor. Marla
3 Spangler said this is the one she tested, not this one. This
4 tested positive for cocaine.
5 It is shameful, but he did that. He framed Jesse
6 Smith. Jesse Smith was looking at six to 30 years in prison,
7 looking at losing his Cadillac. A man who has his own
8 problems, has a prior, has a pending case. Good target to
9 frame a guy with a history passed out drunk in front of your
10 house, your moment of opportunity.
11 Lou was drunk too. You heard him on the call.
12 People make bad decisions when they are drunk, but he did it.
13 He framed Jesse Smith. That is Counts 4 and 5. You have seen
14 and heard the evidence on that.
15 So Mr. Schattnik is going to talk to you next.
16 Oh, last point on that. The car was closer to the
17 school than the house, easily within 1000 feet.
18 Mr. Schattnik is going to talk to you next. I get to
19 talk to you last. It is our burden. I get the last word. I
20 know you are going to find this defendant guilty.
21 THE COURT: Mr. Schattnik?
22 MR. SCHATTNIK: Thank you, Your Honor.
23 Good morning, folks. First off, I apologize for
24 talking fast as Barb may make noises periodically, but I will
25 try to talk in a nice even pace.

1 ridge lines, not enough to get a full print, and it is real
2 easy for those things to be distorted or kind of through
3 natural causes even unintentionally. That is possible.
4 In terms of what else is in the drawers though,
5 photographed everything and showed you everything in the
6 drawers. Top drawer just had socks, socks and the defendant's
7 state issued photo ID. Kind of a key omission. Pretty good
8 evidence the things in the drawers were the defendants. It
9 wasn't just his socks.
10 The defense talks about the gun, you know, could have
11 been printed and DNA tested. The evidence was some of the
12 surfaces on the guns would have been better for prints, some
13 would have been better for DNA. You can ask to do both. If
14 you do prints first, you really can't go back and do DNA.
15 They tried prints, nothing came back. Of course not, because
16 the defendant planted the gun. Why would he leave his prints
17 or DNA on it? There were no witnesses to the defendant
18 committing this act, sneaking out early in the morning while
19 Jesse Smith is drunk out in his car, but the defendant told
20 you what happened on his 911 call.
21 (Whereupon the following is from an audio recording
22 played in open Court.)
23 SPEAKER ONE: (Inaudible.) On Sycamore. I was doing
24 some work for some detectives but right now he's not working
25 right now, but I got a guy, he's asleep in the car. He got

1 the pistol on him and drugs and everything on Sycamore in a
2 red Cadillac.
3 SPEAKER TWO: Who is it?
4 SPEAKER ONE: I don't know what his name is. They
5 call him OG or some shit. He's older guy, went to prison
6 plenty of times.
7 SPEAKER TWO: Were you able to see the gun in the
8 car?
9 SPEAKER ONE: It's in the driver's side, driver's
10 side. He had a gun on the driver's side.
11 SPEAKER TWO: In the seat or (inaudible)?
12 SPEAKER ONE: Under the seat. He's fucked up though.
13 He showed me the gun and pointed it towards me, but like I
14 said, I was working with the detective but he is with his
15 family now so --
16 SPEAKER TWO: So he's asleep inside the car?
17 SPEAKER ONE: Yes, ma'am.
18 SPEAKER TWO: Okay. You don't know where on Sycamore
19 at all?
20 SPEAKER ONE: He's right there in a red Cadillac by
21 Westfield. You can't miss it. It's a red Cadillac baby.
22 SPEAKER TWO: Okay. Do you want to leave your name?
23 SPEAKER ONE: No, baby. I was working with him but
24 they acting like they don't want to answer my call or they
25 busy with they family though when I am trying to put in a word

1 with 'em, you know what I'm sayin'? Because I made a deal
2 with the mother fucker I would put in some work. But I guess
3 that shit on me not to make me call (inaudible) so I'm calling
4 you.
5 SPEAKER TWO: Do you want to leave your name so I can
6 give it to them?
7 SPEAKER ONE: Baby, I can never leave my name, but I
8 wish I could. That's what I'm sayin' I'm just tryin' to put
9 it down (inaudible) call crystal (inaudible). I mean he was
10 shootin' 'em up earlier. So all I want to say, I been in the
11 car with him but at the same time he shootin' 'em up with a
12 pistol. He on Sycamore in a red Cadillac. He got dope in the
13 car in the visor in the car and pistol underneath his seat.
14 SPEAKER TWO: Okay, all right.
15 SPEAKER ONE: They call him Big Chief or some shit.
16 SPEAKER TWO: Big teeth?
17 (Whereupon the following proceedings were held in
18 open Court.)
19 MR. BOYCE: All right, so you got that. So the older
20 guy has been to prison. He knows who is in the car. The
21 cocaine is above the visor, the gun is under the driver's
22 seat. I have been working with the police. I have been
23 working with Big Chief, the code name for Detective McCray.
24 That's not the defendant confessing, but that is him telling
25 you what he did.

1 This is the instruction on direct and circumstantial
2 evidence. This is very good circumstantial evidence. The law
3 doesn't favor one over the other. This is the instruction
4 about inference and, of course, common sense.
5 THE COURT: Four minutes.
6 MR. BOYCE: Thank you, Your Honor. Almost finished.
7 You are going to draw the reasonable inferences from
8 that call and everything else you already know.
9 From that you know that the defendant snuck out there
10 that morning and framed Jesse Smith, put that gun underneath
11 the seat. Remember which way it was pointing, pointing away
12 from the door, not the way it would be if somebody put it in
13 there, and he put the drugs above the visor, right where he
14 told the dispatcher they would be.
15 Jesse Smith was facing 30 years in prison and losing
16 his car. An innocent man almost went down in this case but
17 for Detective McCray. He saved him. It is time for the
18 guilty man to be held accountable. Go and convict this man of
19 all counts using your common sense. Thank you.
20 THE COURT: Okay, folks, I'll shortly release you to
21 the jury room so you can start deliberating. If you do have a
22 question for me, recall the instruction that you must put it
23 in writing. Knock hard on the door. When the door closes
24 there is actually a silence bar that comes down to keep your
25 deliberations completely confidential. Patrice or her

June 26, 2015, Sentencing Hearing Transcript [pp. 6–13]

1 February 2nd 2000, unlawful delivery of a controlled substance
2 case, and Paragraph 67 is their second predicate, an unlawful
3 possession with intent to deliver, which occurred on
4 September 25th 2006.
5 *MR. SCHATTNIK:* And the problem with, then, the
6 additional case, besides the age, the 2006 event, I don't know
7 if I can tell you what exactly happened with regard to the 2006
8 event. I don't think anybody can. As charged, it was a charge
9 for a Class X felony of possession with intent to distribute,
10 which under Illinois law, as the Court knows, would mandate a
11 minimum sentence of six years in the Department of Corrections.
12 Yet in this case, all we know is that there was a 25-month
13 sentence, so it couldn't have been a conviction to the Class X
14 charge.
15 Now, the government has put in its briefing that,
16 well, I guess that means it must be a Class 2 felony. But we
17 don't have any information as to what it is. It might have
18 been a straight possession charge. We just don't know. I have
19 attempted to find the court reporter from that event. She has
20 retired. We have attempted to find her to see if she could get
21 us a transcript. We've attempted a couple of different times,
22 and we've not gotten anything from her and no call back. She
23 was going to see if she had her materials that went back that
24 far.
25 The -- I've been a -- I've been both a prosecutor and

1 a defense lawyer in Madison County, and I have never seen a
2 disposition of 25 months, credit for time served on a charge
3 that would appear to be a Class X felony. For that sentence to
4 go into effect, the charge would have to have had some sort of
5 amendment somehow because 25 months' incarceration is not a
6 sentence that would be a lawful sentence.
7 *THE COURT:* It is a leniently illegal sentence, right?
8 *MR. SCHATTNIK:* Well.
9 *THE COURT:* It had to be nine years, at least, for it
10 to be a legal sentence for the particular charge they're
11 claiming.
12 *MR. SCHATTNIK:* Mmm hmm.
13 *THE COURT:* And it wasn't, it was 25 months.
14 *MR. SCHATTNIK:* Right.
15 *THE COURT:* So either the judge was extraordinarily
16 lenient or made a mistake, or it wasn't that class of a felony.
17 *MR. SCHATTNIK:* Correct.
18 *THE COURT:* In which case, Mr. Boyce's back-up
19 argument is that, well, it must have been some kind of
20 controlled substance offense, so it doesn't really matter. It
21 still applies to the career offender.
22 *MR. SCHATTNIK:* It might have been a possession
23 offense. We just don't know. I mean, we have absolutely no
24 idea, and we are guessing for the imposition of a career
25 offender status on this client. We are guessing as to what the

1 conviction might have been or could have been or should have
2 been.
3 You know, I've been in the front of Judge Hackett many
4 times. He is not an overly lenient judge. Judge Hackett does
5 know the law. He is an experienced attorney. He was both a
6 public defender, he's been CJA counsel, and he was a judge for
7 many years. Judge Hackett would clearly know that if he was
8 sentencing somebody for a Class X felony or, in this case, a
9 Super X, that it would be six years as an X, 9 years as a Super
10 X, and that 25 months is not a sentence that would be available
11 if he were convicted of the offense charged, so, clearly, he
12 could not have been.
13 *THE COURT:* Um, well, the offense, as originally
14 charged, does not match the sentence. I think we all agree to
15 that. So either one of two things had to happen. Either he
16 was convicted of the charge with possession with intent to
17 distribute between 100 and 400 grams of cocaine, but was
18 sentenced to an illegally lenient term of periodic
19 imprisonment, or the charge was reduced without any written
20 amendment to the charging document, which is probably why you
21 wanted to see what the court reporter had to say.
22 *MR. SCHATTNIK:* Well, and I had also gone back and I
23 had talked to attorney Neil Hawkins, who was the public
24 defender who handled this case. If you look at the history of
25 this case, my client originally had one lawyer for a long

1 period of time, who then withdrew, and then a second lawyer got
2 in, who then withdrew, and then the public defender was
3 appointed.
4 And almost immediately, within days of that
5 appointment, without anything else, if you look at the timing
6 of the plea in this case, my client was just brought over from
7 the jail. And typically when you get cases like this, it is
8 like, Do you want to plead guilty to something and go home
9 today, or do you want to go back to jail, and we'll get you a
10 trial somewhere in your Class X felony that will carry at least
11 nine years?
12 So the majority of times when I have received that
13 offer or given that offer as a prosecutor, we resolved the
14 case, but typically we resolve it in a way that you can see on
15 the charge what's supposed to happen. And what typically
16 happens is that the Court actually changes the charge on the
17 actual pleading document, the information, by enter delineation
18 *[sic]*. I've done many reduction cases in Madison County over
19 the years. We have always done the enter delineation *[sic]*
20 when we have changed things, and you would have to do that so
21 that you would match the sentence in the case. So, clearly,
22 there was some activity, but, basically, right now, no one is
23 able to tell us what it was, and the record doesn't give us any
24 information on that.
25 From our perspective, we object because of the

1 severity of what happens if the Court does sentence on career
2 offender status as opposed to not sentencing on career offender
3 status, while the Court has the discretion to give whatever
4 sentence it wants in terms of statutory maximum, but in terms
5 of just making the initial assessment with regard to the
6 applicability of career offender charge or enhancement, if it's
7 a very significant event. And so for that reason, we object to
8 both of those predicate offenses.
9 *THE COURT:* Okay. Do we know -- I'm at Paragraph 67.
10 This is the 2006 second predicate offense. Did he plead or was
11 he found guilty? I can't tell from the PSR.
12 *MR. SCHATTNIK:* It would appear that it was a plea.
13 *THE COURT:* Linda?
14 *PROBATION OFFICER:* Your Honor, I have the document
15 from Madison County, which I will tender.
16 *THE COURT:* What did he plead to?
17 *PROBATION OFFICER:* He pled to unlawful -- at the top
18 it still maintains that he pled to unlawful possession with
19 intent to deliver a controlled substance, and that there were
20 plea negotiations in the case. The defendant pled guilty. And
21 there was a factual basis for a stipulation. And he waived the
22 PSR. That's basically all it says.
23 *MR. SCHATTNIK:* And this is how every event is
24 described in Madison County, regardless of what actually
25 happens on the record. This is the standard boilerplate that's

1 tossed on the orders and the judgments.
2 *THE COURT:* So he actually pled guilty to this
3 predicate offense.
4 *MR. SCHATTNIK:* Pled guilty to some offense.
5 *THE COURT:* Well, he pled guilty to -- I mean if you
6 look at the document, I'm going to mark this as Court's 1 so it
7 is clear for the record. He pled guilty to unlawfully
8 possessing with intent to deliver a controlled substance. So
9 he pled guilty to the predicate offense, and the judge
10 sentenced him erroneously to a lesser sentence. That's what
11 this looks like to me. Can you disagree with me?
12 *MR. SCHATTNIK:* That's what it looks like on paper,
13 but we just don't know.
14 *THE COURT:* Well, you want me to speculate that that's
15 not what happened when it looks like that on paper.
16 *MR. SCHATTNIK:* Well, that's what the document is.
17 *THE COURT:* Mr. Boyce.
18 Mr. Boyce, let me ask you this: As we get into this,
19 your papers say it was one of two things. One, the judge --
20 that he pled guilty to this felony, this particular offense,
21 and the judge, instead of giving him the nine years he should
22 have, which was the mandatory minimum, gave him an erroneously
23 lenient sentence. That's your Option 1.
24 And your Option 2 is this: The charge was reduced
25 without written amendment to the charging document with

1 possession with intent to distribute less than 1 gram of
2 cocaine, for which a sentence of 25 months' periodic
3 imprisonment would have been legal for Class 2 felonies. So
4 you are kind of backing in to that class of felony with that
5 amount of drug, based upon the sentence that the judge came up
6 with.
7 *MR. BOYCE:* That's right, Judge. And I would draw a
8 parallel between the Illinois criminal code and the federal
9 code in that in both codes the first paragraph talks about the
10 conduct that's illegal, the various forms of drug trafficking
11 that are illegal. Then Section B in both goes through the
12 different penalties that are based off of different drug
13 amounts and different drug types. So -- and I think that's
14 reflected there.
15 The conduct that was the basis of the conviction was
16 possession with intent to distribute a controlled substance.
17 That didn't change. If the amount and the cocaine is
18 the drug type, so over -- I think it was over 500 grams of
19 cocaine -- if that hadn't changed, the Section B part, the
20 penalty driver, if that didn't change, then it was an illegally
21 low sentence because you have to get at least nine years.
22 It could be that the second part, the drug amount part
23 changed that they agreed that it was less than a gram, in which
24 case the 25-month sentence would have been legal. That's not
25 reflected on there, but that would, at least, be an

1 explanation.
2 My point is that, in either case, the conduct, the
3 offense of conviction is under Illinois Section 401, the drug
4 trafficking statute. In either event, that's a career offender
5 predicate. It is a drug trafficking prior. It is a felony.
6 He got more than a year. And that's all that the career
7 offender guideline provision requires.
8 Honestly, more likely than not, Judge, it probably
9 should be an ACC predicate, but I wish I could be more help on
10 that. What you do when some crazy thing like this happens,
11 research it, and when you can't find it, what do you do? It is
12 probably an ACC predicate, but they got an illegal sentence,
13 and it is not really clear how that all went down. So...
14 *THE COURT:* I'm not going to consider it predicate for
15 ACC, but I think it is a predicate for career offender because
16 one of two things had to happen. One is the judge gave an
17 illegal sentence, based upon what should have been a mandatory
18 minimum nine-year, and that would be a drug trafficking
19 offense, it would be a felony, and punishment of more than a
20 year. So that would be an appropriate predicate. Or, backing
21 in to the sentence that he did give, the amount of drug
22 quantity necessary to get there would also be a predicate
23 offense as a distribution amount.
24 Thirdly, if you look at Court's Exhibit Number 1,
25 which is the actual court order. It says the case is called

No. 15-2371

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MILES MUSGRAVES,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

I, the undersigned, counsel for the Defendant-Appellant, Miles Musgraves, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

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Dated: November 23, 2015

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MILES MUSGRAVES,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Miles Musgraves, hereby certify that I electronically filed this appendix with the clerk of the Seventh Circuit Court of Appeals on November 23, 2015, which will send notice of the filing to counsel of record in the case.

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Dated: November 23, 2015