05-2365-cr

To be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2365-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOHNNY HAYGOOD, a/k/a "New York,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE 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 the defendant pleaded guilty to being a previously convicted felon in possession of a firearm. 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 his judgment of conviction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

Was the search warrant which led to the discovery of the charged firearm supported by probable cause despite the fact that it included the defendant's un-Mirandized admission, during the booking process, that he lived at the residence searched?

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Preliminary Statement

On September 25, 2003, police officers with the Bridgeport Police Department's Tactical Narcotics Team arrested three individuals whom they had observed engaged in a narcotics transaction, including the defendant, Johnny Haygood. In the course of arresting the defendant, the police seized several small packages of crack cocaine from his jacket pocket. As a result of information already known about the defendant and information learned during the course of the defendant's arrest, the police secured a search warrant for his apartment at 275 Jefferson Street in Bridgeport. During the execution of the search warrant on September 26, 2003, the police discovered a loaded .38 caliber revolver, 40 rounds of .38 caliber ammunition, and approximately

13 grams of cocaine base. After the search, the defendant waived his *Miranda* rights and executed a written statement admitting that he was a drug dealer and that he had knowingly possessed the revolver found in his apartment.

The defendant was subsequently charged by Superseding Indictment in federal court with one count of being a felon in possession of a firearm and one count of possession with the intent to distribute five grams or more of cocaine base. He moved to suppress the firearm and narcotics seized from his residence based on, *inter alia*, the claim that the search warrant included an un-Mirandized, involuntary admission and that, without such information, was not supported by probable cause. He also moved to compel the disclosure of the identity of the confidential informant used in the search warrant affidavit. The district court denied both motions. After jury selection, but prior to the start of trial, the defendant pleaded guilty to the felon-in-possession count and reserved his right to appeal the district court's denial of both the motion to suppress and the motion to compel disclosure. He was then sentenced to 210 months' incarceration based, in part, on his stipulation that he had possessed the firearm at issue in connection with a controlled substance offense. After sentencing, the Government moved to dismiss the cocaine base distribution count.

In this appeal, the defendant challenges only the district court's denial of the motion to suppress based on the alleged *Miranda* violation. He claims that his admission during the booking process that he resided at 275 Jefferson Street was an un-Mirandized and involuntary statement that should have been stricken from the search warrant affidavit, and that, without such statement, the search warrant was not supported by probable cause.

This claim has no merit. Putting aside the Government's contentions that the defendant's admission as to his residence did not require *Miranda* warnings because it was given during the routine booking procedure, and that the un-Mirandized statement was voluntary and thus did not have to be stricken from the search warrant, the district court was correct in concluding that, even without the defendant's statement, the search warrant was supported by probable cause.

STATEMENT OF THE CASE

On September 25, 2003, the defendant-appellant, Johnny Haygood, a/k/a "New York," was arrested by police officers with the Bridgeport Police Department's Tactical Narcotics Team near the intersection of Newfield Avenue and Revere Street in Bridgeport. The state charges were subsequently dismissed when a federal grand jury in Bridgeport, on March 3, 2004, returned a three-count indictment charging the defendant with one count of being a previously convicted felon in knowing possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and one count of possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). JA13.[1] Counts One and Three were based on the contraband seized from the defendant's residence on September 26, 2003, and Count Two was based on the contraband seized from the defendant's jacket on September 25, 2003.

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[1] The Joint Appendix will be cited as "JA" followed by the page number.

On October 19, 2004, the defendant filed a motion to suppress the physical evidence seized from his jacket on September 25, 2003 and the physical evidence seized from his residence on September 26, 2003. JA15. On November 9, 2004, the district court denied the motion. JA113-19. On November 17, 2004, the defendant filed a motion to compel the disclosure of the identity of the confidential informant used in the search warrant affidavit, and on December 14, 2004, the defendant filed a renewed motion to suppress based on his claim that no confidential informant existed. JA122, JA232. On December 28, 2004, the district court denied both motions. JA9 (docket entry).

On December 9, 2004, a federal grand jury in Bridgeport returned a Superseding Indictment against the defendant which only charged Counts One and Three from the first Indictment, the counts based on the firearm and cocaine base seized from the defendant's residence on September 26, 2003. JA127. The defendant entered a plea of not guilty, and jury selection went forward on January 12, 2005. JA10 (docket entry). The next week, the defendant changed his plea to guilty as to Count One of the Superseding Indictment, JA10 (docket entry), and entered into a written plea agreement, under which he expressly reserved his right to challenge the district court's November 9, 2004 and December 28, 2004 rulings, JA213.

On May 2, 2005, the district court (Janet C. Hall, J.) sentenced the defendant to 210 months' imprisonment and five years' supervised release. JA229. On May 4, 2005, the defendant filed a timely notice of appeal. JA231. The defendant has been incarcerated in federal custody since his March 9, 2004 presentment and arraignment on the charges contained in the March 3, 2004 indictment. JA3. He is currently serving his sentence.

STATEMENT OF FACTS

The following facts are essentially undisputed and are based on the exhibits and testimony presented by the Government at the November 5, 2004, November 9, 2004, and December 21, 2004 suppression hearings:

In September, 2003, Bridgeport Police Officers Keith Ruffin and John Andrews, of the Tactical Narcotics Team ("TNT"), utilized a confidential informant ("CI")[2] who had proven to be truthful and reliable in the past to purchase a quantity of cocaine base from an individual identified by the CI as "John," with the street name of "New York." JA145. TNT had utilized the CI to engage in ten prior controlled purchases and to help secure four prior state search and seizure warrants. JA147. On occasions when the CI provided information or engaged in a controlled purchase, TNT officers compensated him, usually in twenty dollar payments; the CI did not have a pending criminal case against him. JA142, JA146-47.

The CI provided information that "John 'New York'" was selling ten dollar bags of crack cocaine from his residence at 275 Jefferson Street, in Bridgeport. JA144; GA11.[3] On September 1, 2003, TNT officers directed the CI to attempt to make a purchase at John's residence. JA144. Although the CI attempted to meet John at 275 Jefferson Street to conduct the transaction, John intercepted the CI before he reached the residence, and the transaction occurred out on the street and out of sight of

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[2] For simplicity, the CI will be referred to in the masculine gender.

[3] The Government's Appendix will be cited as "GA" followed by the page number.

the surveillance officers, who were positioned to observe 275 Jefferson Street. JA181. TNT officers did not use the CI again to attempt to purchase narcotics from John or from 275 Jefferson Street. JA182.

On September 25, 2003, at approximately 9:45 p.m., TNT officers operating in the area of Stratford Avenue moved in to arrest individuals whom they suspected had just engaged in a drug transaction. GA3. Officers had watched the transaction occur near the intersection of Stratford Avenue and Newfield Avenue. GA3. Specifically, they observed one individual (later identified as Cynthia Gill) purchase suspected narcotics from a second individual (later identified as Eddie Davis), who then handed the suspected narcotics proceeds from the transaction to a third individual (later identified as the defendant). GA3. When the officers moved in to make arrests, they detained Gill and Davis, but the defendant ran away. GA4-5.

Several officers gave chase, including Officer Ruffin, who was able to reach the defendant and grab him by his jacket, which displayed the team color, logo and markings of the Philadelphia 76ers. GA3-4; JA148. The defendant, however, was able to slip out of his jacket near the intersection of Newfield Avenue and Revere Street and run through the backyards of several residences south and east of that intersection. GA4; JA148. Police officers, who were wearing clothing with clearly identifiable police insignia and were yelling for the defendant to stop, apprehended him moments later in the vicinity of 18 Revere Street. GA4; JA31. Officers found a crumpled up ten dollar bill in his front left pants pocket. GA4.

During the course of foot pursuit, which lasted only moments, TNT Officer Sean Ronan had positioned himself near the intersection of Newfield Avenue and Revere

Street. JA32; GA1. Just as the defendant was apprehended, Officer Ronan observed another individual (later identified as Terrence Police) stand in the middle of the intersection, pick up the defendant's discarded jacket, and begin turning the sleeves inside out. JA34; GA1. Officer Ronan immediately walked over to Police, took the jacket from him and detained him. JA34. Inside one of the jacket's pockets, Officer Ronan found a leather pouch containing 28 small ziplock bags, each containing suspected crack cocaine and each having an orange basketball emblem on it. JA35; GA4.

While Officer Ruffin was still at the scene, and after the defendant had been arrested, the CI from the September 1, 2003 controlled purchase approached him with information. JA149-50. At the time of the incident, there were numerous people out on the street, as Newfield Avenue is a well-trafficked area. JA150. Officer Ruffin met with the CI around the corner and out of sight of the pedestrian onlookers. JA150. The CI advised Officer Ruffin that the defendant whom he had just arrested was "John 'New York'" about whom he had previously given information. JA150-52; GA13, ¶ 8. The CI advised that he had spoken with the defendant that day, and that the defendant had advised the CI that he had just gone to New York and "re-upped" (a common term for the purchase of a supply of narcotics). JA 151; GA13, ¶ 8. The defendant had also told the CI that he had the narcotics in his apartment, which was on the second floor of 275 Jefferson Street. GA13, ¶ 8. Lastly, the CI pointed to a four door, burgundy, Mitsubishi Galant bearing registration CT 294-RPK and stated that it belonged to the defendant. GA13, ¶ 8.

Back at the police station, the defendant was asked several pedigree questions as part of the booking procedure and prior to the administration of *Miranda*

warnings. GA14, ¶ 9. With respect to his address, the defendant first stated that he was homeless. GA14, ¶ 9. He was then asked where he had stayed the night before the arrest, and he responded, "New York." GA14, ¶ 9. When asked for an address in New York, the defendant responded that he did not live in New York, but had been staying there for the night. GA14, ¶ 9. At that point, the police told the defendant that he was required to provide an address, and the defendant responded that he stayed at "275 Jefferson Street, second floor, left." GA14, ¶ 9. The police also asked the defendant about the four door, burgundy, Mitsubishi Galant that they had removed from the scene, and he confirmed that he had been borrowing the car from his uncle. GA14, ¶ 9.

Later that same evening, officers went to 275 Jefferson Street to confirm the location of the defendant's apartment. GA14, ¶ 11. Once inside, the officers spoke to a tenant, who gave them the exact location of the defendant's apartment (second floor, far left hand side apartment). GA14, ¶ 11. The officers noted that the second floor was similar to a rooming house, with several different single-room apartments and a common kitchen area and bathroom. GA14, ¶ 11. The tenant explained that, as one faced the defendant's room from the kitchen area, it was the far left hand side apartment, and pointed out the defendant's room to the officers. GA14, ¶ 11. The tenant identified him/herself, but asked not to be identified in the police report. GA14, ¶ 11. The officers knocked on the door identified as the defendant's, and no one answered. GA14, ¶ 11.

Officer Ruffin also reviewed the police report related to the CI's September 1, 2003 controlled purchase from "John 'New York'" GA14, ¶ 10. From that report, he learned that the crack cocaine that the CI purchased from John was packaged in ziplock baggies with a similar

orange emblem as the 28 ziplock baggies found in the defendant's jacket. GA14, ¶ 10.

At approximately 8:00 a.m. on September 26, 2003, Connecticut Superior Court Judge Owens signed a search warrant for the defendant's room at 275 Jefferson Street. GA6. Shortly thereafter, the officers, after knocking again and receiving no answer, entered the room using keys taken from the defendant's person during his arrest. GA6. No one was inside. GA6. The room itself was approximately nine and one half feet by seven feet and was furnished with a bed, dresser, and television. GA6. On the dresser, the officers found a dinner plate containing approximately 14 grams of crack cocaine. GA6. Also on the dresser, officers found a cotton swab box containing numerous empty ziplock baggies with a superman logo, and two ziplock baggies with an orange basketball logo containing crack cocaine. GA7. The orange basketball logo was similar to the logos on the baggies seized from the defendant's jacket on September 25, 2003 and purchased from the defendant by the CI on September 1, 2003. GA7. In one of the dresser drawers, officers found a small hand scale and in another dresser drawer, they found a fully loaded Defender, H & R Arms .38 caliber revolver bearing serial number 493, and 40 rounds of Winchester-Western .38 caliber ammunition. GA7. Finally, the officers found $1400 in cash on the floor and numerous mail and items of identification in the defendant's name. GA7-8.

After the discovery of the contraband, the defendant was interviewed by Bridgeport Police Detectives Santiago Llanos and Sanford Dowling. The defendant executed a written waiver of his *Miranda* rights, and signed a written statement regarding the firearm seized from his residence. GA19-20. Specifically, the defendant stated, "I had a pistol in my House For protection From a guy" called

Marvin because "Marvin Had pulled out a pistol on me and stated He didn't want me around" where he sold drugs, "which is on Re[vere] and Newfield Ave." GA20.

SUMMARY OF ARGUMENT

The district court properly refused to suppress the fruits of the search warrant signed by Judge Owens on September 26, 2003. Although the defendant's admission regarding his residence did not require *Miranda* warnings because it was given during the routine booking process, and the statement itself did not have to be stricken from the search warrant affidavit because it was voluntary, the district court did not reach these issues. Instead, the court concluded correctly that the search warrant was supported by probable cause even with the defendant's un-Mirandized admission removed from the affidavit.

ARGUMENT

I. The District Court Properly Determined That The Inclusion Of An Un-Mirandized Statement By The Defendant In The Search Warrant Affidavit Did Not Require Suppression Of The Contraband Seized As A Result Of The Ensuing Search

The defendant claims that the search warrant for his residence, which gave rise to the discovery of the firearm and ammunition to which he pleaded guilty, was not supported by probable cause because it included his un-Mirandized admission during the booking process that he resided in a second floor apartment at 275 Jefferson Street, which was the apartment searched. *See* Def.'s Brief at 8. Although the defendant recognizes, as he must, that even a statement secured in violation of *Miranda* may be utilized and relied upon in a search warrant affidavit provided that the statement itself was voluntary, he argues that the statement at issue here was not voluntary. *See id.* at 17. He further argues that, without the defendant's admission as to his residence, the search warrant is not supported by probable cause. *See id.* at 18. The defendant's argument has no merit. The district court was correct in concluding that the search warrant was still supported by probable cause even if the defendant's un-Mirandized admission as to his residence were stricken from the affidavit.

A. Factual And Procedural Background

In the defendant's October 19, 2004 motion to suppress he raised two claims. First, he argued that the crack cocaine found in his jacket pocket at the time of his arrest was not his, and that, therefore, the arrest which preceded

the issuance of the search warrant was not supported by probable cause. JA17. Second, he claimed that the statement that he made regarding his place of residence was taken in violation of his Fifth and Sixth Amendment rights and should not have been used in the search warrant affidavit for his residence. JA17-18.

At the start of the suppression hearing on November 5, 2004, the Government indicated that it would be relying on the testimony of one witness and that much of the factual record was undisputed and was set forth in several investigative reports and the search warrant affidavit, all of which were offered and accepted without objection as full exhibits. JA20, JA 22; GA1-24. At that point, Bridgeport Police Officer Sean Ronan testified regarding his role in the investigation, which involved the seizure and subsequent search of the defendant's jacket. JA26-49. After the completion of Officer Ronan's testimony, the Government indicated that it would call no additional witnesses and would rely on the factual record set forth in the admitted exhibits. JA49. The Court then considered preliminary oral argument from both counsel. JA50-68.

At that point, the Court asked if the defendant was going to introduce evidence, and the defendant decided to testify. First, he stated that the officers never explained the reason for his arrest and simply started asking him questions when they arrived at the police department. JA70. In response to a question about his address, the defendant recounted that he had told the officers that he was homeless. JA71. At that point, they had asked him where he had slept the previous night, and he had responded, "I spent the night at my cousin's house in New York." JA71. Another officer then came over and told him that he had to give an address, and he "told him the address where I was at." JA72.

Next, the defendant discussed the events preceding his arrest. JA72. He admitted to having received ten dollars from Eddie Davis, whom he characterized as a friend, but claimed that it had not been part of a drug deal, but had been money that Davis had owed to the defendant. JA72-73. As to the police pursuit, he claimed that he had not known that the police had been chasing him and had run because he had been scared of whomever had been chasing him. JA73. As to the jacket, the defendant claimed that he had not had any drugs inside it and had not known about the narcotics seized from the jacket. JA74, JA77. Finally, the defendant said that he had been in New York the night before his arrest, but denied having purchased any narcotics there. JA76.

During cross-examination, the defendant admitted that much of the narcotics taken from his apartment on September 26, 2003 belonged to him, but explicitly denied having possessed the crack cocaine packaged in the small ziplock baggies with the orange basketball logos that had been located with the other packaging material in the cotton swab box on his dresser. JA80, JA90, JA96. He also claimed that any narcotics found in his jacket must have belonged to Mr. Police, who had picked up the jacket after the defendant had slipped out of it. JA81. Despite having admitted to officers on September 26, 2003 that he had the gun to protect himself against a rival drug dealer who was upset with him for conducting business in the vicinity of Revere Street and Newfield Avenue, the defendant testified that, on the night of his arrest, he was not conducting any narcotics transactions at this intersection. JA91-93. Finally, the defendant admitted that, when the officers asked him for an address, they did not suggest any specific address to him or tell him that they knew he lived at 275 Jefferson Street. JA81-83. On this subject, the defendant admitted that he had previously been arrested and put through the booking process on

numerous occasions and had been asked for his address in the past. JA82. Indeed, the defendant admitted that he had been arrested six different times in New York and six different times in Connecticut between 1995 and 2002. JA99. Lastly, he admitted that, on the night of his arrest, he had been clear headed and not under the influence of any alcohol or narcotics. JA82-83.

After hearing additional argument, the district court denied the defendant's motion to suppress. On the issue related to the seizure of the defendant's jacket and his subsequent arrest, the court found that, based on the police officers' observations that night, they had probable cause to arrest the defendant. JA113-14. The court further stated, "Even if I'm wrong about that, they certainly had a reasonable suspicion to stop him and to approach him and to inquire of him based upon the circumstances and when he fled and/or that created I believe sufficient additional cause to pursue him and to arrest him." JA114. As to the jacket, the court found that it was properly searched and seized either as abandoned property or as incident to the arrest of Mr. Police. JA115.

As to the defendant's admission regarding his residence, the district court resolved the issue without determining whether there was a *Miranda* violation or whether the statement at issue was voluntary. JA116. The court noted that, under *United States v. Patane*, 124 S. Ct. 2620 (2004), the defendant would have "great difficulty" sustaining his argument that the un-Mirandized statement had to be removed from the search warrant, but ultimately stated, "I don't think I have to reach that issue because I think if you remove from the search warrant completely any reference to information provided by Mr. Haygood, that the search warrant is still more than sufficient for a finding of probable cause that this address, in particular, this part of the apartment on the second floor is the

residence or location where Mr. Haygood sleeps and maintains items of his own or possesses items." JA116-17. In reaching this conclusion, the court relied on (1) the fact that the officers had a CI who had purchased crack cocaine from the defendant in the past and had connected him to 275 Jefferson Street both at the time of the purchase on September 1, 2003 and at the time of the defendant's arrest on September 25, 2003; and (2) the fact that the officers went to 275 Jefferson Street, spoke to an identified tenant with an identified address and confirmed the CI's information by having that tenant point out the defendant's particular room within the boarding house. JA117-18. "So based upon, as I say, eliminating Mr. Haygood's statement at the police station completely, the court finds that there's still more than adequate probable cause on the face of the [search] warrant to justify the issuance of the search warrant and obviously, therefore, the seizure of the items pursuant to the execution of that search warrant." JA118.

Prior to jury selection, the defendant filed a motion to compel the disclosure of the identity of the confidential informant used in the search warrant. JA122. In support of the motion, the defendant claimed in an affidavit that there was no such confidential informant, that he had never sold narcotics to anyone "while on foot," and that he had not gone to New York to "re-up" prior to his arrest. JA125. At a suppression hearing on December 21, 2004, the Government relied on the testimony of Bridgeport Police Officers Keith Ruffin and John Andrews to establish that the CI referenced in the search warrant affidavit was a paid informant who had been used in ten controlled purchases and to secure four search warrants prior to his use in the defendant's case. JA141, JA147, JA 179-80. On December 28, 2004, the district court denied

the defendant's motion in an oral ruling.[4] *See* JA 9 (docket entry).

Jury selection occurred on January 12, 2005, and trial was set to commence on January 19, 2005. JA10. On January 19, 2005, the defendant changed his plea as to Count One of the Superseding Indictment, which charged him with being a previously convicted felon in knowing possession of a firearm. JA10, JA213. In connection with the change of plea, the defendant and the Government entered into a written plea agreement and a written stipulation of offense conduct, which read as follows:

> On or about September 26, 2003, the defendant, Johnny Haygood, knowingly possessed in his residence, a studio apartment at 275 Jefferson Street, in Bridgeport, approximately 12.93 grams of cocaine base, or crack cocaine. He knew that the controlled substance he possessed was cocaine base, or crack cocaine, and possessed the total quantity of cocaine base, or crack cocaine, with the intent to distribute it. In addition, on that same date, the defendant knowingly possessed in his residence one Defender, H & R Arms .38 caliber revolver bearing serial number 6493 and 40 rounds of Winchester-Western .38 caliber ammunition. He possessed this firearm to protect himself from a rival drug dealer. Prior to September 26, 2003, the defendant had been convicted of two felony offenses in the state of Connecticut and at least one felony offense in the state of New York: a 2002 Connecticut conviction for sale of narcotics, a 1995 Connecticut conviction for sale of narcotics, and a

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[4] The defendant has not challenged the substance of the December 28, 2004 ruling on appeal.

> 1987 New York conviction for attempted second degree burglary. Also prior to September 26, 2003, the subject firearm and ammunition had been transported in or affected interstate commerce.

JA216. The parties also stipulated to a sentencing guideline range of 210-262 months, based, in part, on the defendant's agreement that he possessed the firearm charged in Count One in connection with a controlled substance offense. JA216-17. Finally, pursuant to Fed. R. Crim. P. 11(a)(2), the defendant entered his guilty plea conditional on his right to appeal the district court's November 9, 2004 and December 28, 2004 rulings denying his motions to suppress. JA213, JA217.

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*[*v. Arizona*, 384 U.S. 436 (1966),] 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.*

"In *Miranda*, . . . the Supreme Court was concerned with protecting the suspect against interrogation of an investigative nature rather than the obtaining of basic identifying data required for booking and arraignment." *United States v. Gotchis*, 803 F.2d 74, 79 (2d Cir. 1986) (finding that questions about suspect's employment fall within "benign category" of basic booking questions) (internal quotation marks omitted). The *Miranda* rule exists "to protect a suspect ignorant of his rights from an investigative interrogation intended to elicit information about crimes and the suspect's possible involvement in them." *United States v. Carmona*, 873 F.2d 569, 573 (2d Cir. 1989). "Routine questions . . . ordinarily innocent of any investigative purpose, do not pose the dangers *Miranda* was designed to check." *Gotchis*, 803 F.2d at 79; *see also United States v. Rodriguez*, 356 F.3d 254, 259 (2d Cir. 2004) (finding that *Miranda* warnings not required during interview with suspect "conducted solely for the purpose of determining whether [suspect] would be subject to administrative deportation after his release"). Even during booking, however, "the police may not ask questions . . . that are designed to elicit incriminatory admissions." *Pennsylvania v. Muniz*, 496 U.S. 582, 602 n.14 (1990) (opinion of Brennan, J.). In general, where "the questions appear reasonably related to the police's administrative concerns," they will fall within the "routine booking question" exception to the *Miranda* rule. *See id.* at 601 (finding that questions to suspect regarding his name, address, height, weight, eye color, date of birth, and current age did not have to be preceded by *Miranda* warnings).

A failure to give a suspect *Miranda* warnings does not require suppression "of the physical fruits of the suspect's unwarned but voluntary statements." *United States v. Patane*, 124 S. Ct. 2620, 2624 (2004) (plurality opinion) (refusing to apply the exclusionary rule to violations of the

Miranda rule); *see also Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *Michigan v. Tucker*, 417 U.S. 433 (1974). The remedy for a *Miranda* violation is to prevent the Government from using the un-Mirandized statement as substantive evidence at trial. *See Patane*, 124 S. Ct. at 2629 (plurality opinion). Thus, a voluntary statement given by the defendant in violation of *Miranda* may be used in a search warrant affidavit to help establish probable cause. *See United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987) (relying on *Elstad*, 470 U.S. at 307, to hold that exclusionary rule should not apply to bar use of un-Mirandized statement in search warrant affidavit); *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1515-19 (6th Cir. 1988) (finding that, in absence of evidence of coercion, physical evidence seized as a result of solicitation of un-Mirandized statements would not be suppressed); *see also Massachusetts v. White*, 439 U.S. 280 (1978) (failing to resolve the issue in equally divided (4-4) affirmance of state court decision to exclude physical evidence seized pursuant to search warrant based, in part, on un-Mirandized statements).

Where information was improperly included in a warrant application, the court must disregard the alleged improper information and "determine whether the remaining portions of the affidavit would support probable cause to issue the warrant." *United States v. Canfield*, 212 F.3d 713, 718 (2d Cir. 2000) (quoting *United States v. Trzaska*, 111 F.3d 1019, 1027-28 (2d Cir. 1991)). "If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate." *Id.* "The ultimate inquiry is whether, after putting aside erroneous information . . . , 'there remains a residue of independent and lawful information sufficient to support probable cause.'" *Id.* (quoting *United States v. Ferguson*, 758 F.2d 843, 849 (2d Cir. 1985)). "Probable cause is 'a practical,

commonsense 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.'" *Canfield*, 212 at 718 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "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).

The question whether "untainted portions [of a search warrant affidavit] suffice to support a probable cause finding is a legal question" reviewed *de novo* by this Court. *Canfield*, 212 F.3d at 717.

C. Discussion

1. Even Without The Defendant's Statement Regarding His Residence, The Warrant Was Supported By Probable Cause

Before the district court, the Government argued that the defendant's admission that he was staying at 275 Jefferson Street was made in response to a routine booking question and, therefore, was not subject to the protections afforded by *Miranda*.[5] The Government also argued, in

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[5] More specifically, the Government argued that the officers were not attempting to interrogate the defendant to learn incriminating information; they were simply trying to determine what address to list for him in the police report. They did not suggest an address to him, but simply advised him that he was required to give *an* address. After the defendant (continued...)

the alternative, that any *Miranda* violation did not require suppression because, under *Patane*, 124 S. Ct. at 2624, as long as the unwarned statements were voluntary, their physical fruits should not be suppressed.[6] The district court did not reach these issues and instead skipped straight to the question of whether the search warrant was supported by probable cause without the defendant's un-Mirandized admission about his residence.

As the district court correctly concluded, the search warrant was amply supported by probable cause without the statement. The warrant affidavit sets forth several other sources of information for the defendant's address. First, during the week of September 6, 2003, the CI, who had proven to be reliable and credible in the past and had been used to obtain two prior state search warrants, advised Officers Ruffin and Andrews that an individual named "John" with the street name of "New York" was selling ten dollar bags of crack cocaine from 275 Jefferson Street. GA11. During that week, the CI engaged in a controlled purchase of crack cocaine from "John," but the

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[5] (...continued)
provided an address, the officers did not further question him about it or attempt to elicit additional information not encompassed by their booking questions.

[6] The defendant testified that he was clear headed during the booking process and was not under the influence of any drugs or alcohol. He also admitted that he had been arrested twelve times in New York and Connecticut, and, as a result, had been through the booking process on numerous occasions. Finally, he testified that, at no time, did the officers ask him about 275 Jefferson Street or suggest to him any specific address; they simply advised him that, for the booking process, he had to provide an address.

purchase occurred out on the street, not in his residence. GA11-12.

Second, during the September 25, 2003 arrest, the same CI advised Officer Ruffin that the defendant was the individual whom the CI had previously identified as "John 'New York'" and from whom the CI had previously purchased crack cocaine. GA13. The CI further told Officer Ruffin that the defendant lived in a second floor apartment at 275 Jefferson Street and had advised the CI on September 25, 2003 that he had just gone to New York to purchase additional narcotics and was storing them in his apartment. GA13. It bears note that the crack cocaine seized from the defendant's jacket at the time of his arrest bore the same orange logo as the packaging material used in the prior controlled sale between the defendant and the CI, and the physical description that the CI previously had given for "John" was similar to the defendant's physical description. GA14, ¶ 10.

Third, the officers independently verified the defendant's address on September 25, 2003 when they went to 275 Jefferson Street and spoke with a tenant and resident of the building. GA14. According to that individual, who identified himself/herself to the officers and spoke to them in person, the defendant lived at 275 Jefferson Street, "on the second floor, in the far left hand side apartment, as one faces [the defendant's] door from the kitchen area." GA14, ¶ 11. The officers, knowing the defendant was still at the police station, knocked on the door to the apartment, but received no answer and detected no movement inside of it. GA14.

Thus, even without the defendant's statement about his address, the search warrant affidavit established probable cause that the defendant resided in the apartment at 275 Jefferson Street that was the subject of the search warrant.

2. The Good Faith Exception Applies

"[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) (per curiam) (quoting *Leon*, 468 U.S at 922). 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.

"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) (quoting *Leon*, 468 U.S. at 922 n.23). "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).

Even if the Court were to determine that the warrant was not supported by probable cause without the defendant's admission about his residence, the good faith

exception applies here because the warrant affidavit did not "contain[] a knowing or reckless falsehood," Judge Owens did not "act[] as a mere 'rubber stamp' for the police," and the warrant and affidavit, "after extending appropriate deference to the issuing judge's determination," established probable cause. *See United States v. Logan*, 250 F.3d 350, 366 (6th Cir. 2001) (citing *Leon*, 468 U.S. at 922-23). The officers in this case were justified in relying upon the issuance of a search warrant, supported by probable cause, by a neutral and detached judge and could not have been expected to foresee the removal of the defendant's admission regarding his residence from the affidavit, especially given the fact that the facts justifying underlying the admission were before Judge Owens. *See United States v. Real Property Located At 15324 County Highway E.*, 332 F.3d 1070, 1075-76 (7th Cir. 2003) (applying good faith exception to warrant issued in part based on thermal imaging scan and holding that "any error that is said to have occurred must be attributed to the magistrate, and not law enforcement officers, for the former was in a relatively better position to divine the as-yet unannounced unconstitutionality of the thermal imaging scan"); *see also United States v. Fletcher*, 91 F.3d 48, 51-52 (8th Cir. 1996) (applying good faith exception to warrant which included information about contraband seized as a result of an invalid *Terry* stop). "The purpose of the exclusionary rule, deterrence of police misconduct, will not be served by its application to this case." *Fletcher*, 91 F.3d at 52.[7]

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[7] The district court denied the motion to suppress because it concluded that the search warrant was supported by probable cause without the un-Mirandized statement, and the Government did not rely on the good faith exception. On appeal, however, the district court's decision may be affirmed (continued...)

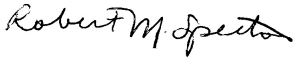
CONCLUSION

For the foregoing reasons, the district court's November 9, 2004 ruling on the defendant's October 19, 2004 Motion to Suppress should be affirmed.

Dated: September 15, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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[7] (...continued)
on this alternate ground. *See United States v. Morgan*, 380 F.3d 698, 701 n.2 (2d Cir. 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.").

ADDENDUM

United States Constitution, 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.