

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
	)	Case No. 1:12CR00034
	)	
v.	)	<b>OPINION AND ORDER</b>
	)	
<b>TRAVIS DEWAYNE CRASTEN, ET AL.,</b>	)	By: James P. Jones
	)	United States District Judge
Defendants.	)	

*Zachary T. Lee, Assistant United States Attorney, Abingdon, Virginia, for United States; Brian J. Beck, Assistant Federal Public Defender, Abingdon, Virginia, for Defendant Travis Dewayne Crasten, and Randall C. Eads, Abingdon, Virginia, for Defendant Jessica Michelle Moorefield.*

In this criminal case, the defendants were convicted by a jury of various crimes relating to their manufacture of methamphetamine. They have now filed a Joint Motion for Judgment of Acquittal or New Trial. For the reasons that follow, I will deny the motion, except that I will exercise my discretion to grant them a new trial as to Count Four, charging them with creating a substantial risk of harm to human life while manufacturing a controlled substance.

I

The defendants, Travis Dewayne Crasten and Jessica Michelle Moorefield, were, with two others, jointly charged in this court in a five-count Indictment.

Count One alleged that they conspired to manufacture 50 grams or more of methamphetamine. Count Two charged them with maintaining a place for the purpose of manufacturing methamphetamine. Count Three alleged that they possessed pseudoephedrine with the intent to manufacture methamphetamine. Count Four charged them with creating a substantial risk of harm to human life while manufacturing methamphetamine and Count Five charged them with manufacturing methamphetamine.

While their codefendants pleaded guilty, Crasten and Moorefield elected to go to trial. At trial, their counsel admitted on their behalf — they did not testify — that they had engaged in the manufacture of methamphetamine with their codefendants. The sole defense was as to Counts One and Four. They asserted that the government had not proved that they had conspired to manufacture 50 grams or more or that they had created a substantial risk of harm to human life. Both the government and the defendants presented expert testimony on these issues.

Following a three-day trial, the jury convicted both defendants on all five counts. The jury also answered a special interrogatory, finding that the quantity of methamphetamine attributable to each of them was 50 grams or more.

The basic facts of the case as presented at trial are as follows.

The defendants and their co-conspirators became the subject of an investigation by the Drug Enforcement Administration (“DEA”) and other law enforcement agencies in November of 2011. DEA Agent Brian Snedeker noticed a pattern of buying pseudoephedrine by the four individuals over the course of several months.<sup>1</sup> All four were found to have made numerous purchases from the same stores, frequently on the same day, and often at the same time. Agent Snedeker personally observed the defendants entering and leaving the stores together and further obtained access to the stores’ security tapes to observe the defendants’ purchases. According to the stores’ records, the four co-conspirators purchased a total of 133.2 grams of pseudoephedrine between November 2011 and February 22, 2012. Agent Snedeker obtained similar evidence of the defendants’ purchases of other precursor materials used to produce methamphetamine.

On the strength of this evidence, law enforcement officers obtained a warrant to search defendant Crasten’s home. Officers arrived wearing hazmat suits and carrying safety equipment. They discovered all four conspirators inside and removed them to execute the search. An air quality monitor carried by one of the

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<sup>1</sup> According to the testimony presented at trial, pseudoephedrine is one of the precursor materials necessary to the production of methamphetamine in clandestine laboratories. The Combat Methamphetamine Epidemic Act of 2005 imposed a requirement on vendors of pseudoephedrine to keep records documenting purchases of pseudoephedrine. *See* 21 U.S.C.A. § 830(e) (West Supp. 2012). The Act further limits the amount of pseudoephedrine a person may purchase in a 30-day period. Law enforcement officials may access these records in the course of their investigations.

officers alerted to the presence of phosphine gas in the room the defendants used to manufacture methamphetamine, prompting the officers to evacuate the home to allow it to ventilate. After several minutes, the monitor again alerted and the officers left to ventilate the home for an additional period of time.

When the officers reentered, they discovered precursor materials for producing methamphetamine, including flammable liquid fuels stored in glass jars with no lid, iodine crystals, and caustic and reactive substances such as lye and muriatic acid, all stored within inches of each other in the same cabinet. Officers also found quantities of methamphetamine, some in a jar apparently used in the production process and some in baggies or vials found in Crasten's pocket and Moorefield's purse. The samples removed from Crasten's pocket were ultimately found to have purities ranging from 75 to 99 percent.

The defendants were arrested and this prosecution followed.

The defendants have now timely filed a Joint Motion for Judgment of Acquittal or New Trial pursuant to Federal Rules of Criminal Procedure 29 and 33, attacking their convictions on Counts One and Four. Specifically, they contend that their conviction for conspiracy to manufacture 50 grams or more of methamphetamine (Count One) was unsupported by the evidence. They argue that the government's case rested on mere assumptions regarding the quantity of pseudoephedrine actually used during the manufacturing process and the likely

yield of methamphetamine. The defendants also submit that the prosecutor made a misstatement of the facts during his closing argument that likely caused the jury to miscalculate the weight of drugs at issue in the conspiracy.

As to Count Four, the defendants challenge certain testimony by government witnesses regarding the permissible exposure limit (“PEL”) to phosphine gas determined by the Occupational Safety and Health Administration (“OSHA”). The defendants contend that these witnesses misrepresented the PEL and its harmful effect.

The government opposes this motion, which has been fully briefed and orally argued and is ripe for decision.

## II

The defendants seek an acquittal or new trial on Count One of the Indictment, which charged them with conspiring to manufacture 50 grams or more of methamphetamine, in violation of 21 U.S.C.A. §§ 841(b)(1)(B), 846 (West 1999 & Supp. 2012). The defendants challenge the sufficiency of the government’s evidence as to the quantity of drugs attributable to them, complaining that the government’s witnesses assumed that all of the defendants’ documented pseudoephedrine purchases were directed towards the manufacturing conspiracy and that the yield of their operation was consistent with other methamphetamine

manufacturers using the same method. The defendants submit these mere assumptions could not serve as proof beyond a reasonable doubt.

In considering a post-trial motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, I must view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the government. *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003) (citing *Glasser v. United States*, 315 U.S. 60, 80 (1942)). The question is whether the convictions are supported by substantial evidence, which is defined as “evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.” *United States v. Young*, 609 F.3d 348, 355 (4th Cir. 2010) (internal quotation marks and citation omitted). I must keep in mind that “it is ‘[t]he jury, not the reviewing court, [which] weighs the credibility of the evidence . . . and if the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe.’” *United States v. Castillo-Pena*, 674 F.3d 318, 321 (4th Cir. 2012) (quoting *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996)).

The defendants especially rely on the Fourth Circuit’s holding in *Evans-Smith v. Taylor*, 19 F.3d 899 (4th Cir. 1994). In that case, the court found that the prosecution’s entirely circumstantial case was insufficient to support the jury’s guilty verdict. The court held that the prosecution cannot simply assume that a

crime occurred in a certain manner and then interpret the evidence at the scene to be consistent with that assumption. *Id.* at 910.

The case against these defendants, however, was far from entirely circumstantial. The government presented video and documentary evidence of each conspiracy member making purchases of pseudoephedrine. These purchases were almost always in close temporal and geographical proximity to those of another conspiracy member. Moreover, the defendants, through their counsel, have admitted that they worked together with the other two conspirators to purchase pseudoephedrine. The government's argument that the defendants intended to use all of the pseudoephedrine each of the conspiracy members purchased is hardly an assumption. It is, rather, a justifiable inference derived from the observed behaviors of the conspiracy members.

The defendants have also protested the government's assumption that their operation generated a yield that would have produced the charged weight of drugs.<sup>2</sup> The government produced substantial evidence, however, about not only the average expected yields of meth labs generally, but also the yields manufacturers in this locality have been found to produce. The government showed that the co-conspirators in this case purchased a total of 133.2 grams of

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<sup>2</sup> The parties in this case used the term "yield" to refer to the percentage of pseudoephedrine added to a reaction that ultimately produced methamphetamine. For example, if 100 grams of pseudoephedrine were added to a lab with a yield of 50 percent, the lab would produce 50 grams of methamphetamine.

pseudoephedrine. The government's experts described studies that have shown lab yields to range from 50 to 75 percent. One expert stated that yields in this locality are generally between 69 and 72 percent. The government's witnesses also described the methamphetamine samples seized from the defendants, which were shown to have purities ranging from 75 to 99 percent. The government's evidence indicated that only an experienced manufacturer would be capable of achieving such high purity levels. The government's evidence further showed that more experienced manufacturers tend to achieve higher yields in their labs. The cumulative effect of this evidence was sufficiently substantial to support the jury's conclusion that the defendants conspired to produce 50 grams or more of methamphetamine.

The defendants claim they should be granted a new trial as to Count One because the government made an improper statement in its closing argument. Because the defendants did not object to the prosecutor's argument during the trial, I must review their claim under a plain error standard. For the defendants to prevail under a plain error standard of review, "the error must be plain. An error is plain, at least, when the error is clear both at the time it occurred and at the time of appeal." *United States v. Greene*, No. 11-4683, 2013 WL 28556, at \*9 (4th Cir. Jan. 3, 2013) (internal quotation marks and citation omitted). If the court determines that a plain error did occur, it should then evaluate "whether the error

affected substantial rights.” *Id.* at \*10 (internal quotation marks and citation omitted). In most cases, the phrase “affecting substantial rights” means that the error was prejudicial. *Id.* In considering whether an error was prejudicial, the court should “look to the totality of the circumstances including all of the evidence adduced.” *Id.* (internal quotation marks and citation omitted).

The defendants contend that error occurred in their trial when without objection the court allowed an improper argument by the prosecutor during his closing statement. The prosecutor’s statement was as follows:

Ladies and gentlemen, as far as weight is concerned, I want you to consider one other thing. Seized from the lab, itself, 9.6 grams of methamphetamine. So, we’re already close to a fifth of the way there of proving that this lab manufactured 50 grams, or more. That’s just February 23rd. That’s not taking into account from November all the way forward. So, ladies and gentlemen, that’s something to keep in mind.

The other evidence you have is about the pseudoephedrine logs . . . .

(Trial Tr. 15, ECF No. 145.) According to the defendants, the prosecutor thus invited the jury, in calculating the weight of drugs attributable to the defendants, to double count the weight of drugs found in Crasten’s home. The defendants interpret this statement to have asked the jury to consider the 9.6 grams of methamphetamine found in the house, and then to add that amount to the weight of drugs the government argued the defendant’s lab was likely to yield. They argue this statement was improper because the drugs found in the house were a product

of the pseudoephedrine purchases the government had already documented. To count that weight separately would be to count that weight twice.

Even accepting the defendants' interpretation of this isolated comment, I must also consider whether any error prejudiced the defendants' substantial rights. *Greene*, 2013 WL 28556 at \*10. I conclude that it did not.

In *Greene*, the Fourth Circuit held that, despite the government's presenting improper testimony, the defendant's substantial rights had not been affected because the government presented strong independent evidence of the defendant's guilt. *Id.* The same is true in this case. The government showed how much pseudoephedrine the defendants acquired. It also showed the range of lab yields methamphetamine manufacturers generally attain. Lab yields have been shown to range from 50 to 75 percent and locally they are generally around 69 percent. Even a very poor yield could still have produced the weight of drugs of which they were convicted.<sup>3</sup> The jury could have properly considered all of this information, without looking to the drugs discovered in the house, in reaching its guilty verdict. The substantial rights of the defendants were, therefore, not prejudiced and they are not entitled to a judgment of acquittal or new trial on this issue.

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<sup>3</sup> At trial, one of the government's expert witnesses testified, "If you were a very, very bad cook, then, yeah, 38 percent would be horrifically low for a manufacturer, but if you went down as low as 38 percent you'd be at 50.6 grams of methamphetamine." (Trial Tr. 70, ECF No. 139.)

### III

The defendants have also moved for a judgment of acquittal on Count Four of the Indictment, charging the defendants with a violation of 21 U.S.C.A. § 858 (West 1999), which provides in relevant part as follows: “Whoever, while manufacturing a controlled substance in violation of this subchapter, or attempting to do so, . . . creates a substantial risk of harm to human life shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.”

Given the evidence outlined above, I find that the government presented substantial evidence such that “a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.” *Young*, 609 F.3d at 355 (internal quotation marks and citation omitted). The evidence showed that the defendants’ activities caused the release of phosphine gas, which can be explosive and toxic. The evidence further showed that Crasten’s home contained other dangerous precursor materials for the manufacture of methamphetamine that were improperly stored. The defendants, therefore, are not entitled to a judgment of acquittal with regard to Count Four.

Alternatively, the defendants argue that they should be granted a new trial on Count Four because “the interest of justice so requires.” Fed. R. Crim. P. 33(a). Specifically, the defendants argue their conviction was against the weight of the evidence in light of alleged misrepresentations by the prosecutor and two

government witnesses. “When the [Rule 33] motion attacks the weight of the evidence, the court’s authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence.” *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). The court is not constrained by any requirement that it view the evidence in the light most favorable to the government and it may evaluate the credibility of witnesses that testified at trial. *United States v. Campbell*, 977 F.2d 854, 860 (4th Cir. 1992) (citing *Arrington*, 757 F.2d at 1485). The Fourth Circuit has also stated, however, that “a district court should exercise its discretion to grant a new trial sparingly and . . . only when the evidence weighs heavily against the verdict.” *United States v. Wilson*, 118 F.3d 228, 237 (4th Cir. 1997) (internal quotation marks and citation omitted). A new trial will only be granted “if the resulting prejudice was so great ‘that it denied any or all the appellants a fair, as distinguished from a perfect, trial.’” *United States v. Villarini*, 238 F.3d 530, 536 (4th Cir. 2001) (quoting *United States v. Parodi*, 703 F.2d 768, 776 (4th Cir. 1983)).

The defendants argue that the jury’s verdict was against the weight of the evidence in light of two related misrepresentations by two government witnesses. First, the investigating DEA agent and a DEA forensic chemist both testified about the air quality monitor that officers carry to alert them to the presence of phosphine gas when investigating a clandestine methamphetamine lab. Both witnesses stated

that the monitor was calibrated to alert when the air concentration of phosphine reached the PEL, which both agents identified as three parts per million (“ppm”). In response to defense counsel’s question about whether he had recorded any information about the monitor’s alert, DEA Agent Snedeker stated, “The alarm goes off at three parts per mill, and that’s all that flashed.” (Trial Tr. 79, ECF No. 139.) DEA forensic chemist Jerome Podorski also testified to the incorrect PEL, stating, “We actually have monitors that detect this gas. It is colorless and odorless. It’s also flammable. It’s a byproduct of the reaction. Now, the levels that OSHA has determined that you’re allowed to be exposed to are three parts per million.” (Trial Tr. 101, ECF No. 139.) Podorski further explain that the monitor alerts “below the permissible exposure limit, three parts per million. It wants to alert to tell you to get out before it’s hazardous.” (Trial Tr. 102, ECF No. 139.)

Although they did not do so during the trial, the defendants now point out that the PEL under official OSHA standards is in fact 0.3 ppm. 29 C.F.R. § 1910.1000, Table Z-1 (2012). They claim that the witnesses’ testimony was misleading to the jury by misrepresenting either the amount of phosphine present in Crasten’s house when the officers entered or the dangerous effect of certain air concentrations of phosphine. Citing information from the Centers for Disease Control (“CDC”), the defendants also point out that phosphine is not always odorless and can often have a garlic or fish-like smell. (Defs.’ Joint Mot. Ex. 2, at

1, ECF No. 146.) The defendants argue that this testimony was misleading and prejudicial in light of additional information that was not presented at trial about the dangers, or lack thereof, of phosphine gas exposure. This information constitutes the second misrepresentation the defendants allege entitles them to a new trial on Count Four.

Chief among the information omitted from the evidence — and therefore not presented to the jury — was the fact that the PEL OSHA has defined for exposure to phosphine gas is actually a weighted average of exposure of 0.3 ppm over eight hours. 29 C.F.R. § 1910.1000(a)(2) (2012). By OSHA’s definition, therefore, an employee would not be in danger of harm from temporary exposure to phosphine gas at an air concentration of 0.3 ppm or even more, so long as the average level of exposure over the course of eight hours did not exceed 0.3 ppm.

The defendants also complain that the government did not adequately explain the difference between the OSHA PEL, at which the monitor would alert, and the exposure level that would be immediately dangerous to human life (“IDHL”). The defendants point out that the IDHL level defined by the CDC’s National Institute for Occupational Health and Safety is 50 ppm. (Defs.’ Joint Mot. 8, ECF No. 146.)

First, I note that several of the concerns the defendants have now raised as being misrepresented or unrepresented at trial were addressed by the defendants’

own expert. The defendants' expert testified about the smell associated with phosphine gas: "[I]f the phosphine gas was there, that was above threshold levels, there would be a garlic smell that certainly would be able to be picked up because the garlic smell is around, I believe, .03 parts per million." (Trial Tr. 185, ECF No. 139.) The defendants' expert also testified to the correct OSHA PEL for phosphine gas during his cross examination by the government. In response to the prosecutor's question about PELs, he stated, "I'm familiar with them, but I can't quote it for you for phosphine gas. Think I want to say it's something like .3 parts per million." (Trial Tr. 183, ECF No. 139.) The prosecutor responded, "You're right." (*Id.*) Moreover, the prosecutor notified the defendants before their trial that the government would call the DEA chemist as an expert and that he would testify about the OSHA PEL, which the pretrial disclosure correctly identified as 0.3 ppm. (Defs.' Joint Mot. Ex. 3, at 2, ECF No. 146-3.) It is clear, therefore, that the government did not intend to misrepresent or hide this information from the defendants.

The defendants have also claimed that the government misrepresented the evidence by neglecting to explain the significance of the IDHL level for phosphine gas and by failing to distinguish that level from the 0.3 ppm standard. The government presented the IDHL level for phosphine, however, during the testimony of the DEA forensic chemist. Agent Podorski testified that "The lethal,

dangerous levels are 50 parts per million. That's the same level as hydrogen cyanide gas that's used in gas chambers." (Trial Tr. 101, ECF No. 139.)

It seems clear, therefore, that much of the information the defendants claim was misrepresented in or missing from their trial was actually discussed. The jury could consider all of this testimony in determining the weight and credibility of the evidence. Importantly, the government's pretrial disclosures and presentation of the evidence make clear that any misstatement with regard to these issues was inadvertent and not designed to mislead the jury.<sup>4</sup> The defendants may now wish they had explored these issues more thoroughly in cross-examination of the government's witnesses, but they cannot claim that they were so unfairly prejudiced by the government's presentation of this evidence to merit a new trial.

On the other hand, the government's failure to disclose to the jury the weighted average dimension of the OSHA PEL rises to a different level. Although I find that it was unintentional, the government's failure to disclose that the OSHA PEL for phosphine was actually a weighted average of exposure over eight hours

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<sup>4</sup> The government's pretrial disclosure acknowledged the correct PEL value. Moreover, on rebuttal, DEA Agent Snedeker stated that he used a canister containing 0.5 ppm of phosphine to test the air monitor alarms officers used while investigating methamphetamine labs. Agent Snedeker would have no use for an alarm set to alert at 3 ppm if his test canister only contained 0.5 ppm. (Trial Tr. 4, ECF No. 140.) The government's attorney himself confirmed that the correct PEL for phosphine is 0.3 ppm when cross-examining the defendants' expert. All of these facts reflect a lack of precision in the presentation of evidence that should have rendered the government's case vulnerable to cross-examination, but they are not characteristic of a design to mislead.

had the effect of misrepresenting the import of this evidence to the jury. A level of exposure that would be dangerous over the course of eight hours is very different from one that would cause harm by the temporary exposure to the law enforcement agents, but the jury did not have the opportunity to consider this evidence.<sup>5</sup>

The correct scope of the OSHA PEL standard as set forth in its regulation was discovered by the defendants after trial. In their request for a new trial on Count Four, they rely upon the obligation of the government to disclose material exculpatory or impeaching evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972),<sup>6</sup>

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<sup>5</sup> The government took the position at trial that the risk of harm to human life as contemplated by 21 U.S.C.A. § 858 did not include any risk to the defendants or their co-conspirators present at the manufacturing site and that the sole relevant risk was to the law enforcement officers who entered the home in execution of a search warrant. Without objection, I so instructed the jury. While that is the law of the case, there is authority to the contrary, at least as to a comparable provision of the Sentencing Guidelines, which provides for a sentencing enhancement under U.S. Sentencing Guidelines Manual § 2D1.1(b)(13)(C)(ii) (2012) for methamphetamine manufacturing that created a substantial risk of harm to human life. *See United States v. Ivey*, 344 F. App'x 57, 59 (5th Cir. 2009) (unpublished) (holding that enhancement applied even though only co-conspirator at risk, in light of plain language of guideline); *see also United States v. Thorn*, 317 F.3d 107, 117-119 (2d Cir. 2003) (holding that sentencing guideline 2Q1.2(b)(2) providing for sentencing enhancement for Clean Air Act violation that resulted in a substantial likelihood of death or serious bodily injury included such risk to co-conspirators); *United States v. Allen*, 297 F.3d 790, 796 (8th Cir. 2002) (finding that it was not necessary under the facts to consider government's argument that 21 U.S.C.A. § 858 applied to the risk to the methamphetamine maker's own life).

<sup>6</sup> The defendants do not rely in their request for a new trial upon the newly-discovered evidence standard applicable under Federal Rule of Criminal Procedure 33(b). It has been observed that the *Brady/Giglio* standard is less onerous for defendants to show than one based upon a newly-discovered evidence claim. *United States v. Maldonado-Rivera*, 489 F.3d 60, 66 (1st Cir. 2007).

In *Giglio*, the Court observed that the presentation of false evidence is incompatible with the rudimentary demands of justice, including circumstances in which the government has not solicited false evidence, but “allows it to go uncorrected when it appears.” *Id.* at 153 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.” *Giglio*, 405 U.S. at 154 (internal quotation marks and citation omitted). The Court emphasized, however, that the evaluating court must make a finding that the false or undisclosed evidence was material; that is, “any reasonable likelihood [it could] have affected the judgment of the jury.” *Id.* (internal quotation marks and citation omitted).

The government first disclosed that it intended to call DEA forensic chemist Podorski as a witness by an email to defense counsel at 6:13 p.m. on Wednesday, October 10, 2012, two business days before the trial that began on Monday, October 15. The government’s intended use of this witness was based upon the defendant’s disclosure on October 2 of its expert witness, Gene Gietzen, a forensic chemist. A summary of the expected testimony by government expert Podorski was not supplied with the email on October 10, and defense counsel filed a written motion on October 12 seeking to prevent the use of this government witness because of the lack of a summary. *See* Fed. R. Crim. P. 16(a)(1)(G), (d)(2)(C).

The government then supplied such a summary in a letter to defense counsel dated the same day, Friday, October 12. In that letter, the government advised that Podorski would testify, among other things, that phosphine gas “is extremely dangerous to human beings” and “has an OSHA Permissible Exposure Limit (PEL) of 0.3 parts per million (ppm).” (Defs.’ Joint Mot. Ex. 3, at 2, ECF No. 146-3.) No mention was made of the weighted average of exposure of eight hours for such PEL. At a hearing before the court on the morning of trial on October 15, counsel for the defendants withdrew any objection to the timeliness of the government’s disclosure, based upon its October 12 letter.

I believe there is a reasonable likelihood that the presentation of this omitted evidence could have affected the judgment of the jury. The government repeatedly emphasized how the air quality monitor’s alert, and the fact that the monitor alerted at the OSHA PEL, reflected the substantial risk of harm to human life that the defendants created. On direct examination, DEA Agent Snedeker testified that the alarm on the gas monitor would go off when “you’ve reached the lower level of the explosive limit” or when the atmosphere had “reached the low threshold . . . for the phosphine alerting you there was phosphine present in that trailer.” (Trial Tr. 18, ECF No. 139.) DEA forensic chemist Podorski testified specifically about the OSHA PEL. He stated that phosphine can be “flammable,” that it is a “lower respiratory irritant” and that the air quality monitor alerts “below [this] permissible

exposure limit . . . . to alert to tell you to get out before it's hazardous.” (Trial Tr. 101-02, ECF No. 139.) In his closing remarks, the government's attorney emphasized the importance of this testimony with regard to Count Four:

The other thing to keep in mind, ladies and gentlemen, most importantly, is phosphine gas . . . . And basically it all boils down to it can kill you . . . . And you don't need a whole lot of it to have problems, to have serious consequences . . . . You heard that the permissible exposure limits, what is deemed to be the limit of phosphine gas that is healthy for a person is point three parts per million, like a drop of food coloring in a bathtub full of water. You also heard when agents made entry in Mr. Crasten's residence their gas alert monitor went off, and if that monitor goes off, if there are levels of phosphine gas present in the residence that are above that permissible exposure level . . . . So, ladies and gentlemen, there's no question there was a very, very dangerous risky situation when those agents entered the residence.

(Trial Tr. 18-19, ECF No. 145.) The PEL concept, therefore, was a key component to the government's evidence regarding the defendants' creation of a substantial risk of harm to human life. Had the concept of the eight-hour weighted average been explained, the jury likely could have evaluated this evidence differently.

Moreover, although the government presented other evidence regarding the risks the defendants' activities created, that evidence was limited in scope and the prosecutor did not emphasize it to the same degree as the presence of phosphine in the home. In his closing argument, the prosecutor mentioned the general dangers associated with manufacturing methamphetamine. He also mentioned the presence of uncapped jars of Coleman fuel and red phosphorus. He focused, however, on

the dangers of phosphine and the importance of the PEL to the jury's evaluation of the evidence. Under these circumstances, and based upon my opportunity as the presiding judge to observe the trial, I believe that it is likely that a more complete presentation of the relevant evidence could have affected the jury's decision. Thus, I find that the defendants are entitled to a new trial as to Count Four because "the interest of justice so requires." Fed. R. Crim. P. 33(a).

It is true, as the government argues, that the OSHA regulations were available to defense counsel and if they had discovered them before trial, rather than after trial, they could have effectively cross-examined the government's witnesses, including Podorski. Normally, "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources." *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (internal quotation marks and citation omitted). However, in light of the timing of the government's disclosure of the expert's summary of testimony, I find that the failure of the defendants to obtain the correct information about the OSHA PEL was not unreasonable under the circumstances. In other words, the defendants did not know nor "should have known the essential facts permitting [them] to take advantage of [the] exculpatory evidence." *Id.* (internal quotation marks and citation omitted).

In summary, I make the following factual findings in regard to the defendant's motion as it pertains to their request for a new trial on Count Four.

1. The government failed to disclose to the defendants prior to or during trial that the OSHA PEL for phosphine was based upon an eight-hour weighted average, which nondisclosure caused the government's evidence concerning the OSHA PEL for phosphine to be incomplete and misleading;
2. The information not disclosed was material, in that the PEL of phosphine was an important factor in the government's proof of substantial risk of danger to human life under Count Four and the undisclosed evidence was exculpatory of the defendants in that it would tend to show a lack of substantial risk to the law enforcement officers who were briefly exposed to phosphine;
3. While the correct information concerning the OSHA PEL standard was otherwise available to the defense, defense counsel acted with due diligence in not learning of the undisclosed information, in light of the timing of the government's summary of its expert's testimony;
4. Although the failure to disclose was not intentional, it prejudiced the defendants because of the centrality of the issue of exposure to phosphine and it is reasonably likely that if such information had been disclosed by the government as required, a different verdict would have resulted as to Count Four.

5. The mistaken testimony by government witnesses as to the correct parts per million aspect of the OSHA PEL standard was immaterial and not prejudicial to the defendants, as well as being otherwise known to the defendants in the exercise of due diligence; and
6. There has been no showing that the testimony of the government's witness as to the lack of odor of phosphine was mistaken or otherwise violated any rights of the defendant.

### III

For the foregoing reasons, the defendants' Joint Motion for Judgment of Acquittal or New Trial (ECF No. 146) is GRANTED IN PART AND DENIED IN PART. A new trial is GRANTED to the defendants as to Count Four of the Indictment. All other relief is DENIED.

The clerk is directed to fix a jury trial date as to Count Four.

It is so **ORDERED**.

ENTER: February 5, 2013

/s/ James P. Jones  
United States District Judge