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May 9, 2023

Richard Portale, Esq.
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By Email: rportale@portalerandazzo.com

Re: *People v. Lance Clarke*, Ind. No. 18-0661

Dear Counsel:

In advance of the upcoming appearance in this matter before the Honorable George E. Fufidio, this letter is to advise you of the findings of a Conviction Review Unit ("CRU") review ("the Review") of a 2017 narcotics "sweep" operation ("the Operation") in Mount Vernon that led to the arrest, prosecution and conviction of your client under the above-referenced case number. This information is being provided to the attorneys for all the individuals arrested, prosecuted and convicted based upon evidence obtained in connection with the Operation.

In light of the findings of the Review, which are detailed below, the People will join in a motion to vacate judgment in this matter, and move to dismiss the underlying case.

The Operation was conducted by officers and investigators of the Mount Vernon Police Department ("MVPD"), the Westchester County Police Department ("WCPD"), and the Westchester County District Attorney's Office ("WCDAO"). The Operation involved a WCPD officer, working as an undercover ("the Undercover"), buying drugs from people at various locations in Mount Vernon between May and

December 2017. Thirty-two people, including your clients, were charged in 2018 with one or more narcotics offenses for their alleged drug sales to the Undercover.¹

In conducting the Review, records and documents in the WCDAO's prosecution files were evaluated and certain police department records and documents that were not in the prosecution files were identified and obtained, including reports memorializing the Undercover's recollections of particular narcotics transactions, his handling of physical evidence, and his identification of certain people as sellers. The following sections explain some of the inconsistencies and sources of unreliability in the Operation evidence that were found in the Review.

- *A review of newly obtained reports by the Undercover about drug buys from two brothers, purportedly driving the same car on separate occasions, raises questions about whether one or both men were misidentified as sellers.*

Newly obtained reports by the Undercover that were missing from the prosecution files raise questions about the reliability of the Undercover's observations and identifications in two drug transactions.

For example, one of the Undercover reports provided to the WCDAO during this Review was of a narcotics purchase from a particular individual ("Individual 1") on July 5, 2017. The Undercover wrote that the Undercover went to the Bronx with

¹ In 2019 and 2020, the People were provided with surreptitiously made recordings of then-MVPD Officer John Campo ("Campo") ("the recordings"). In the recordings, Campo stated that a WCPD officer working undercover in Mount Vernon had misidentified suspects. On one recording, Campo said that the County undercover was told "to identify the wrong people." On an another recording, Campo said:

Dude let me tell you know what the county police are involved too because they had their undercover identify the wrong suspects on numerous occasions after they were told that that wasn't the person that [the Undercover] bought from—just on the paper [the Undercover] said it was that person—so they're gonna indict people on fuckin whatever—state charges or whatever the fuck it is that they don't deserve to be indicted because they weren't even the right person that [the Undercover] bought from . . . And Nini forced him to sign it.

"Nini" appears to be a reference to MVPD Det. Camilo Antonini. After news reports about the recordings and other allegations of misconduct by certain MVPD officers, including Antonini, several people charged in the Operation, through counsel, requested review of their cases by the CRU. One counsel further requested an integrity review of the entire Operation.

a confidential informant ("CI") to conduct a pre-arranged drug buy and that, at approximately 2:22 p.m., the Undercover saw Individual 1 sitting in the driver's seat of a "silver Bmw 4dr 3series." The Undercover reported that when he and the CI arrived at Individual 1's car, Individual 1 "did not want any conversation with me," so the Undercover walked away so the CI "could do the buy."

In this report, the Undercover referred to Individual 1 by his apparent nickname, but did not indicate that the Undercover actually made an identification of Individual 1 after the purchase.

A second report by the Undercover described a July 20, 2017 drug buy from Individual 1 near a gas station on East Lincoln Avenue in Mount Vernon. The Undercover wrote that, at approximately 5:25 p.m., he observed a Black man "sitting in the driver's seat of a silver Bmw 4dr 745i bearing NY Reg [license plate number omitted]." The Undercover again wrote that, upon walking up to the BMW with the CI, Individual 1 "did not want any conversation with me." The report said that the Undercover walked into the gas station where he "could see the CI could do the buy." In this report, the Undercover again referred to Individual 1 by his apparent nickname (the same nickname that the Undercover used in the earlier report), but again did not indicate that the Undercover made an identification of Individual 1 after the purchase.

Crucially, a third report by the Undercover described a July 26, 2017 drug buy from another person ("Individual 2"), a brother of Individual 1, in the area around the same gas station on East Lincoln Avenue where, six days earlier, the CI purchased narcotics from Individual 1. The Undercover reported that at approximately 1:27 p.m., he saw a Black man "sitting in the driver's seat of a silver Bmw 4dr 745i bearing NY Reg [license plate number omitted]"—the same description of the BMW that Individual 1 was reportedly sitting in on July 20. Although the Undercover's July 26, 2017 report identified Individual 2 as "the target" and referred to Individual 2, by his first name, as the person who sold narcotics on that date, in a single sentence the report also inexplicably included Individual 1's apparent nickname that was referenced in the Undercover's two previous reports, and provided a description of what Individual 1 was wearing. After this single reference to Individual 1, the report proceeded to detail how the narcotics purchase from Individual 2 was completed while again referring to Individual 2 by his first name.

The inclusion of information about Individual 1 in this report resulted in a seemingly inaccurate and, in any event, confusing account of this alleged transaction. Moreover, this report does not indicate that the Undercover identified Individual 2 during an identification procedure after the purchase.

Individual 2, whose case was dismissed in 2020, provided alibi notice of evidence that he was not in New York State at the time of the July 26, 2017 transaction.

That three drug purchases reportedly took place over the course of three weeks, involving the same vehicle, but two separate individuals that were brothers, one of who asserted an alibi for the date that he allegedly sold drugs, calls into question the reliability of the Undercover's accounts of all the transactions. This, coupled with the fact that, according to the reports, the Undercover never made an identification of either of the brothers, serves to increase the concerns about the reliability of the Undercover's reporting.

Questions inherently raised by these reports, including whether Individual 1 and Individual 2 drove the same BMW, to the same location, six days apart or whether one of these two brothers was misidentified as the other, do not appear to have been evaluated by the ADAs working on these cases, nor discussed with the ADAs on the other Operation cases because these reports were missing from the prosecution files for Individual 1 and Individual 2. The fact that the reports were not in the prosecution files also prevented the reports from being disclosed to the defense.

In addition to those two cases, the prosecution files for at least five other people charged in connection with the Operation did not include any report or other indication that the Undercover had positively identified those defendants during an identification procedure. Additionally, the Review did not uncover any missing reports that referenced any identification procedures in those cases. This indicates that the Undercover did not make an identification, which is highly problematic for the prosecution of those cases. And, as detailed further below, two of these seven prosecutions were dismissed after a determination by the WCDAO that the evidence against those individuals was insufficient, uncorroborated, or otherwise unreliable.

- *A comparison of the Undercover's reports about a drug transaction and his grand jury testimony about the exchange reveals significant inconsistencies.*

In the prosecution file for two Operation defendants ("Individual 3" and "Individual 4") is an Undercover report describing a drug transaction on September 14, 2017, with a subject line that it pertains to "Buy #1" with Individual 4 and "Buy #2" with Individual 3.

In the report, the Undercover wrote that at 5:20 p.m. he called Individual 3, a woman who the Undercover referred to by a nickname, at "914-[number omitted]," and arranged to meet Individual 3 at Union Avenue and E. 3rd Street. When Individual 3 arrived, she said she did not have any drugs with her and called

Individual 4, a man she referred to by a nickname. Fifteen minutes later, the Undercover wrote, Individual 4 pulled up at the corner of Union and Harrison in a "grey Honda Accord 4dr with NY REG [license plate omitted]." The Undercover gave Individual 3 \$50 and "while standing next to her, [] watched" Individual 3 give Individual 4 the money. The Undercover next said that "[w]hile standing next to the car," he "watched" Individual 4 hand over "2 plastic baggies," and "[w]hen [Individual 3] exited [Individual 4's] car," Individual 3 handed the baggies to the Undercover. After the transaction, the Undercover wrote that he gave the baggies to an MVPD detective and was shown a photo that the Undercover identified "without hesitation" as being Individual 4.

In the Review, a second report on this transaction was obtained. This report's subject line said only "Buy#1" with an unnamed person. In this report, the Undercover said that, at 5:20 p.m., he called a woman, who he referred to by a close, but not the exact, nickname mentioned in the previous report, at an unspecified phone number. The Undercover met the woman at the corner of Union and E. 3rd Street. The woman said she did not have any drugs, and offered to call Individual 4. Sixteen minutes later, Individual 4 pulled up at the corner of Union and Harrison in a "grey Honda Accord 4dr with NY REG [license plate omitted]." The Undercover gave \$50 to the woman and "watched" her give Individual 4 the money.

From this point, the account included some details that were not in the other report. The Undercover wrote that Individual 4 "signaled for me to get away from his car and not to go near his car," and told the woman that "he doesn't know me." From an undescribed vantage point, the Undercover "watched" Individual 4 hand the woman "a plastic baggie," and when the woman got out Individual 4's car, she handed the Undercover "two (2) white substance."

Also in the prosecution file was a backup report by a detective stating that, around the time of the Undercover's account, he saw a Honda Accord with the license plate number mentioned in the Undercover's reports in the area of Union and East 1st Street. The backup officer described the driver of the car as a "light skin, heavy set male," but did not identify him. The officer noted that he "knows this vehicle to be operated by [Individual 4]."

The case against Individual 4 was presented to a grand jury² and, before the grand jury, the Undercover testified that, on September 14, 2017, he asked Individual 3 for drugs and Individual 3, in turn, called Individual 4. After Individual 3 called Individual 4, the Undercover and Individual 3 waited at the corner of Union and

²The court has authorized disclosure of this grand jury information to defense counsels. The provisions of CPL § 190.25 otherwise still apply.

Harrison. The Undercover testified that Individual 4 pulled up and was “mad” at Individual 3. When asked how the Undercover knew Individual 4 was mad at Individual 3, the Undercover testified: “I was with her and he pulled the window down and asked to get the money from me and for her to get in the car and for me to stand there.”

The Undercover said that next:

I stood next to the car. [Individual 3] got in the car and due to the tinted windows I could not see what was going on. Within a few minutes later [Individual 3] got out of the car. [Individual 4] drove off and [Individual 3] gave me the two bags.

At a minimum, the fact that the Undercover told the grand jury that he was not able to see an exchange of drugs for money because of tinted windows, despite writing two reports stating that he actually observed Individual 3 handing money to Individual 4, and Individual 4 handing drugs to Individual 3 in the car, raises significant questions about the Undercover’s credibility and reliability. The Undercover either testified mistakenly or falsely in the grand jury, or made a significant mistake or misrepresentation in his written reports. In addition, the apparent inconsistencies in the Undercover’s two written reports—one stating that the Undercover was standing next to the car while watching a transaction being conducted inside; the other stating that the Undercover had been waved away from the car and warned not to go near the car, suggesting that the Undercover was not right next to the car during the alleged transaction—only add to these concerns.

- *A newly obtained Undercover’s report on a narcotics purchase is materially different than a backup officer’s report on the transaction. In two additional cases, the Undercover’s description of a suspect conflicted with a back-up officer’s observations.*

A newly obtained report written by the Undercover about a particular drug transaction allegedly involving one of the Operation defendants (“Individual 5”) contains significant discrepancies with the facts in a backup officer’s report on the buy.

In the newly obtained report, the Undercover stated that, on September 6, 2017, the Undercover met with a CI to complete a drug buy that had been previously arranged by the CI. The Undercover wrote that they observed Individual 5 sitting in the passenger seat of a “silver 4 door Toyota Camry,” and referred to Individual 5 by a nickname. The Undercover said that Individual 5 “did not want any conversation” with the Undercover, so the Undercover walked away from the Camry so the CI could

complete the transaction. The Undercover said he handed the CI \$50 and then watched the CI get into the rear passenger seat of the Camry and hand the money to Individual 5. The Undercover said the CI got out of the car and handed the Undercover “three (3) plastic twisty bags containing white substance alleged to be crack/cocaine.”

This account was substantially different than the events as described in the backup officer’s report in the prosecution file. In his report, the backup officer wrote that that he saw Individual 5 in the front passenger seat of the Camry and that it was the Undercover, not a CI, who approached the car and conducted the hand-to-hand transaction with Individual 5, and that the transaction was conducted at the front passenger window, not in the interior of the car. Indeed, the backup officer made no mention of the presence of a CI at the buy.

In another case, the Undercover’s report for a June 28, 2017 narcotics purchase described the suspect as “wearing a black t shirt and blue jeans” when he approached the Undercover’s car to engage in a narcotics transaction. However, a report by a member of the “surveillance team” described the suspect as wearing “[a] white t-shirt, black and gray shorts with black slippers.” Video footage in the prosecution file appears to show a male wearing a white shirt and black and gray shorts approaching a parked car which is consistent with the back-up officer’s description of the suspect’s clothing and inconsistent with the Undercover’s description.

In a third case, this one concerning a November 8, 2017 narcotics purchase, the Undercover reported that the suspect was wearing a burgundy jacket with blue jeans and a tan hat. The back-up officer reported that the suspect was wearing a burgundy hoodie with camo pants, and did not mention the target was wearing a hat. As explained below, this case was dismissed after the Undercover expressed uncertainty about his identification of the suspect.

- *A comparison of the Undercover’s reports for two narcotics purchases raises questions about the reliability of his accounts in both cases, one of which already had indicia of unreliability.*

A comparison of the Undercover’s reports on an alleged drug sale by one of the Operation defendants (“Individual 6”), with a newly obtained report about an entirely different narcotics transaction that the Undercover reportedly participated in on the same day with another Operation defendant (“Individual 7”) raises questions about the reliability of the Undercover’s accounts in both cases.

In the case of Individual 6, the proof already was rendered questionable by a recantation of an initial identification procedure of Individual 6 by the Undercover,

inconsistencies between various reports on the alleged transaction, and an inconsistency regarding the suspect's nickname that can be heard on a recording of the transaction.

In the Undercover's first report for Individual 6's case, the Undercover described a September 13, 2017 purchase of \$40 of crack/cocaine from a man who identified himself by a nickname outside of "145 S. 1st Street." After the purchase, around 2:05 p.m., the Undercover put the alleged drugs in their "left rear pocket" and left the area. At 2:48 p.m., the Undercover turned the suspected drugs over to an MVPD detective, who then showed the Undercover a single photograph of a man that the Undercover "immediately and without hesitation recognized . . . as [nickname omitted] as the one who sold me forty (\$40.00) USC worth of crack/cocaine."

In a second report, the Undercover gave a different account of an identification procedure. The Undercover wrote that, on September 14, 2017, the day after the alleged drug sale, the MVPD detective showed him a photo array of six photographs and the Undercover "immediately without hesitation recognized number three (3) as the same individual I purchased crack/cocaine from on September 13th, 2017." The person in photograph number 3 was the same individual (Individual 6) reportedly identified by the Undercover in the single photo identification procedure.

The prosecution file also included a third report by the Undercover about the September 13, 2017 transaction which had affixed to it a Post-It note reading "Amended Report." This report mirrored the first report up until the point that the drugs were turned over to the MVPD detective. The report ended there without any mention of a single photograph identification procedure having been conducted on September 13, 2017 with respect to Individual 6.

A fourth report, this one by the MVPD detective, about the alleged September 13, 2017 sale described the transaction as happening at 126 South 1st Avenue and involving an exchange of \$40 for two twists of alleged crack cocaine, with an individual going by the same nickname as on the Undercover's report, but made no mention of any identification procedure. A fifth report, a supplemental report submitted by that same detective on September 15, 2017, stated that on September 14, 2017, he showed a photo array containing six individuals to the Undercover from which the Undercover "immediately and without hesitation" identified the individual in photograph number 3 as the same individual the Undercover purchased crack cocaine from on September 13, 2017. This fifth report does not report or reference a single photograph identification of Individual 6 on September 13, 2017.

These five reports demonstrated, at best, inconsistent reporting of the identification procedure or procedures used with respect to Individual 6 between

September 13 and 14, 2017. In addition, a two-page report in the prosecution file for Individual 6 contained a folder labeled "ID on 9/13 that led to UC Confusion" which described the Undercover making identifications of Individuals 7 and another person in single photo identification procedures shortly after the alleged transaction with Individual 6. This suggested that, at the very least, the Undercover initially stated that he had identified Individual 6 in a single-photo procedure on the day of the alleged buy because he was mistakenly recalling the other procedures that he did that day.

In sum, there were inconsistencies between the Undercover's and the MVPD detective's reports as to the location of the transaction as well as the identification procedures. And, in audio recordings in Individual 6's file, the Undercover called the person alleged to be Individual 6 by a similar, but different nickname than the one noted in the Undercover's and the MVPD detective's, written reports.

Considered all together, these inconsistencies cast doubt on the reliability of the Undercover and the other MVPD accounts. Adding to this concern is a report that was newly obtained during the Review. In that report, the Undercover wrote that, at 2 p.m. (five minutes before the purchase from Individual 6), he was approached by an individual, who, after asking how much drugs the Undercover wanted, made a call to Individual 7. The Undercover proceeded to a second location and, 25 minutes later, the person who approached the Undercover facilitated an exchange of \$40 for two "white substance" from Individual 7. After this buy, the Undercover said they "placed the alleged crack/cocaine in my left rear pocket and then left the area."

This second report, in which the Undercover describes putting drugs in the same pocket that he, just minutes before, put drugs from the alleged transaction with Individual 6, is another indication that aspects of the two transactions were confused or conflated with each other.

Notably, the information about the inconsistencies in Individual 6's case was not in the prosecution file for Individual 7, even though the transactions were conducted concurrently, and the resulting cases were resolved within days of each other. Most notably, there is no indication in the file for Individual 7 that there were any discrepancies in the identification for the buy that Individual 6 was charged with. Where there were concerns about the Undercover's reliability in one transaction (Individual 6), that information should have been disclosed in the case arising out of a transaction that the Undercover was conducting at the same time (Individual 7), as well as other Operation defendants.

* * * *

Central to the District Attorney's decision to join the defense motions to vacate and dismiss the convictions in the Operation cases is her conclusion that many of the Operation cases did not have corroborative evidence sufficient to overcome the identified inconsistencies going to the unreliability of the Undercover's accounts and identifications of suspects.

Indeed, a review of the prosecution files stemming from the Operation also revealed that many of the cases had either no corroboration, or no sufficiently reliable corroboration, of the reported drug sale, such as a report or other indication that a narcotics transaction was actually observed by anyone other than the Undercover, or, in certain cases, a CI. Although some prosecution files include a back-up officer's report that an undercover narcotics purchase was observed through surveillance, other files either (1) did not include a back-up officer's surveillance report or (2) the back-up officer's report stated that the officer did not observe the hand-to-hand transaction, or (3) the back-up officer's report did not reference a transaction between the Undercover and the target.

Finally, the People note that three Operation cases have already been dismissed because of problems in meeting the requisite burden of proof. As noted above, the prosecution of Individual 2, who offered alibi evidence, was dismissed in 2020. Another case was dismissed when the prosecution was unable to proceed with a jury trial because witnesses were not available.³ In a third case, the prosecution arising out of the Operation was dismissed after a determination by the WCDAO that the evidence against the individual charged was unreliable. In that case, the People identified multiple discrepancies regarding the identification of an individual as a seller in the Undercover's report, the backup officer's report, and audio recordings of the Undercover speaking after the narcotics purchase. When asked about the discrepancies, the Undercover told the assigned prosecutor that, although at the time of the identification procedure, they were confident of the identification (the Undercover initially reported that, approximately 25 minutes after the purchase, they had identified the individual from a single photograph "without hesitation"), they were "now somewhat unsure" of their identification.

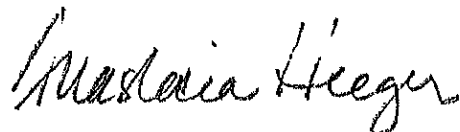
The People will be filing an Affirmation in support of the defense CPL § 440.10 motion that will include these findings.

³ The file specifically includes a notation that there was no surveillance in that case and that the only persons present for the sale were the Undercover, a CI, and the defendant.

Thank you for your attention to these matters.

Sincerely,

MIRIAM E. ROCAH
DISTRICT ATTORNEY

A handwritten signature in black ink that reads "Anastasia Heeger". The signature is written in a cursive style with a large initial 'A'.

By: Anastasia Heeger
Assistant District Attorney
Bureau Chief, Conviction Review

Cc:
Chambers of George E. Fufidio