No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AARON M. RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The government obtained Mr. Richardson's cell site location information (CSLI) without a warrant pursuant to the Stored Communications Act, 18 U.S.C. §§ 2703(c) and (d). Throughout the course of Mr. Richardson's pre-trial proceedings, trial, and appeal, he sought the suppression of that evidence under the Fourth Amendment. The trial court denied Mr. Richardson's motion to suppress. On appeal, the Eleventh Circuit affirmed that denial in light of its decision in *United States v. Davis*, 785 F.3d 498, 513 (11th Cir. 2015) (en banc), which held that obtaining cell site location records under the Stored Communications Act was not a search within the meaning of the Fourth Amendment.

Mr. Richardson petitioned for rehearing with the Eleventh Circuit in light of this Court's expected decision in *Carpenter v. United States*. The Court then issued its decision in *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018), holding that the government must generally obtain a search warrant before obtaining an individual's CSLI, but the Eleventh Circuit denied Mr. Richardson's petition shortly thereafter.

The question presented is:

Whether this Court should grant, vacate, and remand the Court of Appeals for the Eleventh Circuit's decision denying defendant's request to suppress CSLI obtained without a warrant in light of this Court's recent opinion in *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018).

PETITION FOR WRIT OF CERTIORARI

On behalf of Aaron M. Richardson, the undersigned petition for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit in this case and vacate and remand it in light of *Carpenter v. United States*, 585 U.S. ___ (2018).

OPINIONS BELOW

The Eleventh Circuit's order denying rehearing *en banc* is unpublished and reproduced at App'x D at 56a. The opinion of the Eleventh Circuit Court of Appeals is reported at 732 Fed. App'x 822 and included in the Appendix at App'x A at 1a. The orders of the district court are unreported, but are in the Appendix at the following pages: the December 15, 2015 magistrate judge's report and recommendation that the district court deny Mr. Richardson's motion to suppress is unpublished and reproduced at App'x C at 22a; and the district court's February 4, 2016 order adopting the report and recommendation is reproduced at App'x B at 20a.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on May 1, 2018. The order denying the petition for rehearing was entered on June 27, 2018. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

Petitioner Aaron M. Richardson was indicted on various charges in the Middle District of Florida, including attempted murder of a United States District Judge and using, carrying, and discharging a firearm during and in relation to a crime of violence and possessing and discharging a firearm in furtherance of a crime of violence. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1345. In connection with those charges, the government sought and obtained a court order pursuant to the Stored Communications Act, 18 U.S.C. §§ 2703(c) and (d), to allow the collection of cell site location information (CSLI) from Mr. Richardson's cell phone provider. Under these provisions, the government is not required to show probable cause, but only must demonstrate that there are reasonable grounds that the records or information sought are relevant to an ongoing criminal investigation.

Mr. Richardson sought suppression of this evidence before the trial court in the Middle District of Florida. Mr. Richardson's motion to suppress CSLI was denied.

During Mr. Richardson's six-day trial, the district court granted Mr. Richardson permission to maintain a standing objection regarding the admission of CSLI. The government used this CSLI at trial to show the location of the cell phone associated with Mr. Richardson's phone number—and, by association, Mr. Richardson—on specific dates and times relevant to the alleged crimes. The government also used CSLI to support its theory of motive and planning. The jury returned a guilty verdict on all but one count, and Mr. Richardson was sentenced to 4,116 months' imprisonment.

Mr. Richardson appealed to the Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291, arguing, among other things, that the district court erred in not suppressing the CSLI because it was obtained without showing probable cause in violation of Mr. Richardson's Fourth Amendment rights. The Eleventh Circuit affirmed the district court's denial, relying on Eleventh Circuit precedent in *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc), which held that obtaining CSLI under the Stored Communications Act was not a search within the meaning of the Fourth Amendment. Judge Martin wrote separately and recognized that this Court's decision in *Carpenter* "may mean that this issue [Mr. Richardson's Fourth Amendment challenge] will need to be revisited." App'x A at 19a.

Mr. Richardson petitioned the Eleventh Circuit for rehearing *en banc*, knowing that this Court would soon decide *Carpenter v. United States*. The Eleventh Circuit denied Mr. Richardson's petition

for rehearing on June 27, 2018, just five days after this Court issued its opinion in *Carpenter*.

This petition follows.

REASONS FOR GRANTING THE PETITION, VACATING, AND REMANDING

This petition raises the same question that this Court directly addressed in *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018): whether obtaining CSLI without a showing of probable cause violates a defendant's Fourth Amendment rights. The Eleventh Circuit's decision in this case contradicts this Court's decision in *Carpenter*, and should therefore be vacated and remanded.

I. The Eleventh Circuit's Decision Contradicts *Carpenter*

The Eleventh Circuit relied on its decision in *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc), in affirming the district court's denial of Mr. Richardson's motion to suppress CSLI. *Davis* held that the government obtaining CSLI pursuant to a court order under the Stored Communications Act did not constitute a search and did not violate an individual's Fourth Amendment rights. *Id.* at 513. *Davis* further noted that, even if obtaining CSLI constituted a search, individuals "had no reasonable expectation of privacy in the business records made, kept, and owned by" a wireless carrier. *Id.* at 517. The Eleventh Circuit therefore concluded that a warrant is not required to obtain CSLI. *Id.* at 518.

In *Carpenter*, this Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." 585 U.S. at ___, 138 S. Ct. at 2217. Obtaining location information from wireless carriers is therefore a search, and individuals are accordingly entitled to Fourth Amendment protections. *Id.* The government obtained several weeks of Mr. Richardson's CSLI pursuant to a court order under section 2703(d) of the Stored Communications Act, and this Court has concluded that such an order cannot be used to obtain even seven days' worth of CSLI. *Id.* at 2220-21, 2257 n.3. The government must instead obtain a warrant. *Id*. at 2221.

The Eleventh Circuit's reliance on *Davis* is misplaced in light of this Court's holding in *Carpenter*.

II. Grant, Vacate, and Remand is Appropriate in This Case

It is appropriate for this Court to exercise its power to grant, vacate, and remand where, as here:

> [I]ntervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lawrence v. Chater, 516 U.S. 163, 167-68, 116 S. Ct. 604, 607, 133 L. Ed. 2d 545 (1996).

The *Carpenter* decision was issued on June 22, 2018, while Mr. Richardson's petition for rehearing was pending before the Eleventh Circuit. Mr. Richardson's petition was denied five days later. The Eleventh Circuit was likely still relying on its decision in *Davis* in that denial, as the court had previously cited that case as its reason for denying Mr. Richardson's motion to suppress. Given this Court's decision in *Carpenter*, the Eleventh Circuit can no longer rely on *Davis* as a reason to affirm the denial of Mr. Richardson's motion to suppress.

By allowing the introduction of this evidence, the district court could have determined the ultimate outcome of this case. The government used Mr. Richardson's CSLI to purportedly show motive and planning, as well as place Mr. Richardson near the scene of the crime. The government discussed Mr. Richardson's CSLI in its closing argument to the jury.

In each instance, the courts below relied in their decisions on now overturned precedent, never on any other basis, such as harmless error, cumulative evidence, or any exception to the warrant requirement. If the CSLI were properly suppressed, upon retrial, a jury may find reasonable doubt regarding whether Mr. Richardson committed the crimes for which he was convicted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, vacate the decision of the Court

of Appeals for the Eleventh Circuit, and remand for the court to consider the case in light of *Carpenter*.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 1, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14800
D.C. Docket No. 3:13-cr-00177-LSC-JEG-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

AARON M. RICHARDSON,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

May 1, 2018, Decided

Before MARTIN and ANDERSON, Circuit Judges, and MURPHY[*] District Judge.

PER CURIAM:

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[*] Honorable Stephen J. Murphy, United States District Court for the Eastern District of Michigan, sitting by designation.

Appendix A

In March 2016, a Florida jury convicted Appellant Aaron M. Richardson of twenty-four charges related to the attempted murder of District Judge Timothy J. Corrigan. Appellant now appeals his conviction and sentence. The pertinent issues are whether the district court erred by: (1) denying a motion to suppress statements allegedly compelled in violation of the Fifth Amendment; (2) denying a motion to suppress cell-tower data allegedly obtained in violation of the Fourth Amendment; (3) denying a motion for judgment of acquittal on two false-statement charges; and (4) applying a sentencing enhancement for obstruction of justice. For the reasons set forth below, we affirm.

BACKGROUND

I. Factual Background

A. The Shooting

In 2011, Judge Corrigan sentenced Appellant to time served and three years of supervised release for an unrelated offense. The sentence affected Appellant's enrollment at a university, so he sought to end the supervised release. But Judge Corrigan denied the request.

Appellant's troubles then began to compound. He was arrested in October, November, and December 2012 for various burglaries and thefts. Under his supervised release terms, Appellant was required to submit a monthly report regarding contact with law enforcement. Despite his arrests, Appellant reported each month that he had not been arrested or questioned by law enforcement. A

petition for revocation of supervised release was ultimately filed, and Appellant was ordered to appear in court.

Instead of addressing his legal troubles in court, the evidence at trial revealed that Appellant began working on his "Mission Freedom."[1] Appellant found Judge Corrigan's home address and telephone number on the Internet and researched rifles and ammunition. Appellant then visited a sporting goods store and examined a hunting rifle. Several days later, he reentered the same sporting goods store and hid until closing. Once the store emptied, Appellant went to the gun department, cut the plastic trigger guard on the rifle to free it from a security cable, and grabbed some ammunition.

Two days later, Appellant bought a movie ticket from a theater near Judge Corrigan's home. Several hours later, Judge Corrigan sat watching television with his wife in their home. Then suddenly there was a loud bang; Judge Corrigan was struck by shards of metal from the window frame near where he was sitting, and a bullet lodged itself in the family-room closet. Less than two hours later, Appellant entered a bar near Judge Corrigan's home. An employee stated that Appellant looked like he had just walked out of the woods; Appellant also had a fresh injury on his eye that looked like a "scope bite": an injury that occurs when a rifle's recoil causes the scope to strike the shooter.

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1. In his cellphone contact list, Appellant stored Judge Corrigan's phone number as "Mission Freedom." And then on the date of his revocation hearing, Appellant texted his mother from near Judge Corrigan's home that he needed to complete his mission so he could come home free.

B. Arrest and Interrogation

Two days after the shooting, the police went to arrest Appellant at his apartment for failing to appear at his revocation hearings.[2] The police also searched the apartment and found evidence linking Appellant to Judge Corrigan's shooting. First, the police found a rifle in Appellant's bedroom closet. Like the rifle stolen from the sporting goods store, the rifle's trigger guard had been cut and covered with electrical tape; the tape on the rifle matched tape that was found in the bushes outside Judge Corrigan's home. Moreover, the gun's size and rifling were consistent with the bullet recovered from Judge Corrigan's home. And it appeared Appellant had used the rifle as his DNA was found on its scope. In addition to the rifle, the police recovered ammunition, Appellant's cellphone, and bolt cutters. Finally, the police found a sham order with Judge Corrigan's forged signature that ostensibly pardoned Appellant's entire criminal history.

Appellant was ultimately taken to a local sheriff's office so the FBI could question him. After expressing a desire to go home, an agent advised Appellant that he had to stay. An agent then presented Appellant with an advice of rights card, and the agents read the card aloud to Appellant. After each line, an agent asked Appellant if he understood and Appellant either nodded or said yes. Appellant then refused to sign a waiver, but said he would answer the questions.

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2. Appellant's hearing was rescheduled after he missed the first date, but Appellant also did not appear at the rescheduled hearing.

During the questioning, Appellant stated that he had been at home on the night of the shooting and claimed to have no knowledge of the rifle. Appellant also stated that if his fingerprints were on the rifle, it was because he had touched the rifle while getting his shoes out of a pile of clothes after his arrest. Towards the end, Appellant acknowledged that the video recording of the questioning was admissible in court and that he could request an attorney. Appellant believed, however, that he had not said anything incriminating.

II. Procedural History

In September 2013, a grand jury issued a twenty-five-count indictment against Appellant. In addition to charges directly related to Judge Corrigan's shooting, Appellant was also charged with making a false statement during his FBI questioning and for falsely representing on his supervised release report that he had not been arrested in December 2012.

Appellant's competency was then questioned. In October 2013, the magistrate judge ordered a psychiatric evaluation.[3] The magistrate judge later held a competency hearing, and on the next day held a suppression hearing regarding Appellant's statements to the FBI. The district judge ultimately found that Appellant was competent, and the magistrate judge recommended not suppressing the statements at issue here. The district judge adopted the recommendation over objection and without making any additional findings.

3. Appellant's competency was also a primary issue in a separate criminal matter that was simultaneously pending.

Appellant then proceeded to trial. After the Government presented its case, Appellant made an oral motion for judgment of acquittal on, inter alia, two counts of making a false statement. The district court denied the motion and submitted the case to the jury.[4] The jury then convicted Appellant of twenty-four of the twenty-five counts in the indictment. The Court sentenced Appellant to 4,116 months' imprisonment, which included a two-level enhancement for obstruction of justice. This appeal followed.

LEGAL STANDARD

When considering a motion to suppress or application of the sentencing guidelines, the Court reviews conclusions of law de novo and findings of fact for clear error. *United States v. Doe*, 661 F.3d 550, 565 (11th Cir. 2011); *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1185 (11th Cir. 2009). Motions for a judgment of acquittal are reviewed de novo. *United States v. Gonzalez*, 834 F.3d 1206, 1214 (11th Cir. 2016).

DISCUSSION

I. Suppression of Statements

Appellant contends that the district court erred by not suppressing certain statements he made to the FBI. The Fifth Amendment provides that no person

4. Appellant did not present a case in chief, and the district judge advised that his motion for judgment of acquittal was preserved.

"shall be compelled in any criminal case to be a witness against himself." Absent certain procedural safeguards, a statement given during custodial interrogation is presumed to be compelled in violation of the Constitution. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). To dispel that presumption of compulsion, the person in custody must be advised of certain rights. *Id.* The person in custody may then waive his rights, but to be operative the waiver must be made voluntarily, knowingly, and intelligently. *Id.* If the Government violates a person's right against compelled self-incrimination, then generally the compelled statements must be suppressed. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

Appellant's constitutional right against compelled self-incrimination was not violated, so his statements need not be suppressed. Once the *Miranda* protections attach and the *Miranda* warnings have been given, the police are not obligated to stop asking questions. *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). Rather, the suspect must either invoke or waive his rights. *Id.* A waiver can be implied when, as here, the suspect is advised of his rights and acts in a manner inconsistent with the exercising of those rights. *Id.* at 385. Because Appellant answered the FBI's questions, there was at least an implied waiver of his Fifth Amendment rights.

The issue is whether the waiver was effective in light of Appellant's mental health history. Although a waiver must be made voluntarily, knowingly, and intelligently,

the Supreme Court has essentially bifurcated the analysis into whether the waiver was: (1) uncoerced (i.e. voluntary), and (2) made with the requisite level of comprehension (i.e. knowingly and intelligently). *See Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). When performing the analysis, courts evaluate the totality of the circumstances. *Id.*

Appellant's waiver was voluntary. This Court has previously recognized that "a mental disability does not, by itself, render a waiver involuntary[.]" *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995) (citations omitted). Instead, courts look to see whether there was coercion by an official actor; for example, if police take advantage of a suspect's mental disability. *Id.* The only mention of Appellant's mental health at the suppression hearing came when Appellant's attorney asked an FBI agent if he knew that part of Appellant's prior supervised release "had involved mental health treatment." The agent responded that at the time of the interrogation, "I don't believe I knew that." The agent then explained that he learned of Appellant's mental health problems while preparing for trial. Based on the record before us, the district court did not err by concluding that Appellant's waiver was voluntary.

Nor did the district court err by concluding that Appellant's waiver was made knowingly and intelligently. When determining whether a waiver was competently made, courts consider mental health as part of the totality of the circumstances. *Miller v. Dugger*, 838 F.2d 1530, 1539 (11th Cir. 1988). To do so, we "rely on the

objective indicia of a defendant's mental state[.]" *United States v. Sonderup*, 639 F.2d 294, 297-98 (5th Cir. Unit A March 31, 1981).[5] The objective indicia here support the district court's conclusion that Appellant was sufficiently competent to waive his rights. The record shows that an FBI agent read all the *Miranda* rights to Appellant, and after each line Appellant acknowledged his understanding. Appellant even asked clarifying questions (which the agents answered) and carried on a conversation with his interrogators. Near the end, Appellant observed that he knew the video recording of his answers could be used in court and that "I can ask for an attorney but I haven't said anything incriminating." Based on this record, the district court did not clearly err by finding that Richardson had the capacity to waive his *Miranda* rights.[6]

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5. Fifth Circuit decisions issued before October 1, 1981 are binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

6. As our colleague, Judge Martin, notes, all the parties at the suppression hearing, including the magistrate judge, were well aware of Richardson's mental health history. The law is well established that mental health can bear upon whether a defendant has knowingly and intelligently waived his *Miranda* rights. *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995); *Coleman v. Singletary*, 30 F.3d 1420, 1426 (11th Cir. 1994). The law is also well established that we will assume that the trial judge knows the law and applies it in making his decisions. *Burrell v. Bd. of Trs. of Ga. Military Coll.*, 125 F.3d 1390, 1395 (11th Cir. 1997). Here, we assume that the magistrate judge who found that Richardson knowingly and intelligently understood and waived his *Miranda* rights knew that Richardson's mental health history was relevant to that determination. Thus, the magistrate judge made an implicit finding of fact that Richardson's mental health history did not render

For these reasons, we affirm the district court's conclusion that Appellant's constitutional rights were not violated and therefore his statements need not be suppressed.

II. Cell-Tower Data

Appellant contends that the district court erred by not suppressing cell-tower data that was obtained without a warrant and that placed Appellant near the scene of the crime. Appellant acknowledges that his argument is foreclosed by *United States v. Davis*, which held that obtaining cell-tower data without a warrant did not violate the Fourth Amendment. 785 F.3d 498, 513, 518 (11th

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him unable to knowingly and intelligently waive his *Miranda* rights. In light of the evidence before the court at the suppression hearing, Richardson falls far short of demonstrating that this finding of the magistrate judge is clearly erroneous. That evidence included, *inter alia*, the lack of evidence that, at or around the time of the June 25, 2013 interrogation, Richardson was mentally unable to understand and waive his *Miranda* rights; the video indicating that he did in fact knowingly and intelligently waive his rights; and the fact that exceedingly competent counsel (also well aware of his mental health history) were representing Richardson at the suppression hearing but did not suggest that mental illness prevented him from waiving his *Miranda* rights. *See United States v. Rodriguez*, 799 F.2d 649, 655 (11th Cir. 1986) (per curiam) (holding in the analogous context of competence to stand trial that "[the defendant's] counsel's failure to raise the competency issue is also persuasive evidence that [the defendant's] mental competence was not in doubt.").

While it would have been better practice for the magistrate judge to have made the relevant findings of fact expressly instead of implicitly, we cannot conclude that there has been error.

Cir. 2015) (en banc). Because we are bound by *Davis*, Appellant's argument fails.

III. Convictions for False Statements

Appellant challenges the district court's denial of his motion for judgment of acquittal on two counts of making false statements in violation of 18 U.S.C. §§ 1001, 2147(1). A motion for judgment of acquittal should be denied if "the relevant evidence, viewed in a light most favorable to the Government, could be accepted by a jury as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Taylor*, 972 F.2d 1247, 1250 (11th Cir. 1992) (quoting *United States v. Varkonyi*, 611 F.2d 84, 85 (5th Cir. 1980)). The Government was required to prove "(1) that [Appellant] made a false statement; (2) that the statement was material; (3) that [Appellant] acted with specific intent to mislead; and (4) that the matter was within the purview of a federal government agency." *United States v. McCarrick*, 294 F.3d 1286, 1290 (11th Cir. 2002). Falsity "can be established by a false representation or by the concealment of a material fact." *United States v. Calhoon*, 97 F.3d 518, 524 (11th Cir. 1996). We will address each count in turn, and affirm.

A. Statements about Interactions with the Rifle

Count Ten charged Appellant with making false statements in response to a series of questions about whether his fingerprints or DNA would be found on

the rifle recovered from his home.[7] Appellant argues that the answer was hypothetical and was not material to the government's investigation. This Court has previously rejected arguments that a defendant "was only speculating out loud" in response to questions, and therefore his statement could not be false because it was "ambiguous and uncorroborated, and . . . susceptible to an interpretation that was literally true." *United States v. Fern*, 696 F.2d 1269, 1275 (11th Cir. 1983).

Here, a jury could find that Appellant's statement was false on its face. Appellant did not accidently touch the gun after his arrest because no officer let him into the room where the gun was found. And Appellant was untruthful when he claimed not to know that there was a gun: his DNA on the rifle scope shows that he had contact with the gun. Viewing the evidence in the light most favorable to the Government, there was sufficient evidence to support the jury's conclusion that Appellant made a false statement.

Next, a jury could find that Appellant's false statement was material. To be material, "[t]he statement must have a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Boffil-Rivera*, 607 F.3d 736, 741 (11th Cir. 2010) (quotation omitted and alteration adopted). The Government need not rely on the statement,

7. Specifically, Appellant's statement was that if his fingerprints or DNA were on the Savage Arms .30-06 caliber rifle, serial number H783115, it was because he touched the rifle in an attempt to get his shoes out of a pile of belongings that law enforcement officers had assembled and placed in a pile during his arrest on June 25, 2013.

rather the statement "must simply have the capacity to impair or pervert the functioning of a government agency." *Id.* (quotation omitted); *see also United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980). Consequently, Appellant's argument that the Government never actually believed his story is irrelevant. Rather, the statement was relevant and material to the investigation because the statement bore on whether Appellant knew of or had used the rifle. Viewing this evidence in the light most favorable to the government, the district court correctly denied the motion for acquittal.

B. False Monthly Supervision Report

Count Twenty-One charged Appellant with submitting a false monthly supervision report to the U.S. Probation Office. Specifically, Appellant checked a box on his monthly supervision report indicating that he had not interacted with law enforcement during December 2012. Appellant argues that the statement was true when it was made because the report is dated "12/30/12" and he was not arrested until December 31, 2012. *Cf. United States v. Lange*, 528 F.2d 1280, 1288 (5th Cir. 1976) (requiring evidence that defendant knew statement was false at the time it was made). The Government, however, presented evidence that Appellant may have back-dated a previous supervision report.[8] Viewed in the light most favorable to the Government, a jury could infer that Appellant

8. Specifically, the Government presented evidence that Defendant changed the date on his November 2012 supervision report from November 30th to November 29th so that he could avoid reporting an arrest made on November 30th.

also altered his December 2012 supervision report. And misleading denials can support a conviction. *See Boffil-Rivera*, 607 F.3d at 741; *United States v. Swindall*, 971 F.2d 1531, 1553 (11th Cir. 1992). Consequently, the evidence was sufficient to support a guilty verdict. The district court therefore did not err.

IV. Sentencing Enhancement

Finally, Appellant challenges the district court's application of Sentencing Guideline § 3C1.1. That section provides for a two-level enhancement if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." USSG § 3C1.1. The district court applied the enhancement because of Appellant's false statements to the FBI. Because we affirmed that conviction, *supra* Section III.A, the enhancement under § 3C1.1 must also stand. *See* USSG § 3C1.1, cmt. n.4 ("This adjustment [] applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct."); *United States v. Uscinski*, 369 F.3d 1243, 1246-47 (11th Cir. 2004) (per curiam).

CONCLUSION

In sum, we reject all of Appellant's arguments and find that the district court did not err.

AFFIRMED.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

Within six months of Aaron Richardson's June 25, 2013 interrogation by Jacksonville Deputy Sheriffs, in their office, the District Court ordered that he receive a psychiatric evaluation. That evaluation found him to be "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." As a result of this finding, Mr. Richardson's trial for the very serious and frightening charge of discharging a firearm into the home of Judge Corrigan and his wife was delayed two years. Mr. Richardson was ultimately rehabilitated to the point that he was found competent to stand trial. Then on the day after the Magistrate Judge conducted the final competency hearing, which resulted in Mr. Richardson being found competent to stand trial, the same Magistrate Judge held a hearing on Mr. Richardson's claim that his June 25, 2013 statements should be suppressed. All parties involved—the government, the defense, the Court—knew of Mr. Richardson's struggle with schizophrenia. After all, they had all been in the same courtroom, just the day before, discussing this exact topic. Even so, no one raised Mr. Richardson's competence as an issue at the suppression hearing. Because this record demonstrates that the government failed to carry its burden to show Mr. Richardson's *Miranda*[1] waiver was knowing and

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

intelligent, I would suppress the statements he made at the Jacksonville Sheriff's Office on June 25, 2013.

This Court's precedent tells us that mental health can bear on whether Mr. Richardson knowingly and intelligently waived his *Miranda* rights. *See Coleman v. Singletary*, 30 F.3d 1420, 1426-27 (11th Cir. 1994). We also know that the burden is on the government to demonstrate that one's waiver of *Miranda* rights is done voluntarily, knowingly, and intelligently. *J.D.B. v. North Carolina*, 564 U.S. 261, 269-70, 131 S. Ct. 2394, 2401, 180 L. Ed. 2d 310 (2011). At the suppression hearing neither party raised the issue of whether Mr. Richardson's waiver of his *Miranda* rights was knowing and voluntary.

It is true, of course, that in the ordinary case addressing whether there has been a knowing and intelligent waiver of *Miranda* rights, it is the defendant who raises the issue. In this process, courts routinely consider expert testimony as well as recordings of the interrogation, for example. *See, e.g., Coleman*, 30 F.3d at 1426-27. I recognize as well that the government is generally not required to prove a negative in addressing a *Miranda* waiver, by, for example, producing a clean alcohol or drug test for every defendant. *See Grayson v. Thompson* 257 F.3d 1194, 1200, 1230 (11th Cir. 2001) (holding that state court did not err in failing to suppress statements when defendant did not appear to be intoxicated, despite absence of alcohol or drug tests).

This case strikes me as different, however. Everyone participating in this suppression hearing was well aware of Mr. Richardson's mental health problems. Just the day

before, the Magistrate Judge conducted a competency hearing during which the parties discussed Mr. Richardson's diagnosis of schizophrenia and his ongoing treatment. This included testimony from expert witnesses that Mr. Richardson "needs to be on antipsychotic medication" to maintain his legal competency. The government's counsel at the suppression hearing on Friday, was the same counsel who had litigated Mr. Richardson's competency on Thursday. Thus, there is no question that the government was well aware of mental health problems that may have prevented Mr. Richardson from knowingly and intelligently waiving his *Miranda* rights back in June of 2013.[2] In this circumstance, it seems to me that the government's burden to establish Mr. Richardson's waiver as knowing and intelligent requires them to make some showing. *See J.D.B.*, 564 U.S. at 269-70, 131 S. Ct. at 2401; *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286 (1979) (in case of possibly illiterate defendant, it remained the "prosecution's burden" to show the defendant "in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case"); *Hall v. Thomas*, 611 F.3d 1259, 1285 (11th Cir. 2010) (burden remains on the government to show juvenile defendant had the capacity to waive *Miranda* rights).

I interpret the absence of any evidence or argument at the suppression hearing to mean that the government failed to carry its burden of demonstrating a valid waiver.

2. Mr. Richardson was first diagnosed in connection with his federal arson case, meaning the government likely had custody of Mr. Richardson's relevant medical records.

For this reason, I would suppress any statements Mr. Richardson made during his interrogation. *See Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) (explaining that the remedy for a *Miranda* violation is the suppression of evidence).

Counts Five through Ten charged Mr. Richardson with making a false statement during his June 25, 2013, interrogation, so suppressing his statements would result in vacating those convictions. At the same time, I believe the error in admitting Mr. Richardson's statements of that date was harmless as to his remaining convictions. *See Hart v. Att'y Gen.*, 323 F.3d 884, 895 (11th Cir. 2003) ("The admission of statements obtained in violation of *Miranda* is subject to harmless error scrutiny."). The evidence supporting those convictions was simply overwhelming.

On the other hand, suppression of Mr. Richardson's statement in the Jacksonville Sheriff's office on June 25, 2013 would impact the District Court's application of Sentencing Guidelines § 3C1.1. This is the guideline that provides for a two-level increase in the guideline calculation if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." USSG § 3C1.1. The District Court indicated that the enhancement applied because of the false statements Mr. Richardson made during his interrogation in the Sheriff's Office. Indeed the District Court was right that the convictions under § 1001 for those false statements supported an application of the enhancement.

See USSG § 3C1.1, cmt. n.4 ("This adjustment [] applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense *where there is a separate count of conviction for such conduct*." (emphasis added)). Because I would vacate Mr. Richardson's false-statement convictions, I would also set aside the application of this enhancement, and remand this case to the District Court for resentencing.

Finally, while the panel opinion correctly sets out the state of the law in Part II, above, I write separately to address *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015). Our panel is indeed bound by this court's ruling in *Davis*, however I have set out my reasons for believing it was wrongly decided. The parties to this proceeding are aware, of course, that the Supreme Court has recently heard arguments on a similar Fourth Amendment challenge, *see United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211, 198 L. Ed. 2d 657 (2017), which may mean that this issue will need to be revisited.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION, FILED FEBRUARY 4, 2016

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

3:13-CR-00177-LSC-JEG-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AARON M. RICHARDSON,

Defendant.

February 4, 2016, Decided
February 4, 2016, Filed

ORDER

On December 15, 2015, the magistrate judge filed his report and recommendation in the above-styled cause, recommending that defendant, Aaron M. Richardson's, Motion to Suppress Identification be denied (doc. 64), his Motion to Suppress Evidence be denied (doc. 63), and his Motion to Suppress Richardson's Statements be granted in part and denied in part (doc. 62). (Doc. 124). He further recommended that the Government should not be allowed

to use Richardson's statements at Shands Hospital at Richardson's trial but should be allowed to use all other statements made and physical evidence gathered against Richardson. (*Id.*)

On January 6, 2016, the defendant filed under seal objections to the magistrate judge's report and recommendation. (Doc. 130.) On January 20, 2016, the Government responded to those objections, also under seal. (Doc. 134.)

Having now carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation, the defendant's objections thereto, and the Government's response, the Court is of the opinion that the defendant's objections are due to be and hereby are OVERRULED, the report is due to be and hereby is ADOPTED, and the recommendation is ACCEPTED. Consequently, the defendant's Motion to Suppress Identification is DENIED (doc. 64), his Motion to Suppress Evidence is DENIED (doc. 63), and his Motion to Suppress Richardson's Statements is GRANTED IN PART AND DENIED IN PART as stated in the magistrate judge's report and recommendation (doc. 62).

DONE AND **ORDERED** ON FEBRUARY 4, 2016.

/s/ L. Scott Coogler
L. SCOTT COOGLER
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION, FILED DECEMBER 15, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO.: CR313-177

UNITED STATES OF AMERICA,

v.

AARON M. RICHARDSON.

December 15, 2015, Decided
December 15, 2015, Filed

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Richardson Aaron M. Richardson ("Richardson"), facing a twenty-five count indictment charging the attempted murder of a United States District Judge and related offenses, moves the Court to suppress three identifications, two separate statements made by Richardson while in custody, and evidence found pursuant to a protective sweep, two consent searches, and certain cell-site information. (Doc. nos. 63-64, 66.) The undersigned conducted an evidentiary hearing on these Motions on December 1, 2015 at which Agent John

Brock, Florida Department of Law Enforcement, Rod Pinckney, Jacksonville Sheriff's Office, Steve Burros, FBI, Scott Waters, FBI, Bill Logan, FBI, Sharon Richardson, Richardson's mother, and Ronna Richardson, Richardson's sister, testified.

STATEMENT OF THE FACTS

On June 11, 2013, the United States District Court for the Middle District of Florida, Jacksonville Division, issued a warrant for Richardson's arrest due to his failure to appear at an arraignment on a superseding petition for revocation of his supervised release. (Exs. 1A, 1B.) A United States Marshal's Fugitive Task Force was assigned to execute the warrant due to Richardson being a possible suspect in the attempted murder of United States District Judge Timothy J. Corrigan. (Suppression Tr. ("Tr.") at 6-9.)

A. The Execution of the Warrant and Protective Sweep

Special Agent John Brock of the Florida Department of Law Enforcement was the lead case agent for Richardson's outstanding warrant. (Tr. at 5, 51.) SA Brock, through a database search, located a home as Richardson's likely residence, but then determined through a police report made by Richardson that his residence was more likely at 6710 Collins Road, Apartment 2519. (Tr. at 10-12.) The police report identified Aaron Richardson as the complainant making a report in regards to a stolen motorcycle on May 3, 2015, approximately a month and a half before the warrant was executed. (Ex. 2.) Richardson

made the report at 8710 Collins Road and stated that he was in a several week process of moving out of the home that SA Brock initially identified and into apartment 2519. (*Id.*) Richardson also stated in the report that he discovered the motorcycle missing at 6:30 a.m., but did not report it stolen until 5:40 p.m. because he had to go to work at LaborReady at Edgewood.(*Id.*)

After reading this report, SA Brock travelled to Westland Park Apartments and spoke with Jennifer Clavell. (Tr. at 15.) Clavell advised SA Brock that Richardson's mother was leasing the apartment and that she had given Richardson permission to stay in the apartment with his mother as a student. (Tr. at 16.) Clavell also identified Richardson from a picture. (Tr. at 17.) After speaking with Clavell, SA Brock spoke with Larry Trees, the apartment maintenance manager, and asked him to do a maintenance call on the apartment. (Tr. at 17-18.) Trees was unable to gain entry to the apartment due to a third dead-bolt lock installed by a previous tenant that he did not have the key to. (Tr. at 20.) Trees relayed to SA Brock that only the previous tenant possessed a key to the lock, and as a result, the only way to lock the dead-bolt was from the inside of the apartment. (*Id.*) This indicated to SA Brock that someone was inside the apartment. (*Id.*) SA Brock could not locate any cars in the apartment complex's parking lot that they could associate with Richardson's mother. (*Id.*) Wes Bowen of the Jacksonville Sheriff's Office, who was assisting the team by covering the rear of the apartment with his K-9, also radioed to SA Brock that he observed blinds moving from a ceiling fan. (Tr. at 70.) From this information, SA Brock inferred that Richardson was inside the apartment. (Tr. at 20-21.)

SA Brock next attempted to get the individual inside to open the door by loudly knocking and announcing the presence of law enforcement. (Tr. at 24.) SA Brock and the three law enforcement officers standing outside the door were all wearing tactical gear which clearly indicated that they were law enforcement. (*Id.*) SA Brock testified that from his experience, it was common for individuals with knowledge of an outstanding warrant to hide inside their residence to avoid apprehension by law enforcement. (*Id.*) SA Brock waited five to ten minutes before breaching the door and then again announcing their presence and requesting the individual to come to the front door. (Tr. at 24-25.) After waiting another period of time, SA Brock and his team conducted a preliminary sweep of the apartment, checking all rooms for individuals that might have posed an immediate threat. (Tr. at 26.) This did not involve looking into confined spaces where potential threats could hide, such as under the bed or in closets. (*Id.*)

Upon reaching the master bedroom, the team discovered that it was locked, thus requiring breaching it and checking for possible threats. (Tr. at 27.) The officers did not observe anyone in the master bedroom. (*Id.*) After the team cleared the master bedroom, they performed a secondary sweep, checking for potential confederates hiding under beds and in closets. (*Id.*) This was performed to secure the safety of the officers. (*Id.*) Upon looking into a bedroom which was later determined to be Richardson's, the officers found a bolt-action rifle in the closet. (Tr. at 28.) Detective Calhoun, upon finding the rifle, cleared it of any ammunition. (Tr. at 30.)

After performing the secondary sweep, the officers proceeded to the master bedroom and determined that the only option left for an individual hiding would be in the closet of the master bedroom or in the attic crawlspace, the hatch to which was located in the closet. (Tr. at 31.) At this point, SA Brock made the decision to deploy Officer Bowen's K-9, due in part to a recent incident where a law enforcement officer was killed by an individual hiding in a crawlspace. (Tr. at 31, 74.) Officer Bowen in particular had recently been trained to not go into attics or near crawlspaces due to that incident. (Tr. at 74.) Officer Bowen proceeded into the room and announced for any individual to come out or his dog would be released and bite him. (Tr. at 72.) Officer Bowen waited thirty seconds before releasing his K-9, which quickly found Richardson hiding behind a pile of clothes in the closet. (Tr. at 75.) Richardson was handcuffed and given medical care for his wound from the dog bite. (Tr. at 76.)

B. The First Consent Search

After Richardson was arrested, Special Agent Steve Burros and Special Agent Bill Logan with the Federal Bureau of Investigations were tasked with responding to the address and following up on any potential leads due to Richardson's status as a potential suspect in the Judge Corrigan case. (Tr. at 83-84.) After arriving, SA Burros spoke with the officers that executed the warrant, went into the apartment to observe the rifle, and waited for Richardson's mother to arrive to request consent to search the apartment. (Tr. at 85-86.) When Richardson's mother, Sharon Richardson, arrived, SA Burros, SA Logan, and

Detective Calhoun spoke to her and told her they found a gun in the apartment to which she expressed surprise. (Tr. at 87-88.) The officers stated that they were there to take Richardson into custody and then requested Ms. Richardson's permission to search the room in which the rifle was found. (Tr. at 88-89.)

Ms. Richardson identified the apartment as hers and informed the officers that she had the only key to the apartment. (Tr. at 90-91.) Ms. Richardson also relayed to the officers that she had moved Richardson's belongings, set up his bedroom, put his clothes in the closet, and blew up an air mattress in the room. (Tr. at 91.) She further stated that she had full access to the room and that Richardson did not have a key because she did not trust him. (Tr. at 93-94.) Ms. Richardson also refused to volunteer the name of her employer or her younger son's name when asked by the officers. (Tr. at 114-115.) The officers then asked for consent to search the room and presented her with a consent form and also informed that if she did not sign the form, they would seek a warrant. (Tr. at 94, 112, 229, 263; Ex. 7.) The consent form stated that Ms. Richardson has been asked permission to search the first room on the right of Apartment 2519, she has been advised of her right to refuse consent, she gives the permission voluntarily, and she authorizes the agents to take any items which may be related to their investigation. (Ex. 7.) The consent form was witnessed by SA Burros and Detective Calhoun and reflects Ms. Richardson's signature. (*Id.*) As a result of the consent search of the room, the agents seized one zip lock bag containing ammunition, two cellphones, a black backpack also containing ammunition, a machete, and two pairs of shoes. (Ex. 7, p. 3.)

The consent form also reflects permission to search a Verizon cellphone and HP laptop computer. (Ex. 7.) These items were not initially present when Ms. Richardson signed the form but were added later during the search of Richardson's bedroom. (Tr. at 152-154.) The phone was found in Richardson's room. (Tr. at 152.) Ms. Richardson revealed the presence of the laptop to the agents, and said it was sometimes used by Richardson but belonged to his younger brother. (Tr. at 154.) Ms. Richardson agreed to allow the agents to image the computer but did not want them to take it because her younger son used it for school. (Tr. at 154.) Accordingly, the computer was imaged the next day when an examiner was available. (*Id.*) Ms. Richardson initialed the addition of both the laptop and the phone on the form. (Ex. 7; Tr. at 101-102.)

C. The Second Consent Search

On June 28, 2015, three days after Richardson's arrest, SA Logan and Special Agent Joshua Sizemore returned to Ms. Richardson's apartment to seek consent for a second search of the entire apartment. (Tr. at 167.) The detectives were interested in searching the entire apartment because the ballistics test indicated a match between the caliber of bullet that penetrated Judge Corrigan's window in the attempted murder and the rifle found in Richardson's bedroom. (Tr. at 166-167.)

Upon arriving at the apartment, Ms. Richardson was not there, and the agents waited approximately an hour for her to return. (Tr. at 167.) When Ms. Richardson arrived, SA Logan explained that this search would be more

intensive, and she would probably need to find a place to sleep that night, potentially with her daughter who lived in the same complex. (Tr. at 169.) Ms. Richardson asked about her access to the apartment, and SA Logan explained that she could not return to her apartment until after he had discussed with the legal team if they could file for a search warrant (Tr. at 169-170.) After being presented a written consent form, Ms. Richardson signed it shortly thereafter. (Tr. at 170.) The consent form states that Ms. Richardson has been asked permission to search Apartment 2519, she has been advised of her right to refuse consent, she gives the permission voluntarily, and she authorizes the agents to take any items which may be related to their investigation. (Ex. 9.) The agents seized numerous items from the apartment, the most important of which was a sham order purporting to exonerate Richardson of all prior and pending state and federal charges with Judge Corrigan's signature. (Tr. at 131-134, Ex. 20-76, 20-78.)

D. Richardson's Statement to Officers in the Hospital

After being arrested and given first aid for his dog bite, Richardson was transported to Shands Hospital in downtown Jacksonville for treatment of his wound. (Tr. at 32-33.) Special Agent Scott Waters of the FBI responded to the hospital in order to eliminate Richardson as a suspect in the Judge Corrigan case. (Tr. at 123-124.) SA Waters did not believe he was a true suspect due to preliminary tests indicating that the gun used in the Judge Corrigan case was a handgun. (Tr. at 123.)

Upon arriving at the hospital, SA Waters questioned Richardson while he was on a gurney at the hospital. (Tr. at 124-125.) At this time, Richardson was in custody pursuant to his revocation arrest warrant and was not given any *Miranda* warnings. (Tr. at 125.) SA Waters asked what his normal mode of transportation was, and he indicated that he either rode with his mother or on the bus. (Tr. at 126.) SA Waters also asked what he did over the weekend of the attempted murder of Judge Corrigan to which he responded that he was at home sick with his mother due to a sandwich from Tijuana Flats. (Tr. at 126.) SA Waters also asked about the injury above Richardson's eye which he indicated was from a toilet. (Tr. at 127.) SA Waters interviewed him for less than thirty minutes. (Tr. at 128.) Notably, Richardson's alibi that he was with his mother the night of Judge Corrigan's attempted murder later broke down. (*Id.*)

E. Richardson's Statement at the Jacksonville Sheriff's Office

After being discharged from the hospital on June 15, 2013 at approximately 11 p.m., Richardson was taken to the Jacksonville Sheriff's Office robbery unit for questioning. (Tr. at 157.) At the time of questioning, Richardson was only taking ibuprofen for his dog-bite wound. (Tr. at 161.) At the beginning of the interview, Richardson asked if the agents were going to hit him, sharing an experience where he was hit in Clay County. (Tr. at 162.) The agents immediately informed Richardson that they were not going to hit him and that was not why there were there. (*Id.*) (Ex. 24A, 3:45 — 7:23)

Agent Silverstein then read him his rights, informing him that he had the right to remain silent, anything he said could be used against him in court, he had a right to an attorney, if he could not afford an attorney, one would be provided to him, and that he had a right to stop the questioning at any time. (Ex. 24A, 3:45 — 7:23) When asked if he understood his rights, Richardson did not immediately assent, and Agent Silverstein further clarified his rights to him. (*Id.*) Richardson also asked if he could go home, and Agent Silverstein replied that he could not get him home and that he would have to deal with his failure to appear. (Ex. 24, 15:33 — 15:50.) Richardson refused to sign a written consent form but shook Agent Silverstein's hand, stating that looking someone in the eye and shaking their hand was something you could build a trust bond with. (Ex. 24, 17:46 — 17:50; Tr. at 164.) At no point during the interview did the agents threaten or use physical violence against Richardson or draw their weapons. (Tr. at 163.) After the handshake, the recording of the interview reflects that Richardson began talking to Agent Silverstein, apparently of his own volition. Richardson also stated near the end of the interview that he understood that he could ask for an attorney but that he had not said anything incriminating. (Tr. at 166.)

F. The Identification by Erik Markiewicz

A trace performed on the Savage .30-06 rifle found in Richardson's bedroom indicated that the rifle belong to a Sports Authority near Regency Mall in Jacksonville. (Tr. at 174.) The Sports Authority did not realize that the firearm was missing, and review of surveillance

video showed an individual in the store late on the night of June 20th and into the early morning hours of June 21st. (Tr. at 174-175.) Upon reviewing that surveillance, Erik Markiewicz, a manager, recognized the individual as someone that was also in the store on June 15, 2013. (Tr. at 175.)

In an interview with SA Logan, Markiewicz recalled talking to the individual in regards to two separate weapons, a .270 Savage arms rifle and a .30-06 Savage arms rifle. (Tr. at 178; Ex. 16.) The surveillance video from Sports Authority reflects that Markiewicz spoke to the individual for approximately twenty-three minutes. (Ex. 13, 21:30 - 45:08.) Markiewicz described the individual as standing approximately 5'10 with a muscular build, very white teeth, a hat on, and no visible tattoos. (Ex. 16.) During their conversation, the individual claimed to be in the special forces in the military, was home from deployment, and had been shot twice. (*Id.*) Despite claiming to be in the military, the individual's questions did not convey that he had much knowledge about firearms. (*Id.*) The individual asked about the difference between the .270 and .30-06 and their ammunition, and claimed to be dead-on with iron sights. (Lc He also claimed that his father and grandfather were previously in the military and that there was an old sniper movie about his grandfather. (*Id.*)

Upon being shown an unmarked driver's license photo of Richardson, Markiewicz identified the individual in the store that he spoke with on June 15, 2013 as Richardson. (*Id.*) Markiewicz stated he was one hundred percent positive about the identification. (*Id.*) In the interview,

Markiewicz recalled that Richardson's comments made him hesitant to allow Richardson to handle the firearms despite allowing most customers to do so. (Tr. at 180.) Markiewicz also stated that he recalled Richardson in particular because he did not sell many firearms in the store, making such interactions unique. (Tr. at 181.)

G. The Identification by Joshua Sizemore

Through multiple interviews with Ms. Richardson, the agents found out that she picked up Richardson early in the morning on June 21, 2015, the same day the gun was stolen from the Sports Authority. (Tr. at 182.) Ms. Richardson received a phone call that morning from a number that she did not recognize, and it was her son, Richardson, requesting to be picked up. (*Id.*) A review of Ms. Richardson's phone records indicated that the call came from a phone belonging to Joshua Sizemore, the only call from that number. (*Id.*)

An interview with Sizemore revealed that he had gone to the movies that night. (Ex. 17.) He was sitting on the trunk of his car in the parking lot of Regency Square Mall near the theater when an individual walked up between 1:00 a.m. and 1:30 a.m. (*Id.*) Sizemore described the individual as looking like he had just come from a construction site, with paint or concrete on his clothes and wearing a baggy top shirt and work boots. (*Id.*) The individual asked if he could borrow Sizemore's phone, stating he had just gotten off work and had to call his mom for a ride. (*Id.*) Sizemore allowed the individual to use his phone and heard the individual tell his mother to meet him

at the same spot she dropped him off previously. (*Id.*) The records demonstrate that the call lasted approximately two minutes. (Tr. at 187.) Sizemore identified the individual as Richardson from a driver's license photograph. (Tr. at 188.) SA Logan did not disclose to Sizemore the reason for asking the identity of the individual. (*Id.*)

H. The Identification by Jahbari Hall

After multiple interviews with Ms. Richardson, she also admitted that she picked up Richardson on the south side of Jacksonville early in the morning on the same night of the attempted murder of Judge Corrigan. (Tr. at 190-191.) Ms. Richardson admitted to receiving a phone call from an unknown number and then picking up Richardson. (Tr. at 191.) The agents traced a call consistent with this information to a phone number belonging to Jabhari Hall. (Tr. at 191.)

Hall recalled working early in the morning on June 23, 2013 at South Side Ale House. (Ex. 18.) At approximately 2 a.m. that evening, a black male walked into the bar area of the Ale House and sat in the corner across from the dishwasher area. (*Id.*) Hall recalled lending his phone to that individual and that the individual stated he needed to call for a ride, requesting the address of the Ale House. (*Id.*) Hall stated that the individual's appearance was dirty, as if he had just come out of the woods, but did not recall his appearance except for the fact that he may have been wearing a white t-shirt. (*Id.*) In addition, Hall, because of his location across the bar, could not tell whether the individual had any bags or additional items with him. (*Id.*)

The individual waited at the ale house for approximately thirty minutes while waiting for the ride and did not purchase anything. (*Id.*) Hall identified the individual in the restaurant as Richardson from a license photograph and a booking photograph. (Tr. at 194.) When shown the booking photograph, Hall remarked that the scar in that photograph was present when he was in the restaurant. (*Id.*)

DISCUSSION AND CITATION TO AUTHORITY

I. The *Payton* Entry and Protective Sweeps of Ms. Richardson's Apartment Leading to Discovery of the Rifle were Reasonable.

In *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the Supreme Court held that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." The Eleventh Circuit has held that *Payton* requires a two-part inquiry to determine if entry pursuant to an arrest warrant complies with the Fourth Amendment's proscription of unreasonable searches. *See Magluta*, 44 F.3d at 1533. "[F]irst, there must be a reasonable belief that the location to be searched is the suspect's dwelling, and second, the police must have 'reason to believe' that the suspect is within the dwelling." *Id.* Elaborating on this inquiry, the Eleventh Circuit has explained that "for law enforcement officials to enter a residence to execute an arrest warrant for a resident

of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect Is within the residence at the time of entry." *Id.* at 1535. Furthermore, "in evaluating this on the spot determination, as to the second *Payton* prong, courts must be sensitive to common sense factors indicating a resident's presence." *Id.* Such "common sense factors" must also guide courts in evaluating the first *Payton* prong. *United States v. Bervaldi*, 226 F.3d 1256, 1262-63 (11th Cir. 2000).

Here, there are a multitude of factors showing a reasonable belief that Apartment 2519 at Collins Road was in fact Richardson's address. The agents examined a police report which indicated that Richardson was in the process of a moving out of a house on Marsala Road, an address that had come up in the officer's database search. The police report further showed that Richardson was moving into Apartment 2519. The length between the police report and the execution of the warrant, over a month and a half, would have indicated to the officers that any such move would have been completed by that time, and it would be highly unlikely that Richardson would have moved again in such a short time period. SA Brock's conversation with Ms. Clavell, the apartment manager, also confirmed that Sharon Richardson was leasing that apartment and that Richardson was residing with her as a student. Ms. Clavell also identified Richardson from a picture.

The officers also possessed a reasonable belief that Richardson was, in fact, inside the apartment. The apartment maintenance manager, Larry Trees, relayed to the officers that he could not gain access to the apartment for a maintenance call due to a dead-bolt lock installed by the previous tenant. Trees indicated that only the prior tenant had a key, and the lock was engaged from the inside, indicating someone was inside. Officer Bowen also noticed vertical movement of the window blinds, indicating that a ceiling fan was on, and radioed this to SA Brock. SA Brock also had knowledge that Richardson worked at a temporary staffing agency and knew about the transient nature of his work, giving further indications that he could be home during the day. (Tr. at 41.) Further, the refusal of anyone to open the door to law enforcement further heightened the inference that the person inside was Richardson. SA Brock testified that it was not unusual for individuals with a warrant for their arrest to refuse to open the door for law enforcement. When Officer Rod Pinckney forcibly opened the door, the officers had more than reasonable belief to believe that the person hiding inside the apartment was Richardson. This was only further confirmed by the refusal of the individual to come to the door once the door was forcibly opened.

Once the officers had reasonable belief that Richardson was in the apartment, they "had the right, based on the authority of the arrest warrant, to search anywhere in the house that [Richardson] might have been found . . . ." *Maryland v. Buie*, 494 U.S. 325, 330, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial

officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* In accordance with this authority, the officers forcibly opened the door after Richardson refused to open it and then performed primary and secondary sweeps searching for Richardson and any potential threats. During these sweeps, the officers found the rifle in a closet of a bedroom, a place where Richardson or another confederate that could potentially have a weapon could have been hiding. (*See* Tr. at 28.) The rifle was in plain view when the officer looked in the closet, and the officer had a prior justification for validly looking into the closet for Richardson. *See Horton v. California*, 496 U.S. 128, 135, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Further, the incriminating nature of the gun was immediately obvious to the officer because of Richardson's status as a felon and his condition of release that prohibited possession of firearms. (*See* Ex. 3.)

Buie, 494 U.S. at 334, also supports the officers' right to conduct a "protective sweep" to ensure the officers' safety. There, the Court recognized two types of protective sweeps. *See United States v. Mayo*, 792 F.Supp. 768, 773 (M.D.Ala.1992). First, during a search incident to an arrest occurring inside a home, officers may, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Buie*, 494 U.S. at 334. Second, officers may conduct a more pervasive search when they have "articulable facts which, taken together with the rational inferences from those facts, would

warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.*; *See also United States v. Colbert*, 76 F.3d 773, 776 (6th Cir.1996) (discussing the two types of protective sweeps allowed by *Buie*).

Here, the officers were not only looking for Richardson but also searching for any potential threats in the apartment. The closet was a space in which Richardson or confederates could have hidden to potentially launch an attack on the officers. Accordingly, *Buie* also supports the officer's entry into Richardson's bedroom closet which lead to seizure of the gun.

Even if the incriminating nature of the gun was not immediately obvious to the officers, their actions in clearing the rifle and simply placing it on the bed was reasonable. (Tr. at 30, 42; Ex. 6E.) "Upon discovery of weapons during the course of a search, it is permissible to secure those weapons, for the safety of those conducting the search, as well as any others present." *United States v. Laferrera*, 596 F. Supp. 362, 363 (S.D. Fla. 1984). Here, the later seizure of the gun and removal from Richardson's bedroom was authorized by Ms. Richardson's valid consent as explained *infra*. *See United States v. Delancy*, 502 F.3d 1297, 1309 (11th Cir. 2007) (homeowner's voluntary consent was not tainted by prior illegal protective sweep).

II. Ms. Richardson Gave Voluntary Consent for the Search of Richardson's Bedroom, the HP Laptop, and the Verizon Cellphone on June 25, 2013.

Under the Fourth Amendment, a search conducted pursuant to a valid consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). However, when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, the prosecutor bears the burden of proving that the consent was freely and voluntarily given. *Id.* Consent to a search is voluntary if it is the product of an 'essentially free and unconstrained choice.' *United States v. Boulette*, 265 Fed. Appx. 895, 898 (11th Cir. 2008). Consent is not voluntarily given where it is acquiescence to a claim of lawful authority. *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989)

A third party with common authority over the premises may give consent to search the area. *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). "[E]ven if the consenting party does not, in fact, have the requisite relationship to the premises, there is no Fourth Amendment violation if an officer has an objectively reasonable, though mistaken, good-faith belief that the consent he has obtained valid consent to search the area." *United States v. Brazel*, 102 F.3d 1120, 1148 (11th Cir. 1997) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). Common authority "rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of

the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 171, n.7, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).

Here, it is apparent that Ms. Richardson had common authority over Richardson's bedroom. Ms. Richardson was the only person paying rent at the apartment and possessed the only key. (Tr. at 90-91.) She moved Richardson's belongings, set up his bedroom, put his clothes in the closet, and blew up an air mattress in the room. (Tr. at 91.) She also regularly went into his room to pick up laundry so that it would not stink. (Tr, at 255.) This information demonstrated that Ms. Richardson had full access to the room and exercised dominion and control over items in the room, thus showing she had common authority to *permit* a search of the room. After SA Logan had this information, he would have had a reasonable belief that Ms. Richardson had common authority over the room the officers wished to search (Tr. at 149-151.)

Further, there is a complete absence of any evidence of coercion by the officers in getting Ms. Richardson to sign the consent form. The officers merely informed her that they would seek a warrant if she did not consent, which is not a claim of lawful authority but rather an implicit admission by the officers that they had no authority at the moment to search the room. This did not taint Ms. Richardson's consent. *United States v. Garcia*, 890 F.2d 355, 361 (11th Cir. 1989) (consent was voluntary where officers refused conditional consent and requested consent

to search entire premises or else they would have to secure house and apply for search warrant). Nor did the fact that she might have been informed she could not reenter until the warrant application process was completed render her consent involuntary, especially in light of the presence of her daughter's apartment in the same complex. *See id.* Nonetheless, SA Burros testified that Ms. Richardson was never told that she could not return to her apartment unless she consented. (Tr. at 111.) Further, the consent form that was signed by Ms. Richardson and witnessed by SA Burros and Detective Calhoun reflected that she had been advised of her right to refuse, a requirement not necessary for obtaining consent but instructive in determining whether consent is voluntary. Finally, Ms. Richardson's refusal to give her younger son's name or to provide her employer to the officers further shows her awareness of her right to refuse consent.

As to Ms. Richardson's representation that the officers told her that a warrant would inevitably be obtained, the Court finds her not fully credible. SA Burros testimony was unequivocal that Ms. Richardson was informed if she did not sign the form that the officers would be "trying to obtain a search warrant." (Tr. at 99.) This was also confirmed by Ronna Richardson, Ms. Richardson's daughter who was also present when the consent was given. (Tr. at 262-263.) Ms. Richardson's testimony is also impugned by the fact that she misrepresented to agents that she did not see Richardson from June 20, 2015 through June 23, 2015, but sent a cryptic text message to Richardson informing him about the investigation. (Tr. at 248-252.) Her obvious relationship to Richardson also

poses a further obstacle to crediting her testimony over that of the officers.

Ms. Richardson also gave valid consent to search the HP Laptop and Verizon cellphone added to the consent form during the search of Richardson's room on June 25, 2013. As discussed above, Ms. Richardson knew of her right to refuse consent and had demonstrated the ability to exercise that right by refusing to answer certain questions from the agents. The consent form reflects that she initialed these additions, and there were no unscrupulous intentions through adding these items due to their discovery after Ms. Richardson gave consent to search the room. (Tr. at 152-153.) Ms. Richardson specifically identified the Verizon phone as belonging to her, that she paid the bill, and gave the agents permission to search it. (Tr. at 153.) Ms. Richardson also brought the agents the HP laptop, demonstrating dominion over it, and specifically consented to allowing the agents to image it. (Tr. at 153.)[1]

III. Ms. Richardson Gave Voluntary Consent for the Search of the Apartment on June 28, 2013.

The record also demonstrates that Ms. Richardson gave voluntary consent on June 28, 2015, to allow the agents to search the apartment. SA Logan explained to her that this second search would be more intensive,

1. Although Richardson's motion goes to extensive lengths to argue he had an expectation of privacy in his room, it is not apparent that he has standing to contest the seizure of the laptop, as it belonged to his younger brother. (Tr. at 153.)

and she would probably need to sleep at her daughter's apartment who lived in the same complex. (Tr. at 169.) He also explained that she could not return to her apartment until after he had discussed with the legal team if they could file for a search warrant. (Tr. at 169-170.) The consent form that was also signed by Ms. Richardson shows that she was apprised of her right to refuse and voluntarily consented to the search. (Ex. 9.)

On June 28, 2013, Ms. Richardson was fully apprised of the consequences of consenting to the search. She had full knowledge that this would be a more intensive search and would keep her out of her apartment for an extended period of time. Although the agents informed her that they would need to secure the apartment until a warrant could be applied for, this did not render her consent involuntary. *See Garcia*, 890 F.2d at 361. Further, the fact that she would be excluded from her apartment for a period of time put minimal hardship on Ms. Richardson given her daughter's apartment close by. Finally, Ms. Richardson's statement that no one explained any rights and the agents stated "they had to search a second time is contradicted by her signature on the form and by her lack of credibility as explained above. (Tr. at 233.)

IV. Richardson's Unwarned Statements at the Hospital Are Subject to Suppression.

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the

privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A defendant may waive his right against self-incrimination, provided such waiver is voluntary, knowing, and intelligent. Id. at 444. Waiver is voluntary, knowing, and intelligent if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *U.S. v. Beckles*, 565 F.3d 832, 840 (11th Cir. 2009) (internal quotations and citation omitted). Furthermore, "[v]oluntary and spontaneous comments by an accused, even after *Miranda* rights are asserted, are admissible evidence if the comments were not made in response to government questioning." *Cannady v. Dugger*, 931 F.2d 752, 754 (11th Cir. 1991).

It is undisputed that Richardson was not given any sort of warning before being asked questions while he was receiving treatment at Shands hospital. SA Waters testified that Richardson was not high on the suspect list at that point due to the firearm found not being a handgun, the type of firearm preliminary tests indicated was used in the attempted murder of Judge Corrigan. Thus, SA Waters was only seeking exculpatory evidence from Richardson to eliminate him from the suspect list. However, SA Waters subjective intent in asking the questions is irrelevant under the *Miranda* analysis. Further, the fact that he was not in custody for the attempted murder of Judge Corrigan is also irrelevant to the analysis. *Mathis v. United States*, 391 U.S. 1, 4, 88 S. Ct. 1503, 20 L. Ed. 2d 381, 1968-2 C.B. 903 (1968) ("The

Government also seeks to narrow the scope of the Miranda holding by making it applicable only to questioning one who is 'in custody' in connection with the very case under investigation. There is no substance to such a distinction . . . . .'"). Here, Richardson was subject to questioning while in custody without the requisite warnings and *Miranda* compels that these custodial statements cannot be used against him. 384 U.S. at 479.

However, these unwarned statements do not taint any of the physical evidence later gathered against Richardson. "Admission of nontestimonial physical fruits . . . . does not run the risk of admitting into trial an accused's coerced incriminating statements against himself." *United States v. Patane*, 542 U.S. 630, 645, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004) (Kennedy, J., concurring). Thus, the right against self-incrimination "cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements." *Id.* at 637 (plurality opinion). Thus, Richardson's unwarned statements do not mandate exclusion of any later gathered physical evidence from the apartment. Even if the fruit of the poisonous tree doctrine did apply to Richardson's statements, a valid independent source for the June 28, 2013 search existed because of SA Logan's testimony that they were interested in searching the apartment due to a caliber match from the ballistics test of the Savage rifle. *See United States v. Noriega*, 676 F.3d 1252, 1261 (11th Cir. 2012).

V. Richardson Voluntarily Waived His Right to Remain Silent and Have an Attorney Present at the Jacksonville' Sheriff's Office.

The record shows that Richardson was read his full *Miranda* rights before any questioning occurred at the Jacksonville Sheriff's Office. In addition, his actions demonstrate a knowing and voluntarily waiver of those rights. The agents did not promise anything and, in fact, specifically told them that they could not get him home and that he would have to deal with his failure to appear charge. Further, no threats of violence were made, and Agent Silverstein specifically told Richardson that he would not lay a hand on Richardson when relayed the incident that occurred in Clay County. (Tr. at 216.) Although Richardson refused to sign the form stating that "I can't sign that," (Ex. 24, 17:44), his conduct after dispels any notion that this was an unequivocal invocation of his rights. As best as the Court can discern from the garbled audio, Richardson, right after refusing to sign the form, stated that he would "answer questions the best that I can, but if I don't know . . . ." (Ex. 24, 17:51 — 17:58.) Richardson then began speaking unprompted from the detectives for almost two minutes straight. (Ex. 24, 17:44-19:49.)

A defendant can implicitly waive their right to remain silent and right to an attorney. *N. Carolina v. Butler*, 441 U.S. 369, 376, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (U.S. 1979). Nothing in *Miranda* requires a defendant's signature on a written waiver of rights form, and the refusal to sign a waiver does "not conclusively indicate that the suspect wishes to remain silent." *Jones v. Dugger*, 928 F.2d 1020,

1027 (11th Cir. 1991). Here, Richardson shook hands with both detectives, stating that it could build a bond of trust, and then immediately began talking without any prompting, after stating he would not sign the form. SA Logan also testified that the detectives received an affirmative oral waiver by Richardson. (Tr. at 218.) Richardson's statement that he knew he had the right to an attorney but had not said anything incriminating at the end of the interview further confirms his voluntary waiver. The fact that Richardson questioned whether the detectives would hit him does not render his waiver involuntary because he was unequivocally informed that no physical violence would be used. Further, the statement by Richardson that he was going to fall out during the interview also does not render his statements involuntary. Richardson had just been released from a hospital and the only medicine that he was taking for his minor wound was ibuprofen. (Tr. at 161.) Based on this information, the officers had a clear indication that his medical condition was normal.

Further, Plaintiff's statements at the Jacksonville Sheriff's Office are untainted by his earlier unwarned statements at the hospital. In *Oregon v. Elstad*, 470 U.S. 298, 311, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), the Supreme Court firmly rejected the "cat out of the bag" theory that an earlier unwarned confession would perpetually disable law enforcement from using a later, warned and voluntary confession. The factors to consider when determining whether an earlier unwarned statement impacts a later statement include "the completeness and detail of the questions and answers in the first round

of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Missouri v. Seibert*, 542 U.S. 600, 615, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (plurality opinion). Here, it would have been clear to Richardson that the questioning at the Jacksonville's Sheriff's Officer was a new and distinct experience and that he had a genuine choice of whether to follow up on the earlier information he had given to SA Waters.

Here, the two sessions were entirely different in character. The first instance of questioning involved a few perfunctory questions about his whereabouts in the period between June 20th and June 23rd and his mode of transport, which lasted no more than thirty minutes. (Tr. at 128.) The second questioning was more in depth and lasted a full two hours. The two sessions of questioning was also performed by entirely separate officers and at different locations. There was also a substantial lapse of time between the two sessions. Although SA Waters did not testify as to the exact timing of the questioning at the hospital, at least enough time elapsed for Richardson to be discharged from the hospital, driven to the Jacksonville Sheriff's Office, and then given time to eat the McDonald's picked up by the officers. Further, the testimony by SA Waters clearly indicated that the warnings at the hospital were omitted in good faith. *Seibert*, 542 U.S. at 617 (Breyer, J., concurring). This was not an underhanded attempt to gain a confession but rather an effort to eliminate a suspect from a lengthy list. Accordingly,

the two statements are distinct, and the first unwarned statement in no way taints the admissibility of the later voluntary statement.

VI. The Record Shows that Three identifications Are Reliable under the *Biggers* factors.

Defendant argues that the identifications by Markiewicz, Sizemore, and Hall were unduly suggestive leading to substantial risk of irreparable misidentification. (*See* doc. no. 64.) Defendant argues that the single-photo indentification process used by the detectives was unduly suggestive but gives no argument as to the specific factors making the identifications unreliable. (*Id.*)

The Eleventh Circuit requires a two-step analysis to determine whether an identification process is so unreliable as to violate due process. *Williams v. Weldon*, 826 F.2d 1018, 1021 (11th Cir. 1987). First, a court must decide whether the original identification procedure was unduly suggestive. *Id.* If not, that ends the inquiry. *Id.* If so, however, the court must then determine whether the suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial. *Dobbs v. Kemp*, 790 F.2d 1499, 1506 (11th Cir. 1986), *modified in part on other grounds*, 809 F.2d 750 (11th Cir. 1987); *Passman v. Blackburn*, 652 F.2d 559, 569 (5th Cir. Unit A 1981), *cert. denied*, 455 U.S. 1022, 102 S. Ct. 1722, 72 L. Ed. 2d 141 (1982).

Under this analysis, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed.2d 140 (1977). The factors that go into the "totality of the circumstances" analysis include: (1) the opportunity to view, (2) the degree of attention, (3) the accuracy of the description, (4) the level of certainty, and (5) the length of time elapsing between the crime and the identification." *Blanco v. Singletary*, 943 F.2d 1477, 1508 (11th Cir. 1991) (citing *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)).

First, the government suggests that the single-photo identification process used by the agents in speaking to the three witnesses that identified Richardson was not unduly suggestive. This Court could find no case law that found that such a process was not unduly suggestive and the government cites none.

Nonetheless, the *Biggers* factors weigh heavily in favor of admitting the testimony of Markiewicz that Richardson was the person who, in fact, spoke to him about the .30-06 Savage Arms Rifle on June 15, 2013. Markiewicz had an extensive opportunity to view Richardson, speaking with him for over twenty minutes. His description of Richardson appears accurate from the surveillance video. Markiewicz stated that he was one hundred percent certain about the correctness of his identification, and only about two and half weeks elapsed before Markiewicz identified Richardson. (Ex. 16.) Markiewicz also indicated that he specifically remembered Richardson because he did not receive many customers who wished to purchase

guns and thus, the interaction stood out. (Tr. at 181.) Finally, Markiewicz's firm recollection of the eccentric conversation with Richardson indicates that his memory of Richardson remained intact and that his identification was grounded in his recollection of Richardson's appearance. Accordingly, Markiewicz's identification is reliable and admissible at trial.

Applying the *Biggers* factors to Joshua Sizemore's identification, the record shows that his identification of Richardson as the person he allowed to use his phone is reliable. Sizemore described Richardson as a black male who looked like he had just gotten off work because he had paint and concrete on his clothes, was wearing a baggie shirt, and was also wearing work boots. (Tr. at 187.) Richardson asked to borrow Sizemore's phone to call his mom and the call lasted approximately two minutes. (Tr. at 187.) SA Logan described the parking lot of the encounter as well lit and that Sizemore identified Richardson from the photo without hesitation. (Tr. at 188.)

Here, Sizemore had a substantial opportunity to view Richardson for over two minutes and would have been in close contact through handing him the phone. Although there is no direct evidence on his degree of attention, the fact that Richardson was using Sizemore's phone would have led to more than minimal attention due to concerns about the phone being returned. Sizemore did not express any specific degree of certainty but quickly identified Richardson and expressed no doubts as to the identification. (Tr. at 288.) The month between the encounter and the identification is also not so long as to

undermine the reliability of the identification. *United States v. Burke*, 738 F.2d 1225, 1229 (11th Cir. 1984) (finding an identification reliable after a time period of two months elapsed). Finally, Sizemore's identification is supported by his description that Richardson needed to use the phone to call his mom, when the phone was, in fact, used to call Richardson's mom. Accordingly, the Court finds that Sizemore's identification is sufficiently reliable and will be admissible at trial.

Applying the *Biggers* factors to Jabhari Hall's out-of-court identification, the record demonstrates that his identification is sufficiently reliable to be introduced at trial. Hall had an extensive opportunity to view Richardson because he waited at the Ale House for over thirty minutes. (Ex. 18.) Although Hall was performing other tasks during that span of time, Hall would have had the opportunity at least once to get a close view of Richardson through handing him the phone. There is no direct evidence in the record as to Hall's degree attention, but it stands to reason that a person lending a cell phone to another individual would lend some degree of attention to guard against it being purloined. The phone call was also not brief, lasting a total of six minutes. (Tr. at 195.) Hall only gave a generic description of Richardson, stating that he looked like he had just come out of the woods and may have been wearing a white t-shirt but described no facial features, distinctive marks, or body features like height and weight. (Ex. 18.) There was also no specific level certainty assigned by Hall, but he quickly identified him when shown the photograph and expressed no lack of certainty as to the identification. (Tr. at 195.)

As to the last *Biggers* factor, a month and half had passed between the encounter and the identification, a permissible amount of time under Eleventh Circuit case law. *See Burke*, 738 F.2d at 1229. Finally, the accuracy of Hall's identification is firmly supported by the recognition of a distinctive feature, Richardson's wound above his eye. Unprompted by the detectives, Hall pointed out the wound in the booking photo after initially identifying him in the driver's license photo, stating that he had that wound when he came into the restaurant. (Tr. at 194.) Stripping aside any presumption that the wound arose from the attempted murder of Judge Corrigan, it would stand to reason that the scar or wound would likely have been present during the interaction a few days before the booking photo was taken. Thus, Hall's recollection of the wound strengthens the likelihood that his identification was based on his own recollection of Richardson rather than the suggestiveness of the identification procedure used.

CONCLUSION

Based on the foregoing, it is my **RECOMMENDATION** that Richardson's Motion to suppress identification be **DENIED** (doc. no. 64), his Motion to suppress evidence be **DENIED** (doc. no. 63), and his Motion to suppress Richardson's statements be **GRANTED IN PART AND DENIED IN PART** (doc. no. 62.). The government should not be allowed to use Richardson's statements at Shands Hospital at Richardson's trial but should be allowed to use all other statements made and physical evidence gathered against Richardson.

Appendix C

SO REPORTED and RECOMMENDED this 15th day of December, 2015.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 27, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14800-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AARON M. RICHARDSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: MARTIN and ANDERSON, Circuit Judges, and MURPHY*, District Judge.

PER CURIAM:

The petition(s) for panel rehearing filed by Aaron M. Richardson is DENIED.

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* Honorable Stephen J. Murphy, United States District Court for the Eastern District of Michigan, sitting by designation .

Appendix D

ENTERED FOR THE COURT:

/s/Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14800-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AARON M. RICHARDSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING *EN BANC*

BEFORE: MARTIN and ANDERSON, Circuit Judges, and MURPHY*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35,

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* Honorable Stephen J. Murphy, United States District Court for the Eastern District of Michigan, sitting by designation

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

/s/Beverly B. Martin
UNITED STATES CIRCUIT JUDGE