No.:

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IN THE UNITED STATES

SUPREME COURT

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ROBERT LEE SWINTON JR.

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

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On petition for a Writ of Certiorari to

THE SECOND CIRCUIT COURT OF APPEALS

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# APPENDIX FOR THE PETITIONER

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Robert L. Swinton Jr. PRO SE

Seneca County Jail

6150 State Route 96

Romulus, N.Y. 14541

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# MANDATE

18-101
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## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

## SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of December, two thousand nineteen.**

**PRESENT:**

**DENNIS JACOBS,**
**SUSAN L. CARNEY,**
**MICHAEL H. PARK,**
***Circuit Judges.***

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**United States of America,**

***Appellee,***

**v.**

**No. 18-101**

**Robert L. Swinton, Jr., AKA Scooby,**

***Defendant-Appellant.***

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**FOR APPELLEE:** Tiffany H. Lee, Assistant United States Attorney, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, NY.

**FOR DEFENDANT-APPELLANT:** Robert Lee Swinton, Jr., pro se, Loretto, PA (Robert Rosenthal, Esq., standby counsel, New York, NY.)



Appendix A

Appeal from a judgment of the United States District Court for the Western District of New York (Wolford, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment entered on December 28, 2017, is **AFFIRMED IN PART** and **VACATED IN PART.**

Appellant Robert L. Swinton, Jr., pro se, was indicted on five counts: (1) Conspiracy to Manufacture and Possess with Intent to Distribute Cocaine and Cocaine Base, in violation of 21 U.S.C. §§ 841 & 846; (2) Possession of Cocaine with Intent to Distribute, in violation of 21 U.S.C. § 841; (3) Use of Premises to Manufacture, Distribute and Use Controlled Substances, in violation of 21 U.S.C. § 856 and 18 U.S.C. § 2; (4) Possession of Firearms in Furtherance of Drug Trafficking Crimes, in violation of 18 U.S.C. § 924(c); and (5) Felon in Possession of Firearms and Ammunition, in violation of 18 U.S.C. §§ 922(g) & 924(a)(2). He was convicted on all but Count One, the conspiracy count. On appeal, he challenges his conviction on those four counts and his sentence. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

## I. Speedy Trial Issue

First, Swinton argues that his constitutional right to a speedy trial was violated. We review the District Court's findings of fact as they pertain to such a challenge for clear error, and its legal conclusions *de novo*. *United States v. Lynch*, 726 F.3d 346, 351 (2d Cir. 2013). To determine if a defendant's Sixth Amendment right to a speedy trial has been violated, a court must consider the "'[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *United States v. Black*, 918 F.3d 243, 254 (2d Cir. 2019) (quoting *Barker v. Wingo*,

407 U.S. 514, 530 (1972)). The *Barker* Court emphasized that none of the four factors was either "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533. Rather, it held that "they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

**A. Length of Delay**

The length of delay is considered a "triggering mechanism": if the delay is not sufficiently long, there is no need to consider the other factors. *Id.* at 530. There is no bright-line rule for when a delay begins to infringe a defendant's speedy trial right; when unlawful infringement starts depends "upon the peculiar circumstances of the case." *Id.* at 530-31. Once the fact of a sufficiently long delay has been established, "the burden is upon the government to prove that the delay was justified and that appellant['s] speedy trial rights were not violated." *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979).

Almost 57 months passed from the time Swinton was arrested in mid-October 2012 until his trial began in early July 2017. He was detained throughout that time. The Government concedes that "the almost five years' time that elapsed between Swinton's arrest and trial is significant, and cuts in favor of Swinton." Appellee's Br. 40. The length of the delay is sufficient to trigger a speedy trial inquiry, and "weighs heavily against the government." *United States v. Tigano*, 880 F.3d 602, 612 (2d Cir. 2018).

**B. Reasons for Delay**

The Supreme Court has explained that "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government," while "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. at 531. We

have ruled that "[t]his factor must take into account the affirmative duty of the district court and the government to monitor the progress of a criminal case toward disposition and to take steps to avoid unnecessary delay where possible." *Tigano*, 880 F.3d at 613.

The pre-indictment delay in Swinton's case was almost entirely tied to plea negotiations and Swinton's investigation of and challenge to his Florida conviction. Between Swinton's October 2012 arrest and July 2017 trial, defense counsel, the Government, and the magistrate judge all requested adjournments, but the defense sought 21 continuances and adjournments during that time. Also during that period, Swinton filed numerous motions to which responses were filed, hearings held, and decisions rendered. At a November 2017 hearing, the District Court determined the responsibility for the delay was "overwhelmingly" Swinton's.

On appeal, Swinton argues that all of the extensions granted while he and the Government were negotiating a plea agreement should be "counted against the government." Appellant's Br. 30. We have ruled that "[g]ood faith plea negotiations by a defendant should not be equated to a waiver of speedy trial rights, and, under [certain] circumstances, the government must assume responsibility for the risk of institutional delays where the bargain ultimately is unsuccessful." *New Buffalo Amusement*, 600 F.2d at 378. Even if the six-month plea negotiation period is counted against the Government, however, the primary responsibility for the remaining 51 months' delay lies with Swinton because it arose from his challenges to his Florida conviction, his changes of counsel, and his filing of an omnibus motion, which included a complex motion to suppress. Adjudication of that motion, with its many supplemental filings and hearings, took much of the time between issuance of the indictment and the start of the trial. Accordingly, this factor cuts in favor of the Government. *See Tigano*, 880 F.3d at 613.

**C. The Manner of Defendant's Assertion of the Right**

The manner in which a defendant asserts his speedy trial right—the third *Barker* factor—is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32. Swinton first invoked his right to a speedy trial in the Affidavit of Due Process Violations that he filed on March 10, 2017, asserting that he had "continually" requested that his counsel not seek any further postponements. Swinton's Aff. of Ineffective Assistance of Counsel at 3, *United States v. Swinton*, No. 15-cr-6055 (W.D.N.Y. Mar. 10, 2017), ECF No. 111. Swinton attached to that motion a letter to his counsel dated December 23, 2016, in which he wrote that he wanted to proceed immediately to trial. The docket does not indicate whether any of the District Court, magistrate judge, or Government were aware that Swinton had declared that desire before March 10, 2017, when he filed his pro se motion and Affidavit.

In *Tigano*, the defendant "requested his speedy trial so frequently and vociferously" that we found it "simply inconceivable the government was not 'put on notice' that this issue would resurface if Tigano's speedy trial rights were not protected." 880 F.3d at 617. The same cannot be said for Swinton, who raised the issue to the court for the first time 53 months after his arrest and who therefore did not frequently and vociferously assert his right to a speedy trial. This factor cuts in favor of the Government.

**D. Prejudice to the Defendant**

The final *Barker* factor, prejudice, should be analyzed "in the light of the interests of defendants which the speedy trial right was designed to protect," namely, "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the

possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The last consideration is "the most serious." *Id.*

Swinton's 57 months of pretrial incarceration were certainly "oppressive," simply by virtue of the fact that he was not at liberty. In addition, a December 2016 letter from prison to his counsel plausibly represents that he experienced anxiety. Swinton asserts further that his defense was impaired by the delay because, by the time of trial, Rochester Police Department ("RPD") Investigator Ed Bernabei could not answer "[m]ost" of Swinton's questions "due to the lapse of time," Appellant's Reply Br. 19, and Swinton's co-defendant, David Jones, could have testified on Swinton's behalf had trial happened earlier. Jones, however, who died a month before trial in an unrelated homicide, had pleaded guilty to being in a drug conspiracy with Swinton; so it is therefore unlikely that Jones would have helped. Bernabei's failure to recall a few details raised on cross-examination—such as whether Bernabei collected evidence from Swinton's jacket and in which bedroom Bernabei recovered marijuana—cannot reasonably be said to have meaningfully impaired Swinton's defense. Thus, although Swinton may have suffered anxiety during his pretrial incarceration, which was undeniably long, there is no evidence that the delay meaningfully impaired his defense.

**E. Balancing Test**

The four *Barker* factors "must be considered together," and "courts must . . . engage in a difficult and sensitive balancing process." *Barker*, 407 U.S. at 533. Here, the first prong, length of delay, weighs heavily in favor of Swinton; however, the second prong, reason for delay, and third prong, timely assertion of the right, cut in favor of the Government. The last prong, prejudice to the defendant, slightly favors Swinton. Assessing these factors *de novo*, the District Court did not

err in ruling that Swinton's Sixth Amendment right to a speedy trial had not been violated.

**F. Speedy Trial Act**

Swinton also alleges that this delay violated the Speedy Trial Act (the "Act"). The Act mandates that a criminal defendant be brought to trial within "seventy days from the filing date (and making public) of the information or indictment." 18 U.S.C. § 3161(c)(1); *see also United States v. Bert*, 814 F.3d 70, 78 (2d Cir. 2016). The Act excludes from the mandated 70-day indictment-to-trial period delays stemming from certain enumerated events. *See* 18 U.S.C. § 3161(h); *see also Bert*, 814 F.3d at 78. We review for clear error the District Court's findings of fact as they pertain to a violation of the Act; we review *de novo* its legal conclusions. *Lynch*, 726 F.3d at 351.

We conclude that the Government did not violate Swinton's rights under the Act. The 30-month period between Swinton's October 2012 arrest and the filing of the April 2015 indictment is excluded because the Act's clock begins to run after the indictment is filed, not before. *See* 18 U.S.C. § 3161(c)(1). In total, 23 days cognizable under the Act elapsed from the day Swinton was indicted until the day his trial began. These were two days from April 21, 2015 through April 22, 2015; four days from October 13, 2016 through October 16, 2015; fifteen days from May 16, 2017 through May 30, 2017; and two days from July 8, 2017 through July 9, 2017. Accordingly, the District Court did not err in its ruling.

**II. Identity of the Confidential Source**

Swinton argues that the District Court abused its discretion in denying his motion to require the government to disclose the identity of the confidential source ("CS") who was referred to in the search warrant. We have long held that "[t]he government is not generally required to disclose

the identity of confidential informants." *United States v. Fields*, 113 F.3d 313, 324 (2d Cir. 1997). Disclosure obligations depend on "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro v. United States*, 353 U.S. 53, 62 (1957). In general, "[t]he defendant bears the burden of showing the need for disclosure of an informant's identity and to do so must establish that, absent such disclosure, he will be deprived of his right to a fair trial." *Fields*, 113 F.3d at 324 (internal citation omitted). "The defendant is generally able to establish a right to disclosure where the informant is a key witness or participant in the crime charged, someone whose testimony would be significant in determining guilt or innocence." *United States v. Saa*, 859 F.2d 1067, 1073 (2d Cir. 1988) (internal quotation marks omitted). "Speculation that disclosure of the informant's identity will be of assistance is not sufficient to meet the defendant's burden . . . ." *Fields*, 113 F.3d at 324. The decision whether to order disclosure lies within the sound discretion of the district court. *Id.*

At trial, the Government did not call the CS to testify nor did it rely on any evidence about the CS to establish Swinton's guilt. The CS's identity was therefore not material to the defense, and we discern no abuse of discretion in the District Court's denial of Swinton's request to learn the CS's identity. *See Saa*, 859 F.2d at 1073 ("[D]isclosure of the identity or address of a confidential informant is not required unless the informant's testimony is shown to be material to the defense.").

### III. *Batson* Issue

Swinton contends next that the District Court erred in denying his *Batson* motion. To establish a *Batson* violation, a defendant asserting discrimination must first make a prima facie

showing that a prosecutor's use of peremptory challenges constituted discrimination against jurors who belong to minority groups. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986). Second, if the defendant makes a prima facie showing, "the burden shifts to the [Government] to come forward with a neutral explanation for challenging [minority] jurors." *Id.* at 97. "A neutral explanation in [this] context . . . means an explanation based on something other than the race of the juror." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). Third, if the Government provides such an explanation, the district court then has "the duty to determine if the defendant established purposeful discrimination." *Batson*, 476 U.S. at 98. We review for abuse of discretion the trial court's determination under *Batson* as to whether a party has established a prima facie case. *United States v. Martinez*, 621 F.3d 101, 109 (2d Cir. 2010). We review for clear error its ruling on the issue of discriminatory intent, a mixed question of law and fact. *Id.*

The District Court found "very credible" the Government's race-neutral reasons for striking the two prospective jurors whose dismissal Swinton challenged. Gov't App'x at 367. Justifying its strikes, the Government pointed to reservations admitted by one prospective juror about whether the "system could even be fair" and whether his fellow jurors were implicitly biased, even after the court advised that it would instruct the jury panel that race could not factor into any of their deliberations. Gov't App'x at 362-63. The Government expressed concern that having a juror who did not believe that the opinions of his fellow jurors were well informed would be "very detrimental to the jury process." Gov't App'x at 363. The District Court reasonably accepted this explanation.

As to the other juror, who worked as a drug counselor, the Government observed that she exhibited a "general detachment . . . in terms of her concern" about individuals with substance

abuse problems whom she counseled, and her sister was employed by the Ontario County Public Defender's Office. Gov't App'x at 363-64. The District Court considered the totality of the circumstances and concluded that Swinton had not carried his burden of showing by a preponderance of the evidence that the government had unlawfully discriminated against the proposed juror on account of race. *See Martinez*, 621 F.3d at 109.

For these reasons, we conclude that the District Court did not clearly err by denying Swinton's *Batson* challenges.

## IV. Indictment Challenge

Swinton maintains that the indictment was impermissibly duplicitous because Count 3 (Use of Premises to Manufacture, Distribute and Use Controlled Substances, in violation of 21 U.S.C. § 856) and Count 4 (Possession of Firearms in Furtherance of Drug Trafficking Crimes, in violation of 18 U.S.C. § 924(c)) each reference 18 U.S.C. § 2, which provides for punishment of someone who aids or abets the commission of a substantive crime.

"An indictment is impermissibly duplicitous where: 1) it combines two or more distinct crimes into one count in contravention of Fed. R. Crim. P. 8(a)'s requirement that there be 'a separate count for each offense,' and 2) the defendant is prejudiced thereby." *United States v. Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001). A claim that an indictment is duplicitous is "generally deemed to be waived if not properly raised before trial." *United States v. Berardi*, 629 F.2d 723, 729 (2d Cir. 1980); *see also* Fed. R. Crim. P. 12(b)(3)(B). Waiver of such a claim generally applies if "the alleged duplicitous character of the counts appears on the face of the indictment." *Sturdivant*, 244 F.3d at 76 (emphasis and internal quotation marks omitted).

Swinton did not present his argument that the indictment was duplicitous before trial. He

raised it in his post-trial motions under Rule 29 and 33. The basis for the duplicitousness—the indictment's joinder of the aiding and abetting violation to the substantive charges made in Counts 3 and 4—appeared on the face of the indictment. We therefore deem this argument to be waived. Even if the Court were to treat Swinton's contentions as not waived, they would be unavailing. The aiding and abetting statute, 18 U.S.C. § 2, does not in itself define a crime. *United States v. Campbell*, 426 F.2d 547, 553 (2d Cir. 1970). Accordingly, "[t]here can be no violation of 18 U.S.C. § 2 alone; an indictment under that section must be accompanied by an indictment for a substantive offense." *Id.* Joining aiding and abetting to a substantive crime is therefore not duplicitous.

## V. Challenge to Extraction of Text Messages from Cellphone

Swinton asserts next that the District Court erred by denying his motion to suppress the text messages and nude pictures extracted from his cellphone. He argues that the extraction exceeded the scope of law enforcement's search warrant.

In reviewing a denial of a motion to suppress, we assess a district court's "conclusions of law *de novo* and its factual findings for clear error, viewing the evidence in the light most favorable to the government." *United States v. Ramos*, 685 F.3d 120, 128 (2d Cir. 2012). In particular, "[w]here the district court's factual findings are premised upon credibility determinations, we grant particularly strong deference to those findings." *United States v. Mendez*, 315 F.3d 132, 135 (2d Cir. 2002).

At the April 2016 evidentiary hearing that focused on this claim, RPD Commander Joseph Morabito testified that he believed the search was permitted by the warrant's language, which authorized the search of "[a]ny evidence that tends to demonstrate that a drug related offense was committed or that a particular person participated in the commission of such offense," including

"records reflecting the names, addresses and telephone numbers of persons from whom Cocaine is purchased and sold, including but not limited to[] address and telephone books, including those contained in cellular phones or Personal Data Assistants and telephone bills." Ex. B to Mot. for Bill of Particulars, *United States v. Swinton*, No. 15-cr-6055 (W.D.N.Y. July 6, 2015), ECF No. 59-2. He arrived at that conclusion, he explained, because, based on his experience, he knew that drug transactions were often "made over text messages"; that each text message is linked to a phone number; and that those phone numbers are often linked to an individual identified in the cellphone's "contacts." Tr. of Apr. 4, 2016 Evidentiary Hearing at 18-20, *United States v. Swinton*, No. 15-cr-6055 (W.D.N.Y. Apr. 18, 2016), ECF No. 84.

In October 2016, the magistrate judge recommended that the court deny Swinton's motion to suppress. She found that Commander Morabito credibly testified that he "reasonably and in good faith construed the language of the warrant to authorize the search of Swinton's cellular phone for text messages," and, therefore, the good-faith exception recognized in *United States v. Leon*, 468 U.S. 897 (1984), applied. Report & Recommendation at 8, *United States v. Swinton*, No. 15-cr-6055 (W.D.N.Y. Oct. 21, 2016), ECF No. 94. The District Court ultimately denied Swinton's suppression motion, reasoning both that the plain language of the warrant encompassed the text messages and that the good faith exception of *Leon* applied.

The magistrate judge's factual findings were premised upon its favorable credibility determination regarding Commander Morabito's explanation. As a result, "strong deference" is due to her recommendation to apply *Leon*'s good-faith exception. *Mendez*, 315 F.3d at 135. The District Court did not abuse its discretion in adopting that recommendation.

## VI. Rule 33 Argument: Admission of Bowen's Testimony

Swinton challenges the District Court's denial of his Rule 33 motion for a new trial. He argues that the testimony of Danielle Bowen regarding the conspiracy charge (as to which Swinton was acquitted) was "irrelevant, inflammatory, inadmissible and highly prejudicial to the remaining counts of the indictment." Appellant's Br. 44. The testimony caused "retroactive misjoinder," he asserts, and denied him a fair trial by harmfully "spill[ing] over" from one count to the others. *Id.*

We review a district court's denial of a Rule 33 motion for abuse of discretion. *United States v. DiTomasso*, 932 F.3d 58, 70 (2d Cir. 2019). "A defendant raising a claim of prejudicial spillover bears an extremely heavy burden." *United States v. Friedman*, 854 F.2d 535, 563 (2d Cir. 1988). "The concept of prejudicial spillover . . . requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." *United States v. Hamilton*, 334 F.3d 170, 182 (2d Cir. 2003). We have formulated a three-part test for identifying prejudicial spillover:

> (1) whether the evidence introduced in support of the vacated count was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts, (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong.

*Id.* (internal quotation marks omitted).

The term "retroactive misjoinder" refers to circumstances in which (as we have explained) the "joinder of multiple counts was proper initially, but later developments—such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of fewer than all convictions—render the initial joinder improper." *Id.* at 181 (internal quotation marks omitted). To obtain a new trial because of retroactive misjoinder, the defendant "must show compelling prejudice." *Id.* at 182 (internal quotation marks omitted). He may do so by demonstrating

"prejudicial spillover from evidence used to obtain a conviction [that is] subsequently reversed on appeal." *Id.* (alteration and internal citation omitted).

Bowen's testimony that Swinton and Jones sold cocaine from Swinton's residence and that they both handled firearms there was highly relevant, not only to whether they engaged in a conspiracy, but also to whether Swinton possessed cocaine with intent to distribute; whether he used the downstairs apartment for the purpose of manufacturing, distributing, or using controlled substances; and whether he possessed firearms. Swinton did not argue that the evidence presented on Counts 2 through 4—the text messages from Swinton's cellphone demonstrating his willingness to sell drugs, and pictures of the recovered drugs and related paraphernalia—was less inflammatory than Bowen's testimony, although it, too, served as compelling evidence that Swinton was involved in the sale of drugs. *See id.* at 182 (holding that the first prejudicial spillover factor "is not met where 'the evidence that the government presented on the reversed counts was, as a general matter, no more inflammatory than the evidence that it presented on the remaining counts.'" (quoting *United States v. Morales*, 185 F.3d 74, 83 (2d Cir. 1999)). That Swinton was acquitted on Count 1 but found guilty on the remaining counts indicates that the guilty verdicts were *not* affected by prejudicial spillover. *Id.* at 183 ("[N]o case has held that a defendant was entitled, on the ground of retroactive misjoinder, to a new trial on the counts of conviction simply because the jury found the government's proof on other counts unpersuasive."). Accordingly, we rule that the District Court did not abuse its discretion in denying Swinton's motion for a new trial on these grounds.

## VII. Jurisdictional Element of Count 5

Swinton argues that the Government lacked jurisdiction to prosecute Count 5 of the

indictment (Felon in Possession of a Firearm) because it did not satisfy the crime's interstate commerce jurisdictional element. He observes that, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court ruled that the Government "does not have jurisdiction over a weapon for an eternity." Appellant's Br. 54. The firearms recovered from Swinton's residence, he argues, "left commerce" once they entered New York. *Id.* at 54-56.

The felon in possession of a firearm statute makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). To satisfy the statute's interstate commerce requirement, "only a minimal nexus with interstate commerce is necessary." *United States v. Gaines*, 295 F.3d 293, 302 (2d Cir. 2002). We have approved jury instructions explaining that the statute's interstate commerce element is met "if the firearm in question previously had traveled in interstate commerce"; it is sufficient, we said, "that the firearm allegedly possessed or received by the defendant had at some point previously traveled across a state line." *United States v. Carter*, 981 F.2d 645, 648 (2d Cir. 1992) (internal quotation marks omitted). A panel of this Court more recently reaffirmed that, "when interpreted to require only a 'minimal nexus' between the defendant's possession of a firearm and interstate commerce, [§ 922(g)] is constitutional and does not violate *Lopez*." *United States v. Estremera*, 282 F. App'x 935, 938 (2d Cir. 2008) (summary order); *see also United States v. Santiago*, 238 F.3d 213, 217 (2d Cir. 2001) (considering, on plain error review, and deciding constitutional question).

Because Swinton did not object to the relevant jury instruction before the jury retired to consider its verdict, a plain error standard of review applies. *United States v. Botti*, 711 F.3d 299,

308 (2d Cir. 2013). We therefore may reverse only if the instruction contains "(1) error, (2) that is plain, and (3) that affect[s] substantial rights." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal quotation marks omitted).

Bureau of Alcohol Tobacco Firearms and Explosives ("ATF") Special Agent William Farnham testified at Swinton's trial that the rifle and revolver seized from Swinton's residence were manufactured in New Hampshire and Brazil, respectively. That testimony was sufficient to establish the "minimal nexus with interstate commerce" that is required to invoke § 922(g). *Gaines*, 295 F.3d at 302. Therefore, the District Court did not plainly err by instructing the jury that Swinton should be convicted of the felon-in-possession count if the Government proved "that at some point prior to [the] defendant's possession, the firearms and ammunition had traveled in interstate or foreign commerce." Tr. of July 19, 2017 Trial Proceedings at 1002, *United States v. Swinton*, No. 15-cr-6055 (W.D.N.Y. Oct. 12, 2018), ECF No. 282. Swinton's argument fails.

**VIII. Substantive and Procedural Reasonableness of the Sentence**

Finally, Swinton challenges his sentence. On a sentencing challenge, we review a district court's relevant factual findings for clear error and its application of the Guidelines to the facts *de novo*. *United States v. Loudon*, 385 F.3d 795, 797 (2d Cir. 2004).

First, Swinton argues that his 1994 Florida conviction for armed robbery should not be considered a "crime of violence" under U.S.S.G. § 4B1.1 & -.2, the career offender Guideline. But the Eleventh Circuit recently ruled that a Florida conviction for armed robbery qualified as a crime of violence under § 4B1.2(a), and on that basis affirmed a defendant's career offender sentence under § 4B1.1(a). *United States v. Ochoa*, 941 F.3d 1074, 1106-08 (11th Cir. 2019). We defer to that ruling, and the Eleventh Circuit's holding forecloses Swinton's argument concerning his

Florida conviction. The unpublished opinion in *Lee v. United States*, No. 16-cv-6009, No. 08-cr-6167, 2016 WL 1464118, at *5-7 (W.D.N.Y. Apr. 12, 2016), which noted in dicta that a defendant's Florida robbery conviction could not be a predicate offense under the Armed Career Criminal Act ("ACCA"), and on which Swinton relies, does not control, particularly in light of *Ochoa*.

Next, he asserts that his 1999 New York conviction for attempted criminal sale of a controlled substance in the third degree should not be considered a predicate controlled-substance offense under the career offender Guideline.[1] This question is an open one in the Second Circuit.

Several of our sister circuits, including the Sixth Circuit in a recent *en banc* opinion, have held that "[t]he Guidelines' definition of 'controlled substance offense' does not include attempt crimes." *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (en banc); *see also United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018) ("If the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review."). As the *Havis* court explained, "the plain language of § 4B1.2(b) says nothing about attempt crimes." 927 F.3d at 385. The government urged the court to look to the commentary, which states: "'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2(b) cmt. n.1; *cf. United States v. Moore*, 916 F.3d 231, 237 (2d Cir. 2019) ("Commentary and application notes in the Guidelines must be given

[1] Although an argument could be made that Swinton waived this argument, we have long held that pro se litigants must be accorded "special solicitude." *E.g.*, *Ruotolo v. IRS*, 28 F.3d 6, 8 (2d Cir. 1994); *see also United States Sadler*, 765 F. App'x 627, 630-31 (2d Cir. 2019) (summary order) (considering pro se litigant's challenge to sentence even though it was not raised until reply brief).

controlling weight unless they: (1) conflict with a federal statute, (2) violate the Constitution, or (3) are plainly erroneous or inconsistent with the Guidelines provision they purport to interpret."); *United States v. Jackson*, 60 F.3d 128, 131 (2d Cir. 1995) (characterizing application note as "authoritative"). But "commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment," and thus—under controlling Supreme Court precedent—it "has no independent legal force." *Havis*, 927 F.3d at 386 (citing *Stinson v. United States*, 508 U.S. 36, 44-46 (1993)).

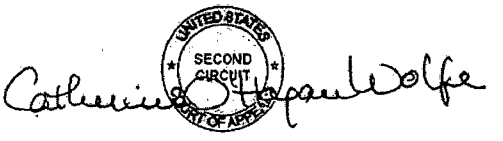
Two other Circuits have now determined that the Application Note to § 4B1.2 is not a mere "*interpretation*" of the Guideline, but an attempt to actually change the plain text "to *add* an offense not listed in the guideline." *Id.* (emphasis in original). Where "[t]he guideline expressly names the crimes that qualify as controlled substance offenses . . . [and] none are attempt crimes," but "the Commission knows how to include attempt crimes when it wants to—in subsection (a) of the same guideline, for example," "[t]he Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." *Id.* at 386-87; *see also Winstead*, 890 F.3d at 1091-92 (observing that USSG § "4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses").

Whether the career offender Guideline applies in Swinton's case is a serious question with serious consequences, namely thirteen to sixteen years of incarceration. *Cf. Winstead*, 890 F.3d at 1090 (exercising *de novo* review over textual legal question whether attempt crimes constitute controlled substance offenses under career offender Guideline). Neither the parties nor the District Court have fully addressed the question in this case. They should have the opportunity to do so before we opine on the issue. Accordingly, we remand for resentencing, with directions that the

District Court consider again whether, in light of the concerns addressed in *Havis* and *Winstead*, the career offender Guideline applies to Swinton on his criminal record. Finally, our decision obviates the need to address Swinton's additional arguments regarding his sentence.

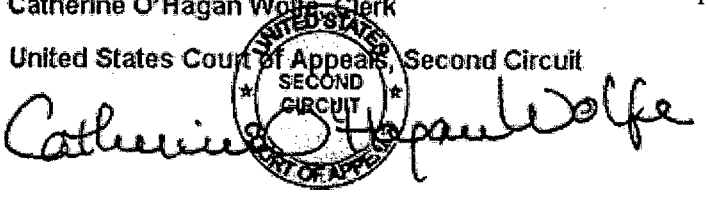
We have considered Swinton's remaining arguments and conclude that they have no merit. Accordingly, we **AFFIRM IN PART** and **VACATE IN PART** the judgment of the District Court.

FOR THE COURT:
Catherine O-Hagan Wolfe, Clerk of Court






A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

SCW/jac (18328)



# UNITED STATES DISTRICT COURT

Western District Of New York

UNITED STATES OF AMERICA
v.

Robert L. Swinton
a/k/a Robert L. Swinton, Jr.
a/k/a Scooby

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 6:15CR06055-001

USM Number: 22008-055
Robert L. Swinton (Pro Se) and Michael J. Tallon (Stand-by Counsel)
Defendant's Attorney

**THE DEFENDANT:**

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 2, 3, 4, and 5 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C), 18 U.S.C. § 851, and 18 U.S.C. § 2 | Possession of Cocaine with Intent to Distribute | October 16, 2012 | 2 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 1

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 20, 2017
Date of Imposition of Judgment

Signature of Judge

Honorable Elizabeth A. Wolford, U.S. District Judge
Name and Title of Judge

December 28, 2017
Date



Appendix B

DEFENDANT: Robert Swinton a/k/a Robert L. Swinton, Jr. a/k/a Scooby
CASE NUMBER: 6:15CR06055-001



# ADDITIONAL COUNTS OF CONVICTION

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 21 U.S.C. § 856(a)(1), 21 U.S.C. § 856(b) | Use of Premises to Manufacture, Distribute and Use Controlled Substances | October 16, 2012 | 3 |
| 18 U.S.C. § 924(c)(1)(A)(i), 18 U.S.C. § 2 | Possession of Firearms in Furtherance of Drug Trafficking Crimes | October 16, 2012 | 4 |
| 18 U.S.C. § 922(g)(1), and 18 U.S.C. § 924(a)(2) | Felon in Possession of Firearms and Ammunition | October 16, 2012 | 5 |

DEFENDANT: Robert Swinton Robert Swinton a/k/a Robert L. Swinton, Jr. a/k/a Scooby
CASE NUMBER: 6:15CR06055-001



## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 210 months on Count 2, 210 months on Count 3, 120 months on Count 5, all to run concurrent to each other, and 60 months on Count 4, consecutive to all other counts, for a total of 270 months.

The cost of incarceration fee is waived.

☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant shall serve his sentence at a suitable Bureau of Prisons facility as close to Rochester, New York, as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Robert Swinton Robert Swinton a/k/a Robert L. Swinton, Jr. a/k/a Scooby
CASE NUMBER: 6:15CR06055-001

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:
6 years on Count 2, 3 years on Count 3, 5 years on Count 4, and 3 years on Count 5, all terms to run concurrent, for a total of six (6) years.

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Robert Swinton Robert Swinton a/k/a Robert L. Swinton, Jr. a/k/a Scooby
CASE NUMBER: 6:15CR06055-001



# STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

Upon a finding of a violation of probation or supervised release, I understand that this court may (1) revoke supervision, (2) extend the terms of supervision, and/or (3) modify the conditions of probation or supervised release. A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

U.S. Probation Officer's Signature _____ Date _____

## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to substance abuse testing, to include urinalysis and other testing. Details of such testing shall be supervised by the U.S. Probation Office. If substance abuse is indicated by testing, the defendant is to complete a drug/alcohol evaluation and enter into any treatment as deemed necessary by the U.S. Probation Office and/or the Court. The defendant is not to leave treatment until discharge is agreed to by the U.S. Probation Office and/or the Court. While in treatment and after discharge from treatment, the defendant is to abstain from the use of alcohol. The defendant is required to contribute to the cost of services rendered (co-payment in the amount to be determined by the U.S. Probation Office based on the ability to pay or availability of third party payment).

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based upon reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

DEFENDANT: Robert Swinton Robert Swinton a/k/a Robert L. Swinton, Jr. a/k/a Scooby
CASE NUMBER: 6:15CR06055-001

# CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | JVTA Assessment* | Fine | Restitution |
|---|---|---|---|---|
| TOTALS | $ 400 ($100 on each Count) | $ 0 | $ 400 ($100 on each Count) | $ 0 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss** | Restitution Ordered | Priority or Percentage |
|---|---|---|---|

| | | |
|---|---|---|
| TOTALS | $ _____ | $ _____ |

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Robert Swinton Robert Swinton a/k/a Robert L. Swinton, Jr. a/k/a Scooby
CASE NUMBER: 6:15CR06055-001



## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay a special assessment of $100 on each Count, for a total of $400, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

While incarcerated, if the defendant is non-UNICOR or UNICOR grade 5, the defendant shall pay installments of **$25** per quarter. If assigned grades 1 through 4 in UNICOR, the defendant shall pay installments of 50% of the inmate's monthly pay. While on supervision, the defendant shall make monthly payments at the rate of **10% of monthly gross income.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

ROBERT L. SWINTON,

Defendant.

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**DECISION AND ORDER**

6:15-CR-06055-EAW

## INTRODUCTION

Defendant Robert L. Swinton, Jr. ("Defendant"), appearing *pro se* with standby counsel, stands accused by way of a five-count Indictment, returned April 21, 2015, as follows:

> Count 1: Conspiracy to manufacture and possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846;
>
> Count 2: Possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2;
>
> Count 3: Use of premises to manufacture, distribute, and use controlled substances, in violation of 21 U.S.C. § 856(a)(1), and 18 U.S.C. § 2;
>
> Count 4: Possession of firearms in furtherance of drug trafficking crimes (the offenses charged in Counts 1 through 3), in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2; and
>
> Count 5: Possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2);

(Dkt. 53). The Court referred all pre-trial matters to Magistrate Judge Marian W. Payson pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). (Dkt. 54).



Appendix C

Defendant has filed both counseled and *pro se* objections to the Magistrate Judge's two Reports and Recommendations (Dkt. 78; Dkt. 94) ("R&Rs") that recommended denial of Defendant's various suppression motions. (Dkt. 59). After a *de novo* review, including a careful review of the submissions of the parties, the Court accepts and adopts the proposed findings and conclusions set forth in the R&Rs, for the reasons set forth therein. However, with respect to Defendant's motion to suppress the evidence obtained from Defendant's cellular telephone, while the Court agrees with the Magistrate Judge's recommendation to deny Defendant's motion to suppress that evidence, this Court believes that, in addition to the reasoning that the search fell within the good faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1983), the plain language of the warrant authorized the search of the cellular telephone text messages and related content.

## PROCEDURAL HISTORY

On July 6, 2015, Defendant, through counsel, filed a pretrial motion seeking various forms of relief. (Dkt. 59). Among other requests, Defendant sought a *Franks* hearing and moved to suppress tangible evidence (including the cellular telephone content), statements he made during and subsequent to the execution of a search warrant on October 16, 2012, and recorded telephone calls he made from the Monroe County Jail. (*Id.*). On August 3, 2015, the Government filed a response in opposition. (Dkt. 61). After additional filings by both parties (Dkt. 63; Dkt. 67; Dkt. 70), and appearances before Judge Payson (Dkt. 62; Dkt. 65; Dkt. 66; Dkt. 68), Judge Payson conducted an evidentiary hearing on December 1, 2015, at which Rochester Police Sergeant Edward

McDonald testified about Defendant's statements made during the execution of a search warrant at 562 Maple Street, and Rochester Police Investigator Myron Moses testified about Defendant's statements made several hours later at the Public Safety Building. (Dkt. 71; Dkt. 72). The parties filed post-hearing submissions before Judge Payson. (Dkt. 75; Dkt. 76; Dkt. 77).

On February 10, 2016, Judge Payson issued a Report and Recommendation recommending that the Court deny Defendant's request for a *Franks* hearing and deny his motions to suppress tangible evidence, statements made during and subsequent to the execution of the search warrant, and recorded telephone calls he made from the Monroe County Jail ("February 2016 R&R"). (Dkt. 78 at 30). However, Judge Payson reserved decision on Defendant's motion to suppress certain evidence seized from the cellular telephone pending an evidentiary hearing. (*Id.*).

An evidentiary hearing was conducted before Judge Payson on April 4, 2016, at which Commander Joseph Morabito, who was employed by the Rochester Police Department and extracted the text messages from Defendant's cellular telephone, testified about, *inter alia*, the basis for his belief that the search warrant authorized the extraction. (Dkt. 83; Dkt. 84). The parties later submitted post-hearing memoranda of law. (Dkt. 90; Dkt. 91).

On October 21, 2016, Judge Payson issued a second Report and Recommendation recommending that the Court deny Defendant's motion to suppress evidence seized from the cellular telephone ("October 2016 R&R"), reasoning that the good faith exception applied even if the warrant's plain language did not authorize the search. (Dkt. 94).

On December 12, 2016, Defendant, through counsel, filed consolidated objections to the R&Rs. (Dkt. 101). On February 17, 2017, the Government filed a response to Defendant's consolidated objections. (Dkt. 107).

On or about March 3, 2017, this Court received documentation from Defendant requesting, among other things, to proceed *pro se*. On March 10, 2017, after conducting a colloquy with Defendant, the Court granted Defendant's request to proceed *pro se*. (Dkt. 115). On that same date, the Court arranged for the Clerk's Office to file the various written submissions received from Defendant, including the supplemental *pro se* objections to the R&Rs (Dkt. 112), an "Affidavit of Truth" (Dkt. 113), and an "Affidavit of Due Process Violations" (Dkt. 114). Defendant requested that the Court consider these additional submissions, and the Court permitted the Government an opportunity to respond. (Dkt. 116; Dkt. 117). On March 23, 2017, the Government filed a response to the additional *pro se* submissions. (Dkt. 118).

## DISCUSSION

A district court reviews any specific objections to a report and recommendation under a *de novo* standard. Fed. R. Crim. P. 59(b)(3); *see also* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). To trigger the *de novo* review standard, objections to a report "must be specific and clearly aimed at particular findings in the magistrate judge's proposal." *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009). Following review of the report and recommendation, the district judge "may accept, reject, or modify, in whole or

in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

Further, "[t]he Second Circuit has instructed that where a Magistrate Judge conducts an evidentiary hearing and makes credibility findings on disputed issues of fact, the district court will ordinarily accept those credibility findings." *United States v. Lawson*, 961 F. Supp. 2d 496, 499 (W.D.N.Y. 2013) (citing *Carrion v. Smith*, 549 F.3d 583, 588 (2d Cir. 2008) ("[A] district judge should normally not reject a proposed finding of a magistrate judge that rests on a credibility finding without having the witness testify before the judge." (quoting *Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999)))); *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989) ("Had the district court rejected the magistrate's conclusions regarding the credibility of the central witnesses without hearing live testimony from those witnesses, troubling questions of constitutional due process would have been raised."); *see also United States v. Raddatz*, 447 U.S. 667, 675-76, (1980) (district court is not required to rehear witness testimony when accepting a magistrate judge's credibility findings).

The Court incorporates the recitation of the facts as provided in the R&Rs, and will recount them here only as necessary to explain the Court's ruling. After a *de novo* review, the Court agrees with all of the conclusions set forth in the R&Rs: Defendant's motion to suppress the statements made on October 16, 2012, should be denied; Defendant's motion to suppress the recorded telephone calls from Monroe County Jail should be denied; Defendant's request for a *Franks* hearing should be denied; and Defendant's motion to suppress tangible evidence, including the evidence seized from the

cellular telephone, should be denied. However, with respect to Defendant's motion to suppress the cellular telephone evidence, in addition to the October 2016 R&R's conclusion that the motion should be denied because of the good faith exception, this Court concludes that the search of the text messages and related content was authorized by the plain language of the warrant. Thus, based upon a *de novo* review, Defendant's motions are denied for the reasons set forth in the February 2016 R&R and the October 2016 R&R, but as discussed further below, this Court also concludes that the plain language of the warrant authorized the cellular telephone search.

## I. Motion to Suppress Cellular Telephone Evidence

Defendant, through counsel, objects to the Magistrate Judge's recommendation to deny his motion to suppress evidence seized from his cellular telephone. (Dkt. 101 at 2-7). In his motion papers, Defendant argued that the search warrant did not authorize the search and seizure of the contents of the cellular telephone. (*Id.*).

The warrant at issue authorized a search of the apartment at 562 Maple Street for the following items:

> Any evidence that tends to demonstrate that a drug related offense was committed or that a particular person participated in the commission of such offense, written records, books and computer records tending to show sale and trafficking of Cocaine and money showing profits from the sale of Cocaine, safe deposit box records and keys, records, ledgers, notes or other writings reflecting deposit, withdrawal, investment, custody or location of money, real property, personal property or other financial transactions, records, ledgers notes or other writing reflecting ownership of said property, *records reflecting the names, addresses and telephone numbers of persons from whom Cocaine is purchased and sold, including but not limited to, address and telephone books, including those contained in cellular telephones* or Personal Data Assistants and telephone bills; all records ledgers, notes or other writings reflecting income earned and

> reported to the Internal Revenue Service or other taxing agencies; residency and/or ownership of the described vehicle, including but not limited to, utility and telephone bills, cancelled envelopes, keys, deeds and mortgages; photographs and video tapes that depict individuals involved in Cocaine violations and/or photographs to assist in helping identify drug traffickers and their associates including undeveloped rolls of film, memory cards and disposable cameras.

(Dkt. 59-2 at 1-2 (emphasis added)).

A. Plain Language of Warrant

The Magistrate Judge concluded that the warrant plainly authorized the seizure of Defendant's cellular telephone and a search of the phone's address book or "contacts" information (Dkt. 78 at 28), but expressed skepticism with respect to the Government's argument that the plain language of the warrant authorized the search of "[c]ertain SMS (text) messages tending to show the sale and trafficking of cocaine, as well as the telephone numbers/contact information associated with those SMS messages. . . ." (*Id.* at 29). The Magistrate Judge concluded that the above-quoted italicized portion of the warrant did not encompass text messages, but rather "limit[ed] the search of cellular telephones to searches for address and telephone listings, such as those commonly found in the 'contacts' section of the phone.'" (Dkt. 94 at 5). The Magistrate Judge also expressed doubts concerning the merits of the Government's argument that the reference in the warrant to "computer records tending to show sale and trafficking of Cocaine" would have encompassed text messages on a cellular telephone. (Dkt. 78 at 29).

This Court readily agrees with the Magistrate Judge that the language of the search warrant is "unwieldly" and contains "somewhat confounding grammar." (*Id.* at 26). Yet, in this Court's view, the warrant's grammar failures do not translate to a failure to meet

the Fourth Amendment's particularity standard. Rather, the plain language of the warrant encompassed the text messages contained on the cellular telephone (including the telephone numbers/contact information associated with those text messages).

The Fourth Amendment requires that a warrant must state with particularity the items to be searched and seized. *See* U.S. Const. Amend. IV. "This particularity requirement protects individuals from 'exploratory rummaging' not supported by probable cause." *United States v. Bershchansky*, 788 F.3d 102, 111 (2d Cir. 2015) (quoting *United States v. Galpin*, 720 F.3d 436, 445 (2d Cir. 2013)). "In determining the permissible scope of a search that has been authorized by a search warrant [the Court] must look to the place that the magistrate judge who issued the warrant intended to be searched and not to the place that the police intended to search when they applied for the warrant." *Id.* (citation and alteration omitted). "[T]he warrant must enable the executing officer to ascertain and identify with reasonable certainty those items that the magistrate has authorized him to seize." *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992). However, while sufficient particularity is required, the warrant "need not describe the items to be seized in such detail as to eliminate the executing officer's discretion completely." *United States v. Lustyik*, 57 F. Supp. 3d 213, 227 (S.D.N.Y. 2014) ("[A] warrant's description of the items to be seized need only be 'sufficiently specific to permit the rational exercise of judgment by the executing officers in selecting what items to seize.'" (quoting *United States v. Liu*, 239 F.3d 138, 140 (2d Cir. 2000)). The Court looks "directly to the text of the search warrant to determine the permissible scope of an authorized search." *Bershchansky*, 788 F.3d at 111. Whether a warrant "is sufficiently

particular to pass constitutional scrutiny presents a question of law. . . ." *George*, 975 F.2d at 75.

In this Court's view, notwithstanding the warrant's poor grammar and "unwieldy" language, the search for and seizure of Defendant's text messages was authorized by the clause of the warrant ordering the search and seizure of "*records* reflecting the names, addresses and telephone numbers of persons from whom Cocaine is purchased and sold, including but not limited to, address and telephone books, *including those contained in cellular telephones* or Personal Data Assistants and telephone bills." (Dkt. 59-2 at 1-2 (emphasis added)). Although text messages are not expressly referenced in that language, they plainly fall within the scope of "records" that are "contained in a cellular telephone." Indeed, it would be unlikely that an examiner could ascertain whether a contact contained on a cellular telephone was associated with a person from whom cocaine is purchased and sold—which plainly fell within the scope of the warrant—without reviewing the substance of the communications involving the person, as reflected by a text message. Moreover, the identifying information contained within a text message (such as telephone numbers and/or contact information) would fall within the scope of the warrant even if not specifically listed in the phone's contact section, to the same extent as a telephone bill (specifically referenced in the warrant) reflecting itemized information concerning calls made and received. *See United States v. Aguirre*, 664 F.3d 606, 614 (5th Cir. 2011) (affirming district court's denial of motion to suppress and finding that cellular telephone was within the scope of warrant even though warrant's language did not reference phones directly, because "the cellular text messages, directory

and call logs of [the defendant's] cell phone searched by law enforcement officers can fairly be characterized as the functional equivalents of several items listed in . . . [the warrant], including correspondence, address books and telephone directories"); *United States v. Ramsey*, No. 1:12-cr-00310-3, 2013 WL 6388518, at *7 (M.D. Pa. Dec. 5, 2013) (cellular telephones fell within scope of warrant authorizing seizure of drug paraphernalia and documentary evidence associated with trafficking of controlled substances).

This conclusion is only further buttressed by the fact that the introductory phrase of the warrant authorizes the search and seizure of "[a]ny evidence that tends to demonstrate that a drug related offense was committed or that a particular person participated in the commission of such offense," as well as the fact that the warrant authorizes the search and seizure of "computer records tending to show sale and trafficking of Cocaine. . . ." (Dkt. 59-2 at 1). *Cf. Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (describing cellular telephones as "minicomputers that also happen to have the capacity to be used as a telephone"). In other words, the cellular telephone's text messages and related content fell within the scope of the plain language of the warrant.

B. Good Faith Exception

Even if the plain language of the warrant did not authorize the search of the contents of the cellular telephone, this Court agrees with the Magistrate Judge that the good faith exception applies. Following an evidentiary hearing and additional briefing, the October 2016 R&R considered whether the scope of the search may be upheld under *United States v. Leon*, 468 U.S. 897 (1983), because Commander Morabito, in good faith, believed that the warrant authorized him to search for and copy text messages from

Defendant's cellular telephone. (Dkt. 94 at 5). The October 2016 R&R credited the testimony of Commander Morabito and concluded that he "reasonably and in good faith construed the language of the warrant to authorize the search of [Defendant]'s cellular telephone for text messages." (*Id.* at 6). Commander Morabito's reasonable and good-faith construction of the warrant's language is not only supported by the Magistrate Judge's credibility determinations with respect to his testimony, but it is objectively supported by this Court's own conclusion as to the meaning of the warrant's language. In other words, while the warrant's language is less than ideal, and this Court and the Magistrate Judge may disagree as to the scope of the search authorized by the plain language of the warrant, that disagreement simply underscores the conclusion that an investigator, in good faith, could reasonably believe that the warrant authorized the search of the contents of the cellular telephone.

Thus, even if the plain language of the warrant did not authorize the search and seizure of the text messages, the Court concurs with the October 2016 R&R that Commander Morabito reasonably and in good faith interpreted the warrant to authorize the search of Defendant's cellular telephone for text messages, and as a result, the motion to suppress that evidence should be denied. (Dkt. 94 at 4-8). As discussed below, neither Defendant's counseled objections nor his *pro se* objections offer a persuasive reason to depart from the analysis and conclusions reached by the October 2016 R&R.

Through counsel, Defendant argues that the claim of good faith reliance on the language of the warrant is defeated by Commander Morabito's recognition that the language of the warrant did not describe the text messages and his admission that he

seized them regardless because they could be relevant to the investigation. (Dkt. 101 at 3). This characterization of Commander Morabito's testimony is misleading. Commander Morabito agreed that the search warrant did not expressly reference text messages, but explained that he believed that the search was authorized by the following clause of the warrant: "records reflecting the names, addresses and telephone numbers of persons from whom Cocaine is purchased and sold, including, but not limited to, address and telephone books, including those contained in cellular telephones." (Dkt. 84 at 18-21). Indeed, as discussed above, this Court also reached that same conclusion.

As a result, this Court accepts the Magistrate Judge's finding that Commander Morabito credibly testified that he believed the language of the warrant authorized the search for and seizure of Defendant's text messages (Dkt. 94 at 6) and agrees that a reasonable officer in Commander Morabito's position could interpret the warrant to authorize that search (*id.* at 7).

In his *pro se* objections, Defendant argues that the search warrant was overbroad and lacked probable cause, and as a result, reliance on it was not in good faith. (*See* Dkt. 112). He argues: "Investigator E. Barnabei . . . made a knowingly deficient affidavit to the issuing judge in this case, void of probable cause to warrant all of the requested items in his affidavit. Lieutenant Morabito also knew the warrant lacked probable cause before his extraction of the seized devices." (*Id.* at 3). The Court finds Defendant's *pro se* objections unpersuasive.

The issuance of a search warrant must be supported by probable cause. The determination of whether a search warrant satisfies the probable cause requirement is

based on the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Specifically,

> [i]n the warrant context, "[p]robable cause is a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . , including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

*United States v. Howe*, 545 F. App'x 64, 66 (2d Cir. 2013) (quoting *United States v. Canfield*, 212 F.3d 713, 718 (2d Cir. 2000)).

In this case, the warrant application supports a finding of probable cause. The search warrant was issued based on a supporting affidavit by Rochester Police Department Investigator Edmond Bernabei, in which he described two controlled purchases allegedly made by a confidential informant ("CS-1") from the downstairs apartment at 562 Maple Street on September 28 and October 2, 2012. (Dkt. 59-2 at 3-7). The affidavit also described the reliability of CS-1: "Other officers of the Rochester Police Department and I know the Confidential Informant described in this affidavit. CS-1 has provided reliable information that has resulted in the arrest of suspects and the recovery of illegal narcotics and firearms." (*Id.* at 8). Moreover, as discussed above, the Court agrees with the October 2016 R&R that Commander Morabito relied in good faith on the search warrant in order to extract text messages from Defendant's cellular telephone. Accordingly, the Court is unpersuaded by Defendant's *pro se* objections.

For the foregoing reasons, as well as for the reasons articulated more fully in the R&Rs, Defendant's motion to suppress the evidence obtained from the cellular telephone is denied.

## II. Defendant's *Pro Se* Affidavits

This Court has also considered Defendant's *pro se* affidavits, entitled "Affidavit of Truth" (Dkt. 113) and "Affidavit of Due Process Violations" (Dkt. 114), and concludes that they do not provide any reason to depart from the Court's decision to deny Defendant's motions to suppress, nor do they provide any basis for granting any further relief to Defendant.

In his "Affidavit of Truth," Defendant appears to challenge the Court's jurisdiction over this case. (*See* Dkt. 113 at 4 ("The Defense objects to this arbitrarily enforced jurisdiction of the UNITED STATES OF AMERICA, and allege that the jurisdiction of this case lies only with the sovereign State of NEW YORK.")). He contends that the Court lacks personal jurisdiction over him as a defendant and subject matter jurisdiction over this case. (*Id.* at 5, 8). Defendant's arguments are meritless. This Court has personal jurisdiction over Defendant. *See United States v. Borbon*, 326 F. App'x 35, 37 (2d Cir. 2009) (citing *United States v. Williams*, 341 U.S. 58, 65 (1951) (noting that "[t]he District Court had jurisdiction of offenses against the laws of the United States . . . hence it had jurisdiction of . . . the persons charged") (citations omitted)). This Court also has subject matter jurisdiction over the prosecution of the federal crimes with which Defendant is charged. *See* 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."); *Borbon*, 326 F. App'x at 37 ("Because [the defendant] was charged with two federal conspiracy crimes, the district court had subject matter jurisdiction over the prosecution of these crimes pursuant to 18 U.S.C. § 3231.");

*see also United States v. Acquest Dev., LLC*, 932 F. Supp. 2d 453, 458-59 (W.D.N.Y. 2013) ("Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231, and there can be no doubt that Article III permits Congress to assign federal criminal prosecutions to federal courts. That's the beginning and the end of the jurisdictional inquiry. District judges always have subject-matter jurisdiction based on any indictment purporting to charge a violation of federal criminal law." (alterations, quotations and citations omitted)).

In Defendant's "Affidavit of Due Process Violations," he appears to argue that the Speedy Trial Act has been violated and that the length of his pretrial detention has violated his rights under the Due Process Clause of the Fifth Amendment. (*See* Dkt. 114).

Upon review of the docket sheet in this case, the Court concludes that no violation of the Speedy Trial Act has occurred. Under the Speedy Trial Act, "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). Further, trial must begin within 70 days of the date on which the indictment or information is made public, or from the first appearance, whichever is later. *See id.* § 3161(c)(1). "If a defendant is not brought to trial within the time limit required . . . the . . . indictment shall be dismissed on motion of the defendant." *Id.* § 3162(a)(2). However, 18 U.S.C. § 3161(h) identifies eight periods of delay that are to be excluded when computing the time within which a defendant's trial must commence. Here, Defendant points to the delay between

the filing of his motions in July 2015 (Dkt. 59) and the filing of the October 2016 R&R (Dkt. 94). (Dkt. 114 at 2-3). This does not give rise to a Speedy Trial Act violation because "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is specifically excluded. 18 U.S.C. § 3161(h)(1)(D).

The Court also concludes that Defendant's pretrial detention has not violated due process. "Pretrial detention constitutes punishment in violation of the Fifth Amendment's Due Process Clause when it is excessive in relation to non-punitive purposes of detention, such as preventing danger to the community or ensuring a defendant's presence at trial." *United States v. Hill*, 462 F. App'x 125, 126 (2d Cir. 2012) (alterations, quotations, and citations omitted). "To determine whether the length of pretrial detention has become unconstitutionally excessive, a court must weigh: (1) its length, (2) the extent of the prosecution's responsibility for delay of the trial, (3) the gravity of the charges, and (4) the strength of the evidence upon which detention was based, i.e., the evidence of risk of flight and dangerousness." *Id.* (quoting *United States v. El–Hage*, 213 F.3d 74, 79-80 (2d Cir. 2000)). "Due process sets no bright-line limit on the length of pretrial confinement. Thus, the length of detention will rarely by itself offend due process." *Id.* at 127 (alteration, quotations, and citation omitted). To determine if a due process violation has occurred, the court reviews "the totality of the circumstances." *Id.*

A review of the totality of circumstances in this case leads the Court to conclude that Defendant's pretrial detention has not violated due process. As to the first factor, the

length of Defendant's pretrial detention is considerable; he has been detained since his arrest in October 2012, over four years ago. (10/19/2012 Dkt. Entry). However, the remaining factors weigh against a finding that his pretrial detention offends due process. Nothing in the record shows that the Government has caused intentional or unwarranted delay. A significant portion of the delay is attributable to, *inter alia*, pretrial motion practice, plea negotiations (*e.g.*, Dkt. 13; Dkt. 18; Dkt. 22; Dkt. 65), changes in defense counsel (Dkt. 27; Dkt. 35; Dkt. 40; Dkt. 115), and adjournments to investigate a prior conviction in Florida (Dkt. 31; Dkt. 32; Dkt. 39; Dkt. 42; Dkt. 43; Dkt. 44; Dkt. 45; Dkt. 47; Dkt. 49; Dkt. 50; Dkt. 51). Finally, Defendant is charged with serious drug offenses and, according to the Government, faces a potential sentence of life imprisonment if convicted on Count 1 and Count 4 of the Indictment. (Dkt. 118 at 9). These circumstances conspire to defeat Defendant's argument that his pretrial detention is unconstitutional.

Accordingly, to the extent that Defendant requested any relief in his *pro se* affidavits, those requests are denied.

## CONCLUSION

Based upon this Court's *de novo* review, for the reasons set forth above and for the reasons set forth in the Reports and Recommendations (Dkt. 78; Dkt. 94), Defendant's suppression motions (Dkt. 59) are denied. Further, to the extent that Defendant requested any relief in his *pro se* affidavits (Dkt. 113; Dkt. 114), those requests are denied.

SO ORDERED.

ELIZABETH A. WOLFORD
United States District Judge

Dated: April 24, 2017
Rochester, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT L. SWINTON,
a/k/a Robert L. Swinton, Jr.,
a/k/a Scooby,

Defendant.

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REPORT & RECOMMENDATION

15-CR-6055W

## PRELIMINARY STATEMENT

Currently pending before the Court for report and recommendation is Swinton's motion to suppress evidence seized from his cellular telephone, the one motion left open in my prior opinion dated February 10, 2016. (Docket ## 59, 78). In that report and recommendation, the Court concluded that a further evidentiary hearing was necessary to evaluate the applicability of the plain view exception to the warrant requirement. (*Id.* at 26-29). Familiarity with that opinion, including the relevant factual and procedural background, is assumed.

A hearing was conducted on April 4, 2016, at which time the government withdrew its reliance on the plain view doctrine.[1] (Tr. 61-62, 93-94; Docket # 91 at 4 n.2). The parties agreed, however, that the hearing should proceed in order to develop the record adequately to evaluate the government's argument that the search for and seizure of text messages from Swinton's cellular telephone may be upheld under *United States v. Leon*, 468 U.S. 897 (1984). (Tr. 62, 75-76, 93-94). Subsequent to the hearing, the parties submitted post-hearing memoranda of law, which this Court has considered. (*See* Docket ## 90, 91).

[1] The transcript of the hearing shall be referred to as "Tr. __." (Docket # 84).

Appendix D

## APRIL 4, 2016, EVIDENTIARY HEARING

At the hearing, the government called Joseph Morabito, a commander employed by the Rochester Police Department ("RPD"). (Tr. 63). The defense called no witnesses.

Commander Morabito ("Morabito") offered the following testimony relevant to the *Leon* issue. In 2012, Morabito worked as the Lieutenant in charge of the Greater Rochester Narcotics Enforcement Team ("GRANET"). (*Id.*). In that capacity, he became familiar with and employed a device manufactured by Cellebrite, which was designed to forensically extract information from cellular telephones. (Tr. 63-64). He testified that he used the Cellebrite device to extract data from Swinton's cellular phone during the investigation leading to Swinton's prosecution and estimated that he had used the device on approximately forty other occasions. (Tr. 64, 70).

Based on his experience, Morabito testified as to how the device worked. He explained that after connecting the phone to be searched to the Cellebrite device, the device would display various prompts. (Tr. 66-67). After confirming the make and model of the phone to be searched, the prompt would ask whether the user wanted to extract data from the phone. (Tr. 68). The user would indicate "yes" by pushing the "ok" button on the device. (*Id.*). At that point, the device would allow the user to select particular categories of data to be searched, including "contact list, text messages, photos, call data, both incoming and outgoing calls, ring tones, [and] videos." (*Id.*). Once the user pressed the "ok" button in response to the prompt "Do you want to start?," the device would copy the requested categories of data directly onto an attached thumb drive. (Tr. 68-69). The device prevented the user from editing or changing any of the downloaded and copied data. (Tr. 69).

With respect to the search of Swinton's phone, Morabito testified that Bernabei provided him with the phone and a copy of the search warrant for 562 Maple Street the same day that the warrant was executed. (Tr. 70, 86-87). According to Morabito, he performed the data extraction the next day. (Tr. 87). Before beginning, he reviewed the warrant "to ensure what parameters I was allowed to search for from the phone, what was contained on the warrant so I could know what I could select as far as what I could search for." (Tr. 70). Morabito testified that based on his review of the warrant, he selected the following categories of data to be searched and copied:

> [c]ontacts, SMS text messages, calendar notes and tasks, call logs, MMS multi-media messages, images, and video.

(Tr. 71-74; Government's Exhibit ("G. Ex.") 3). He did not select the categories "ring tones" or "audio." (Tr. 74). After the copying was completed, Morabito gave the thumb drive and the cellular phone to Bernabei. (Tr. 79). As Morabito further explained, the thumb drive contained a file in the form of a report that gathered the data extracted and sorted and reproduced it by category. (Tr. 72). The report from the extraction performed on Swinton's phone was admitted into evidence and has been reviewed by this Court. (Tr. 79-80; G. Ex. 3).

Morabito testified that he believed that the following language in the warrant authorized the search for text messages:

> records reflecting the names, addresses and telephone numbers of persons from whom [c]ocaine is purchased and sold, including but not limited to, address and telephone books, including those contained in cellular telephones.

(Tr. 78; G. Ex. 1). His testimony also made clear that the language of the warrant was identical to language commonly used in warrants at that time, although it has since been modified, and

that data extractions he performed in cases involving such warrants typically included searches for text messages. (Tr. 65, 91-93).

Morabito observed, based on his more than ten years' experience investigating narcotics activities, that many drug transactions are conducted through text messages, which, "if you read them, [allow] you [to] actually get phone numbers . . . that take you to cocaine distributors and/or customers from the text messages." (Tr. 77-78). As he explained, a phone number is associated with every text message; often the phone number may also be linked to an identified individual in the phone's "contacts" or address book. (Tr. 90). In this case, the section of the report of the data copied from Swinton's cell phone that is captioned "SMS – Text Messages" reflects phone numbers associated with every text message and names (often a nickname) associated with the substantial majority of them. (G. Ex. 3). At the end of that section, the report states, "Phonebook name lookup [was] used to retrieve names." (*Id.*). The section of the report captioned "MMS – Multimedia Messages" includes text messages that are accompanied by photographs. (*Id.*).

On cross-examination, Morabito admitted that there was nothing in the warrant that suggested that Swinton's cell phone had been used to conduct narcotics transactions. (Tr. 85-86).

## DISCUSSION

None of the testimony adduced at the hearing diminishes my skepticism as to the merits of the government's argument that the plain language of the warrant authorized the search of Swinton's phone for text messages. (*See* Docket # 78 at 28-29). First, as a matter of law, it is far from clear that Morabito's testimony as to his interpretation of the warrant's language is even

relevant to the Court's determination of the plain language of the warrant. Even if it were, his reliance rests on the following clause in the warrant, the plain language of which I find suggests the contrary:

> records reflecting the names, addresses and telephone numbers of persons from whom [c]ocaine is purchased and sold, including but not limited to, address and telephone books, including those contained in cellular telephones.

(Tr. 77-78). The plain language refers to cellular telephones in the context of "address and telephone books" and, in my estimation, limits the search of cellular telephones to searches for address and telephone listings, such as those commonly found in the "contacts" section of the phone.

The government's reliance on the *Leon* good faith exception raises a question different from the plain language question. *Leon* focuses on what a reasonable officer could believe he was authorized to search for under the terms of a warrant. In this case, I credit Morabito's testimony that he believed in good faith he was authorized by the warrant's language quoted above to search for and copy text messages. The question is whether his belief, regardless of the Court's disagreement with its merits, is objectively reasonable.

Turning to that question, I note first that this case concerns the applicability of *Leon* in the context of an officer's reliance on warrant language to justify the scope of his search – a search that may in fact have exceeded the scope of the plain language of the warrant. As this Court previously recognized in *United States v. Miller*, 2013 WL 4505458, *4 (W.D.N.Y.), *report and recommendation adopted*, 2013 WL 6145765 (W.D.N.Y. 2013):

> "Although an officer will usually behave unreasonably by exceeding the scope of a search warrant, the Supreme Court has held that in some cases the good faith exception may nevertheless apply." *United States v. Jefferson*, 2010 WL 1186279, *5 (E.D. Wis. 2010) (citing *Massachusetts v. Sheppard*, 468 U.S. 981,

988 (1984) and *Maryland v. Garrison*, 480 U.S. 79, 87 (1987)); *see also United States v. Biles*, 100 F. App'x 484, 493-94 (6th Cir. 2004) ("*Leon* exception may save a search that exceeds the scope of a warrant if officers reasonably mistake what may be found within a home's curtilage"); *United States v. Gorman*, 104 F.3d 272, 274-75 (9th Cir. 1996) (when determining whether officers exceeded the scope of warrant, "we use an objective test: would a reasonable officer have interpreted the warrant to permit the search at issue") (citing *United States v. Leon*, 468 U.S. at 918-19); *United States v. Rodriguez*, 2007 WL 466752, *58 (D.N.D. 2007) (officers were objectively reasonable in interpreting warrant that authorized search for "clothing that contained blood, hair or fibers" to authorize seizure of blood, hair or fibers on upholstery or floor of vehicle; "[i]f the officers exceeded the scope of the warrant, they acted in good faith [and . . .] the exclusionary rule does not apply"), *aff'd*, 581 F.3d 775 (8th Cir. 2009); *cert. denied*, 562 U.S. 981 (2010). Under such circumstances, "[i]f it was objectively reasonable for the officer to believe that the warrant authorized him to search a particular area, even though it is later determined that the search exceeded the strict textual scope of the warrant, the evidence need not be suppressed." *See United States v. Jefferson*, 2010 WL 1186279 at *5 (collecting cases).

Morabito credibly testified that he believed the warrant's language authorizing a search for records reflecting names, addresses, and phone numbers of individuals engaged in cocaine transactions, including but not limited to address and telephone books contained in cellular phones, permitted officers to search Swinton's cell phone for text messages. (Tr. 71-72, 77-78, 90-91). He explained his reasoning: based upon his substantial experience investigating drug trafficking, he knows that drug transaction arrangements are "common[ly] . . . made over text messages"; that all text messages are linked to a phone number; and, that those phone numbers are often linked to a particular individual identified in the user's cellular phone's "contacts." (*Id.*).

The scant relevant caselaw that this Court has found supports the government's position. For example, less than one year before the search of Swinton's phone, the Fifth Circuit upheld a search of a cellular phone for text messages and call logs conducted in reliance on a

search warrant that did not identify cell phones as items to be searched or seized. *See United States v. Aguirre*, 664 F.3d 606, 613-15 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1949 (2012). In that case, the court noted that the warrant authorized the search of "a wide variety of items used to facilitate drug sales and trafficking," which were listed on an attachment to the warrant. The court reasoned:

> [T]he cellular text messages, directory and call logs of [defendant's] cell phone searched by law enforcement officers can fairly be characterized as the functional equivalents of several items listed in Attachment A, including correspondence, address books and telephone directories. Furthermore, [the agent] testified during the suppression hearing that "[c]ell phones are highly significant in that they record the transaction of – in some cases the buying and selling of drugs." As such the cell phone in this case, used as a mode of both spoken and written communication and containing text message and call logs, served as the equivalent of records and documentation of sales or other drug activity.

*Id.* at 614-15. In the absence of contrary authority from the Second Circuit, *Aguirre* lends strong support for the government's position that a reasonable officer in Morabito's position could have interpreted the warrant in this case to authorize a search of Swinton's cellular phone for text messages – information from which the identities of individuals engaged in cocaine transactions could be determined, whether directly from the messages or indirectly by cross-referencing the phone number associated with the message to Swinton's "contacts." *See also United States v. Tatro*, 2016 WL 3059542, *5 (M.D. Fla. 2016) (applying *Leon* to search of cellular phone under warrant authorizing searches of "pocket computer" and "computer storage media"; "[t]here is no evidence here that the [a]gents acted with intentional deceit or in bad faith or that they deliberately exceeded the scope of the [s]earch [w]arrant[;] [t]he [a]gents testified unequivocally that they believed the [c]ell [p]hones and SD [c]ard to be covered by the [s]earch [w]arrant[;] [t]hus, the [a]gents acted in good faith in executing the [s]earch [w]arrant"); *Jefferson*, 2010 WL

1186279 at *6 ("although the evidence . . . shows that the basement is a common area and not technically or exclusively part of the [business named in the warrant], it was objectively reasonable for [the agent] to believe, at the time of the search, that the basement area . . . was part of [the business][;] . . . [t]herefore, I find in the alternative that the officers acted in good faith, that the search of the [basement closet] was reasonable under these specific circumstances"); *United States v. Rodriguez*, 2007 WL 466752 at *58 ("[i]n this case, the warrant permitted the officers to search for items of clothing that contained blood, hair, or fibers[;] [s]ince the warrant makes specific reference to the blood, hair, and fibers on these items, it would be objectively reasonable for the officers to believe that the warrant authorized the seizure of blood, hair, and fibers when those items are found on the upholstery or floor of the vehicle[;] . . . [i]f the officers exceeded the scope of the warrant, they acted in good faith [and] the exclusionary rule does not apply) (citing *Maryland v. Garrison*, 480 U.S. at 88-89; *United States v. Biles*, 100 F. App'x at 494)).

In sum, under the circumstances of this case, I find that Morabito reasonably and in good faith construed the language of the warrant to authorize the search of Swinton's cellular phone for text messages. Applying the exclusionary rule here would not serve the purpose of deterring law enforcement misconduct, *see Herring v. United States*, 555 U.S. 135, 147-48 (2009); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), and I thus recommend that Swinton's motion to suppress evidence seized from his phone be denied under *Leon*.

no descrip. in warrant / law enforc. guessing - if not misconduct, encouraged by such rulings

## CONCLUSION

For the reasons stated above, I recommend that the district court deny Swinton's motion to suppress evidence seized from his cellular telephone. (Docket # 59).

*s/Marian W. Payson*
MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
October 21, 2016

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

**ORDERED**, that this Report and Recommendation be filed with the Clerk of the Court.

**ANY OBJECTIONS** to this Report and Recommendation must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report and Recommendation in accordance with the above statute and Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York.[2]

The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance. *See, e.g., Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988).

**Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.** *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York, "[w]ritten objections . . . shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 59(b) may result in the District Court's refusal to consider the objection.**

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the parties.

**IT IS SO ORDERED.**

*s/Marian W. Payson*
MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
October 21, 2016

[2] Counsel is advised that a new period of excludable time pursuant to 18 U.S.C. § 3161(h)(1)(D) commences with the filing of this Report and Recommendation. Such period of excludable delay lasts only until objections to this Report and Recommendation are filed or until the fourteen days allowed for filing objections has elapsed. *United States v. Andress*, 943 F.2d 622 (6th Cir. 1991); *United States v. Long*, 900 F.2d 1270 (8th Cir. 1990).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT L. SWINTON,

Defendant.

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DECISION & ORDER and
REPORT & RECOMMENDATION

15-CR-6055W

## PRELIMINARY STATEMENT

By Order of Hon. Elizabeth A. Wolford, United States District Judge, dated April 21, 2015, all pretrial matters in the above-captioned case have been referred to this Court pursuant to 28 U.S.C. §§ 636(b)(1)(A)-(B). (Docket # 54).

Defendant Robert L. Swinton ("Swinton") is charged in a five-count indictment. (Docket # 53). Count One charges him with conspiring from August through October 16, 2012 to manufacture and to possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 841(b)(1)(C). (*Id.*). Count Two charges Swinton with possessing cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). (*Id.*). The third count charges him with using the downstairs apartment of 562 Maple Street, Rochester, New York for the purpose of manufacturing, distributing and using cocaine and cocaine base, in violation of 21 U.S.C. § 856(a)(1). (*Id.*). The fourth and fifth counts charge Swinton with possessing firearms in furtherance of the drug trafficking crimes

Appendix E

charged in the first three counts, in violation of 18 U.S.C. § 924(c)(1)(A)(i), and possessing firearms as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), respectively. (*Id.*).

Currently pending before the Court are Swinton's motions to suppress tangible evidence, statements he made during and subsequent to the execution of a search warrant on October 16, 2012, and recorded telephone calls he made from the Monroe County Jail.[1] (Docket ## 59, 61, 63, 67, 70). He also moves for an order requiring a *Franks* hearing, the disclosure of grand jury minutes, and a bill of particulars. (*Id.*). On December 1, 2015, this Court held an evidentiary hearing on Swinton's motion to suppress statements (Docket ## 71, 72), after which the parties submitted post-hearing submissions (Docket ## 75, 76, 77). For the reasons discussed below, I deny Swinton's motions for a bill of particulars and disclosure of grand jury minutes. I further recommend that the district court deny Swinton's suppression motions.

## FACTUAL BACKGROUND

### I. Swinton's Statements

This Court conducted an evidentiary hearing on December 1, 2015 concerning the circumstances surrounding statements made by Swinton on October 16, 2012 during the execution of a search warrant for 562 Maple Street and several hours later at the Rochester Public Safety Building.[2] (Docket # 71). The government called two witnesses: Rochester Police Sergeant Edward McDonald ("McDonald"), who testified about the statements inside 562 Maple

[1] Swinton filed omnibus motions seeking other forms of relief including, *inter alia*, *Brady* material, discovery and inspection, Rule 404(b), 608 and 609 evidence, expert witness disclosure, and leave to file additional motions. (Docket # 59). Each of the above-referenced motions was decided by the undersigned or resolved by the parties in open court on November 6, 2015. (Docket ## 68, 69).

[2] The transcript of the hearing shall be referred to as "Tr. ___." (Docket # 72).

Street, and Rochester Police Investigator Myron Moses ("Moses"), who testified about the statements at the Public Safety Building. (Docket # 72).

A. **Testimony of McDonald**

McDonald testified that he has been employed as a Sergeant with the Rochester Police Department for approximately eighteen years. (Tr. 3-4). On October 16, 2012, he was part of a team of law enforcement officers involved in the execution of a search warrant for an apartment located at 562 Maple Street, Rochester, New York. (Tr. 4-5, 14, 18-19). The team forcibly entered the apartment through a door that led into the kitchen; from there McDonald walked towards the living room and observed Swinton exiting a bedroom on the southeast side of the apartment. (Tr. 4-5, 15). McDonald grabbed Swinton's wrist, ordered him to the kitchen floor, and handcuffed him. (Tr. 5, 15). Two other adults and Swinton's infant child were also present in the apartment. (Tr. 6). While the search was being conducted, McDonald left Swinton in the custody of a uniformed police officer for a period of time while McDonald searched the basement, after which McDonald returned to the kitchen. (Tr. 17-18).

McDonald testified that because all of the adults were going to be arrested, he needed to find another individual who could come to the apartment and take custody of Swinton's infant. (Tr. 6-7). According to McDonald, it was common police practice to try to find a custodian for a minor child under "circumstances such as th[ese]." (Tr. 7). McDonald advised Swinton that the adults were going to be taken to jail and he needed to identify a custodian for the child. (Tr. 8, 21). McDonald testified that Swinton responded, in sum and substance, "Get my phone. It's in my room, the room I came out of." (Tr. 8, 22, 27).

According to McDonald, he walked into the southeast bedroom and saw the phone on a chair. (Tr. 8, 30). McDonald brought the phone back to the kitchen, and Swinton

asked to use it. (Tr. 9). After reviewing his report of the search, McDonald clarified that he was not certain if Swinton responded to McDonald's statement that he needed to identify a custodian by asking to use his phone, or by telling McDonald to get his phone and then asking to use it. (Tr. 28-29). McDonald testified that he denied Swinton's request to use the phone out of concerns for officer safety, and Swinton provided McDonald with the passcode to access the phone. (Tr. 9, 10). McDonald testified that he could not recall whether he asked Swinton for the passcode or whether Swinton volunteered it. (Tr. 9). Once the phone was unlocked, Swinton identified two possible custodians. (Tr. 10, 24). McDonald contacted them and learned that they were unavailable. (Tr. 11, 24). Swinton then identified the infant's mother, who was able to come to the apartment and care for the child. (Tr. 11, 14, 25). McDonald explained that he found the phone numbers for the three individuals he called in the "contacts" section of the phone. (Tr. 10-11, 24-25). McDonald testified that he did not look at any other information in the phone. (Tr. 11).

Swinton was not read *Miranda* warnings at any time inside 562 Maple Street. (Tr. 6). McDonald testified that Swinton was not questioned about the location of his phone, nor promised anything or threatened in order to disclose the location of his phone. (Tr. 8, 12, 27). According to McDonald, Swinton was not interviewed, made no other statements while he was inside the apartment (other than possibly a statement that the infant was his child), and did not appear to be under the influence of drugs or alcohol. (Tr. 6, 13, 19-20).

**B. Testimony of Moses**

Moses has been employed with the Rochester Police Department for the past twenty-five years, the last five as an investigator. (Tr. 33-34). Moses testified that he was part

of the team that executed the warrant at 562 Maple Street on October 16, 2012. (Tr. 34). According to Moses, the warrant was executed at approximately 9:52 a.m. (*Id.*).

Moses testified that he had no conversations with Swinton at 562 Maple Street. (*Id.*). Swinton was eventually transported from Maple Street to the Rochester Police Department Public Safety Building, where Moses and Malcolm Van Alstyne, an agent with the Bureau of Alcohol, Tobacco and Firearms, interviewed him in an interview room at approximately 1:00 p.m. (Tr. 34-35, 37). Swinton had one arm handcuffed to the table during the interview. (Tr. 36). Both officers were seated. (Tr. 38).

Moses began the interview by identifying himself; Agent Van Alstyne did the same, and Moses asked Swinton if he needed anything to drink. (Tr. 37-38). Swinton declined. (Tr. 38). Moses told Swinton that he would explain what was going on, but first needed to read him his *Miranda* rights. (Tr. 38, 52). Moses confirmed that Swinton could read, write and understand English and then, using a Rochester Police Department Notification and Waiver Form, advised him of his rights by reading them directly from the form.[3] (Tr. 41, 52-53). Following that recitation, Moses asked him the two questions printed on the form and recorded verbatim Swinton's responses. (*Id.*). Specifically, Moses asked, "Do you understand what I

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[3] The form that Moses testified he read verbatim to Swinton provided:

1. You have the right to remain silent – you do not have to say anything if you don't want to.
2. That anything you do say can be used against you in a court of law.
3. You have the right to talk to a lawyer before answering any questions and have him here with you.
4. If you can't pay for a lawyer, one will be given to you before questioning if you wish.
5. If you do wish to talk with one, you can stop me at any time.

(Tr. 39-41; Government Exhibit ("G. Ex.") 1).

have just said to you?" (Tr. 42, 53; G. Ex. 1). Swinton replied, "Yep." (*Id.*). Moses then asked, "With these rights in mind, do you agree to talk with me now?" (*Id.*). Swinton responded, "Yeah." (*Id.*). Moses never explicitly asked, "Are you waiving your rights now?" (Tr. 53).

Following those questions, Moses and Van Alstyne interrogated Swinton for approximately fifteen minutes. (Tr. 43). Swinton never asked for an attorney or for the questioning to cease. (*Id.*). Moses characterized Swinton's demeanor as relaxed and responsive. (Tr. 44). According to Moses, Swinton did not appear to be ill, injured, intoxicated or confused. (*Id.*). Moses testified that neither he nor Van Alstyne promised Swinton anything or threatened him to induce his statements. (Tr. 43-44). Moses explained that the officers determined to conclude the interrogation because "we kept going back and forth about the partying at the house." (Tr. 43). Moses later returned to the interview room to obtain information from Swinton to complete the Prisoner Data Report, a process which took approximately six minutes. (Tr. 45). During that exchange, Moses did not return to the subject of Swinton's activities at 562 Maple Street. (Tr. 55).

### C. Swinton's Affidavits

Swinton submitted two affidavits in support of his suppression motion. (Docket ## 63, 67). In the first, he states that officers tried to question him when he was taken into custody at 562 Maple Street. (Docket # 63, ¶ 2). He further states that he never agreed to speak to the officers or waived his rights, and that he demanded an attorney. (*Id.* at ¶ 3).

In his second affidavit, Swinton affirms that two officers came into the kitchen when he was handcuffed – one holding his infant daughter and the other holding his cell phone that had been in his bedroom. (Docket # 67, ¶ 3). The officer with the cell phone asked Swinton if there was someone who could come and pick up his daughter. (*Id.* at ¶ 4). Swinton asked if he

could use his cell phone, and the officer refused, after which Swinton provided the officer with his passcode and directed him to the telephone numbers of certain relatives that were stored in the phone. (*Id.* at ¶ 5). The officer then made three calls on the phone. (*Id.* at ¶ 6).

## II. The Search Warrant for 562 Maple Street

On October 9, 2012, Monroe County Court Judge John L. DeMarco issued a warrant authorizing a search of the downstairs apartment at 562 Maple Street, Rochester, New York. (Docket # 59-2 at 1-2). The warrant authorized a search for:

> Cocaine in violation of section[] 220.00 of the New York State Penal Law. Any evidence that tends to demonstrate that a drug related offense was committed or that a particular person participated in the commission of such offense, written records, books and computer records tending to show sale and trafficking of Cocaine and money showing profits from the sale of Cocaine, safe deposit box records and keys, records, ledgers, notes or other writings reflecting deposit, withdrawal, investment, custody or location of money, real property, personal property or other financial transactions, records, ledgers[,] notes or other writing reflecting ownership of said property, records reflecting the names, addresses and telephone numbers of persons from whom Cocaine is purchased and sold, including but not limited to, address and telephone books, including those contained in cellular telephones or Personal Data Assistants and telephone bills; all records[,] ledgers, notes or other writings reflecting income earned and reported to the Internal Revenue Service or other taxing agencies; residency and/or ownership of the described vehicle, including but not limited to, utility and telephone bills, cancelled envelopes, keys, deeds and mortgages; photographs and video tapes that depict individuals involved in Cocaine violations and/or photographs to assist in helping identify drug traffickers and their associates including undeveloped rolls of film, memory cards and disposable cameras.

(*Id.*).

The warrant was issued upon a supporting affidavit of Edmond Bernabei ("Bernabei"), an investigator with the Rochester Police Department, sworn to on October 9,

2012. (*Id.* at 3-9). Bernabei's affidavit described two controlled purchases allegedly made by a confidential informant, identified as CS-1, from the downstairs apartment at 562 Maple Street. (*Id.* at 7). According to the affidavit, Investigator Myron Moses and Bernabei met with CS-1 on September 28, 2012 to make plans to buy cocaine from the apartment. (*Id.*). Bernabei reported that at approximately 1:20 p.m., CS-1 was searched, no contraband was found, and CS-1 was provided with $20 in cash. (*Id.*). Approximately five minutes later, CS-1 was driven "to the area of 562 Maple Street and went directly to the location." (*Id.*). At about 1:25 p.m., "CS-1 left the location and walked directly" to the undercover vehicle and handed Moses a baggie containing "a white powdery substance." (*Id.*).

According to Bernabei's affidavit, CS-1 reported that "he/she walked down the driveway at 562 Maple Street and walked upon a back porch . . . on the rear of the house . . . [and] knocked at the only door that is on the rear porch." (*Id.*). A black male answered the door, and CS-1 asked to purchase one bag of cocaine. (*Id.*). The male handed CS-1 a baggie containing "a white powdery substance" in exchange for $20, and CS-1 walked directly to the undercover vehicle and handed Moses the "suspected cocaine." (*Id.*). The affidavit further stated that Moses field tested "the suspected crack cocaine substance in the bag and found it to test positive for the presence of cocaine." (*Id.*).

According to Bernabei's affidavit, on October 2, 2012, CS-1 met again with Moses and him to make plans to purchase cocaine from 562 Maple Street. (*Id.*). CS-1 was searched at approximately 11:54 a.m., and no contraband was found. (*Id.*). CS-1 was given $40 and, at approximately 12:03 p.m., was "dropped off in the area of 562 Maple Street and went directly to that location." (*Id.*). According to the affidavit, approximately four minutes later,

CS-1 left the location and walked directly to the undercover vehicle. (*Id.*). CS-1 handed Moses two baggies containing "a white powdery substance." (*Id.*).

Bernabei's affidavit stated that CS-1 reported entering the apartment in the same manner as on September 28th – by walking down the driveway on the east side of the house, walking up on the porch and knocking on the back door. (*Id.*). CS-1 reported that the same man with whom CS-1 had dealt on September 28th answered the door on October 2nd. (*Id.*). The man allowed CS-1 into the apartment through the back door leading into the kitchen. (*Id.*). CS-1 asked to purchase two bags of cocaine, and the man retrieved a bag from inside a kitchen cabinet. (*Id.*). The man removed two bags containing "a white powdery substance" from the larger bag and gave them to CS-1 in exchange for $40. (*Id.* at 8). CS-1 walked to the undercover vehicle directly from the location and handed Moses "the suspected cocaine." (*Id.*). The affidavit stated that Bernabei field tested "the suspected crack cocaine substance and found it to test positive for the presence of cocaine." (*Id.*).

Relevant to Swinton's motion, Bernabei's affidavit also contained the following two-sentence paragraph concerning the reliability of CS-1:

> Other officers of the Rochester Police Department and I know the Confidential Informant described in this affidavit. CS-1 has provided reliable information that has resulted in the arrest of suspects and the recovery of illegal narcotics and firearms.

(*Id.*).

## III. Recorded Telephone Calls Made by Swinton from Monroe County Jail

In response to Swinton's motion to suppress evidence of recorded telephone calls he made while incarcerated in the Monroe County Jail, the government submitted an affidavit of

Charles W. Facteau, Systems Administration/Technician for Inmate Phone Services for the Monroe County Jail for the past nineteen years. (Docket # 61-4, ¶ 1). His affidavit states:

> On each inmate phone at the Monroe County Jail, there is a placard detailing dialing instructions and giving notification that the telephone call may be monitored or recorded. Each placard is approximately six inches by three inches. The following notification is on the bottom of each placard in bold, black capital letters: "ALL CALLS ARE SUBJECT TO MONITORING AND RECORDING." This placard is placed on every phone accessible to inmates at the Monroe County Jail.
>
> Additionally, each time a phone call is placed from an inmate phone or the Monroe County Jail, there is a verbal warning that the inmate placing the telephone call will hear. This recorded notification states that the call may be recorded or monitored and both the inmate and the party being called are able to hear it.

(*Id.* at ¶¶ 2-3). At oral argument, Swinton's attorney stated that the defense had no basis to challenge Facteau's factual assertions.

## DECISION & ORDER

### Motions for a Bill of Particulars and Disclosure of Grand Jury Minutes

Swinton's motions for a bill of particulars and disclosure of grand jury minutes are both predicated on his assertion that the government's discovery contains no references whatsoever to cocaine base. (Docket # 59 at 4-6, 35-41). In the absence of such evidence, Swinton argues, the government should be required to particularize whether Swinton or one of his co-conspirators manufactured, distributed, or possessed with intent to distribute cocaine base and, if Swinton did so, the manner in which he did and the quantity that he personally manufactured, distributed, or intended to distribute. (*Id.* at 40-41). Swinton also maintains that the absence of such evidence in the government's discovery strongly suggests that the grand jury

had insufficient evidence upon which to charge Swinton with conspiring to manufacture and to possess with intent to distribute crack cocaine. (*Id.* at 4-6).

The purpose of a bill of particulars is to enable the defendant "to identify with sufficient particularity the nature of the charge pending against him, thereby enabling [the] defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (citations omitted) (per curiam). A bill of particulars is not to be used as a discovery device to obtain "evidentiary detail" about the government's case. *See, e.g., United States v. Torres*, 901 F.2d 205, 234 (2d Cir.) (citation omitted), *cert. denied*, 498 U.S. 906 (1990), *abrogated on other grounds by United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010). In other words, a bill of particulars should be granted where the information sought is "necessary" to prepare a defense and to avoid double jeopardy, not where it is merely "useful" to the defense in ascertaining the government's proof. *See United States v. Henry*, 861 F. Supp. 1190, 1197 (S.D.N.Y. 1994); *see also United States v. Love*, 859 F. Supp. 725, 738 (S.D.N.Y.), *aff'd sub nom. United States v. Roberts*, 41 F.3d 1501 (2d Cir. 1994), *cert. denied*, 519 U.S. 951 (1996). Where the charge against the defendant is broad in scope, a bill of particulars may be more appropriate than where the charged conduct is more narrow. *See, e.g., United States v. Barnes*, 158 F.3d 662, 666 (2d Cir. 1998) ("a bill of particulars or other adequate disclosure is appropriate where a conspiracy count covers a complex series of events over a number of years, but provides only the bare bones of the charge"); *United States v. Davidoff*, 845 F.2d 1151, 1154-55 (2d Cir. 1988) (district court abused discretion in denying a bill of particulars identifying victims in seven-year racketeering conspiracy; court noted that principles governing

bills of particulars "must be applied with some care when the [g]overnment charges criminal offenses under statutes as broad as RICO").

To warrant a bill of particulars, the indictment's charges against a defendant must be so general that they fail to advise him of the specific acts of which he is accused. *See United States v. Torres*, 901 F.2d at 234; *United States v. Henry*, 861 F. Supp. at 1198. In determining that question, the court may consider whether the information sought by the defendant has been made available in alternative forms, such as in discovery or prior court proceedings. *See United States v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984); *United States v. Kelly*, 91 F. Supp. 2d 580, 583-84 (S.D.N.Y. 2000); *United States v. Ahmad*, 992 F. Supp. 682, 684 (S.D.N.Y. 1998); *United States v. Feola*, 651 F. Supp. 1068, 1133 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 857 (2d Cir.), *cert. denied*, 493 U.S. 834 (1989).

There is a presumption that grand jury proceedings are lawful and regular, *Torres*, 901 F.2d at 232 (quoting *Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974)), and disclosure of grand jury proceedings is available only by order of the Court. Fed. R. Civ. P. 6(e). A party seeking disclosure bears the burden of establishing a "particularized need" or "compelling necessity" for such disclosure that outweighs the policy of grand jury secrecy. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *In re Rosahn*, 671 F.2d 690, 695 (2d Cir. 1982). Unspecified allegations of impropriety or mere speculation are not sufficient to satisfy this heavy burden. *United States Calandra*, 414 U.S. 338, 345 (1974). Therefore, "review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." *Torres*, 901 F.2d at 233.

Here, the government's response to Swinton's motions demonstrates that his factual premise is mistaken. According to the government, among the evidence seized during the execution of the warrant at 562 Maple Street was a beaker in plain view in the kitchen sink. (Docket # 61 at 2). The laboratory report, which the government included in its discovery disclosures, indicates that the residue in the beaker tested positive for cocaine base. (*Id.* at Exhibit ("Ex.") A). At oral argument, the government also proffered that it expects to offer testimony at trial from co-conspirators describing Swinton's involvement in the charged conspiracy to manufacture and to distribute crack cocaine. The prosecutor noted that among the discovery turned over to the defense was a report of an interview with one of the individuals present with Swinton at the apartment when the warrant was executed, who described Swinton's involvement with drug activities during the two to three-month conspiracy.

Considering the government's representations, I find that Swinton has not met the burden for establishing that he is entitled to disclosure of the grand jury minutes. Swinton's demand for disclosure rests on nothing more than a speculative assertion that irregularities may have occurred before the grand jury – an insufficient legal basis to justify disclosure of grand jury minutes. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. at 218; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. at 400; *United States v. Leung*, 40 F.3d 577, 582 (2d Cir. 1994) ("[a] review of grand jury minutes should not be permitted without concrete allegations of [g]overnment misconduct"); *United States v. Shaw*, 2007 WL 4208365, *6 (S.D.N.Y. 2007). Nor has Swinton demonstrated that without further particularization of the specific activities he, as opposed to his co-conspirators, engaged in involving crack cocaine, he will be unable to adequately prepare for trial. *See United States v. Cephas*, 937 F.2d 816, 823 (2d Cir. 1991) ("[a]lthough the government did not list the specific activities which showed how [defendant]

furthered the criminal enterprise or the conspiracy, such specific acts need not be alleged with respect to every named defendant, if the indictment is otherwise sufficient and names the other persons involved in the criminal activity"), *cert. denied*, 502 U.S. 1037 (1992); *United States v. Muhammad*, 903 F. Supp. 2d 132, 136 (E.D.N.Y. 2012) (denying request for particularization of narcotics conspiracy charge including additional specifics regarding "the role each such co-conspirator is alleged to have played" and "the precise conduct attributed to the defendant"); *United States v. Jimenez*, 824 F. Supp. 351, 363 (S.D.N.Y. 1993) (defendants in narcotics conspiracy prosecution were not entitled to "further specifics of the particular acts they are alleged to have participated in or for which they are being held responsible"). Accordingly, Swinton's motions for a bill of particulars and disclosure of grand jury minutes are denied.

## REPORT & RECOMMENDATION

### I. Motion for a *Franks* Hearing

Swinton contends that he is entitled to a *Franks* hearing because of the inclusion of several allegedly false or misleading statements in Bernabei's affidavit submitted in support of the application for the search warrant for 562 Maple Street. (Docket # 59 at 13-25). He further maintains that these false and misleading statements were material to the issuing judge's probable cause determination and, when excised from the affidavit, render the warrant invalid, thus requiring suppression of the evidence seized pursuant to the warrant. (*Id.*).

Ordinarily, a reviewing court's obligation is merely to determine that the issuing judge had a "substantial basis for ... conclud[ing] that probable cause existed." *United States v. Smith*, 9 F.3d 1007, 1012 (2d Cir. 1993) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)) (internal quotation omitted); *Walczyk v. Rio*, 496 F.3d 139, 157 (2d Cir. 2007) ("a reviewing

court must accord considerable deference to the probable cause determination of the issuing magistrate"). "Nevertheless, little or no deference is due where the government's affidavit misstated or omitted material information about probable cause." *United States v. Rajaratnam*, 2010 WL 4867402, *7 (S.D.N.Y. 2010) (citing *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000)), *aff'd*, 719 F.3d 139 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2820 (2014).

Under *Franks v. Delaware*, 438 U.S. 154 (1978), "a district court may not admit evidence seized pursuant to a warrant if the warrant was based on materially false and misleading information." *United States v. Levasseur*, 816 F.2d 37, 43 (2d Cir. 1987) (citing *Franks v. Delaware*, 438 U.S. at 154). To justify a *Franks* hearing, a defendant challenging an affidavit must make "a substantial preliminary showing that (1) the affidavit contained false statements made knowingly or intentionally, or with reckless disregard for the truth; and (2) the challenged statements or omissions were necessary to the Magistrate's probable cause finding." *Id.* (citing *Franks*, 438 U.S. at 171-72) (internal quotation omitted). A hearing is required if the defendant provides the court with a sufficient basis upon which to doubt the truth of the affidavit at issue. As the Supreme Court has explained:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

*Franks*, 438 U.S. at 171.

With respect to the first prong, "[a]llegations of negligence or innocent mistake are insufficient." *Id.* Instead, "[t]he focus is not on whether a mistake was made, but rather on

the intention behind the mistake." *United States v. Markey*, 131 F. Supp. 2d 316, 324 (D. Conn. 2001) (citing *Beard v. City of Northglenn*, 24 F.3d 110, 116 (10th Cir. 1994)), *aff'd*, 69 F. App'x 492 (2d Cir. 2003). Thus, *Franks* teaches that not all statements in an affidavit have to be true; instead "the statements [must] be 'believed or appropriately accepted by the affiant as true.'" *See United States v. Campino*, 890 F.2d 588, 592 (2d Cir. 1989) (quoting *Franks*, 438 U.S. at 165), *cert. denied*, 498 U.S. 866 (1990).

To determine whether a misstatement in an affidavit is material, the court must "set[ ] aside the falsehoods in the application, . . . and determine [w]hether the untainted portions [of the application] suffice to support a probable cause . . . finding." *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d Cir. 2013) (internal quotations and citations omitted), *cert. denied*, 134 S. Ct. 2820 (2014). According to the Second Circuit, "[t]he ultimate inquiry is whether, after putting aside erroneous information and [correcting] material omissions, there remains a residue of independent and lawful information sufficient to support [a finding of] probable cause." *United States v. Rajaratnam*, 719 F.3d at 146 (quoting *United States v. Canfield*, 212 F.3d at 718).

In this case, Swinton identifies four allegedly false or misleading statements that he contends justify a *Franks* hearing. First, he argues that Bernabei "either negligently or intentionally misrepresented the type of substance field tested [following the two controlled purchases described in the warrant] as crack cocaine, although the officer alleged that what CS-1 described purchasing and provided for testing was a white powdery substance." (*Id.* at 18-19). Second, he maintains that Bernabei intended to mislead the issuing judge into believing that law enforcement officers actually observed CS-1 enter the apartment at 562 Maple Street, when in fact they did not. (*Id.* at 19-20). Third, he challenges the veracity of Bernabei's statement that

CS-1 was searched before the controlled purchases. (*Id.* at 20-21). Finally, Swinton contends that Bernabei's conclusory statement that CS-1 was reliable was misleading because it did not disclose specific information about the benefit CS-1 expected to receive in return for CS-1's cooperation, such as financial compensation or favorable treatment with respect to pending criminal charges. (*Id.* at 21-22).

With respect to the first challenged misrepresentation, I agree with the government that Swinton's assertion does not entitle him to a *Franks* hearing. First, Swinton has not made a substantial preliminary showing of the falsity of Bernabei's statement that the substances that CS-1 turned over to Bernabei and Moses were "suspected crack cocaine." *See United States v. Dixon*, 861 F. Supp. 2d 2, 11-12 (D. Mass. 2012) ("[the affiant's] identification of the substance as crack cocaine, based on his training and experience, was one of many factors that the magistrate could have considered in making a probable cause determination[;] [b]ecause [d]efendant has offered no evidence that [the affiant's] statements was either deliberately false or made with reckless disregard for the truth, a *Franks* hearing is not warranted on this ground"), *aff'd*, 787 F.3d 55 (1st Cir.), *cert. denied*, 136 S. Ct. 280 (2015). In any event, the sentence that Swinton challenges discloses that the "suspected crack cocaine" in fact "test[ed] positive for the presence of cocaine." In addition, the other references in the affidavit – to the negotiations between CS-1 and the seller, to the material in the baggie the seller handed to CS-1 and to the material in the baggie CS-1 handed to Investigator Moses – were all to cocaine or a white powdery substance. It is difficult to understand the manner in which the issuing judge could have been misled by the one lone reference to the officers' suspicion that the cocaine was cocaine base. Moreover, whether the controlled substance was cocaine base or cocaine, in my estimation, is ultimately immaterial as it does not detract from or alter the probable cause

determination. In this case, the probable cause supporting the warrant was primarily based upon CS-1's alleged purchases of controlled substances from 562 Maple Street. Whether the substance was cocaine or cocaine base is ultimately immaterial to the question whether there was probable cause to believe that controlled substances were present at the location. *United States v. Green*, 572 F. App'x 438, 442 (6th Cir. 2014) (denying *Franks* hearing where affidavit alleged controlled purchases involving cocaine but field tests were positive for heroin; "even if we assume *arguendo* that [defendant] has made a substantial preliminary showing that several statements tangentially related to the controlled purchases were intentionally or recklessly falsified, his argument would still fail because even 'a single controlled purchase is sufficient to establish probable cause to believe that drugs are present at the purchase location'") (quoting *United States v. Archibald*, 685 F.3d 553, 558 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 898 (2013)).

With respect to the second challenged statement, Swinton claims that Bernabei intended to mislead the issuing judge into believing that Bernabei and Moses had observed CS-1 enter the apartment at 562 Maple Street, when in fact they could not have because the apartment door is at the rear of the house and not observable from the street. (Docket # 59 at 20). I disagree that Bernabei's statements in the affidavit can be said to be misleading. The affidavit clearly discloses that 562 Maple Street is a two-family residence and that the downstairs apartment is accessible through a door on the back porch of the house. The affidavit states that CS-1 was "driven to the area of 562 Maple Street and went directly to that location." The affidavit further includes a report of a detailed description provided by CS-1 to Bernabei and Moses indicating where CS-1 walked upon arrival at the house – down the driveway on the east side of the house, to the back porch, and through the only door on the back porch. Taken

together, these statements disclose that the officers observed CS-1 walk to the house and subsequently learned from CS-1 where CS-1 went after arriving; the statements are neither false nor misleading.

Nor is a *Franks* hearing warranted by Swinton's other two challenges. As to the search of CS-1, Swinton simply speculates that CS-1 is female and could not have been searched prior to the controlled purchases because Bernabei and Moses are males. (Docket # 59 at 20). Even accepting the unproven assertion that CS-1 is female, nothing more than speculation supports the proposition that she could not have been searched before the purchases because it was Bernabei and Moses who drove her to the area of 562 Maple Street. Finally, neither a *Franks* hearing nor suppression of the evidence seized pursuant to the warrant is justified by Swinton's contention that Bernabei's statement about CS-1's reliability (he knows CS-1 and CS-1 has provided reliable information in the past leading to the recovery of illegal firearms and narcotics) is too conclusory to be credited without amplification of the benefits CS-1 received in return for CS-1's cooperation. *See United States v. Long*, 2015 WL 1458403, *4 (W.D.N.Y. 2015) ("the omissions regarding the informant's prior drug use and payment by law enforcement does not alter the probable cause analysis in this case, and *Franks* does not entitle the [d]efendant to any relief"). Accordingly, I recommend denial of Swinton's motion for a *Franks* hearing and suppression of tangible evidence.

## II. Motion to Suppress Statements Made on October 16, 2012

### A. Statements at 562 Maple Street

Swinton moves to suppress the statements he made to Sergeant McDonald in response to McDonald's statement that he needed to find someone to take custody of the infant

because all of the adults were being arrested. (Docket # 75 at 3-5). Swinton argues that his statements were made while he was in custody, in response to the functional equivalent of interrogation and without the benefit of *Miranda* warnings. (*Id.*). The government does not dispute that Swinton was in custody and had not been advised of his *Miranda* rights, but contends that McDonald's statement to Swinton was not "reasonably likely to elicit an incriminating response from the suspect" and thus did not amount to interrogation. (Docket # 70 at 6). I agree.

Interrogation is not limited to "express questioning"; rather, it extends to the "functional equivalent" of questioning, namely, "'words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *United States v. Broughton*, 600 F. App'x 780, 783 (2d Cir. 2015) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)). The Second Circuit has reaffirmed that the determination whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response should be made upon "the totality of the circumstances." *Id.* (quoting *Acosta v. Artuz*, 575 F.3d 177, 191 (2d Cir. 2009)).

In this case, Sergeant McDonald advised Swinton that a custodian would need to be identified to care for the infant while the adults were taken into custody. Both parties agree, and McDonald's testimony demonstrates, that the purpose of his statement was to obtain information from Swinton, although the parties may disagree about the type or scope of information being sought. That McDonald's statement was not posed as a question does not mean that it does not qualify as interrogation; it was plainly designed to elicit responsive information. The relevant issue is whether McDonald's inquiry falls within an exception to

*Miranda* and, if not, whether it was "reasonably likely [or not] to elicit an *incriminating* response from the suspect." *See United States v. Stroman*, 420 F. App'x 100, 102-03 (2d Cir. 2011) ("[t]he question thus posed by this case is whether the police conduct was intended to elicit an incriminating response from [defendant] before informing him of his *Miranda* rights").

Some authority exists to support the government's proposition that McDonald's statement falls outside the scope of *Miranda* because "it is the sort of question[] normally attendant to arrest and custody," which is "ordinarily innocent of any investigative purpose." (Docket # 76 at 6 (quoting *United States v. Gotchis*, 803 F.2d 74, 79 (2d Cir. 1986)). For example, the Ninth Circuit has held that "[q]uestions related to the care of minors are 'normally attendant to arrest and custody' and are not 'reasonably likely to elicit an incriminating response.'" *United States v. Galeote*, 357 F. App'x 110, 111 (9th Cir. 2009) (quoting *Rhode Island v. Innis*, 446 U.S. at 301), *cert. denied*, 559 U.S. 1080 (2010). Similarly, in *United States v. Meza-Beltran*, the court found that an officer's "mention [of child protective services] during the course of a home arrest in which a small child [wa]s present" was nothing other than a statement "normally attendant to arrest and custody." 2007 WL 2126501, *5 (D. Ariz. 2007). As the court acknowledged, "it remains the officers' duty to ensure the safety of a child during the course of a home arrest, which includes securing supervision by CPS if no appropriate adult will remain at a residence to care for a child." *Id.* Determining as a matter of law that a police officer's question or statement relating to the care and custody of a minor child during an arrest falls outside the reach of *Miranda* furthers that important public safety interest. That said, the Second Circuit does not appear to have held that such inquiries are insulated from *Miranda* as a matter of law.

In any event, I find that the outcome of Swinton's challenge is no different whether the standard is a legal one or a factual one based upon the totality of the circumstances. McDonald and the other law enforcement officers were present at 562 Maple Street to execute a search warrant. They encountered three adults and one infant child of one of the adults. After making the determination to arrest and take into custody all three adults, the officers had a responsibility to ensure the safe care and custody of the infant. In discharging that responsibility, McDonald told Swinton that he needed to find someone who could come to the apartment to care for the child. I do not find that McDonald's statement was reasonably likely to elicit an incriminating response. Rather, McDonald reasonably could have expected Swinton to respond by identifying names of individuals who could be contacted. *See, e.g., United States v. Meza-Beltran*, 2007 WL 2126501 at *5 ("[o]fficers must take the necessary steps to secure appropriate supervision for a child during custody and arrest, and without more, a reference to CPS is not 'reasonably likely to elicit an incriminating response'"). That Swinton in fact responded with statements that appear to connect him to a particular phone and a particular bedroom at 562 Maple Street, and may indeed be incriminating in the context of the case against him, does not entitle him to an order suppressing their use at trial.

**B. Statements at Public Safety Building**

Swinton also seeks suppression of the statements he made several hours later while in custody at the Public Safety Building. (Docket # 75 at 6-7). He contends that the government has not established that he validly waived his constitutional rights before speaking to Moses and Van Alstyne. (*Id.*). According to Swinton, Moses's failure to ask him explicitly "whether he intended to waive [his] rights or whether any choice to do so was voluntary"

precludes the government from demonstrating that he voluntarily waived his rights. (*Id.*). I disagree.

To establish a valid waiver of *Miranda* rights, the government must prove by a preponderance of the evidence "(1) that the relinquishment of the defendant's rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and of the consequences of waiving that right." *United States v. Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). The law "does not impose a formalistic waiver procedure that a suspect must follow to relinquish [his *Miranda* rights;] . . . the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010). Thus, the government need not "obtain an express waiver of [*Miranda* rights] before proceeding with the interrogation." *Id.* at 387 (alteration in original) (quoting *North Carolina v. Butler*, 441 U.S. 369, 379 (1979) (Brennan, J., dissenting)). Instead, an implicit waiver may be inferred from the defendant's conduct. *See id.* at 384 (waiver may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver") (quoting *North Carolina v. Butler*, 441 U.S. at 373).

To demonstrate the adequacy of a waiver, the government must do more than provide evidence that a *Miranda* warning was given and that the defendant thereafter made an uncoerced statement. *See id.* The government "must make the additional showing that the accused understood the[] rights." *See id.* Accordingly, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Id.*

In examining whether a statement was made voluntarily, a court must consider the totality of the circumstances in which it was given "to determine whether the government agents' conduct 'was such as to overbear [a defendant's] will to resist and bring about [statements] not freely self-determined.'" *United States v. Kaba*, 999 F.2d 47, 51 (2d Cir.) (quoting *United States v. Guarno*, 819 F.2d 28, 30 (2d Cir. 1987) (citations omitted)), *cert. denied*, 510 U.S. 1003 (1993). In evaluating the totality of the circumstances, the court must assess: "(1) the characteristics of the accused, (2) the conditions of the interrogation, and (3) the conduct of law enforcement officials." *United States v. Awan*, 384 F. App'x 9, 14 (2d Cir. 2010) (quoting *Green v. Scully*, 850 F.2d 894, 901-02 (2d Cir.), *cert. denied*, 488 U.S. 945 (1988)), *cert. denied*, 562 U.S. 1170 (2011). Where circumstances suggest evidence of "brutality, [p]sychological duress, threats, [or] unduly prolonged interrogation," statements will be deemed involuntary. *United States v. Moore*, 670 F.3d 222, 233 (2d Cir.) (alteration in original) (quoting *United States v. Verdugo*, 617 F.3d 565, 575 (1st Cir. 2010), *cert. denied*, 562 U.S. 1156 (2011)), *cert. denied*, 133 S. Ct. 48 (2012).

On the record before me, I find that Swinton, after being advised of his *Miranda* rights, voluntarily waived them and chose to speak to Moses and Van Alstyne. After informing Swinton of his *Miranda* rights by reading them verbatim from a rights card, Moses asked Swinton whether he understood his rights, and Swinton replied that he did. Moses then asked Swinton, "With these rights in mind, do you agree with me now?" Again, Swinton responded affirmatively.

Moses's failure to ask explicitly whether Swinton was voluntarily waiving his rights was neither error nor requires suppression. *See Berghuis v. Thompkins*, 560 U.S. at 384-85; *United States v. Scarpa*, 897 F.2d 63, 68 (2d Cir.), *cert. denied*, 498 U.S. 816 (1990).

Swinton was advised of his rights, stated that he understood his rights, and agreed to speak with Moses and Van Alstyne. Such facts establish that Swinton knowingly and voluntarily waived his rights.

Further, the credible testimony establishes that Swinton's statements were not coerced. As an initial matter, nothing in the record suggests that his age or characteristics rendered him particularly vulnerable to coercion, or that he was intoxicated, sick or in pain. In fact, Moses testified that Swinton seemed relaxed, cooperative and responsive. Moses testified that no promises or threats were made to induce Swinton to speak. Finally, the conditions under which the statements were made do not suggest that Swinton was subjected to any undue influence to induce a statement.

Accordingly, I recommend that the district court deny Swinton's motion to suppress the statements he made on October 16, 2012.[4]

## III. Motion to Suppress Evidence of Recorded Calls from the Monroe County Jail

Swinton moves to suppress evidence of telephone calls he made as an inmate at the Monroe County Jail, which were recorded by the jail. (Docket # 59 at 26-34). He argues that the recording of his calls violated Title III because it was done without his consent, either express or implied, and for no legitimate penological purpose. (Docket # 59 at 25-34).

This Court addressed and rejected this very argument in a Report and Recommendation issued in another case merely three weeks ago, *United States v. Simmons*, 2016

[4] Following the submission by his counsel of a post-hearing submission, Swinton submitted a *pro se* submission. *See* Docket # 77. Because he is represented by counsel, however, he does not have the right to make additional arguments *pro se*. *See, e.g., United States v. Pray*, 2014 WL 3534010, *11 (W.D.N.Y.), *report and recommendation adopted by*, 2014 WL 4370483 (W.D.N.Y. 2014). In any event, none of his contentions alter my findings or recommendations. Many of his arguments rest on challenges to the credibility of McDonald's and Moses's testimony, which certainly may be raised on cross-examination at trial or through Swinton's testimony, should he choose to testify. At this juncture, and based on the record before me, I find McDonald's and Moses's testimony credible.

WL 285176, *24-25 (W.D.N.Y. 2016). In that case, the defendant had been detained in several different jails, one of which was the Monroe County Jail. *Id.* Through the same attorney who represents Swinton in this case, he sought suppression of recorded calls from the Monroe County Jail on the grounds that the recording violated Title III, as well as the First, Fourth and Fifth Amendments. *Id.* For the same reasons articulated in *Simmons*, Swinton's Title III challenge should be denied in this case.

## IV. Motion to Suppress Evidence Obtained Through Search and Seizure of Swinton's Cellular Telephone

Finally, Swinton seeks suppression of evidence seized from his cell phone on the grounds that the search warrant did not authorize the search and seizure of the contents of the phone. (Docket # 59 at 25-26). There is no dispute that a search of the phone was conducted by police officers using a software tool, which yielded evidence of photographs, videos, call logs and text messages. (Docket # 70 at 3-4). The government opposes the motion on three independent bases: first, that the search and extraction of evidence was authorized by the terms of the warrant; second, that the seizure of the challenged evidence was lawful under the plain view exception to the warrant requirement; and third, that the search was conducted in good faith reliance on the warrant under *United States v. Leon*, 468 U.S. 897 (1984). (Docket # 70).

The parties' dispute over the scope of the terms of the search warrant is unsurprising considering the unwieldly and somewhat confounding grammar of the seventeen-line sentence at issue.[5] That one sentence contains twenty-five commas and three semicolons, making it difficult to determine where one clause or phrase begins and another ends.

[5] Although the Rochester Police Department appears to use this language as a matter of practice in its search warrant applications, the text has since been modified – both in its language and grammar – to avoid some of the confusing issues noted in this decision. *See, e.g., United States v. Pray*, 2014 WL 3534010 at *1.

> Any evidence that tends to demonstrate that a drug related offense was committed or that a particular person participated in the commission of such offense, written records, books and computer records tending to show sale and trafficking of Cocaine and money showing profits from the sale of Cocaine, safe deposit box records and keys, records, ledgers, notes or other writings reflecting deposit, withdrawal, investment, custody or location of money, real property, personal property or other financial transactions, records, ledgers[,] notes or other writing reflecting ownership of said property, records reflecting the names, addresses and telephone numbers of persons from whom Cocaine is purchased and sold, including but not limited to, address and telephone books, including those contained in cellular telephones or Personal Data Assistants and telephone bills; all records[,] ledgers, notes or other writings reflecting income earned and reported to the Internal Revenue Service or other taxing agencies; residency and/or ownership of the described vehicle, including but not limited to, utility and telephone bills, cancelled envelopes, keys, deeds and mortgages; photographs and video tapes that depict individuals involved in Cocaine violations and/or photographs to assist in helping identify drug traffickers and their associates including undeveloped rolls of film, memory cards and disposable cameras.

For example, the sentence uses commas to separate numerous apparently independent clauses or phrases identifying particular evidence to be searched, and then suddenly and curiously adopts the use of semicolons to separate the remaining three. This grammatical juxtaposition commonly suggests that the material preceding the semicolon is intended to be read together as a cohesive unit, but the substance of the content preceding the semicolon suggests otherwise.[6] In other words, the language of the warrant supports the interpretation that the material preceding the

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[6] The sentence is confusing even as to the material following the semicolons. For example, the sentence includes the following material set apart by semicolons:

> residency and/or ownership of the described vehicle, including but not limited to, utility and telephone bills, cancelled envelopes, keys, deeds and mortgages.

Obviously, agents cannot search for "residency and/or ownership." Is there a clause or phrase which the quoted material is intended to modify? The substance of the material would suggest so, even though the grammar suggests not.

semicolon consists of independent categories of evidence, although it is still unclear where one category begins and another ends.[7]

In any event, relevant to Swinton's challenges, one of the warrant's clauses explicitly authorizes a search of cellular telephones for:

> records reflecting the names, addresses and telephone numbers of persons from whom [c]ocaine is purchased and sold, including but not limited to, address and telephone books, including those contained in cellular telephones or Personal Data Assistants and telephone bills.

This language defeats any argument by Swinton that the warrant did not authorize the seizure of the phone.

This plain language also clearly authorizes the search of the phone's address book or "contacts" information. According to the government, among the information obtained from the phone that it intends to use at trial are those "portions of the phone book/contact list that reflect the names and contact information for individuals from whom cocaine [was] purchased and sold." (Docket # 70 at 4). That evidence was lawfully seized by the terms of the warrant.

Whether the terms of the warrant authorized the search for and seizure of the two other categories of information the government seeks to introduce is a much closer question. The government has identified those categories as:

> Certain SMS (text) messages tending to show the sale and trafficking of cocaine, as well as the telephone numbers/contact information associated with those SMS messages; and . . . records indicative of the owner or user of the device.[8]

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[7] For example, it is unclear whether the following provision authorizes a search for records of currency or currency itself:

> written records, books and computer records tending to show sale and trafficking of [c]ocaine and money showing profits from the sale of [c]ocaine.

[8] It is clear that the government searched for and seized photographs and videotapes from the cell phone. Although the government has not stated that it intends to use any of the photographs and videotapes at trial, the search for and seizure of such evidence was permitted by the warrant's last clause authorizing a search for:

(*Id.*). The warrant language explicitly referencing cellular telephones contains no language expressly authorizing a search of text messages or information identifying the owner or use of the device. Among other arguments, the government contends that these searches were authorized by the language authorizing a search for "written records, books and computer records tending to show sale and trafficking of [c]ocaine." (*Id.* at 6). The government has cited no controlling authority, and this Court is unaware of any, holding that a warrant authorizing a search for computer records necessarily includes cellular telephone records. Indeed, it is possible that text messages – a communication method most commonly utilized through cell phones and not computers, at least in 2012 – exist only in cell phone records and not in computer records.

The government urges that the search should be upheld on the alternate grounds that the text messages were or would have been discovered in plain view during the course of a lawful search for names and contact information of individuals involved in the sale and purchase of cocaine. (*Id.* at 8-10). As noted above, the search was evidently conducted with the use of a software program. (*Id.* at 3). In order to ascertain the facts necessary to evaluate the government's argument that the plain view exception applies, this Court shall conduct an evidentiary hearing on that issue. A status conference shall be held on **February 29, 2016**, at **4:00 p.m.**, to address the scope of and to set a date for the hearing.

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> photographs and video tapes that depict individuals involved in [c]ocaine violations and/or photographs to assist in helping identify drug traffickers and their associates including undeveloped rolls of film, memory cards and disposable cameras.

*See United States v. Miller*, 2013 WL 6145765, *4 (W.D.N.Y. 2013) (warrant's authorization to search for and seize "photographs" "reasonably encompasses all photographs whether printed and finished or stored in digital format").

## CONCLUSION

For the reasons stated above, Swinton's motion for a bill of particulars and disclosure of grand jury minutes **(Docket # 59)** are **DENIED**. Further, for the reasons stated above, I recommend that the district court deny Swinton's motion for a *Franks* hearing and for suppression of statements he made during and subsequent to the execution of a search warrant on October 16, 2012, and recorded telephone calls he made from the Monroe County Jail. **(Docket # 59)**. Pending an evidentiary hearing, Swinton's motion to suppress certain evidence seized from his cellular telephone is **RESERVED**. **(Docket # 59).**

**IT IS SO ORDERED.**

*s/Marian W. Payson*
MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
February 10, 2016

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

**ORDERED**, that this Report and Recommendation be filed with the Clerk of the Court.

**ANY OBJECTIONS** to this Report and Recommendation must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report and Recommendation in accordance with the above statute and Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York.[9]

The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance. *See, e.g., Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988).

**Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.** *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York, "[w]ritten objections . . . shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 59(b) may result in the District Court's refusal to consider the objection.**

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the parties.

**IT IS SO ORDERED.**

*s/Marian W. Payson*
MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
February 10, 2016

[9] Counsel is advised that a new period of excludable time pursuant to 18 U.S.C. § 3161(h)(1)(D) commences with the filing of this Report and Recommendation. Such period of excludable delay lasts only until objections to this Report and Recommendation are filed or until the fourteen days allowed for filing objections has elapsed. *United States v. Andress*, 943 F.2d 622 (6th Cir. 1991); *United States v. Long*, 900 F.2d 1270 (8th Cir. 1990).

# UNITED STATES COURT OF APPEALS
## FOR THE
## SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of February, two thousand twenty.

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United States of America,

Appellee,

v.

Robert L. Swinton, Jr., AKA Scooby,

Defendant - Appellant.

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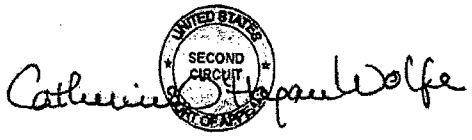
**ORDER**

Docket No: 18-101

Appellant, Robert L. Swinton, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk




Appendix F