No. 19-_____

IN THE

Supreme Court of the United States

ALEX KNIGHT,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12448
Non-Argument Calendar

D.C. Docket No. 1:18-cr-20033-JEM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALEX KNIGHT,

Defendant-Appellant.

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

(May 16, 2019)

Before TJOFLAT, JORDAN, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Alex Knight, a convicted felon, was indicted and charged with (1) unlawful possession of a firearm and ammunition (Count One), (2) possession of a controlled substance with intent to distribute (Count Two), and (3) possession of a firearm in furtherance of a drag trafficking crime (Count Three). Knight moved to suppress the firearm, ammunition, and controlled substance that provided the bases for the charges. The District Court denied the motion, and the case went to trial. A jury found Knight guilty of possessing a firearm and ammunition—Count One—and guilty of simple possession of a controlled substance—a lesser-included offense in Count Two. The jury found Knight not guilty of possessing a firearm in furtherance of a drag trafficking crime—Count Three. The District Court sentenced him to 72 months' imprisonment; this was above the recommended Guideline range.

Knight raises three issues on appeal. First, he argues that the District Court erred by denying his Motion to Suppress. Second, he claims the District Court erred when it applied a four-level enhancement to his sentence based on its finding that he "possessed a[] firearm or ammunition in connection with another felony offense." *See* United States Sentencing Commission, *Guidelines Manual* § 2K2.1(b)(6)(B) (Nov. 2016). Third, he says the District Court erred by refusing to reduce his sentence because he accepted responsibility. *See id.* § 3E1.1(a) (noting that the sentencing court should decrease the offense level by two "[i]f the

defendant clearly demonstrates acceptance of responsibility for his offense"). We affirm.

I.

Knight was indicted based on a firearm and drugs that police officers found while searching his house. The officers had a warrant, but Knight says the warrant was invalid—and thus its fruits should be suppressed—because the author of the warrant's supporting affidavit purposefully or recklessly left out important information.

Here's what happened. Knight was a suspect in a string of burglaries, and there was a warrant for his arrest. Two detectives and a police officer went to Knight's house to execute the arrest warrant. After they placed him under arrest and cuffed him, Knight said that he was having stomach pains. In response, one of the detectives called fire rescue to the scene so they could evaluate Knight before taking him to the police station. No one gave Knight the *Miranda* warnings.

While the group was waiting for fire rescue to arrive, the lead detective for the burglary investigation arrived on the scene. According to the detective's testimony at the suppression hearing, she arrived at Knight's house and asked him for consent to search for the items related to the burglaries. Knight said he would consent if the detective would "overlook a weapon that he had." The detective

explained that's not how things work: if he consented to a search, there would be no stipulations.[1] Then, the detective went outside.

The detective was called back inside because Knight wanted to speak with her. She went inside, and Knight told her that she could search his house if she would overlook the drugs that he had for his "personal use." The detective explained that she was going to get a search warrant and again rejected Knight's conditional offer. She eventually went back to the police station and filled out the search warrant and supporting affidavit.

In the probable cause statement, the detective noted that she did "not include[] every aspect, fact, or detail of t[he] investigation" "[b]ecause t[he] affidavit [was] being submitted for a limited purpose of requesting a warrant." The detective explained that she located Knight at his house. Then, she wrote this: "The officers who contacted [Knight] indicated that they need[ed] to talk with him. Spontaneously, [Knight] stated that there was a weapon and illegal narcotics in [his house]." In the "Property Sought" section of the supporting affidavit, the detective listed (1) firearms, (2) ammunition, (3) illegal drugs, and (4) the items taken during the burglaries.

[1] The detective asked Knight why he had the firearm, and he said his friend gave it to him for protection. She asked if the firearm was on his person, and he explained that it was in his bedroom closet.

The search warrant was approved, and police officers executed it. During the search, they found a firearm, bullets, 72 baggies that contained a heroin-fentanyl mixture, and $160 in one-, ten-, and twenty-dollar bills.

Knight moved to suppress the evidence and requested a *Franks*[2] hearing. He argued that the warrant's supporting affidavit left out material facts: it did not mention that the detective asked Knight for consent to search after he was placed under arrest. Nor did it say that Knight told the officers about the firearm and narcotics in his house only after he was asked to consent to a search. Thus, Knight argued, his statements were not really "spontaneous"; instead, he was in custody and answering a question when he made them. Finally, Knight claimed that if the supporting affidavit told the full story, it would not have supported a finding of probable cause.

The District Court held a hearing on Knight's motion to suppress the evidence and request for a *Franks* hearing. It denied relief. The Court found that the supporting affidavit's use of "spontaneous" was "the right word": "If a question is asked [here, the question was whether Knight would consent to a search] and he [Knight] answered a different question, that's spontaneous." As for the omissions—that other officers were at the house, that Knight was sick, that fire rescue had been called, and that Knight had been asked for consent—the Court

[2] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978).

found that they were not "particularly material." It also found that they were not deliberately left out. Finally, the Court found that even if the supporting affidavit included the omitted statements, it still would have supported a finding of probable cause.

When considering a motion to suppress, we review a district court's findings of fact for clear error and its application of the law to the facts *de novo*. *United States v. Novaton*, 271 F.3d 968, 986 (11th Cir. 2001). Thus, "we will not overturn a district court's decision that omissions or misrepresentations in a warrant affidavit were not reckless or intentional unless clearly erroneous." *United States v. Reid*, 69 F.3d 1109, 1113 (11th Cir. 1995). In reviewing a motion to suppress, we "construe[] [all facts] in the light most favorable to the prevailing party below." *Id.*

Affidavits supporting arrest warrants are presumptively valid. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684 (1978). To void the warrant and exclude the evidence, Knight must prove by a preponderance of the evidence "(1) that the alleged misrepresentations or omissions were knowingly or recklessly made by [the detective], and (2) that the result of excluding the alleged misrepresentations and including the alleged omissions would have been a lack of probable cause for issuance of the warrant[]." *Novaton*, 271 F.3d at 986–87.

We begin with the alleged misrepresentation. Knight argues that he did not "spontaneously" tell the officers about the firearm and narcotics because he shared the information only after being asked if he would consent to a search. The District Court found that Knight's answers to the consent question were in fact spontaneous because they did not respond to the question the detective asked. This finding is not clearly erroneous. Spontaneous means "proceeding from natural feeling or native tendency without external constraint." *Spontaneous*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/spontaneous. Here, Knight knew that he had a firearm, ammunition, and drugs that he shouldn't have. And his answer—telling the detective that he would consent to a search if she overlooked these items—was unconstrained by the detective's question. Indeed, a simple yes or no response would have answered the consent question. The District Court did not clearly err in finding that Knight failed to prove the first prong.

Next, we consider the omissions. Knight argues that the supporting affidavit should have told the entire story—that other officers were at the house, that Knight was sick, that fire rescue had been called, and that Knight had been asked for consent. The District Court found that these facts were not deliberately omitted. Nothing in the record convinces us that the detective deliberately or recklessly left these facts out. At the suppression hearing, the detective said that she included only those facts that were relevant to the finding of probable cause. The District

Court did not clearly err in finding that Knight failed to prove the first prong for the omitted facts.

But even if Knight had met his burden under the first prong for either the misrepresentation or the omissions, the District Court found that Knight had not met his burden under the second prong. The Court found that even without the alleged misrepresentation and omissions, the affidavit still would have supported a finding of probable cause. We give "great deference to a determination of probable cause by a district court." *United States v. Shabazz*, 887 F.3d 1204, 1214 (11th Cir. 2018) (citation and alterations omitted). We agree with the District Court that—even if the supporting affidavit parroted the detective's testimony at the suppression hearing—the affidavit would still "contain 'sufficient information to conclude that a fair probability existed that [a firearm, ammunition, and drugs] would be found'" at Knight's house. *See id.* (citation omitted). In other words, these omissions were immaterial to the probable cause analysis.

Knight argues that if the supporting affidavit told the full story, the judge who approved the warrant would have questioned whether Knight voluntarily gave his "un-Mirandized" incriminating statements about the firearm and drugs. He points out that he has his limited education and mental health issues. He also notes that he was under arrest at the time. But he points to no coercive behavior from the detective or other officers. We have no reason to think that his answers to a simple

yes-or-no question were involuntary or were simply an acquiescence to police authority. In fact, he tried to bargain with the detective and ultimately refused to give consent. Thus, the District Court did not err in finding that the affidavit would support probable cause even without the alleged misrepresentation and omissions.[3]

The District Court did not err by denying the motion to suppress.

II.

Before sentencing, the probation office prepared a Presentence Investigation Report (the "PSI"). As part of Knight's Guideline calculations, the probation office applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B). Section 2K2.1(b)(6)(B) applies if a defendant "possessed a[] firearm or ammunition in

[3] There's a good chance that the firearm, ammunition, and drugs would be admissible under the inevitable-discovery doctrine. That doctrine operates as an exception to the exclusionary rule, allowing the introduction of evidence obtained through unlawful means that would otherwise be inadmissible. *United States v. Virden*, 488 F.3d 1317, 1322 (11th Cir. 2007). To get the benefit of the doctrine, the Government must show by a preponderance of the evidence that the evidence in question ultimately would have been discovered by lawful means that were being actively pursued before the illegal conduct occurred. *See id.*

Here, even if we assume that the detective intentionally misrepresented and omitted facts, and even if we assume there was no probable cause to search for the firearm and drugs without the misrepresented and omitted facts, the Government likely would have found the evidence anyway. Even without the complained-of problems, the affidavit still would have supported a finding of probable cause to search for items related to the burglaries. Those items included credit cards, ATM cards, bank cards, wallets, and purses. Officers would have reasonably searched the bedroom closet (where the gun was found) and the jar in the kitchen (where the drugs and money were found) when looking for the items related to the burglary. Knight claims the Government's assertion that the officers would have stumbled across the firearm and drugs is speculative. Given our holding above, we need not definitively decide the inevitable-discovery question.

connection with another felony offense." Here, the "felony offense" that triggered § 2K2.1(b)(6)(B) was possession of heroin with intent to distribute, a drug-trafficking crime.

Knight objected and argued that the Government did not show by a preponderance of the evidence that Knight possessed the firearm in connection with a drug trafficking crime. In fact, Knight noted, the jury found him not guilty of this very crime when it found him not guilty of Count Three. Recall, Count Three was possession of a firearm in furtherance of a drag trafficking crime. The District Court overruled the objection and applied the enhancement.

"We review a district court's factual findings under the Sentencing Guidelines for clear error" and its interpretation of the guidelines *de novo*. *United States v. Carillo-Ayala*, 713 F.3d 82, 87 (11th Cir. 2013). "The Government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement." *United States v. Askew*, 193 F.3d 1181, 1183 (11th Cir. 1999). A preponderance of the evidence, while not a high standard of proof, is not a toothless standard, and a district court may not abandon its responsibility to ensure that the Government meets this standard. *Id.*

Here, to trigger the enhancement under § 2K2.1(b)(6)(B), the Government needed to prove by a preponderance that Knight (1) possessed a firearm or ammunition (2) "in connection with another felony offense," U.S.S.G.

§ 2K2.1(b)(6)(B), here, the possession of heroin with intent to distribute. Only the second element is at issue.

First, we consider whether the Government proved by a preponderance of the evidence that Knight possessed heroin with intent to distribute. It can make this showing even though Knight was not convicted of that offense. *See* U.S.S.G. § 2K2.1(b)(6)(B), cmt. n.14(C) ("'Another felony offense', for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.").

Knight argued that there was not enough evidence at trial to prove that he intended to distribute the heroin because there was no evidence that he ever actually sold or delivered it to anyone. The District Court overruled the objection. It noted that the officers "found everything that looked to anybody with any experience as the stuff of a petty drug dealer." It went on and explained that "it was pretty obvious what [Knight] was doing with this stuff in his house." Indeed, the Court said that "people that are going to use drugs do not usually go to the trouble of putting them in separate glassine envelopes. They just don't. . . . They don't put them in separate envelopes unless they're going to sell them to somebody." The District Court's finding is not clearly erroneous.

One of the detectives who helped execute the search warrant found a medium-sized Ziploc bag that had 72 individual baggies of a heroine-fentanyl mixture. He said the street value for each baggie is $10, or $720 total. He also found $160 in one-, ten-, and twenty-dollar bills. The detective testified that the small bills were "very, very common in the street level narcotics." Another witness—who had worked on narcotics cases for most of his 21-year career—testified that, based on his experience, "no more than five" baggies of heroin were consistent with personal use. "Ten bags and up," by contrast, were consistent with someone distributing heroine. The detective said it was "obvious" to him that the number of baggies in Knight's apartment was consistent with distribution. Given all this evidence, the District Court's finding that the Government proved by a preponderance that Knight intended to distribute heroin is not clearly erroneous.[4]

Knight argues (in a footnote) that the District Court made no findings of fact as to whether the facts supported the Government's argument that Knight was engaged in drug trafficking. True enough, the District Court did not use magic

[4] Knight argues that the four-level enhancement violated his Sixth Amendment right to a trial by jury and his Fifth Amendment right to due process of law because the enhancement was based on acquitted conduct. He acknowledges that argument is foreclosed by our precedent. *United States v. Faust*, 456 F.3d 1342, 1348 (11th Cir. 2006) ("[U]nder an advisory Guidelines scheme, courts can continue to consider relevant acquitted conduct so long as the facts underlying the conduct are proved by a preponderance of the evidence and the sentence imposed does not exceed the maximum sentence authorized by the jury verdict.").

words and say that it found as a matter of fact that the Government met its burden. But based on our discussion above, we have no doubt that the Court did in fact make the necessary finding.

Next, we consider whether Knight possessed the firearm "in connection with" the drug trafficking offense. *See* U.S.S.G. § 2K2.1(b)(6)(B). "A 'connection' is shown by *less* evidentiary proof than is required to show possession 'in furtherance of' a drug offense." *Carillo-Ayala*, 713 F.3d at 96. When the "other felony offense" is a drug trafficking crime—and here it is—the enhancement applies if the "firearm is found in close proximity to drugs." U.S.S.G. § 2K2.1(b)(6)(B), cmt. n.14(B). This is because, as the commentary explains, "the firearm has the potential of facilitating another felony offense." *Id.* Finally, if a firearm in fact is found "in close proximity to drugs," the enhancement applies even if there is no additional evidence. *See Carillo-Ayala*, 713 F.3d at 92 ("A firearm found in close proximity to drugs or drug-related items simply '*has*'—without any requirement for additional evidence—the potential to facilitate the drug offense.").

So, everything turns on whether the firearm in Knight's apartment was found in close proximity to the drugs. He argued that the firearm was not in close proximity because it was in his bedroom closet, and the drugs were in the kitchen.

The District Court overruled the objection and found that the firearm was in close proximity. This finding is not clearly erroneous.

A detective testified that Knight's apartment was "fairly small." The firearm was found in in a shoebox on the top shelf of Knight's bedroom closet. Given the size of the apartment, the bedroom and the kitchen were close together. Thus, the District Court did not clearly err.

III.

The Guidelines recommend decreasing a defendant's offense level by two levels "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. §3E1.1(a). Here, the probation office did not apply the reduction because "Knight put the government to its burden of proof by denying the essential factual elements of guilt."

Knight objected; he argued that he admitted at trial that he possessed narcotics and asked the jury to find him guilty of simple possession (a lesser-included offense of Count Two). Thus, Knight said, he should be given some credit for accepting responsibility. The District Court overruled the objection.

We give great deference to a district court's denial of a reduction for acceptance of responsibility under § 3E1.1. *United States v. Moriarty*, 429 F.3d 1012, 1022 (11th Cir. 2005) (per curiam). We review for clear error. *See id.*

Here, "the facts in the record [do not] clearly establish that [Knight] accepted responsibility," so the District Court did not err.

We have said that "[a] defendant who fails to accept responsibility for all of the crimes he has committed and with which he has been charged is entitled to nothing under § 3E1.1." *United States v. Thomas*, 242 F.3d 1028, 1034 (11th Cir. 2001). And the commentary to the Guidelines notes that the adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, cmt. n.2.

That said, a defendant who proceeds to trial is not "automatically preclude[d]" from getting the adjustment. *Id.* In "rare situations," a defendant may show that he accepted responsibility even though he exercised his constitutional right to a trial. *Id.* For example, this might happen if "a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." *Id.*

Here, Knight argued at trial that he did not knowingly possess the firearm. Thus, he denied an essential factual element of guilt. He also moved to suppress the firearm, ammunition, and drugs; this was another attempt to avoid factual guilt. *See United States v. Gonzalez*, 70 F.3d 1236, 1239 (11th Cir. 1995) (per curiam)

("By challenging the admissibility of the essential evidence against him, [the defendant] attempted to avoid a determination of factual guilt and to thereby escape responsibility for his crime."). The District Court did not clearly err.

IV.

The judgment of the District Court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 18-20033-CR-JEM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Miami, Florida
May 30, 2018
Pages 1-23

ALEX KNIGHT,

Defendant.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

P-R-O-C-E-E-D-I-N-G-S

COURTROOM DEPUTY: Case number 18-20033-criminal-Martinez, United States of America versus Alex Knight.

Counsel, please state your appearance.

MS. LANDON: Good afternoon, Your Honor. Quin Landon on behalf of the United States. Along with me at counsel's table is Special Agent Tamara Horne, who is the lead agent on the case.

THE COURT: Good afternoon.

MR. DUNHAM: Good afternoon, Your Honor. Christian Dunham, Assistant Federal Defender on behalf of Alex Knight who is present.

THE COURT: Good afternoon.

We're here on a sentencing on Mr. Knight. Can I get an appearance from Probation.

THE PROBATION OFFICER: Good afternoon, Your Honor. Daniel Sylvester-Pierre on behalf of US Probation.

THE COURT: All right. We're here on the sentencing. I've reviewed the verdict form. I remember the case, the trial. Reviewed the presentence investigation.

Note the Defendant requests to be designated to a medical facility, which I will ask the Bureau of Prisons to screen him for medical needs and if necessary, designate him to a medical facility.

Note the Defendant's objections to the PSI, the Government's response, the Government's motion for an upward variance, the first and second addendum to the presentence investigation, and I'm ready to proceed at this time.

Mr. Dunham, if you have any objections that have not been dealt with to your satisfaction, please raise them now or I will consider them to be waived.

MR. DUNHAM: Yes, Your Honor. Thank you.

Your Honor, we are objecting in particular to the four level increase under 2K2.1 B6B.

THE COURT: For the gun?

MR. DUNHAM: That's correct. Your Honor.

THE COURT: Okay. The gun was in the closet, and I believe that the case law in the Eleventh Circuit is such that that is -- the proximity is sufficient and therefore, I will deny your motion or overrule your objection, whichever it is.

Next?

MR. DUNHAM: Thank you, Your Honor. Obviously, yes, the Court did hear the facts of the case.

The only other issue is the acceptance of responsibility. I know it's a little odd, but if you do remember, we did admit that he was in possession of the drugs so we would ask for maybe one point.

THE COURT: I don't know. Let me hear from the prosecutor as to what --

MS. LANDON: Your Honor, in order for the Defendant to be entitled to a two level decrease for acceptance of responsibility, he would have had to truthfully admit the conduct that comprised the convictions.

During trial, he denied having possession of the gun. He said that he didn't knowingly possess it, even though he told the police officers prior to them searching or obtaining a search warrant and searching the home that the gun was in the closet and they found it exactly where he said it would be.

So because the Defendant denied the factual allegations supporting his conviction, the Government does not believe that a two level decrease or any decrease for acceptance of responsibility is warranted.

THE COURT: Yeah, I don't believe he's entitled to a reduction for acceptance of responsibility. I'll deny your motion or overrule your objection, whichever it is.

What else do we have?

MR. DUNHAM: In terms of the guidelines, Your Honor, that's it.

THE COURT: Okay. Then let me hear from the Government as to what you believe -- because you've got a motion for an upward variance.

MS. LANDON: Yes, Your Honor. The Government believes that a sentence of 96 months, which is eight years and above the guideline range, is appropriate and reasonable when taking into

consideration the factors under section 3553(a). The Defendant's criminal history is significantly under-represented. I believe he was only assessed seven criminal history points despite the fact that he has been dedicated to a life of crime for almost 40 years. As outlined in the motion, Your Honor, the Defendant has amassed over 40 -- well, 40 separate convictions, but more than that if you count all of the underlying convictions, as well as 12 which are felonies. He's also had a multitude of arrests, I believe upwards of 30.

THE COURT: 70. 70 total.

MS. LANDON: 70 total. And so early on in his career he's engaged in violent conduct. At one point, he beat a victim over the head with the leg of a table in response to an argument causing the victim to receive a skull fracture. He also was accused of beating a robbery victim until the victim was bloody. There's also a conviction for holding a screwdriver to another victim's neck and then punching her in the face several times while he robbed her.

In addition to that, the Defendant has engaged in a string of burglaries. He's climbed through victim's windows, he's broken the security gates off of windows. He's broken into the glass of the window. He's walked into commercial establishments, and that conduct has continued from early on in his career up until the present point. If Your Honor would remember at trial, the reason why the Defendant was originally

confronted by the police was because he was under investigation for several robberies, and they have video of the Defendant committing the robberies and they also found the clothing that he was wearing in the video in his house at that time.

In addition to that, in 2015, the Defendant was arrested for criminal conduct that is substantially similar to what he was originally charged for. The police officer witnessed the Defendant in a hand-to-hand sale of narcotics. When the police officer searched him, he had cocaine as well as heroin in his possession. That is substantially similar to the crime that the Government charged here. He had 72 baggies of heroin laced with fentanyl.

Throughout the Defendant's career, he's received short sentence after short sentence. He's also been given and afforded opportunities to change his behavior. I believe at one point, as stated in the PSI, the state of Florida even recommended that he get substance abuse training and that he also have the opportunity to get GED training. Every time he was let out of prison, he did not take those opportunities and turn them for the better. Instead, he just continued to engage in a life of crime.

At some point, at some point something has to deter this Defendant's conduct and the Government believes that a hasher sentence of eight years would be sufficient, but not greater than necessary, to do that.

THE COURT: All right. Mr. Dunham.

MR. DUNHAM: Thank you, Your Honor. First I would like to correct one thing. This case, the investigation started based on some unoccupied burglaries. There were no robberies. A robbery is something by force involving a person, that is not correct. The investigation started unoccupied burglaries of a dentist's office and a law office where there was nobody home. There was nobody there. So just to correct that.

MS. LANDON: I apologize about the misstatement. Sorry.

MR. DUNHAM: Judge, the other thing in terms of the variance, the Government's filed this motion for upward variance and they cite some things that are frankly troubling. They cite cases that were dismissed. Now, even a man with a criminal record as a convicted felon, still presumed innocent. And if a case is dismissed, the Government can't get up here and say well, he bashed somebody over the head. That case was dismissed. They can't get up here and say he robbed somebody with a gun. That case was dismissed. The Court should not rely on that. So that's a major problem. And he is presumed innocent, even if he's a convicted felon with 30 pages of record.

They also cite ten loitering cases which, specifically under the guidelines 4A1.2 C2, are never, ever counted. And they want you to factor in that he had ten loitering

convictions.

They also cite seven trespassing cases which are almost never used. They're only used if a person went to jail for 30 days or more, or if the person got probation. Of those --

THE COURT: I think that's their point though is that because of the fact that these are not counted, his criminal history category is seriously understated.

MR. DUNHAM: But when the legislature enacts these sentencing guidelines and says that they're never to be counted, there's a reason, right? And loitering, in particular, is a very troubling crime. It's a crime that's often used by law enforcement as an excuse to stop and detain someone. So to use a loitering charge here to say he's a bad guy when we all know that loitering is walking while black in a certain area, police officers stop you and they charge you with loitering. So I don't think the Court should put any faith in a loitering arrest saying that this is a bad guy because of a loitering arrest. If they want to say he's a bad guy because of burglaries and robberies etcetera, fine. But loitering? That is a real weak reason to find someone being a bad person for an upward variance.

Judge -- and most of his criminal record is burglaries. And I want to say that because remember the facts of this case. This guy is an addict, he's not a drug dealer. He's not a violent drug dealer. He's an addict. What do addicts do? They

go commit burglaries to steal, to get money for their drugs and that's what his record shows. His record shows. Actually eight of the burglaries that they cited in their motion all he got sentenced to all at the same time, when I think he was like 24 years old. He had eight burglaries in one year, he got sentenced to them all at the same time.

THE COURT: He got caught on eight burglaries in one year.

MR. DUNHAM: He got caught on eight. He probably had more. You're right. But they're still burglaries.

He has mental health issues, Judge. If you notice on the PSI, we provided the probation officer with his records from Jackson, with his records from New Horizons.

THE COURT: But Mr. Dunham, one thing that you're either ignoring or setting aside is that at the time of his arrest, I don't know why the jury found him not guilty of that, but the police had said that they saw him selling drugs outside his apartment and then when they went into the apartment, they found lots of little bills in some sort of a container, and they found I don't know how many little glassine envelopes. They found everything that looked to anybody with any experience as the stuff of a petty drug dealer. I mean, I'm not saying he's Mr. Big. I'm not saying he's a major drug broker or salesman, but I think it was pretty obvious what he was doing with this stuff in his house. I mean, people that are going to use drugs

do not usually go to the trouble of putting them in separate glassine envelopes. They just don't. They scrape it off and use it at the time. They don't put them in separate envelopes unless they're going to sell them to somebody.

MR. DUNHAM: And I think that's probably true, and I think most likely a lot of users also sell.

THE COURT: Odds are that they were. So you've got -- I don't know, I don't think it makes an awful lot of difference one way or the other, but I will say that the 70 times that I counted that he had been arrested or stopped or questioned or charged with but everything was then dropped is not inconsistent with what we see in the state system a lot. And that is they get busy. You know it better than I do. They get busy and they drop cases. And I don't think we're doing him any favors. I think that maybe he needs to get his attention brought to what he's doing. What he's doing with his life. I think he needs to understand that what he's doing is serious and it's going to result in substantial jail time. This isn't a case where we're going to put him in jail for 20 years, but I suspect that he's not far away from that in the future. And it's time to get his attention. That's what troubles me. I think that the Government might have something. All of these cases which were nolle prossed, dismissed, dropped, time served, you know, just nothing is not doing him any favors.

MR. DUNHAM: No, and I --

THE DEFENDANT: Can I speak?

MR. DUNHAM: In a second.

THE COURT: Yeah, you'll have an opportunity. I'll ask you in a moment.

MR. DUNHAM: I think what I was going to get to, Judge, is he still has to go back to state court. He has a probation violation over there and he also has this case that we tried, he still has this case pending over there, as well as another burglary. So he does have some situation over there. I am fully aware that we're at -- 41 to 51 months where the guidelines are are very low considering everything about my client. I totally get that.

At the same time I have to advocate, and I don't think eight years is necessarily appropriate. Maybe an upward variance is appropriate based on his record, but I have to advocate for him, Judge.

THE COURT: No, I understand. I'm not arguing with you. You know, you do a good job for your client and I think you need to. But I wanted to tell you where I was coming from.

MR. DUNHAM: Absolutely. Your Honor, let me just finish and say --

THE COURT: Go ahead.

MR. DUNHAM: -- that the records we provided to probation show that he has a history of mental health issues as well as substance abuse issues. In particular, he's been

diagnosed with bipolar disorder, major depressive disorder and mood disorder. They also indicate that he has drug addictions, heroin and pain killers. In the '80s and '90s he had an addiction to crack cocaine, he has been using marijuana since he was 12. He also has other medical issues besides mental health and drug addiction. He has chronic back pain and chronic knee pain. He's had cases of acute vomiting and hypertension. He had a head injury. So he has a lot of different issues going on Your Honor, and because of all those reasons, we're asking for a guideline sentence, top of the guidelines of 51 months.

And I know Mr. Knight does want to address the Court.

THE COURT: Yes, sir. Please stay seated. It's easier to speak into the microphone.

THE DEFENDANT: How are you doing today, sir?

THE COURT: I'm going great. How about you?

THE DEFENDANT: First of all, none of those charges are true that the Government brung up. I didn't commit none of those crimes that they said. I don't know where they get those charges from. I don't recall any of those charges and I have not committed any of those charges.

THE COURT: You got 40 convictions.

THE DEFENDANT: Yeah, but those charges she just brung up, that's not true. I never put a screwdriver to a person neck or bang somebody in the head with a table leg. I never did none of that stuff. I never had a violent crime in my life. So all

that what she said that I did is not true. I don't know where she get that from and she can't prove that.

Okay. Second of all, the Government never proved that I made a statement saying that I had invited the officers to my house to search and I had guns and I got drugs in my house. That was never proven. Okay. I filed a motion to vacate the judgment, the guilty verdict, which I asked my lawyer to adopt which he refused to adopt saying that it was frivolous. I asked him to adopt that based on the fact that it was never proven. Okay. The Government -- it's the Government burden to prove that I made that statement and they did not prove that. Okay.

Second of all, okay, I didn't want to go to trial and said that I own up to the drugs being mine. That wasn't none of my idea, that's not something that I agreed with. Okay. I thank Mr. Christian Dunham for what he doing for me, but some of these things that been argued in court is not something that I agree with. There's some very important facts that would have freed me. Okay. First of all, she said that I told her that it was a gun and drugs in the apartment, but in the affidavit the officer who contact me said they need to talk to me, officers (unintelligible) told them that I had drugs. There's two different peoples that I supposedly told I got drugs and guns in my apartment. That was never proven.

Okay. In the burglary, they said that I walked in the building, the camera caught me going to the elevator going up to

the third floor, going to Room 303, running out of Room 303, but then again, she says there's no cameras in the building. And she never identified a suspect. They're going by a tag number. A tag number that they pulled up and said it was my tag, but it never identified me as the person that supposed to have did these burglaries. Okay.

Now, I was forced to go to trial. Okay. I was forced to go to trial, you know what I'm saying, with two weeks of this guy, this attorney representing me. Two weeks he been my attorney for -- he had my case, got my -- two weeks we into trial. Okay. I filed -- the motion that he filed on my behalf, I asked him not to file that. Okay. There's supporting facts in my case that could have been argued in that motion. He didn't want to file that. Okay.

Everything that's going on, it's making me look like I'm a bad guy to you, and it's okay. But I understand. It's their job to make me look bad.

THE COURT: Mr. Knight, you told me that you never held a screwdriver to anybody's neck. On June 7, 1989, police officers observed the victim standing next to her broken down vehicle. Knight approached the vehicle, picked up a screwdriver from the seat of the victim's car and held it at her throat like you were going to stab her. Knight snatched a gold chain from the victim's neck, punched her several times in the face before fleeing. Officers apprehended Knight a block away where Knight

stated I know I'm dead wrong, the lady didn't deserve that. You were actually convicted of that and you got 12 years imprisonment with 121 days credit time served, and then he were released seven years later.

THE DEFENDANT: Sir, that never happened. Okay. I have a mental problem. Okay. A lot of times when I be coming to these courts, okay, these lawyers and these prosecutors, they manipulate my -- I don't even know what they be saying sometimes. I don't understand what goes on in court sometimes. Half the time when they be arguing, I don't understand what they arguing. Okay. I never did anything like that. I never hold a screwdriver to anyone's neck and try to rob or snatch a gold chain or anything like that. That's not me. Okay. I'm not a violent person. I admit that I have -- in the past I have some drug problems. I did. Okay. But this case here, this case here, falsified statements, fabricating evidence. The officer falsified the statement in the affidavits and they fabricated the evidence that they have against me.

THE COURT: Well, Mr. Knight, you certainly have the right to appeal this sentence and you will be given an opportunity to do that and you'll be able to make that argument then. But I'm not going to overturn the jury's verdict. The jury listened to all the facts and they convicted you of -- as a matter of fact, they did not convict you of Count 2 of the indictment, but they convicted you as to Count 1 and the -- what

was the --

MS. LANDON: Simple possession, Your Honor.

THE COURT: And simple possession under Count 2 as opposed to sale. And they also did not find you guilty of Count 3. So they were kind of discriminating in what they found and so, you know, you can appeal that. But this not the place for that.

THE DEFENDANT: Okay. Well during trial, I tried to bring my arguments to you about me going to trial with a lawyer that's only been my lawyer for two and a half weeks. I tried to tell you at trial I didn't understand what was going on. You don't let me finish saying what I was saying -- was trying to say to you, because the fact that okay, he don't even know what case -- there's arguments that he could have brunged up that he doesn't brunged up.

THE COURT: I understand in your judgment he did not do a good job. I was there and I observed him, and I did think he did do a reasonable job under the circumstances.

THE DEFENDANT: Okay. Then why didn't he adopt my motion?

THE COURT: I don't know, and I can tell you that that's something that you can take up on appeal. But this isn't the time or place for it. This is a time for you to tell me what you think a fair sentence is and why you think that you should get a lesser sentence. The fact that you didn't do it

just indicates to me that you do not accept responsibility which is something that already has been determined. I know that you're not accepting responsibility. That's fine. You don't have to. You take it up on appeal, the Eleventh Circuit will listen. After the direct appeal, you probably will do a 2255 which is a motion attacking the competence of your lawyer and a lot of other things. You can do all of that. But this isn't the time or place. This is the time to tell me what you believe, given the circumstances which is that you were found guilty of two separate offenses by the jury.

THE DEFENDANT: Okay. Then I can give you that then.

One of the reasons, okay, I have mental issues that's slowly decreasing as I've been incarcerated. I'm not getting the proper treatment in here. Okay. You're saying that you can probably send me to a mental health place, but being incarcerated for a period of time is not going to help me.

I have physical issues that cause me -- where I would not get the proper medication to help me to cope with the pain that I go through on a daily basis. Okay. It's a lot of issues that I have that I can address to the Court. But, you know, there's a problem. There's a problem with my case.

THE COURT: Mr. Knight, the problem is that every -- virtually every single person that sits in your chair and is about to be sentenced has all sorts of problems that they have and almost all of them are getting sicker by the day. And they

have terrible health problems that all of a sudden didn't stop them from committing the crime, but it stops them -- they can't go to jail because of it. I hear this a lot, Mr. Knight. I'm sorry, but it's -- you know, it's a little hard to take after a while. I hear it almost every day from people telling me how sick they are, how they can't go to jail because -- fill in the blank. Their back hurts, their head hurts, they're mentally not well, they're physically not well, they're going to drop dead if they go to jail. I mean, I hear all the time and I do understand that there are circumstances that -- you know, I do understand that you do have some physical problems. I can't really deal with all of that, but all I can do is do what I believe is a fair sentence. In your case, you have a lot, a lot of history.

THE DEFENDANT: Judge me by my history. That's what I'm trying to say all the while. All those things I haven't done. I haven't done all those things, you know. But you judge me -- you're not judging me by the crime that's been committed, but you judge me by the history.

THE COURT: No, that's not true. I am judging you by the crime.

THE DEFENDANT: That's what you bringing up to me right now, my history. You're not saying anything about the crime that been committed, supposed to be have been committed now.

THE COURT: How about I just told you that you had all

these glassine envelopes, that you had the drugs, that you had the gun. How about that?

THE DEFENDANT: Okay.

THE COURT: And the money.

THE DEFENDANT: Okay. Did the Government prove that?

THE COURT: I thought they did. The jury thought they did.

THE DEFENDANT: Oh, man.

THE COURT: All right, sir.

Well, thank you very much. Is there anything further from either side?

MS. LANDON: Your Honor, if I just may briefly respond to Defense counsel's arguments. It would be very brief.

THE COURT: Very brief.

MS. LANDON: Yes.

THE COURT: Go.

MS. LANDON: Your Honor, I believe -- the Government believes that *United States versus Shaw* is directly on point to this case. The Defendant made several arguments about the fact that the Defendant -- that we counted the loitering charges and all of that in the motion for upward variance. But in *United States versus Shaw*, in addition to all of the burglaries and all of the crimes that the Defendant engaged in, the Eleventh Circuit also stated "as the final brush stroke on the portrait of Shaw's contempt for the law, the PSR also noted his eight

traffic convictions and suspended driver's license; so therefore, taking into consideration the entirety of the Defendant's criminal history is appropriate".

Also in *United States versus Shaw*, the defendant, as evidenced in Footnote Number 1, also suffers from bipolar disease that was diagnosed at a very early age. The PSI states, which came from the defendant himself, that he had received therapy, his mother took him to therapy when he was young and the court in *Shaw* which is again, directly on point, went from a 30 to 37 month sentence, which is lower than here, all the way to the top of the guideline range of 120 months.

So in light of *United States versus Shaw*, the Government believes that a sentence of eight years is perfectly reasonable considering the Defendant's criminal history and the lack of acceptance of responsibility.

THE COURT: Thank you, ma'am.

Mr. Dunham? Anything further?

MR. DUNHAM: No. Just to remind the Court to also sentence him on the possession charge.

THE COURT: Yes. Count 1 and Count 2.

MR. DUNHAM: Yes, Your Honor.

THE COURT: The Court has considered the statements of all the parties, the presentence report which contains the advisory guidelines and the statutory factors as set forth in 18 USC section 3553(a).

It is the finding of the Court that the Defendant is not able to pay a fine.

It is the judgment of the Court that the Defendant, Alex Knight, is committed to the Bureau of Prisons to be imprisoned for 72 months. This sentence consists of 72 months as to Count 1 and 12 months as to Count 2 to be served concurrently.

Upon release from imprisonment, the Defendant shall be placed on supervised release for a term of three years. This term consists of three years as to Count 1 and one year as to Count 2 to be served concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the Defendant shall report in person to the Probation Office in the district to which the Defendant is released. While on supervised release, the Defendant shall comply with the mandatory and standard conditions of supervised release which include not committing any crimes, prohibition from possessing a firearm or other dangerous device, not unlawfully possessing a controlled substance, cooperation in the collection of DNA.

The Defendant shall also comply with the following special conditions:

Substance abuse treatment, mental health treatment, permissible search, no new debt restriction, self-employment restriction and unpaid restitution, fines or special assessments

as noted in Part G of the presentence report.

It is further ordered the Defendant shall immediately pay to the United States a special assessment of $100 as to Count 1 and $25 as to Count 2 for a total of $125.

The total sentence: 72 months imprisonment, Three years supervised release, $125 special assessment.

Now that sentence has been imposed, does the Defendant or his counsel object to the Court's finding of fact or the manner in which sentence was pronounced?

MR. DUNHAM: Your Honor, we do object to the guideline enhancement under 2K2.1, the four level enhancement, and we also object to the upward variance.

THE COURT: All right. You have the right to appeal the sentence imposed. Any notice of appeal must be filed within 14 days after the entry of the judgment. If you're unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis.

I will recommend to the Bureau of Prisons that he be screened for mental health and medical conditions and be sent to an appropriate medical facility. But if he is not in a medical facility, to be incarcerated as close to South Florida as possible.

The Court recommends also the Defendant be screened for substance abuse problems and be referred to participate in an appropriate drug education treatment program by the Bureau of

Prisons. This may include placement in the Residential Drug Abuse Treatment Program, that is the 500-hour drug treatment program, at a designated Bureau of Prisons institution.

We'll be in recess.

COURT SECURITY OFFICER: All rise.

(PROCEEDINGS CONCLUDED)

* * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

7/4/2018 /s/ Dawn M. Savino

Date DAWN M. SAVINO, RPR

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER