07-0359-cr

To Be Argued By:
BRIAN P. LEAMING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0359-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

WILLIAM TISDOL,
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

BRIAN P. LEAMING
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Janet B. Arterton, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on January 29, 2007. JA64. On January 31, 2007, the defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. JA66. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court's factual findings crediting the officers' testimony of an observed traffic infraction were clearly erroneous?

2. Whether the district court correctly concluded the police officer's subjective motivations were irrelevant in determining whether reasonable suspicion justified the motor vehicle stop?

3. Whether the issuance of a valid search warrant for the target residence independently justified the motor vehicle stop and detention of the defendant within minutes of his exit from the residence?

4. Whether the district court abused its discretion by admitting into evidence the defendant's recorded prison phone call conversation admitting that he was selling drugs during the period charged in the indictment?

5. Whether the 140-month within-guidelines sentence imposed by the district court was reasonable?

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UNITED STATES OF AMERICA,

Appellee,

-vs-

WILLIAM TISDOL,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On August 3, 2005, members of Hartford's joint federal-state Violent Crime Impact Team (VCIT), initiated surveillance of 1860 Main Street as a prelude to executing a search warrant for the first floor apartment. The VCIT supervisor had determined that it was too dangerous to execute the search warrant while the defendant was inside the apartment because of, *inter alia*, the defendant's history of violence, the probability that firearms were present in the residence, and the likelihood that children were in the apartment. From their surveillance position in

a church parking lot across the street, at approximately 10:45 p.m., police officers saw the defendant and his 12-year old daughter leave the building and get into a taxi, which drove north on Main Street. Just as the taxi reached the church parking lot, it made a U-turn, driving over a marked median separating the north and south travel lanes. Police stopped the taxi approximately two blocks away. Police ordered the defendant out, patted him down, and recovered 26 grams of crack cocaine and $716 in cash in his pockets. A jury later convicted the defendant of possession with intent to distribute 5 grams or more of cocaine base and the court sentenced him to 140 months in prison.

The defendant appeals his conviction and sentence, as well as the district court's ruling denying his motion to suppress the crack cocaine and money seized from his person. The defendant advances four claims: (1) the court's factual finding that the taxi made an illegal U-turn was clearly erroneous; (2) the court erred in denying the defendant's motion to suppress because the traffic stop was pretextual; (3) the court erred in admitting a recorded phone conversation in which the defendant admitted selling drugs; and (4) the court imposed an unreasonable sentence. For the reasons that follow, each claim is without merit and the judgment should be affirmed.

STATEMENT OF THE CASE

On August 3, 2005, the defendant was arrested. JA 50.[1] On October 12, 2005, a federal grand jury sitting in Hartford, Connecticut returned an indictment charging the defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and possession with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). JA17-18. On February 9, 2006, the defendant moved to suppress the firearm seized from 1860 Main Street, the narcotics and cash seized from his person, and a post-arrest statement he made to police. JA24. The court granted the defendant's request for a suppression hearing which was held on May 10, 11 and 12, 2006. JA7. On August 30, 2006, the court (Arterton, J.) issued a written ruling denying the motion to suppress. JA34. On September 8, 2006, the government filed a second-offender notice pursuant to 21 U.S.C. § 851 based on the defendant's prior felony drug conviction. JA9.

On October 31, 2006, a petit jury was sworn and trial commenced on the two-count indictment. JA11. On November 6, 2006, the jury returned a verdict of not guilty as to Count One and guilty as to Count Two. JA12. On November 10, 2006, the defendant moved for judgment of acquittal and for a new trial. JA54-59. On January 10, 2007, the court issued a written ruling denying the post-verdict motions. JA60. On January 26, 2007, the court

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[1] Citations to the Joint Appendix and Government's Appendix are designated "JA" and "GA," respectively.

sentenced the defendant to 140 months imprisonment followed by 60 months of supervised release, with judgment entering on January 29, 2007. JA13, 64. The defendant filed a notice of appeal on January 31, 2007. JA66.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

Part A below summarizes the evidence presented at the suppression hearing. Part B summarizes the district court's ruling denying the motion to suppress. Part C summarizes the evidence relevant to the court's ruling on the admissibility of the defendant's recorded prison call. Part D summarizes the sentencing hearing.

A. The suppression hearing

The following facts can be adduced from the testimony and exhibits presented at the suppression hearing on May 10, 11 and 12, 2006.

On August 3, 2005, with a search warrant issued by the Connecticut Superior Court in hand, members of the joint federal-state Violent Crime Impact Team (VCIT) initiated surveillance of 1860 Main Street, First Floor. GA13-14, 67-69. Detective William Rivera and Sergeant Mack Hawkins of the Hartford Police Department were in the rear of a church parking lot on the west side of Main Street a short distance north of 1860 Main Street. GA14, 29, 70, 72-73, 127. At approximately 8:30 p.m., the officers saw a tan Nissan Maxima stop in front of 1860

Main Street. GA20, 278-81. The defendant exited the vehicle and went into the building. GA74-75. At approximately 10:45 p.m., a taxi pulled up to the front of 1860 Main Street. GA21, 75. After several minutes, the defendant walked out of the building with a young girl, subsequently identified as his 12-year-old daughter, and got into the taxi, with the defendant sitting in the front passenger seat and his daughter in the rear seat. GA23, 75. The taxi traveled north "maybe a couple hundred feet" when it made a U-turn over a median in front of the parking lot entrance to the church, and directly in front of Hawkins and Rivera. GA32, 78, 146-48. From their position in the rear of the parking lot on the south side of the church, the officers could clearly see the U-turn, but the church obstructed their view so that neither officer could see the intersection of Main Street and Mahl Avenue. GA145-46. Photographs admitted at the suppression hearing depict the sight line of Sergeant Hawkins and Detective Rivera as they waited in their unmarked vehicle. GA132-134, 295-96. A concrete median divides the north and southbound travel lanes of Main Street, but directly in front of the church parking lot the median descends to near grade of the travel portion of Main Street. GA136-144, 298-302. The median then ascends as it approaches the intersection of Main Street at Mahl Avenue. GA142-45.

Hawkins and Rivera reasonably believed that the defendant had firearms in the residence and that his girlfriend and children would likely be present. GA76. For these reasons, Hawkins, as the unit supervisor, had decided for the safety of the officers and occupants of the

residence executing the search warrant while the defendant was present was not a viable option. *Id.* The plan was for the officers to detain the defendant when he left the building, before he entered any vehicle, and thereafter execute the search warrant. GA78, 97. Because the defendant immediately entered the taxi upon leaving 1860 Main Street, the officers did not have sufficient time to detain him. GA146. After the defendant got into the taxi and began driving north on Main Street, Hawkins determined that they would stop the taxi. GA76. Notwithstanding Hawkins' subjective decision to have the taxi stopped, the taxi was not stopped until after it made the U-turn over the median on Main Street. GA80. Either Rivera or Hawkins requested a marked police unit to stop the taxi. GA39, 79. Rivera and Hawkins followed the taxi and saw it travel south on Main Street and turn right onto Mather Street where it was stopped on Mather Street just west of East Street, but before it reached Center Street, or approximately 1 ½ blocks from Main Street and two blocks from 1860 Main Street. GA48-51, 80.

Christopher Adams testified that he was the taxi driver who picked up the defendant and his daughter at approximately 10:30 p.m. on August 3, 2005. GA209. Adams testified that the defendant called him on his cell phone requesting transportation. *Id.* Adams testified further that he drove north on Main Street and made a U-turn at the intersection of Main Street and Mahl Avenue. GA210-11. Adams denied driving over the median. GA215. Adams testified that he traveled south to the next intersection and turned right onto Mather Street. *Id.* Adams testified further that as soon as he crossed East

Street, but before he reached Center Street, the police stopped him. GA216-17. Adams averred that he was not issued a citation, was not told the reason for the stop, and did not ask the police the reason for the stop. GA218. Adams admitted that it would have been unlawful for him to have driven over any portion of the median, including the area described by the officers where the median is almost at grade level. GA242.

Adams testified that he had known the defendant for years, and they lived in the same neighborhood. GA227. Adams acknowledged that the defendant had his personal cell phone number, had called him on numerous occasions for fares, and that he let the defendant ride in the front seat. GA227-229. Adams testified that his driving record could impact his employability as a driver if he received tickets, was involved in accidents, or drove recklessly. GA236. Adams also testified that he was a convicted felon, having twice been convicted of selling narcotics. GA238.

Before initiating the traffic stop, Hawkins was aware of numerous firearms-related arrests involving the defendant, that Detective Rivera had developed information from multiple sources that the defendant was known to carry firearms, that the defendant was alleged to have shot at least one other person, and that he was previously involved in a fight with police. GA109, 116-18. Hawkins considered this a "high risk motor vehicle stop" and immediately ordered the occupants to show their hands. GA81-82. Hawkins then removed the defendant from the taxi, though he did not recall how. GA52-53, 81-

82. As soon as the defendant was out of the taxi, Hawkins patted down his outer clothing to determine if he possessed any weapons. GA82-84. Hawkins patted down the defendant's pants and felt a hard object in his front pocket. GA85, 88. The hard object was the size of the palm of Hawkins' hand. GA88. Hawkins immediately recognized the object as narcotics. GA89. The object felt like a "hard rock-like - - hard substance" in several pieces. GA89-90. Hawkins at the time of this arrest had approximately 15 years of law enforcement experience and extensive experience as a narcotics investigator. GA. 152. In addition, Hawkins had received specialized training in identifying narcotics and conducting frisks and searches of persons to locate contraband and weapons. GA153. Hawkins had participated in "thousands" of frisks and searches of persons. *Id.* On "many occasions" Sergeant Hawkins has handled or felt crack or rock cocaine. GA154. The crack seized from the defendant's pocket weighed 26.4 grams, with a circumference larger than a golf ball and perhaps as large as a baseball. GA155.

Upon recognizing the object as narcotics, Sergeant Hawkins removed it from the defendant's pocket. GA90. Upon visual inspection, it appeared to be crack cocaine. *Id.* Approximately $716 in cash was seized from the defendant's pocket as well. GA278-80. The defendant was arrested, placed into custody, and transported to 1860 Main Street. *Id.*

Upon arrival at 1860 Main Street, officers encountered the defendant's girlfriend and five minor children. *Id.* search of the premises resulted in the seizure of a Glock 9

mm semi-automatic pistol, with an extended 31-round magazine, and ammunition. *Id.* The firearm, ammunition and magazine were recovered inside a leather handbag hanging on a bedroom closet door. *Id.* The defendant's girlfriend denied ownership of the firearm and provided a written statement to the officers that the firearm must belong to the defendant. *Id.*

B. The district court ruling

The district court ruled that the officers lawfully stopped the taxi. JA42. The court credited the testimony of Rivera and Hawkins that the taxi made the U-turn over the median just south of the intersection of Main Street and Mahl Avenue. *Id.* The court did not credit the testimony of the taxi driver, Christopher Adams, who testified that he made the U-turn at the intersection of Main Street and Mahl Avenue, and not over the median. *Id.* Noting that Adam's driving record would be negatively impacted if it were established that he had committed a traffic infraction and that he had a friendly relationship with the defendant, the court discounted his version of events. *Id.* The court concluded further that Adams's testimony was contradicted by the officers account that from their position they could not see the intersection where Adams claimed he reversed direction. *Id.* Moreover, the court found that the officers testimony was corroborated by the defendant's own statement to Hartford Police Internal Affairs that "[We] do a U-turn . . . There's a divider right there that people use all the time, they do a U-turn . . . Right by the church." JA36, 42.

Having credited the testimony of Rivera and Hawkins, the court concluded that:

> the evidence shows that the officers lawfully stopped the taxicab for a traffic violation, and, having stopped the car, acted legally in ordering the defendant, his daughter, and Adams out of the car.

JA42 (internal citations omitted). The court disregarded the officers' subjective motivation or intentions of stopping the taxi regardless of the observed traffic violation. JA43. Adhering to the established standard that an officer's subjective motivations are irrelevant to the determination of whether probable cause or reasonable suspicion existed to conduct the traffic stop, the court ascribed no importance to Rivera and Hawkins testimony that they intended to stop the taxi as soon as they saw the defendant enter the taxi. *Id.*

Once the court found the stop to be lawful, it further held that Hawkins was justified in frisking the defendant for weapons because it was reasonable to believe the defendant was armed and dangerous. JA43. Based on the information received from the confidential informant, the issuance of a search warrant for firearms, the defendant's prior arrests for firearm violations, and the defendant's prior altercation with Rivera while the defendant was armed with a firearm, Hawkins was permitted to pat down the defendant for weapons. *Id.*

The court further concluded that the seizure of the crack cocaine from the defendant's pocket was authorized under the "plain feel" doctrine. JA43-44 (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993)). Crediting Hawkins' testimony and the case incident report, the court found that Hawkins had training and experience in narcotics packaging and identification, and that during the pat-down he felt in the defendant's front pants pockets several hard, rock-like substances, which he immediately recognized as narcotics. JA44. The court held that the pat down search was reasonable in scope and manner and therefore denied the defendant's motion to suppress the crack cocaine seized from his pocket. JA44-45.

C. Trial

At trial, the government sought to introduce a recorded telephone conversation made on August 17, 2006, while the defendant was incarcerated in a Connecticut prison during which he said that "I'm the same person that I was a year ago, yo. I'm going to come home and I'm going to do the same things that I did; I'm going to run the streets and sell drugs and hang with Pumpkin." GA553-54, JA (CD). After hearing arguments and listening to the recorded conversation, the court held that Fed. R. Evid. 404(b) did not apply to the statement because it was "not evidence of a prior bad act, but referencing the conduct that is the subject of the indictment, namely possession with intent to distribute drugs in August 2005." GA553-54. In reaching its decision, the court noted the defendant's statement

specifically references the time when he was arrested for possessing the crack cocaine. *Id.*

The court held that "the description of conduct in August of '05 by the defendant as selling drugs strikes me as probative of his conduct, of his intent to distribute drugs, that is, he was selling." GA555. The court further held that the statement was an admission under Fed. R. Evid. 801(d)(2) of what the defendant was doing in August 2005. *Id.* Under the balancing test of Fed. R. Evid. 403, the court found that the probative value outweighed the potential prejudice to the defendant, and that the government had not shirked any responsibility to disclose the evidence in a reasonable amount of time under the circumstances. GA555-56. The defendant did not ask for a limiting instruction, and none was given. The court did, however, grant the defendant's request that the full 15-minute recording be played so that the defendant could argue the defendant was being sarcastic when he made the statement or that it was no admission at all. GA556-57.

D. Sentencing hearing

The district court sentenced the defendant principally to 140 months of imprisonment. GA531. The sentence was at the lowest end of the range recommended by the Sentencing Guidelines. GA488. The offense of conviction, based on the defendant's prior felony drug conviction, mandated a ten-year minimum term of imprisonment. *Id.* In imposing a sentence within the guidelines range, the court denied the defendant's motion

for a downward departure and his request for a non-Guideline sentence. GA530.

The court imposed that sentence only after considering the PSR, the comments of the defendant and his mother, and argument of counsel. The court then listed the sentencing factors it must, and did, consider. First, the court considered the seriousness of the offense and found that the defendant's conduct is not "atypical" for "that which the sentencing commission would have included in its establishment of the range." GA532. The court considered the need to deter the defendant and others, to protect the public from the defendant, to provide educational and vocational training, and to promote respect for the law. GA533. The court found that deterrence, protection of the public, and educational and vocational training are "very much needed." *Id.* Even accepting the defendant's sincerity about his desire and will to change, the court noted the "big road to travel between your sincerity and your ability to put that into practice." *Id.* The court concluded that a sentence at the low end of the range "advances deterrence [and] deterrence advances public safety, and all of that is accomplished adequately, but not excessively, by a sentence of 140 months." GA534.

SUMMARY OF ARGUMENT

1. The district court's factual findings crediting the testimony of Sergeant Hawkins and Detective Rivera were not clearly erroneous. The court justifiably found that the police saw the taxi in which the defendant was a passenger

perform a U-turn over an "intervening space or . . . a physical barrier or clearly indicated dividing section" in violation of Conn. Gen. Stat. § 14-237, and that the police were therefore justified under the Fourth Amendment in stopping the taxi. Based on these factual findings, the court properly denied the defendant's motion to suppress the crack cocaine and money seized from his person.

2. The district court properly disregarded the subjective intentions of the police in initiating the traffic stop of the taxi. Sergeant Hawkins' stated intention to stop the taxi and detain the defendant based on the issuance of the search warrant, the court correctly found, was of no constitutional significance. The police observation of the traffic violation independently justified the stop.

3. Alternatively, the traffic stop was justified based on the issuance of the search warrant and the reasonable manner in which the stop was accomplished. The issuance of the search warrant independently authorized the police to stop and detain the defendant under *Michigan v. Summers*, 452 U.S. 692 (1981). The police initiated the traffic stop and detention in close proximity to the residence, and as soon as practicable once the defendant walked out of the apartment building. The police action was further justified based on the likely presence in the apartment of children, the defendant's history of violence, and his likely access to firearms in the apartment.

4. The district court did not abuse its discretion in admitting at trial an admission made by the defendant

during a prison phone call with his girlfriend. During the phone call, on August 17, 2006, the defendant commented that when he was released from prison he was going to be the same person he had been "a year ago," running the streets and "selling drugs." The court acted well within its discretion in admitting the recorded phone call as an admission under Fed. R. Evid. 801(d)(2), and not as evidence of uncharged misconduct under Fed. R. Evid. 404(b), as the defendant's statement referenced the time charged in the indictment – August 2005. Even if this Court were to hold that Rule 404(b) does apply, any hypothecated error would be harmless because the court also gave what amounted to a complete analysis for the admission of the statement under Rule 404(b). Moreover, any prejudice would have been minimal in light of the overwhelming evidence of guilt, including the seizure of retail-quantity crack cocaine from the defendant's pocket.

5. The within-guidelines-range sentence of 140 months of imprisonment was reasonable. The district court understood that the sentencing guidelines are advisory and properly considered the sentencing factors under § 3553(a) in fashioning a sentence sufficient but not greater than necessary. Further, any anticipated change in the sentencing ranges for offenses involving cocaine base does not justify a remand because the court properly considered the guidelines that were in force at the time of sentencing. Although the Sentencing Commission has recommended a change in the drug table with respect to cocaine base, it remains to be seen whether Congress modifies or disapproves of the proposed amendment, and whether that amendment is to be applied retroactively. In

the event that such a retroactive change takes place, the procedural vehicle for seeking a sentence reduction would be 18 U.S.C. § 3582(c), not a remand from this Court.

ARGUMENT

I. The district court did not clearly err in crediting the testimony of the police officers that they observed a traffic violation which justified a traffic stop.

A. Factual and procedural background

On February 8, 2006, the defendant filed a motion to suppress, claiming that the traffic stop of the taxi and resulting pat down search violated the Fourth Amendment. JA14-17.[2] The Government submitted a preliminary opposition to the defendant's motion on March 20, 2006. JA5. An evidentiary hearing followed on May 10, 11 and 12, 2006. JA7. Post-hearing memoranda were filed by the defendant on July 6, 2006, and the government on July 7, 2006. JA8.

On August 31, 2006, the court issued a written ruling denying the defendant's motion to suppress. JA34. On September 22, 2006, the defendant moved to reopen the

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[2] The defendant also moved to suppress the firearm recovered from 1860 Main Street. JA 19. As the defendant was acquitted on Count One, there is no challenge to the district court's ruling denying the defendant's motion to suppress the firearm.

suppression hearing and reconsider newly discovered evidence. JA46. The defendant's motion to reconsider was directed to his claim that the search warrant affidavit contained materially false information. *Id.* On September 28, 2006, the government filed a response. JA9. On October 2, 2006, the court granted the defendant's motion to reconsider its ruling in light of the newly discovered evidence. JA51. Upon reconsideration, however, the court declined to reopen the hearing and adhered to its earlier ruling. JA53.

B. Governing law and standard of review

The Fourth Amendment permits law enforcement officers to initiate investigative stops when they have "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981). "[T]he level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause." *Sokolow*, 490 U.S. at 7. As the Supreme Court explained: "Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002) (citations and internal quotation marks omitted).

In determining whether the information possessed by a law enforcement officer provided a sufficient basis for a *Terry* stop, the court is required to look at the totality of the circumstances. *Arvizu*, 534 U.S. at 273. "[T]he court must evaluate those circumstances through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *United States v. Colon*, 250 F.3d 130, 134 (2d Cir. 2001) (internal quotation marks omitted). The "totality of the circumstances" inquiry permits police officers to "make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Arvizu*, 534 U.S. at 273 (internal quotation marks omitted).

A police officer may also "tak[e] steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Terry*, 392 U.S. at 23. "[W]here the [information provided] concerns an individual with a gun, the totality-of-the-circumstances test for determining reasonable suspicion should include consideration of the possibility of the possession of a gun, and the government's need for a prompt investigation." *United States v. Bold*, 19 F.3d 99, 104 (2d Cir. 1994). "[A]n 'officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" *United States v. Moorefield*, 111 F.3d 10, 14 (3d Cir. 1997) (quoting *Terry*, 392 U.S. at 27).

"'An ordinary traffic stop constitutes a limited seizure within the meaning of the Fourth and Fourteenth Amendments.'" *United States v. Scopo*, 19 F.3d 777, 781 (2d Cir. 1994) (quoting *United States v. Hassan El*, 5 F.3d 726, 729 (4th Cir. 1993)). To lawfully stop a car, the police must have either "probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct." *Id.* at 781 (quoting *Hassan El*, 5 F.3d at 729). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996). If a police officer observes a traffic offense, then a vehicle stop is reasonable. *United States v. Gaines*, 457 F.3d 238, 243 (2d Cir. 2006); *accord Scopo*, 19 F.3d at 781 ("When an officer observes a traffic offense – however minor – he has probable cause to stop the driver of the vehicle.") (quoting *United States v. Cummins*, 920 F.2d 498, 500 (8th Cir. 1990)).

If the traffic stop is lawful, neither the driver nor the passengers have a valid Fourth Amendment objection to being ordered out of the stopped vehicle. *See Maryland v. Wilson*, 519 U.S. 408, 419 (1997) (passengers in lawfully stopped car may be ordered out of car consistent with Fourth Amendment); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam) (once vehicle is lawfully stopped, ordering driver out of car is a *de minimis* intrusion that does not violate Fourth Amendment). Whether probable cause or reasonable suspicion exists is an objective inquiry and the "actual motivations of the individual officers involved" in the stop "play no role" in

the analysis. *Whren*, 517 U.S. at 813; *see also United States v. Dhinsa*, 171 F.3d 721, 724 (2d Cir. 1998) ("[A] police officer who observes a traffic violation may stop a car without regard to what a reasonable officer would do under the circumstances and without regard to the officer's own subjective intent.") (internal quotation marks omitted) "[A]n officer's use of a traffic violation as a pretext to stop a car in order to obtain evidence for some more serious crime is of no constitutional significance." *Id.* at 724-25.

This Court reviews a district court's findings of fact for clear error. *United States v. Mendez*, 315 F.3d 132, 135 (2d Cir. 2002). When the district court's findings are predicated on credibility determinations, this Court affords particularly strong deference to those findings. *Id.*; *see Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.").

In reviewing the denial of a motion to suppress involving a determination of reasonable suspicion or probable cause, this Court applies clear error review to the factual findings of the district court and *de novo* review to the mixed question of fact and law that the facts, as found, justified a detention and that the resulting seizure of evidence was lawful. *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *United States v. Garcia*, 339 F.3d 116, 118-19 (2d Cir. 2003). The evidence is to be construed in

the light most favorable to the Government. *United States v. Bayless*, 201 F.3d 116, 132 (2d Cir. 2000).

C. Discussion

The district court's factual findings crediting the testimony of Sergeant Hawkins and Detective Rivera were not clearly erroneous. On the contrary, the court's findings were based on the reasonable, logical and consistent testimony of Hawkins and Rivera regarding their observations of the defendant and the operation of the taxi in which the defendant was a passenger. Moreover, the testimony of the police officers was corroborated by the defendant's own statement to the Hartford Police Internal Affairs Department ("IAD"), and contradicted only by a witness who demonstrated bias, had a questionable memory, and was a convicted felon.

Sergeant Hawkins and Detective Rivera both testified that they were positioned in a parking lot on the south side and adjacent to a church on the west side of Main Street. Both officers testified that from their position they could see clearly the entrance of 1860 Main Street. Both officers saw the defendant exit the premises, get into a taxi which had just arrived at the front entrance of 1860 Main Street, and go north on Main Street. Both officers testified further that they watched the taxi drive towards their position, then reverse direction by making a U-turn directly in front of them. Both officers testified further that the taxi crossed a depressed median, bordered by solid yellow lane markers, to accomplish this maneuver. From their position in the rear of the lot, the officers testified,

they could not see the intersection of Main Street and Mahl Avenue because the church obstructed their view.

The officers' account was corroborated by the defendant, who admitted to investigators from IAD that the U-turn was accomplished by driving over the "divider," that such a turn was not illegal and that "everyone does it." The defendant described the sequence as follows:

> We get into the cab, pull off from 1860 Main Street, do a U-turn. There's a divider *right there*. . .

GA285-87 (emphasis added). The defendant is particular in his account of how the U-turn occurs immediately after the taxi "pulls off" from 1860 Main Street, and how the divider is "right there." *Id.* This description corroborates not only the location of the divider as being *at* the church parking lot -- and not at the intersection from which the officers were blinded by the church -- but the rapidity with which the U-turn occurred. *Id.* The defendant nowhere suggested that the taxi traveled for any distance, arrived at a light controlled intersection or reversed direction at Mahl Avenue. *Id.*

Having established that the U-turn occurred *over* the median, or divider, there is no dispute that in doing so, the taxi driver, Christopher Adams, committed an infraction in violation of Connecticut's motor vehicle code. *See*

Conn. Gen. Stat. § 14-237.[3] The parties, witnesses, and the court agreed that driving over the divider or median, as described by the officers, constituted a motor vehicle infraction. There is also no dispute that if the officers saw Adams commit this infraction, they were justified in conducting a motor vehicle stop of the taxi. *See Dhinsa*, 171 F.3d at 724.

The singular basis for the defendant's challenge to the court's factual findings is the purported inconsistency between Detective Rivera's case incident report wherein he described the location of the U-turn as at the "intersection of Mahl Ave. and Main Street" and Sergeant Hawkins' grand jury testimony that the U-turn occurred at the intersection of "Main and Pavilion." GA279, 320. The more specific testimony offered by the officers at the hearing, however, is not inconsistent, but rather imprecise. As Detective Rivera explained during his testimony:

> That was the nearest intersection where the U-turn was made. So at that time, that's what I wrote. I did not mean, intend, that the - that he made the U-turn at the intersection.

GA37-38. Moreover, the statement by Rivera to IAD and his reference to "looping" does not "clearly indicate" that the U-turn was accomplished at the intersection. GA310-11. As the hearing testimony clarified, there was a raised median, with trees, immediately in front of 1860 Main Street, but then for a distance adjacent to the church

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[3] *See* Addendum.

parking lot, the median ran almost level with the street and acted as more of a divider, before it ascended to an elevated median before the intersection. The taxi therefore looped, or reversed direction, as explained by Rivera, after it passed the raised concrete medium, and over the "divider." Hawkins similarly explained his grand jury testimony describing the intersection as the location of the U-turn as a reference point. GA338.

More significantly, however, the defendant's argument ignores his own statement admitting that the U-turn was accomplished by driving over the "divider." On the contrary, the defendant explained "that people use [the divider] all the time" and that "you can go right over [it]." GA286. There is no doubt that the defendant speaks not of the barrier decorated with trees on one side of the church parking lot and the raised concrete fixture capable of disemboweling most any automobile who dares to cross it, but of the near-grade divider directly in front of the church parking lot. The defendant further confirms the immediacy of the U-turn as occurring right after the taxi "pull[ed] off from 1860 Main Street." *Id.* The defendant's statement to IAD was made on January 20, 2006, before he filed his motion to suppress. GA283.

While the defendant disparages the district court's credibility findings as "absurd" and criticizes the court for ignoring the previous statements of Detective Rivera and Sergeant Hawkins, he conveniently marginalizes his own statement to IAD. The defendant's suggestion that his statement was equivocal because he described the U-turn as occurring "right by the church" and therefore at the

intersection is simply wrong. First, the area where the divider is near-grade *is* "right by the church." GA300-308. Second, the church is not at the intersection of Main Street and Mahl Avenue. GA300. The church is bordered on the north side by another parking lot and a vacant lot north of the parking lot. *Id*. Thus, if the church is the defendant's reference point to where Adams navigated the U-turn, he clearly described it as happening before the intersection.

The record amply supports the court's finding that Adams demonstrated questionable credibility when he testified that he made the U-turn at the intersection of Main Street and Mahl Avenue. First, as the court found, Adams had a "friendly" relationship with the defendant. Adams' testimony established an obvious bias in favor of the defendant. Adams testified that he knew the defendant from the neighborhood over a period of years, that he had taxied the defendant on numerous occasions and that they had developed a relationship where the defendant could call Adams directly on his personal cell phone number to arrange a ride. GA227-28. Adams, in fact, demonstrated familiarity with the defendant's family and their activities. GA230 ("I know his mom goes to church and has fund-raising activities at the church."). Adams was also "friendly" enough with the defendant to let him ride in the front seat of the taxi. GA228.

Second, Adams was not likely to admit freely to intentionally violating the motor vehicle code because his driving record could be negatively impacted. *See* JA42. The record supports, again, the court's finding. Adams testified that driving over the median, as described by the

officers, would be unlawful. GA242, 249. Tickets for motor vehicle infractions, accidents and reckless driving, Adams acknowledged, could prevent him from driving a taxi. GA236. So while Adams may not have had a personal stake in the outcome of the suppression hearing, he would not likely admit to willfully committing a motor vehicle violation.

Adams also admitted having two felony convictions, both for selling narcotics. Rule 609(a)(1) provides that evidence of felony convictions "shall be admitted" to attack a witness's credibility subject to Rule 403. Fed. R. Evid. 609(a)(1) (2006); *see United States v. Estrada*, 430 F.3d 606, 615-16 (2d Cir. 2005). The rationale for allowing impeachment by prior criminal convictions is predicated on the theory that "a person with a criminal past may be less likely to testify truthfully than a law-abiding citizen." 4 *Weinstein's Federal Evidence* § 609.02 (2d ed. 2007). While the court did not expressly rely on Adams' felony convictions in discounting his credibility, the record supports such a finding and further bolsters the district's court's factual findings.

II. The district court correctly held that a police officer's subjective motivations are irrelevant to the determination of reasonable suspicion

A. Factual and procedural background

The relevant facts are set forth above in the Statement of Facts, Suppression Hearing.

B. Governing law and standard of review

The governing law is set forth above in Point I.B.

C. Discussion

First, the defendant argues that where there is strong evidence that police were motivated by a pretext, a traffic stop cannot be justified by an objective factual basis. That argument fails because it runs directly contrary to the Supreme Court's decision in *Whren*, which specifically authorized a pretext stop provided the officer had an objective basis to conduct the stop. *Whren*, 517 U.S. at 814 ("[T]he Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.") (internal quotation marks omitted) Neither *Whren* nor its progeny created an exception that might depend on the strength or weakness of the evidence of the officers' subjective intent. *Whren*, for example, does not limit its reasoning to those circumstances where officers have mixed reasons for the stop, one of which is pretextual. *Whren* unequivocally removes subjective motivations from the equation.

In this Circuit, the defendant's argument is specifically refuted by *United States v. Dhinsa*, 171 F.3d 721 (2d Cir. 1998). *Dhinsa* authorized a pretext stop "without regard to the officer's subjective intent" and held that the officer's "use of a traffic violation as a pretext to stop a car in order to obtain evidence for some more serious crime is of no constitutional significance." *Id.* at 724-25. It simply does not matter what reasons may have motivated the

officer to make the traffic stop so long as there was an objective basis for it. The court's finding that the officers observed Adams commit a moving violation, therefore, ends the constitutional inquiry.

The defendant's second argument – that an infraction under Connecticut law does not authorize a custodial arrest – is beside the point because it confuses the principles governing the initial stop with those governing the pat down. The pat down was authorized because Sergeant Hawkins had reasonable suspicion to believe the defendant was armed and dangerous. There is no question that the police, and Hawkins in particular, had reasonable suspicion to search the defendant for weapons. In fact, the defendant makes no challenge to this factual determination by the district court. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). The defendant had previous arrests for firearms offenses, was previously involved in a violent struggle with an officer, and was identified by confidential sources as possessing firearms. GA109, 116-18, 278-81, 561-65. It was therefore reasonable for Hawkins to conduct a pat down for officers' safety.

III. Even if the subjective motivations of police were relevant to the traffic stop, they were authorized to stop the vehicle in which the defendant was a passenger because he was detained as he exited an apartment for which they had a search warrant, and the stop was reasonable.

Assuming *arguendo* that this Court were to disagree with the government's position that the subjective motivations of the police were irrelevant to the traffic stop, the police were nevertheless justified under the Fourth Amendment in stopping the taxi based on the issuance of the search warrant for this defendant's apartment and the reasonable method in which they conducted the stop. Further, even though the district court did not rely on this basis in denying the motion to suppress, this Court "may affirm the denial of the suppression motion on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Estrada*, 430 F.3d at 609-10 (quoting *United States v. Tropiano*, 50 F.3d 157, 161 (2d Cir. 1995) (citation and internal quotation marks omitted)).

A. Factual and procedural background

The relevant facts are set forth above in the Statement of Facts, Suppression Hearing.

B. Governing law and standard of review

"If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." *Michigan v. Summers*, 452 U.S. 692, 704-705 (1981). Thus, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705. In *Summers*, when officers arrived to execute a search warrant at the defendant's residence, he was seen descending the front steps of his residence, detained and returned to the residence. *Id.* at 693. When the officers found narcotics in the house, the defendant was arrested and searched where additional contraband was seized from his person. *Id.* In upholding the detention of the defendant and his return to the residence, the Supreme Court reasoned:

> The existence of a search warrant . . . provides an objective justification for the detention. A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain

> basis for determining that suspicion of criminal activity justifies a detention of that occupant.

Id. at 703.

"Absent special circumstances, the police of course have the authority to detain occupants of premises while an authorized search is in progress, regardless of individualized suspicion." *Rivera v. United States*, 928 F.2d 592, 606 (2d Cir. 1991). "An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (quoting *Summers*, 452 U.S. at 705 n.19). The Fourth Amendment intrusion is balanced against law enforcement interests in "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search." *Summers*, 452 U.S. at 702-03.

The authority to detain occupants found on, or near, the premises of a search warrant is not limited by geographical proximity to the location searched. *See United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991):

> *Summers* does not impose upon police a duty based on geographic proximity (i.e., defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon

> as practicable after departing from his residence. Of course, this performance-based duty will normally, but not necessarily, result in detention of an individual in close proximity to his residence.

C. Discussion

The police were independently justified in stopping the taxi based on the issuance of the search warrant, the temporal proximity of the traffic stop to the target location of the search warrant, and the reasonable manner in which the police conducted the stop. As the touchstone for any Fourth Amendment analysis is reasonableness, the police action here in waiting for the defendant to exit the premises and stopping him as soon as practicable after departing was undeniably reasonable. The police considered the risk and potential danger in conducting a search for firearms in a residence with multiple occupants, including children, where the target has a history of violence, and justifiably decided to await his departure from the residence. Once they observed the defendant enter the taxi and depart from 1860 Main Street, Sergeant Hawkins and Detective Rivera requested a marked police cruiser to initiate the stop within seconds of the taxi departing and immediately after the taxi made the U-turn. The taxi was stopped by a marked police unit a short distance away; about 1½ blocks from Main Street and about two blocks from 1860 Main Street. When the police action is viewed through the lens of reasonableness, the principles of *Summers* logically extend to the

circumstances here and justified the stop and detention of the defendant.

Once a neutral magistrate has already authorized police to invade the privacy of a home, and determined that there is probable cause that the occupant of the residence is committing a crime, it would be unreasonable to set an arbitrary geographical limit on where the police may detain the occupant. Reasonableness should not be defined on the basis of whether the defendant is detained in the bedroom, the outside stairwell, the corner sidewalk, or the parking lot across the street. If the Fourth Amendment was intended to protect against unreasonable searches and seizures, then the dispositive issue is whether it was reasonable for the police to await the defendant's departure and stop him two blocks from the residence. *Summers* has been, and should be here, applied to circumstances where the resident of the targeted residence is detained as soon as practicable upon his exiting the premises to be searched. In circumstances where police reasonably believe that their safety, or the safety of the occupants, is at risk, such as a search for firearms, *Summers* should authorize the police to allow the defendant to leave the premises and stop him as soon as practicable. Otherwise, the police would be constrained to the untenable position of executing a high risk search warrant, or allowing the defendant to elude apprehension in the event contraband is found.

In *United States v. Cochran*, the Sixth Circuit validated police action in stopping and detaining the defendant as he drove away from the targeted residence.

939 F.2d 337. The police in *Cochran* did not make a forcible entry because they believed the defendant to carry a firearm and that a guard dog was inside. *Id.* at 338. During the ensuing motor vehicle stop, the police recovered a firearm from the vehicle and arrested the defendant. *Id*. The Sixth Circuit refused to define a "duty based on geographic proximity" holding that "the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence." *Id.* at 339.

As in *Cochran*, the VCIT harbored similar concerns regarding their safety and that of the occupants in executing the search warrant while the defendant was present. The plan was to detain the defendant as he exited the residence, but when that could not be accomplished, the stop was made approximately two blocks from his residence.

Similarly, in *United States v. Fullwood*, 86 F.3d 27 (2d Cir. 1996), this Court validated a detention of the defendant who was outside his residence and entering a vehicle. Applying *Summers*, the Court held that officers could stop the defendant, require him to return to the residence, and detain him while the officers conducted their search. *Id.* at 29-30. *Fullwood* also held that it was prudent for the officers to handcuff the defendant until they could be certain that the situation was safe. *Id.* at 30.

More recently, a district court validated the stop and detention of a suspect in very similar circumstances. In *United States v. Bailey*, the police intentionally allowed

the defendant to exit the premises, enter his vehicle, and drive a distance to where the police believed the vehicle could be safely stopped. 468 F. Supp.2d 373, 378-79 (E.D.N.Y. 2006). Relying on legitimate law enforcement interests of minimizing the risk of harm to officers and preventing flight should incriminating evidence be found, the *Bailey* court found the officers' actions in waiting until the defendant departed reasonable. *Id.* "There is no basis for drawing a 'bright line' test under *Summers* at the residence's curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away." *Id.* A detention immediately outside the residence versus a few blocks away is of no constitutional significance. *Bailey*, 468 F. Supp.2d at 379.

Here, the officers reasonably concluded that a warrant could not be executed safely when the defendant was inside. As soon as the defendant departed in the taxi, a prompt decision to stop the taxi was made. Before the taxi traveled even three blocks, it was stopped and the defendant was detained. So long as the officer's actions were reasonable and practicable, there should not be an arbitrary geographical limit on when the officers may permissibly stop and detain the resident of the premises for which the police have a search warrant.

IV. The district court did not abuse its discretion by admitting recorded prison phone conversation in which the defendant admitted drug dealing during the time period covered by the indictment.

A. Factual and procedural background

In addition to the facts set forth above, the following evidence was presented during the trial. With the assistance of a marked police unit, the taxi was stopped on Mather Street, between East and Center Streets. GA346-347. Once the taxi was stopped, Sergeant Hawkins ordered the occupants to show their hands. *Id.* Once Hawkins "saw the hands were clear" he removed the defendant from the vehicle, and conducted a frisk of his person. GA347-348. Hawkins recovered from the defendant's pants pocket a clear plastic bag containing a white rock-like substance which he recognized as crack cocaine. GA348-50. Hawkins described the size of the substance as being between a golf ball and baseball. GA350. Hawkins also seized from the defendant's pocket $716 in cash. GA352, 354-356.

Sergeant Hawkins then proceeded to 1860 Main Street to participate in the search. GA354. Once the apartment was secured, Hawkins directed the agents to commence a room-by-room search. GA356. As supervisor, Hawkins monitored the search. GA356-63. Before any evidence or contraband was seized, Hawkins was notified so he could observe the evidence and determine if it should be photographed. GA357-60. No pipes, tools or implements

for use in the ingestion of crack cocaine were found during the search of 1860 Main Street by Hawkins, and none of the officers or agents notified him of any such findings. GA361-62.

Officer Patrick Farrell, of the Hartford Police Department, testified that he was assigned a marked police unit and participated in the traffic stop of the taxi on August 3, 2005. GA374-75. Farrell was on scene where he observed Hawkins conduct a pat down of the defendant and recover from the defendant's person a plastic bag containing a substance he recognized as crack cocaine. GA376-78. Upon completion of the pat down and subsequent search of his person, the defendant was placed in Farrell's vehicle and transported to the Main Street residence. GA378-79.

Deputy United States Marshal John Stevens testified that he was present at the traffic stop. GA386. Stevens observed Sergeant Hawkins conducting a pat down of the defendant. GA387-88. Stevens saw Hawkins holding a "large bag, or round bag, of what appeared to be narcotics." GA390. Stevens thereafter traveled to 1860 Main Street to secure the premises and participate in the search. GA391-92. During the search, Stevens located the Glock 9mm pistol and high capacity magazine in the leather handbag, which was hanging on a doorknob of a bedroom closet. GA395-98. Stevens did not locate any items indicative of drug use or distribution such as pipes or stems. GA400.

Special Agent Robert Borstein of the Federal Bureau of Investigation ("FBI") testified as an expert in narcotics investigations. Borstein testified that he has been employed as a special agent with the FBI since 1996, was previously employed as a special agent with the United States Environmental Protection Agency, Criminal Investigation Division, and as a law enforcement officer with the United States Department of Interior ("DOI"), Bureau of Land Management. *Id.* With the DOI, Bornstein's responsibilities including investigation of clandestine labs in the Mohave Desert. *Id.*. Bornstein received training at the Federal Law Enforcement Training Center, California Department of Narcotics and the FBI Academy in Quantico, Virginia. GA404-405. Bornstein's conducted narcotics investigations in Oklahoma City and El Centro, California. GA404-406. Since 2001, Bornstein has coordinated the Hartford Safe Streets Task Force where he has focused on the investigation of organized street crews or gangs involved in violent crime and narcotics activity. GA407. Bornstein's narcotics investigations have involved a variety of illegal substances, including cocaine and cocaine base. GA408. In Connecticut, Borstein's investigations have resulted in the indictment of more than 110 individuals on federal charges. GA409. Bornstein has been an affiant on more than 100 arrest warrants and between 30 to 50 search warrants related to narcotics activity. GA413. Bornstein explained that crack cocaine is the principle drug used and distributed in the north end of Hartford. GA415. Borstein has had extensive contact with cocaine and crack cocaine having encountered it on a weekly basis. GA416-17.

Agent Bornstein also testified on the chemical process by which cocaine hydrochloride becomes crack cocaine, and the physical properties, characteristics, color and appearance of crack cocaine. GA421-24. Borstein explained how crack cocaine is typically ingested and the paraphernalia used in the ingestion process. GA424-26. Additionally, Bornstein described distribution quantities, the monetary value for various distribution amounts in Hartford, and dosage amounts. *Id.* More particularly, Bornstein testified that a typical dose of crack cocaine can be measured in "tenths of the gram," or as little as one "tenth of a gram" and up to two or three tenths of a gram, with a typical dose about the size of a finger nail clipping. GA430, 435, 444. The typical crack user spends $10 to 20 dollars for a rock of cocaine. GA430-31. The distribution of the $10-20 rock is the lowest level of distribution and that in the distribution heirarchy the next level of supplier will typically have a quantity of 3.5 grams (or an "eight-ball"), and the next level of distribution at 1/4 ounce or more, and then the ½ ounce (14 grams) supplier, and so on. GA430-34.

The parties stipulated that the net weight of the cocaine base seized from the defendant was 21.7 grams. GA567. According to Borstein, the largest amount of crack cocaine he has seized from a crack user is an eight-ball, or 3.5 grams. GA451-52. Borstein testified that in his experience he has not encountered a drug user who hordes or stores quantities of crack cocaine. *Id.*

Testimony was also received from a representative of the Connecticut Department of Labor ("DOL"). Stanley

Kuligoski testified that the DOL maintains records of wages paid by Connecticut employers and to Connecticut residents and had stored data from the third quarter of 2002 through the second quarter of 2006. GA456-61. Kuligoski researched DOL records to determine if any employer reported wages paid to the defendant. GA463-64. Kuligoski testified that the only reported wages paid to the defendant was in the fourth quarter of 2003 in the total amount of $345.15. GA464-65.

B. Governing law and standard of review

A district court has "wide discretion in determining the admissibility of evidence under the Federal Rules," and this Court reviews the admission of evidence for abuse of that discretion. *United States v. Abel*, 469 U.S. 45, 54-55 (1984); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005). A district court abuses its discretion when it "act[s] arbitrarily and irrationally," *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992), or its rulings are "manifestly erroneous," *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (internal quotation marks omitted).

Trial errors that do not affect the substantial rights of the defendant are harmless and do not compel the reversal of a criminal conviction. *See United States v. Colombo*, 909 F.2d 711, 713 (2d Cir. 1990); Fed. R. Crim. P. 52(a). An error is harmless if the reviewing court is convinced that the "error did not influence the jury's verdict." *Colombo*, 909 F.2d at 713 (quoting *United States v. Ruffin*, 575 F.2d 346, 359 (2d Cir. 1978). In that determination, "[t]he strength of the government's case against the

defendant is probably the most critical factor." *Id.* at 714 (citing 3A C. Wright, *Federal Practice and Procedure* § 854, at 305 (2d ed. 1982)). "Reversal is necessary only if the error had a substantial and injurious effect or influence in determining the jury's verdict." *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2003) (internal quotation marks omitted).

All relevant evidence is generally admissible in court. Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even if evidence is relevant, however, the district court has the discretion to exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Federal Rule of Evidence 404(b) limits the admissibility of evidence of other crimes, wrongs, or acts. Rule 404(b), however, does not apply to evidence that is intertwined with the charged offense:

> [E]vidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence

> regarding the charged offense, or if it is necessary to complete the story of the crime on trial.

United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000) (quoting *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997)). Such "intrinsic evidence" falls outside the scope of Rule 404(b) and is admissible at trial where it tends to prove the existence of an element of the charged offense. *See United States v. Birbal*, 62 F.3d 456, 464 (2d Cir. 1995).

In short, Rule 404(b) applies to evidence of "other crimes, wrongs, or acts" – not to acts directly relating to the crime charged. *See Gonzalez*, 110 F.3d at 942.

C. Discussion

The defendant argues that the district court erred in admitting the August 17, 2006, prison call between the defendant and Dondi Morrell during which the defendant admitted selling drugs. The defendant claims that the statement was irrelevant or that, if it possessed any relevance, such relevance was outweighed by its unfairly prejudicial nature. The defendant further argues that his statement did not qualify for admission under Fed. R. Evid. 404(b).

The defendant was charged by indictment with possession with intent to distribute 5 grams or more of cocaine base. To prove this offense, the government was required to prove not only that the defendant possessed the cocaine base, but that he intended to distribute it. *See*

United States v. Gore, 154 F.3d 34, 45 (2d Cir. 1998). The jury must ultimately determine if the narcotics were for the defendant's personal use, or for the purpose of distribution. *See United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995)

An admission by the defendant which reveals his intent cannot reasonably be claimed as irrelevant when intent is an element of the offense. The statement has a "tendency to make the existence of any fact" (the knowing possession and intent to sell); which is "of consequence to the determination of the action" (it is an essential element of an offense charged); "more probable or less probable than it would be without the evidence" (was the crack cocaine for personal use or for distribution). Thus, there is no denying the relevance of the defendant's statement.

Contrary to the defendant's argument, the probative value of the statement was not substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403. A trial court's Rule 403 analysis "is reversible error only when it is a clear abuse of discretion." *United States v. Padilla*, 203 F.3d 156, 162 (2d Cir. 2000) (internal quotation marks omitted). The evidence was probative of the defendant's intent to distribute the drugs he possessed when arrested. While the danger of prejudice to the defendant admittedly may have been high, the danger of *unfair* prejudice was not. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519

U.S. 172, 180 (1997). The probative value of this evidence, on the other hand, was high because the defendant was effectively admitting to the charged conduct in his statement. Moreover, any danger of unfair prejudice was lessened both by the court's granting the defendant's request to play the tape in its entirety, and by the defendant's ability to argue to the jury both that he was being sarcastic and that whatever was said was not actually an admission to anything.

The defendant also argues that the statement constituted evidence of uncharged misconduct and therefore its admissibility is governed by Fed. R. Evid. 404(b). The government argued for its admissibility as a an admission by a party opponent under Fed. R. Evid. 801(d)(2), and the district court agreed. The court specifically found "the description of conduct in August of '05 by the defendant as selling drugs [was] probative of his conduct, of his intent to distribute drugs, that is, he was selling." GA555. The court also concluded that the defendant's admission was "not evidence of a prior bad act, but referencing the conduct that is the subject of the indictment, namely possession with intent to distribute drugs in August 2005." GA555-56. The defendant counters that the statement does not specify the possession of the precise drugs for which he was charged on August 3, 2005, and therefore would be extrinsic to the charged offense. The defendant's position is unpersuasive. The defendant makes a specific reference to "a year ago," which was when was arrested with drugs.

An admission by a defendant may be considered evidence of the charged conduct even if it does not contain a specific admission to the charged offense or specifically refer to the date of the offense. *See United States v. Bibo-Rodriguez*, 922 F.2d 1398 (9th Cir. 1991). In *Bibo-Rodriguez*, the Ninth Circuit held that a defendant's general statements to conduct over an unspecified period of time did not constitute "other act" evidence. *Id.* at 1401. There, the defendant admitted in December of 1988, after being arrested for transporting marijuana, that 1) he had been routinely transporting cocaine and marijuana; 2) he had done so numerous times; and 3) he had been doing so for quite a while. *Id.* He was later charged with transporting cocaine arising out of an incident in September of 1988, nine weeks before the statements were made. *Id.* The Ninth Circuit held that the statements were admissible under Rule 801(d)(2)(A) as party admissions, and not "other act" evidence, because they were admissions of the charged conduct. *Id.* "[T]he statements were made merely nine weeks after the charged offense and it is reasonable to conclude that [the defendant] was referring to a period of time which included the charged offense." *Id.*

In this case, the defendant's statement was made on August 17, 2006 and references what he was doing during the time charged in the indictment. The district court did not abuse its discretion in concluding that the defendant was referencing the charged conduct when he stated he was selling drugs a year ago. The court properly determined that the defendant's statement was not subject

to Rule 404(b) analysis, but rather an admission under Rule 801(d)(2)(A).

The court nevertheless provided an alternative basis for admitting the statement under Rule 404(b). Admission of uncharged misconduct under Rule 404(b) requires that 1) the jury be able to reasonably conclude the defendant committed the act; 2) the evidence be offered for a proper purpose; 3) the evidence be relevant; 4) the probative value of the evidence not be substantially outweighed by the potential for unfair prejudice; and 5) if requested, the jury be instructed that the evidence is "to be considered only for the proper purpose for which it was admitted." *Huddleston v. United States*, 485 U.S. 681, 689-92 (1988).

Even if this Court finds that the district court erred in holding that Rule 404(b) did not apply to the defendant's recorded admission, this error should be deemed harmless because the court also gave what amounts to a complete analysis for the admission of the statement under Rule 404(b). The court held that the statement was relevant, and that it was probative of the defendant's knowledge and intent to distribute drugs when he was arrested. The court also conducted a Rule 403 balancing test, holding that the danger of unfair prejudice did not substantially outweigh the probative value of the statement, and the defendant made no request for any kind of limiting instruction. Also, assuming, *arguendo*, that the defendant was admitting acts other than the charged conduct, the fact that the defendant himself was admitting these acts would clearly allow the jury to reasonably conclude he did them.

The government complied with every aspect of Rule 404(b), and the district court, though holding that Rule 404(b) did not apply, provided a record that is sufficient for this Court to determine that even if the statement was 404(b) evidence, it was still properly admitted.

Lastly, even if this Court were to conclude that the district court erred in admitting the defendant's recorded statement, any error was harmless. The jury had ample evidence to conclude that the defendant possessed the crack cocaine with intent to distribute it. The jury heard from Sergeant Hawkins who physically removed the crack cocaine from the defendant's pocket at the scene of the traffic stop. Testimony was received from witnesses that the defendant possessed no paraphernalia associated with the ingestion or use of crack cocaine. In fact, there was no evidence whatsoever that the defendant was a user of crack cocaine. The jury also heard testimony about the quantities, dose amounts and value of crack cocaine in Hartford. Agent Borstein informed the jury that dosage amounts for crack cocaine were measured in tenths of a gram, and that low-level distribution of chips or rocks could be as small as one tenth of a gram. Agent Bornstein testified that dose amounts are about the size of a clipped fingernail and range in size from 1/10 to 3/10 of a gram. The defendant was found in possession of almost 22 grams of crack cocaine, or, conservatively, more than 60 doses.

The jury also heard testimony that the defendant was in possession of a substantial amount of cash, in small denominations and that he had received no reportable wages since 2003. The jury could also infer that if the

defendant was a user, it would be illogical to be carrying such a large amount, while riding in a taxi with his daughter to bring her to church. Thus, even without the defendant's admission of selling drugs, there was ample evidence of the defendant's intent to distribute.

V. The 140-month within-guidelines range sentence imposed by the district court was reasonable.

A. Relevant facts

The relevant facts are set forth above in Statement of Facts, Sentencing.

B. Governing law and standard of review

The Sentencing Guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See United States v. Booker*, 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 110-18 (2d Cir. 2005). Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific factors to be considered such as the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence to serve the various purposes of punishment, the sentencing guidelines, and the need to avoid unwarranted sentencing disparities.

In *Crosby*, this Court explained that courts should now engage in a three-step sentencing procedure. First, the court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113.

On appeal, sentences are now reviewed for reasonableness. *See Booker*, 543 U.S. at 261. There are two dimensions to reasonableness review. First, the Court will assess procedural reasonableness – whether the sentencing court complied with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *Id.* at 115. The "brevity or length of a sentence can exceed the bounds of 'reasonableness,'" although this Court has observed that it "anticipate[s] encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). An evaluation of whether the sentence is reasonable will necessarily "focus . . . on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005).

The Court has explained what is meant by "consideration" of the statutory factors in order for the sentence ultimately imposed to be "reasonable." This Court has "steadfastly refused to require judges to explain or enumerate how such consideration was conducted." *United States v. Pereira*, 465 F.3d 515, 523 (2d Cir. 2006). Rather, this Court presumes "in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the statutory factors . . . and will not conclude that a district judge shirked [his] obligation to consider the § 3553(a) factors simply because [he] did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced." *Id.* (quoting *United States v. Fernandez,* 443 F.3d 19, 30 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006)). Indeed, "'[a]s long as the judge is aware of both the statutory requirements and the sentencing range . . . and nothing in the record indicates misunderstanding about such materials

or misperception about their relevance, we will accept that the requisite consideration has occurred.'" *Fernandez*, 443 F.3d at 29-30 (quoting *Fleming*, 397 F.3d at 100).

The Supreme Court recently held, in *Rita v. United States*, 127 S.Ct. 2456 (2007), that a court of appeals may presume that a sentence within the Guideline range is reasonable. The Court reasoned that a presumption of reasonableness reflects both that the sentencing judge and the Sentencing Commission reached the same conclusion as to the appropriate sentence (including that it is "sufficient but not greater than necessary" in the words of § 3553(a)), and that the Commission was required to consider the same § 3553(a) factors in writing the Guidelines as sentencing judges must consider, examined thousands of sentences, and continues to study sentencing, so that the Guidelines "reflect a rough approximation of sentences that might achieve §3553(a)'s objectives." 127 S. Ct. at 2463-65.

Although this Court has declined to adopt a formal presumption that a within-Guidelines sentence is reasonable, it has nevertheless "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez,* 443 F.3d at 27; *see also United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

Thus, although there is no formal presumption, this Court is in accord with *Rita*, which ultimately held that when a court of appeals reviews a Guidelines sentence, the fact that both the sentencing court and the Commission agree on the sentence "significantly increases the likelihood that the sentence is a reasonable one," 127 S. Ct. at 2463, because "when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable," *id.* at 2465.

This Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted).

C. Discussion

According to the defendant, the district court construed the sentencing guidelines as mandatory and erroneously concluded that it had no authority to impose a non-Guideline sentence. The defendant's argument is misplaced, as it misinterprets the district court's comments regarding its authority to depart from the guidelines for policy reasons. The district court did not construe the

guidelines as mandatory. On the contrary, at the sentencing hearing, the court stated:

> The November 1, '06 guidelines are applicable for the purpose of considering what the applicable guideline is, and relatedly, considering it in the advisory capacity along with the other factors for sentencing, including considerations of the defendant's motions.

GA488. The district court's comment that *Booker* does not authorize it to sentence below the guidelines was directed to the defendant's argument that the court should impose a non-guideline sentence because of the disparity in sentencing ranges between cocaine and cocaine base. JA 530. *See United States v. Castillo*, 460 F.3d 337, 355 (2d Cir. 2006) ("Nothing in *Booker* specifically authorizes district judges to rewrite different Guidelines with which they generally disagree, which is effectively what district judges do when they calculate a sentence with a 20:1 or 10:1 ratio instead of the 100:1 ratio in the drug sentencing table."). The court did not in any way construe the sentencing guidelines as mandatory. Rather, the court properly explained that it lacked authority to substitute its own judgment as to the reasonableness of the disparity in the guidelines. The defendant's argument that it was unclear as to whether the court knew it had authority to impose a non-guideline sentence is simply not supported by the record. The court was clear about its authority to impose a non-guideline sentence. After giving due consideration to all the sentencing factors, it simply

determined that a reasonable sentence was within the guideline range.

The defendant also argues that the Sentencing Commission's recommendation for an across-the-board two-level reduction for offenses sentenced under U.S.S.G. § 2D1.1 where the relevant conduct involved cocaine base supports his claim that the sentence in his case is unreasonable. Earlier this year, the Sentencing Commission recommended that Congress alter the ratio used in establishing the statutory minimum sentences for crack-cocaine offenses, although the Commission made no specific recommendation. *See* Report to the Congress: *Cocaine and Federal Sentencing Policy*, at 8 (2007). In doing so, the Commission reiterated that "establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress's prerogative." *Id.* at 9. The Commission also proposed an amendment to the Guidelines that would lower base offense levels for crack-cocaine offenses by two levels (and make conforming changes to the drug equivalency table) – with the result that, at quantities that trigger a statutory minimum sentence, the statutory minimum sentence would fall near the top, rather than at the bottom, of the resulting Guidelines sentencing range. *See* 72 Fed. Reg. 28, 571-28, 573 (2007). That amendment will take effect on November 1, 2007, unless it is modified or disapproved by Congress. *See* 28 U.S.C. § 994(p). Should Congress allow the amendment to take effect, it could apply in this case only if it were made retroactive, *see* 18 U.S.C. §§ 3582(c)(2), 3742(g)(1); 72 Fed. Reg. 41,794-41,795

(2007) (requesting comment on proposal to make amendment retroactive).

The prospect of amending drug guidelines does not render the defendant's sentence unreasonable. First, the district court properly applied the guidelines which were in effect at the time of sentencing. JA 488. Second, the Commission's proposed amendments are just that: proposed. Congress could modify or disapprove of the proposed amendment, just as it has done to prior recommendations by the Commission to reduce the disparity between cocaine and cocaine base guidelines. Any claim that the district court's sentence was erroneous based on this anticipated change is therefore premature. Third, even if Congress permits the proposed changes, it is not clear whether they will apply retroactively. If they do, then the defendant may be permitted to seek a sentence modification under 18 U.S.C. § 3582(c)(2). Fourth, the disparity in the ratio between cocaine and cocaine base sentencing ranges is a product of congressional mandate. Congress intended to impose significantly greater penalties on distributors of crack cocaine than similarly situated distributors of powder cocaine. *See United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006) ("Congress's decision to punish crack cocaine offenders more severely than powder cocaine offenders is plainly a policy decision"), *cert. dismissed*, 127 S.Ct. 3040 (2007). Thus, the district court is "without license to usurp the policy role of the legislative and executive branches" in ignoring the 100:1 ratio between crack and powder cocaine. *Castillo*, 460 F.3d at 361.

The district court considered the presentence report, the comments of the defendant and his mother, and argument of counsel, before imposing sentence. The court also considered each of the factors listed in § 3553(a). GA63-67. In particular, the court reasoned that deterrence and protection of the public was "very much needed." GA67. The court further reasoned that a sentence of 140 months imprisonment "advances deterrence and deterrence advances public safety." *Id.* In fashioning the sentence, the court had available a detailed history of the defendant and a thorough understanding of the criminal conduct for which he was sentenced. Having presided over the trial and evidentiary hearing, the court had a more complete understanding of the offense conduct than in most cases. GA530. The court also considered the defendant's "dreadful childhood" and his "ongoing drug use." GA532. From this wealth of information, the court reasonably concluded a sentence that advances the factors of § 3553(a) was 140 months. The defendant alleges no clearly erroneous finding fact or error of law, or that the district court exceeded the bounds of allowable discretion. *See Fernandez*, 443 F.3d at 27. There is no need to require the district court to revisit the sentence as it has already readily and logically explained the reasonableness of the sentence imposed.

CONCLUSION

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

Dated: August 31, 2007

Respectfully submitted,

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

BRIAN P. LEAMING
ASSISTANT U.S. ATTORNEY

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

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 13,922 words, exclusive of the Table of Contents, the Table of Authorities, and this Certification.

BRIAN P. LEAMING
ASSISTANT U.S. ATTORNEY

ADDENDUM

Fed. R. Evid. 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more
probable or less probable than it would be without the evidence.

Fed. R. Evid. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by an Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 404(b). Other Crimes, Wrongs, or Acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible

for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 609. Impeachment by Evidence of Conviction of Crime.

(a) **General Rule.** For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

Fed. R. Evid. 801. Definitions.

(d) Statements which are not hearsay. A statement is not hearsay if–

(2) The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or . . .

Statutory Provisions

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such Guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect

on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable Guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such Guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and

> commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

18 U.S.C. § 3582(c). Modification of an imposed term of imprisonment.

The court may not modify a term of imprisonment once it has been imposed except that --

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994 (o),

upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Conn. Gen. Stat. § 14-237. Driving on divided highways.

When any highway has been divided into two roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section, each vehicle shall be driven only upon the right-hand roadway and no vehicle shall be driven over or across any such dividing space, barrier or section, except through an opening or at a crossover or intersection established by public authority. Violation of any provision of this section shall be an infraction.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Tisdol

Docket Number: 07-0359-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 8/31/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: August 31, 2007