NO. _____

In The Supreme Court of the United States

MARIUS A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: October 15, 2021

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QUESTIONS PRESENTED FOR REVIEW

Section 61-7-12 of the West Virginia Code provides that the offense of wanton endangerment is committed if a person "wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another." The first question presented is whether probable cause exists to issue a State search warrant to seize firearms, ammunition, and associated equipment, when the affidavit fails to allege facts sufficient to suggest that the person committed any act with the firearm that would qualify as wanton endangerment. The second question presented is whether a District Court errs by admitting evidence of a defendant's post-*Miranda* statement obtained by federal agents in violation of the "fruit of the poisonous tree" doctrine, when that evidence is predicated on the tainted State search warrant and when the defendant, who has appointed counsel on the same underlying State offense, is questioned while in State custody without the benefit of counsel.

STATEMENT OF RELATED CASES

There are no proceedings directly related to this case as required by Supreme Court Rule 14(1)(b)(iii).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OPINION BELOW

The unpublished opinion of the court of appeals (App., infra, 1a-4a) is found at *United States v. Brown*, No. 20-4322, 854 F. App'x. 535, 2021 WL 3185572 (4th Cir. July 28, 2021). The district court's unpublished Order Adopting the Magistrate Judge's Report and Recommendation, denying petitioner's motion to suppress the evidence adduced from the State search warrant (App., infra, 13a-22a), is found at *United States v. Brown*, Criminal Action No. 5:18-CR-2, 2018 WL 4403646 (N.D.W. Va. Sept. 17, 2018) (Bailey, J.).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 2021. The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

STATUTORY/CONSTITUTIONAL PROVISIONS AT ISSUE

The relevant statutory and constitutional provisions are reproduced in the appendix to this petition. App., infra, 31a-33a.

STATEMENT OF THE CASE

After being indicted in federal court for unlawful possession of a firearm, petitioner sought to suppress the underlying State search warrant for his residence from which the firearm was seized on the basis that a Fourth Amendment violation had occurred because the search warrant affidavit was deficient and lacked probable cause. He also sought to suppress (a) DNA evidence from a federal search warrant predicated on the State search warrant and (b) a post-*Miranda* statement to federal agents executing the warrant to obtain his DNA, which he made while in State

custody on a charge of unlawful possession of the firearm. The District Court rejected petitioner's challenge to the validity of the State search warrant, finding probable cause to support the State warrant's issuance. The District Court also denied petitioner's motion to suppress the DNA evidence and his statement, finding that the statement was made freely and voluntarily after petitioner's execution of a *Miranda* waiver and that petitioner's right to counsel under the Sixth Amendment had not attached with respect to the federal firearms charge when he was jailed on the corresponding State firearms charge.

Following a bench trial, petitioner was convicted in the United States District Court for the Northern District of West Virginia of unlawful possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He was sentenced to the statutory maximum of 120 months of imprisonment. On appeal, he challenged the validity of the underlying search warrant and the admissibility of his post-*Miranda* statement which was predicated on that search warrant. The Court of Appeals affirmed, holding that there was a fair probability that petitioner's conduct violated the West Virginia wanton endangerment statute, and concluding that the affidavit provided probable cause to search the premises. Because of its conclusion that the warrant was based on probable cause, the appellate court found no reason to consider petitioner's "fruit of the poisonous tree" argument. App., infra, 1a-4a.

Under W. Va. Code § 61-7-12, "[a]ny person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony. . . ." A person who violates that provision may be

imprisoned "for not less than one year nor more than five years, or, in the discretion of the court, confined in the county jail for not more than one year, or fined not less than two hundred fifty dollars nor more than two thousand five hundred dollars, or both." W. Va. Code § 61-7-12.

In October 2017, local law enforcement officials in Wheeling, West Virginia, were summoned to petitioner's home in response to reports that, during a domestic disturbance, petitioner had broken the rear passenger window of his girlfriend's car with a firearm. Petitioner's girlfriend advised that petitioner had used the firearm as a blunt instrument, by holding the firearm in his hand while breaking the car window. App., infra, 2a. One of the officers obtained a search warrant for petitioner's home, asserting that there was probable cause to believe that petitioner had committed the offense of wanton endangerment. *Id.* The officers determined that "it would be easier getting a search warrant for wanton endangerment because we were looking for a firearm. In a domestic it's a little harder to look for any other kind of evidence. Wanton endangerment kind of shows that a firearm might have been involved." App., infra, 3a.

Officers recovered a firearm from petitioner's residence and he was charged in State court with five violations of West Virginia law: one count of wanton endangerment, one count of unlawfully possessing the firearm due to a prior felony conviction, one count of use or presentation of the firearm during commission of a felony, and two counts of manufacture/delivery/possession with intent to

manufacture/deliver (schedule I or II narcotic). Counsel was appointed to defend him on the State charges. App., infra, 2a.

While petitioner was in State custody, federal ATF agents came to the jail where he was incarcerated, bringing a *Miranda* waiver and a federal search warrant for his DNA. After execution of the waiver, but while petitioner had no counsel present, the agents questioned him about the incident but did not record the interaction. The agents also obtained petitioner's DNA. App., infra, 4a.

Petitioner was indicted in federal court for possession of the firearm as a prohibited person. Petitioner's motion to suppress the statements and the DNA evidence as "fruit of the poisonous tree" was denied, and the agents testified at his federal trial that petitioner had admitted to owning the firearm. Testimony also was adduced that the DNA recovered from the firearm matched petitioner's DNA. *Id.*

REASONS FOR GRANTING THE PETITION

The court of appeals in this case concluded that the district court did not err in finding that the magistrate "had a substantial basis for concluding that probable cause existed." App., infra, 2a (citing *United States v. Lull*, 824 F.3d 109, 115 (4th Cir. 2016)). It noted that this determination requires a judicial officer to "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit[,] there is a fair probability that contraband or evidence of *a crime* will be found in a particular place." *Id.* (emphasis added) (quoting *United States v. Allen*, 631 F.3d 164, 172 (4th Cir. 2011)).

The court of appeals rejected petitioner's "sufficiency of the evidence" argument, deeming that the appropriate "question is whether the magistrate judge who issued the search warrant had probable cause to believe that evidence of the crime of wanton endangerment was to be found in Brown's home." *Id.* at 3a-4a. Applying this standard, it deemed probable cause to have existed and, thus, did not reach the question of whether the evidence obtained during ATF's custodial interview was "fruit of the poisonous tree." *Id.* at 4a.

The court of appeals' interpretation – that the facts "provided reasonable grounds to believe that [petitioner] had committed that crime and that evidence of the crime would be found in his home," *id.*, – ignores that, for probable cause to have existed, the affidavit must have "contain[ed] facts and circumstances sufficient to warrant the belief of a prudent person of reasonable caution that **a crime** [wanton endangerment] **has been committed** and that the specific fruits, instrumentalities,

or contraband **from that crime** presently may be found at a specific location [Brown's residence]." *State v. Lilly*, 194 W. Va. 595, 602, 461 S.E.2d 101(1995).

Because no objectively reasonable law enforcement officer could conclude that petitioner's acts (waving the gun in the air or breaking the car window with the firearm) could "create a substantial risk of death or serious bodily injury to another," as required by W. Va. Code § 61-7-12 to charge wanton endangerment, the affidavit was insufficient, and the court of appeals' finding to the contrary is in error. Simply put, there is not "a fair probability that [petitioner's] conduct violated the West Virginia wanton endangerment statute." App., infra. 4a.

Correspondingly, the court of appeals erred in failing to consider whether the DNA evidence and statements subsequently obtained by ATF agents from petitioner should have been excluded as "fruit of the poisonous tree." App., infra, 4a.

These rulings are of practical significance because they mean that a West Virginia law enforcement officer can allege the offense of wanton endangerment in order to obtain a search warrant merely by asserting that a firearm has been exhibited. The wanton endangerment statute is not so broad, and the "probable cause" standard is not so minimal. Moreover, the first ruling has the salutary effect of precluding the court's consideration of whether petitioner's rights under the Fifth Amendment and Sixth Amendment were infringed by the government's use of "fruit of the poisonous tree."

Accordingly, the court of appeals' decision, if left unreviewed, will result in the overbroad application of the "probable cause" standard in wanton endangerment

cases. It also leaves unanswered the question of whether it is proper, following the improper issuance of a State search warrant, for federal agents to use evidence obtained during an uncounseled interview of that person while incarcerated on State charges in order to obtain evidence to use in support of a corresponding federal charge. This Court's intervention is warranted to ensure that all person's Constitutional rights are protected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 15th day of October, 2021

/s/ Shawn A. Morgan
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Counsel for Petitioner Marius A. Brown

APPENDIX

TABLE OF CONTENTS

Appendix Page

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4322

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIUS A. BROWN,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:18-cr-00002-JPB-JPM-1)

Submitted: May 28, 2021 Decided: July 28, 2021

Before HARRIS, QUATTLEBAUM, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Shawn A. Morgan, Christopher Etheredge, STEPTOE & JOHNSON PLLC, Bridgeport, West Virginia, for Appellant. William J. Powell, United States Attorney, Shawn M. Adkins, Assistant United States Attorney, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Marius A. Brown appeals from his conviction for possession of a firearm by a convicted felon, challenging the search of his home. Brown asserts that probable cause did not exist to believe that he committed the offense listed in the state search warrant, wanton endangerment in violation of W. Va. Code § 61-7-12. Specifically, Brown asserts that using a firearm to break a car window, as was alleged, is insufficient to establish wanton endangerment under state law. We affirm.

This court "review[s] the factual findings underlying a motion to suppress for clear error and the district court's legal determinations de novo." *United States v. Davis*, 690 F.3d 226, 233 (4th Cir. 2012). When the district court has denied a defendant's suppression motion, we construe the evidence in the light most favorable to the Government. *Id.* "The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *United States v. Lull*, 824 F.3d 109, 115 (4th Cir. 2016) (internal quotation marks and alterations omitted). "[T]he concept of probable cause is not subject to a precise definition." *United States v. Allen*, 631 F.3d 164, 172 (4th Cir. 2011). In making a determination of whether probable cause exists, a judicial officer must "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit[,] there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (internal quotation marks omitted). "When reviewing the probable cause supporting a warrant, a reviewing court must consider only the information presented to the magistrate who issued the warrant." *United States v. Wilhelm*, 80 F.3d 116, 118 (4th Cir. 1996).

An individual commits wanton endangerment if he "wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another." *State v. Bell*, 565 S.E.2d 430, 434-35 (W. Va. 2002) (quoting W. Va. Code § 61-7-12). Discharge of the firearm is not an element. *State v. Hulbert*, 544 S.E.2d 919, 930 (W. Va. 2001).

Brown contends that the search warrant affidavit did not provide probable cause to believe that he committed wanton endangerment because there were no allegations that he pointed the gun at anyone. While he admits that the cases cited above, and others, state that "any act" with a firearm may constitute wanton endangerment, he asserts that West Virginia has not actually applied the statute to mere brandishing or other uses of a firearm that did not include either discharging it or pointing it at someone. However, the question here is not sufficiency of the evidence. Instead, the question is whether the magistrate judge who issued the search warrant had probable cause to believe that evidence of the crime of wanton endangerment was to be found in Brown's home.

The affidavit stated that Brown had been involved in a domestic dispute, had used a firearm to break the window of his ex-girlfriend's car,[*] had injured himself in the process,

[*] Brown contends that the state officer misled the magistrate in the affidavit by stating that Brown "used a firearm" to break the car window because those words suggested that Brown had broken the window by discharging the weapon rather than using it as a blunt instrument. Brown states that the officer's omission of this information was grounds for a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154 (1978). To obtain a *Franks* evidentiary hearing on allegedly false or misleading statements in a search warrant affidavit, a defendant faces a heavy burden which increases even more when the defendant relies upon omissions. *United States v. Tate*, 524 F.3d 449, 454-55 (4th Cir. 2008). A claim that an omission was negligent or an innocent mistake is insufficient; instead, the (Continued)

was yelling and uncooperative, and had entered the house with the firearm and returned without it. Brown does not dispute the veracity of any of these statements. Regardless of whether these facts alone would be sufficient to uphold a conviction for wanton endangerment, we find that they provided reasonable grounds to believe that Brown had committed that crime and that evidence of the crime could be found in his home. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (defining probable cause). Because there is a fair probability that this conduct violated the West Virginia wanton endangerment statute, we conclude that the affidavit provided probable cause to search the premises.

The remainder of Brown's brief argues that the good faith exception does not apply and that DNA evidence and statements acquired subsequently by federal authorities were "fruit of the poisonous tree." Given our conclusion that the warrant was based on probable cause, these claims are unavailing. As such, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

---

defendant must make a detailed offer of proof and show that consideration of the omitted information would have defeated probable cause. *See United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). As discussed herein, use of the weapon as a blunt instrument still provided probable cause supporting issuance of the warrant. As such, Brown was not entitled to a *Franks* hearing.

FILED: July 28, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4322
(5:18-cr-00002-JPB-JPM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARIUS A. BROWN

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
v.
MARIUS A. BROWN

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:18CR2

USM Number: 12368-087

Frank C. Walker II
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) One of the Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Unlawful Possession of a Firearm	10/21/2017	1

☐ See additional count(s) on page 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) _____

☐ 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.

June 17, 2020
Date of Imposition of Judgment

Signature of Judge

Honorable John Preston Bailey, U.S. District Judge
Name and Title of Judge

6-18-2020
Date

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: MARIUS A. BROWN
CASE NUMBER: 5:18CR2

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 120 months

☑ The court makes the following recommendations to the Bureau of Prisons:

☑ That the defendant be incarcerated at an FCI or a facility as close to Wheeling, West Virginia as possible;

☑ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

☑ including the 500-Hour Residential Drug Abuse Treatment Program.

☐ That the defendant be incarcerated at _____ or a facility as close to his/her home in _____ as possible;

☐ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

☐ including the 500-Hour Residential Drug Abuse Treatment Program.

☑ That the defendant receive credit for time served since October 21, 2017.

☐

☑ That the defendant be allowed to participate in any educational or vocational opportunities while incarcerated, as determined by the Bureau of Prisons.

☑ Pursuant to 42 U.S.C. § 14135A, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the Probation Officer.

☑ 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 12:00 pm (noon) on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ on _____, as directed by the United States Marshals Service.

☐

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: MARIUS A. BROWN
CASE NUMBER: 5:18CR2

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 3 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 probation officer.
   - ☐ 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 (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where 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: MARIUS A. BROWN
CASE NUMBER: 5:18CR2

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 shall not commit another federal, state or local crime.
4. You shall not unlawfully possess a controlled substance. You shall refrain from any unlawful use of a controlled substance. You shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.
5. 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.
6. You must answer truthfully the questions asked by your probation officer.
7. 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.
8. 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.
9. 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.
10. 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.
11. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
12. 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).
13. 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.
14. 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.
15. You shall not purchase, possess or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids or other designer stimulants.
16. You shall not frequent places that sell or distribute synthetic cannabinoids or other designer stimulants.
17. Upon reasonable suspicion by the probation officer, you shall submit your person, property, house, residence, vehicle, papers, computers, or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
18. You are prohibited from possessing a potentially vicious or dangerous animal or residing with anyone who possess a potentially vicious or dangerous animal. The probation officer has sole authority to determine what animals are considered to be potentially vicious or dangerous.
19. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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 _____

DEFENDANT: MARIUS A. BROWN
CASE NUMBER: 5:18CR2

SPECIAL CONDITIONS OF SUPERVISION

1) You must participate in an outpatient substance abuse treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

2) You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.

3) You must participate in a mental health treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

4) You must comply with the Northern District of West Virginia Offender Employment Program which may include participation in training, counseling, and/or daily job search as directed by the probation officer. Unless excused for legitimate reasons, if not in compliance with the condition of supervision requiring full-time employment at a lawful occupation, you may be required to perform up to 20 hours of community service per week until employed, as approved by the probation officer.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: MARIUS A. BROWN
CASE NUMBER: 5:18CR2

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ 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.

The victim's recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim receives full restitution.

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

TOTALS $ _____ $ _____

☐ See Statement of Reasons for Victim Information

☐ 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:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** 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.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: MARIUS A. BROWN
CASE NUMBER: 5:18CR2

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 $ 100 due immediately, balance due

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

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F, or ☐ G 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:
Financial obligations ordered are to be paid while the defendant is incarcerated, and if payment is not completed during incarceration, it is to be completed by the end of the term of supervised release; or

G ☐ Special instructions regarding the payment of criminal monetary penalties:
The defendant shall immediately begin making restitution and/or fine payments of $_____ per month, due on the first of each month. These payments shall be made during incarceration, and if necessary, during supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to Clerk, U. S. District Court, Northern District of West Virginia, P.O. Box 1518, Elkins, WV 26241.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	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:
A Smith & Wesson pistol, model SD40VE, .40 caliber and 30 rounds of .40 caliber ammunition.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING

UNITED STATES OF AMERICA,

Plaintiff,

v. **Criminal Action No. 5:18-CR-2 (BAILEY)**

MARIUS S. BROWN,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day, the above-styled matter came before this Court upon consideration of the Report and Recommendation of United States Magistrate Judge James E. Seibert. By Local Rule, this action was referred to Magistrate Judge Seibert for submission of a proposed report and a recommendation ("R&R"). Magistrate Judge Seibert filed his R&R on August 20, 2018 [Doc. 51]. In that filing, the magistrate judge recommends that this Court deny defendant's Motion to Suppress Statements [Doc. 35] and defendant's Motion to Suppress Search [Doc. 36].

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); ***Snyder v. Ridenour***, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***, 727 F.2d 91,

94 (4th Cir. 1984). Here, objections to Magistrate Judge Seibert's R&R were due within fourteen (14) days of filing of this same, pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b). Objections to the R&R were timely filed on September 3, 2018 [Doc. 60]. Accordingly, this Court will conduct a *de novo* review of those portions to which objections were made; the remaining portions will be reviewed for clear error.

BACKGROUND

On October 21, 2017, police received a call about a domestic incident involving the breaking of a window of a car. Wheeling Police Department Officers Agostino and McKenzie arrived on the scene and found the woman who made the initial phone call, Miana McGaha, sitting in her vehicle with a broken out rear passenger window. A man, identified as defendant Marius Brown, was outside yelling at the woman as the officers arrived.

McGaha told officers that defendant struck her in the back of her head as she tried to leave his residence and the defendant had broken the car window with a firearm. She told officers that defendant had taken the firearm into the residence before they arrived on the scene. Officers ordered defendant to show his hands. Upon his show of hands, the officers observed that defendant's hand was bleeding profusely. Defendant was taken into custody based on the accusations of domestic violence.

Officer McKenzie took defendant to the hospital, while Officer Agostino went to a magistrate to obtain a search warrant to search defendant's residence for the firearm in question. The officer presented an affidavit with the details of the incident and the claims by McGaha. Subsequently, the magistrate issued the search warrant. Upon execution of

the search warrant, the officers found a gun, ammunition, and drugs in defendant's residence.

On October 22, 2017, defendant was charged with violating West Virginia Code § 61-7-7(b)(2), which prohibits possession of a firearm by a person who has been "convicted in this state or any other jurisdiction of a felony controlled substance offense involving a Schedule I controlled substance other than marijuana, a Schedule II or a Schedule III controlled substance." W.Va. Code § 61-7-7. In early November, Wheeling Police contacted ATF Agent Heather Kozik about a possible firearm violation. Wheeling Police provided reports of their investigation, the criminal complaint, and copies of photographs of Brown. Agent Kozik then began her own investigation and confirmed that the defendant was a convicted felon who was prohibited from owning or possessing a firearm.

On November 21, 2017, Agent Kozik applied for a search warrant to allow for a DNA sample/buccal swab. The search warrant was issued. On November 24, 2017, Agent Kozik and another ATF agent went to the Northern Regional Jail where defendant was incarcerated. While there, defendant made incriminating statements about owning and possessing the firearm.

On January 23, 2018, defendant was indicted federally for unlawful possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On January 27, 2018, the state charges were dismissed on the State's motion because the defendant was being prosecuted by the Federal Government.

Defendant filed motions to suppress both the search of his residence and his statements to the ATF agents [Docs. 35, 36]. On August 13, 2018, United States

Magistrate Judge Seibert held an evidentiary hearing on the Motion to Suppress Statements [Doc. 35] and Motion to Suppress Search [Doc. 36]. Magistrate Judge Seibert then filed his R&R on August 20, 2018, recommending this Court to deny both motions. Defendant then timely filed his objections to the R&R on September 4, 2018 [Doc. 60].

DISCUSSION

The defendant objects to the R&R's conclusion and recommendation. He argues that his Fourth, Fifth, and Sixth Amendment rights have been violated. Specifically, he argues that the search of his residence was based on a deficient affidavit, and his statements to the ATF agents at the Northern Regional Jail were taken without counsel present and violated his Fifth and Sixth Amendment rights.

I. Motion to Suppress Search

The defendant argues that the affidavit for the search warrant was deficient and lacked probable cause because it was based on Officer Agostino's statement detailing McGaha's statements and not based on sworn testimony of McGaha or anyone who personally observed the firearm [Doc. 60, p. 3]. Defendant also lists another set of errors with the search warrant that "were or should have been apparent to the officers executing the search" [*Id.*]. These purported errors are: (1) there are two versions of the warrant, one with a county magistrate stamp and one without; (2) the date on the search warrant with the stamp is incorrect, and there is no time indicated; (3) McGaha's credibility was not assessed by the magistrate and Officer Agostino offered no credibility assessment in the affidavit; (4) there is no recording or transcript of Officer Agostino's statements to the magistrate; and (5) the defendant was initially arrested for domestic violence but then

charged with wanton endangerment in order to "make it easier to secure a search warrant" [*Id.*]. Defendant also attempts to bolster his argument that the affidavit is deficient through a letter sent to this Court [Doc. 58], claiming that his "aunt works for and is very dear friends with U.S. Magistrate Oliver Solomon[1] and he informed her that indeed there are several deficiencies in the search warrant."

Probable cause does not have a rigid definition, but the Supreme Court has said probable cause exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Illinois v. Gates***, 462 U.S. 213, 214 (1983). To establish probable cause, "the facts presented to the magistrate need only 'warrant a man of reasonable caution' to believe that evidence of a crime will be found." ***United States v. Williams***, 974 F.2d 480, 481 (4th Cir. 1992) (quoting ***Texas v. Brown***, 460 U.S. 730, 742 (1983) (plurality opinion)).

The R&R concludes that there was ample information in the affidavit that supports the magistrate's finding of probable cause that a search of the defendant's residence would produce evidence of a crime. The affidavit details, among other things: (1) the officers responded to the 911 call by McGaha; (2) when officers arrived, defendant was yelling at McGaha; (3) that McGaha told officers defendant used a gun to break the window of her car; (4) that McGaha told the officers the defendant had taken the firearm into the residence; (5) that McGaha told officers defendant had struck her in the back of her head; and (6) the officer's observation that defendant was bleeding profusely. [Doc. 47-4, p. 5].

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[1] This Court has found no United States Magistrate Judges by the name Oliver Solomon. However, there is a Judge Solomon Oliver, Jr., who is a United States District Court Judge for the Northern District of Ohio.

As the magistrate judge correctly concluded, all of this clearly amounts to probable cause or "that there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Defendant's arguments that the affidavit is deficient—because McGaha's credibility was never assessed formally, Officer Agostino's statements to the magistrate were not recorded, and that he was initially charged with domestic violence but charged with wanton endangerment—do not persuade this Court. McGaha was a victim with firsthand knowledge of the situation because she was the one being screamed at when the police showed up and she was the one sitting in her car with the window busted out. Additionally, there is no requirement for statements to the magistrate in requesting a warrant be transcribed or recorded. Finally, just because a person is arrested for one thing does not preclude law enforcement from investigating other crimes or deciding to charge a different offense. In short, a woman called for help saying a man broke her window out of her car with a gun, struck her in the back of the head, and took the gun inside. There was probable cause that the gun would be found in the residence.

The R&R then goes through a ***Leon*** analysis and the defendant mentions ***Leon*** in his objections as well. The R&R concludes that even if this Court found that no probable cause existed for the magistrate to issue the search warrant, that the search would still be valid under the ***Leon*** good faith exception. The defendant objects to this finding without offering much support. In ***Leon***, the Supreme Court held that if a police offer executing a search warrant issued by a judicial officer acted in good faith, the evidence obtained by the search is admissible even if the warrant is found to be deficient after the fact. *See* ***United***

States v. Leon, 468 U.S. 897, 922–23 (1984). ***Leon*** identified four circumstances that an officer relying on a warrant will not be covered by the ***Leon*** good faith exception: (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the magistrate wholly abandons his judicial role as a neutral and detached party; (3) the affidavit is so lacking in probable cause that reliance on it is entirely unreasonable; or (4) the warrant is so facially deficient that the officer executing the search cannot reasonably presume it to be valid. ***Id.*** at 923.

The defendant does not offer much evidence to counter the R&R's conclusion that the facts do not satisfy one of the exceptions under ***Leon***. There is no evidence provided that the officer misled the magistrate or that the magistrate was not neutral and detached. As discussed above, the affidavit was not lacking in probable cause and it was not unreasonable to rely on it. Finally, the defendant argues that there was no stamp on one of the versions of the warrant and that the stamped warrant had the wrong date. These type of clerical errors are not "so facially deficient" that a officer could not reasonably presume the warrant to be valid.

For the foregoing reasons, this Court adopts the R&R's recommendation that this Court deny the motion to suppress the search of the defendant's residence.

II. Motion to Suppress Statements

The defendant objects to the R&R's recommendation that his motion to suppress statements be denied. Defendant argues that his statements to the ATF agents while at the Northern Regional Jail were taken in violation of his Fifth Amendment right against self-

incrimination and his Sixth Amendment right to counsel.

A. Fifth Amendment

When a subject is interrogated while in custody, a ***Miranda*** warning is required. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). To determine whether an individual waived his or her ***Miranda*** rights, the Fourth Circuit has announced two elements that must be satisfied: (1) the waiver "must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception"; and (2) "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." ***United States v. Cristobal***, 293 F.3d 134, 140 (4th Cir. 2002) (internal quotations and citations omitted). The burden is on the Government to show that by a preponderance of the evidence, that the defendant knowingly and voluntarily waived his ***Miranda*** rights. ***United States v. Robinson***, 404 F.3d 850, 860 (4th Cir. 2005).

Defendant signed a waiver acknowledging that he had read the statement of ***Miranda*** rights or it had been read to him and that he understands the ***Miranda*** rights [Doc. 47-7]. Defendant does not contest that he signed this waiver, but states that he thought he was signing a form for the DNA swabbing and that he asked for counsel. The agents testified that the rights were read to him and that he voluntarily waived them. Defendant testified that he signed the waiver after making statements and that he did not understand what he was signing. As Magistrate Judge Seibert stated in his R&R, "the signed waiver speaks for itself" and that is enough for the Government to satisfy its burden by a preponderance of the evidence that the defendant voluntarily, knowingly, and

intelligently waived his ***Miranda*** rights before speaking with the ATF agents. [Doc. 51, p. 6]

B. Sixth Amendment

The Sixth Amendment provides that for all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right "does not attach until after the initiation of formal charges." ***Moran v. Burbine***, 475 U.S. 412, 431(1986). The right is also "offense specific," and "cannot be invoked once for all future prosecutions." ***McNeil v. Wisconsin***, 501 U.S. 171, 175 (1991). "Even though an accused has a Sixth Amendment right to counsel for one offense—because formal charges have been brought—the right does not automatically attach to other offenses with which he has not been charged." ***United States v. Alvarado***, 440 F.3d 191, 196 (4th Cir. 2006) (citing ***Texas v. Cobb***, 532 U.S. 162, 168 (2001)).

The Fourth Circuit has established that federal offenses and state offenses are not the same offense under a Sixth Amendment analysis. The Court, in ***Alvarado***, held "[s]ince they arise from separate sovereigns, state and federal offenses are not the same for purposes of the Sixth Amendment right to counsel." ***Alvarado***, 440 F.3d at 196.

Defendant argues that his Sixth Amendment was right to counsel was violated because he had been charged with state crimes and had an attorney. He further argues that it is "wholly unjust to allow federal law enforcement—at the explicit request of state law enforcement—to investigate and ultimately interview" a defendant who had counsel for pending state charges. [Doc. 60, p. 9]. However, Fourth Circuit precedent is very clear that state offenses and federal offenses are not the same offense under the Sixth Amendment. It is undisputed that at the time of the federal ATF agents' interview with defendant, that

defendant had not been formally charged with any federal offense. Therefore, his Sixth Amendment right to counsel for the federal offense had not yet attached, and there was no violation of defendant's Sixth Amendment right.

CONCLUSION

After careful consideration of the record and the motions, it is the opinion of this Court that the Report and Recommendation **[Doc. 51]** should be, and is, hereby **ORDERED ADOPTED**. The Objections **[Doc. 60]** are **OVERRULED**. As such, the Motion to Suppress Statements **[Doc. 35]** and Motion to Suppress Search **[Doc. 36]** are both hereby **DENIED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: September 17, 2018.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. Criminal Action No.: 5:18-CR-2

MARIUS A. BROWN,

Defendant.

REPORT AND RECOMMENDATION

I. INTRODUCTION

The Defendant is a convicted felon and therefore prohibited from possessing a firearm. On January 23, 2018, the Grand Jury indicted him for one count of unlawful possession of a firearm as well as a forfeiture allegation.

The Defendant filed a Motion to Suppress Statements and a Motion to Suppress Search. The Court held a hearing regarding these motions on August 13, 2018. The Defendant appeared in person and by his counsel, John A. Schwab, Esq. The Government appeared through its counsel, Stephen L. Vogrin, Esq.

For the reasons that follow, The Court recommends that Defendant's Motions be denied.

II. FINDINGS OF FACT

On October 21, 2017, police received a call about a man breaking the window of a vehicle. Officers Agostino and McKenzie of the Wheeling Police Department were the first to arrive on scene. Upon arriving on the scene, they found the woman who made the initial call, later identified as Miana McGaha, sitting in her vehicle. The vehicle had a broken out window. A man, identified as the Defendant, was outside the vehicle yelling at the woman.

The woman told officers that Defendant had broken the window with a firearm. The woman also claimed that Defendant had struck her in the back of the head as she tried to leave his residence after retrieving some personal belongings of hers which she had left there. She stated she had been in a relationship with the Defendant but that he had kicked her out a few days prior after an argument. She stated that she believed Defendant had taken the firearm into the residence just before officers arrived on the scene. Upon making contact with Defendant, officers observed that he was bleeding profusely from his hand and was emotional. Once accusations of domestic violence were made by the woman, Defendant was taken into custody.

While Officer McKenzie took Defendant to the hospital for treatment on his hand, Officer Agostino met with a magistrate to obtain a search warrant to search Defendant's residence for the firearm in question. An affidavit was presented to the magistrate detailing the claims made by the woman. The magistrate issued the search warrant. After clearance by the hospital, Defendant was taken to the Northern Regional Jail. Execution of the search warrant resulted in officers finding a gun with what appeared to be blood on it, ammunition, and various drugs along with drug paraphernalia.

In early November of 2017, ATF Agent Heather Kozik was contacted by Wheeling Police about the Defendant and began an investigation into a possible firearm violation because, as she confirmed through her investigation, the Defendant was a convicted felon who was prohibited from owning or possessing a firearm.

On November 24, 2017, Agent Kozik along with ATF Agent Travis Campbell went to Northern Regional Jail. While there, they spoke with Defendant, who made incriminating statements with respect to his ownership and possession of the firearm.

III. DISCUSSION

A. Defendant's Motion to Suppress Search

The Defendant argues that the search warrant obtained prior to his residence being searched was invalid, rendering the search a violation of his Fourth Amendment protection against unreasonable search and seizure. It is undisputed that Defendant had an expectation of privacy in his residence and that he did not consent to a search. Therefore, the only issue is whether the search warrant was valid.

The Defendant argues that the magistrate did not have the requisite probable cause needed to issue the warrant. Probable cause is not subject to a precise definition. *United States v. Richardson*, 607 F.3d 357, 369 (4th Cir. 2010). That being said, probable cause has been said to exist by the Supreme Court "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657 (1996). In determining whether probable cause is present, a magistrate should make "a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317 (1983), *United States v. Allen*, 631 F.3d 164, 172 (4th Cir. 2011).

Here, there was ample information in the affidavit provided to the magistrate to support a finding that probable cause existed that a search of Defendant's residence would produce evidence of a crime. The affidavit states that officers responded to Defendant's residence in response to a 911 call in which a woman said that a man, who turned out to be the Defendant, broke her vehicle's window out with a gun. When officers arrived on the scene, they observed

the broken window. The woman told officers that Defendant struck her in the back of the head as she tried to leave the residence. She also told officers that she believed that Defendant had taken the gun inside the residence before police arrived. Officers observed Defendant to be bleeding profusely from his hand. The Court believes this is enough to establish probable cause, even without the magistrate asking additional questions or gathering additional information.

Furthermore, even if the Court were to find that probable cause did not exist for the magistrate to issue a search warrant, the search would still be valid under the *Leon* good faith exception. In *Leon*, the Supreme Court held that in situations where a warrant issued by a judicial officer is found after the fact to be deficient, the evidence obtained as a result of the search warrant is still admissible if the police officers acted in good faith. *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405 (1984). Normally, a search warrant issued by a judicial officer is sufficient to show that a police officer acted in good faith. *Id*. at 922. *Leon* identifies four circumstances in which an officer who relies on a warrant in conducting a search is not covered under the *Leon* good faith exception. *Id*. They are: (1) when the judicial officer issuing the warrant was misled by information in the affidavit that the affiant knew to be false or would have known to be false absent reckless disregard for the truth; (2) the judicial officer wholly abandoned his role as a neutral and detached party; (3) when the affidavit is so lacking in probable cause that belief in its existence is entirely unreasonable; or (4) when the warrant is so facially deficient that the law enforcement officer executing it cannot reasonably have assumed its validity. *Id*. at 923, *United States v. Perez*, 393 F.3d 457, 461 (4th Cir. 2004).

There was simply no evidence to establish that any of these circumstances existed. No evidence was presented showing that Officer Agostino misled the magistrate, either intentionally or unintentionally, or recklessly disregarded the truth. No evidence showed that the magistrate

wholly abandon his role because the affidavit contained probable cause and the magistrate acted reasonably in issuing the warrant, which also addresses the third and fourth exceptions to the *Leon* good faith exception. Accordingly, even if evidence was presented to support Defendant's argument that the magistrate abandoned his judicial role by failing to be neutral and detached and that the warrant was so facially deficient that the officers executing it could not have reasonably presumed it to be valid, the exclusionary rule would not apply to the instant case.

The Defendant also makes an argument pertaining to an alleged failure of the officer and magistrate to establish the veracity of Ms. McGaha's statements to officers. ECF No. 36 at 7. Because this argument is premised on Ms. McGaha being an informant, the Court need not discuss this argument in detail. The uncontroverted testimony was that Ms. McGaha was a suspected victim of a crime, likely multiple crimes, and not an informant.

Because of the foregoing, the Court is not persuaded by Defendant's arguments and recommends that Defendant's Motion to Suppress Search be denied.

B. Defendant's Motion to Suppress Statements

The Defendant also argues that statements made by him to ATF agents while incarcerated at Northern Regional Jail were taken in violation of his Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. ECF No. 35.

When a subject is interrogated while in custody, a *Miranda* warning is required. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A court's "inquiry into whether an individual waived effectuation of the rights conveyed in the *Miranda* warnings has two distinct dimensions." *United States v. Cristobal*, 293 F.3d 134, 139 (4th Cir. 2002). Under *Christobal*, a waiver of a suspect's *Miranda* warnings "must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception." *Id.* (quotation marks

omitted). Next, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (quotation marks omitted). "In short, a waiver of Miranda rights must be voluntary, knowing, and intelligent." *United States v. Simmons*, 526 F. Supp. 2d 557, 564 (E.D.N.C. 2007). Under the preponderance of the evidence, the Government has the burden to show that Dubrowski waived his *Miranda* rights. *United States v. Robinson*, 404 F.3d 850, 860 (4th Cir. 2005).

The Government must show, by a preponderance of the evidence, that Defendant voluntarily, knowingly, and intelligently waived his right not to speak with the Agents Kozik and Campbell. Defendant signed a waiver acknowledging that his rights had been read to him and that he understood them. Agent Kozik testified that she read them verbatim to Defendant, and Agent Campbell also testified Defendant was read his rights and voluntarily waived them. Defendant testified that he signed the waiver at the end of the conversation rather than the beginning and did not understand what he was signing. He also claimed multiple times during his testimony that he never speaks to law enforcement. Yet, he never denied speaking with them on this occasion and he never denied making the incriminating statements at issue. Also, Defendant has demonstrated throughout these proceedings that he has at least a base understanding of the legal system; certainly enough to know when he's signing a waiver of his *Miranda* rights that it is not a meaningless form. Indeed, the signed waiver speaks for itself. Therefore, the Court finds that the Government showed by a preponderance of the evidence that Defendant voluntarily, knowingly, and intelligently waived his right to remain silent before speaking with ATF agents on November 24, 2017.

Defendant argues that the statements taken were also in violation of his Sixth Amendment right to counsel. The Sixth Amendment provides that all individuals accused in

criminal prosecutions have the right to counsel to assist in their defense. U.S. Const. amend. VI. However, the right "attaches only after the commencement of formal charges against a defendant." *United States v. Alvarado*, 440 F.3d 191, 196 (4th Cir. 2006), see also *Moran v. Burbine*, 475 U.S. 412, 431, 106 S.Ct. 1135 (1986).

Although there is a circuit split on the issue, the law of the Fourth Circuit establishes that "[s]ince they arise from separate sovereigns, state and federal offenses are not the same for purposes of the Sixth Amendment right to counsel." *Id*. Although Defendant had been charged with being a felon in possession at the state level at the time he spoke with the Agents, no federal charges had been against him. Therefore, the notion that the right to counsel applies to charges which are not brought until later if the offenses are the same is not applicable here. Since Defendant had not been charged with any crime federally at the time the statements were made to federal law enforcement officers who were investigating the situation as a precursor to potentially bringing federal charges against the Defendant, his Sixth Amendment right of counsel had not yet attached.

Because of the foregoing, the Court is nrecommends that Defendant's Motion to Suppress Statements be denied.

IV. RECOMMENDATION

The Court **RECOMMENDS** that the Defendant's [ECF No. 35] Motion to Suppress Statements and [ECF No. 36] Motion to Suppress Search be **DENIED**.

Any party who appears *pro se* and any counsel of record, as applicable, may, within fourteen days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection.

A copy of such objections should be submitted to the District Court Judge of Record. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985): *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

The Clerk of the Court is **DIRECTED** to provide a copy of this Report and Recommendation to parties who appear *pro se* and all counsel of record, as applicable, as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia.

Dated: August 20, 2018

/s/ *James E. Seibert*
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE

United States Code Annotated
Constitution of the United States
Annotated
Amendment IV. Searches and Seizures; Warrants

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants

Amendment IV. Searches and Seizures; Warrants

Currentness

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

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants, USCA CONST Amend. IV-Search and Seizure; Warrants
Current through PL 117-39.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through PL 117-39.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Notes of Decisions (5935)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through PL 117-39.

End of Document