06-3411-cr

To Be Argued By:
MICHAEL J. GUSTAFSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-3411-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

PHILLIP STEWART,
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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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

MICHAEL J. GUSTAFSON
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Droney, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on July 18, 2006. A: 5a. The defendant filed a timely notice of appeal on July 17, 2006, A: 5a, pursuant to Fed. R. App. P. 4(b). Accordingly, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the defendant sustained his burden of demonstrating that he was entitled to acceptance of responsibility.

2. Whether the defendant's due process rights were violated by the district court's failure to convene an evidentiary hearing to resolve acceptance of responsibility where the defendant never requested a hearing or otherwise identified potentially materially untrue information.

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Preliminary Statement

The defendant, Phillip Stewart, challenges the district court's determination that he did not sustain his burden of demonstrating acceptance of responsibility pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 3E1.1. Stewart argues that the district court improperly relied on hearsay evidence – specifically, a set of police reports executed under penalty of perjury to support his arrest on state drug trafficking charges – to conclude that Stewart engaged in criminal conduct while awaiting sentencing

even though the state drug cases ultimately were nolled. Because the two reports contain sufficient indicia of reliability, and given that the defendant did not advise the district court of any materially untrue information in the reports, the defendant's due process rights were not violated and this Court should affirm the district court's sentence.

Statement of the Case

On July 30, 2002, a federal grand jury returned a sealed indictment alleging that on May 31, 2002, Phillip Stewart knowingly and intentionally possessed with intent to distribute and did distribute 50 grams or more of a mixture and substance containing a detectable amount of cocaine base ("crack cocaine"), in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(A)(iii). A: 2, 6-7.

Federal authorities unsealed the indictment and arrested Stewart on January 9, 2003. Stewart was presented in court and released on bond the same day. A: 2 (doc. # 2-5). On May 19, 2003, Stewart entered a plea of guilty to Count One. A: 3 (doc. # 18); SA: 18-23 (plea agreement). Following his plea of guilty, the defendant was permitted to remain free on bond.

While the defendant was awaiting sentencing, he became the subject of a narcotics investigation conducted by a local police department. Specifically, the New Britain Police Department made a controlled drug purchase from Stewart on November 25, 2003, and arrested him on January 9, 2004. SA: 44-50. Following Stewart's arrest on state drug charges, the district court

convened a hearing on January 20, 2004, to determine whether it should revoke Stewart's release bond. A: 4 (doc. #26). Stewart offered no evidence to rebut the charges and instead acquiesced to detention without prejudice to revisiting the matter at his request. He never sought a hearing, however. GA: 1-8 (Bond Revocation Hearing transcript).

The district court conducted a sentencing hearing on July 10, 2006. The court initially calculated an advisory Guidelines range of 360 months to life imprisonment, based on the defendant's status as a career offender. The court denied the defendant's requests for a downward departure and/or a non-Guidelines sentence and, moreover, determined that Stewart was not entitled to credit for acceptance of responsibility. However, based on a motion filed under seal by the government, the district court departed twelve levels to a sentencing range of 110 - 137 months of imprisonment. The court imposed a sentence at the bottom of this range (110 months of imprisonment), to be followed by a five-year term of supervised release. GA: 9-58 (Sentencing transcript).[1] Judgment entered on July 18, 2006 – the defendant previously having filed a notice of appeal on July 17, 2006. A: 26-28; A: 5a (docket sheet # 56); A: 29 (Notice of Appeal).

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[1] The government's appendix ("GA") includes the entire sentencing transcript, save that portion of the hearing that was conducted under seal, which is contained in the defendant's Special Appendix at SA: 51-57.

The defendant currently is serving his sentence of incarceration.

STATEMENT OF FACTS

A. The Offense Conduct And Guilty Plea

On May 31, 2002, Phillip Stewart sold approximately 61.6 grams of cocaine base to a government informant. The transaction was observed by federal law enforcement agents and tape recorded. SA: 4-5 (Presentence Report "PSR" ¶¶ 5-7). The government obtained a sealed indictment against Stewart on July 30, 2002. A: 6-7 (Indictment). Stewart was arrested and presented on January 9, 2003. A-2 (doc. # 2). He was released that same day on a $250,000 non-surety bond. A-2 (doc. # 4).

The defendant pleaded guilty to Count One on May 19, 2003. SA: 4 (PSR, ¶ 4); SA: 18-23 (plea agreement). Again, his release bond remained in effect.

B. The Defendant's Continued Criminal Activity And Subsequent Bond Revocation

In November, 2004, New Britain Police Officer Jerry Chrostowski learned from a confidential informant ("CI") that an individual known as "Lox," and subsequently identified as Phillip Stewart, was selling crack cocaine in New Britain and Hartford. Specifically, the CI provided Officer Chrostowski with Lox's telephone number and stated that Lox used a black Dodge Intrepid or blue Honda Accord to deliver crack cocaine to his customers. SA: 45.

Officer Chrostowski confirmed with fellow members of the New Britain Police Department's Narcotic Enforcement Bureau that Lox was a street name for Phillip Stewart, whom the officers had arrested on prior occasions for drug and assault charges. SA: 45. Chrostowski confirmed through motor vehicle records that a black 2000 Dodge Intrepid was registered to Stewart and, moreover, that Stewart's mother – who resided at the same address – owned a blue 2000 Honda Accord. SA: 45.

Armed with this information, Officer Chrostowski determined that the CI was willing to make a controlled purchase of narcotics from Lox. On November 25, 2003, the CI telephoned Lox, who in turn agreed to meet the CI in New Britain. Officer Chrostowski searched the CI and the CI's vehicle for drugs, with negative results. The CI was then provided a sum of "buy money" and followed to the prearranged meeting location by four members of the New Britain Police Department. There, the surveillance team saw the Dodge Intrepid that was registered to Stewart. The vehicle was unoccupied. Officer Chrostowski observed the CI leave his/her vehicle and meet with a black male that Chrostowski immediately recognized as Phillip Stewart. SA: 45.

The CI and Stewart were seen getting into Stewart's vehicle for a period of time. The CI then exited Stewart's car and drove from the area in his/her car. Officer Chrostowski followed the CI directly to a predetermined location where the CI provided a knotted baggie containing a rock-like substance. Officer Chrostowski used a Cobalt Thiocyanate field test kit to determine that

the substance yielded a positive reaction for the presence of cocaine. SA: 46. The CI told Chrostowski that once inside Lox's car, he/she handed Lox the buy money and Lox produced the baggie containing the suspected crack cocaine. Officer Chrostowski reduced these events to a sworn incident report. SA: 45-46.

On January 9, 2004, at approximately 9:00 p.m., members of the New Britain Narcotic Enforcement Bureau were conducting a drug related investigation in the parking lot of 610 Hartford Road, New Britain, Connecticut, when Officer Chrostowski observed Stewart arrive in the area driving a Ford Taurus. Members of the law enforcement team placed Stewart under arrest.[2] A search incident to arrest disclosed that Stewart had concealed in his buttocks region a plastic bag that contained a quantity of rock-like objects that, based on the training and experience of the narcotics officers, appeared to be crack cocaine. Stewart was also in possession of a cellular telephone bearing the number previously provided by the CI as Lox's contact number. Officer Chrostowski conducted a field test, again using the Cobalt Thiocyanate kit, and discovered that the suspected contraband yielded a positive reaction for the presence of cocaine. The substance weighed approximately 20 grams. SA: 49. As with his prior report, Officer Chrostowski again swore to the contents of his January 9, 2004, report.

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[2] The arrest was not without incident: Stewart drove the wrong way down a restaurant driveway and struck an unmarked unit. SA: 49.

Upon learning of Stewart's arrest, the government moved to writ Stewart into federal custody for purposes of revoking his release bond. A: 3-4 (doc. # 25 & 26). Judge Droney conducted a hearing on January 20, 2004. GA: 1-8 (Bond Revocation Hearing transcript). At the hearing, the defendant stipulated to federal detention without prejudice to seeking a hearing at a subsequent date. GA: 2. Stewart never requested that the district court revisit the issue.

C. The Presentence Report

The PSR prepared by the United States Probation Office using the November 1, 2001, Sentencing Guidelines Manual[3] calculated the defendant's Guidelines imprisonment range to be 360 months to life. It is undisputed that Stewart is a career offender pursuant to U.S.S.G. § 4B1.1. SA: 6-10 (PSR ¶¶ 16-30). The PSR also noted that although the parties contemplated in their plea agreement that the defendant would be credited with acceptance of responsibility for his timely plea of guilty (SA: 4-5; PSR ¶¶ 3, 4 & 8), the Probation Office would not recommend any reduction given the defendant's arrest in New Britain. SA: 6 (PSR ¶ 17).

On or about May 22, 2006, the defendant advised the Probation Office that on September 29, 2005, "all of the

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[3] During the sentencing hearing, the parties, the district court and the probation officer agreed that the 2001 Manual was appropriately used in this case even though the probation officer initially consulted the 2004 manual. *Compare* 16 (sentencing transcript) to SA: 5 (PSR ¶ 9).

charges in both cases were *nolled* by the State's Attorney in the New Britain Superior Court." SA: 40. The defendant continued:

> As a result of the disposal of said charges in his favor, the defendant submits that he is, therefore, entitled to a three-point reduction for acceptance of responsibility. A mere arrest, that has not been prosecuted, cannot form the basis for any conclusions concerning the defendant's activities.

SA: 40-41. The Probation Office issued a Second Addendum on May 25, 2006, which noted that Stewart's cases had been nolled but reported that "the Court can rely on the arrest reports prepared by the New Britain Police Department (see attached), and if necessary, the testimony of the officers who investigated and arrested the defendant on January 9, 2004." SA: 38.

D. The Sentencing

The district court conducted a sentencing hearing on July 10, 2006. GA: 9-58 (sentencing transcript). At the outset, Judge Droney noted that he had "the discretion to give a non-guideline sentence, even if a departure is not met[.]" GA: 15.

The court then addressed the acceptance of responsibility issue. Citing the police reports and the PSR, which evinced Stewart's failure to terminate or withdraw from criminal conduct or associations, the government noted that Stewart sold crack cocaine to an informant in

November 2003, and then possessed an additional quantity of crack cocaine in January 2004. GA: 17-19. Specifically, the government argued:

> The police reports speak for themselves. We have no witnesses to offer to the court to substantiate the charge. And I do note that ultimately the officials in the state system nolled the charges. I don't think that changes the analysis today. The police report's very clear as to Mr. Stewart's conduct and that at the time it happened i[t] was brought to the [district] court's attention and [Stewart's] bond was revoke[d] at that point as well. I think there's enough before the court to certainly conclude that Mr. Stewart did engage in additional criminal conduct pending sentencing and as a result should not get the acceptance of responsibility.

GA: 19.[4]

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[4] The district court then inquired about the defendant's numerous failed drug tests. The government replied that the failed drug tests would constitute an alternative basis for concluding that Stewart was not entitled to acceptance of responsibility. GA: 19-21. In his appeal brief, the defendant suggests that Judge Droney expressly rejected the positive drug tests as a basis for denying acceptance of responsibility. *See* Def. Br. at 4, 12. The government respectfully submits that the record is ambiguous on this point. In ruling that he was relying on the police reports to conclude that the defendant had continued to engage in criminal conduct, Judge Droney stated, "[a]nd I have not made a finding based at all on the dirty urines.

(continued...)

Judge Droney rejected the defendant's request for acceptance of responsibility, explaining:

> I find that the defendant is not entitled to a two or three level reduction for acceptance of responsibility pursuant to *United States v. Fernandez*, [127 F.3d 277 (2d Cir. 1997)]. A factor to consider is whether the defendant voluntarily terminated all criminal conduct. I find that the defendant here continued to distribute crack cocaine while awaiting sentencing in this case. Also, after he entered his guilty plea in this case. As the Court in *Fernandez* stated, these additional crimes "refute the disavow[al] of future criminal activity implied by the guilty plea to the first crime."

SA: 53-54.

Defense counsel asked Judge Droney to confirm "that the police reports provide evidence to a level of preponderance of the underlying offenses[,]" SA: 56, and

Judge Droney stated:

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[4] (...continued)
It's exclusively on the drug dealing that's set forth in the New Britain Department police reports." SA: 56. It is not clear whether the district court was reserving judgment on the failed drug tests or, as the defendant suggests, was ruling that the failed tests will never be a factor in the acceptance of responsibility matter.

> That's my conclusion, yes. And I have not made a finding based at all on the dirty urines. It's exclusively on the drug dealing that's set forth in the New Britain Police Department police reports. And just to recap then, I've departed 12 levels, from 37 to 25. The new range is 110 to 137 months.

SA: 56. Defense counsel then inquired whether the court would have departed to a lower Guidelines range if Judge Droney had credited Stewart with acceptance of responsibility, and the Judge replied, "I can't tell you exactly where I would go, but I will say it would make a difference. In other work [sic], if I had granted the acceptance of responsibility, he would have ended up at a lower range after the granting of [the government's motion]. SA: 56.

The defendant then pursued his arguments in favor of a non-Guidelines sentence and/or for a downward departure. GA: 35-39. Ultimately, the court rejected these arguments:

> Now, as to departures from the guidelines, although I recognize I have the authority to depart further from the guidelines range on the bases identified by Mr. Schoenhorn as well as other bases, I choose not to do so as the facts do not warrant a further departure here. I've also determined that Mr. Stewart should be sentenced within the guidelines range that I have found. However, I note for the

> record I would give him the same sentence were I to impose a non-guideline sentence.

GA: 49. The court then sentenced the defendant to 110 months of imprisonment, which was at the bottom of the advisory Guidelines range. GA: 50.

SUMMARY OF ARGUMENT

I. The defendant did not sustain his burden of proving by a preponderance of the evidence that he had accepted responsibility when, at his sentencing hearing, he simply noted that his state court cases had been nolled and objected to the court's reliance on two detailed police reports. The district court did not abuse its discretion in relying on sworn police reports, which contained sufficient indicia of reliability to support probable accuracy, to conclude that the defendant was not entitled to acceptance of responsibility, especially where the defendant never challenged his bond revocation and at no point claimed that the reports were without foundation or contained any material untrue statements.

II. The defendant's due process rights to a "full-blown" evidentiary hearing were not violated where the defendant did not claim that the police reports were "without foundation" or contained "material untrue statements," and the sentencing judge gave the defendant an opportunity to be heard on the issue.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RELYING ON TWO POLICE REPORTS TO DETERMINE THAT THE DEFENDANT DID NOT SUSTAIN HIS BURDEN OF DEMONSTRATING ACCEPTANCE OF RESPONSIBILITY.

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above, Parts A-D.

B. Governing Law and Standard of Review

1. Acceptance of Responsibility

Under Guidelines section 3E1.1(a), as it existed at the time the defendant committed his offense of conviction, sentencing judges were instructed to reduce a defendant's offense level by two points if he "clearly demonstrates acceptance of responsibility for his offense," and section 3E1.1(b)(2) provided for an additional one-level decrease if, *inter alia*, the defendant qualified for the two-level decrease in subsection (a) and he timely notified authorities of his intention to plead guilty, thereby saving the government the resources needed to prepare for trial. U.S.S.G. § 3E1.1(a), (b)(2).

A plea of guilty does not automatically entitle a defendant to a sentencing reduction under this provision,

however, for "[a]lthough many defendants who plead guilty receive this two-level adjustment, a defendant who enters a guilty plea 'is not entitled to an adjustment under [§ 3E1.1] as a matter of right,'" *United States v. Goodman*, 165 F.3d 169, 175 (2d Cir. 1999) (quoting U.S.S.G. § 3E1.1, application note 3); *see also United States v. Hirsch*, 239 F.3d 221, 226-27 (2d Cir. 2001) ("Although a guilty plea is 'significant evidence' of acceptance of responsibility, it does not entitle the defendant 'to an adjustment . . . as a matter of righ'"; other 'conduct . . . that is inconsistent with . . . acceptance of responsibility' may outweigh a guilty plea.") (quoting U.S.S.G. § 3E1.1, application note 3, and citing *United States v. Fredette*, 15 F.3d 272, 277 (2d Cir. 1994)). Rather, the Guidelines instruct that when determining whether a defendant has clearly demonstrated acceptance of responsibility, the sentencing court should ascertain whether the defendant has voluntarily terminated or withdrawn from criminal conduct or associations. U.S.S.G. § 3E1.1, application note 1(b).

Thus, in *United States v. Fernandez*, 127 F.3d 277 (2d Cir. 1997), this Court ruled that "[i]f a defendant commits a second crime after pleading guilty to, and while awaiting sentencing for, a first offense, that is a relevant consideration in denying the acceptance-of-responsibility adjustment in selecting the sentence for that first offense." *Id*. at 285 (internal quotation marks omitted). And in *United States v. Woods*, 927 F.2d 735 (2d Cir. 1991) (per curiam), this Court explained, "continued involvement in criminal activity casts substantial doubt on the sincerity of a defendant's protestations of contrition, and a court is

well within its discretion in considering such involvement in setting a defendant's sentence." *Id*. at 736.[5]

2. Burden of Persuasion and Proof

Disputed sentencing factors need only be proved by a preponderance of the evidence to satisfy due process. *United States v. Ibanez*, 924 F.2d 427, 430 (2d Cir. 1991); *United States v. Woods,* 927 F.2d at 736 n.1; *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 182 (2d Cir. 1990); *United States v. Rivalta*, 892 F.2d 223, 230 (2d Cir. 1989); *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989); *see McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986) (holding that preponderance standard satisfies due process in state sentencing proceeding).

It is similarly settled that the party seeking an adjustment in the sentence level must establish the factual

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[5] The vast majority of circuit courts that have addressed this issue have similarly determined that unrelated criminal conduct is relevant to a court's determination of acceptance of responsibility pursuant to section 3E1.1. *See United States v. Prince*, 204 F.3d 1021, 1023-24 (10th Cir. 2000); *United States v. Ceccarani*, 98 F.3d 126, 130-31 (3d Cir. 1996); *United States v. Byrd*, 76 F.3d 194, 196-97 (8th Cir. 1996); *United States v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994); *United States v. Pace*, 17 F.3d 341, 343 (11th Cir. 1994); *United States v. O'Neil*, 936 F.2d 599, 600-01 (1st Cir. 1991); *United States v. Watkins*, 911 F.2d 983, 984-85 (5th Cir. 1990). *But see United States v. Morrison*, 983 F.2d 730, 735 (6th Cir.1993). In the case at bar, of course, Stewart's criminal conduct – drug trafficking – was identical to his offense of conviction.

predicate justifying the adjustment. *See United States v. Gambino*, 106 F.3d 1105, 1110 (2d Cir. 1997) ("Generally, under the Sentencing Guidelines, a defendant who seeks to take advantage of a sentencing adjustment carries the burden of proof.") (discussing safety-valve provision of 18 U.S.C. § 3553(f)); *see also United States v. Leiva-Deras*, 359 F.3d 183, 193 (2d Cir. 2004) (applying same burdens to sentencing departures); *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990); *United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989) (defendant has the burden when seeking a decrease in the sentence level); *United States v. Smith*, 918 F.2d 664, 669 (6th Cir. 1990) (per curiam) (citing *United States v. Urrego-Linares*, 879 F.2d 1234, 1239 (4th Cir. 1989)); *see also* U.S.S.G. § 3E1.1 ("If *the defendant* clearly demonstrates acceptance of responsibility . . . ") (emphasis added).

3. Due Process at Sentencing

Section 3661 of Title 18 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *See generally United States v. Watts*, 519 U.S. 148, 150-52 (1997) (per curiam) (discussing breadth of § 3661). Guidelines section 1B1.4 echoes this principle that sentencing courts be provided with the fullest possible array of information to address sentencing issues, dictating in pertinent part that "[i]n determining the sentence to impose . . . the court may consider, without limitation, any information concerning

the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. § 1B1.4.

Guidelines section 6A1.3, moreover, provides that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." U.S.S.G. § 6A1.3(a). The information then presented to the court need only have "sufficient indicia of reliability to support its probable accuracy" without regard to admissibility under the rules of evidence. *Id.*; *see also* Commentary to § 6A1.3; *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978) ("[W]hen the defendant does not dispute the truth of the statements sought to be introduced, or the statements are sufficiently corroborated by other evidence, hearsay is admissible in sentencing proceedings.").

As a result, this Court has repeatedly confirmed that "[t]he sentencing court's discretion is 'largely unlimited either as to the kind of information [it] may consider, or the source from which it may come.'" *United States v. Sisti*, 91 F.3d 305, 312 (2d Cir. 1996) (citing *Carmona*, 873 F.2d at 574, quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)); *United States v. Brinkworth*, 68 F.3d 633, 640 (2d Cir. 1995) (sentencing court is not limited to "admissible evidence" in making its sentencing determination)*; United States v. Pico*, 2 F.3d 472, 475 (2d Cir. 1993) (district court has "broad discretion" to consider "all relevant information" when making factual findings pertaining to sentencing).

More specifically, sentencing courts may rely upon "hearsay evidence, evidence of uncharged crimes, dropped counts of an indictment and criminal activity resulting in acquittal," *United States v. Reese*, 33 F.3d 166, 174 (2d Cir. 1994); *see also United States v. Romano*, 825 F.2d 725, 728 (2d Cir. 1987), and even the hearsay statements of an absent informant, *see United States v. Streich*, 987 F.2d 104, 107 (2d Cir. 1993) (per curiam) (district court was entitled to rely on informants' statements summarized in the presentence report, especially because defendant made no demand for cross- examination); *Fatico*, 579 F.2d at 713 (due process does not prevent use in sentencing of out-of-court declarations by even an unidentified informant, where there is sufficient corroboration of declarations).

A defendant has a due process right, however, not to be sentenced on the basis of "materially untrue" statements or "misinformation." *Romano*, 825 F.2d at 728 (quoting *Townsend v. Burke*, 334 U.S. 736, 741 (1948)); *United States v. Prescott*, 920 F.2d 139, 143-44 (2d Cir. 1990); *United States v. Alexander*, 860 F.2d 508, 511-12 (2d Cir. 1988); *see also United States v. Greer*, 285 F.3d 158, 178 (2d Cir. 2002) (purpose of Rule 32 is to protect defendant from being sentenced on basis of materially untrue statements or misinformation); *United States v. Reiss*, 186 F.3d 149, 157 (2d Cir. 1999) (same).

Accordingly, a district court is allotted broad discretion to determine the procedure by which disputed issues at sentencing will be resolved, so long as it "'afford[s] the defendant some opportunity to rebut the Government's

allegations.'" *United States v. Slevin*, 106 F.3d 1086,1091 (2d Cir. 1996) (quoting *United States v. Eisen*, 974 F.2d 246, 269 (2d Cir. 1992)); *see also United States v. Berndt*, 127 F.3d 251, 257 (2d Cir. 1997). But even when facts pertaining to sentencing are contested, a trial court is "not required under the due process clause or the Guidelines to hold a full-blown evidentiary hearing," *United States v. Olvera*, 954 F.2d 788, 792 (2d Cir. 1992); *see also United States v. Zagari*, 111 F.3d 307, 330 (2d Cir. 1997). Instead, the sentencing court may alternatively afford the defendant an opportunity to be heard by means of "affidavits, letters or other writings, argument and comment directed to the court, [or] cross-examination of witnesses." *Prescott*, 920 F.2d at 143; *accord Brinkworth*, 68 F.3d at 640-41; *Berndt*, 127 F.3d at 257; *United States v. Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986).

4. Standard of Review

On appeal, this Court reviews the sentencing court's decision concerning "the kind of information it may consider, or the source from which it may come," for abuse of discretion. *United States v. Duverge Perez*, 295 F.3d 249, 254-55 (2d Cir. 2002) (quoting *Carmona*, 873 F.2d at 574); *see also Slevin*, 106 F.3d at 1091 (decisions as to types of procedures to be followed at sentencing are reviewed for abuse of discretion); *Sisti*, 91 F.3d at 312 (manner in which contested matters at sentencing are resolved is left to discretion of district court). Thus, to the extent the defendant is challenging the district court's decision not to hold a full evidentiary hearing, he must demonstrate that the court abused its discretion.

By contrast, when reviewing a district court's ultimate application of the Guidelines to the facts, this Court takes an "either/or approach," *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004), under which the Court reviews "determinations that primarily involve issues of law" *de novo* and reviews "determinations that primarily involve issues of fact" for clear error, *id*. This Court has held that "[w]hether or not a defendant has accepted responsibility for [a] crime is a factual question." *United States v. Irabor*, 894 F.2d 554, 557 (2d Cir. 1990); *United States v. Reyes*, 9 F.3d 275, 280 (2d Cir. 1993) (same). Because the sentencing court "is in a unique position to evaluate a defendant's acceptance of responsibility," its determination whether to grant the reduction is "entitled to great deference on review." U.S.S.G. § 3E1.1, application note 5 (2001); *see also United States v. Zhuang*, 270 F.3d 107, 110 (2d Cir. 2001) (per curiam). Unless a district court's determination as to whether a defendant has accepted responsibility is "without foundation," it may not be disturbed. *Id*.; *United States v. Volpe*, 224 F.3d 72, 75 (2d Cir. 2000); *United States v. Harris*, 13 F.3d 555, 557 (2d Cir. 1994). Thus, to the extent the defendant here is challenging the district court's ultimate factual finding that he engaged in post-plea drug dealing, reversal would be appropriate only if the district court committed clear error.

C. Discussion

The district court did not abuse its discretion in relying on the police reports at Stewart's hearing to determine that the defendant did not sustain his claim for acceptance of responsibility because the reports contained sufficient

indicia of reliability and the defendant never identified any material untrue statements. Instead, the defendant erroneously argued that the government had the burden to demonstrate a lack of acceptance. GA: 26.

Two things happened at the defendant's sentencing hearing that militate against Stewart's challenge to his sentence. First, the district court fully complied with its obligation to ensure that the hearsay statements it considered had "sufficient indicia of reliability." *Carmona*, 873 F.2d at 574. Second, at no point in the proceeding did the defendant identify materially incorrect information that the court factored into its findings.

The allegations contained in the two police reports possess strong indicia of reliability. Both reports are regular on their face. They are sworn to by a member of the narcotics unit that conducted the investigation.[6] They are the kind of reports that magistrate judges and state court judges commonly rely upon to issue arrest and search warrants, and they document two separate instances where Stewart was involved with cocaine. In addition, embedded within the reports are details that corroborate the charge that Stewart was selling crack cocaine: (1) the two vehicles that the CI associated with "Lox" were in fact registered to Stewart and his mother; (2) members of the narcotics unit knew Lox to be Stewart; (3) Stewart was observed meeting a CI who had been searched before the

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[6] The defendant did not raise the issue of the possibility of an improper/deficient notarization until this appeal. Def. Br. at 4.

meeting and who subsequently produced a baggie of suspected crack cocaine after being followed from the meeting; (4) six weeks after the first drug deal, when the officers arrested Stewart, he had an additional quantity of rock-like substances knotted in a baggie and concealed in his buttocks; (5) when arrested, Stewart was also in possession of a cellular telephone that the CI previously called to contact Lox; and (6) the contraband tested positive for cocaine in both instances. *See, e.g., United States v. Posada-Rios*, 158 F.3d 832, 881 (5th Cir. 1998) (affirming sentence based in part on district court's decision to credit police report that "bore sufficient indicia of reliability" rather than defendant's "self-serving testimony").

Juxtaposed with these indicia of reliability is the defendant's presentation at the sentencing hearing, where Stewart produced no evidence suggesting that the affiants lacked personal knowledge of the matters contained in the statements. The defendant did nothing to show that the hearsay statements considered by Judge Droney were unreliable. Instead, the defendant advanced a perfunctory, *pro forma* objection to the hearsay contained in the reports. GA: 27-28.

Against this backdrop, it is clear that far from relying on speculation or assumptions, the district court had detailed and direct evidence of Stewart's ongoing criminal activity: two separate instances of drug possession, one of which involved the police extracting contraband from his buttocks region.

The district court's decision to rely on the police reports is also buttressed by Judge Droney's familiarity with the procedural history of this case. It is undisputed that after Stewart was arrested for two drug trafficking offenses committed approximately six weeks apart, Judge Droney convened a hearing on January 20, 2004, to assess Stewart's bond situation in light of the arrests. The hearing lasted less than five minutes, as the defendant stipulated to the revocation of his bond with the caveat that he could return to court at a future date to revisit the issue. Not once did the defendant deny the fact of his arrest or the veracity of the charges, which included the police finding suspected crack cocaine hidden in his buttocks. GA: 1-8. Critically, when the State's Attorney did not pursue the case, Stewart did not invoke his right to revisit the detention order. Instead, he voluntarily remained incarcerated even though he had the opportunity to revisit the matter. The government submits that the district court was entitled to consider this tacit admission to the accuracy of the charges when assessing whether the defendant has shown that he fully accepted responsibility.[7] The defendant's objection at the sentencing hearing was

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[7] The Government did not raise this argument before the district court, arguing simply that "the police reports [are] very clear as to Mr. Stewart's conduct and at the time that it happened it was brought to the [district] court's attention and his bond was revoked at that point[.]" GA: 19. Nevertheless, this Court is free to affirm a district court's decision on any ground that is supported by the record. *See, e.g., United States v. Gregg*, 463 F.3d 160, 166 (2d Cir. 2006) (per curiam); *United States v. Yousef,* 327 F.3d 56, 156 (2d Cir. 2003).

not that he sold crack, but rather a more technical objection that the police report was not proof by a preponderance of the evidence.

Accordingly, the findings of fact made by Judge Droney in reliance on the sworn statements in two police reports were not clearly erroneous, and his decision to rely on the police reports was not an abuse of discretion.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO HOLD A FULL EVIDENTIARY HEARING BECAUSE THE DEFENDANT NEVER CLAIMED THAT THE REPORTS CONTAINED MATERIAL UNTRUE STATEMENTS.

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above, Parts A-D.

B. Governing Law and Standard of Review

The governing law and standard of review pertinent to consideration of this issue are set forth in the section I.B.3 and I.B.4, *supra*.

C. Discussion

The defendant now mistakenly argues that Judge Droney should have allowed him to present witnesses regarding whether he in fact was observed selling cocaine

to an informant on November 25, 2003.[8] "Decisions as to what types of procedure are needed lie within the discretion of the sentencing court . . . ." *Slevin*, 106 F.3d at 1091.

Here, Officer Chrostowski's sworn reports provided a reliable basis for the district court to conclude that Stewart sold crack cocaine to an informant in November 2003, and, perhaps more importantly, had an additional quantity of contraband hidden on his person in January 2004. As a result, the district court properly declined to grant the defendant's request of a two-level or three-level reduction for acceptance of responsibility.

The government was not required to disprove Stewart's acceptance of responsibility; rather, the defendant bore the burden of persuasion to demonstrate that he had accepted responsibility. To meet that burden, he relied upon the legal fiction that "it didn't happen" because of the nolle. At no point in the hearing was the district court confronted with the claim that the two instances were without foundation or that two nolles had entered because the reports contained materially untrue information. If the

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[8] In his brief, the defendant questions "the reliability of a police officer, who, in turn credits a confidential informant, and about hearsay mention of 'Thiocyanate field test' performed on a rock-like substance.'" Def. Br. at 10. He makes no mention of the fact that the confidential informant was not involved in the arrest of the defendant on January 9, 2004, when an additional quantity of cocaine was taken from the defendant.

defendant wanted a hearing, he should have asked for an opportunity to present witnesses – either before or after Judge Droney made his finding. Instead, the record reflects that the defendant never asked for an opportunity to explore the November 2003, controlled drug purchase or the January 2004, seizure made incident to Stewart's arrest. The only reference to the possibility of examining witnesses occurred in the following colloquy:

> THE COURT: Let me ask you this. It's not the mere fact of the arrest. Isn't it that the detail in the police reports that I can consider?
>
> MR. SCHOENHORN: I submit that the Court can consider hearsay. . . . If acquitted conduct is not allowed to be considered unless it rises to the level of preponderance of the evidence, and often in those cases, including I think it's the *Concepcion* case, the Court heard the evidence at the trial, yet the jury found the individual not guilty. The Court has said you still have -- you're going to consider acquitted conduct, there has to be a finding of the preponderance of the evidence. I submit that based on an uncorroborated and, more to the point, untested hearsay, which denies me the right to cross-examine the proponent of those statements, that the Court cannot find that they rise to the level of preponderance of the evidence. I ask the Court, therefore, to grant Mr. Stewart at least two, if not three, points for acceptance of responsibility.

GA: 27-28.

It is well established that there is no requirement that a sentencing court hold an evidentiary hearing in resolving sentencing disputes. The only requirement is that the defendant have "some opportunity" to be heard concerning the information the district court receives. *Slevin*, 106 F.3d at 1091. The sentencing court's choice of the form that hearing takes – whether it be through written submissions, oral argument, or live witness testimony – is within the district court's discretion, and is grounds for reversal only if that discretion is abused. *Id*.; *see also Ibanez*, 924 F.2d at 430 ("This is not the sort of situation where all a defendant need do is knock on the hearing room door, and it will automatically open to him.") (quoting *United States v. Khan*, 920 F.2d 1100, 1102 (2d Cir. 1990)). Rather, all that is required is that the court "afford the defendant some opportunity to rebut the Government's allegations." *Slevin*, 106 F.3d at 1091 (quoting *Eisen*, 974 F.2d at 249).

Here, Judge Droney gave the defendant an opportunity: The court reviewed the reports, determined that they were sufficiently reliable to determine that the defendant had engaged in continuing criminal conduct after his conviction in the instant matter, and asked counsel, "Isn't it that the detail in the police reports that I can consider?" GA: 27. Defense counsel's answer – essentially that the reports were untested hearsay that had not been subjected to cross-examination, and therefore would be insufficient to conclude that the government had failed to establish a lack of acceptance by a preponderance of the evidence – hardly constitutes a demand for an evidentiary hearing. In fairness to the district court, it cannot be said that the

judge was put on notice that the defendant was claiming that any aspect of the reports was materially untrue.

A sentencing court's refusal to order an evidentiary hearing can be reversed only for abuse of discretion. *See United States v. Garcia*, 900 F.2d 571, 575 (2d Cir.1990); *Slevin*, 106 F.3d at 1091. *See also, e.g., Pugliese*, 805 F.2d at 1123 ("because of the costly burden" they impose on the court, hearings "ultimately are conducted within the discretion of the [sentencing] court"); *United States v. Grant*, 114 F.3d 323, 327 (1st Cir. 1997) (discretion not abused in denying request for evidentiary hearing where court had no reason to believe that any benefit would be derived from it).

Here, rather than ask the court to allow him to subpoena the police officers and officials from the State's Attorney's office, the defendant simply objected to the government's purported inability to sustain a burden it did not carry. Given that the district court was within its discretion to credit the police reports under these circumstances, and considering the lack of any specific claim to the contrary, there was no basis under settled Second Circuit law to convene a full blown evidentiary hearing. Accordingly, the defendant's argument should be rejected.

CONCLUSION

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

Dated: March 30, 2007

Respectfully submitted,

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

MICHAEL J. GUSTAFSON
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

ADDENDUM

Title 18, United States Code, Section 3661. Use of Information for Sentencing.

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

. . . .

U.S.S.G. § 1B1.4 Information to be Used in Imposing Sentence. (2001)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.

. . . .

U.S.S.G. § 3E1.1 Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has

assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

. . . .

U.S.S.G. § 6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Stewart

Docket Number: 06-3411-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 3/30/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: March 30, 2007