

FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF GUAM
Mongmong, Guam

Assigning Memo

TO: Student Attorney
FROM: Alexander W. Desantis, Esq.
DATE: January 2022
RE: U.S. v. Hark, No. 21-10460

I have an interesting case for you and your partner. I was defense counsel below. I lost at trial and on a post-trial motion, but some new evidence came out that I think the Ninth Circuit will find compelling grounds for granting a new trial.

I have no doubt that you'll read all of the materials closely, but here's a summary: Our client, Archibald Hark, is a student at Guam Tech. He's a good kid. While at Guam Tech, he met a guy who, unbeknownst to him, was a DEA agent. After some pretty bogus pressure, Hark got mixed up in a heroin deal and was arrested on the spot. At trial, we argued that Archie was entrapped. The jury disagreed with us, but I think they got it wrong. We used the same entrapment argument to challenge the sufficiency of the evidence supporting the jury's verdict under Fed. R. Crim. P. 29. Unfortunately, the judge denied our motion.

A few days after trial, we received some compelling new evidence from three witnesses, and we moved for a new trial based on that evidence. But the trial judge denied our motion! She sentenced Hark to 24 months in prison. I have discussed this appeal with our boss (the Federal Defender). We decided to base our appeal on two issues. First, we will argue that the district judge erred when she denied our motion for judgment of acquittal because Archie was entrapped as a matter of law. Second, we will argue that the district judge abused her discretion when she denied our new trial motion. I've spoken with the Assistant United States Attorney who tried the case for the government and advised him that those are the only issues we will raise in the appeal. I note that if we win the entrapment argument, we won't need a new trial, but we still need to include both issues in our brief.

For the entrapment issue, the court will focus on whether the government induced the defendant and whether the defendant was predisposed to commit the crime. United States v. Jones, 231 F.3d 508, 516 (9th Cir. 2000). There are a few Supreme Court cases out there that address entrapment, and they could be helpful for some background, but the real meat will be in Ninth Circuit cases, as the circuit has developed its own test. Be careful not to get caught up in cases addressing "entrapment by estoppel," "derivative entrapment," "sentencing entrapment," or "outrageous government conduct." **None of those is at issue here.** Also, I can say firsthand that we've got nothing to challenge in the judge's jury instructions. I think that we've got a bit of an uphill battle on entrapment because the standard for evaluating Rule 29 motions is very favorable to the government. See, e.g., United States v. Ruiz-Lopez, 749 F.3d 1138, 1141–43 (9th Cir. 2014). Even so, there are certainly some strong arguments to be made for our side. Make sure your brief addresses this standard!

For the second issue, the court's inquiry will be limited to whether the district judge abused her discretion under Fed. R. Crim. P. 33. See United States v. Hinkson, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (articulating the test on appeal). Don't get caught up in whether the

affidavits contain hearsay—when I spoke to the AUSA on this case, he advised that the government will not argue that there are any hearsay objections to the affidavits.

The attached files from the case form the record for this appeal; be sure to read them over carefully. The record contains (i) partial transcripts from the two days of trial, our Rule 29 motion, sentencing, and our post-trial motion for a new trial; (ii) the exhibits and affidavits relied on in those proceedings; (iii) the district court's decisions; (iv) our notice of appeal; and (v) the parties' stipulations on appeal. I've omitted parts of the record that are irrelevant to our two issues (for instance, pre-trial proceedings, jury instructions, and sentencing).

I know you just started in the office, so I've also attached a summary of some key criminal procedure topics to this memo. Remember, in criminal cases, the Federal Rules of *Criminal* Procedure govern. Make sure to review the relevant rules—especially rules 29 and 33.

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STAGES OF A CRIMINAL PROSECUTION¹

Criminal cases can be broken into two major stages—investigation and adjudication—each of which has many sub-stages. This summary will focus on the latter stage, which encompasses the period from arrest through appeals. The steps are presented roughly in order, but several of the early steps can be switched around.

Complaint and Arrest Warrant

Federal prosecutions usually begin with a judge issuing an arrest warrant pursuant to an indictment (see below) or complaint. A complaint includes a sworn statement from law enforcement laying out evidence against a suspect. If the judge finds that there is probable cause to believe a crime has occurred and that the suspect committed it, she issues a warrant authorizing the suspect's arrest.

Arrest

A law enforcement officer must have probable cause to effectuate an arrest. Most arrests can be effectuated without an arrest warrant.

Preliminary Matters

In the days after arrest, an arrestee will have one or two hearings. She will be informed of the charges against her and provided information about counsel, and a judicial officer will determine whether she will be released pending trial and the amount of bail she will have to pay for that release. Absent an indictment (see below), the government must again prove probable cause, and the defendant may rebut the evidence presented.

Indictment

In all federal felony cases, the government must present evidence about the case to a grand jury, made up of between 16 and 23 citizens, who (in theory) make an independent probable cause determination. The grand jury operates in secret and may issue subpoenas, so it is often used as an evidence-gathering body.

Trial

Trial is itself broken into several stages: (1) opening arguments (where both sides lay out what the evidence will prove), (2) the prosecution's case (where the prosecutor puts on evidence in an attempt to prove the crime beyond a reasonable doubt), (3) the defense's case (where the defense may put on its own evidence rebutting the prosecution), (4) closing arguments (where both sides review the evidence presented and whether it establishes proof of guilt beyond a reasonable doubt), (5) jury instructions (where the judge instructs the jury on matters of law), (6) jury deliberations, and (7) the verdict (where the jury announces its decision).

Rule 29 Motions

At several points throughout the trial, the defense may move under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. This motion may first be made at the close of the prosecution's case, and the judge will grant it if the evidence presented is insufficient as a

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matter of law to establish guilt beyond a reasonable doubt. The motion may also be made at the close of the defense's case, and the judge will grant it if the evidence before the court—together—is insufficient as a matter of law to establish guilt. Either of the preceding motions is equivalent to a judgment as a matter of law/directed verdict under Rule 50 of the Federal Rules of Civil Procedure.

The defense may also present a Rule 29 motion after the jury returns either a guilty verdict or no verdict. The judge will set aside the verdict and enter a verdict of acquittal if the evidence presented was insufficient as a matter of law to establish guilt. In this context, the motion is equivalent to a judgment as a matter of law/judgment notwithstanding the verdict under Rule 50 of the Federal Rules of Civil Procedure. However, unlike in the civil context, the defense need not have filed a Rule 29 motion earlier in the trial to file one after the verdict.

Note that while Federal Rule of Criminal Procedure 29 is equivalent to Federal Rule of Civil Procedure 50, decisions about one are neither binding on nor persuasive as to the other.

Sentencing

In a federal case, the judge will dismiss the jury after it returns its verdict. If the verdict is guilty, the judge will then await a presentence investigation report from a federal probation officer laying out the defendant's past and highlighting any previous criminal conduct. Both the prosecution and defense will make arguments about an appropriate sentence, highlighting aggravating and mitigating factors respectively. The defendant will also have a chance to address the court. Taking all this information into account, the judge will calculate a sentence according to the United States Sentencing Guidelines and then impose a sentence within, above, or below the suggested Guidelines range as she deems appropriate. Shortly after sentencing (usually the same or next day), the judge will enter a formal final judgment.

Rule 33

The defense may move for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. The motion must be made within fourteen days after the verdict unless it is grounded on newly discovered evidence, in which case it must be made within three years of the verdict.

Appeal

A defendant may appeal either of or both the guilty verdict and sentence and must do so within ten days of the final judgment in the case. The government cannot appeal a not guilty verdict, but it may appeal the district court's sentence if it is unsatisfied.

DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY FOR THE DISTRICT OF GUAM, CRIMINAL DIVISION
Hagatna, Guam

Assigning Memo

TO: Student Attorney
FROM: Andrew R. Madsen, Assistant United States Attorney
DATE: January 2022
RE: U.S. v. Hark, No. 21-10460

I have an important case for you and your partner. I litigated this case below, got a guilty verdict, and won a post-trial motion. But some new evidence came out after trial, and the defendant filed for a new trial. We won that motion too, but I think it will be close on appeal.

I know you will read the attached materials very carefully, but here are the basics: The defendant in this case is a student at Guam Tech with a prior drug conviction. The DEA picked him up for dealing heroin—I think it was a pretty standard sting operation. At trial, the defendant’s sole defense was that he was entrapped by one of the DEA agents and the informant. As you will see, the jury did not buy his story, and it found him guilty of distributing heroin. The defense used the same entrapment argument to challenge the sufficiency of the evidence supporting the jury’s verdict under Fed. R. Crim. P. 29, but the judge denied their motion.

Shortly after trial, the defendant moved for a new trial based on some newly discovered evidence (three affidavits). We see defendants make these motions all the time, and they’re almost never granted. The trial judge ultimately denied the motion, but it was close. After she denied the new trial motion, the judge sentenced the defendant to 24 months in prison.

Of course, the defendant appealed. I spoke to the federal defender who tried the case. He told me that they will raise two issues on appeal. First, they will argue that the district judge erred when she denied the motion for judgment of acquittal because, they believe, the defendant was entrapped as a matter of law. Second, they will argue that the district judge abused her discretion when she denied the new trial motion.

We don’t want to litigate this case again, and we definitely don’t want the defendant back on the street. If the defense wins the entrapment argument, they won’t even need a new trial.

For the entrapment issue, the court will focus on whether the government induced the defendant and whether the defendant was predisposed to commit the crime. United States v. Jones, 231 F.3d 508, 516 (9th Cir. 2000). There are a few Supreme Court cases out there that address entrapment, and they could be helpful for some background, but the real meat will be in Ninth Circuit cases, as the circuit has developed its own test. And remember that the standard for evaluating Rule 29 motions is very favorable to us. See, e.g., United States v. Ruiz-Lopez, 749 F.3d 1138, 1141–43 (9th Cir. 2014). Make sure your brief addresses it! But be careful not to get caught up in cases addressing “entrapment by estoppel,” “derivative entrapment,” “sentencing entrapment,” or “outrageous government conduct.” **None of those is at issue here.**

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would usually be a slam dunk for us, but this case has some bad facts. Don't get caught up in hearsay issues—I told the federal defender that we won't be arguing that there is inadmissible hearsay in the affidavits.

The attached files from the case form the record for this appeal; be sure to read them over carefully. The Record contains (i) partial transcripts from the two days of trial, the defendant's Rule 29 motion, sentencing, and the defendant's post-trial motion for a new trial; (ii) the exhibits and affidavits relied on in those proceedings; (iii) the district court's decisions; (iv) the defendant's notice of appeal; and (v) the parties' stipulations on appeal. I've omitted parts of the record that are irrelevant to our two issues (for instance, pre-trial proceedings, jury instructions, and sentencing).

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UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

THE HON. JUDGE E. HO MATHEWS, JUDGE PRESIDING

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	NO. 1:21-cr-00020
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Hagatna, Guam

July 8, 2021

Roy R. Williams, CSR 1650 - Official Reporter
U.S. District Court of Guam
520 West Soledad Avenue
Hagatna, Guam 96910

1 **APPEARANCES :**

2
3 FOR THE PLAINTIFF:

4 ANDREW R. MADSEN, ESQ.

5 ASSISTANT UNITED STATES ATTORNEY

6 UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT

7 OF GUAM

8 108 HERNAN CORTEZ, SUITE 500

9 HAGATNA, GU 96910

10 (671) 864-1291

11
12 FOR THE DEFENDANT:

13 ALEXANDER W. DESANTIS, ESQ.

14 ASSISTANT FEDERAL PUBLIC DEFENDER

15 FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF GUAM

16 400 ROUTE 8, SUITE 501

17 MONGMONG, GU 96910

18 (671) 442-3128

1 **HAGATNA, GUAM; JULY 8, 2021, 9:06 A.M.**

2 THE COURT: Okay. The Hark matter. Let the record show that Mr.
3 Hark is present before the court with his counsel, Mr. Desantis.
4 The United States is represented by Mr. Madsen. The jury is not
5 present. It is my understanding that we have finished with all
6 of the preliminary motions and we are ready to begin trial. Am I
7 correct?

8 MR. MADSEN: Yes, your honor.

9 MR. DESANTIS: That is correct, your honor.

10 THE COURT: Okay. Okay. All right. Let's have the jury, please.

11 (The following proceedings were held in open court, in the
12 presence of the jury):

13 THE COURT: All right. Thank you, ladies and gentlemen. Please be
14 seated. All right. The record should reflect that we have been
15 joined by all the members of our jury panel. Good morning,
16 ladies and gentlemen.

17 THE JURY: Good morning, your Honor.

18 THE COURT: We are going to begin with the opening statements
19 made by the lawyers in the case. Let me remind you from my
20 instructions to you yesterday that any statements made to you by
21 the attorneys during the course of their opening statements are
22 not evidence and should not be considered as such by you. These
23 opening statements are just meant to give you an overall road
24 map of how to evaluate the evidence that the lawyers will

1 eventually present. All right. Are both sides prepared to go
2 forward? Does the United States wish to make an opening
3 statement?

4 MR. MADSEN: Yes, we do, your honor.

5 THE COURT: Please proceed.

6 OPENING STATEMENT

7 BY MR. MADSEN:

8 Your Honor, Judge Mathews, and Mr. Desantis, Mr. Hark, and to
9 you, ladies and gentlemen of the jury, good morning.

10 I thank you for being here today to help us do justice. I want
11 to thank you in advance for keeping the promises you made when
12 you were selected to be on this jury. The promise to keep an
13 open mind, to carefully consider all of the evidence and to come
14 to a verdict on the basis of the evidence. You promised to do
15 that based on the law, based on the facts and the evidence, and
16 nothing else. You promised us that you would do everything you
17 could under the law to see that justice was done. So I thank
18 you for that and I thank you in advance for the verdict that you
19 will at some point render in this case.

20 Ladies and gentlemen, we are here today to answer a single
21 question: Is the defendant--is Archibald Hark guilty of dealing
22 ten grams of heroin? That's it. And I am here in front of you
23 this morning to answer that question. We'll answer it from the
24 witness stand, from the exhibits you'll later see and from the

1 evidence. When you put the evidence together, the answer will
2 be clear. Yes. Yes. Archibald Hark committed this offense.
3 He sold heroin and it's your job to find him guilty of that.
4 Let me tell you what you will see and hear in this trial.
5 First, you will hear from Special Agent Paul Lopez. He will
6 tell you that he is a Special Agent for the Drug Enforcement
7 Administration. He will tell you that in January of this year,
8 he was enrolled in some courses at Guam Tech, trying to obtain
9 certification for his next promotion within the DEA. He will
10 tell you that that is where he met the defendant, who was a
11 fellow student of his at Guam Tech. Agent Lopez will tell all
12 about how he overheard the defendant talking about his past
13 experience with drugs. He will tell you how, after barely
14 knowing him, the defendant told Agent Lopez that he was a drug
15 dealer. Agent Lopez will tell you how the defendant jumped on
16 his first opportunity to get into the heroin business.
17 You will also hear from Jason Jacobs. Jason Jacobs was a long
18 time heroin dealer. Mr. Jacobs will tell you that the defendant
19 called him up out of nowhere--he had never met the defendant
20 before, and the defendant called him out of nowhere to say that
21 he wanted to get in on the heroin trade. That he wanted to push
22 needles. He will tell you that the defendant offered to start
23 immediately. He will tell you that on March 19, 2021, the
24 defendant agreed to meet him at night to push - sell - ten grams

1 of black tar, some of the most potent heroin, to a woman named
2 Kathryn Wongchenko. Mr. Jacobs will tell you that the defendant
3 met him that night at the Nieves Public Library here in Hagatna.

4 THE COURT: Mr. Madsen which graphic is this?

5 MR. MADSEN: I am sorry?

6 THE COURT: What graphic are you showing? What Exhibit number?
7 For the record.

8 MR. MADSEN: I am sorry. Exhibit P-1, your honor, illustrating a
9 bird's eye view of the Nieves Public Library. Mr. Jacobs will
10 tell you that the defendant met him at the library at 10:30 p.m.
11 and handed him a baggie containing ten grams of black tar
12 heroin.

13 THE COURT: Is this P-2?

14 MR. MADSEN: This is P-2. This is a picture of the ten-gram rock
15 of black tar heroin that the defendant took from Mr. Jacobs and
16 sold to Ms. Wongchenko.

17 Mr. Jacobs will tell you that he accompanied Mr. Hark to the
18 meeting with Ms. Wongchenko. He will tell you that he saw the
19 defendant walk up to Ms. Wongchenko and exchange the rock of
20 heroin you see here for nine hundred dollars.

21 That, ladies and gentlemen, is this case. Plain and simple.
22 Thank you.

23 THE COURT: Mr. Madsen, could you take the poster down please?

24 MR. MADSEN: Yes.

1 THE COURT: Mr. Desantis, on behalf of Mr. Hark, are you prepared
2 to proceed?

3 MR. DESANTIS: I am ready to proceed your honor, and thank you
4 very kindly.

5 OPENING STATEMENT

6 BY MR. DESANTIS:

7 Good morning, Judge Mathews, my colleagues on the right here, to
8 my colleagues on the defense side, and to the Hark family. And
9 good morning to you, ladies and gentlemen.

10 THE JURY: Good morning.

11 MR. DESANTIS: Thank you for being here. A man named Abraham
12 Lincoln once said that the highest act of citizenship is jury
13 service. And, he was right. By virtue of being here, you are
14 participating in the search for justice and for the truth.
15 You just heard the prosecution's story. You might be surprised,
16 but I'm going to tell you that a lot of what the prosecution
17 just told you is correct. However, the important parts of the
18 story--the parts that you need to know to deliver justice--were
19 left out of that story. Let me tell you what they didn't tell
20 you this morning and we will have to wonder why the prosecution
21 has left out so many of these details. We will look at the
22 whole story - not just the pieces selected by the prosecution -
23 and we will show you that Archibald Hark is an innocent man,

1 before you only because he was entrapped into this crime by the
2 very witnesses you will hear from later today.
3 Let me take you through the prosecution's story and fill in the
4 gaps. It is true that the evidence will show that Archibald
5 Hark was a student at Guam Tech and that he met a man there
6 named Paul Lopez. Mr. Hark was at Guam Tech to get educated and
7 to get himself a job - to get his life on track. And Paul Lopez
8 - a federal agent - was also enrolled at Guam Tech, trying to
9 advance in his career. What was left out? The evidence will
10 show Mr. Hark did not meet Paul Lopez by happenstance. Rather,
11 Mr. Lopez targeted Mr. Hark. Targeted him as someone he could
12 use to get his next promotion. Paul Lopez approached Mr. Hark.
13 He didn't tell him that he was a federal agent. He built a
14 friendship with Mr. Hark, and he took advantage of Mr. Hark.
15 The evidence will show that Mr. Hark had no intentions of
16 dealing heroin before he met Paul Lopez. In fact, Mr. Hark had
17 learned his lesson after being arrested for selling marijuana to
18 some friends years before. Agent Lopez turned Mr. Hark into a
19 heroin dealer, into a criminal. That, my friends, is what the
20 law refers to as entrapment -

21 MR. MADSEN: May we approach just a minute?

22 THE COURT: Yes, with the reporter, please.

23 (THE FOLLOWING PROCEEDINGS HELD AT THE BENCH):

1 MR. MADSEN: I did not want to object during the opening
2 statements, but Mr. Desantis should not be testifying in his
3 opening statement.

4 MR. DESANTIS: I was - Please, you did the same thing in your-

5 THE COURT: Right. You need to say witnesses will tell you, the
6 evidence will show that. Blah, blah, blah.

7 MR. DESANTIS: Fine, was this objection sustained?

8 THE COURT: No, this is just a caution to be careful with how you
9 say things.

10 MR. MADSEN: Thank you, your honor.

11 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE
12 PRESENCE OF THE JURY):

13 MR. DESANTIS: The evidence will show that Agent Lopez implanted
14 criminal behavior in Mr. Hark's innocent mind. The evidence
15 will show that Agent Lopez tried hard to get Mr. Hark to deal
16 heroin and Mr. Hark kept saying no, but that Agent Lopez would
17 not give up. The evidence will show that Agent Lopez connected
18 Mr. Hark with a man - a heroin dealer - named Jason Jacobs. It
19 will show that Jason Jacobs is not just any heroin dealer, but a
20 heroin dealer that has retired to work for the government. A
21 heroin dealer who got paid to set Mr. Hark up.

22 The law has a special name for this. When an otherwise innocent
23 person is convinced by the police to commit a crime, the law
24 calls that entrapment. And, if you agree - which I think you

1 will - that Mr. Hark was entrapped by the police here, then you
2 must acquit him. You must recognize that it is not okay for the
3 Government to implant a criminal plan in an innocent person's
4 mind and then later prosecute him for it. It is because Mr.
5 Hark would have been innocent if not for Agent Lopez and Jason
6 Jacobs that you are called here today to do justice and acquit
7 Archibald Hark.

8 THE COURT: All right. Ladies and gentlemen, we're going to take
9 a short recess. Restrooms, and what not. Please remember my
10 admonition to you: Don't discuss the case amongst yourselves,
11 form any opinions about the case, talk to anybody about the case
12 or allow anyone to talk to you about it.

13 (AT 10:18 A.M., THE MORNING RECESS WAS TAKEN UNTIL 10:40 A.M. OF
14 THE SAME DAY)

15 THE COURT: All right. Good morning again, counsel. Is there
16 anything we need to address before we invite the jurors to
17 rejoin us?

18 MR. DESANTIS: No, your honor.

19 MR. MADSEN: No.

20 THE COURT: Let's have the jury.

21 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE
22 PRESENCE OF THE JURY):

23 THE COURT: All right. Be seated. Ladies and gentlemen, thank
24 you. Back on the record in the Hark matter. Mr. Hark is again

1 present before the court with his counsel. The United States is
2 represented. And we have all the members of our jury panel
3 present with us. All right. Mr. Madsen, are you ready to call
4 your first witness?

5 MR. MADSEN: Yes we are, your honor. Thank you.

6 THE COURT: All right. Let's have it then, please.

7 MR. MADSEN: The United States calls Agent Paul Lopez, your
8 honor.

9 THE COURT: All right.

10 PAUL LOPEZ, CALLED AS A WITNESS BY THE UNITED STATES, WAS SWORN
11 AND TESTIFIED AS FOLLOWS:

12 THE CLERK: Please raise your right hand. Do you solemnly swear
13 that the testimony you may give in the cause now pending before
14 this court shall be the truth, the whole truth and nothing but
15 the truth, so help you God?

16 THE WITNESS: I do.

17 THE CLERK: Please be seated and state and spell your first and
18 last names for the record.

19 THE WITNESS: My first name is Paul, spelled P-A-U-L. Last name
20 is Lopez, L-O-P-E-Z.

21 THE COURT: Mr. Madsen.

22 MR. MADSEN: Thank you, your honor.

23 DIRECT EXAMINATION OF PAUL LOPEZ

24 BY MR. MADSEN:

1 Q: Good morning, Mr. Lopez.

2 A: Good morning.

3 Q: Mr. Lopez, could you please tell us who you work for?

4 A: The Drug Enforcement Administration.

5 Q: And what is your job title?

6 A: I am a Special Agent.

7 Q: Okay. And were you a Special Agent on January 1, 2021?

8 A: Yes. I became a Special Agent in mid-2018 and I have
9 been one since then.

10 Q: And where were you stationed on January 1, 2021?

11 A: Here, in Hagatna, Guam. I've been stationed here since
12 I began with the DEA.

13 Q: Mr. Lopez, during your time as a Special Agent, did you
14 ever come across the defendant in this case, Archibald
15 Hark?

16 A: Yes.

17 Q: Could you tell us where you met Mr. Hark?

18 A: I met him at the Guam Technical Institute.

19 Q: Can-- When was that?

20 A: We were enrolled in the same class. It began in early
21 January, 2021. We met shortly after that.

22 Q: Which class were you and the defendant enrolled in?

23 A: Empirical chemical biology.

24 Q: And what was your reason for taking this class?

1 A: I was taking it for the purpose of career advancement.
2 I was hired into the DEA as a GS-7 agent and I was trying
3 to get promoted to GS-9, the next level.

4 Q: Do you remember the first time you met the defendant?

5 A: Yes.

6 Q: Could you tell us the circumstances in which you met
7 him?

8 A: Yes. Before class one day, I overheard the defendant
9 talking to someone-- another classmate. They were talking
10 about dealing drugs.

11 Q: Could you tell us what you heard the defendant say?

12 MR. DESANTIS: Objection your honor. The government is
13 fishing for hearsay and inadmissible character evidence
14 here.

15 MR. MADSEN: Your honor, these statements are plainly
16 admissible as a party admission. Plus, they've raised a
17 defense of entrapment, so the defendant's character is
18 directly at issue here.

19 THE COURT: I'll allow it - overruled.

20 Q: Mr. Lopez, could you tell us what you heard the
21 defendant say?

22 A: I didn't hear the whole conversation. He was talking to
23 another classmate. He said that he used to know every
24 marijuana dealer in the city. And he said that as far as

1 he knew, any half-wit could deal drugs without getting
2 caught.

3 Q: Did he say anything else?

4 A: Yes, he said that he thought Guam's stringent drug laws
5 are absurd.

6 Q: Agent Lopez, what happened next?

7 A: Nothing. Class began. Archie went to the other side of
8 the classroom and sat in his seat.

9 Q: So when did you meet the defendant?

10 A: After that class.

11 Q: How did you meet him?

12 A: Our instructor told us that we would begin labs the next
13 week, so after class I introduced myself and asked Archie
14 if he still needed a lab partner.

15 Q: And what did he say?

16 A: He said that he didn't have a partner, and he'd be happy
17 to pair up with me.

18 Q: Did you say anything else to him?

19 A: Nope. That was it.

20 Q: And what was your next interaction with the defendant?

21 A: The following Monday. We worked together on our first
22 lab.

23 Q: Okay. And when you worked together on this lab, was
24 that in class?

1 A: Yes. All of our labs are just in class.

2 Q: During that first lab, did you and the defendant speak
3 to each other about anything beyond the lab experiment?

4 A: N-Well. No. Not that day. He did not seem
5 particularly interested in getting to know me at the time.
6 He was pretty focused on the lab.

7 Q: Were you lab partners again in the future?

8 A: Oh yes. We were partners for the rest of the semester
9 until Archie got arrested. Labs were usually every other
10 Monday. After the first experiment, Archie always sought
11 me out as a partner.

12 Q: Did you ever discuss topics beyond the substance of your
13 labs?

14 A: Yes. Of course.

15 Q: Did you ever hear the defendant speak about drugs,
16 again?

17 A: Yes.

18 Q: Do you remember the circumstances?

19 A: Yes. It was during our third lab, four weeks later - we
20 were studying cells' responses to various drugs. At one point I
21 casually asked him if he'd ever gotten high, and he said yes.

22 Q: Did you ask him anything else?

23 A: Yes. I asked him if he still smokes and he said,
24 "Yeah." He said something like, "it's not a big deal. Weed's

1 not even criminal any more in California as long as you don't
2 pack more than an ounce. Worst case you get fined 100 bucks."
3 I eventually asked him if he could get me some marijuana and he
4 said, "I used to know all the weed dealers in town. How much
5 are you looking for?"

6 Q: And how did you respond when he asked you how much
7 marijuana you were looking for?

8 A: I said that I was looking for just a gram, and he kind
9 of laughed and said, "Sorry, can't help ya. The guys I know
10 can't make any dough in moving a gram. No one's going to do
11 that, not worth anyone's trouble."

12 Q: And then what happened?

13 A: I thought best to drop it. We just finished up our lab
14 work.

15 Q: Did you ever speak about drugs again?

16 A: Yes.

17 Q: Could you tell us when?

18 A: During our fifth lab about a month later. We were
19 studying the effect of painkillers on the human system. One of
20 the painkillers we were working with was diacetylmorphine - also
21 known as heroin. I figured I'd broach the subject again.

22 Q: What did you say?

23 A: I told him that I had a good friend who's been dealing
24 heroin in Hagatna.

1 Q: And what was the defendant's response?

2 A: I think he said something along the lines of, "your
3 buddy must be crazy, that stuff will get you locked up for
4 years. If you need money to help out your family, like I do,
5 there are a lot of better ways."

6 Q: And what happened next?

7 A: I agreed with him, I told him that it was crazy in some
8 ways to do it.

9 Q: And then?

10 A: I eventually told him that the funny thing is, that the
11 stuff was so addictive that my friend didn't even need to
12 advertise it, and business was off the rails and he was making a
13 killing. I told Archie, "my friend is really doing right by his
14 family and taking care of his responsibilities."

15 Q: And what was the defendant's reaction?

16 A: He asked, "how much"?

17 Q: What did you say?

18 A: I think I said something like, "he's making enough that
19 he's not having any problems making his mom's mortgage
20 payments."

21 Q: And then what happened?

22 A: I think I told him that my friend has been doing it for
23 about two years now and never gotten caught.

24 Q: What was the defendant's response?

1 A: He said something about how this class was supposed to
2 help him earn more money. Then he said, "I'd like to be able
3 help my family the way your friend does." He said his mom had
4 recently broken her leg and the medical bills were "piling up."
5 He sort of sighed and said, "I wish it wasn't so hard." Then he
6 went back to the lab.

7 Q: Did you say anything else?

8 A: Yes. I told him it was really admirable to want to help
9 your family, even if it required tough choices. Then we worked
10 for about twenty minutes without saying anything. Then I told
11 him that my buddy's been looking to expand, looking for a
12 partner. Someone with street smarts.

13 Q: How did the defendant respond?

14 A: I think he just kept working, he seemed pretty deep in
15 thought.

16 Q: When did you next speak to the defendant?

17 A: The following Thursday, I headed over to Langdells, the
18 local coffee shop. I bought an iced latte and as I was leaving
19 I happened to see Mr. Hark sitting alone at the coffee bar,
20 reading for class.

21 Q: Did you approach him?

22 A: Yeah, I went over to say hello. I sat down next to him
23 and said something like, "I'm addicted to iced coffee, but it
24 can't make the difference other drugs can for your family, can

1 it? Ha, ha." I then quickly told him to think about what we'd
2 discussed.

3 Q: Did Hark respond?

4 A: Well, he nodded along pretty closely. And I think he
5 asked again about how much trouble you could get into. But it
6 was a quick conversation.

7 Q: Did the defendant ever talk to you about drugs again?

8 A: Yes. During our next lab, in mid-March. The day before
9 the arrest. At the very start, he said, "give your friend my
10 number", and he handed me a paper with his phone number on it.

11 Q: And what did you say?

12 A: I said alright. That I'd let my friend know.

13 Q: And then what did you do?

14 A: That evening, after our lab, I called our central DEA
15 office. They told me that they had a local informant trained
16 and ready to set up a deal anytime. The next morning, I gave
17 Archie the informant's phone number.

18 Q: Did they tell you the informant's name?

19 A: Yes. It was Jason Jacobs.

20 Q: And when was the next time you saw the defendant?

21 A: I guess it would have been when we arrested him.

22 Q: Could you tell us what you know about the events leading
23 up to that arrest?

1 A: Well, Archie called Jacobs right away, I think later
2 that afternoon.

3 MR. DESANTIS: Objection, your honor. Hearsay and Mr. Lopez
4 clearly has no personal knowledge of these events-

5 THE COURT: Overruled, counsel.

6 Q: And, from your understanding, what transpired from that
7 call?

8 A: Archie and Jacobs set up a time to meet that night and
9 push some heroin.

10 Q: Where was the meeting place?

11 A: The Nieves Library, downtown.

12 Q: And did you tag along?

13 A: No - not with the deal itself. I was set up across the
14 street at a nearby gas station.

15 Q: I am showing you what has been marked as Exhibit P-1,
16 illustrating a bird's eye view of the Nieves library and
17 surrounding buildings. The Nieves Library is marked with the
18 pink pin labeled "A," is that correct?

19 A: Yes.

20 Q: Could you mark on this photograph your position that
21 night?

22 A: Yes.

1 Q: Let the record show that the witness marked with a
2 yellow pin his position at a building just northeast of the
3 library. And, what happened that night?

4 A: We were just camped out nearby in the parking lot of the
5 gas station there. We'd just wait for a text message from
6 Jacobs to know right when the buyer had arrived, and once the
7 sale was made, we'd move in.

8 Q: What time did you get the message from Jacobs?

9 A: About 11:45pm.

10 Q: And what did you do at that time?

11 A: I walked south towards the library, where I encountered
12 Archie walking briskly away from the library. I tackled him,
13 and cuffed him. I told him his rights, and a patrol car took
14 him into the station.

15 Q: Could you please mark with this green pin where that
16 took place?

17 A: Yes. Here.

18 Q: Thank you. Let the record show that he marked a place
19 just east of the library. Between the library and the gas
20 station.

21 Q: Did you search Mr. Hark?

22 A: Yes.

23 Q: Did you find anything on him?

1 A: Yes, I found a roll of one-hundred dollar bills in the
2 amount of nine hundred dollars. I also found a small
3 pocketknife in his pocket.

4 Q: Agent Lopez, did your team arrest anyone else that
5 night?

6 A: Yes.

7 Q: Who was that?

8 A: A Ms. Kathryn Wongchenko.

9 Q: And to your knowledge, was she searched?

10 A: Yes.

11 Q: To your knowledge was anything found on Wongchenko?

12 A: Yes, we found about ten grams of heroin.

13 Q: Let the record show that I am showing Exhibit P-2.
14 Agent Lopez, was this the heroin that was found on Ms.
15 Wongchenko?

16 A: Yes, that looks like it.

17 Q: Thank you Agent Lopez. Your honor, I have no further
18 questions at this time.

19 THE COURT: All right. Mr. Desantis?

20 MR. DESANTIS: Thank you very kindly, your honor.

21 CROSS-EXAMINATION OF PAUL LOPEZ

22 BY MR. DESANTIS:

23 Q: Good morning Mr. Lopez.

24 A: Good morning.

1 Q: You are presently assigned by the Drug Enforcement
2 Administration to the territory of Guam, is that correct?

3 A: Yes.

4 Q: And how long have you been in the Drug Enforcement
5 Administration?

6 A: For one year, this month.

7 Q: And you are a Special Agent?

8 A: Yes.

9 Q: And that is the entry level position for the
10 Administration, correct?

11 A: Yes.

12 Q: That is where everyone starts out.

13 A: Yes.

14 Q: Could you tell us what it involves to qualify to become
15 a Special Agent?

16 A: Sure. First you take an online quiz. It also takes-
17 most people- all the Special Agents I've met have a college
18 degree.

19 Q: What does the online quiz involve?

20 A: Well that's just the start, it's just about five
21 questions to see if you qualify. We also get train-

22 Q: And do you have a college degree?

23 A: Yes.

24 Q: And what was your major?

1 A: Spanish.

2 Q: You mentioned training. What sort of training do you
3 get once you have answered this quiz?

4 A: After you apply, if you are selected by the recruitment
5 office, you go through sixteen weeks of basic training at the
6 Academy in Quantico, Virginia.

7 Q: And at the time you met Archibald Hark, how long had you
8 been with the Administration?

9 A: For about six months.

10 Q: When you spoke with Mr. Madsen just a moment ago, you
11 mentioned that you first noticed Mr. Hark when you heard him
12 talk about marijuana with a friend, is that right?

13 A: Yes.

14 Q: And you hadn't ever seen or heard of Mr. Hark before
15 that point?

16 A: No. I mean, maybe in class.

17 Q: But you didn't know who he was?

18 A: No.

19 Q: And when you overheard him speaking, he said that he
20 knew drug dealers in town, that any half-wit dealer wouldn't get
21 caught, and that he was opposed to stringent drug laws, correct?

22 A: Yes.

23 Q: Did you hear him say that he himself dealt marijuana?

24 A: No. But he told me that later-

1 Q: Please just answer my questions, Mr. Lopez. Did you
2 hear Mr. Hark mention heroin to this classmate?

3 A: No.

4 Q: In fact, before you brought up heroin with Mr. Hark, you
5 had never heard him mention heroin, is that right?

6 A: Yes, that's right.

7 Q: From your limited training and experience so far, Mr.
8 Lopez, do most marijuana dealers also deal heroin?

9 A: No, but-

10 Q: And after you heard my client speak with his friend, you
11 approached him, right?

12 A: Yes.

13 Q: You had never spoken to him before, but you walked
14 across the room at the end of class and asked him to be your lab
15 partner?

16 A: Yes.

17 Q: And you decided at that moment that you were going to
18 see if you could get Mr. Hark to deal heroin?

19 A: No, it wasn't like that.

20 Q: Did you tell Mr. Hark that you were a government agent?

21 A: No.

22 Q: Did you ever tell Mr. Hark that you were a government
23 agent?

24 A: No.

1 Q: Why not?

2 A: He didn't seem interested in my personal life at all.
3 He never asked.

4 Q: Mr. Lopez, during your sixteen weeks of basic training,
5 were you ever trained regarding "entrapment"?

6 A: I think so, yes.

7 Q: Can you clarify - were you trained on entrapment or not?

8 A: Now that I think about it, I don't think we had any
9 training on that.

10 Q: Okay. Mr. Lopez, you mentioned earlier that you were at
11 Guam Tech seeking a promotion - from GS-7 to GS-9, is that
12 right?

13 A: Yes.

14 Q: That's basically seeking a raise, am I right?

15 A: Yes, that would be a pay increase.

16 Q: Did you think that setting up a sting against my client
17 would get you that raise?

18 MR. MADSEN: Objection, your honor.

19 THE COURT: Huh? Why? I'll allow it. Seems relevant to
20 whether or not the defendant was induced.

21 Q: Mr. Lopez, was the reason that you asked my client to be
22 your lab partner because you thought you might get an arrest
23 under your belt and advance within the DEA?

1 A: No. I mean, the fact that he talked about drugs got my
2 attention, but I had no idea that he had actually been a dealer.
3 No idea that he would end up asking to deal heroin.

4 Q: Would you say that you and Mr. Hark became friends?

5 A: I guess so, yeah.

6 Q: And when you told Mr. Hark that you had a good friend,
7 one who deals heroin, was that true?

8 A: Y-

9 Q: Did you have a good friend who deals heroin?

10 A: No, I didn't.

11 Q: So Jason Jacobs, he was not a good friend of yours?

12 A: No.

13 Q: In fact, you had never met Jason Jacobs at that time,
14 had you?

15 A: That's right.

16 Q: You testified earlier that you talked with Mr. Hark at a
17 coffee shop. Did Mr. Hark tell you to leave him alone about
18 selling heroin?

19 A: No way. I would remember that.

20 Q: Did Mr. Hark tell you that he didn't want anything to do
21 with selling heroin?

22 A: Nope.

23 Q: No further questions, your honor.

24 THE COURT: Mr. Madsen?

1 MR. MADSEN: Nothing further, your honor.

2 THE COURT: All right. Agent, thank you very much. You are
3 excused from further testimony. Please don't discuss your
4 testimony with anybody else except the attorneys in this case.

5 THE WITNESS: Thank you, your honor.

6 THE COURT: All right. Ladies and gentlemen, we're going to take
7 a recess for lunch. We'll keep it short and resume in about an
8 hour.

9 (AT 12:15 P.M., THE AFTERNOON RECESS WAS TAKEN UNTIL 1:13 P.M.
10 OF THE SAME DAY)

11 THE COURT: Ok. We're back on with the Hark matter. Mr. Hark is
12 here with counsel and the United States is also here. Let's
13 have the jury, please.

14 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE
15 PRESENCE OF THE JURY):

16 THE COURT: All right. Mr. Madsen, as to the government's next
17 witness?

18 MR. MADSEN: The United States calls Jason Jacobs to the stand,
19 your honor.

20 JASON JACOBS, CALLED AS A WITNESS BY THE UNITED STATES, WAS
21 SWORN AND TESTIFIED AS FOLLOWS:

22 THE CLERK: Please raise your right hand. Do you solemnly swear
23 that the testimony you may give in the cause now pending before

1 this court shall be the truth, the whole truth and nothing but
2 the truth, so help you God?

3 THE WITNESS: I do.

4 THE CLERK: Please be seated and state and spell your first and
5 last names for the record.

6 THE WITNESS: My first name is Jason, spelled J-A-S-O-N. Last
7 name Jacobs, J-A-C-O-B-S.

8 THE COURT: Mr. Madsen.

9 MR. MADSEN: Thank you, your honor.

10 DIRECT EXAMINATION OF JASON JACOBS

11 BY MR. MADSEN:

12 Q: Good afternoon, sir.

13 A: Hey.

14 Q: Mr. Jacobs, could you tell us what you do for a living?

15 A: I am a painter. I paint houses.

16 Q: And what did you do before you were a painter?

17 A: I was a drug dealer.

18 Q: Where?

19 A: Here, in Hagatna.

20 Q: What sort of drugs did you deal?

21 A: The whole lot - mostly crack and tecata.

22 Q: I'm sorry, tecata?

23 A: That's heroin.

24 Q: When did you stop selling drugs?

1 A: When I got picked up by the police for it.

2 Q: Did you serve time?

3 A: Yes.

4 Q: How long?

5 A: Three years.

6 Q: Mr. Jacobs, are you acquainted with Archibald Hark, the
7 defendant in this case?

8 A: Yeah, I know him.

9 Q: Do you remember the circumstances in which you first met
10 him?

11 A: Yeah, I remember.

12 Q: What were those circumstances?

13 A: Ever since I've been outta jail I occasionally do some
14 work for the cops--informant stuff. Cops called me to tell me
15 that I'd get a call from a guy and that I should set up a deal
16 for him. Sure 'nough he called me up the next day and said he
17 wanted to push tecata--heroin.

18 Q: Archie Hark called you and told you that he wanted to
19 deal heroin?

20 A: Yeah.

21 Q: Had you ever spoken to the defendant before that time?

22 A: No.

23 Q: And he just told you that he wanted to do this?

24 A: Yeah.

1 Q: And when the police have someone call you like that,
2 what do you do?

3 A: I tell them that I'll watch them making a smaller sale
4 first. If it goes well, then we can work together to move bigger
5 quantities.

6 Q: So how does that play out?

7 A: I give them the name and number of a local junky who
8 needs drugs, and I tell them to call 'em to set something up.

9 Q: And that's what you did when the defendant called you?

10 A: Yeah.

11 Q: What name did you give the defendant?

12 A: Wongchenko.

13 Q: Kathryn Wongchenko?

14 A: Yeah.

15 Q: And you told the defendant to call her?

16 A: Yeah.

17 Q: And to your knowledge, did he call her?

18 A: Yeah, he called her right after we hung up. Called me
19 back within 10 minutes. Said she wanted ten grams of black tar.

20 Q: Could you tell us what "black tar" is?

21 A: Mexican heroin. The strongest stuff.

22 Q: And the defendant wanted to deal ten grams?

23 A: Yeah.

24 Q: How much does ten grams of black tar heroin sell for?

1 A: Nine hundred bucks. Ninety per gram in Guam.

2 Q: Did the defendant tell you where he planned to meet Ms.

3 Wongchenko?

4 A: Yeah, at Nieves. The Library.

5 Q: Did you tell him to arrange that meeting spot?

6 A: No, he picked it.

7 Q: Did the defendant tell you what time he was going to

8 meet Ms. Wongchenko?

9 A: Eleven pm.

10 Q: Did you pick that time?

11 A: No, he set all that up. Said he would take care of it

12 all, that he knew what he was doing.

13 Q: Okay. And how did you respond to the defendant when he

14 told you the meeting place and time?

15 A: I told him I'd meet him there at ten thirty.

16 Q: And did you meet him there at ten thirty?

17 A: Yes.

18 Q: And did the defendant show up?

19 A: Yeah, he was there first.

20 Q: And what happened after you met?

21 A: He gave me five hundred dollars. I gave him the baggie

22 with ten grams of heroin in it.

23 Q: You gave him ten grams of heroin in a bag?

24 A: Yes.

1 Q: Could you please tell us what happened on the night of
2 March 19 of this year, after you gave the defendant the drugs?

3 A: Uh. Well first we just waited there. Behind the
4 library. I started to tell him how it would go down, but he
5 told me he knows.

6 Q: Ok. And what happened next?

7 A: We just waited. The buyer didn't show at eleven, we
8 waited until about eleven forty pm I think.

9 Q: And did anything happen while you were waiting?

10 A: Nope, not really. We just waited, silent.

11 Q: And when Ms. Wongchenko arrived at eleven forty pm, was
12 the defendant calm at that time?

13 MR. DESANTIS: Objection, your honor. The witness's
14 perception of the defendant's state of mind is-

15 THE COURT: Overruled, counsel.

16 Q: From your perspective, was the defendant calm at the
17 time that Ms. Wongchenko arrived?

18 A: Yup, he was calm.

19 Q: Could you tell us what happened when Ms. Wongchenko
20 finally arrived?

21 A: Yeah. She came and asked for the drugs.

22 Q: Th-

23 A: But Archie got right in her face and said "give me the
24 cash." She handed him a roll of hundreds. Archie took it and

1 gave her the baggie. Then we both walked away going different
2 directions.

3 Q: Then what happened?

4 A: I saw the police coming from both sides and arrest
5 Wongchenko.

6 Q: Mr. Jacobs, how many times had you helped the police out
7 with this sort of sting operation?

8 A: Five or six.

9 Q: From your experience doing that, and from your
10 experience as a heroin dealer before, did Mr. Hark seem like
11 just another dealer to you?

12 A: Just another dealer.

13 Q: No further questions, your honor.

14 THE COURT: Mr. Desantis.

15 MR. DESANTIS: Thank you, your honor.

16 CROSS-EXAMINATION OF JASON JACOBS

17 BY MR. DESANTIS:

18 Q: Mr. Jacobs, you testified that you used to be a heroin
19 dealer, is that correct?

20 A: Yes.

21 Q: You are not still a heroin dealer?

22 A: No. Only when the cops ask for help.

23 Q: Okay. When the police ask you for help, as they did in
24 this case, it's your job to find a buyer, is that right?

1 A: Yeah.

2 Q: And you found Ms. Wongchenko, is that right?

3 A: Yes.

4 Q: And you had Ms. Wongchenko's name ready right when the
5 defendant called you?

6 A: Yeah.

7 Q: You had a buyer ready on the spot, but you no longer
8 engage in the heroin business?

9 A: Yeah, I keep a list ready for police stuff.

10 Q: How do you get this list?

11 A: I know the street. I know all of the junkies and I know
12 all of the sellers, so it's easy.

13 Q: And you knew that Ms. Wongchenko would be interested in
14 buying heroin?

15 A: Yes.

16 Q: How did you know that?

17 A: I used to sell to her sometimes.

18 Q: Okay. Mr. Jacobs, do you know someone named Paul Lopez?

19 A: Yeah, I met him in the last few weeks.

20 Q: Did you know Agent Lopez at all before you met Archibald
21 Hark?

22 A: Before I met Archie? No.

23 Q: Do you consider yourself to be a "friend" of Agent
24 Lopez?

1 A: Hah. Friends? No we're not friends.

2 Q: So if Agent Lopez said that you were his good friend,
3 you would consider that a lie, correct?

4 A: What? I don't get the-

5 Q: Would it be a lie to say that you and Agent Lopez are
6 good friends?

7 A: Yeah. Why would anyone say that? I barely know him.

8 Q: And, before he called you on March 19, did you know
9 Archibald Hark?

10 A: No sir.

11 Q: Had you ever heard of him before?

12 A: No.

13 Q: You mentioned a moment ago that you know everyone in
14 Guam who is involved in the heroin business - all the dealers -
15 but you had never heard of Archibald Hark, right?

16 A: Yeah.

17 Q: Okay. When Mr. Hark called you on March 19, 2021, what
18 exactly did he say to you?

19 A: He said that he wanted to get into tecata, that he
20 wanted to make some cash.

21 Q: Did Mr. Hark use the word tecata?

22 A: N-no - he said heroin.

23 Q: Did he sound to you like he knew anything about the
24 heroin business?

1 A: No, said he'd sold weed before but this'd be his first
2 time dealing heroin.

3 Q: So you told him how everything would go down, right?

4 A: Well, dealing drugs is dealing drugs. Dealing heroin is
5 no different from weed, just more money in it.

6 Q: Mr. Jacobs, you brought the heroin to the library that
7 night, is that right?

8 A: Yeah.

9 Q: And you sold it to Mr. Hark, right?

10 A: Yes.

11 Q: How long was he holding the heroin for?

12 Q: He sold it to Ms. Wongchenko maybe an hour after I sold
13 it to him.

14 Q: Mr. Jacobs, where did you get the black tar heroin, that
15 potent stuff that you handed to Archibald Hark right before the
16 deal?

17 A: The cops provide it.

18 Q: You obtained the heroin from The Drug Enforcement
19 Administration?

20 A: Yeah. They give me a stash that I use for this sort of
21 stuff. When they need my help.

22 Q: Just to make sure I'm getting this right: The DEA asked
23 you to set a deal up with Mr. Hark, gave you the drugs, and you
24 gave them to Mr. Hark?

1 A: Yeah, that's how we always do it. They always give me
2 the drugs.

3 Q: And Mr. Hark paid you five hundred dollars for the
4 heroin, correct?

5 A: That's right.

6 Q: What happened to it?

7 A: Sorry?

8 Q: What did you do with the five hundred dollars you
9 received?

10 A: I kept it. It's part of what I get for being an
11 informant.

12 Q: Mr. Jacobs, do you know what "entrapment" is?

13 A: No, I've- I don't know, no.

14 Q: No one from the DEA has ever talked to you about making
15 sure you don't cross the line and entrap people?

16 A: Don't think so.

17 Q: No further questions, your honor.

18 THE COURT: Any redirect?

19 MR. MADSEN: No, your honor.

20 THE COURT: And your next witness?

21 MR. MADSEN: Subject to receipt of the United States' exhibits
22 into evidence, the United States rests.

23 THE COURT: Exhibits P-1 and P2 will be received into evidence.

24 Ladies and gentlemen, the government has now rested its case

1 against Mr. Hark. At this time, I expect there to be some
2 matters that I must address outside of your presence. This
3 should only take a short amount of time, and then we will have
4 you back. I propose that we stand in recess for thirty minutes--
5 until 3:45 and then we'll have you back. All right.

6 (THE FOLLOWING PROCEEDINGS WERE HELD OUTSIDE THE PRESENCE OF THE
7 JURY):

8 THE COURT: I believe there is going to be a Rule 29 motion here,
9 is that right?

10 MR. DESANTIS: Yes, your honor.

11 THE COURT: Do you want to go ahead on the record please?

12 MR. DESANTIS: Your honor, at this time the defense wishes to
13 move for a judgment of acquittal under Federal Rule of Criminal
14 Procedure 29, on the basis that Mr. Hark was entrapped as a
15 matter of law. Both of the government's witnesses provided
16 ample testimony that my client was induced by the government and
17 lacked any prior disposition to commit this crime.

18 THE COURT: All right. All right. The Court has heard the
19 evidence in this case up until this point. My inclination is
20 that the evidence is sufficient to sustain a conviction and that
21 should be left to the jury. At this time, I will reserve
22 judgment on the motion so that we may proceed with the trial. I
23 will rule on the motion at the end of this proceeding.

24 MR. DESANTIS: Thank you, your honor.

1 THE COURT: Anything else?

2 MR. DESANTIS: No, your honor.

3 MR. MADSEN: No, your honor.

4 THE COURT: Okay, well, I'm going to hit the restroom. Let's
5 have the jury back here in 15 minutes.

6 (AT 3:28 P.M., RECESS WAS TAKEN UNTIL 3:45 P.M. OF THE SAME DAY)

7 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE
8 PRESENCE OF THE JURY):

9 THE COURT: All right. Thank you, ladies and gentlemen. Please
10 be seated. And let the record reflect that we have now been
11 rejoined by all the members of our jury panel. Good to see you
12 all again. At this point, Mr. Desantis, you may call the
13 Defense's first witness.

14 MR. DESANTIS: Thank you very kindly, your Honor. Good afternoon,
15 your Honor. Good afternoon, ladies and gentlemen.

16 THE JURY: Good afternoon.

17 MR. DESANTIS: Your honor, the first witness the Defense will
18 call is the defendant, Mr. Archibald Hark.

19 THE COURT: Mr. Hark, will you come forward please.

20 ARCHIBALD HARK, CALLED AS A WITNESS BY THE DEFENSE, WAS SWORN
21 AND TESTIFIED AS FOLLOWS:

22 THE CLERK: Please raise your right hand. Do you solemnly swear
23 that the testimony you may give in the cause now pending before

1 this court shall be the truth, the whole truth and nothing but
2 the truth, so help you God?

3 THE WITNESS: Yes sir. I do.

4 THE CLERK: Please be seated and state and spell your first and
5 last names for the record.

6 THE WITNESS: My first name is Archibald. A-R-C-H-I-B-A-L-D.

7 And my last name is Hark. H-A-R-K.

8 THE COURT: Mr. Desantis, you may proceed.

9 MR. DESANTIS: Thank you, your honor.

10 DIRECT EXAMINATION OF ARCHIBALD HARK

11 BY MR. DESANTIS:

12 Q: Good afternoon Mr. Hark.

13 A: Good afternoon.

14 Q: Mr. Hark, what was your occupation in January of this
15 year?

16 A: I was a student. At Guam Tech.

17 Q: Why did you decide to study at Guam Tech?

18 A: I was trying to get an education so that I could get a
19 better job, support my family more. Also, my mom's been unable
20 to work because of her leg and there are more and more bills to
21 deal with.

22 Q: What was your previous job? Before you enrolled at Guam
23 Tech?

1 A: I was a custodian at the Dulce Nombre de Maria
2 Cathedral.

3 Q: You worked at the church, here in Hagatna?

4 A: Yes.

5 Q: And you enrolled at Guam Tech because you wanted a new
6 job?

7 A: Yes.

8 Q: What job?

9 A: I wanted to qualify to become a lab assistant.

10 Q: Were you having trouble getting that job while you were
11 a custodian?

12 A: Yes.

13 Q: Why?

14 A: Most lab technicians have more than a high school
15 education—I've only graduated high school, no college. Also,
16 several years ago I was convicted for dealing marijuana. I
17 tried really hard to find a job, but most labs said that I need
18 to take more courses. So I enrolled in the Chemical Technician
19 program at Guam Tech.

20 Q. Okay. Mr. Hark, when were you bor-how old are you?

21 A: I was born in 1997. I'm 24 years old.

22 Q: And when were you convicted for dealing marijuana?

23 A: Once in 2015.

24 Q: So when you were 18 years old?

1 A: Yes.

2 Q: Did you plead guilty?

3 A: Yes. I admitted my wrongs.

4 Q: Did you spend time in prison?

5 A: No, I spent 4 months under house arrest with an
6 electronic monitor. Then I was under probation for three years
7 and I did 200 hours community service at Dulce Nombre de Maria
8 Cathedral.

9 Q: And have you dealt marijuana since 2015?

10 A: No. Never.

11 Q: When you used to deal marijuana, did you ever deal other
12 drugs as well?

13 A: No sir. It wasn't running anything serious, basically
14 buying and selling marijuana to my pals.

15 Q: Okay. When were you supposed to graduate as a Chemical
16 Technician from Guam Tech?

17 A: May of this year.

18 Q: Mr. Hark, when you were at Guam Tech did you meet
19 someone by the name of Paul Lopez?

20 A: Yes.

21 Q: Could you tell us the circumstances in which you met
22 Paul Lopez?

1 A: He came up to me after class one day and introduced
2 himself. He said that he did not have a lab partner and asked
3 me if I would be his partner.

4 Q: What was your response?

5 A: I said that I didn't have a partner, and that I guess
6 I'd join him.

7 Q: Had you ever met or spoken to him before?

8 A: Never.

9 Q: When Paul Lopez introduced himself to you, did he tell
10 you that he was a federal agent?

11 A: No, he did not.

12 Q: Did Mr. Lopez ever tell you that he was a federal agent?

13 A: Not until he tackled and arrested me.

14 Q: Would you say that you and Mr. Lopez became friends over
15 the course of being lab partners?

16 A: Yes. I considered him a friend. We always seemed to be
17 sitting near each other when it was time to pair up for labs, so
18 we always paired up.

19 Q: Mr. Hark, before you met Mr. Lopez, had you ever
20 considered dealing heroin?

21 A: Never.

22 Q: Mr. Hark, do any of your own friends deal heroin?

23 A: No.

1 Q: Have you ever been in the same room as someone selling
2 or using heroin?

3 A: Not that I know of.

4 Q: So it was Mr. Lopez who, for the first time in your
5 life, connected you with a heroin dealer?

6 A: Yes.

7 Q: Mr. Hark, why did you tell Agent Lopez that you would
8 help his friend deal heroin?

9 A: Paul told me a couple times that there was tons of money
10 in it. And he told me that I wouldn't get caught. He sketched
11 the whole thing out.

12 Q: What happened the first time Agent Lopez brought up
13 dealing heroin?

14 A: Paul said he had a friend who dealt and had been able to
15 support his family. He told me his friend was being
16 responsible, like, you know, stepping up. I said I wasn't
17 interested but he said his friend never got caught and was
18 looking for someone to help.

19 Q: Did Agent Lopez discuss dealing heroin with you a second
20 time?

21 A: Yes, we ran into each other at Langdells a few days
22 later. He actually pitched me pretty hard. He called it a
23 "foolproof plan," talked about my mom, and even wrote down on a
24 napkin what he thought I could earn.

1 Q: How long did this conversation continue?

2 A: I'm not sure. Several minutes I guess.

3 Q: How did you feel about Agent Lopez's proposition?

4 A: Well, I knew that heroin wasn't anything to mess around
5 with but the money he mentioned was definitely attractive.
6 Things have been tough recently. Also, he made it all sound so
7 easy.

8 Q: What did you say to Agent Lopez?

9 A: I told him to leave me alone about this. I told him I
10 didn't want to have anything to do with selling heroin.

11 Q: Alright. When did you next discuss heroin with Agent
12 Lopez?

13 A: At our next lab, I told him to have his friend give me a
14 call. I guess I figured that I had enough experience on the
15 street to help his friend and get away with it, too.

16 Q: Why the change of heart?

17 A: The night before the lab, my mom told me that her
18 doctor's office called and told her that her insurance wouldn't
19 cover her treatment anymore, so she'd need to pay out of pocket.
20 I figured that selling heroin was the only way that I could get
21 the money I needed to pay my mom's medical bills.

22 Q: And what happened next?

23 A: The next day, Lopez gave me the phone number for Jason
24 Jacobs, the guy he said was his dealer friend. I called up

1 Jacobs and he gave me the number of someone to sell to as a
2 test.

3 Q: What name did he give you?

4 A: Kathryn Wongchenko.

5 Q: And he gave you her phone number?

6 A: Yes.

7 Q: And you were under the impression that Jason Jacobs was
8 Mr. Lopez's good friend, is that right?

9 MR. MADSEN: Objection your honor, leading question.

10 THE COURT: It's fine. I'll allow it.

11 A: Yes.

12 Q: And Jason Jacobs - a man you thought was Mr. Lopez's
13 good friend - put you in contact with Ms. Wongchenko, who wanted
14 to buy heroin?

15 A: Yes, he instructed me to call her and set up a deal.

16 Q: And you followed his instruction?

17 A: Yes.

18 Q: And you set up a deal with Ms. Wongchenko for that
19 night?

20 A: Yes.

21 Q: And you called Jason Jacobs back to tell him about the
22 deal?

23 A: Yes.

24 Q: And what did he say?

1 A: He said that he would meet me at the library at 10:30.

2 Q: Did you meet with Jacobs that night?

3 A: Yes, we met at 10:30, before the deal.

4 Q: Did you bring any drugs with you to the library that
5 night?

6 A: Me? No. Ja-

7 Q: What happened when you met?

8 A: Jacobs sold me a baggie of heroin for five hundred
9 dollars that I was supposed to sell to Ms. Wongchenko for nine
10 hundred.

11 Q: And then you went to meet with Ms. Wongchenko?

12 A: Yes.

13 Q: And when Ms. Wongchenko arrived, what happened?

14 A: She asked me for the drugs. I asked her for the money.
15 After she paid me, I gave her the baggie.

16 Q: How long would you say you carried those drugs for?

17 A: Maybe like half an hour.

18 Q: And after you gave her the money, what did you do?

19 A: I walked up the street, north, where I got mobbed and
20 arrested by a bunch of police.

21 Q: Was Agent Lopez one of those officers?

22 A: Yes.

23 Q: Were you surprised to see him there?

1 A: Absolutely. I had no idea what was going on. It took
2 me a while to realize that I had been set up.

3 Q: No further questions, your honor.

4 THE COURT: Mr. Madsen.

5 MR. MADSEN: Yes. Thank you, your honor.

6 CROSS-EXAMINATION

7 BY MR. MADSEN:

8 Q: Hello Mr. Hark.

9 A: Hello.

10 Q: Mr. Hark, is it true that on July 16, 2015 you were
11 arrested?

12 A: Yes.

13 Q: What were you arrested for?

14 A: Selling marijuana.

15 Q: How much marijuana did you sell?

16 A: A few grams.

17 Q: And you were charged?

18 A: Yes.

19 Q: And you pled guilty, is that right?

20 A: Yes.

21 Q: Mr. Hark, you testified that you met Agent Paul Lopez in
22 one of your classes and became lab partners with him and that
23 you had never met him before that time, is that correct?

24 A: Yes.

1 Q: How many labs did you complete with Agent Lopez before
2 you were arrested on March 19?

3 A: Five or six.

4 Q: Was it five, or six?

5 A: Let's see. Six.

6 Q: How long on average was each lab?

7 A: We worked for something like seven or eight hours on
8 each.

9 Q: Did you ever hang out with Agent Lopez outside of those
10 labs?

11 A: Not really. I spoke with him one time at Langdells, the
12 coffee place.

13 Q: Did you and Agent Lopez have any mutual friends?

14 A: No.

15 Q: So you didn't know Agent Lopez very well?

16 A: Well we worked together for six labs, over the course of
17 many weeks, so we-

18 Q: Mr. Hark, do you remember speaking with Agent Lopez
19 about marijuana during one of your labs - telling him that you
20 smoke marijuana and knew every dealer in town?

21 A: Yes, I do.

22 Q: When was that?

23 A: It was during our third lab.

24 Q: And that was this year?

1 A: Yes.

2 Q: But you no longer deal marijuana, is that right?

3 A: Yes.

4 A: And you were willing to talk about heroin with someone
5 so soon after meeting them?

6 Q: He brought it up.

7 Q: Do you remember when you first spoke with Agent Lopez
8 about dealing heroin?

9 A: Yeah, it was the lab two weeks before I got arrested.

10 Q: That was your fifth lab?

11 A: Yes.

12 Q: So you agreed to deal heroin with his friend, even
13 though you had only worked with him on five separate occasions?

14 A: Actually, I only agreed during the sixth lab. I had no
15 reason not to trust him. And he told me I could make a ton
16 without getting caught. I thought we felt the same way about
17 family responsibilities and he knew my mom was counting on me.

18 Q: And you were ready to start dealing heroin whenever his
19 friend would have you?

20 A: Yeah. He tol-

21 Q: Mr. Hark, have you ever been asked to deal heroin
22 before?

23 A: No.

1 Q: So the first person who asked you to start dealing
2 heroin - you said yes to him, that's right?

3 A: I suppose-

4 Q: And when you spoke with Jason Jacobs, did you talk about
5 how much money you would get?

6 A: Yeah.

7 Q: How much did he say you would make?

8 A: He said that if I became his partner part-time I'd make
9 fifteen hundred dollars per week.

10 Q: And you agreed to set up the deal?

11 A: Yes.

12 Q: And when you called Ms. Wongchenko - who came up with
13 the location for the drug deal?

14 A: I picked the library.

15 Q: And who chose eleven pm as the meeting time?

16 A: Me.

17 Q: No further questions, your honor.

18 THE COURT: All right. Mr. Desantis, how long do you expect?
19 Shall we take a recess now?

20 MR. DESANTIS: I have only a few additional questions, your
21 honor.

22 THE COURT: Okay, then let's get that in.

23 REDIRECT EXAMINATION

24 BY MR. DESANTIS:

1 Q: Mr. Hark, how much money did you make as a custodian at
2 the Cathedral?

3 A: Basically minimum wage. About \$350 per week.

4 Q: And when Paul Lopez asked you to join his friend, you
5 took two weeks before you got back to him, is that right?

6 A: Yes.

7 Q: Why did you take so long?

8 A: Fifteen hundred dollars is a lot of money. I didn't
9 want to do it. I didn't. But my family has never had money like
10 that and we really need it these days what with my mom's
11 condition.

12 Q: Nothing further, your honor.

13 THE COURT: Okay. Will the defense be calling any other
14 witnesses?

15 MR. DESANTIS: Your Honor, I'm very pleased to say that we have
16 no further testimony to present at this time, and as difficult
17 as it is, the Defense does rest at this point. Thank you, your
18 Honor.

19 THE COURT: Okay. Let's rest today. Tomorrow we'll begin with
20 any stipulations that both parties agree on, then we will have
21 summation arguments and let our jurors begin deliberation.
22 Jurors, please remember all of my admonitions to you. Don't
23 discuss the case amongst yourselves, don't form any opinions
24 about the case, don't allow anybody to communicate with you with

1 regard to the case, don't conduct any deliberations until the
2 matter has been submitted to you. As far as the jury is
3 concerned, we'll stand in recess until tomorrow at 9:00 A.M.

4 (AT 4:44 P.M., AN ADJOURNMENT WAS TAKEN UNTIL JULY 9, 2021, 9:00
5 A.M.)

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF GUAM

3
4 THE HON. JUDGE E. HO MATHEWS, JUDGE PRESIDING

5
6 UNITED STATES OF AMERICA,)
7)
8 Plaintiff,)
9)
10 v.) NO. 1:21-cr-00020
11)
12)
13 ARCHIBALD H. HARK,)
14)
15 Defendant.)
16 _____)
17

18
19 REPORTER'S TRANSCRIPT OF PROCEEDINGS

20 Hagatna, Guam

21 July 9, 2021

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28 Roy R. Williams, CSR 1650 - Official Reporter
29 U.S. District Court of Guam
30 520 West Soledad Avenue
31 Hagatna, Guam 96910

1 **APPEARANCES :**

2
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1 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, OUT OF THE
2 PRESENCE OF THE JURY):

3 THE COURT: All right. Back on the record in the Hark matter.
4 Mr. Hark is again present before the Court with counsel, Mr.
5 Desantis. The United States are represented by Mr. Madsen. The
6 jury is not present. Counsel, have you agreed to any
7 stipulations for the jury before we move to closings?

8 MR. MADSEN: Yes, your honor.

9 THE COURT: Okay. We'll start with those and then have your
10 statements. I'm hoping this doesn't need to be said, but let's
11 keep things quick and short. Everything is fresh in the jury's
12 mind. No need for a closing statement that takes us the whole
13 day.

14 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT, IN THE
15 PRESENCE OF THE JURY):

16 THE COURT: Thank you, ladies and gentlemen. Please be seated.
17 Let the record reflect that we have been rejoined by all the
18 members of our jury panel. Good morning again, ladies and
19 gentlemen. And, Mr. Madsen, are you prepared to offer some
20 stipulations at this time?

21 MR. MADSEN: Yes I am, your honor. Thank you.

22 THE COURT: Okay.

23 MR. MADSEN: First stipulation, counsel, with respect to Mr.
24 Jason Jacobs. May it be stipulated that Mr. Jacobs was a

1 government informant, effectively acting as an agent of the
2 government in all of his communications with the defendant.

3 THE COURT: Counsel, may it be so stipulated?

4 MR. DESANTIS: So stipulated, your honor.

5 Mr. MADSEN: And does the court receive the stipulation, your
6 honor?

7 THE COURT: Thank you, counsel. The Court will receive and
8 accept the stipulation. And ladies and gentlemen, as you have
9 previously been informed, a stipulation is an agreement between
10 the parties as to the facts of the case. Mr. Madsen.

11 MR. MADSEN: Thank you, your honor. We have no further
12 stipulations.

13
14 [The Court proceeded to instruct the jury on the law that
15 applies to the case. The jury instructions have been omitted
16 from the record, as the parties agree that there was no error in
17 the jury instructions.]

18
19 THE COURT: Mr. Madsen, on behalf of the United States, is the
20 Prosecution prepared to proceed with their closing argument?

21 MR. MADSEN: Yes, your honor, we are.

22 THE COURT: You may proceed.

23 MR. MADSEN: Thank you, your honor.

24 CLOSING ARGUMENT BY MR. MADSEN

1 MR. MADSEN: Good morning, ladies and gentlemen.

2 THE JURY: Good morning.

3 MR. MADSEN: Ladies and gentlemen, thank you. At the beginning
4 of this trial, I stood before you and told you many things that
5 we would show you. We showed you those things. We have
6 overcome our burden.

7 Now you heard from three people yesterday who told you their
8 stories. What's amazing is, and I hope you noticed, how similar
9 those stories are. I hope you noticed that the people you've
10 heard from agree on a lot. They all agree that the defendant
11 said yes to dealing heroin. They all agree that the defendant
12 showed up of his own volition and they all agree that, on March
13 19, 2021, the defendant dealt heroin to Ms. Kathryn Wongchenko.
14 That's a crime, ladies and gentlemen.

15 Now, the defendant wants you to believe that he was induced.
16 That Agent Lopez and Jason Jacobs trapped him into committing
17 this crime. But think about how little these two people did
18 here. Agent Lopez basically said, "Want to deal heroin?" and
19 the defendant said yes. Maybe he paused for two weeks to crunch
20 the numbers or pull together some money, but he said yes.

21 Ladies and gentlemen, would you say yes to that offer? I don't
22 think so.

23 That's this case. That's it. It's about our expectations. We
24 expect our police officers, like Agent Lopez, to keep their eyes

1 and ears open for people who lack respect for the law. Agent
2 Lopez understood his responsibilities here. He acted
3 responsibly. He met his expectation.
4 We also, however, expect citizens to follow the law. And that's
5 where we were let down here. The defendant, Archibald Hark, did
6 not meet that expectation. And quite simply, that is why he is
7 guilty.

8 THE COURT: Okay. Mr. Desantis?

9 CLOSING ARGUMENT BY MR. DESANTIS

10 MR. DESANTIS: Good morning, ladies and gentlemen.

11 THE JURY: Good morning.

12 MR. DESANTIS: Ladies and gentlemen, Archibald Hark was entrapped
13 by Agent Lopez and Jason Jacobs. Let me help you see why. Here
14 is the question I want you to think about: If Agent Lopez never
15 approached Mr. Hark after class that day, would we be sitting
16 here today? Would Mr. Hark have dealt heroin? The prosecution
17 speaks about expectations, and I think we would have to expect
18 that answer to be no. How do we know this? It is because we
19 know two important things: First, the government planted this
20 idea in Mr. Hark's head and second, Mr. Hark had no inclination
21 to do this otherwise.

22 Mr. Hark was enrolled at Guam Tech trying to better
23 himself, trying to get a job as a chemical technician, trying to
24 earn more money to support his family and particularly his

1 injured mother. But, because Agent Lopez had a plan to do some
2 career advancement of his own, a plan to get Mr. Hark to commit
3 a crime, Mr. Hark is sitting before us today with the
4 possibility of some serious punishment. Agent Lopez didn't just
5 say "want to deal heroin?" Agent Lopez earned Mr. Hark's trust.
6 He actively persuaded Mr. Hark to say yes. He said that his
7 good friend was making tons of money, was admirably supporting
8 his family, and would not get caught. He wanted Mr. Hark to say
9 yes.

10 That's what happened here. That's not what law enforcement
11 is all about. It's not about picking on the weak and getting us
12 to commit crimes that we wouldn't otherwise commit. That's not
13 what we stand for, and it's not what our criminal justice system
14 allows. For this reason, ladies and gentlemen, you must acquit
15 Archie Hark.

16 THE COURT: Ladies and gentlemen, I have not intended by anything
17 that I have said or done or by any questions that I may have
18 asked or by any of the rulings that I have made in your presence
19 to intimate or suggest what you should find to be the facts or
20 that I believe or disbelieve any of the witnesses. If anything
21 that I have done during the course of this trial or said has
22 seemed to so indicate to you, you will disregard it and form
23 your own conclusion. The instructions which I have given to you
24 will be made available in written form for your deliberations.

1 The attitude and conduct of jurors at all times are very
2 important. It is rarely helpful for a juror at the beginning of
3 the deliberations to express an emphatic opinion on the case or
4 to announce a determination to stand for a certain verdict.
5 When one does that at the outset, a sense of pride may be
6 aroused and one may hesitate to change a position even if it is
7 shown to be wrong. Remember that you are not partisans or
8 advocates in this matter. You are the impartial judges of the
9 facts. During the periods of recess, you must not discuss with
10 anyone any subject connected with this trial and you must not
11 deliberate further upon the case until all 12 of you are
12 together and reassembled in the jury room. Once the clerk or
13 the bailiff has been notified that the jury has reassembled, you
14 may continue your deliberations.
15 You shall now retire and select one of your number to act as
16 Foreperson. He or she will preside over your deliberations. In
17 order to reach a verdict, all 12 jurors must agree as to the
18 decision and as to any finding you have been instructed to
19 include in your verdict. As soon as all of you have agreed upon
20 a verdict so that when polled, each may state truthfully that
21 the verdict expresses his or her vote, have it dated and signed
22 by your Foreperson and then return with the verdict to this
23 courtroom. Alright, Sergeant Mathis, could you please escort the
24 jury to the jury room?

1 SERGEANT MATHIS: Yes, your honor.

2 (At 12:35 P.M., an adjournment was taken until 2:55 P.M)

3 THE COURT: All right. Thank you, ladies and gentlemen. Please
4 be seated. Let the record reflect that we have been rejoined by
5 all the members of our jury panel, including our two alternates.
6 Good afternoon again, ladies and gentlemen.

7 THE JURY: Good afternoon.

8 THE COURT: Ladies and gentlemen, while we were taking our brief
9 recess, Mrs. Robertson advised me that you buzzed three times
10 and indicated after receiving the verdict forms that you have
11 reached a verdict in this case. Is that correct, Madam Foreman?

12 JUROR NO. 1: Yes.

13 THE COURT: All right. Ladies and gentlemen, I'm going to ask
14 that--I've asked already that your foreman place the verdict
15 forms--and ma'am foreman, have you signed and dated one set of
16 verdict forms?

17 JUROR NO. 1: Yes, I have.

18 THE COURT: Would you hand those, please, to Deputy Sharon. All
19 right. Thank you. All right. Ladies and gentlemen of the
20 jury, I'm going to ask that you carefully listen to the verdicts
21 as they are being read by the clerk, as after the verdicts have
22 been read, you will be asked if these are your verdicts. And I
23 would caution the audience during the course of the reading of
24 these verdicts to remain calm and that any--if there is any

1 disruption during the reading of the verdicts, the bailiffs will
2 have the obligation to remove any persons disrupting these
3 proceedings. All right. Mr. Hark, would you please stand and
4 face the jury.

5 THE CLERK: "United States District Court for the District of
6 Guam. In the matter of the United States of America versus
7 Archibald H. Hark, case number CR00020. We, the jury, in the
8 above-entitled action, find the Defendant, Archibald H. Hark,
9 guilty of the crime of distribution of more than ten grams of
10 heroin in violation Title 21 U.S.C. Section 841(a)(1)."

11 THE COURT: All right. Counsel, Mr. Simpson, would you be
12 seated, please. Let's have it quiet in the courtroom, please.
13 Mrs. Pappone, would you please poll the jurors.

14 THE CLERK: Juror no. 1, as to Count I, is this your verdict?

15 JUROR NO. 1: Yes.

16 THE CLERK: Juror no. 2, as to Count I, is this your verdict?

17 JUROR NO. 2: Yes.

18 THE CLERK: Juror no. 3, as to Count I, is this your verdict?

19 JUROR NO. 3: Yes.

20 THE CLERK: Juror no. 4, as to Count I, is this your verdict?

21 JUROR NO. 4: Yes.

22 THE CLERK: Juror no. 5, as to Count I, is this your verdict?

23 JUROR NO. 5: Yes.

24 THE CLERK: Juror no. 6, as to Count I, is this your verdict?

1 JUROR NO. 6: Yes.

2 THE CLERK: Juror no. 7, as to Count I, is this your verdict?

3 JUROR NO. 7: Yes.

4 THE CLERK: Juror no 8, as to Count I, is this your verdict?

5 JUROR NO. 8: Yes.

6 THE CLERK: Juror no. 9, as to Count I, is this your verdict?

7 JUROR NO. 9: Yes.

8 THE CLERK: Juror no. 10, as to Count I, is this your verdict?

9 JUROR NO. 10: Yes.

10 THE CLERK: Juror no 11, as to Count I, is this your verdict?

11 JUROR NO. 11: Yes.

12 THE CLERK: Juror no. 12. as to Count I, is this your verdict?

13 JUROR NO. 12: Yes.

14 THE COURT: All right. The clerk is directed to record the
15 verdict as read. Ladies and gentlemen, I want to take this
16 opportunity to publicly thank you for the service that you've
17 given to us. I am now going to excuse you from further service
18 on this case.

19 (The following proceedings were held in open court, out of the
20 presence of the jury):

21 THE COURT: All right. Let's everybody have a seat, please. Mr.
22 Madsen and Mr. Desantis, anything else we need to take up?

1 MR. DESANTIS: At this time, the defense would like to move for
2 judgment notwithstanding the jury verdict, on the basis that the
3 defendant was entrapped as a matter of law.

4 THE COURT: Understood. All right. I will take that motion
5 under advisement and withhold any ruling right now. If that's
6 all, we will be in touch about the order on that and then
7 sentencing.

8 THE COURT: All right. Then we stand in recess.

9 (Proceedings concluded.)

10 **HATAGNA, GUAM; JULY 9, 2021; 3:44 P.M.**

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF GUAM

3
4 THE HON. JUDGE E. HO MATHEWS, JUDGE PRESIDING

5
6 UNITED STATES OF AMERICA,)
7)
8 Plaintiff,)
9)
10 v.) NO. 1:21-cr-00020
11)
12)
13 ARCHIBALD H. HARK,)
14)
15 Defendant.)
16 _____)
17

18
19 REPORTER'S TRANSCRIPT OF PROCEEDINGS

20 Hagatna, Guam

21 July 13 2021

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27
28 Roy R. Williams, CSR 1650 - Official Reporter
29 U.S. District Court of Guam
30 520 West Soledad Avenue
31 Hagatna, Guam 96910

1 **APPEARANCES :**
2

3 FOR THE PLAINTIFF:

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5 ASSISTANT UNITED STATES ATTORNEY

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7 OF GUAM

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16 400 ROUTE 8, SUITE 501

17 MONGMONG, GU 96910

18 (671) 442-3128
19
20
21
22
23
24

1 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

2 THE COURT: All right. Back on the record in the Hark matter.
3 Mr. Hark is again present before the Court with counsel, Mr.
4 Desantis. The United States is represented by Mr. Madsen. Mr.
5 Desantis, I understand that you would like to make a special
6 motion?

7 MR. DESANTIS: Yes, your honor. Thank you. At this time, the
8 defense moves under Federal Rule of Criminal Procedure 33 for a
9 new trial on the basis of newly discovered evidence.

10 THE COURT: Could you explain what newly discovered evidence you
11 have come across?

12 MR. DESANTIS: Yes, your honor. Three pieces of evidence. Three
13 affidavits. The first affidavit is from Sophia Brooks. Ms.
14 Brooks in her affidavit states that she was a classmate of the
15 defendant and Agent Paul Lopez. She further states that during
16 one of the first classes in January, she saw Agent Lopez
17 examining what appeared to be a mugshot of my client, Mr. Hark.
18 She further states that on a morning in early March, 2021, she
19 heard Agent Lopez speaking on the phone with the DEA. She heard
20 him make several statements suggesting that he had the motive of
21 entrapping Mr. Hark. She further states that on several
22 occasions she observed Agent Lopez jockeying for position so as
23 to pair up with Mr. Hark during labs.

1 THE COURT: Ok. And Ms. Brooks, why didn't she come forward at
2 trial?

3 MR. DESANTIS: As she states in her affidavit, although she was
4 aware of the trial, she did not realize that her knowledge would
5 have been material until the day after trial. That is when she
6 contacted me and provided her statement.

7 THE COURT: Mr. Madsen, do you have anything to say to the court?

8 MR. MADSEN: Yes, your honor. We would just submit that Ms.
9 Brooks, as a classmate of the defendant, should have been an
10 obvious candidate for interview in this case. The mere fact
11 that the defendant failed to interview her should not force us
12 to try this case again.

13 THE COURT: All right. Mr. Desantis, why did you not reach out to
14 Ms. Brooks?

15 MR. DESANTIS: Your honor, I had the Dean of Students at Guam
16 Tech send an email soliciting information about this case to
17 every student enrolled in Mr. Hark's class. The email included
18 my contact information, including my personal cell. I also
19 personally interviewed a few of Mr. Hark's classmates in
20 preparing for trial, but I did not have time to interview every
21 classmate. We had no idea that Ms. Brooks had such useful
22 information.

23 THE COURT: Did you have a list of all of the defendant's
24 classmates?

1 MR. DESANTIS: Yes, your honor. We had the same list used by the
2 Dean's office to send the email asking students for information.
3 But we had names only.

4 THE COURT: Was Ms. Brooks' name on that list?

5 MR. DESANTIS: Yes, it was.

6 THE COURT: Okay. And the second piece of evidence?

7 MR. DESANTIS: Your honor, the second piece is an affidavit from
8 Merry Boak, a barista at Langdells. She was working at the
9 coffee bar, observed Agent Lopez and overheard the conversation
10 between Lopez and Archie Hark.

11 THE COURT: What is the third piece of evidence?

12 MR. DESANTIS: Your honor, the third affidavit is the most
13 alarming yet. Mr. Hark's mother's doctor has come forward to
14 reveal that Agent Lopez coerced him into having his staff tell
15 the mother that insurance would no longer cover her treatment.
16 We didn't know about this until after trial. It is really
17 pretty shocking.

18 THE COURT: Ok. I will review the documents and issue an order.
19 Anything else?

20 MR. DESANTIS: Your honor, we just point out that we are still
21 awaiting your disposition on our motion to acquit
22 notwithstanding the verdict.

23 THE COURT: Okay. I know. I will rule on that at the same time.
24 If that is all, we will recess.

1 (Proceedings concluded.)

2 HAGATNA, GUAM; JULY 13, 2021.

EXHIBITS

EXHIBIT P-1

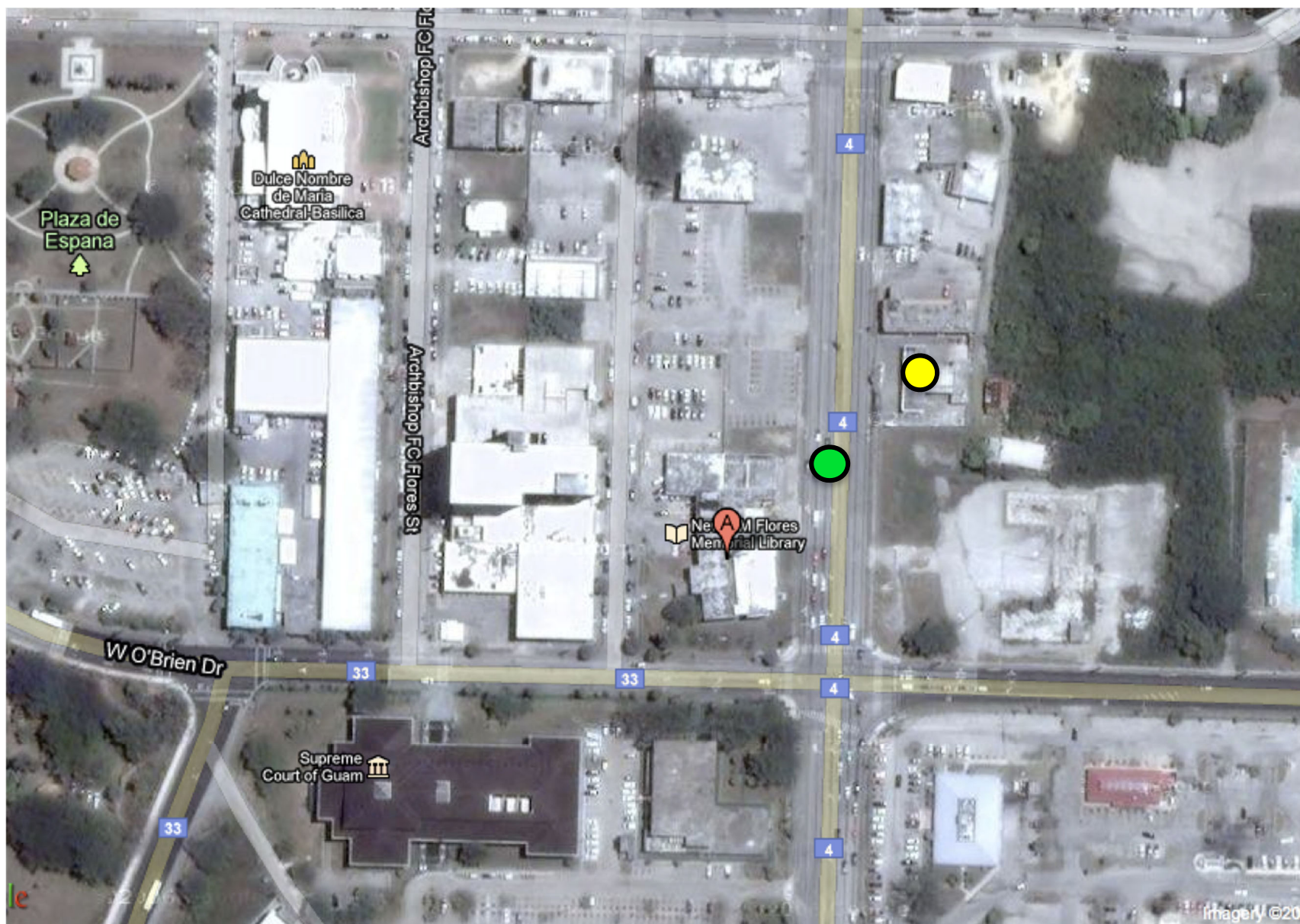


EXHIBIT P-2



In the United States District Court for the District of Guam

UNITED STATES OF AMERICA,)	
	)	<u>AFFIDAVIT OF SOPHIA BROOKS</u>
Plaintiff,)	
)	
v.	)	1:21-cr-00020
)	
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

Sophia Brooks, being of full age, on her oath, deposes and says:

1. From January 2021 to March 2021, I was a classmate of Paul Lopez and Archibald H. Hark, defendant in the above matter.
2. Archibald Hark and I have met several times in class and exchanged formalities several times in the past. We have never met outside of class.
3. Paul Lopez and I have never spoken to each other before. However, I am aware of who he is from his participation in class.
4. During one of the first classes—in early January—I observed Paul Lopez examining what looked to me like a full-page mugshot of Archibald Hark. He looked down at the photograph and then up at Archibald Hark several times and then put the photograph out of sight.

5. One morning in early March 2021, at 7:00 A.M., I was having a cigarette outside of Guam Technical Institute's main building and I heard Paul Lopez engage in a phone call.
6. During this conversation, Paul Lopez appeared to be speaking to a member of the Drug Enforcement Administration. I heard Mr. Lopez say the following statements: "Yes, he wasn't biting last time, but I'm gonna try and turn up the volume later today. I know he doesn't want to be a custodian forever. Maybe I can play up the family angle. His mom is really sick, I think. Do you have an informant ready to set it all up? I should be able to lock this down, but if not I'm willing to give him some time."
7. Paul Lopez did not see me listening to his conversation.
8. I also observed Paul Lopez darting across the classroom a few times in order to be nearby when it came time to pair up for lab. Most of us just partnered with whoever was nearby, but Lopez and Hark always seemed be paired up.
9. Although I have been here in Hagatna for the whole year, I did not come forward before the date of this statement because I was not aware that the conversation I had overheard was relevant to this proceeding until the date of this statement. I came forward the instant that I realized my testimony would be relevant to this case.

10. In searching my junk mail, I discovered a message from the Dean of Students office asking for information, but never read the email until the date of this statement.
11. I have never been interviewed by the defendant, defense counsel, or the prosecution prior to the date of this statement.

Harry Selton

Sworn to and subscribed
Before me this 10th
Day of July,
2021.

In the United States District Court for the District of Guam

UNITED STATES OF AMERICA,)	
	)	<u>AFFIDAVIT OF MERRY BOAK</u>
Plaintiff,)	
)	
v.	)	1:21-cr-00020
)	
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

Merry Boak, being of full age, on her oath, deposes and says:

1. Since September 2020, I have worked on Wednesday and Thursday afternoons as a barista at Langdells.
2. The defendant, Archibald Hark, is a regular at Langdells and we have chatted several times while he sits at the coffee bar.
3. Paul Lopez and I have also spoken before but only to take his coffee orders.
4. One Thursday in mid-March 2021 at 3:00 P.M., I was making coffee behind the bar at Langdells and observed Agent Lopez peering through the window into the shop.
5. He had his face close to the glass and his hands cupped around his eyes. He was sort of scanning the place. It looked very unusual.
6. As soon as his eyes fell on Archie Hark he stopped staring through the window and moved towards the entrance.

7. I took Agent Lopez's order and watched him walk over to an empty seat at the bar next to where Mr. Hark was reading.
8. I was then close enough while making coffee behind the bar to overhear parts of a conversation between Lopez and Hark.
9. After Lopez sat down, he said, "Archie, I've been thinking about our plan and I think I need to spell it out for you so you can see what a smart move it will be for your family."
10. Then Lopez said something about how cops in Guam are "always behind the eight ball" and that's why it was such a sure bet for an enterprising young man with important responsibilities.
11. Lopez then mentioned something about a broken leg several times.
12. As far as I could hear, Hark was listening closely, nodding, and once said, "Man, that amount of money sounds like exactly what I need to make things better at home."
13. To my knowledge, neither Archie Hark nor Paul Lopez realized I could hear their conversation.
14. I also saw Lopez write something on one of our napkins. Whatever it was, Hark seemed engrossed.
15. Then Hark sat up on his chair and told Lopez that he wasn't going to be involved in selling drugs. He told Lopez to leave him alone about this stuff.
16. Although I have been working at Langdells for the whole year, I did not come forward before the date of this statement because I did not

realize that there was a trial. I remembered the incident only when I heard some other students speaking about the incident this week.

17. I have never been interviewed by the defendant, defense counsel, or the prosecution prior to the date of this statement.

A handwritten signature in cursive script that reads "Harry Selton".

Sworn to and subscribed
Before me this 10th
Day of July,
2021.

In the United States District Court for the District of Guam

UNITED STATES OF AMERICA,)	
	)	<u>AFFIDAVIT OF RAFAEL DIAZ</u>
Plaintiff,)	
)	
v.	)	1:21-cr-00020
)	
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

Rafael Diaz, being of full age, on his oath, deposes and says:

1. I have been in practice as a medical doctor for thirteen years. My practice is in Hagatna, Guam.
2. I am the primary care physician for Jane Hark, the mother of the defendant in this case.
3. In March 2021, I received a phone call at my office from a person identifying himself as Special Agent Paul Lopez of the DEA. Lopez told me that he was investigating a family member of Jane Hark. He said that Ms. Hark's son was a drug dealer and he was trying to put him away.
4. Lopez told me that I needed to have my staff contact Ms. Hark and tell her that her insurance would no longer cover the treatments that she was receiving from my office.

5. Agent Lopez told me that if I did not cooperate with his investigation, he would do everything he could to have my license to prescribe controlled substances revoked. He also threatened to flood my office with subpoenas and federal officers as part of a lengthy investigation. He also told me that if I disclosed our conversation to anyone, I would be charged with obstruction of justice.
6. Reluctantly, I complied with Lopez's direction.
7. A few days ago, I read a newspaper story about this case and learned that a jury had found Mr. Hark guilty of distributing heroin and rejected Mr. Hark's entrapment defense. I felt that I could no longer maintain my silence. I contacted Mr. Hark's defense counsel and told him what had happened.

Harry Selton

Sworn to and subscribed
Before me this 10th
Day of July,
2021.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

THE HON. JUDGE E. HO MATHEWS, JUDGE PRESIDING

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	NO. 1:21-cr-00020
)	
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

This order concerns two motions made by defense counsel in this proceeding: (i) motion for acquittal on the basis of entrapment as a matter of law and (ii) motion for a new trial on the grounds of newly discovered evidence.

This court holds that the defendant was not entrapped as a matter of law. A jury's verdict rejecting the defense of entrapment should be overturned only if "viewing the evidence in the government's favor--no reasonable jury could have concluded that the government disproved the elements of the entrapment defense." United States v. Mendoza-Prado, 314 F.3d 1099, 1102

(9th Cir. 2002). A defendant is entrapped only if he was both induced by the government and not predisposed to commit the offense. United States v. Poehlman, 217 F.3d 692, 698 (9th Cir. 2000). Although the defendant may very well have been induced by the government to commit this crime, given the five-factor test for entrapment, United States v. Jones, 231 F.3d 508, 518 (9th Cir. 2000), a reasonable juror could have found that the defendant was predisposed to commit this crime. In particular, the defendant had a history of dealing drugs and was clearly motivated by making money. These factors are sufficient to hold that the defendant was not entrapped as a matter of law.

Now for the motion for a new trial. While this new evidence makes the entrapment issue closer, I still do not believe it tips the scales. In assessing the defendant's motion for a new trial, this Court applies the five-step test provided in United States v. Harrington, 410 F.3d 598, 601 (9th Cir. 2005). Here, only some of the factors are met. First, the evidence is newly discovered. I do not believe that any of the affidavits could have reasonably have been obtained before trial. Second, the evidence was not obtained late due to the defendant's lack of diligence. Defendant could not have known any of these pieces of evidence and is not expected to pursue every possible avenue in searching for evidence. Defense counsel made an effort to email the class and interview some of

the defendant's classmates, but could not have been expected to interview them all. But the evidence does not seem particularly material. The mugshot Agent Lopez was allegedly holding could have been anything. While troubling, the doctor's affidavit does not convince me either. I am acutely concerned about the cost of a new trial, and I do not believe that this evidence would have changed the jury's mind.

Defendant's motion for acquittal as a matter of law is hereby DENIED. Defendant's motion for a new trial is hereby DENIED.

Judge E. Ho Mathews
U.S. District Court Judge
DATED: July 23, 2021

UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

THE HON. JUDGE E. HO MATHEWS, JUDGE PRESIDING

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	NO. 1:21-cr-00020
)	
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Hagatna, Guam

July 23, 2021

Roy R. Williams, CSR 1650 - Official Reporter
U.S. District Court of Guam
520 West Soledad Avenue
Hagatna, Guam 96910

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(671) 864-1291

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ASSISTANT FEDERAL PUBLIC DEFENDER

FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF GUAM

400 ROUTE 8, SUITE 501

MONGMONG, GU 96910

(671) 442-3128

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT):

THE COURT: All right. Back on the record in the Hark matter.

Counsel, are you ready to proceed with sentencing?

MR. MADSEN: Yes, your honor.

MR. DESANTIS: Yes, your honor. But I have to ask you to reconsider your Rule 33-

THE COURT: Save it for appeal, counsel. For the record, the court has received the presentence investigation report—thanks to pretrial services for the exceptionally fast turnaround. So for sentencing.

[The Court proceeded to conduct the sentencing hearing. The hearing has been omitted from the record, as the parties agree that there was no error in sentencing.]

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Mr. Hark, be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 24 months.

Upon release from imprisonment, Mr. Hark will be placed on supervised release for an additional year.

You are assessed a one hundred dollar special assessment, which is payable immediately.

Mr. Hark, you can appeal this decision.

(Proceedings concluded.)

HATAGNA, GUAM; JULY 23, 2021.

UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

THE HON. JUDGE E. HO MATHEWS, JUDGE PRESIDING

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	NO. 1:21-cr-00020
)	
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty after a plea of not guilty. The defendant is adjudicated guilty of the following offense: distribution of more than ten grams of heroin in violation Title 21 U.S.C. Section 841(a)(1). The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months. Upon release from imprisonment, the defendant shall be on supervised release for a term of one year. The defendant is assessed a special assessment of \$100, which is payable immediately. This sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Judge E. Ho Mathews
U.S. District Court Judge
DATED: July 23, 2021

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	NO. 1:21-cr-00020
)	
)	
ARCHIBALD H. HARK,)	
)	
Defendant.)	
_____)	

Notice of Appeal

Defendant Archibald Hark hereby gives notice that he appeals to the United States Court of Appeals for the Ninth Circuit the judgment entered in this case on July 23, 2021. Mr. Hark appeals from the judgment and all pretrial, trial, and post-trial rulings that make up or are inherent in the judgment.

Alexander W. Desantis
Attorney for Archibald Hark
DATED: July 27, 2021.