No. 18-3114

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HARRY MILLER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
(Honorable Judge William M. Conley, No. 3:17-cr-00082)

BRIEF AND SUPPLEMENTAL APPENDIX FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The appellant's jurisdictional statement is not complete and correct. Accordingly, pursuant to Circuit Rule 28(b), the United States submits the following jurisdictional statement.

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Miller on September 17, 2018. App. 1.[1] On September

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[1] "Doc. __, at __" refers, respectively, to the document recorded on the district court docket sheet and page number. "App. __" refers to Miller's Short Appendix by

(continued…)

26, 2018, Miller filed a timely motion for a new trial. Doc. 127. On October 1, 2018, Miller filed a timely notice of appeal from the court's judgment. Doc. 129. The court denied Miller's motion for a new trial on August 30, 2019 (Doc. 153), at which time his notice of appeal became effective. See Fed. R. App. P. 4(b)(3)(B). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly rejected Miller's argument that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963) by not disclosing notes and audio recordings from a parallel investigation that Miller alleges were favorable and material to the defense.

STATEMENT OF THE CASE

1. Procedural History

In January 2018, a federal grand jury in the Western District of Wisconsin returned a three-count superseding indictment charging defendant Harry Miller with various offenses in connection with his sex trafficking of two women. Doc. 25. Count 1 charged Miller with trafficking Alishayna Daniels[2] from March 10, 2017 to

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page number. "Supp. App. __" refers to the Government's Supplemental Appendix by page number. "__A Tr. __" and "__P Tr. __" refers, respectively, to the morning or afternoon volume and page number of the trial transcript. (There is only one session for Volume 3 of the trial transcript.) The corresponding district court docket number precedes a transcript citation. "Br. __" refers to the original page number of Miller's opening brief and not the pagination set by this Court.

[2] While the indictment and superseding indictment did not identify the victims by name, the victims were identified, and testified, at trial. "Jane Doe 1" is
(continued…)

April 21, 2017, and Count 2 charged Miller with trafficking Emily Breitzke from March 2017 to June 2017, both in violation of 18 U.S.C. 1591(a)(1).[3] Doc. 25, at 1-2. Count 3 charged Miller with maintaining a drug house in Madison, Wisconsin, for the purpose of distributing and using controlled substances, namely heroin and cocaine, in violation of 21 U.S.C. 856(a)(1). Doc. 25, at 2.

A three-day trial began in May 2018. Docs. 78-79, 81. The jury convicted Miller on all three counts. Doc. 84. The court sentenced Miller to 20 years' imprisonment on Counts 1 and 2, and five years' imprisonment on Count 3, with the sentences to run concurrently. App. 2-3.

Miller filed a motion for a new trial on the two sex trafficking counts. Doc. 127. He asserted that the government violated his rights under the Due Process Clause and *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), by withholding favorable and material evidence that resulted from a Madison, Wisconsin, Police Department's undercover investigation of him (generally referred to below as the "parallel" investigation). Doc. 138. He asserted that when undercover officers visited Miller's building during this investigation, the officers "saw no evidence he

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Daniels and "Jane Doe 2" is Breitzke. Given their identification and testimony in district court, we refer to the victims by name.

[3] Section 1591(a) of Title 18, in relevant part, punishes anyone who knowingly, in or affecting interstate commerce, "recruits, entices, harbors, transports, provides * * * [or] maintains * * * by any means a person * * * knowing, * * * or * * * in reckless disregard of the fact, that means of force, threats of force, * * * coercion * * * , or any combination of such means will be used to cause the person to engage in a commercial sex act." 18 U.S.C. 1591(a).

was holding women against their wills for prostitution." Doc. 138, at 1. Miller argued that evidence of the undercover officers' failure to detect any sex trafficking activity would have been material to showing that it did not happen. Doc. 138, at 18-25. The district court denied the motion. App. 8-27; Doc. 153.

Miller timely appealed. Doc. 129. He challenges only his sex trafficking convictions (*i.e.*, Counts 1 and 2). As to those sex trafficking convictions, Miller does not challenge the sufficiency of the evidence. Rather, Miller's only claim on appeal is that the government violated *Brady* by not disclosing evidence resulting from the undercover investigation because, in his view, this evidence was favorable and material to his sex trafficking case.

2. Statement Of The Facts

Although the single issue presented in this appeal is straightforward, the underlying facts are not. We therefore set forth the facts in some detail.

a. Miller's Commercial Sex Trafficking

The evidence at trial showed that, beginning in March 2017, Miller engaged in a scheme consisting of violent force, threats of force, withholding drugs to induce painful withdrawal symptoms, and manipulation of debts to compel Alishayna Daniels and Emily Breitzke to engage in commercial sex for his benefit. Both women were heroin addicts and homeless when they started living with Miller in his apartment on the second floor of a commercial building located at 1502 Greenway Cross, Madison, Wisconsin, where he was the on-site maintenance worker. In exchange for heroin and a place to live, Miller made Daniels and

Breitzke engage in sexual acts for money. The government presented uncontroverted direct evidence of Miller's sex trafficking through the testimony of the two victims; corroborating eyewitness testimony of Matthew Remisoski and Seth Schumacher, two now-recovering heroin addicts who lived in Miller's apartment while the trafficking occurred; and Fawne Granby, the mother of Miller's son and a drug counselor who visited the apartment several times during this period. The government also presented the testimony of several other witnesses and other pieces of evidence to support the sex trafficking charges against Miller.

i. Miller's Sex Trafficking Of Alishayna Daniels. Miller trafficked Daniels for approximately three weeks from early March 2017 until March 21, 2017. Daniels was homeless, in her early 20s, and addicted to heroin when she first met Miller through another drug addict, bought heroin from Miller, and used it at his apartment. Doc. 89/1P Tr. 53; Doc. 90/2P Tr. 13-14; Doc. 95/2A Tr. 105, 107, 110-111; App. 12. In early March 2017, Daniels, and her dog moved into the apartment. Doc. 89/1P Tr. 53; Doc. 95/2A Tr. 111, 113, 119, 143. At that time, Emily Breitzke was already living with Miller. Doc. 95/2A Tr. 34-36. On the night she moved in, Daniels asked Miller to give her heroin and offered to go on a "date"—*i.e.*, perform sexual activities for money—to get money to pay Miller for the heroin. Doc. 95/2A Tr. 111-113. Daniels then posted an advertisement on Backpage promoting sexual services.[4] As a result, Daniels engaged in commercial sex acts and gave the money

[4] Backpage was an online classified site organized geographically that included advertisements for various products and services, as well as an adults

(continued…)

to Miller, who bought drugs that he shared with Daniels and Breitzke. Doc. 95/2A Tr. 113-115, 141-143.

Subsequently, Miller claimed that Daniels still owed him money for heroin he had given her and told her that she could not leave until she repaid the debt. Doc. 95/2A Tr. 115-116. Daniels attempted to repay the money by posting other Backpage advertisements and engaging in sexual activities for money. Doc. 95/2A Tr. 118, 121. Schumacher, one of the drug addicts who lived with Miller, recalled Miller asking Daniels a few times whether she had an upcoming "date." Doc. 90/2P Tr. 57. During this time, Miller supplied Daniels with two grams of heroin a day. Doc. 95/2A Tr. 126-128. Miller was aware of Daniels' continual need to use heroin to avoid withdrawal symptoms. Doc. 95/2A Tr. 126.[5]

Miller largely directed Daniels' commercial sex transactions, which took place in his apartment. On a daily basis, Miller pushed for and supervised Daniels' posting of Backpage advertisements promoting commercial sex. Doc. 95/2A Tr. 121, 131-132, 145-146. Miller required Daniels to obtain payment from her customers in

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section. Doc. 95/2A Tr. 11. Government witnesses testified that a number of Backpage ads were associated with Miller's telephone numbers, and that a cell phone seized during a search of Miller's apartment was connected to Miller and contained images tied to the Backpage ads. Doc. 89/1P Tr. 66, 88-89; Doc. 90/2P Tr. 26-36; Doc. 95/2A Tr. 7, 10-22, 43-44.

[5] James Sauer, an expert on substance abuse treatment and counseling, testified that as heroin leaves the body, users experience withdrawal symptoms, including sweaty faces or brows, severe nausea and vomiting, and depression. Doc. 89/1P Tr. 131-132; see also Doc. 95/2A Tr. 29 (Breitzke's description of withdrawal symptoms). According to Sauer, the only way for a heroin addict to stop these withdrawal symptoms is to use the drug again. Doc. 89/1P Tr. 134, 137.

advance of her sexual services, and to give him the money. Doc. 95/2A Tr. 118-119. Before each sexual transaction, Miller would empty the apartment of the other drug addicts living with him, and afterward he would pat Daniels down to confirm she was not hiding any additional money from him. Doc. 95/2A Tr. 122-125. When Daniels asked Miller if she could avoid engaging in sex on a particular occasion, he got angry and told her that she needed to pay off the debt she owed him. Doc. 95/2A Tr. 122-123. Despite engaging in commercial sex acts at least three times per day, Daniels was never able to pay off the debt. Doc. 95/2A Tr. 118, 122, 124, 145.

Miller coerced Daniels in other ways to ensure her continued compliance. He took her dog away when a customer was coming over and threatened that she would never see the dog again unless she went through with the commercial sex transaction. Doc. 95/2A Tr. 120. Miller also withheld heroin from Daniels, exacerbating her withdrawal symptoms, until she set up another commercial sex transaction. Doc. 95/2A Tr. 124, 127. At one point, Daniels told Miller that she wanted to leave. Doc. 95/2A Tr. 61, 125. Miller refused to let her leave unless she paid off her debt, and threatened to keep her dog as collateral, and once even to kill it, to prevent her from leaving. Doc. 95/2A Tr. 61-62, 125.

Miller also controlled Daniels through violence. On one occasion, Miller dragged her out of the apartment, hit her, and locked her out of the building after telling her she needed to leave and come back with the money she owed him or she would not see her dog again. Doc. 95/2A Tr. 125-126. Daniels testified that she returned because she had nowhere else to go, and that Miller only let her back into

the apartment so that she could continue engaging in commercial sex acts. Doc. 95/2A Tr. 126. On another occasion, Miller punched Daniels after he suspected she gave her phone number to Granby, Miller's ex-girlfriend who worked as a drug counselor, in an attempt to leave. Doc. 89/1P Tr. 23-24; Doc. 95/2A Tr. 127-128. And once when Daniels told Miller to stop threatening to take her dog away and hugged the dog protectively, Miller got angry and strangled her until she could not breathe, only stopping when the dog bit him on the leg. Doc. 95/2A Tr. 120.

On March 21, 2017, Daniels called her mother from Miller's apartment because she believed her dog was in danger. Doc. 89/1P Tr. 54-55; Doc. 95/2A Tr. 133-134. Because Daniels sounded "very frightened," her mother contacted the Madison police, and her mother and the police then went to the apartment to try to retrieve Daniels and her dog. Doc. 89/1P Tr. 55-56; Doc. 95/2A Tr. 134. When the police arrived, Daniels initially panicked and was reluctant to leave because she believed Miller would have her killed if she left. Doc. 89/1P Tr. 55; Doc. 95/2A Tr. 134. Eventually, Daniels exited the apartment at her mother's request. Doc. 89/1P Tr. 57-59; Doc. 95/2A Tr. 134-135. The police arrested Daniels on outstanding warrants for felony theft and other charges, and she had no subsequent contact with Miller. Doc. 95/2A Tr. 107-108, 135, 138-140.

ii. Miller's Sex Trafficking Of Emily Breitzke. Miller trafficked Breitzke for approximately three-and-a-half months (from early March 2017 until on or about June 16, 2017). Breitzke's experience with Miller was even more severe than that of Daniels'. Breitzke was in her late 20s, addicted to heroin for nearly a decade, and

living in hotels when she met Miller. Doc. 95/2A Tr. 27-28, 30; App. 12. In late February, after Breitzke was released from jail, she went to Miller's apartment to use heroin to overcome her withdrawal symptoms, and soon began living with him. Doc. 95/2A Tr. 34-36. She then posted a Backpage advertisement promoting sexual services to get money to pay Miller for the drugs he provided her. Doc. 95/2A Tr. 36, 41. For her sexual transactions, Breitzke went by the name "Diamond." Doc. 89/1P Tr. 91; Doc. 95/2A Tr. 41, 131.

Over time, Miller became verbally abusive toward Breitzke, particularly when he believed she was not posting ads. Miller called her a "whore" and "worthless" and told her that nobody was going to help her except him. Doc. 89/1P Tr. 35-36, 92; Doc. 90/2P Tr. 55-56; Doc. 95/2A Tr. 54, 63-64, 129-130. As he did with Daniels, Miller also exerted significant control over Breitzke's commercial sex transactions. Miller took photographs of Breitzke with his cell phone for use in her Backpage advertisements, and made her repeatedly post such ads up to four times an hour. Doc. 89/1P Tr. 92, 95; Doc. 95/2A Tr. 44-49. Miller sometimes took Breitzke's phone from her to confirm that she was posting, and to send text message responses to inquiries from potential clients that included proposing certain sexual acts that she did not want to perform. Doc. 95/2A Tr. 51, 54. He did not allow her to refuse a commercial sex transaction, even when she was sick. Doc. 95/2A Tr. 57-58.

Miller's control extended to the money that Breitzke received for her compelled commercial sex acts. As with Daniels, Miller required Breitzke to collect

payment in advance from her customers. Doc. 90/2P Tr. 56; Doc. 95/2A Tr. 50. Miller would wait outside the apartment's door to take the money before the commercial sex transaction started. Doc. 95/2A Tr. 50. Although Breitzke would sometimes try to hide the payments from Miller, he would search her to make sure that she gave him all the money she collected. Doc. 89/1P Tr. 93, 98; Doc. 95/2A Tr. 50, 55.

Miller also coerced Breitzke to continue engaging in commercial sex acts by threatening to withhold heroin from her if she did not post ads and find customers, which caused her to become "scared" and "nervous." Doc. 95/2A Tr. 49, 59, 130; see also Doc. 90/2P Tr. 59. Miller also knew that Breitzke had outstanding arrest warrants, and told her that he would call the police if she tried to leave or stop selling sexual services for his benefit. Doc. 95/2A Tr. 58. Nevertheless, several times Breitzke attempted to leave, and Miller prevented her from doing so. Doc. 95/2A Tr. 63-64. Once when she attempted to leave with Granby, Miller's ex-girlfriend, Miller pulled Breitzke back into the apartment and told Granby, "You ain't taking my 'B' with you." Doc. 89/1P Tr. 34. Breitzke's ability to leave Miller's apartment was further compromised by her lack of close family members, of which he was aware. Doc. 95/2A Tr. 64. One time, Miller threw Breitzke out of the apartment for the night because he mistakenly believed she had taken his crack cocaine, but she returned because she had nowhere else to go. Doc. 95/2A Tr. 64-65.

Miller also controlled Breitzke through violence and threats of violence. Miller told Breitzke that if she withheld money from him or did not post ads he

would punch her and "beat [her] ass." Doc. 95/2A Tr. 55, 83; see Doc. 90/2P Tr. 56. Miller made good on this promise, grabbing and hitting the sores on her arms that resulted from injecting heroin. Doc. 95/2A Tr. 55-56. Miller also physically abused Breitzke as a matter of course. Doc. 89/1P Tr. 97. On one occasion, Miller mistakenly believed that Breitzke had smoked his cigarettes, and he kicked her in the chest, knocking the wind out of her. Doc. 95/2A Tr. 55.

In June 2017, concerned about the abuse Breitzke was receiving, Remisoski and another individual removed her from Miller's apartment. Doc. 89/1P Tr. 93; Doc. 95/2A Tr. 36-37, 65-66, 83. She returned to Miller's apartment shortly thereafter, but was arrested on or about June 16, on outstanding felony warrants for theft and other charges. Doc. 95/2A Tr. 32, 37, 66, 73.

iii. Miller's Arrest. In March or April 2017, Granby, Miller's ex-girlfriend, called Dane County Detective Thomas Roloff of the Dane County Narcotics Task Force and notified him that sex trafficking may be taking place in Miller's apartment. Doc. 89/1P Tr. 44. In early May, after Daniels finally left Miller's apartment and was arrested, she told Detective Roloff that Miller had coerced her into commercial sex transactions. Doc. 90/2P Tr. 7-8; Doc. 94/1A Tr. 6-8; Supp. App. 5 n.6.[6] In June, shortly after Breitzke's arrest, Detective Roloff interviewed her about Miller's coercion and abuse. Doc. 95/2A Tr. 81-83; Doc. 138-6.

[6] The document the Government includes in its Supplemental Appendix was filed under seal in the district court to protect the identities of the victims, which are now a matter of public record.

On July 5, 2017, Miller was arrested by Detective Roloff and other Dane County law enforcement officers. Doc. 89/1P Tr. 63-64, 108. Shortly thereafter, Miller was charged in state court with sex trafficking. In August, the federal government indicted Miller on federal sex trafficking and other charges and the state charges were dismissed.

b. Pre-Trial Proceedings Reveal That The Madison Police Department Had Been Conducting A Separate Undercover Investigation Of Miller That Partially Overlapped With The Time Period Of Miller's Sex Trafficking

After Miller was indicted on the federal charges, the government provided his lawyers with nearly 1800 discovery items, including surveillance videos and telephone records. App. 10. The government later supplemented this discovery with more than 200 additional documents, including criminal history of and interviews with Schumacher and Remisoski. Doc. 69; App. 10.

From this pre-trial discovery, Miller learned that the Madison Police Department (MPD) had been conducting an undercover investigation of him and had visited the building that partially overlapped with the time frame described in the indictment. Doc. 138-3; App. 10. The record does not disclose why the Madison police were conducting this investigation, although it appears Miller was the target. See App. 10 n.2. Subsequently, Miller sent an e-mail to the government requesting the identity of the undercover officer and indicating that he may need to subpoena the officer. See Supp. App. 19-20. On May 7, 2018, two weeks before the beginning of trial, the government disclosed to Miller that the officer in charge of the investigation was MPD Officer David Mertz. See Supp. App. 19-20.

On May 18, 2018, the government forwarded to defense counsel an e-mail from Detective Roloff about the undercover investigation, which the government had received from Roloff in response to its request for reports related to the undercover operation at Miller's building. Doc. 138-8; App. 11. The e-mail stated that "[t]he [u]ndercover work was related to another case * * * and never really took off"; that Officer Mertz had visited Miller's building "on a few occasions during the time period of the indictment"; and that Mertz did not write any reports regarding his undercover work because he did not gather any information of substance. Doc. 138-8; App. 11.

Miller's trial began on May 21, 2018. Doc. 78. On the first day of trial, prior to the government calling witnesses, the court held a hearing outside the presence of the jury so that Miller could question Detective Roloff about his investigation into Miller's sex trafficking, the disclosures the victims and others made to him during that investigation, and the notes he took during that time. Doc. 94/1A Tr. 6-31. Miller was seeking, in part, to explore possible violations of *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) and Federal Rule of Criminal Procedure 16. Doc. 70.

As part of this questioning, Miller asked Detective Roloff about his conversations with Officer Mertz about Mertz's undercover operation. Doc. 94/1A Tr. 20-23. Detective Roloff testified that he spoke with Officer Mertz about Miller, and that Mertz told him that "there was nothing that took place [at the building] that warranted a report," such as criminal activity, and that "he saw people there but didn't have a lot of contact with people." Doc. 94/1A Tr. 22. Detective Roloff

recalled Officer Mertz stating that he saw Miller at the building, but did not recall Mertz asserting that he saw Daniels or Breitzke there. Doc. 94/1A Tr. 22. Detective Roloff stated that he did not memorialize his conversation with Officer Mertz. Doc. 94/1A Tr. 22. Detective Roloff also testified that the only surveillance video of the building the police downloaded was a short video of Miller walking across the parking lot. Doc. 94/1A Tr. 23. Miller did not request any additional information about Officer Mertz's undercover operation, and after Miller finished his questioning the court began jury selection without addressing Roloff's testimony or any issues the testimony raised.

c. The Government's Post-Trial Disclosure Of Evidence Detailing The Madison Police Department's Undercover Operation

After a three-day trial during which Miller presented no evidence (Doc. 91/3 Tr. 2), a jury convicted Miller of the two counts of sex trafficking in violation of 18 U.S.C. 1591(a)(1) and one count of maintaining a drug house in violation of 21 U.S.C. 856(a)(1). Docs. 25, 84.

Subsequently, Miller filed a motion for an extension of time to file post-trial motions and a motion to subpoena the MPD for all records relating to the undercover operation, which he claimed he needed for his post-trial motions. Doc. 113; Doc. 138-1, at 2, 22. The district court granted these motions. Doc. 119; Doc. 138-1, at 24. As a result, the MPD gave Miller Officer Mertz's notes summarizing Mertz's visits to Miller's building between April 28, 2017, and June 30, 2017, during the undercover operation. App. 16-17. Officer Mertz's notes revealed the following information:

i. Officer Mertz's Notes On The Undercover Operation. On April 28, Officer Mertz contacted Patty Caputo, the building manager at the commercial building where Miller lived, to get pricing information for renting a unit for the ostensible purpose of starting a cleaning business with his girlfriend. Doc. 138-1, at 6, 9-10; App. 16. On May 1, Officer Mertz met Caputo at the building for a walkthrough of the property and available units. Doc. 138-1, at 9-10; App. 16. His notes state that he observed "Seth" (presumably Seth Schumacher, who lived with Miller at this time) inside working on "interior/exterior cameras on [a] tablet." Doc. 138-1, at 9; App. 16. Officer Mertz subsequently called Caputo about finalizing the rental agreement. Doc. 138-1, at 8, 10, 13; App. 16.

On May 24, Officer Mertz, accompanied by DEA Special Agent Jessica Meier posing as his girlfriend, moved into their "office" in Unit 101H. Doc. 138-1, at 10; App. 16. The following day, Officer Mertz and DEA Special Agent Meier met Miller in Miller's first-floor office and spoke to him for the first time. Doc. 138-1, at 10, 15; App. 16.

On June 1, Officer Mertz and DEA Special Agent Meier returned to the building to check on a broken downstairs storage locker. Doc. 138-1, at 10, 12; App. 16. When they went back upstairs they overheard Miller in the first-floor hallway "talking w/some female upstairs" and telling her, "Keep him waiting as long as possible." Doc. 138-1, at 12; App. 16. Officer Mertz and Miller had a brief conversation about the broken storage locker door. Doc. 138-1, at 12; App. 16. Officer Mertz noted that he and DEA Special Agent Meier subsequently observed an

"IL plate B/M driver pull in when we left . . . possibly who Harry [Miller] was telling female to delay." Doc. 138-1, at 12; App. 16. Officer Mertz then received a call from Miller's phone. Doc. 138-1, at 12; App. 16. When Officer Mertz returned the call, he spoke to a woman who went by "Diamond" who seemed not to understand when he told her who he was and why he was calling. Doc. 138-1, at 12; App. 16.

Several days later, Officer Mertz and DEA Special Agent Meier returned and met with Miller outside the building to discuss the storage locker. Doc. 138-1, at 14; App. 17. Officer Mertz observed people and cars on the west and north sides of the property and documented a conversation he had with "Reggie" about drugs. Doc. 138-1, at 14. Officer Mertz recorded more than 90 minutes of audio conversations he had with Miller and with other people on the property. App. 17.

Two days later, Officer Mertz and DEA Special Agent Meier again returned to the building and discovered that the storage locker was still not fixed. Doc. 138-1, at 10, 16; App. 17. Officer Mertz again called Miller, and Miller came downstairs to meet Mertz and DEA Special Agent Meier in the building's lobby to give them a key to the new lock that would be installed on the storage locker. Doc. 138-1, at 16; App. 17. Officer Mertz and Miller went into Miller's office to continue their conversation. Doc. 138-1, at 16.

On June 15, Officer Mertz returned to the building accompanied by ATF Special Agent Michael Aalto, posing as his friend "Chino." Doc. 138-1, at 10, 17; App. 17. Officer Mertz met with Miller outside the building to introduce Miller to

ATF Special Agent Aalto and discuss a broken light in his rental unit. Doc. 138-1, at 17; App. 17. During this visit, Officer Mertz again spoke to "Reggie" and to another individual from whom Mertz bought a gold chain. Doc. 138-1, at 17. Officer Mertz observed Miller going in and out of the building and maintaining the property. Doc. 138-1, at 17; App. 17.

On June 21, Officer Mertz and ATF Special Agent Aalto visited the property again. Doc. 138-1, at 10, 19; App. 17. Miller came out of the building and met with them to discuss Officer Mertz's cleaning business and Mertz's desire to cancel his storage unit. Doc. 138-1, at 19; App. 17. One week later, Officer Mertz and ATF Special Agent Aalto returned to the building and spoke with Miller about replacing lightbulbs and modifications to the rental unit. App. 17.

On June 30, Officer Mertz visited the property alone. Doc. 138-1, at 10, 21; App. 17. His notes state "Got hallway video for search warrant." Doc. 138-1, at 21; App. 17. Officer Mertz walked up to Miller's apartment on the second floor—the first and only time he documented doing so—and knocked on the door. Doc. 138-1, at 21; App. 17. Miller came out, Officer Mertz returned the storage locker key, and Miller went back into his unit. Doc. 138-1, at 21; App. 17. Officer Mertz left after 30-35 minutes. Doc. 138-1, at 21; App. 17.

ii. Other Materials Provided By The Government. In addition to Officer Mertz's notes outlining these events, the police department turned over to Miller approximately seven hours of audio recordings Mertz made during his visits, as well as videos and photos. Doc. 138-1, at 2; Doc. 138-2; App. 17. The police department

also disclosed a rental receipt for Officer Mertz's unit and e-mails between Detective Roloff and DEA Special Agent Meier showing that Roloff was aware of Mertz's undercover activity on the property and asked Meier to run a "toll" on Miller's phone.[7] Doc. 138-1, at 3-4; Doc. 138-3; App. 17-18.

d. Miller's Motion For A New Trial

After reviewing these materials, Miller filed a motion for a new trial. Doc. 127. He argued that the government's failure to turn over evidence of the undercover operation prior to trial violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Doc. 138, at 1. As discussed more fully below, to establish a *Brady* violation the defendant must show that (1) the evidence is material to an issue at trial; (2) the evidence is favorable to the defendant; and (3) the prosecution suppressed the evidence. See, *e.g.*, *United States* v. *Palivos*, 486 F.3d 250, 255 (7th Cir.), cert. denied, 552 U.S. 891 (2007). Favorable evidence is material if the government's suppression of such evidence is prejudicial, *Strickler* v. *Greene*, 527 U.S. 263, 282 (1999), *i.e.*, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Youngblood* v. *West Va.*, 547 U.S. 867, 870 (2006) (per curiam) (quoting *Strickler*, 527 U.S. at 280).

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[7] Toll records "are records of calls placed and received on the subscriber's account (including the time, duration, and phone number dialed, but not the content of the calls)." *United States* v. *Beverly*, 943 F.3d 225, 230 n.2 (5th Cir. 2019), cert. denied, No. 19-7682, 2020 WL 1326081 (U.S. Mar. 23, 2020).

Miller argued that "[n]owhere in Mertz's notes or in the audio recordings is there any evidence that Miller was holding women against their wills for prostitution." Doc. 138, at 13. Miller further argued that this lack of any reference to any activities that might be related to sex trafficking was both favorable to his defense and had a reasonable probability of producing a different verdict. Doc. 138, at 18-25. Miller argued, in the alternative, that the district court should order the government to produce Detective Roloff's entire case files for both the sex trafficking and undercover operation and hold an evidentiary hearing. Doc. 138, at 25-26.

The government opposed the motion, arguing that the evidence Miller claims is exculpatory is neither favorable (exculpatory) nor material to his defense. Supp. App. 1-19. The government also argued that the evidence was not "suppressed" for purposes of *Brady* because Miller was aware of Officer Mertz before trial and questioned Detective Roloff about Mertz and Mertz's investigation at a hearing on the first day of trial. Supp. App. 19-20. The government asserted that "[i]f the defense believed that Officer Mertz had evidence that was relevant at trial, that evidence was available to them with the exercise of reasonable diligence." Supp. App. 20.

In July 2019, the district court denied Miller's motion for a new trial. App. 8-27. Although the court recognized that the government conceded that it did not provide the defense Officer Mertz's notes and audio recordings before trial, the court agreed with the government that Miller failed to show a *Brady* violation because the evidence was neither favorable nor material. App. 13.

First, the court concluded that Officer Mertz's notes and audio tapes from his undercover investigation were not favorable to Miller's defense. Highlighting the timing of "Mertz's brief investigation" of Miller's activities "in the context of the government's proof" of the sex trafficking charges, the court noted that Officer Mertz's first contact with Miller was on May 25, 2017—two months *after* Daniels left Miller's apartment for good, and two-and-a-half months *after* Miller began trafficking Breitzke and three weeks before she left permanently as well. App. 21. Thus, the court explained, "Mertz had *no* information – inculpatory or exculpatory – about defendant or his activities at [the building] for the entire time Daniels was trafficked or for most of the time Breitzke was trafficked." App. 21.

Further, the court determined that the absence of any observations by Officer Mertz of sex trafficking by Miller during his visits to Miller's building while Breitzke was still there was not exculpatory because the absence of evidence of criminal activity is not relevant to a defendant's guilt or innocence. App. 21-23. As the court stated, "Mertz did not determine that defendant was *not* engaged in sex trafficking; he just did not notice anything during his relatively brief visits suggesting that he was." App. 21. Finally, the court noted that some of Officer Mertz's observations were actually inculpatory because they placed Miller at the location and time of the trafficking and placed Breitzke with him. App. 23-24.

Second, the court concluded that even assuming that Officer Mertz's notes and audio recordings were favorable to Miller, they were not material to his guilt. The court found that testimony by Officer Mertz and his fellow officers—that they

did not witness sex trafficking during their interactions with Miller on five brief visits to the building that overlapped with Miller's trafficking of Breitzke (but not of Miller's trafficking of Daniels)—did not have a reasonable probability of changing the verdict. App. 24. The court observed that the government presented "overwhelming" evidence of Miller's guilt at trial, consisting of the testimony of the victims and of eyewitnesses, physical evidence that documented the victims' description of extensive drug use, evidence linking phone numbers associated with Miller with Backpage solicitations, and expert testimony on heroin's addictive properties and the effects of its withdrawal. App. 24-25. Accordingly, the court concluded, it was "highly unlikely" that testimony by Officer Mertz and other undercover officers as to what they did *not* observe during their visits to the building—which did not include access to the apartment where the drug use and sexual activities took place—would have resulted in a different outcome. App. 25.

As an alternative to granting a new trial, Miller asked the court to order Detective Roloff to turn over his entire case file for the both the sex trafficking and undercover operation on which he worked and for the court to hold an evidentiary hearing. App. 26. The court denied the request for an evidentiary hearing, but ordered the government to produce Detective Roloff's files. App. 26-27. The district court subsequently determined that nothing in these files was favorable or material to the defense, and denied Miller's motion for a new trial in full. Doc. 153.

SUMMARY OF ARGUMENT

The government did not violate *Brady* v. *Maryland*, 373 U.S. 83 (1963), by not producing before trial notes and audio recordings concerning Miller's activities that were compiled by the Madison Police Department (MPD) during a parallel undercover investigation of Miller that partially overlapped in time with Miller's sex trafficking. Miller asserts that the notes and other materials that resulted from the undercover investigation were favorable and material to his defense, and thus disclosure was required under *Brady*. Miller reasons that the absence of any observations of sex trafficking activities in the notes and audio recordings is material to his claim that the sex trafficking did not happen. The district court did not abuse its discretion in rejecting this argument and denying Miller's motion for a new trial based on the alleged *Brady* violation.

To receive a new trial based upon a *Brady* violation, Miller must prove that (1) the evidence the government did not disclose is material to an issue at trial; (2) the evidence is favorable to the defendant; and (3) the prosecution suppressed the evidence, either willfully or inadvertently. Evidence is material if the government's suppression of the evidence is prejudicial, *i.e.*, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Miller cannot make any of these showings, and failing any one is fatal to his argument.

First, the evidence is not material because there is no reasonable probability that the result of the proceeding would have been different had the government

disclosed the evidence before trial. This Court can affirm on this basis alone. The government presented uncontroverted testimony by Daniels and Breitzke and three other eyewitnesses that the two victims were homeless heroin addicts when they began living with Miller; he pushed them to post Backpage advertisements promoting commercial sex transactions in exchange for heroin; they engaged in commercial sex acts several times a day; Miller kept the money for himself; he coerced them into continuing commercial sex acts for his benefit through threats, violence, and withholding of heroin; and they wanted to leave their situation but Miller prevented them from doing so. Given the strength of this evidence, it is highly unlikely that pre-trial disclosure of Officer Mertz's notes and audio recordings, which related to a separate undercover investigation and were not relevant to the witnesses' testimony, would have affected the outcome of the trial.

Second, as the district court correctly concluded, Officer Mertz's notes and audio recordings from his undercover investigation are not favorable to Miller. As an initial matter, the time period during which the undercover operation was active at the building did not overlap at all with the entire time period during which Miller trafficked Daniels (early March to March 21), and only briefly overlapped with Miller's trafficking of Breitzke (early March to on or about June 16). Thus, Officer Mertz and the other law enforcement officers on the investigation could not have seen any trafficking activities related to Daniels, and made only a handful of brief visits to the building that overlapped with the time Breitzke was associated with Miller, during which time Mertz and the other officers had little or no

opportunity to witness sex trafficking. Accordingly, the fact that the notes and other materials do not discuss any sex trafficking activities have little or no bearing on whether these activities occurred. Indeed, as the district court recognized, far from being exculpatory, various observations in Officer Mertz's notes are actually inculpatory, including the placement of Breitzke with Miller at the building during the time of the trafficking. Further, evidence that Miller acted lawfully on certain occasions is not proof that he acted lawfully on other occasions, and therefore the absence of observations of sex trafficking is not favorable *Brady* material.

Third, the government did not suppress Officer Mertz's notes and audio recordings from the MPD's undercover investigation. The district court did not squarely address the suppression element, instead assuming that it was satisfied by the government's concession that it did not provide the evidence to Miller before trial. The record indicates, however, that despite the government not producing the notes and audio recordings, the evidence was available to Miller before trial with the exercise of reasonable diligence. Miller was aware of the undercover investigation from the government's initial discovery, and learned the name of Officer Mertz several weeks before trial. At that time, Miller could have subpoenaed Officer Mertz's notes and audio recordings or Mertz himself to testify as to their contents. Miller's failure to do either indicates that he did not exercise reasonable diligence in seeking this material, and therefore the government did not suppress the evidence. See *Carvajal* v. *Dominguez*, 542 F.3d 561, 566-567 (7th Cir. 2008).

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE GOVERNMENT DID NOT VIOLATE *BRADY* V. *MARYLAND*, 373 U.S. 83 (1963), BY TURNING OVER EVIDENCE TO DEFENDANT AFTER TRIAL THAT RESULTED FROM AN UNRELATED INVESTIGATION OF MILLER'S ACTIVITIES AND WAS NEITHER MATERIAL NOR FAVORABLE TO THE DEFENSE

A. Standard Of Review

This Court reviews for abuse of discretion a district court's denial of a motion for a new trial based on an alleged violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), "viewing the evidence in the light most favorable to the prevailing party." *United States* v. *Warren*, 454 F.3d 752, 759 (7th Cir. 2006). "Under this standard, [this Court] will defer to the district court unless no reasonable person could adopt its view." *United States* v. *Norweathers*, 895 F.3d 485, 490 (7th Cir. 2018) (quoting *United States* v. *Schmitt*, 770 F.3d 524, 532 (7th Cir. 2014), cert. denied, 575 U.S. 906 (2015)). This Court reviews the district court's factual findings underlying its decision for clear error and its legal conclusions de novo. *United States* v. *Ballard*, 885 F.3d 500, 504 (7th Cir. 2018). This Court "will find clear error when [it is] 'left with the definite and firm conviction that a mistake has been committed.'" *Furry* v. *United States*, 712 F.3d 988, 992 (7th Cir. 2013) (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985)).

B. Overview Of Brady *Principles*

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the "suppression of evidence favorable to an accused upon [his] request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The government's duty to disclose such information "is applicable even though there has been no request by the accused," *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999), but only if "the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce," *United States* v. *Agurs*, 427 U.S. 97, 107 (1976).

Brady establishes the government's "broad duty of disclosure," but "not every violation of that duty necessarily establishes that the outcome was unjust." *Strickler*, 527 U.S. at 281. A defendant who seeks a new trial based upon a *Brady* violation must satisfy three elements: (1) the evidence must be material to an issue at trial; (2) the evidence must be favorable to the defendant; and (3) the government must have suppressed the evidence. See, *e.g.*, *United States* v. *Palivos*, 486 F.3d 250, 255 (7th Cir.), cert. denied, 552 U.S. 891 (2007) see also *United States* v. *Villasenor*, 664 F.3d 673, 683 (7th Cir. 2011), cert. denied, 568 U.S. 859 (2012); *United States* v. *Bland*, 517 F.3d 930, 934 (7th Cir. 2008); *United States* v. *Wilson*, 481 F.3d 475, 480 (7th Cir. 2007).

Evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood* v. *West Va.*, 547 U.S. 867, 870 (2006) (per

curiam) (quoting *Strickler*, 527 U.S. at 280). In other words, the failure to disclose favorable evidence must have been prejudicial. *Strickler*, 527 U.S. at 282. "[T]he effect that a particular piece of evidence is likely to have had on the outcome of a trial must be determined in light of the full context of the weight and credibility of all evidence actually presented at trial." *United States* v. *Morales*, 746 F.3d 310, 316 (7th Cir. 2014) (quoting *United States* v. *Silva*, 71 F.3d 667, 670 (7th Cir. 1995)). There is a "reasonable probability" of a different result when the absence of the evidence, considered in the context of the entire case, "undermines confidence in the outcome of the trial." *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 678 (1985)). Thus, a court must consider whether and to what extent the withheld evidence challenges testimony of a significant or peripheral witness or challenges the weight of other evidence that supports the conviction. See *Strickler*, 527 U.S. at 289-295 (withheld impeachment evidence was not material where it did not undermine other evidence, including physical evidence, of defendant's role in and presence at the crimes).

To be "favorable" to the defendant, the evidence must be either exculpatory or impeaching. *Carvajal* v. *Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). A court "evaluate[s] the tendency and force of the undisclosed evidence item by item." *Kyles*, 514 U.S. at 436 n.10.

Finally, evidence is suppressed when the prosecution (1) fails to disclose the evidence, either willfully or inadvertently, in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the

exercise of reasonable diligence. *Carvajal*, 542 F.3d at 566-567; see also *United States* v. *Knight*, 342 F.3d 697, 705 (7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004). The prosecution's duty to disclose "extends to the police and requires that they similarly turn over exculpatory/impeaching evidence to the prosecutor, thereby triggering the prosecutor's disclosure obligation." *Carvajal*, 542 F.3d at 566.

C. Miller Cannot Establish Any Of The Elements Of A Brady *Violation: The Evidence Is Neither Material Nor Favorable And, In Any Event, The Government Did Not Suppress It*

Miller's argument that the government violated *Brady* by failing to disclose, until after trial, Officer Mertz's notes and audio recordings detailing Mertz's undercover operation investigation of Miller is not correct. First, given the government's overwhelming and uncontroverted evidence that Miller trafficked Daniels and Breitzke, including the testimony of five eyewitnesses, the evidence is not material. There is no reasonable probability that pre-trial disclosure of the evidence would have led to a different outcome. This Court can affirm on this basis alone. Second, the evidence is not favorable because Officer Mertz and the other undercover officers had little or no opportunity to witness sex trafficking and, in any event, the absence of observations of sex trafficking is not evidence that Miller acted lawfully on other occasions that must be disclosed pursuant to *Brady*. Finally, the government did not suppress the evidence at issue because Miller could have discovered the evidence through the exercise of reasonable diligence. Accordingly, the district court did not abuse its discretion in denying Miller's motion for a new trial based on an alleged *Brady* violation.

1. The Evidence Is Not Material Because There Is No Reasonable Probability That Its Pre-Trial Disclosure Would Have Led To A Different Outcome

The district court found that the evidence detailing Officer Mertz's undercover operation was not material because there was no reasonable probability that the result of the proceeding would have been different had the government disclosed the evidence to Miller prior to trial. App. 24-26. Miller argues (Br. 43-46) that the district court erred by considering only the government's evidence in making this determination, without taking into account how evidence that law enforcement officers did not observe any sex trafficking would have bolstered his argument that there was no support for the government witnesses' testimony at trial. Miller also argues (Br. 47-49) that this evidence is material because the government's case rested upon the unreliable and inconsistent testimony of witnesses with serious drug problems and an incentive to curry favor with the government to reduce the drug charges they were facing. These arguments are not persuasive.

As discussed above, evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood*, 547 U.S. at 870 (quoting *Strickler*, 527 U.S. at 280). Thus, the failure to disclose favorable evidence must have been prejudicial; it must have undermined confidence in the outcome of the trial. See p. 27, *supra*. Because the record here, viewed in the light most favorable to the government, see *Warren*, 454 F.3d 759, overwhelmingly supports

Miller's convictions for trafficking Daniels and Breitzke, Officer Mertz's notes are not material for purposes of *Brady*.

a. First, the two victims gave strikingly similar testimony concerning how Miller confined them and coerced them into engaging in commercial sex transactions for his benefit. As recounted above, see pp. 5-7, 8-10, *supra*, both women were in their 20s, homeless, and heroin addicts when they moved in with Miller and started advertising sexual transactions on the Internet to repay him for the heroin he gave them. Miller made both women post these advertisements at least daily, and supervised their postings to confirm that they were soliciting customers. Both Daniels and Breitzke engaged in commercial sex acts several times a day in Miller's apartment for $100-$250 per transaction. And Miller required both women to get this payment in advance from their customers, and would search them to confirm that they were not hiding money from him.

Further, both Daniels and Breitzke similarly testified to the ways in which Miller coerced them into continuing to engage in commercial sex acts for his benefit. He used heroin, and the threat to deny the women this drug and force them into withdrawal, to coerce them to post ads, engage in commercial sex transactions with customers, and give him the money. Miller also controlled Daniels and Breitzke through threats and violence, physically abusing them when they did not do his bidding or just because they angered him. Both Daniels and Breitzke attempted to leave Miller at some point, but Miller prevented them from doing so either physically or through psychological coercion. In any event, neither woman had

anywhere to go if she left, so both returned to Miller even after he threw them out. Daniels and Breitzke were only able to escape from Miller when they were arrested. See pp. 7-8, 10-11, *supra*.

The testimony of other individuals who were in Miller's apartment at the time the sex trafficking occurred corroborated the testimony of the two victims. Schumacher, a heroin addict who lived with Miller at this time, recalled that Miller asked Daniels a few times whether she had an upcoming "date"—*i.e.*, a customer coming to the apartment for sex. Schumacher also substantiated Breitzke's testimony that Miller required her to collect payment in advance from her customer and give it to Miller, and that he threatened to punch her or withhold heroin from her if she did not post ads and find customers. Remisoski, another heroin addict who then lived with Miller, confirmed Breitzke's testimony that Miller pushed her repeatedly to post Backpage ads, she posted such ads and engaged in commercial sex acts multiple times a day, he controlled the money she received for the sexual transactions, and he used violence against her on more than one occasion. And Granby, a drug counselor and the mother of Miller's son, recalled that when Breitzke once attempted to leave with her, Miller pulled Breitzke back into the apartment and told Granby, "You ain't taking my 'B' with you." Doc. 89/1P Tr. 34.

Given the strength of the government's evidence establishing Miller's sex trafficking, there is no reasonable likelihood that the government's pre-trial disclosure of Officer Mertz's notes and audio recordings would have affected the outcome of the trial. In *Morales*, this Court held that an allegedly material e-mail

that the government did not disclose to the defendant until after trial did not undermine confidence in the verdict because the record contained ample evidence of the defendant's guilt, the e-mail contained no information that the defendant should not have already known, and nothing in the e-mail contradicted the sender's testimony. 746 F.3d at 316-317. This reasoning applies with even greater force here. Officer Mertz's notes and audio recordings related to a wholly different case and the nature and timing of the visits to the building gave the officers little or no opportunity to witness any indicia of Miller's sex trafficking. And nothing in Officer Mertz's materials implicated, much less undermined, the witnesses' uncontroverted testimony. See *Strickler*, 527 U.S. at 289-295 (withheld impeachment evidence was not material where it did not undermine other evidence, including physical evidence, of defendant's role in and presence at the crimes). Indeed, as the district court correctly found, "it is equally likely that [the officers'] testimony about what they *did* observe * * * would have contributed to a guilty verdict." App. 25-26.

b. Miller argues (Br. 44) that the district court erred by failing to consider the materiality of Officer Mertz's evidence in the context of the entire record, citing *Kyles*, 514 U.S. at 436 and *Agurs*, 427 U.S. at 112. But the district court applied the *Brady* materiality analysis consistent with these decisions. In *Kyles*, the Supreme Court held that the materiality "of suppressed evidence [is] considered collectively, not item by item." 514 U.S. at 436. And in *Agurs*, the Supreme Court held that omission of the evidence at issue "must be evaluated in the context of the entire record." 427 U.S. 112.

Here, after recounting the government's evidence, the district court concluded that "[g]iven the strength and amount of [this] evidence, it is highly unlikely that the outcome would have been different had [Officer] Mertz and the other undercover officers been called to testify about their visits to 1502 Greenway Cross, and more particularly, what they did *not* observe during those visits without access to the upstairs studio where the defendant maintained his drug house and some of the prostitution took place." App. 25. The decisions in *Kyles* and *Agurs* require no more of the district court. As in those cases, the district court considered Officer Mertz's evidence as a whole and in the context of the entire record, which consisted solely of evidence the government presented. See also *Morales*, 746 F.3d at 316 (materiality of withheld evidence "determined in light of the full context of the weight and credibility of all evidence *actually presented* at trial") (emphasis added; citation omitted). Further, Miller's argument (Br. 44-45) that this evidence would have affected the trial because it was "the defense's argument that there was no support for the witnesses' stories" ignores the fact that overwhelming and consistent testimony of the victims and the eyewitnesses supported Miller's sex trafficking. See *Morales*, 746 F.3d at 317 (concluding that notion that defendant would have called witness to stand to impeach her with e-mail that was not disclosed, and that her testimony would have affected the trial, "is too speculative to be availing").

Miller seeks (Br. 45) to buttress his argument that the court erred by not considering the materiality of Officer Mertz's evidence in the context of the case as a whole by attempting to dismiss the relevance of particular pieces of the

government's evidence. But Mary Daniels' testimony about her daughter's attachment to her dog supported Daniels' and Breitzke's testimony that Miller coerced Daniels by threatening to harm her dog if she did not comply with his demands, and Mary's recollection of her daughter's fear of Miller substantiated Daniels' reluctance to leave his apartment voluntarily. Further, testimony from an expert witness about heroin's addictive properties and the effects of its withdrawal confirmed that Miller coerced Daniels and Breitzke to continue to engage in commercial sex acts by denying, or threatening to deny, them heroin. And evidence linking Backpage advertisements to Miller's phone and phone numbers verified that Daniels and Breitzke in fact posted such advertisements. Thus, the district court properly relied upon this evidence, all of which supported the government's theory that Miller forced Daniels and Breitzke into engaging in commercial sex transactions for his benefit. See *Morales*, 746 F.3d at 316 (listing and relying upon evidence that supported the government's position that the defendant "was intimately involved in the fraud at every step" in rejecting defendant's argument that e-mail that was not disclosed would have affected the outcome of the trial by undermining the government's trial theme).

Next, Miller relies (Br. 45-46) on *United States* v. *Walter*, 870 F.3d 622 (7th Cir. 2017) (which he cites as *United States* v. *Bell*, the name of a co-defendant) in support of his argument that the district court should have determined that he did not have a trial with a verdict "worthy of confidence" in light of the evidence that the government failed to disclose and the shortcomings of its witnesses. But *Walter*

is of no help to Miller here. In *Walter*, this Court concluded that the government violated *Brady* by failing to disclose to the defense the fact that a key government witness lied when he testified that he was no longer dealing drugs while cooperating with the government. 870 F.3d at 629-631. The Court determined that this evidence was material because the government presented no direct evidence of the defendant's involvement in the charged conspiracy, but instead relied upon witnesses of questionable credibility, and the evidence would have impeached a witness who gave detailed and firsthand testimony that corroborated the otherwise problematic testimonies of those other witnesses. *Id.* at 630-631. Here, by contrast, the government presented direct evidence of Miller's sex trafficking through the testimony of five eyewitnesses, including both victims, who had personal knowledge of the commission of this crime. Moreover, the evidence that the government did not disclose before trial is not material because it did not implicate, much less impeach, these witnesses' testimonies.

Finally, Miller asserts (Br. 46-48) that because the victims and witnesses who testified against him had either felony convictions, serious drug problems, or both, and their testimony was either internally inconsistent or inconsistent with the testimony of other witnesses, their credibility was questionable, making Officer Mertz's evidence all the more material to the question of Miller's guilt. But this argument cuts against itself. The argument makes clear that even without that evidence, Miller was able to cross-examine vigorously the government's witnesses for bias, inability to remember, and motive to curry favor with the government.

Despite Miller's best efforts to undermine the witnesses' testimony, the jury chose to believe them and convicted him of both counts of sex trafficking. Because Officer Mertz's notes and audio recordings do not implicate the witnesses' veracity, there is no reasonable probability that pre-trial disclosure of this evidence would have led to a different outcome.

In sum, this case is not one in which, as Miller claims (Br. 49), the government's pre-trial disclosure of Officer Mertz's notes and audio recordings, because they contained no observations of sex trafficking, would have undermined the witnesses' testimonies because "the dog didn't bark." The dog did not "bark" because Officer Mertz and the other law enforcement officers had little or no opportunity to witness any indicia of Miller's sex trafficking during the brief time Mertz's undercover operation overlapped with the trafficking. The absence of any such observations therefore did not implicate the witness testimonies, much less "effective[ly] impeach[] * * * [any] eyewitness" or "indicat[e] that a witness whose testimony may well be determinative of guilt or innocence is unreliable." Br. 49 (citations omitted). Given the overwhelming and uncontroverted witness testimony that Miller trafficked Daniels and Breitzke, a retrial in which he called Officer Mertz and the other officers to testify as to what they did *not observe* would have no reasonable probability of changing the outcome of this case. Accordingly, the district court correctly concluded that Officer Mertz's notes and audio recordings from his undercover operation were not material.

2. The Evidence Is Not Favorable Because It Is Not Exculpatory

Miller argues (Br. 38-43) that evidence detailing Officer Mertz's undercover operation was favorable to his defense because it would have shown that the undercover officers never observed facts suggesting sex trafficking, and therefore would have supported the conclusion that no such trafficking occurred. The district court correctly rejected this argument.

a. First, the timing of Officer Mertz's undercover investigation supports the district court's determination that this evidence was not favorable to Miller. The investigation took place between April 28, 2017, and June 30, 2017, and overlapped only briefly with Miller's sex trafficking. Officer Mertz's first visit to Miller's building was a walkthrough of the building and his rental unit on May 1, and his first contact with Miller was more than three weeks later, on May 25. Doc. 138-1, at 9-10, 15; App. 16. This initial contact took place more than two months *after* Daniels left Miller's apartment for good (March 21), and nearly three months after Breitzke began staying with Miller (early March). Doc. 138-1, at 9-10; App. 16. Accordingly, as the district court correctly observed, "Mertz had *no* information – inculpatory or exculpatory – about [Miller] or his activities at [the building] for the entire time Daniels was trafficked or for most of the time Breitzke was trafficked." App. 21.

That leaves only the three-week period (May 25 to on or about June 16) that Officer Mertz's active investigation overlapped with the time period that Miller trafficked Breitzke, during which time Mertz and the other law enforcement officers

had or little or no opportunity to witness sex trafficking at the building. During this time, Officer Mertz, accompanied by other law enforcement officers, paid five brief visits to Miller's building, the longest of which according to Mertz's notes was around 90 minutes. Doc. 138-1, at 10, 12, 14-17; App. 16-17. Officer Mertz's notes do not indicate that, during these visits, he or the other officers ever went to the building's second floor, much less stop at Miller's apartment on that floor where the sex trafficking took place. Indeed, according to Officer Mertz's notes, the first and only time he stopped by Miller's apartment was to drop off his storage locker key on June 30—the last day of the investigation and two weeks *after* Breitzke's departure—and he never entered the unit itself. Doc. 138-1, at 21; App. 17. Thus, the lack of observations by Officer Mertz and the other law enforcement officers of Miller's sex trafficking could not be exculpatory.

Moreover, the district court correctly observed that "some of Mertz's observations" contained therein "are actually *inculpatory*." App. 23. Officer Mertz's notes place Miller and a woman named "Diamond" (Breitzke's alias) with Miller at the location and time of the sex trafficking. Doc. 138-1, at 12, 14-17. Officer Mertz's observation during his building walkthrough that "Seth" was working on the interior and exterior cameras of the building suggests that Schumacher, one of the eyewitnesses to the sex trafficking who testified at trial, was on the scene at the relevant time as well. Doc. 138-1, at 9. And Officer Mertz's recollection of hearing Miller tell a woman upstairs to "Keep him waiting as long as possible," and then seeing a male driving up in a car with Illinois plates when he and DEA Special

Agent Meier left the property, was consistent with commercial sex transactions occurring in Miller's apartment. Doc. 138-1, at 12.

Further, it is well-settled that "[p]roof that a defendant acted lawfully on other occasions is not necessarily proof that he acted lawfully on the occasion alleged in the indictment." *United States* v. *Heidecke*, 900 F.2d 1155, 1162 (7th Cir. 1990). Accordingly, "the absence of incriminating information in a report cannot be turned into an affirmative conclusion that it is 'favorable' to [a] [d]efendant[] and, therefore, cannot constitute *Brady* material." *United States* v. *Borda*, 941 F. Supp. 2d 16, 24 (D.D.C. 2013); see *United States* v. *Scarpa*, 897 F.2d 63, 70 (2d Cir.) (rejecting defendant's contention that the absence of incriminating statements on audio tapes was relevant under Federal Rule of Criminal Procedure 16 because "[a] defendant may not seek to establish his innocence * * * through proof of the absence of criminal acts on specific occasions"), cert. denied, 498 U.S. 916 (1990);[8] cf., *e.g.*, *United States* v. *Reese*, 666 F.3d 1007, 1020-1021 (7th Cir. 2012) (district court did not err in preventing defendant from eliciting on cross-examination evidence of his failure to engage in unlawful conduct). Thus, Officer Mertz's notes, which contained observations of Miller engaging in lawful conduct such as replacing a storage locker and maintaining the property, but no observations of him involved

[8] The version of the Federal Rule of Criminal Procedure 16 in effect at the time *Scarpa* was decided required the government to disclose "any relevant written or recorded statements made by the defendant . . . within the possession, custody or control of the government." *Scarpa*, 897 F.2d at 70 (quoting Fed. R. Crim. P. 16(a)(1)(A)).

in sex trafficking, are not favorable evidence under *Brady*.[9] The district court therefore correctly concluded that Officer Mertz's notes and audio recordings from his undercover investigation were not favorable to Miller.

b. Miller presents several factual and legal challenges to the district court's conclusion, none of them meritorious. First, he argues (Br. 36-37, 39) that Officer Mertz's notes are favorable because Mertz and the other officers failed to witness "certain facts" associated with sex trafficking "that would have been witnessed by *any* bystander at Greenway Cross," such as random men entering the building, the apartment emptying before the sexual transactions occurred, and Miller standing watch outside the apartment. But there are good reasons why Officer Mertz's notes would not include those details. The officers' visits to the building were brief—the longest lasting around 90 minutes according to Officer Mertz's notes—and Mertz was the only law enforcement officer to ever visit the second floor where Miller's apartment was located, and did so only once in a cursory fashion after the sex trafficking concluded. Thus, he and the other officers could not have witnessed the apartment emptying and Miller standing watch outside. Moreover, there is nothing to suggest that it would have been uncommon for individuals to enter the

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[9] As the government argued below, and the district court stated in its order rejecting Miller's *Brady* argument, "a defendant on trial for felon in possession of a gun would not be permitted to call a witness to testify about all the times he or she saw the defendant without a gun, nor would a defendant on trial for child pornography be allowed to call a witness to testify about all of the times he or she did not see the defendant looking at child pornography during the relevant time period." App. 23.

commercial building, and therefore the fact that Officer Mertz's notes do not mention such conduct is hardly surprising, let alone favorable to Miller.

Miller also contends (Br. 38-40) that the district court erred in characterizing his reliance on Officer Mertz's notes as the use of "evidence of 'good character' to rebut a charge," citing Federal Rule of Evidence 404(a), and therefore that the court applied the wrong legal standard in evaluating this evidence. That argument is not supported by a fair reading of the court's decision. Nowhere does the court cite or discuss Rule 404(a) or the notion of character evidence. Rather, the court applied the general proposition that evidence that a defendant engaged in lawful conduct on one occasion is not relevant to whether he engaged in unlawful conduct on another occasion, a legal principle this Court has cited in numerous contexts. See *Reese*, 666 F.3d at 1020-1021 (upholding district court's limitations on cross-examination that sought to elicit evidence of defendant's failure to engage in unlawful conduct because "[e]vidence that a defendant acted lawfully on other occasions is generally inadmissible to prove he acted lawfully on the occasion alleged in the indictment"); *Heidecke*, 900 F.2d at 1162-1163 (upholding district court's denial of motion to compel discovery of investigation materials that did not reveal evidence of defendant's misconduct other than that charged in the indictment and that defendant sought to support his entrapment defense because "[p]roof that a defendant acted lawfully on other occasions is not necessarily proof that he acted lawfully on the occasion alleged in the indictment").

Finally, the cases Miller relies upon to support his argument that the evidence is favorable are not persuasive. Miller cites (Br. 41), for example, *Alvarez* v. *Ercole*, 763 F.3d 223 (2d Cir. 2014), but this case does not help him. In that case, the court addressed whether the petitioner's Confrontation Clause rights were violated when the court denied him the right to cross-examine the lead detective on a murder investigation to show that the police had not investigated certain leads provided by a witness. In affirming the district court's grant of habeas relief, the court of appeals held that the trial court's decision not to permit this cross-examination was neither a reasonable limit on cross-examination nor harmless error. *Alvarez*, 763 F.3d at 229. Miller quotes the court of appeals' observation of Alvarez's trial strategy, which "was to show that the NYPD's incomplete investigation indicated that the NYPD had prematurely concluded that Alvarez was the guilty party, and in that way to raise a reasonable doubt that Alvarez was in fact responsible." Br. 41 (quoting *Alvarez*, 763 F.3d at 230). While acknowledging that this passage addresses "a slightly different scenario," *i.e.*, Alvarez's Confrontation Clause challenge, Miller asserts that this language supports his contention that Officer Mertz's notes and audio recordings would likewise show that the government ignored facts that did not fit its narrative. Br. 41.

Alvarez is readily distinguishable. There, the petitioner sought to show that the police failed to pursue leads related to the crime *for which he was being investigated* and for which the government's case was "far from overwhelming." *Alvarez*, 763 F.3d at 234 (citation omitted). By contrast, Officer Mertz's notes and

audio recordings related to another case and did not provide the government with leads associated with Miller's sex trafficking. Instead, Officer Mertz's notes simply showed that Mertz and the other law enforcement officers did not observe sex trafficking at Miller's building during the brief times they were there. Moreover, the evidence of Miller's sex trafficking was vast and uncontroverted.[10]

Miller also attempts to distinguish (Br. 40) *Scarpa*, upon which the district court relied to support its ruling that the absence of observations that Miller engaged in sex trafficking was not exculpatory. In *Scarpa*, the defendant attempted to obtain tape recordings possibly containing his voice that were previously determined to contain no relevant incriminating or exculpatory evidence. The defendant argued that "the absence of incriminating [evidence] [of drug dealing] during the period [that this alleged criminal activity occurred] was relevant to establish the absence of the activity alleged." *Scarpa*, 897 F.2d at 67, 70. The Second Circuit affirmed the district court's decision refusing to permit discovery of the tapes, explaining that "[a] defendant may not seek to establish his innocence * * * through proof of the absence of criminal acts on specific occasions. *Id.* at 70. Miller argues (Br. 40) that, unlike his case, Scarpa knew that the government was

[10] Miller also cites (Br. 41) *Walter* (or *Bell*, as he cites it) to support his argument that Officer Mertz's notes "would have been used to show that despite all the work and investigation, nothing corroborated the witness's story." But the language he cites in *Walter* is from the background section of the decision addressing a Rule 404(b) issue. In any event, nothing in *Walter* supports the conclusion that evidence from an unrelated investigation involving a defendant is material under *Brady* to whether the defendant committed a different charged crime simply because the investigation did not result in evidence of the charged crime.

investigating him and therefore could have argued to the jury that its surveillance of him failed to yield evidence of drug dealing. But whatever the factual distinctions between this case and *Scarpa*, the court below cited *Scarpa* as support for a general legal proposition, not for its application of that proposition to the facts of that case. In any event, Miller could have made the same argument as Scarpa because Miller *did* know before trial that Officer Mertz conducted an undercover investigation of Miller on another matter and that Mertz did not write any reports because he did not witness any criminal activity.

In sum, the district court correctly concluded that Officer Mertz's notes and audio recordings from his undercover investigation were not favorable to Miller under the *Brady* analysis. The mere absence of any observations of sex trafficking by Officer Mertz and the other law enforcement officers during their brief visits to Miller's building is not exculpatory evidence that Miller did not engage in sex trafficking. Indeed, as noted above, in several respects it is inculpatory.

3. The Government Did Not Suppress The Evidence

Finally, the government did not suppress this evidence. The district court did not squarely address this issue. It simply asserted that the government "[c]onced[ed]" that it did not turn over Officer Mertz's notes and audio recordings before trial. App. 20. That is correct, but it does not end the analysis. The second requirement of the suppression analysis requires the court to determine whether the evidence was "otherwise available to [Miller] through the exercise of reasonable diligence." *Carvajal*, 542 F.3d at 567. The record indicates that Miller failed to

exercise such diligence, as the evidence he sought and received after trial was readily available to him before trial given what he knew about Officer Mertz's investigation. Although the government made this argument in response to Miller's motion for new trial (Supp. App. 19-20), the district court did not address it. Accordingly, the district court clearly erred in its *sub silentio* determination that the government suppressed the evidence at issue, and Miller's *Brady* claim fails for this reason as well.

The government is on notice of its obligation to disclose potential *Brady* material even absent a defendant's request where such evidence is "clearly supportive of a claim of innocence." *Agurs*, 427 U.S. at 107. For evidence with less obvious probative value, a party asserting a *Brady* violation cannot show that the government suppressed allegedly exculpatory documentary evidence when such evidence is readily available to the party via subpoena before trial. See, *e.g.*, *Ienco* v. *Angarone*, 429 F.3d 680, 683 (7th Cir. 2005); *United States* v. *Rodriguez-Andrade*, 62 F.3d 948, 952 (7th Cir. 1995). The rationale is that *Brady* "does not place any burden upon the government to conduct a defendant's investigation or assist in the presentation of the defense's case." *United States* v. *White*, 970 F.2d 328, 337 (7th Cir. 1992) (alteration and citation omitted). Accordingly, *Brady* does not require the government to wade through all of its files in search of potentially exculpatory evidence. Cf. *United States* v. *Navarro*, 737 F.2d 625, 631 (7th Cir.) ("Mere speculation that a government file may contain *Brady* material is not sufficient to

require a remand for *in camera* inspection, much less reversal for a new trial."), cert. denied, 469 U.S. 1020 (1984).

Here, it is undisputed that several weeks before trial the government disclosed to Miller that Officer Mertz had conducted a parallel, undercover investigation of Miller and that Mertz had visited the building where Miller lived during the time frame described in the indictment. Based upon this information, at that time Miller could have, and should have, subpoenaed Officer Mertz's notes and audio recordings from that investigation. Moreover, Miller was fully aware, at least a few days before trial, that Officer Mertz did not write any reports regarding his undercover work because he did not gather any information of substance. If that information was key to Miller's defense, as he now claims, he could have asked at that point for any notes or recordings related to Officer Mertz's investigation. Miller did not.

Further, the information in Officer Mertz's notes and audio recordings that Miller claims the government suppressed—*i.e.*, that neither Mertz nor any of the other officers working on the undercover operation witnessed the sex trafficking during their visits to the building—was readily available through Mertz's testimony on the first day of trial, and Miller could have called him as a defense witness. See *Ienco*, 429 F.3d at 683 (concluding that the government did not suppress evidence witness could have testified to at trial). As this Court has recognized, "where counsel is on notice that a witness may have exculpatory information, and has an opportunity to subpoena that witness, there is no obligation for a prosecutor to seek

out and provide information to a defendant." *United States* v. *Lockhart*, 956 F.2d 1418, 1426 (7th Cir. 1992).

CONCLUSION

This Court should affirm the district court's denial of Miller's motion for a new trial and his sex trafficking convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of Circuit Rule 32(c) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 12,541 words.

2. This brief complies with the typeface requirements of Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Century New Schoolbook, 12-point font.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
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Date: May 1, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, I electronically filed the foregoing BRIEF AND SUPPLEMENTAL APPENDIX FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang
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SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v. Case No. 17-cr-82-wmc

HARRY MILLER,

Defendant.

GOVERNMENT'S RESPONSE TO MOTION FOR NEW TRIAL UNDER FRCP 33

The United States of America, by its attorneys Scott C. Blader, United States Attorney for the Western District of Wisconsin, Julie Pfluger and Diane Schlipper, Assistant United States Attorneys for that district, hereby submits this brief in response to the defendant's motion for a new trial under Federal Rule of Criminal Procedure 33. The government requests that the Court deny the defendant's motion for a new trial, and also deny his request for an evidentiary hearing.

I. The Due Process Clause Requirements: Favorable and Material

The Due Process Clause requires the government to disclose to a criminal defendant any known information that is both favorable and material to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 432 (1995): *United States v. Bagley*, 473 U.S. 667, 675-76 (1985); *United States v. Agurs*, 427 U.S. 97, 106-7 (1976); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good

faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *Bagley*, 473 U.S. at 676. Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; see also *Kyles*, 514 U.S. 433–434.

A. Evidence That Defense Claims is Favorable and Material

The evidence that defense claims is "favorable" and "material" is that "at least three undercover law enforcement officers [] observed [the defendant] regularly in May and June, and saw no evidence he was holding women against their wills for prostitution." [Dkt 138, pg. 1]. First, defendant mischaracterizes the crime. Sex trafficking is not kidnapping or false imprisonment – in this case, it is using force, threats, and coercion to cause two women to engage in commercial sex acts. Second, the specific evidence that the defense claims is exculpatory is not relevant, admissible, or exculpatory in this case. The evidence that the defendant lists as exculpatory is:

May 1 to June 15, 2017[1]

- On May 1, 2017, during his initial tour of the Greenway Cross building, Officer Dave Mertz saw "Seth" "working on interior/exterior cameras on [a] tablet." [Dkt. 138, p. 10].

[1] Count 2 of the superseding indictment (Dkt. 24) charges the defendant with trafficking Emily Breitzke from March 2017 to June 2017. Because Alishayna Daniels had left the defendant's residence on April 21, 2017, and Emily Breitzke was arrested and taken to the hospital on June 15, 2017, the government did not present any evidence or allege at trial any trafficking after June 15, 2017.

- On May 24, 2017, Officer Mertz rented a unit at Greenway Cross from Patty Caputo. [Dkt. 138, p. 9]. On May 25, 2017, Officer Mertz surreptitiously recorded audio of the rental process, including 14 minutes of recordings of a conversation with the defendant where they "talked about keys for the unit and storage space." [Dkt. 138, p. 10].
- On June 1, 2017, Officer Mertz went to Greenway Cross and had a conversation with the defendant about "storage space; a storage locker's door was broken and Miller said he had not had time to fix it." [Dkt. 138, p. 11].
- On June 1, 2017, Officer Mertz contacted the defendant via phone to talk about repairs. "Diamond" answered the defendant's phone. [Dkt. 138, p. 11].
- "On June 6, [] Mertz returned to Greenway Cross. Mertz had phone calls with Miller as well as surreptitiously recorded audio totaling over 90 minutes. The audio includes conversations with Miller as well as others on the property." [Dkt. 138, p. 11].
- On June 8, 2017, Officer Mertz "returned again…The storage locker still wasn't fixed, so Mertz called Miller, who agreed to meet him to get the issue sorted out. Notably, Diamond/Breitzke had answered the phone. When Miller and Mertz met in person later, Mertz recorded about 9 minutes of audio."[2] [Dkt. 138, p. 11].

[2] Officer Mertz's notes reflect that he "call[ed] + talk to female. She hands phone off to Harry…" There is no mention of "Diamond"or Emily in his notes. Additionally, when Officer Mertz meets with Miller, Miller states that his phone is a "wifi phone," which is consistent with government evidence presented at trial.

- On June 15, 2017, Officer Mertz went to Greenway Cross with "Chino" and spoke to the defendant. Officer Mertz made a surreptitious recording of a conversation with the defendant that included Miller being introduced to Chino. Officer Mertz's notes indicate that, on this date, Emily was taken into custody and taken to the hospital. [Dkt. 138, p. 12].

June 21 – June 28, 2017

- On June 21, 2017, Officer Mertz went to Greenway Cross and spoke with the defendant about "Mertz's business and the property generally." [Dkt 138, p. 12]. Officer Mertz surreptitiously recorded this conversation. [Id.].
- On June 28, 2017, Officer Mertz returned to Greenway Cross and spoke with the defendant about "replacing lightbulbs and modifications to the rental unit." [Dkt. 138, p. 13]. Officer Mertz surreptitiously recorded this conversation. [Id.].

Other

- On June 30, 2017, Officer Mertz's notes indicated that he visited Greenway Cross and "got hallway video for search warrant." [Dkt. 138, p. 13]. The defense claims that the "government hasn't disclosed any security video from the building." [Dkt 134, p. 7].[3]

[3] In defendant's motion for an extension of time to file post-trial motions, defense asserts that "Mertz retrieved security video of the hallway at Greenway Crossing for a search warrant." [Dkt. 134, p. 7]. Counsel for the government contacted defense counsel on November 28, 2017, to inform them that any video that Officer Mertz may have had from June 30, 2017, was recorded from his cell phone (and not retrieved from any security cameras), and that he no longer possessed that phone and thus no longer has any video of the hallway of Greenway Cross that he may have taken. Law enforcement were not able to retrieve any security videos during the course of this investigation. Additionally, in speaking with Ms.

- Detective Roloff asked "Meier's office [to] 'run phone tolls' on Miller's phone."[4] [Dkt. 138, p. 14].
- "The defense learned after the trial that [Patty] Caputo had met with the prosecution team on May 17, 2018. [Dkt. 138, p. 15]. The defense claims that "[t]he government hasn't disclosed anything related to this meeting." [Dkt. 134, p. 7][5]
- "MPD has contact with Breitzke related to Roloff's investigation of Miller on May 10, 2017 – about one month before Breitzke's 'first' documented meeting. Nowhere in the government's discovery is there any reference to any police contact with Breitzke on May 10." [Dkt. 138, p. 16; Dkt. 138-7].[6]

B. The Evidence the Defendant Cites is not Favorable

Generally, "favorable" information is either exculpatory or impeaching of the government's witnesses. Whether information is actually or even potentially "exculpatory" will depend on the factual and legal issues raised by the case. *See Kyles*, 514 U.S. at 439. The government need not disclose information that is irrelevant or

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Breitzke after this issue arose (post-trial), she stated that the defendant was in charge of the surveillance system and the defendant ensured there were no recordings available from the building.

[4] Prior to the filing of defendant's motion, counsel for the government informed counsel for the defense that phone tolls were run on 608-622-5312, which is not associated with the defendant or anyone known to be related to this case. It is believed that Detective Roloff provided a wrong number to Jessica Meier.

[5] Detective Roloff and AUSA Diane Schlipper met with Patty Caputo on May 17, 2018. A report of this interview was provided to defense in discovery prior to the trial. See Attachment A, Bates stamped 2250-51. Additionally, on November 28, 2018, the government provided both defense attorneys notes taken by Detective Roloff during this meeting.

[6] May 10, 2017, was the date that Alishayna Daniels was interviewed by law enforcement while in the Dane County Jail. During this interview, "Emily" was identified as having potential involvement in the human trafficking case. The entry on Docket 138-7 from May 10, 2017, does not represent a meeting with Ms. Breitzke but is merely an entry to notate her potential involvement in the human trafficking case. See Attachment C, Bates Stamp 1278.

inculpatory. The pieces of evidence that the defendant cites are not favorable and are irrelevant. The evidence places the defendant at the location of the trafficking during the time of the trafficking. The evidence shows that one of the trafficked women ("Diamond") was with the defendant. The evidence supports government testimony that the defendant ran the building at 1502 Greenway Cross by acting as the maintenance man.

"A defendant may not seek to establish his innocence ... through proof of the absence of criminal acts on specific occasions." *United States v. Santos*, 65 F. Supp. 2d 802, 846 (N.D. Ill.1999) (citing *United States v. Scarpa,* 897 F.2d 63, 70 (2d Cir.1990) and *United States v. O'Connor,* 580 F.2d 38, 43 (2d Cir.1978)); 1A Wigmore on Evidence § 56.1 (Tillers rev.1983); *see also United States v. Winograd,* 656 F.2d 279, 284 (7th Cir.1981) ("The district judge correctly refused to admit the evidence on this basis because evidence that [defendant] engaged in certain legal trades is generally irrelevant to the issue of whether he knew of other illegal trades.") (*citing United States v. Dobbs,* 506 F.2d 445, 447 (5th Cir. 1975); *Herzog v. United States,* 226 F.2d 561, 565 (9th Cir. 1955)).

Officer Mertz met with the defendant five times at 1502 Greenway Cross during the time he was trafficking Emily Breitzke and Alishayna Daniels. Officer Mertz's first visit to 1502 Greenway Cross was on May 1, 2017, and his first contact with the defendant was on May 24, 2017. Thus, his first contact with Miller was over a month after Alishayna Daniels had left Miller's, and two-and-a-half months after Miller began trafficking Emily Breitzke. Thus, Officer Mertz would have no information about the defendant or his activities at Greenway Cross for the entire time Alishayna was

trafficked and the majority of the time Emily was trafficked. Additionally, the fact that Officer Mertz did not see Miller holding Emily "against her will" is also not exculpatory. If anything, the fact that "Diamond" answered Miller's phone is inculpatory. Finally, while Officer Mertz was at the Greenway Cross building multiple times, he went upstairs (where the trafficking mainly took place) once – on June 30, 2017 (after the trafficking had ended) to drop keys off. [Dkt 138-1, p. 21]. During his one trip upstairs, he knocked on a door, Miller came out, and Mertz gave him the keys. Thus, it is no surprise that Officer Mertz did not observe any suspicious behavior.

Not only is what Officer Mertz did not see not favorable, it is not relevant. At trial for a felon in possession of a gun, a defendant would not be permitted to call a witness to testify to all the times he/she saw the defendant without a gun. At a child pornography trial, a defendant would not be allowed to call a witness to testify about all the times he/she saw the defendant not looking at child pornography. At this trial, the defense would not be allowed to call a witness to testify all of the times they saw Miller not trafficking women. Defendant is putting forth Officer Mertz as a sort of alibi witness, seeking his testimony that during the five brief times he was at 1502 Greenway Cross and interacted with the defendant, he did not see the defendant force, threaten, or coerce Emily to cause her to perform a commercial sex act. Given that the defendant is charged with trafficking Emily over a four-month period, what Officer Mertz did not see during five brief visits is not an alibi, or relevant.

C. The Evidence the Defendant Cites is not Material

Undisclosed information works a violation of due process only if the information was "material" to the case. *Brady*, 373 U.S. at 87. "Material" information is information of such significance that, had it been disclosed, there is a reasonable probability that the result would have been different, i.e., that confidence in a guilty verdict would be undermined. Given the evidence presented at this trial, any testimony by Officer Mertz as to what he did or did not observe at Greenway Cross would not have had a reasonable probability of undermining the jury's guilty verdict. Given the strength of the evidence presented at trial, summarized below, there is no reasonable probability that the verdict the jury came to would have been altered by Officer Mertz's testimony.[7]

Fawne Granby testified that she had known the defendant over 30 years and that he was the father of her son. [1-P-24]. Ms. Granby stated that she had addiction issues in the past and was in recovery at the time of her testimony. [Id.]. Ms. Granby testified that she saw the defendant in March of 2017 when she went to his apartment complex on Greenway Cross and loaned him $100. [1-P-25]. Several days later, the defendant offered Ms. Granby drugs as repayment of the $100. [1-P-26]. Ms. Granby had been in recovery for five years at that point, but accepted the drugs from the defendant and subsequently relapsed.

[7] The defense's assertion that that the government's case relied on four "insider" percipient witnesses with criminal backgrounds and a history of drug abuse is not an accurate representation of the government's case.

While at the defendant's apartment, Ms. Granby saw Emily Breitzke sick and laying on the kitchen floor. [1-P-28]. The defendant told Ms. Granby to ignore Ms. Breitzke and stated she "just wants more dope." [1-P-29]. Ms. Granby testified that the next time she went to the defendant's apartment, she got crack from him and smoked it with him. [1-P-31-32]. Ms. Granby observed several people at the apartment who were "in pain," and the defendant told Ms. Granby that those people were all doing heroin. [1-P-32]. Ms. Granby observed multiple people doing drugs at the defendant's apartment as well as the defendant providing drugs and drug paraphernalia to multiple people. [1-P-34-35].

Ms. Granby testified that Miller was very mean to Ms. Breitzke and, that during one visit to Greenway Cross, Emily Breitzke attempted to leave with Ms. Granby. [1-P-35]. The defendant physically prevented Ms. Breitzke from leaving and told Ms. Granby that she wasn't taking his "B". [1-P-34]. On other occasions, Ms. Granby heard the defendant tell Ms. Breitzke that she wasn't making enough money, directed her to go make money and bring it to him, and verbally berated her. [1-P-35-36]. Ms. Granby observed Ms. Breitzke sick from heroin withdrawal at the defendant's apartment. [1-P-37].

Mary Daniels testified that she was Alishayna Daniels' mother and that Alishayna struggled with heroin addiction. [1-P-50-51]. Ms. Daniels testified that she watched Alishayna's dog, Hondo, starting in January 2017, during a time when Alishayna was homeless. [1-P-53]. In March of 2017, Ms. Daniels brought Hondo to Alishayna at a the defendant's building on Greenway Cross. [Id.]. On March 21, 2017,

Alishayna called Ms. Daniels [from the defendant's apartment] and seemed very frightened. [1-P-54]. Ms. Daniels contacted the police and went to the defendant's apartment on Greenway Cross. [1-P-55]. Ms. Daniels talked to Alishayna by phone, and Alishayna got very upset that the police were involved, stating that "they're going to kill [me]" because the police are involved. [Id.]. Ms. Daniels and the police were able to enter the apartment building when the defendant came to the front door to get a food delivery. [1-P-56-57]. The police communicated with Alishayna through a door for approximately 45 minutes and then stated that they needed to leave. [1-P-58]. Ms. Daniels then went and talked to Alishayna through the door and convinced her to come out. [Id]. Alishayna exited the defendant's apartment and was handcuffed by the police. [1-P-59].

Detective Heidi Gardner testified that she was present on July 5, 2017, during a search warrant of 1502 Greenway Cross in Madison, Wisconsin, and the contemporaneous arrest of the defendant. [1-P-63-64]. Detective Gardner identified photographs taken at the time of the search warrant, including images of drug paraphernalia and a note [written by the defendant] stating that he could be contacted at 608-556-7581. [1-P-65-71]. Detective Gardner also identified evidence collected from a trash collection at 1502 Greenway Cross, including more drug paraphernalia and a note from the defendant stating he was out getting a "wake up" for Emily. [1-P-73].

Matthew Reminoski, an admitted heroin addict, testified that he met the defendant two years prior while looking for heroin. [1-P-82-83]. Mr. Reminoski stated he initially he went to the building on Greenway Cross and got drugs from the

defendant, and that he later moved in with the defendant at an upstairs unit of Greenway Cross. [1-P-84-86]. Mr. Reminoski identified images that were taken at 1502 Greenway Cross, and stated that 608-556-7581 was the defendant's phone number. [1-P-88-89]. Mr. Reminoski testified that Emily and Seth stayed at 1502 Greenway Cross and that the defendant provided drugs to people in the building. [1-P-90-91]. He testified that Emily was also known as "Diamond," and that the defendant controlled Emily's life, including her body, money, and drugs. [1-P-91-93]. Mr. Reminoski heard the defendant asking Emily a lot if she had posted on Backpage. [1-P-92].

When Mr. Reminoski moved out of the defendant's residence, he tried to take Emily with him because of "the conditions that she was in." [1-P-93]. He testified that during the time Emily was at 1502 Greenway Cross, she didn't shower for months, had sores all over her arms, and was in "very bad shape." [1-P-94]. Mr. Reminoski testified that he heard the defendant instruct Emily to do "dates," and that she did five to ten (or more) dates a day. [1-P-95]. He testified that the defendant asked him to take Emily to some of her dates, which he did, and that the defendant instructed him to take her straight to the date and right back and not to stop anywhere else. [1-P-100].

Mr. Reminoski testified that the defendant had a rule about people sitting at his desk and, on one occasion, the defendant hit Emily and berated her because Mr. Reminoski sat at the desk. [1-P-97]. Mr. Reminoski also testified that he saw the defendant use physical violence against Emily on other occasions. [1-P-97-98]. He stated that Emily had to tell the defendant exactly how much money she got for dates, and that she tried to hide money from him at times. [1-P-98]. He stated that he saw a

variety of drugs at the defendant's apartment on Greenway Cross and that the defendant provided drug paraphernalia and a safe place to do the drugs. [1-P-98-99].

The government's expert witness, **James Sauer**, testified as to the effects of heroin, the way heroin is ingested, the addictive properties of heroin, the effects of ingesting heroin, the symptoms of withdrawal from heroin, triggers for heroin use, experiences of relapse, and other general information about heroin and opioid addiction, withdrawal, use, and relapse. [1-P-127-137].

Officer Gregory Sosoka testified that, on June 24, 2017, he was dispatched to 1502 Greenway Cross based on a call to law enforcement by the defendant. [2-A-6-7]. The defendant provided the phone number of 608-302-6092 during this contact and stated that he was the property manager at the address. [2-A-7]. Officer Sosoka testified on cross-examination that he did not see evidence of drug dealing, and if he had seen evidence of drug dealing or human trafficking, he would have likely followed up on it.[8] [2-A-9].

Backpage paralegal **Issa Martin** testified about the mechanics of posting ads on Backpage.com and verified ads that were posted from email several email accounts, containing several different phone numbers associated with the defendant. (2-A-10-22).

[8] While the defense was allowed to cross-examine Officer Sosoka regarding what he did or did not see at Greenway Cross, defense would not have been able to call Officer Sosoka to testify solely about what he did not observe. Additionally, while defense asserts that, had they known about other law enforcement at Greenway Cross who did not see sex trafficking, they would have called them and argued that what they did not see was powerful evidence in closing, defense did not mention what Officer Sosoka did not observe in their closing argument.

Emily Breitzki testified that she had been addicted to heroin for approximately ten years. [2-A-27-28]. From March to June 2017 she was using a gram of heroin a day and would use it ten or more times a day. [2-A-28]. If she went more than an hour or two without heroin, she would begin to suffer withdrawal. [2-A-29]. In February 2017, Ms. Breitzke was living with her friend and heroin supplier, Ed, in various hotels. [2-A-30]. Ed introduced Ms. Breitzke to the defendant. [Id.]. Ms. Breitzke was arrested and taken to jail in February and, upon release on February 23, had nowhere to go. She was suffering from heroin withdrawal upon her release and went to the defendant's studio on Greenway Cross. [2-A-31, 34]. She testified that the defendant lived in the upstairs studio and acted as the maintenance man for the building. [Id.].

After arriving at Greenway Cross, Ms. Breitzke got heroin from the defendant and then "posted…to make some money for Harry." [2-A-36]. Ms. Breitzke stayed at the defendant's residence on Greenway Cross for approximately four months. [Id.]. Ms. Breitzke used heroin, provided by the defendant, multiple times every day. [2-A-37]. The defendant provided drugs to many other people during the time Ms. Breitzke was there, including Seth, Jamie, Luke, Ali, David, Tosha, Ryan, Misha, and Fawne. [2-A-38]. During the first few days Ms. Breitzke stayed with the defendant, he was "nice" to her, and asked her to post for dates on Backpage.com. [2-A-38-39].

Ms. Breitzke posted for a date the day she arrived at Greenway Cross under the name "Diamond." [2-A-41]. The ads were posted using her phone number at first, but after one week her phone was stolen and the ads were posted using the defendant's phone number of 608-556-7581. [2-A-42-43]. Ms. Breitzke identified images from

several Backpage ads as imaged of her taken by the defendant in his apartment at Greenway Cross. [2-A-44-47]. The defendant would tell Ms. Breitzke to post Backpage ads as much as four times an hour and would threaten to withhold heroin from her if she did not post. [2-A-47-49]. Ms. Breitzke identified ten separate Backpage ads that were posted of her within one 24-hour period. [Id.]. At times, the defendant would withhold heroin from Ms. Breitzke because she didn't want to post. [2-A-59]. Once, the defendant tried to make Ms. Breitzke wear a diaper (because she would be sick from withdrawal) until she agreed to do a date. [2-A-59-60].

Ms. Breitzke performed sex acts in the defendant's apartment, in a car in the parking lot at Greenway Cross, and at other locations with the men who responded to the ads. [2-A-49-50]. The defendant would get the money that Ms. Breitzke was given for the sex acts before the sex acts occurred. [2-A-50]. One time Ms. Breitzke tried to hide the money and keep it and the defendant searched her. [Id.]. The defendant would threaten to "beat [her] ass" or "make [her dope] sick" if she didn't give him all of the money. [2-A-55]. The defendant hit her in her chest and grabbed her infected arms because she didn't post Backpage ads when he instructed. [2-A-56-57]. Ms. Breitkze testified about the incident where the defendant threatened her after Mr. Reminoski sat at his desk. [2-A-63].

Ms. Breitzke testified that, at times, the defendant would take the phone and present to be Ms. Breitzke and text with the men responding to the ads because he thought Ms. Breitzke wasn't responding like he wanted her to. [2-A-51]. One time he texted a man, pretending to be Ms. Breitzke, and said she would have anal sex with him

– when Ms. Bretizke refused, the man showed her the texts. [Id.]. Ms. Breitzke did from three to ten dates every day for the defendant. [2-A-57]. She was not allowed to refuse a date, even if she was sick or menstruating. [2-A-57-58]. If she attempted to resist doing a date, the defendant would verbally or physically abuse her, or would threaten to call the police on her. [Id.].

At times, the defendant would enter the room where Ms. Breitzke had a "date" and would threaten the men, sometimes with a baseball bat, to try to get more money. [2-A-52]. The defendant would take the phone from Ms. Breitzke to make sure she was actually posting on Backpage, and would berate her and yell at her if he thought she was not posting ads. [2-A-54]. Ms. Breitzke attempted to leave Greenway Cross but was physically prevented. [2-A-64]. During one incident, the defendant kicked Ms. Breitzke out of the apartment and she slept in the downstairs bathroom before coming back that next day; she didn't leave Greenway Cross because she had nowhere to go. [2-A-65].

Ms. Breitzke identified Backpage ads that were posted for a double date with both her and Alishayna Daniels; these ads were posted at the defendant's direction. [2-A-53-54]. She stated that, on one occasion, Alishayna wanted to leave and the defendant threatened to kill her dog. [2-A-61].

Alishayna Daniels testified that she had been addicted to heroin for approximately two years. [2-A-107]. She described the pain and physical discomfort withdrawing from heroin caused her. [2-A-112]. She met the defendant at 1502 Greenway Cross when she bought heroin from him and used it at his studio. [2-A-110-

111]. After meeting the defendant several times, Ms. Daniels ended up staying with him at Greenway Cross. [2-A-111]. The night she ended up moving in with him, in March of 2017, she asked the defendant to front her $20 worth of heroin. [2-A-111-113]. After the defendant provided her with the heroin, she said she would do a date to pay him pack. [2-A-113]. Ms. Daniels ended up doing several dates and splitting the earnings ($800-900) between the defendant and Emily Breitzke. [Id.]. The defendant spent all of the money buying drugs for people whom he invited to come over and party. [2-A-115]. The next morning, the defendant told Ms. Daniels that she could not leave because she owed him $300. [2-A-115-116]. Ms. Daniels ended up staying with the defendant until March 21, 2017. [2-A-116]. During the time she stayed with him, she observed the defendant supply heroin and crack to multiple people at his studio on Greenway Cross. [2-A-132-133].

The defendant asked Ms. Daniels to do more dates to pay him back, and she did, but she was never able to pay off her "debt." [2-A-118]. When she did a date, the defendant would collect the money before the sexual activity occurred. [Id.]. If Ms. Daniels didn't do what the defendant asked, he would get angry at her and at times he hit her and/or strangled her. [2-A-118-119]. The defendant "pushed" for her to post ads and monitored her posting to make sure she wasn't lying about posting. [2-A-121]. Ms. Daniels did at least three dates every day for the defendant. [2-A-122]. If Ms. Daniels said that she didn't want to do a date, the defendant would get angry and tell her she had a debt to pay. [2-A-122-123]. When the defendant suspected Ms. Daniels

was not giving him all of the money she made from dates, he would get angry and withhold heroin from her. [2-A-123].

Ms. Daniels testified that, at some point during the time she stayed with the defendant, her mother brought her dog, Hondo, to come stay with her. [2-A-119]. The defendant threatened that Ms. Daniels would never see her dog again if she didn't do dates. [2-A-120]. During one incident, the defendant strangled Ms. Daniels and didn't let her go until the dog bit him. [Id.]. When she said she wanted to leave, the defendant would threaten to keep her dog and would tell her she could not leave. [2-A-125]. During one incident, the defendant dragged Ms. Daniels out of his apartment and locked her out, while keeping her dog. [2-A-125-126]. He hit her and told her to come back with $300. [Id.].

Ms. Daniels saw Fawne Granby at the defendant's studio. [2-A-127-128]. During one incident, the defendant suspected Ms. Daniels of giving Fawne her phone number in an attempt to leave and punched her. [Id.].

Ms. Daniels testified that the defendant was "terrible" to Emily. [2-A-129]; he consistently belittled her, accused her of stealing, withheld heroin from her, and verbally abused her. [2-A-129-130]. She stated that the defendant got her and Emily Breitzke to post joint ads. [2-A-131].

On March 21, 2017, Ms. Daniels called her mother, who then came to 1502 Greenway Cross with the police. [2-A-133-134]. She was scared that the defendant would have her killed because her mother had gotten the police involved. [2-A-134]. After some time, Ms. Daniels came out of the defendant's apartment and was arrested

by the police; she left because she realized it "was [her] only chance to get out safely." [2-A-135].

Digital Forensic Examiner Christine Byers testified about evidence obtained from a cell phone seized during the search warrant executed at 1502 Greenway Cross. [2-P-26-36]. Evidence retrieved from the phone correlated the phone and the phone number with the defendant. [Id.]. Additionally, images from the phone were tied to Backpage.com ads. [Id.].

Seth Schumacher testified that he was addicted to heroin and had been using opiates for 12 years. [2-P-48]. He met the defendant in January of 2017 at his residence on Greenway Cross. [Id]. Mr. Schumacher returned to the defendant's residence a week later and bought heroin from the defendant. [2-P-50-51]. He ended up living with the defendant for a few weeks in April. [2-P-51]. The defendant was the building manager and provided drugs, including heroin, to people. [2-P-52-53]. While staying at the defendant's studio, Mr. Schumacher heard the defendant asking Ms. Breitzke if she posted or if she had any dates. [2-P-55]. At times, the defendant was verbally abusive and called Ms. Breitzke names. [2-P-56]. He also threatened to punch her if she didn't get him some money. [Id.].

When Ms. Breitzke had a date, the defendant would go up to the studio and collect the money before the sex act occurred. [2-P-56]. Once, Mr. Schumacher drove Ms. Breitzke to a date for the defendant. [2-P-58]. Ms. Breitzke's physical condition at that time was bad; she had abscesses on her arms from using heroin obtained from the

defendant. [2-P-58]. Mr. Schumacher heard the defendant threatening to withhold heroin from Ms. Breitzke until she arranged a date. [2-P-59].

Mr. Schumacher saw Alishayna Daniels at the defendant's studio. He overheard the defendant asking Ms. Daniels if she had a date set up. [2-P-57]. The defendant treated Ms. Daniels better than he treated Ms. Breitzke. [Id.].

Defendant's Caselaw

While the defense claims that courts have found Brady violations on lesser showings, the cases cited are not comparable.[9] Given the strength of the evidence presented at trial, even if Officer Mertz had been called as a witness and testified as to what he did not observe, there is no reasonable probability that the jury would have discounted all of the other witnesses and found the defendant not guilty.

II. Defendant was Aware of Officer Mertz Prior to Trial

Evidence is suppressed for Brady purposes only if (1) the prosecution failed to disclose evidence that it or law enforcement was aware of, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence. *United States v. Senn*, 129 F.3d 886, 893 (7th Cir.1997) ("[T]he government did not suppress the evidence because the defendants could have obtained it before trial through the exercise of reasonable diligence"). On May 7, 2018, defense counsel emailed the government and

[9] Defense cites *Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999), a habeas case where the Seventh Circuit found that a *Brady* violation was committed when the defense requested the criminal history of a key government witness and the state failed to provide it. Defense also cited *Boss v. Pierce*, 263 F.3d 734 (7th Cir. 2001), a habeas case where the Seventh Circuit found a *Brady* violation was committed where the state withheld an investigative report summarizing a witness who said that the defendants were not involved in the murder at issue and that someone else was.

requested the identification of "UC 219" and stated that they were considering issuing a subpoena to this officer for trial. On the same day, the government informed the defense team that UC 219 was Dave Mertz. See Attachment B. Additionally, at the hearing held before the start of trial, the defense questioned Detective Roloff extensively about Dave Mertz and his investigation. If the defense believed that Officer Mertz had evidence that was relevant at trial, that evidence was available to them with an exercise of due diligence.

III. The Court Should Deny Defendant's Request for a Hearing

As an alternative remedy to granting defendant's motion for a new trial, defense asks the Court to order Detective Roloff to turn over his "case file" for both investigations and hold an evidentiary hearing. As a basis for this hearing, the defense challenges Detective Roloff's testimony at the hearing held before jury selection. Specifically, defense takes issue with Detective Roloff's testimony that Officer Mertz (1) did not generate any reports regarding his drug investigation and (2) did not see anything that warranted a report and did not talk about observing any criminal activity.[10] [Dkt 138, pp. 7-8]. Defense claims that "Mertz's undercover activity at Greenway Cross was much more robust than Roloff's testimony suggested." [Dkt. 138, p. 9]. To the contrary, the notes from Officer's Mertz reveal that Officer Mertz's

[10] Defense also challenges Detective Roloff's testimony of how many times he met with Alishayna Daniels and Emily Breitzke, citing both Ms. Daniels' and Ms. Breitzke's cross-examination. However, at trial, both witnesses testified that they were unsure of how many times they had met with law enforcement and prosecutors in this case.

undercover activity at Greenway Cross was precisely as Detective Roloff described it.[11] While defense claims that it needs to "verify [] Roloff's testimony that Mertz had authored no reports about his undercover activity at Greenway Cross," "resolve the discrepancies among Roloff's, Daniels', and Breitzke's testimonies regarding the number of meetings," and "explore any potentially material, exculpatory evidence" that might be generated [Dkt. 138, p. 9], defense has cited nothing to support their accusations that Detective Roloff is withholding information. The government fails to see what purpose another evidentiary hearing would serve given that the defense has failed to identify grounds or a legal basis for such hearing.

Dated this 17th day of January 2019.

Respectfully submitted,

SCOTT C. BLADER
United States Attorney

By: /s/
JULIE PFLUGER
Assistant United States Attorney
DIANE SCHLIPPER
Assistant United States Attorney

[9] The government received a call on January 15, 2019, from Madison Police Department, alerting the government that the defense was requesting additional documents regarding the drug investigation at Greenway Cross. The government advised MPD that we had no objection to MPD providing any information requested by defense. Therefore, the defense will be receiving additional documents pertaining the drug investigation at Greenway Cross even without this Court's ruling.