03-1249-cr

To be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 03-1249-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

NATHAN SNAPE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the District of Connecticut (Janet C. Hall, J.) after a jury found the defendant guilty of unlawful possession of ammunition. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to the judgment of conviction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Did the district court properly conclude that the defendant's incriminating statements to law enforcement agents were voluntary and preceded by a valid waiver of his *Miranda* rights?

II. Did the district court properly uphold the state court's determination that the state search warrant, which led to the officers' entry into the defendant's residence and the discovery of the ammunition charged in the Indictment, was supported by probable cause?

III. Did the district court violate the defendant's Sixth Amendment rights by increasing his sentence based on facts not proven beyond a reasonable doubt to the trial jury?

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PRELIMINARY STATEMENT

On October 1, 2001, law enforcement officers with the Connecticut Board of Parole, the United States Marshals Service and the Bridgeport Police Department executed a state arrest warrant for the defendant, Nathan Snape, for alleged parole violations and a state search warrant for, *inter alia*, "the body of Nathan Snape" at 68 Highland Avenue, Building 3, Apartment 334, which was the apartment of the defendant's girlfriend. In the course of executing the warrant and conducting a protective sweep, officers discovered a Colt ten millimeter handgun and a magazine loaded with eight rounds of ammunition sitting

on a shelf just outside the bathroom. The defendant was arrested on the parole warrant. At the time of his arrest, the defendant twice told his parole officer, without the benefit of *Miranda* warnings, that the gun in the apartment belonged to him. The Government did not offer these statements at trial.

On October 9, 2001, the defendant was brought to the federal courthouse and interviewed by federal agents regarding criminal activity of others occurring in the Greene Homes housing project, which was where he had been living and where he was arrested. He waived his *Miranda* rights in writing and, in the course of the interview, volunteered that he had knowingly possessed the gun and ammunition found in the apartment. Specifically, he explained that he and a group of approximately five other individuals had been selling drugs in Greene Homes and, in the context of this drug dealing operation, had possessed the firearm seized from his apartment to arm themselves against rival drug dealers. Because of the defendant's history of drug dealing convictions and the fact that the firearm at issue had been manufactured and sold in Connecticut, he was charged in federal court with unlawful possession of ammunition by a convicted felon. The jury convicted him after trial.

In this appeal, the defendant challenges his conviction and sentence on three grounds. FIRST, he argues that the district court should have suppressed his October 9, 2001 statements either because the written *Miranda* waiver was not knowing and voluntary or because the statements themselves were not knowing and voluntary. This claim has no merit. The district court properly credited the law

enforcement officer's testimony and refused to suppress these statements. SECOND, the defendant contends that the evidence derived from the October 1, 2001 search should be suppressed on the ground that the state search warrant was not supported by probable cause. This argument fails for three reasons: the warrant was indeed supported by probable cause; the good faith exception to the warrant requirement should apply; and the exclusionary rule should not apply because, regardless of the propriety of the search warrant, the officers had an arrest warrant for the defendant and a reasonable belief that the defendant was residing in his girlfriend's apartment. THIRD and finally, the defendant challenges the district court's sentence because, despite the significant downward departure, it was based on enhancing facts not found by the jury beyond a reasonable doubt. This claim lacks merit because this Court has held that *Blakely* does not apply to the sentencing guidelines. Accordingly, the Court should affirm the defendant's judgment of conviction.

STATEMENT OF THE CASE

On March 6, 2002, a federal grand jury in Connecticut returned a one-count indictment charging the defendant-appellant, Nathan Snape, with unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). A16. On November 26, 2002, the district court (Janet C. Hall, J.) held a suppression hearing to address the defendant's motion to suppress evidence derived from the execution of the search warrant and denied the motion in an oral ruling. A90. On December 12, 2002, the district court held a suppression

hearing to address the defendant's motion to suppress his various statements to law enforcement officers and denied the motion in an oral ruling. A189. On December 17, 2002, a trial jury found the defendant guilty of the offense charged. On April 2, 2003, the district court sentenced the defendant to 84 months' imprisonment and three years' supervised release.

On April 4, 2003, the defendant filed a timely notice of appeal. A245. The defendant has been incarcerated since his arrest in this case and is currently serving his sentence.

STATEMENT OF FACTS

A. TRIAL PROCEEDINGS

Based on the evidence presented by the Government at trial, the jury reasonably could have found the following facts:

On September 19, 2001, Deputy United States Marshal Laurence Bobnick was contacted by officers with the Connecticut Board of Parole to aid in the location of a fugitive named Nathan Snape, the defendant in this case. Tr. at 51.[1] The Board of Parole had an arrest warrant for the defendant. Tr. at 109. On September 21, 2001, the officers went to the Greene Homes housing project in Bridgeport to look for the defendant. Tr. at 50-51. Specifically, they went to Apartment 334 of Building 3 at

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[1] The trial transcript will be referred to as "Tr." All other transcripts will be referred to as "Tr." and the appropriate date.

68 Highland Avenue. Tr. at 51. When they arrived at the apartment, they found one adult named Najja Fagan sleeping in a back bedroom and two children: a four-year old child named Jahneesha Williams and an infant named Na-Sheay Snape. Tr. at 53; A11.

The officers conducted additional investigation, which included talking with a confidential informant and reviewing records kept by the Bridgeport Housing Authority. Tr. at 53. Deputy Bobnick learned that the lessee of the apartment was Janetta Williams and that she lived there with her two children: Jahneesha Williams and Na-Sheay Snape. Tr. at 53; A11. He applied for and received a fugitive search warrant for apartment 334 and executed it with other law enforcement officers on October 1, 2001. Tr. at 55; A11.

The officers arrived at the apartment at approximately 6:00 a.m. on October 1, 2001, knocked on the front door of the apartment and announced themselves, breached the door after waiting a reasonable amount of time with no response, and entered the apartment. Tr. at 55-56. When they entered, they immediately saw a man and a woman lying on a mattress on the floor of a bedroom toward the rear of the apartment, but in direct view of the front door. Tr. at 56. Deputy Bobnick and Parole Officer William Griffin handcuffed these two individuals and attempted to ascertain their identities while Deputy James Masterson and Parole Officers Stephen O'Connor and Dan Barry conducted a security sweep of the apartment for other individuals. Tr. at 57.

At first, the defendant indicated that his last name was Giles, and Ms. Williams agreed. Tr. at 59. Deputy Bobnick had never before met the defendant, but had a picture of the "Nathan Snape" for whom they were searching. Tr. at 59. At that point, Officer Griffin took the defendant out of the apartment to talk with him further, and Deputy Bobnick remained with Ms. Williams. Tr. at 59.

Officers O'Connor and Barry checked the first bedroom, where the defendant and Williams had been sleeping, and found no one else there. Tr. at 111. They then turned down the hallway toward the second bedroom. Tr. at 112. As they approached the second bedroom, they noticed what appeared to be a gun sitting at eye level on a shelf in the hallway. Tr. at 112-13. Without stopping, the officers conducted a protective sweep in the second bedroom and found no one. Tr. at 112. At that point, Officer O'Connor returned to the gun, removed it from the shelf, along with a magazine that was sitting next to it. Tr. at 112. He turned over the gun and magazine to Deputy Bobnick, who identified the gun as a Colt, Delta Elite, 10 millimeter, semi-automatic handgun, and the ammunition in the magazine as eight 10 millimeter bullets. Tr. at 62-63, 125-28. The ammunition was later identified more specifically as eight 10 millimeter, hollow-point rounds manufactured by the Poongson Metal Manufacturing Company in Korea. Tr. at 126, 128. A subsequent fingerprint analysis of the gun and ammunition revealed no identifiable latent prints. Tr. at 148.

When Officer Griffin took the defendant outside the apartment and into the hallway, they were approached by

Najja Fagan, the same individual who had been in the apartment on September 21. Tr. at 157. Mr. Fagan was subjected to a patdown search and found to be in possession of a cigar tube containing several small baggies of suspected crack cocaine. Tr. at 158. He was detained and arrested by Bridgeport police officers. Tr. at 158, 243.

Meanwhile, Deputy Bobnick and other law enforcement officers began searching the apartment for other identifying items connecting the defendant to the residence or indicating a possible location of the defendant. Tr. at 64. At this point, the officers were still not certain that the male individual with Officer Griffin was indeed the subject of the search warrant. In a freestanding metal cabinet in the kitchen, Deputy Bobnick located a green cigar tube, similar to the one removed from Mr. Fagan, containing approximately 26 small ziplock baggies with suspected crack cocaine. Tr. at 65, 105, 218. The substance inside the cigar tube subsequently lab tested positive for the presence of cocaine base. Tr. at 104-105.

At that point, Deputy Bobnick confronted Ms. Williams, who was still seated in the living room area. Tr. at 66. She admitted that the male who was outside talking with Officer Griffin was, in fact, Nathan Snape. Tr. at 66. By this time, approximately fifteen to twenty minutes had passed since the original entry. Tr. at 67. The officers left the residence, escorted the defendant to Officer Griffin's vehicle and transported him to the Bridgeport Correctional Center, where he was charged with various parole

violations.[2] Tr. at 67, 161. The paperwork that was provided to the defendant gave him the opportunity to request a lawyer, but he chose not to do so. Tr. at 214.

On October 9, 2001, Deputy Bobnick and Special Agent Chad Campanell with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") had the defendant brought to the federal courthouse from the jail to conduct an interview. Tr. at 68. The agents wanted to talk to the defendant about suspected, ongoing narcotics activity in the Greene Homes housing project and, specifically, about the possibility that additional firearms and narcotics were being stored in the vicinity of Ms. Williams's apartment. Tr. at 68, 225. They did not tell the defendant prior to October 9 that they would be speaking to him on that date. Tr. at 73, 224. The interview itself lasted approximately thirty-five minutes. Tr. at 68, 228.

At that start of the interview, the agents identified themselves, confirmed that the defendant was willing to talk to them, and read him his *Miranda* warnings. Tr. at 69, 225, 229. The defendant listened to the warnings and then read and signed a written *Miranda* waiver form

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[2] On the date of his arrest, the defendant, without the benefit of *Miranda* warnings, twice admitted to Officer Griffin (once in the presence of Deputy Bobnick) that the gun found in the apartment belonged to him. GA3-GA4. At trial, the Government chose not to offer these statements in its case-in-chief, but, in doing so, did not concede a *Miranda* violation or the inadmissibility of the statements. A95-A98.

provided by Special Agent Campanell. Tr. at 69, 229; Ex. 6 (*Miranda* waiver form); GA1.[3]

The agents then began discussing the drug dealing activity in Greene Homes. Tr. at 70. The defendant stated that he had been involved with a group of individuals who had been dealing drugs there. Tr. at 70. In discussing his relationship with these individuals, the defendant specifically admitted to dealing drugs with them. Tr. at 71-72. He identified other members of the group by either their street names or first names: Chef, Sose, Buck, Big Mike and Najja. Tr. at 70, 230.

As to firearms, the defendant indicated that his group had been arguing with a rival group of drug dealers and, as a result, had felt the need to arm themselves. Tr. at 70, 231. According to the defendant, at all times, at least one member of the group was armed; indeed, they passed around several firearms among them for the express purpose of protecting themselves against this rival group. Tr. at 70-71, 231. He provided possible locations of apartments used to stash their guns and admitted that his apartment was sometimes used to hide the Colt firearm that had been discovered there on October 1. Tr. at 70-71, 232. He further admitted that, although he did not own the Colt firearm, he had handled it, brought it with him while dealing drugs, allowed it to be stored in Ms. Williams's apartment and, during the weekend prior to October 1, had placed the gun on the hallway shelf, removed its magazine

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[3] Citations to the defendant's appendix will be referred to by "A" and the page number. Citations to the Government's appendix will be referred to by "GA" and the page number.

and locked its slide to the rear position, which was exactly how the officers had found the gun during the protective sweep. Tr. at 72. The defendant also expressed concern about having kept the gun in the apartment because he had not wanted to get Ms. Williams "in trouble" and did not want to jeopardize the safety of her two small children. Tr. at 72, 237. In fact, he explained that he had taken the magazine out of the gun and secured it on the hallway shelf to keep it away from the children in the apartment. Tr. at 237.

Also on October 9, 2001, Deputy Bobnick and Special Agent Campanell interviewed Janetta Williams in her apartment in Greene Homes. Tr. at 73. Ms. Williams provided the agents with an oral statement and then agreed to sign a written statement prepared by Deputy Bobnick. Tr. at 74. Although Deputy Bobnick was able to locate and speak with Ms. Williams in early 2002, he was unable to find her prior to the defendant's December 2002 trial. Tr. at 76. According to family members who live in Bridgeport, Ms. Williams was employed as a traveling salesperson and, as of the beginning of December 2002, was in Oregon. Tr. at 76. Deputy Bobnick was unable to discover an address or phone number for her, but did not think that her absence from Connecticut was related, in any way, to this case. Tr. at 77.

On September 11, 2002, at approximately 2:29 p.m., during the pendency of this case, the defendant placed a phone call from a Connecticut prison facility. Tr. at 258-59. All state inmates are informed orally and in writing that their telephone calls are recorded. Tr. at 257-58. During the call, the defendant indicated, *inter alia*:

> I got to get out of this jail man. I got like, I got three months I owe in January. I got till January to finish this case. I'm trying to get out man. Then I'm done, I'm done man. I'm done . . . it's over. I'll get a job somewhere, I'm done man.

Ex. 11 (CD recording of prison call).[4]

B. SENTENCING PROCEEDING

At sentencing on April 2, 2003, the district court concluded that the defendant's base offense level was 24 by virtue of his two prior felony convictions for either a crime of violence or controlled substance offense under U.S.S.G. § 2K2.1(a)(2). Tr.4/2/03 at 20. The court further concluded that the defendant had accumulated 19 criminal history points and, as a result, placed him in Criminal

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[4] The Government sought to have a much larger excerpt of the prison call admitted as consciousness of guilt evidence to show that the defendant had been trying to get in contact with Janetta Williams to have her change her written statement in which she had indicated that the gun found in her apartment belonged to the defendant. Tr.12/13/02 at 3-5. Because Ms. Williams was unavailable at trial and could not be confronted as to her statement, the district court excluded both her written statement and the defendant's references during the prison call to approaching Ms. Williams and asking her to change her statement. Tr. at 175-193. At that point, the Government offered the far less substantial excerpt quoted above, which was admitted as corroborative evidence of the defendant's confession to Deputy Bobnick and Special Agent Campanell. Tr. at 203-04; Ex. 11.

History Category VI, so that the resulting guideline range was 140-175 months' incarceration and the effective guideline range was the 120 month statutory maximum sentence under 18 U.S.C. § 924(a)(2). Tr.4/2/03 at 20-21.

The defendant moved for a downward departure under U.S.S.G. §§ 5K2.0 (combination of factors) and 4A1.3 (overstatement of criminal history). The court refused to depart under § 4A1.3, but agreed to depart under § 5K2.0. In so departing, the district court relied primarily on the circumstances of the defendant's childhood and his resulting emotional condition, as discussed in *United States v. Rivera,* 192 F.3d 81 (2d Cir. 1999). The court imposed a sentence of 84 months' incarceration.[5]

SUMMARY OF ARGUMENT

I. The district court properly refused to suppress the defendant's October 9, 2001 statements. The defendant was advised of his *Miranda* rights orally and in writing and executed a written waiver of those rights at the start of the interview. By the defendant's own testimony, he was not threatened or coerced in any way and understood the rights he was waiving. The defendant's claim that he was not Mirandized until after he made incriminating statements contradicted the agent's testimony and was

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[5] Although the court did not indicate a specific number of levels it was departing from the defendant's adjusted offense level of 28, a six level departure would have been necessary to reach a guideline range which encompassed the 84 month sentence.

discredited by the district court. Also, the fact that the agents began the interview by telling the defendant that they were not interested in discussing his case, but were interested in discussing, generally, firearms and drug dealing activity occurring in the Greene Homes housing project does not render the admissions unknowing because the defendant began discussing his case without question or provocation from the agents and did so after being advised that his statements could be used against him.

II. The district court properly denied the defendant's motion to suppress the contraband seized from Apartment 334 based on his argument that the search warrant authorizing the officers' entry was not supported by probable cause. The warrant was issued based on information received from, and repeated contacts with, a known, confidential informant, and successful attempts to corroborate some of this information through independent investigation. Moreover, even if the search warrant were not supported by probable cause, the contraband seized from the residence should not be suppressed under the exclusionary rule because both the good faith exception and the inevitable discovery doctrine apply to the facts of this case.

III. The district court's application of a four level enhancement for possession of ammunition in connection with another felony offense under U.S.S.G. § 2K2.1(b)(5), and attribution of 19 criminal history points under U.S.S.G. § 4A1.1 did not violate the defendant's Sixth Amendment rights. Under this Court's recent decision in *United States v. Mincey*, the proposition set forth in *Blakely v. Washington*, that facts which enhance a

defendant's maximum possible sentence must be proven beyond a reasonable doubt to a jury, does not apply to the federal sentencing guidelines.

ARGUMENT

I. THE DEFENDANT'S OCTOBER 9, 2001 STATEMENTS TO LAW ENFORCEMENT OFFICERS WERE KNOWING AND VOLUNTARY AND PRECEDED BY A VALID *MIRANDA* WAIVER

A. RELEVANT FACTS

On October 1, 2001, after the discovery of the firearm and ammunition, the defendant twice admitted to law enforcement officers that the gun belonged to him. GA3-GA4. At trial, the Government neither conceded a *Miranda* violation nor the inadmissibility of these statements, but chose not to offer them in its case-in-chief.[6] A95-A98.

At a suppression hearing held on December 12, 2002, the Government offered testimony from ATF Special Agent Chad Campanell, which revealed the following facts: On October 9, 2001, the defendant was brought by

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[6] The Government indicated that the statements would be offered to cross-examine the defendant, should he testify, or in a rebuttal case, if necessary. A95-A96. The defendant did not testify or call any witnesses at trial.

the United States Marshal Service from the state correctional center where he was being housed to the United States Marshal's office in the federal building in Bridgeport, Connecticut. A101, A113. Deputy United States Marshal Laurence Bobnick and Special Agent Campanell interviewed the defendant in a conference room adjacent to the United States Marshal's office when he arrived. A101-A102. The primary purpose of the interview, which lasted approximately 30-45 minutes, was to learn additional information about criminal activity in the Greene Homes housing project, and specifically, to gain information about where firearms were being sold and stored in the housing project. A102, A107. Because the defendant had been arrested in Greene Homes with a firearm and crack cocaine, the agents believed that, prior to his arrest, the defendant had frequented this housing project often and knew quite a bit about criminal activity occurring there. A103.

At the start of the interview, Special Agent Campanell told the defendant that he was interested in information about criminal activity occurring in Greene Homes. A114. He advised the defendant that he was aware that he had taken responsibility for the gun seized from Apartment 334, was not interested in discussing that incident further, and was more interested in discussing firearms activity by others in the housing project. A114-A115.

At that point, Special Agent Campanell advised the defendant of his *Miranda* rights orally. A103-A104. Then, he provided the defendant with an ATF form setting out the *Miranda* warnings and asked him to read it. A105. The form includes a waiver provision which indicates that

the defendant is willing to talk with the officer, does not want an attorney, is willing to waive his right to remain silent and has not been subjected to any threats or coercion in the course of the interview. A105; GA1 (waiver form). The defendant read through the form and signed it in three different places. A105. First, he signed to indicate that he understood the rights; second, he signed to indicate that he was willing to waive those rights; and third, he signed to certify that Special Agent Campanell had read him the *Miranda* warnings. A105; GA1. Both Deputy Bobnick and Special Agent Campanell witnessed the defendant's signature. GA1.

The defendant himself admitted to having been arrested previously and having heard the *Miranda* warnings numerous times. A165. Specifically, he admitted to having felony convictions from two different states and arrests from no less than five different police departments in Connecticut alone. A165. He stated that he had no problem understanding the warnings. A165. In fact, he admitted that, on one prior occasion in 1999, he had executed a written confession in a case involving his use of an alias and had waived his *Miranda* warnings in writing. A178.

The defendant freely spoke with Deputy Bobnick and Special Agent Campanell. A106. He appeared to understand his rights and knowingly waive them. A106-A107. He did not appear to be under the influence of alcohol, any controlled substance or mental disability. A106. He himself admitted that the officers did not threaten him in any way and that he was not suffering from any physical or mental disability on the day of the

interview. A175. The agents asked him open-ended questions and, in response, he made several incriminating statements about his own activity in Greene Homes. A116. It was the defendant himself who brought up the firearm seized from Apartment 334. A117. In essence, he discussed it in the course of discussing the other members of the group with whom he dealt drugs and describing the various guns that he and the others had possessed to defend their drug business. A117.

The defendant testified at the suppression hearing. A123. He agreed with Special Agent Campanell's version of events in that he stated that the officers he met on October 9, 2001 had told him they wanted to know who was buying and selling guns and who was dealing drugs in Greene Homes. A126-A127. He claimed, however, that, had he known that the agents would be discussing his own unlawful activities, he would never have waived his rights and agreed to talk to them. A127. He also claimed that he was not given his *Miranda* warnings at the start of the interview and, instead, was asked several substantive questions about criminal activity in the housing project. A132-A133. According to the defendant, it was not until the subject arose regarding the gun seized from Apartment 334 that the *Miranda* warnings were read. A133-A134. In fact, the defendant claimed that he did make several incriminating statements about the gun at issue in this case prior to being read his *Miranda* warnings. A160. Finally, the defendant maintained that he had never admitted to being a drug dealer, but only to being acquainted with members of a small drug operation. A163. He also maintained that he never admitted to having possessed or

even touched the gun found in Ms. Williams's apartment. A169, A171.

The district court denied the motion to suppress. The court credited Special Agent Campanell's testimony that he read the *Miranda* warnings at the start of the interview. The court further concluded that the *Miranda* waiver was knowing and voluntary. On this point, the court held:

> [T]he waiver was given under circumstances in which the defendant was in no physical distress or discomfort; that the conduct of the agents was . . . low key, there was nothing overbearing, intimidating, abusive, either physically or emotionally, psychologically; no threats were made to the defendant; and period of time of the questioning was not long.

A185. The court also held that the waiver was knowing because the warnings were given at the start of the interview, the defendant is articulate and intelligent enough to understand the warnings, and the agents did not attempt to mislead the defendant about the nature of the interview to procure a waiver. A186-A187.

The court specifically discredited the defendant's claim that the agents misled him about the nature of the interview to get him to waive his rights and incriminate himself:

> On the contrary, I find that the agent advised him that he wanted to ask about, generally about, criminal activity and guns in Greene Homes; that

> he read the waiver to him, that the defendant read the waiver, the defendant signed the waiver, and that the agent then proceeded to inquire about general criminal activity in Green Homes and in the course of that, answering those questions, the defendant volunteered the information about the gun in the apartment in question.

A188-A189.

B. GOVERNING LAW AND STANDARD OF REVIEW

Under the Fifth Amendment to the Constitution, no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The police may use a defendant's confession without transgressing his Fifth Amendment right only when the decision to confess is the defendant's free choice." *United States v. Anderson*, 929 F.2d 96, 98 (2d Cir. 1991). "[T]o reduce the risk of a coerced confession and to implement the Self-Incrimination Clause, th[e] Court in *Miranda* concluded that the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Missouri v. Seibert*, 124 S.Ct. 2601, 2608 (2004) (internal citation and quotation marks omitted). "*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Id.* "Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility." *Id.* "[C]ases in which a defendant can make a colorable

argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984).

A *Miranda* waiver must be knowing and voluntary. "A voluntary relinquishment of a right occurs when the relinquishment is the product of a free and deliberate choice rather than intimidation, coercion, or deception." *United States v. Male Juvenile*, 121 F.3d 34, 41 (2d Cir. 1997) (internal quotation marks omitted). The officers' state of mind is irrelevant to the question of voluntariness. *See Moran v. Burbine*, 475 U.S. 412, 423 (1986). "The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they are just not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible." *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990). The court must look to the totality of the circumstances to determine whether a defendant was given the chance to "deliberately waive his rights." *Male Juvenile*, 121 F.3d at 41. The government is required to prove waiver by a preponderance of the evidence. *See Male Juvenile*, 121 F.3d at 39. "To prove a valid waiver, the government must show (1) that the relinquishment of the defendant's rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and of the consequences of waiving that right." *United States v. Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995) (per curiam).

"[A] district court's conclusion regarding a defendant's waiver of his constitutional rights is subject to *de novo*

review," and its underlying factual findings are reviewed "for clear error." *United States v. Lynch*, 92 F.3d 62, 65 (2d Cir. 1996). In making its determination, the Court should consider "the totality of all the surrounding circumstances." *United States v. Ruggles*, 70 F.3d 262, 264-65 (2d Cir. 1995).

C. DISCUSSION

1. THE DEFENDANT'S *MIRANDA* WAIVER WAS KNOWING AND VOLUNTARY

Special Agent Campanell orally advised the defendant of his *Miranda* rights at the start of the October 9, 2001 interview. He then provided a written recitation of those rights and watched as the defendant read them. After reading the form, the defendant signed it in three different places and, in doing so, expressly acknowledged and waived his right to remain silent, his right to an attorney, and his right to stop answering questions *at any time* during the interview. This waiver establishes that the defendant "had a full awareness of the right being waived and of the consequences of waiving that right." *Jaswal*, 47 F.3d at 542. "It may be assumed that [a written waiver's] main purpose is evidentiary, to establish with a minimum of difficulty and a maximum of certainty that the police gave the warnings and that the suspect had agreed -- preliminarily -- to answer questions." *Collins v. Brierly*, 492 F.2d 735, 739 (3d Cir. 1974). Indeed, no express statement of waiver, whether written or oral, is even required; in light of all relevant circumstances, merely answering questions after *Miranda* warnings can be

enough to constitute a valid waiver. *See United States v. Scarpa*, 897 F.2d 63, 68 (2d Cir. 1990).

The defendant cannot point to personal characteristics which undercut the validity of his waiver. He is not a juvenile; he is not illiterate; he has no trouble understanding English; he has no apparent mental disability; he was not under the influence of alcohol or any controlled substance at the time of the waiver; and, most importantly, he has significant experience with the criminal justice system, having had felony convictions from two different states and arrests from five different police departments in Connecticut. *See Ruggles*, 70 F.3d at 265 (upholding *Miranda* waiver based on defendant's extensive criminal record, absence of evidence that defendant lacks maturity, education or intelligence, and fact that he was twenty-eight years old at the time of questioning). "[H]is dealings with the criminal justice system would have allowed him to fully comprehend the serious situation in which he found himself . . . ." *Alston v. Redmon*, 34 F.3d 1237, 1254 (3d Cir. 1994) (finding that defendant's three prior convictions "indicate that he was not an uninitiated novice, susceptible to coercive pressure or threats by law enforcement officers") (internal quotation marks omitted). As the Supreme Court found in *United States v. Watson*, 423 U.S. 411, 424-25 (1976), "[t]here is no indication in this record that [the defendant] was a newcomer to the law, mentally deficient, or unable in the face of a custodial arrest to exercise a free choice." *Id.* (footnote omitted).

On appeal, it appears that the defendant's principal argument is that the agents tricked him into waiving his

Miranda rights by telling him that they were not interested in discussing his case, but wanted to discuss the criminal activity of others occurring in the housing project where he had been arrested. Neither side disputes that, at the start of the interview, the agents told the defendant they wanted to talk to him about criminal activity generally occurring in Greene Homes. It is the effect of this statement that is in dispute.

First, the *Miranda* warnings themselves address any concern that a defendant could be misled into believing his statements would be protected in some manner. The *Miranda* warnings given to the defendant orally and in writing specifically provided, without limitation, that *any* statements made by the defendant may be used against him "in court, or other proceedings." GA1. Second, the district court properly credited Special Agent Campanell's testimony that the defendant himself had volunteered the incriminating information and had done so, not in response to any question about his case, but in response to the agents' general questions about criminal activity occurring in the housing project. A district court has wide latitude to make credibility findings; indeed, "[t]he district court is afforded 'greater deference' when its findings are based on the credibility of the witnesses." *See United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001). Third, it is well-settled that courts will not protect a defendant from his own voluntary decisions to make incriminating statements about his own case. *See United States v. Alvarado*, 882 F.2d 645, 650 (2d Cir. 1989) ("It is not improper to mention the situation which the defendant faced and the advantages to him if he assisted the government") (internal quotation marks and brackets

omitted); *Edwards v. Arizona*, 451 U.S. 477, 490 (1981) (Burger, C.J., concurring) (noting that the Court "consistently has 'rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case'") (quoting *Michigan v. Mosley*, 423 U.S. 96, 109 (1975) (White, J., concurring in result).

The defendant recognizes that the "Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the fifth amendment privilege." Def.'s Brief at 19 n.2 (citing *Colorado v. Spring*, 479 U.S. 564, 575 (1987). Instead, he argues that the agents made affirmative misrepresentations to procure the waiver. This argument is directly rebutted by the agent's testimony at the suppression hearing, which the district court credited. There is absolutely no evidence to suggest that the agents had any other motivation in bringing the defendant to the courthouse and interviewing him or that they made any misrepresentations to him. Moreover, it is settled that the subjective intent of the interviewing agents is not relevant to whether a defendant's waiver was valid. *See Moran*, 475 U.S. at 423.

Finally, the defendant appears to challenge the district court's finding that Special Agent Campanell read the *Miranda* warnings and procured the waiver at the start of the interview. The defendant testified at the suppression hearing that the warnings were not read until the middle of the interview and until after he had made several incriminating statements; however, Special Agent

Campanell testified that he read the warnings at the start of the interview and before questioning commenced. The district court's function at a suppression hearing is to make credibility determinations and factual findings, which are then reviewed under the clearly erroneous standard. *See Lynch*, 92 F.3d at 65. Here, the district court found the defendant's version of events to be incredible. On appeal, the defendant can point to no other facts in the record to show why this credibility determination was clearly erroneous.[7] *See id.*

To the extent that the defendant relies on *Missouri v. Seibert*, 124 S. Ct. 2601, his reliance is misplaced. In *Seibert*, the Court addressed what it characterized as a somewhat routine police practice of intentionally

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[7] The defendant's arguments appear to contradict each other. On the one hand, he claims that Special Agent Campanell would have had no reason to read the defendant his *Miranda* warnings at the start of the interview because the subject of the interview was not going to be the defendant's case, but the criminal activity of others in Greene Homes. Def.'s Brief at 22. On the other hand, he claims that Special Agent Campanell read the *Miranda* warnings because he supposedly thought that the defendant's un-Mirandized statements on October 1, 2001 would not be admissible against him and, therefore, wanted to procure incriminating statements. Def.'s Brief at 23. Neither argument can overcome the plain facts found by the district court, i.e., that Special Agent Campanell advised the defendant of his Fifth Amendment rights at the start of the interview and that these rights specifically informed the defendant that his statements could be used against him in the future.

withholding the provision of *Miranda* warnings until the middle of an interview, after a suspect makes inculpatory statements. *See Seibert*, 124 S. Ct. at 2609. The Court struck down this "question-first" practice because it "effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose." *Seibert*, 124 S. Ct. at 2613. Here, the district court credited Special Agent Campanell's testimony, who specifically stated that he administered the *Miranda* warnings at the start of the interview and *prior* to initiating any substantive questioning.

Although the defendant does not appear to make any such claim on appeal, his two un-*Mirandized* admissions at the time of his arrest on October 1 do not implicate the principles set forth in *Seibert* and render his October 9 statements inadmissible. The Court in *Oregon v. Elstad*, 470 U.S. 298 (1985), held that a suspect's un-*Mirandized* admissions at the time of his arrest in his home did not render inadmissible a subsequent *Mirandized* statement during an interrogation at the police station. *See id.* at 311-14. In rejecting this "cat out of the bag" argument, the *Elstad* Court reasoned that any causal connection between the suspect's two statements was "speculative and attenuated." *Id.* at 313. In *Seibert*, the Court further explained its holding in *Elstad*:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be

> effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.
>
> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings.

Seibert, 124 S. Ct. at 2612.

On October 1, the defendant made two separate, brief, un-*Mirandized*, admissions to state Parole Officer Griffin that the gun in the apartment belonged to him.[8] GA14-

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[8] There is little in the record as to the circumstances giving rise to the defendant's October 1 admissions (continued...)

GA15. Nine days later, he was brought into the federal courthouse, provided with a complete oral and written *Miranda* warning and waiver, and questioned about criminal activity occurring in the Greene Homes housing project. The agents specifically told him that they were not interested in discussing his case. Under these circumstances, the holding in *Elstad*, as more fully explained in *Seibert*, controls. Thus, the voluntariness and admissibility of the defendant's fully *Mirandized* October 9 statements are not undermined at all by his un-*Mirandized* October 1 statements.

2. THE DEFENDANT'S OCTOBER 9, 2001 STATEMENTS WERE VOLUNTARY

The defendant also claims that, even if he is found to have validly waived his Fifth Amendment rights, his subsequent statements to Deputy Bobnick and Special Agent Campanell on October 9, 2001 were involuntary. Def.'s Brief at 25. In support of this claim, he repeats the argument that the agents deceived him by telling him that they were not interested in discussing his case, but were interested in discussing criminal activity of others occurring in Greene Homes. *See id.* To this argument, which is addressed above, he adds the claim that, despite his *Miranda* waiver, he "could reasonably [have]

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[8] (...continued)
because they were not offered against him at trial and were not raised by defense counsel in attacking the admissibility of the October 9 statement.

believe[d] that the officer's bona fide purpose in taking these statements from the defendant was to investigate people other than the defendant, and that would assist him in limited prosecution or in not being prosecuted." *Id.* at 26.

First, there is no evidence in the record to suggest that Special Agent Campanell told the defendant he would not be prosecuted or would be treated more leniently if he provided information about the criminal activities of others in Greene Homes. To the contrary, the agent testified that he simply advised the defendant of the purpose of the meeting and asked him open-ended questions about the crime occurring in the housing project. It was in that context that the defendant volunteered incriminating statements about his own criminal activity. Moreover, the defendant testified at the suppression hearing and never claimed (1) that the agents discussed the benefits of cooperation with him, or (2) that he had any subjective expectation of a benefit as a result of speaking with the agents.

Second, even if the agent had made such statements, they would not have undercut the voluntariness of the defendant's subsequent admissions. "[A] confession is not involuntary merely because the suspect was promised leniency if he cooperated with law enforcement officials." *United States v. Bye*, 919 F.2d 6, 9 (2d Cir.1990) (internal quotation marks omitted); *see also Jaswal*, 47 F.3d at 542. "[S]tatements to the effect that it would be to a suspect's benefit to cooperate are not improperly coercive." *Ruggles*, 70 F.3d at 265. "Statements such as these are

merely common sense factual observations." *Id.* After a suspect has been advised of his rights, officers are "free to discuss with him the evidence against him and the reasons why he should cooperate." *Id.* (citing *United States v. Tutino*, 883 F.2d 1125, 1138 (2d Cir.1989)).

Thus, the district court properly concluded that the defendant's incriminating statements to Deputy Bobnick and Special Agent Campanell were knowing and voluntary. There is no evidence to suggest that the defendant was coerced or threatened in any way, or that he was suffering from any physical or mental disability at the time of the interview. Moreover, at the start of the interview, Special Agent Campanell advised the defendant of his *Miranda* rights orally and in writing and did not begin to question him until the defendant had executed an explicit, written waiver of those rights. The defendant chose to speak to the agents, knowing full well that any statements he made to them could be used against him at a later time.

II. THE SEARCH WARRANT IN THIS CASE WAS SUPPORTED BY PROBABLE CAUSE, OR IN THE ALTERNATIVE,THE SEIZED EVIDENCE SHOULD NOT BE SUPPRESSED UNDER THE GOOD FAITH EXCEPTION OR THE INEVITABLE DISCOVERY DOCTRINE

A. RELEVANT FACTS

On November 18, 2002, the defendant filed a motion to suppress the firearm and ammunition seized from Ms. Williams's apartment on October 1, 2001. GA39. Specifically, the defendant claimed that the evidence should be suppressed because the search warrant which gave rise to the officers' entry into the apartment was not supported by probable cause. GA42. The district court held a suppression hearing on November 26, 2002, at which Deputy Bobnick testified, and both parties presented oral argument as to whether the search warrant was supported by probable cause. Based on this testimony, the search warrant affidavit and the exhibits, the court reasonably could have found the following facts:

On September 28, 2001, Deputy United States Marshal Laurence Bobnick and Connecticut Board of Parole Officer William Griffin applied for a search warrant to "search the premises of 68 Highland Ave. Bld. 3, Apt. 334, Bridgeport, CT for the body of Nathan Snape and any articles or papers which might assist in his apprehension." A10. Connecticut Superior Court Judge Burton Kaplan found, based on the contents of the warrant affidavit sworn out by these two officers, that probable cause existed to

search the premises and authorized a search for "the body of Nathan Snape and any articles or papers which might assist in his apprehension." A14. The officers executed the warrant on October 1, 2001 and, in the course of arresting the defendant, discovered the firearm containing the ammunition charged in the Indictment. GA41.

The search warrant was issued based on the following information, which is contained in the warrant affidavit executed by Deputy Bobnick and Parole Officer Griffin: On or about September 20, 2001, Connecticut Parole officers and Deputy Bobnick approached a confidential informant near 68 Highland Avenue in Bridgeport, Connecticut. A11. The officers were searching for the defendant in connection with an alleged Connecticut parole violation. A10-A11. They showed the informant a picture of the defendant, and the informant immediately recognized him. A11. He told the officers that he had seen the defendant "hanging out" near Building Three of 68 Highland Avenue. A11. The officers gave the informant their various phone numbers and told him to call if he knew, more specifically, where the defendant was living. A11.

Later that same day, Deputy Bobnick received a call from the same informant, during which the informant stated that the defendant was staying in Apartment 334 of Building Three of 68 Highland Avenue. A11. The next morning, at 7:30 a.m., officers went to the address, knocked persistently for approximately one minute, and, at that point, were greeted by a four-year-old girl, who was soon after identified as Jahneesha Williams. A11. They had heard quiet noises emanating from inside before the

door was opened. A11. When the door was opened, they immediately noticed an infant sleeping on a full-sized mattress in a back bedroom. A11. They asked the girl if her parents were home, and she confirmed that they had left. A11. She also stated that there were no adults at home. A11. The officers decided to call the Connecticut Department of Children and Families based on this information, but determined that it was not necessary because they found a male sleeping in a second bedroom. A11.

The adult sleeping in the apartment identified himself as "Najja Fagan." A11. He stated that he was the boyfriend of a "Ricola Griffin," who lived in that apartment with her sister, Janetta Williams. A11. Neither Griffin nor Williams were in the apartment. A11. To test Fagan's reliability, the officers showed him a photograph of a different individual involved in an unrelated case and asked him several questions about that individual. A11. Based on what the officers knew about this unrelated case, they determined that his answers were false and that he was not reliable. A11.

Jahneesha Williams stated that she was not sure when her parents would return to the apartment, that her father had just left, and that she sees her father "all the time." A11. When the officers looked in the bedroom where the infant was sleeping, they saw numerous articles of men's clothing strewn about the room. A11. They also noticed that one of the windows in that bedroom had no screen, was left wide-open and emptied out to a fourth floor landing, which gave access to windows of some fourth

floor apartments. A11. At that point, the officers left the apartment. A11.

Later that same day, Deputy Bobnick received a call from the same informant inquiring as to whether the defendant had been apprehended. A11. Deputy Bobnick replied that the defendant had not been in the apartment when they had arrived and questioned the informant as to the information he had given them thus far. A11. The informant insisted that the defendant did live in Apartment 334. A11. He also stated that the defendant's two children were living there.[9] Deputy Bobnick independently investigated the name of the infant child who had been in the apartment through the lease agreement kept on record by the Bridgeport Public Housing Authority. According to that document, the lessee of the apartment was Janetta Williams, and she lived there with her two daughters, Jahneesha Williams and Na-Sheay N. Snape.[10] A11, A65.

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[9] Deputy Bobnick testified that the informant told him about the two children without having been told that there had been two children in the apartment when the officers had gone there the first time. A64-A65. This detail is not in the warrant affidavit. A11.

[10] In the warrant affidavit, Deputy Bobnick, out of concern for protecting the identity of the individual at the Bridgeport Housing Authority who helped him, did not disclose how he independently investigated the identity of the infant child. A65. The warrant affidavit simply states, "Further investigation revealed that the infant's name is Na-Sheay N. Snape." A11.

Based on all of this information, Deputy Bobnick affirmed that "there does exist sufficient probable cause to believe that Nathan Snape is residing at 68 Highland Ave., Bld. 3, Apt 334, Bridgeport, CT." A12. He also stated that the warrant was necessary for officer safety, in light of Fagan's significant criminal history, which included an arrest for murder and numerous firearms violations, and in light of his suspicion that the defendant had been in the apartment on September 21, 2001, but had escaped out of a window when the officers first knocked on the door. A12. Lastly, the warrant sought "papers or articles which may assist in the capture" of the defendant, in light of the affidavit's statement that, even if the defendant is not found in the apartment, other evidence in the form of phone bills, notes and bills might provide information about the defendant's whereabouts. A12.

The warrant affidavit does not indicate that the informant has a proven track record of reliability. A11, A84-A85. At the suppression hearing, however, Deputy Bobnick testified that he had used the informant on one prior occasion, in connection with a civil matter, and had received reliable information. A61-A62. He also testified that he had not compensated the informant on the prior occasion and could not remember if he had compensated him on this occasion. A70, A74-A75. Deputy Bobnick indicated that, since the issuance of the search warrant in this case, he has used the informant on several occasions and, in connection with those instances, has compensated him. A70.

After hearing argument, the district court determined that the warrant was supported by probable cause. A88.

Specifically, the court stated: "[T]aking the entire content of the affidavit as a whole, and giving deference to the issuing judge as I've indicated the case law suggests that I should, the Court concludes that there is, in fact, probable cause on the face of this application for the issuance of a warrant for this defendant at this address and this apartment." A88. In so ruling, the court noted that the informant was known and identified to the officers, that the officers conducted an independent investigation to corroborate the informant's information, that the informant himself corroborated the results of the subsequent investigation by indicating that the defendant lived in the apartment with his two children, and that the infant child living in the apartment had the same last name as the defendant. A87-A88.

The district court also addressed the alternative argument under the good faith exception in case "someone were to think it were a closer question that I have just indicated . . . ." A88. On that issue, the court found that "the affidavit was not so lacking in indicia of probable cause so as to render belief in such probable cause entirely unreasonable." A90.

B. GOVERNING LAW AND STANDARD OF REVIEW

1. ISSUANCE OF A SEARCH WARRANT

The Constitutional protection is that "no Warrants shall issue, but upon Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

Probable cause is "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (internal quotation marks omitted). "[P]robable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. "In assessing the proof of probable cause, the government's affidavit in support of the search warrant must be read as a whole, and construed realistically." *United States v. Salameh*, 152 F.3d 88, 113 (2d Cir. 1998).

A court reviewing the issuance of a search warrant "accord[s] 'great deference' to a judge's determination that probable cause exists[] and . . . resolve[s] any doubt about the existence of probable cause in favor of upholding the warrant." *Salameh*, 152 F.3d at 113; *United States v. Martin*, 157 F.3d 46, 52 (2d Cir. 1998). The court's "duty is 'simply to ensure that the magistrate had a substantial basis for . . . conclud[ing]' that probable cause existed." *Salameh*, 152 F.3d at 113 (quoting *Gates*, 462 U.S. at 238-39). "[T]he resolution of doubtful cases . . . should be largely determined by the preference to be accorded to warrants." *Martin*, 157 F.3d at 52 (internal quotation marks omitted). "A reviewing court should not interpret supporting affidavits in a hypertechnical, rather than a commonsense manner." *Id.* (internal quotation marks omitted).

2. THE GOOD FAITH EXCEPTION

"[T]he good faith exception to the exclusionary rule allows the admission of evidence, despite the absence of probable cause, 'when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.'" *United States v. Smith*, 9 F.3d 1007, 1015 (2d Cir. 1993) (quoting *United States v. Leon*, 468 U.S. 897, 920 (1984)). "The Supreme Court held in *Leon* that the exclusionary rule barring illegally obtained evidence from the courtroom does not apply to evidence seized in 'objectively reasonable reliance on' a warrant issued by a detached and neutral magistrate, even where the warrant is subsequently deemed invalid." *United States v. Jasorka*, 153 F.3d 58, 60 (2d Cir. 1998) (quoting *Leon*, 468 U.S at 922 n.23). The *Leon* Court reasoned that, "even assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 918-19; *see also Groh v. Ramirez*, 124 S. Ct. 1284, 1290 (2004) (refusing to apply good faith exception to warrant which omitted entirely description of items to be seized).

"The test of objective good faith is 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'" *United States v. Moore*, 968 F.2d 216, 222 (2d Cir. 1992). "The exception, however, will not apply when, *inter alia*,

the warrant application 'is so lacking in indicia of probable cause as to render reliance upon it unreasonable.'" *Smith*, 9 F.3d at 1015 (internal quotation marks omitted).

3. INEVITABLE DISCOVERY

"[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." *Nix v. Williams*, 467 U.S. 431, 443 (1984); *see also Segura v. United States*, 468 U.S. 796, 814 (1984) (refusing to suppress evidence based on illegal entry because illegality did not affect discovery of contraband in residence). "[T]he exclusionary rule should be limited only to those instances where the constitutional violation has caused actual harm to the interest . . . that the rights protect." *United States v. Espinoza*, 256 F.3d 718, 725 (7th Cir. 2001) (internal quotation marks omitted).

"[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980). "The rationale is that where there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that the suspect's arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *United States v. Lovelock*, 170 F.3d 339, 343 (2d Cir. 1999) (internal quotation marks and brackets omitted). In order to authorize entry into a person's home to execute a warrant

for his arrest, the officers' belief that the residence to be entered is the home of the person named in the warrant need not be supported by probable cause; rather, "the proper inquiry is whether there is a reasonable belief that the suspect resides at the place to be entered to execute the warrant, and whether the officers have reason to believe that the suspect is present." *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir.1995) (citing *Payton*, 445 U.S. at 603) (internal quotation marks and brackets omitted). Information that a suspect is merely visiting a residence is insufficient to justify entry. *See Lovelock*, 170 F.3d at 344.

C. DISCUSSION

1. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE

In essence, there are three primary sources of information in the warrant affidavit which, taken together, give rise to probable cause. First, the confidential informant states on two separate occasions that the defendant resided in the apartment that was searched. The informant had recognized the defendant's picture immediately and, before doing any independent work, had recalled seeing the defendant "hanging out" near Building Three, which contains the apartment in which the defendant resided. More importantly, when the informant contacted the officers after they had gone to Apartment 334 the first time, he told them that the defendant's two children resided in the apartment with him. Although the informant did not yet have a track record with Deputy Bobnick and, at that time, had not yet proven himself to be

reliable over a period of time, he was by no means anonymous and was accountable to Deputy Bobnick if he provided false or misleading information. In fact, prior to seeking the warrant, Bobnick had three prior conversations with the informant about the defendant: one in person, and two by phone. Also, during their first meeting, Bobnick had given the informant his phone number and asked him to call if he learned any new information about the defendant.

Second, the officers made several pertinent observations when they went to Apartment 334 on September 21, 2001. After knocking at the front door of the apartment, they had been forced to wait approximately one minute outside, during which time they heard "quiet noises emanat[ing] from within . . . ." Eventually, four-year-old Jahneesha Williams answered the door and stated that her parents were not home, that she did not know when they would return, that her father had just left the apartment, and that she sees her father "all the time." When the officers entered the apartment, they observed an infant sleeping in a back bedroom on a mattress. In that room, they also observed various items of men's clothing and an open window with no screen, underneath which was a short drop to a landing on the fourth floor of the building. The officers suspected that the defendant had fled through the open window to another apartment in the building while they had waited outside of the apartment.

Third, after the confidential informant contacted Deputy Bobnick later in the day on September 21, 2001 and informed him that the defendant lived in Apartment 334 with his two children, Deputy Bobnick, through

independent investigation, verified that the infant's last name was Snape.

Much of the defendant's argument is premised on the fact that the confidential informant listed in the warrant affidavit did not have a proven track record, i.e., that "[t]here is nothing in the warrant application demonstrating that this informant has proved reliable in the past." Def.'s Brief at 30. The law in this area is well-settled. "[I]t is improper to discount an informant's information simply because he has no proven record of truthfulness or accuracy." *United States v. Canfield*, 212 F.3d 713, 719 (2d Cir. 2000) (internal quotation marks omitted). An informant need not have a track record to provide information to support the issuance of a warrant. Where independent police investigation confirms details provided by the informant, the absence of a prior track record is completely irrelevant. *See Mapp v. Warden*, 531 F.2d 1167, 1171 (2d Cir. 1976). In fact, anonymous tipsters who are completely unaccountable for their actions can, in some circumstances, supply sufficiently detailed information to support the issuance of a warrant. *See, e.g., Gates*, 462 U.S. at 244-46; *United States v. Peyko*, 717 F.2d 741, 743 (2d Cir. 1983) (upholding probable cause determination based on verifiable details provided by anonymous informant); *United States v. Zucco*, 694 F.2d 44, 49 (2d Cir. 1982).

The issuing judge undoubtedly placed some significance on the fact that the informant was known to Deputy Bobnick, met him in person to view the defendant's picture, and then contacted him twice more with additional information about the defendant. "A face-

to-face informant must, as a general matter, be thought more reliable than an anonymous telephone tipster, for the former runs the greater risk that he may be held accountable if his information proves false." *Canfield*, 212 F.3d at 719 (internal quotation marks and brackets omitted). The informant in this case was certainly accountable to Deputy Bobnick. "[C]ommon sense tells us" that these circumstances increase the likelihood that the informant is not "concoct[ing] his story while pretending to cooperate in order to harass an innocent or curry favor with the police." *United States v. Wagner*, 989 F.2d 69, 73 (2d Cir. 1993).

The defendant also argues that "there is no information at all in the warrant as to the basis of the confidential informant's knowledge or means by which he attained that knowledge." Def.'s Brief at 30. Given that the warrant is for a search of the body of the defendant and does not seek the fruits of any criminal activity, the relevant inquiry regarding basis of knowledge centers around whether, in fact, the informant knew the defendant and knew where he lived. As to that issue, the warrant affidavit does state that Deputy Bobnick showed the confidential informant a picture of the defendant, and the informant immediately recognized him and had *seen* him "hanging out" near Building Three. A11.

Moreover, it is the "[c]orroboration of the details supplied by the informant [that] serves to buttress the reliability of the informant by confirming the accuracy of the tip." *Zucco,* 694 F.2d at 47. "As the extent to which the informer's inherent reliability can be imputed decreases, the nature and detail of the corroborating facts

become correspondingly more important." *Id.* at 49 (internal quotation marks omitted). An untested confidential informant or even an anonymous tipster can provide sufficient information to establish probable cause if this information is corroborated by independent police work. *See Wagner*, 989 F.2d at 72-73; *Gates*, 462 U.S. at 237-38.

Here, the officers corroborated the information provided by the confidential informant. They went to the apartment on September 21, 2001, found two young children there, one of whom had the same last name as the defendant, found numerous articles of men's clothing and evidence to suggest someone had just fled out a bedroom window, and learned from the older child that her father sees her all the time and had just left before the officers arrived. In short, the officers did not seek a search warrant based on uncorroborated information from a confidential informant. Deputy Bobnick took independent steps to verify the informant's information, spoke to the informant several times in the course of the investigation, and used all of the information gathered to apply for the search warrant. *Cf. United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1297 (9th Cir. 1988) (faulting marshals for acting on informant tip as to location of fugitive without conducting independent investigation or applying for arrest or search warrant on the basis of the information contained in the tip).

2. THE GOOD FAITH EXCEPTION APPLIES

Even if the Court were to conclude that the search warrant was not supported by probable cause, the fruits of

the search warrant should not be suppressed under the good faith exception because the warrant is not so lacking in indicia of probable cause that no reasonable well-trained law enforcement officer would rely on it. *See Moore*, 968 F.2d at 222.

First and foremost, there is no evidence that Deputy Bobnick or Officer Griffin misrepresented any information in the warrant affidavit or otherwise deliberately or recklessly misled Judge Kaplan. *See Jasorka*, 153 F.3d at 60-61. To the contrary, the officers did not state that the informant had a track record or otherwise overstate their rapport and past experience with the informant. Indeed, based on the testimony of Deputy Bobnick regarding one prior, successful reliance on the informant in a civil matter, which was not set forth in the warrant affidavit, he could have provided additional information about the informant in the affidavit which would have bolstered the informant's credibility in the eyes of the issuing judge. The fact of this information cannot be used to support a subsequent finding of probable cause by a reviewing court, but it can be used to support a finding that the officers acted reasonably and in good faith in relying on the authority of the search warrant issued by the Judge Kaplan. *See id.*

Second, unlike a typical search warrant which authorizes the search and seizure of evidence or proceeds of criminal activity, the warrant in this case was a fugitive search warrant and, as such, simply authorized the search and seizure of the defendant. The warrant affidavit, therefore, need only have established probable cause that the defendant could be found in the searched apartment.

As discussed above in Section II.C.1, the affidavit does just that. The officers located a confidential informant with personal knowledge of the defendant's whereabouts, independently investigated his information and spoke to him several times to verify details. Their reliance on the issuance of the search warrant, therefore, was not unreasonable.

On appeal, the defendant argues that the issuing judge "may not have had the time to do a careful review of the affidavit in support of a warrant given the unusually high press of business in a busy urban Connecticut State criminal court." Def.'s Brief at 33. He claims in his brief that there is "strong evidence that, for whatever reason, the state magistrate did not have the opportunity to carefully consider if this warrant was supported by probable cause." Def.'s Brief at 33. To the contrary, there is absolutely *no* evidence to support this assertion in the record, and this Court should entirely discount it. The defendant had the opportunity to present evidence at the suppression hearing and chose not to do so.

In short, the district court properly found that the officers relied in good faith on a facially valid warrant issued by a neutral and detached judge.

3. THE ENTRY INTO THE APARTMENT WAS JUSTIFIED BECAUSE THE OFFICERS HAD AN ARREST WARRANT AND A REASONABLE BELIEF THAT THE DEFENDANT WAS RESIDING THERE

It is undisputed that, at the time they entered Apartment 334, the officers had a valid arrest warrant for the defendant for alleged parole violations. It is also undisputed that the firearm and ammunition found in the apartment were discovered in plain view in the course of a protective sweep for other individuals conducted moments after the officers entered. Thus, even if this Court were to conclude that the search warrant was not supported by probable cause and that the good faith exception to the warrant requirement does not apply, exclusion of the firearm and ammunition seized from the apartment would not be required if the officers had separate, independently justified, legal grounds for entering the apartment. *See Nix*, 467 U.S. at 443.

An arrest warrant authorizes entry into a defendant's residence to effect the arrest; a separate search warrant is not necessary. *See Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981). An arrest warrant alone, however, does not authorize entry into a third-party's residence to arrest a suspect; in that instance, the officers either need a search warrant or a reasonable belief that the suspect is living in the residence and is there at the time of the entry. *See Payton*, 445 U.S. at 603; *Lovelock*, 170 F.3d at 343.

Here, in addition to the search warrant, the officers also had both a reasonable belief that the defendant was residing in Apartment 334 and that he would be there at the time of the entry on October 1, 2001. The informant knew the defendant and advised the officers that he was living in the apartment with his two children. The officers went to the apartment on September 21, 2001, observed two young children there, one of whom had the same last name as the defendant, learned from the older child that her father had just left, and observed evidence that someone might have fled the apartment through an open bedroom window. As this Court held in *Lauter* and *Lovelock*, the reasonable belief standard is lower than the probable cause standard and can be met with less exacting evidence than that used to justify the issuance of a separate fugitive search warrant. In this case, at a minimum, the evidence set forth in the warrant affidavit, along with the additional evidence put forth by Deputy Bobnick during his testimony, supported a reasonable belief by the officers that the defendant was living at Apartment 334 and would be there at the time of the entry.[11]

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[11] The district court denied the motion to suppress because it concluded that the search warrant was supported by probable cause, and the Government did not assert the alternate ground of inevitable discovery. On appeal, however, the district court's decision may be affirmed on this alternate ground. *See United States v. Morgan*, No. 03-1151, 2004 WL 1853723, *5 n.2 (2d Cir. Aug. 19, 2004) ("[W]e are entitled to affirm the judgment of the district court on any ground with support in the record, even one raised for the first time on appeal").

III. THE DISTRICT COURT'S SENTENCE DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT

The defendant claims that the district court's sentence violated his Sixth Amendment rights because it was based on facts not found by the jury beyond a reasonable doubt. Specifically, he relies on the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and argues that the district court improperly (1) applied a four level enhancement for possession of ammunition in connection with another felony offense, under U.S.S.G. § 2K2.1(b)(5), and (2) attributed 19 criminal history points to him by virtue of his prior convictions (16 points) and the fact that he committed the instant offense while on parole and less than two years after having been released from prison (3 points). The defendant claims that, under *Blakely*, he has a constitutional right to have the four level enhancement and the criminal history points established by facts which are proven to a jury under the reasonable doubt standard.

This Court's recent decision in *United States v. Mincey*, No. 03-1419L, 2004 WL 1794717 (2d Cir. Aug. 12, 2004), is directly on point. In *Mincey*, this Court decided that it would not apply *Blakely* to the federal sentencing guidelines, so that enhancements and departures provided for under the guidelines need not be proven to a jury beyond a reasonable doubt. Specifically, the Court stated:

> We therefore reject appellants' arguments that, in this Circuit, the Sixth Amendment now requires every enhancement factor that increases a Guidelines range to be pleaded and proved to a jury beyond a reasonable doubt. Unless and until the Supreme Court rules otherwise, the law in this Circuit remains as stated in *Garcia, Thomas,* and our other related case law. We conclude that the district court did not err in sentencing defendants in accordance with the Guidelines as previously interpreted by this Court.
>
> In so holding, we expect that, until the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines.

The Supreme Court will address the issue squarely when it considers the appeals in *United States v. Booker*, 04-104, and *United States v. Fanfan*, 04-105 during the October 2004 term. This Court, therefore, in accordance with its August 6, 2004 memorandum, should withhold the mandate in this case until after the Court's decision in the *Booker/Fanfan* cases and, depending on the outcome of those cases, permit either party to file supplemental petitions for rehearing in this case with appropriate briefing at that time.

It bears note, however, that a portion of the defendant's argument is directly undermined by the Court's decision in *Blakely*, even assuming *arguendo* that the holding applies to the federal sentencing guidelines. The defendant claims that the district court's attribution of 19 criminal history points violated the principles set forth in *Blakely* because

the facts giving rise to these criminal history points were not found by a jury beyond a reasonable doubt. *See* Def.'s Brief at 38-40. The Court's decision in *Blakely*, however, explicitly exempts criminal convictions from its purview. *See Blakely*, 124 S. Ct. at 2536. In doing so, the Court continues to apply the principle set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* (emphasis added); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (holding that defendant's recidivism need not be treated as element of offense and can be determined by court at sentencing); *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) ("[W]e read *Apprendi* as leaving to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related [factual] issues . . . [including] the 'who, what, when, and where' of a prior conviction"), *cert. denied*, 535 U.S. 1070 (2002).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 2, 2004

Respectfully submitted,

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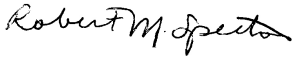
DISTRICT OF CONNECTICUT



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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,140 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Robert M. Spector

ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

ADDENDUM OF STATUTES

Constitutional Provisions

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions

18 U.S.C. § 922(g) (1)

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

United States Sentencing Guidelines

U.S.S.G. § 2K2.1(b)(5)

If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.