UNITED STATES OF AMERICA, Appellee, v. MOUNIR MRABET, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
2025 U.S. App. LEXIS 14758; 2025 LX 119087
No. 24-1313-cr
June 16, 2025, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge).United States v. Mrabet, 2023 U.S. Dist. LEXIS 175465, 2023 WL 6390169 (S.D.N.Y., Sept. 29, 2023)

Counsel FOR DEFENDANT-APPELLANT: Elizabeth M. Johnson, Law Office of Elizabeth M. Johnson, New York, NY.

FOR APPELLEE: Jane Yumi Chong, Jacob R. Fiddelman, Assistant United States Attorneys, for Matthew Podolsky, Acting United States Attorney for the Southern District of New York, New York, NY.

Judges: PRESENT: RAYMOND J. LOHIER, JR., SUSAN L. CARNEY, MYRNA PÉREZ, Circuit Judges.

CASE SUMMARY The court found no clear error in the District Court's finding that Mrabet failed to make the required preliminary showing for a Franks hearing, as there was no evidence the misstatements were intentional or reckless.

OVERVIEW:

Key Legal Holdings

Material Facts

Controlling Law

Court Rationale

OUTCOME:

Procedural Outcome

LexisNexis Headnotes

Appendix A

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact
Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Sufficiency Challenges

When reviewing the denial of a Franks hearing, an appellate court reviews the district court's factual findings of falsity and knowledge for clear error and its determinations of materiality de novo.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Sufficiency Challenges

To be entitled to a Franks hearing, a defendant must make more than a mere conclusory showing and may not rely upon allegations of negligence or innocent mistake.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Governments > State & Territorial Governments > Claims By & Against

For U.S. Const. amend. IV purposes, private actions are generally attributable to the government only where there is a sufficiently close nexus between the State and the challenged action.

Evidence > Procedural Considerations > Weight & Sufficiency
Evidence > Inferences & Presumptions > Inferences

In reviewing a challenge to the sufficiency of evidence, an appellate court must view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and must affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Jury Instructions
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object
Criminal Law & Procedure > Jury Instructions > Objections

When a defendant fails to object to jury instructions at trial, an appellate court reviews the challenge for plain error only.

Criminal Law & Procedure > Trials > Judicial Discretion
Criminal Law & Procedure > Jury Instructions

A district court has broad discretion in crafting its jury instructions, which is only circumscribed by the requirement that the charge be fair to both sides.

Opinion

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Mounir Mrabet appeals from a judgment of conviction entered on April 26, 2024 in the United States

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District Court for the Southern District of New York (Rakoff, *J.*) following a jury trial at which Mrabet was found guilty of one count of conspiracy to distribute narcotics in violation of 21 U.S.C. § 841(a), two counts of narcotics distribution in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b), and one count of using a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). The District Court sentenced Mrabet principally to 270 months' imprisonment to be followed by a five-year term of supervised release. We**{2025 U.S. App. LEXIS 2}** assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

I. The *Franks* Motion

Mrabet first challenges the District Court's denial of his motion to suppress evidence gathered pursuant to four search warrants, as well as his motion for a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), to scrutinize alleged misstatements and omissions made in the affidavits submitted in support of the warrants.

In considering the denial of a *Franks* hearing, "we review the district court's factual findings of falsity and knowledge for clear error and its determinations of materiality *de novo*." *United States v. Sandalo*, 70 F.4th 77, 86 (2d Cir. 2023). With that standard in mind, we conclude that the District Court did not clearly err in finding that Mrabet failed to make a substantial preliminary showing that Detective Gurleski's misstatement about Mrabet's hotel occupancy was made intentionally or with reckless disregard for the truth. *See United States v. McKenzie*, 13 F.4th 223, 236 (2d Cir. 2021). To be entitled to a *Franks* hearing, a defendant must make "more than a mere conclusory showing," *Sandalo*, 70 F.4th at 86, and may not rely upon "[a]llegations of negligence or innocent mistake," *id.* at 85 (quotation marks omitted). Nothing in the record supports Mrabet's contention that Detective**{2025 U.S. App. LEXIS 3}** Gurleski made the misstatement intentionally or with reckless disregard for the truth. Indeed, Detective Gurleski's voluntary correction of the misstatement in the fourth warrant application belie Mrabet's claim to the contrary.

The District Court also found that the alleged omission regarding a prior police visit to a storage facility where Mrabet rented a unit was neither misleading nor made intentionally or with reckless disregard for the truth. *See McKenzie*, 13 F.4th at 236. Mrabet describes the affidavit as misleading because it "conceal[ed]" that the storage facility employees who entered Mrabet's unit and discovered pills in plain view acted on behalf of law enforcement. Appellant's Br. at 20. As the District Court found, however, Mrabet made no "offer of proof" to support the allegation that the police instructed or encouraged these employees to enter Mrabet's unit. *See Sandalo*, 70 F.4th at 85. To the contrary, the uncontested fact that Mrabet's storage unit had been left open and unattended for at least a full day suggests that the employees had a legitimate, independent reason to enter the unit. For Fourth Amendment purposes, "private actions are generally attributable to the government only where there is a sufficiently close nexus between**{2025 U.S. App. LEXIS 4}** the State and the challenged action," *United States v. DiTomasso*, 932 F.3d 58, 67 (2d Cir. 2019) (quotation marks omitted), and Mrabet has provided no evidence of such a nexus. Further, Mrabet did not demonstrate that the prior police visit was "clearly critical" to the probable cause determination as to allow the court to infer recklessness from the affidavit's failure to mention it. *See United States v. Rajaratnam*, 719 F.3d 139, 154-55 (2d Cir. 2013).

Because we affirm the denial of the *Franks* hearing and the motion to suppress on the ground that Mrabet failed to make a substantial preliminary showing of the requisite mental state, we need not address whether the alleged misstatements and omissions were material to the finding of probable cause.

II. Sufficiency of the Evidence

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Mrabet also challenges the sufficiency of the evidence supporting his conviction on the firearms charge. He argues that the Government failed to prove that he possessed a "firearm" as defined by 18 U.S.C. § 921(a)(3). "In reviewing such a challenge, we are required to view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and we must affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable**{2025 U.S. App. LEXIS 5}** doubt." *United States v. Josephberg*, 562 F.3d 478, 487 (2d Cir. 2009).

Viewing the trial evidence in the light most favorable to the Government, the jury reasonably could have found beyond a reasonable doubt that Mrabet used a firearm in furtherance of a drug trafficking crime. Among other things, a video from Mrabet's iCloud account showed him possessing a revolver alongside drugs and cash; text messages from Mrabet referenced specific firearm calibers, asked for ammunition, and threatened to shoot associates; and Mrabet told an undercover officer about the multiple firearms he possessed, including a "drug gun." Viewed in its totality, the evidence amply supported the jury's verdict. *See United States v. Castillo*, 924 F.2d 1227, 1230 (2d Cir. 1991) (holding that physical recovery of a gun was not required for conviction for using a firearm in connection with a drug trafficking offense).

III. Jury Instruction

Finally, Mrabet contends that the District Court erred by not defining "firearm" in its jury instructions. Because Mrabet failed to object to the instructions at trial, we review this challenge for plain error only. *United States v. Hunt*, 82 F.4th 129, 138 (2d Cir. 2023).

A district court has "broad discretion in crafting its instructions, which is only circumscribed by the requirement that the charge be fair to both sides." *United States v. Fazio*, 770 F.3d 160, 166 (2d Cir. 2014) (alteration adopted) (quotation**{2025 U.S. App. LEXIS 6}** marks omitted). The District Court's jury instructions accurately stated that the Government must prove that Mrabet "unlawfully, knowingly, and intentionally us[ed], carr[ied] or possess[ed] a firearm in furtherance of the drug conspiracy." D. Ct. Dkt. No. 42 at 125. Nothing in the record suggests that the jury found that Mrabet exclusively possessed toy guns or BB guns. In any event, given the overwhelming evidence that Mrabet possessed actual firearms, there is no "reasonable probability that" the failure to define the term "firearms" "affected the outcome of the trial." *United States v. Scott*, 979 F.3d 986, 991 (2d Cir. 2020) (quotation marks omitted).

CONCLUSION

We have considered Mrabet's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 10th day of September, two thousand twenty-five.

United States of America,

Appellee,

v.

Mounir Mrabet,

Defendant - Appellant.

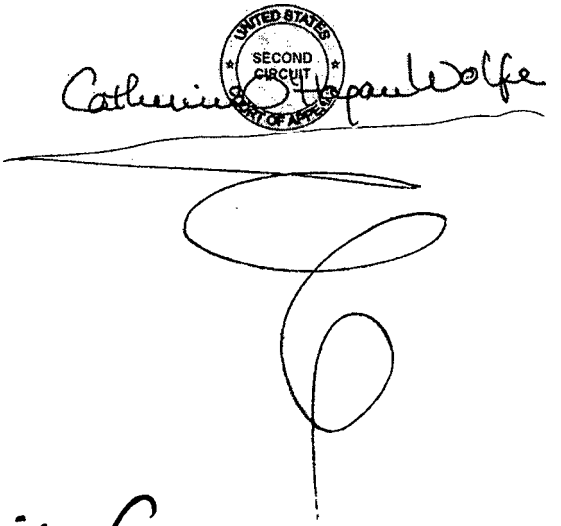
ORDER

Docket No: 24-1313

Appellant, Mounir Mrabet, 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 C -

UNITED STATES OF AMERICA, -v- MOUNIR MRABET, Defendant.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
2023 U.S. Dist. LEXIS 175465
23-cr-69 (JSR)
September 29, 2023, Decided
September 29, 2023, Filed

Editorial Information: Subsequent History

Later proceeding at United States v. Mrabet, 2023 U.S. Dist. LEXIS 210180 (S.D.N.Y., Nov. 27, 2023)

Counsel **{2023 U.S. Dist. LEXIS 1}**For Mounir Mrabet, also known as Sealed Defendant, Defendant: Camille Marie Abate, LEAD ATTORNEY, Camille M. Abate, Esq., New York City, NY.

For USA, Plaintiff: Jane Chong, LEAD ATTORNEY, New York, NY; Matthew J. King, US Attorney's Office, Southern District of New York, New York, NY.

Judges: JED S. RAKOFF, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JED S. RAKOFF

Opinion

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.:

Mounir Mrabet faces a superseding indictment on one count of narcotics conspiracy, two counts of narcotics distribution, and one count of possession of a firearm in furtherance of a drug trafficking crime. ECF No. 10. Mrabet has pleaded not guilty, and on August 4, 2023, he moved for a hearing under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), regarding the potential suppression of evidence from four search warrants that he argues contained materially false statements and omissions. ECF No. 17 ("Motion"). The Government submitted an opposition on August 22, 2023, ECF No. 19 ("Opp."), and Mrabet filed a reply on August 29, 2023, ECF No. 20 ("Reply"). The Court denied the motion by "bottom-line order" on September 12, 2023. ECF No. 23. This opinion reconfirms and provides reasoning for that ruling.

As explained below, Mrabet has not supported his allegations**{2023 U.S. Dist. LEXIS 2}** with anything more than a conclusory assertion that the affiant of the search warrant applications made misstatements or omissions intentionally or with reckless disregard for the truth. Moreover, even if Mrabet had made a substantial preliminary showing that the affiant had such a state of mind, the challenged misstatements or omissions were not material to the probable cause determination for any of the challenged warrants.

Appendix B

I. Factual Background

On July 30, 2022, three people overdosed on narcotics in a room at the Grand Hyatt Hotel in Manhattan. Motion, Ex. A, Ex. F at 5. Two of the individuals died. Motion, Ex. F, at 5. After interviewing the survivor and other witnesses, law enforcement learned that those who overdosed had used cocaine with three others in the hotel room. Id. One member of the group had checked into the hotel room on July 28, 2022 and discovered a bag of powder in the hotel room closet. Id.; Motion, Ex. B. Several members of the group then snorted the powder. Motion, Ex. F, at 5.

Mounir Mrabet became a person of interest on August 4, 2022, after law enforcement received information about him from a confidential source ("CS-1"). Id.; ECF No. 17-1 ("Abate Decl."),**{2023 U.S. Dist. LEXIS 3}** ¶ 7. In particular, CS-1 told law enforcement that Mrabet had sold fentanyl and crystal methamphetamine near and inside the Grand Hyatt Hotel. Motion, Ex. F, at 5; Abate Decl. ¶ 7. CS-1 also told law enforcement that CS-1 had accompanied Mrabet on at least one occasion to a storage unit that Mrabet rented at Gotham Mini Storage and saw narcotics inside the unit. Motion, Ex. F at 5.

On August 11, 2022, New York City Police Department Detectives Carlos Perez and Joseph Aliberti spoke to the assistant manager of the Grand Hyatt, and each wrote separate follow-up reports. Abate Decl. ¶ 9; Motion, Exs. C-D. Detective Perez reported that Mrabet had stayed in the same hotel room where the overdose occurred, checking in on July 23, 2022 and checking out on July 25, 2022. Motion, Ex. C. Detective Aliberti reported that Mrabet was the last person to occupy that hotel room before the group that overdosed on July 30, 2022. Motion, Ex. D. On August 23, 2022, Detective Aliberti visited the Gotham Mini Storage location that CS-1 had identified. Motion, Ex. E. Employees of the facility told Detective Aliberti that Mrabet rented three storage units and received packages there. Id.

A. The Storage Unit{2023 U.S. Dist. LEXIS 4} Warrant

On September 28, 2022, Detective Mark Gurleski, a task force officer with the U.S. Attorney's Office for this District, applied for a search warrant for two of Mrabet's storage units at Gotham Mini Storage. Motion, Ex. F. Detective Gurleski's supporting affidavit explained that, earlier that day, a Gotham Mini employee had discovered one of the units with its door open. Id. at 3, 5. According to the affidavit, the employee entered the unit 'to ascertain whether something was wrong, and at that point identified pills that were visible in plain view inside the unit." Id. at 6. The employee notified an NYPD detective and sent the detective photographs of the pills and another substance inside an open container. Id. at 6. Detective Gurleski wrote in the affidavit that, based on his training and experience, he believed "the appearance of the pills to be consistent with counterfeit oxycodone pills laced with fentanyl," and believed "the appearance of the second substance to be consistent with crystal methamphetamine." Id. at 6.

Detective Gurleski's affidavit also described the overdose at the Grand Hyatt Hotel on July 30, 2022 and relayed the information from CS-1 about Mrabet and**{2023 U.S. Dist. LEXIS 5}** his storage unit. Id. at 5. In addition, the affidavit stated, "From hotel reservation records, I know that the individual who rented the Hotel room immediately prior to the individuals in the group was Mrabet Mounir." Id. The affidavit made no mention of Detective Aliberti's visit to Gotham Mini Storage on August 23, 2022.

A magistrate judge signed the warrant and law enforcement carried it out the same day. Id. at 11. The search recovered approximately 183 blue fentanyl pills and, inter alia, small quantities of additional fentanyl, methamphetamine, and cocaine. Motion, Ex. H, at 11-12.

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B. The Undercover Purchase

On September 30, 2022, an undercover police officer purchased $1,600 worth of fentanyl and methamphetamine from Mrabet and made a video recording of the purchase. Motion, Ex. H, 12-13. Lab testing of the drugs showed that they included approximately 11.451 grams of pills containing a detectable amount of fentanyl and a separate substance containing approximately 119.8 grams of pure methamphetamine hydrochloride. Id. at 13.

C. The "Pen-Ping" Warrant

On October 28, 2022, Detective Gurleski submitted a search warrant application for Mrabet's cell site location information and pen**{2023 U.S. Dist. LEXIS 6}** register information. See Motion, Ex. G. That warrant application included and incorporated by reference Detective Gurleski's supporting affidavit for the storage unit warrant application. See Abate Decl. ¶ 25; Opp. at 6-7.1 A magistrate judge signed the warrant on November 3, 2022. Id. at 4.

D. The iCloud Warrant

On December 20, 2022, Detective Gurleski submitted -- and a magistrate judge signed -- a third search warrant application, for access to the iCloud server associated with Mrabet's phone. Motion, Ex. H. Like the storage unit and pen-ping warrant applications, the supporting affidavit stated that Mrabet had occupied the hotel room where the overdose occurred "immediately prior to the individuals" who overdosed. Id. at 11. Similarly, the affidavit described the photographs that Gotham Mini Storage employees sent of Mrabet's open storage unit, though it failed to mention that Detective Aliberti had previously visited the storage facility to inquire about Mrabet. Id. at 11-12. The affidavit also listed the narcotics that law enforcement had discovered while executing the storage unit warrant. Id. Finally, the affidavit described the video-recorded undercover purchase of $1,600 of**{2023 U.S. Dist. LEXIS 7}** fentanyl and methamphetamine from Mrabet. Id. at 12-13.

E. The Residence Warrant

On January 4, 2023, Detective Gurleski submitted -- and a magistrate judge signed -- a search warrant application for Mrabet's residence and an additional storage unit. Motion, Ex. I. The supporting affidavit described the narcotics that law enforcement discovered when executing the storage unit warrant, but once again did not mention that Detective Aliberti had visited the storage facility to inquire about Mrabet. Id. at 4-5.

The application enclosed, but did not incorporate, the supporting affidavit for the storage unit warrant application. Id. at 4-5 n.l. Instead, Detective Gurleski corrected and clarified his statements in the storage unit warrant affidavit about Mrabet's stay at the Grand Hyatt Hotel. Id. Detective Gurleski wrote:

> Specifically, after reviewing hotel records that a hotel employee pulled up on a computer, I attested that, "[f]rom hotel reservation records, I know that the individual who rented the Hotel [R]oom immediately prior to the individuals in the group" is MRABET. Storage Unit Warrant Affidavit ¶ 7(c).
>
> On or about January 2, 2023, I revisited the hotel and spoke to the same employee**{2023 U.S. Dist. LEXIS 8}** to obtain documentation confirming that MRABET occupied the Hotel Room immediately prior to the decedents, but she indicated that the computer system now showed that another guest had occupied the Hotel Room in between MRABET checking out and the decedents' use of the Hotel Room. When asked, she was not able to explain why the information had not been previously available in the hotel computer system. Notwithstanding this new

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information, I believe that the Storage Unit Warrant set out sufficient probable cause to believe that the MRABET had committed the Subject Offenses and that the storage units reserved in his name contained evidence, fruits and instrumentalities of the Subject Offenses.Id. (alterations in original). In addition, the affidavit described the video-recorded undercover purchase of $1,600 worth of fentanyl and methamphetamine from Mrabet on September 30, 2022. Id. at 5-8.

II. Legal Standard

"To be entitled to a Franks hearing, a defendant must make a substantial preliminary showing of (1) falsity, that a false statement . . . was included by the affiant in the warrant affidavit, (2) knowledge, that the affiant made the allegedly false statement knowingly and intentionally,**{2023 U.S. Dist. LEXIS 9}** or with reckless disregard for the truth, and (3) materiality, that the allegedly false statement is necessary to the finding of probable cause." United States v. Sandalo, 70 F.4th 77, 85 (2d Cir. 2023) (ellipses in original).2

"[T]he burden imposed by the 'substantial preliminary showing' standard [is] a heavy one that requires more than a mere conclusory showing." Id. at 86. "A defendant is required to make allegations of deliberate falsehood or of reckless disregard for the truth . . . accompanied by an offer of proof." Id. at 85 (ellipses in original). Defense counsel's "mere desire to cross-examine" does not suffice. Id.

"With respect to knowledge, allegations of negligence or innocent mistake are insufficient." Id. "As for materiality, the alleged falsehood or omission should be set aside and the remaining portions of the affidavit should be reviewed . . . to determine if probable cause still exists." Id. (ellipses in original). "If after doing so there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Id. "But if the remaining content is insufficient, the defendant is entitled . . . to a hearing." Id. (ellipses in original).

"Probable cause requires a fair probability that contraband or**{2023 U.S. Dist. LEXIS 10}** evidence of a crime will be found in a particular place." United States v. McKenzie, 13 F.4th 223, 236 (2d Cir. 2021). "When the available facts would warrant a person of reasonable caution to believe that contraband or evidence of a crime is present, an officer has probable cause to conduct a search." Id. The Court must "consider the totality of the circumstances in making probable cause assessments," avoiding "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." Id.

"Fourth Amendment principles governing searches and seizures apply only to governmental action and are thus wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official." United States v. DiTomasso, 932 F.3d 58, 67 (2d Cir. 2019). "[P]rivate actions are generally attributable to the government only where there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself." Id. at 67-68 (ellipses in original). "The requisite nexus is not shown merely by government approval of or acquiescence in the activity." Id. at 68. Rather, it must be "that the**{2023 U.S. Dist. LEXIS 11}** government is responsible for the specific conduct of which the accused complains." Id. (emphasis in original).

III. Discussion

Mrabet argues that a Franks hearing is necessary because each of the four challenged search warrants contained two material falsehoods -- one an affirmative statement, the other an omission. First, Mrabet notes, the affidavits supporting the storage unit warrant, pen-ping warrant, and 'Cloud warrant "mischaracterized the defendant as the hotel guest last occupying [the hotel] room before the

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deceased guests occupied it." Abate Decl. ¶¶ 11, 22, 27. Although Detective Gurleski's affidavit in support of the residence warrant corrected that mischaracterization, Mrabet contends that the correction itself "contained several additional misstatements." Id. ¶ 32. Second, in discussing the photographs of Mrabet's open storage unit sent by Gotham Mini Storage employees, all four challenged warrants omitted the fact that Detective Aliberti had previously visited the storage facility and, Mrabet alleges, also omitted the fact that employees "entered the storage unit as agents of the police" because they were "deputized" by Detective Aliberti. Id. ¶¶ 16-20.

A. Misstatement About{2023 U.S. Dist. LEXIS 12} Mrabet's Hotel Stay

Mrabet is not entitled to a Franks hearing about the mischaracterization that Mrabet stayed in the hotel room in question "immediately prior" to the guests who overdosed. Mrabet has not made a substantial preliminary showing that Detective Gurleski made the misstatement intentionally or with reckless disregard for its truth. Moreover, even if Mrabet had made such a showing, the misstatement was immaterial because it was not necessary for a finding of probable cause for any of the challenged warrants.

Mrabet's allegations of Detective Gurleski's mental state make no "more than a mere conclusory showing" of intent or recklessness regarding the timing of Mrabet's hotel stay. Sandalo, 70 F.4th at 86. Mrabet makes a bare assertion that Detective Gurleski's mischaracterization must have been "designed to mislead," Motion at 3, because Detective Gurleski "had reason to know it was not true," Abate Decl. ¶ 23. But alleging that an affiant "had reason to know" a fact was untrue, id., makes no showing that the affiant acted with anything other than "negligence or [by] innocent mistake." Sandalo, 70 F.4th at 85.

Indeed, it was Detective Gurleski himself who corrected the mischaracterization when, in his affidavit supporting the**{2023 U.S. Dist. LEXIS 13}** residence warrant application, he explained the discrepancy. See Motion, Ex. I, at 4-5 n.1 ("On or about January 2, 2023, I revisited the hotel and spoke to the same employee to obtain documentation confirming that MRABET occupied the Hotel Room immediately prior to the decedents, but she indicated that the computer system now showed that another guest had occupied the Hotel Room in between MRABET checking out and the decedents' use of the Hotel Room. When asked, she was not able to explain why the information had not been previously available in the hotel computer system."). Mrabet has not made a substantial preliminary showing of Detective Gurleski's mental state by urging the Court to make the speculative inference that Detective Gurleski intentionally provided false information about the timing of Mrabet's hotel stay -- or provided such information with reckless disregard for its truth -- in the first three challenged warrant applications, all of which were approved, only to reverse course by correcting himself in the residence warrant application.

Mrabet asserts that even the corrected statement was false because the true timing of his hotel stay "was not only in the hotel reservation**{2023 U.S. Dist. LEXIS 14}** records computer but was provided at the August 11 interview." Abate Decl. ¶ 32. Mrabet is referring to the follow-up report by Detective Perez, who spoke with the hotel's assistant front manager on August 11, 2022. But that report says only that "[t]he last time Mrabet, Mounir checked in the hotel was on July 23, 2022 and checked out July 25, 2022." Abate Decl. ¶ 10 (quoting Motion, Ex. C). It says nothing about whether any other guest stayed in the same room in between when Mrabet checked out on July 25 and a member of the group that overdosed checked in on July 28. Moreover, another report from August 11, prepared by Detective Aliberti, does state that the assistant front desk manager informed law enforcement that the hotel room in question "was last occupied by Mrabet, Mounir." Id. ¶ 11. The August 11 reports thus do not suggest that Detective Gurleski's corrected statement was false. If anything, they undercut Mrabet's assertion that -- at the time of the first three challenged warrant applications --

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Detective Gurleski had any reason to know that his statement about the timing of Mrabet's hotel stay was a mischaracterization.

Mrabet also asserts that the correction falsely stated{2023 U.S. Dist. LEXIS 15} that "Detective Gurleski reviewed hotel records that a hotel employee pulled up on a computer before making the assertion that the individual who rented the Hotel Room immediately prior to the individuals in the group is MRABET." Id. ¶ 33. As Mrabet points out, the only police reports from August 11 -- when law enforcement spoke with the Grand Hyatt assistant front manager -- are from Detectives Perez and Aliberti, not Gurleski. Id. ¶¶ 10-11.

But Mrabet makes no argument for why it is material to probable cause whether Detective Gurleski initially reviewed the hotel records himself or whether he relied on the reports from Detectives Perez and Aliberti in his affidavits for the first three warrant applications. Moreover, on January 2, 2023, Detective Gurleski memorialized his follow-up conversation with the Grand Hyatt employee -- the subject of the corrected statement in the residence warrant application -- in which he learned that a different hotel guest occupied the room in question between Mrabet and the group that overdosed. Opp., Ex. A; see id. ("The representative did not have an explanation as to why this reservation did not appear in their records when we initially asked in{2023 U.S. Dist. LEXIS 16} the beginning of the investigation. She stated it was likely a computer issue as their system is old and frequently malfunctions.").

Moreover, even assuming arguendo that Detective Gurleski intentionally or recklessly mischaracterized the timing of Mrabet's hotel stay in the first three challenged warrant applications, that mischaracterization would still not be material. It was not "necessary to the finding of probable cause" that Mrabet stayed in the hotel room right before the group that overdosed rather than, as the parties agree was actually the case, three days before the group. Sandalo, 70 F.4th at 85. The Court agrees with the Government that "[a]djusting the statement to reflect [that] the defendant occupied the room 'prior to' the decedents would result in a statement that still supports, and certainly does not undermine, probable cause." Opp. at 27. "The defendant's occupancy of the hotel room prior to the check-in of one of the decedents is the key fact, and is significant when combined with other remaining facts: other hotel occupants' discovery and use of powder from the closet, the mass fentanyl-related overdose incident that followed, and information from a confidential source about the defendant's{2023 U.S. Dist. LEXIS 17} fentanyl activities." Id. (emphasis added). Either way, "[t]he point is that the defendant was suspected of leaving narcotics inside the closet of a room that he had recently occupied." Id.

Moreover, even if the Court were to entirely scrub the statements about Mrabet's hotel stay from Detective Gurleski's affidavits, the information from CS-1 -- who informed law enforcement that Mrabet sold drugs in and outside the Grand Hyatt Hotel and who personally observed drugs in Mrabet's storage unit -- would have been enough for probable cause to search the storage unit, which was the first warrant application. At that point, the later warrant applications validly included the fact that the storage unit search had uncovered narcotics. In addition, days after Mrabet's storage unit was searched, an undercover officer purchased $1,600 worth of fentanyl and methamphetamine from Mrabet, a fact that was included in the iCloud and residence warrant applications and that also would have sufficed for probable cause for those warrants independent of the challenged misstatement.

B. Omission of Detective Aliberti's Visit to the Storage Facility

Mrabet is similarly not entitled to a Franks hearing about the omission{2023 U.S. Dist. LEXIS 18} of Detective Aliberti's visit to the storage facility. Mrabet's allegations on that score are either speculative or conclusory, or in any case immaterial. Mrabet asserts that "[t]he employees entered

Appendix B

the storage unit as agents of the police" because Detective Aliberti's visit "deputized the storage facility employee(s) to enter the defendant's storage unit without his consent and take pictures of possible contraband -- circumventing Fourth Amendment concerns." Abate Decl. ¶¶ 18-19. "This deputizing of the employees was wholly omitted from the search warrant application" and would mean that the affidavit's statement that the storage facility employees entered "to ascertain whether something was wrong" was false. Id. ¶ 20.

But Mrabet makes no "offer of proof" at all, let alone a "substantial preliminary showing," of the allegation that Detective Aliberti "deputized" the storage facility employees or that the employees entered Mrabet's unit as agents of the police. Sandalo, 70 F.4th at 85. Mrabet has provided no basis to infer that Detective Aliberti told the employees to enter Mrabet's storage unit without consent. Mrabet does not contest that his storage unit was open and unattended for at least a full day, which would provide**{2023 U.S. Dist. LEXIS 19}** sensible reason for the employees to enter "to ascertain whether something was wrong." Abate Decl. ¶ 20.

Nor does Mrabet make any argument that the omission of Detective Aliberti's visit would be material in the absence of any deputization. Instead, Mrabet emphasizes that "a landlord has no right to access a lessee's property without notice to the lessee." Reply at 1. True as that may be, a search conducted "by a private individual not acting as an agent of the Government" is not a Fourth Amendment concern, DiTomasso, 932 F.3d at 67, and thus cannot be a basis for suppression. It would not be enough even for Mrabet to allege "government approval of or acquiescence in the" employees' search; rather, Mrabet must have made a substantial preliminary showing that "the government is responsible for" the search. Id. at 68 (emphasis in original). He has not done so.

Finally, even if the Court were to strike from Detective Gurleski's affidavits any mention of the photographs from the storage facility employees (as well as the challenged statement about the timing of Mrabet's hotel stay), the warrant applications would still have been supported by probable cause. As described above, the storage unit warrant application relayed information from**{2023 U.S. Dist. LEXIS 20}** CS-1, the confidential source who described that Mrabet sold drugs in and near the Grand Hyatt Hotel and who claims to have personally observed drugs inside Mrabet's storage unit. It was thus not "necessary to the finding of probable cause" that the storage facility employees also observed drugs in the unit. Sandalo, 70 F.4th at 85. And, once again, the independent basis for probable cause is even stronger for the later warrant applications, which mentioned that law enforcement had discovered drugs while executing the storage unit warrant and that an undercover officer had purchased drugs from Mrabet.

IV. Conclusion

For the reasons explained above, the Court hereby reaffirms its prior ruling that Mrabet's motion for a Franks hearing must be, and hereby is, denied.

SO ORDERED.

New York, NY

September 29, 2023

/s/ JeD S. Rakoff

JED S. RAKOFF, U.S.D.J.

Appendix B

{703 F. Supp. 3d 442} JED S. RAKOFF, U.S.D.J.:

On November 9, 2023, a jury convicted Mounir **Mrabet** of narcotics conspiracy, two counts of narcotics distribution, and possessing a firearm in furtherance of a drug trafficking crime. At trial, the Government introduced the testimony of Alfred Hernandez, a Special Investigator and Assistant Inspector General at the New York City Department of Investigation and a Task Force Officer at the Drug Enforcement Administration, concerning drug sellers' and buyers' use of slang to describe illegal narcotics, the packaging of certain drugs for wholesale and retail distribution, and the pricing of certain illegal drugs. All this was introduced without objection.

However, when the Government also attempted to introduce testimony from Mr. Hernandez about the sourcing of methamphetamine and fentanyl from Mexico, defense counsel**{2023 U.S. Dist. LEXIS 2}** objected to such testimony as outside the scope of Mr. Hernandez's purported expertise. The Court asked the Government whether Mr. Hernandez had submitted a report in compliance with Federal Rule of Criminal Procedure 16(a)(1)(G). The Government's answer was "yes." But as it turned out, the Government's answer was, at best, an exaggeration. After reviewing what the Government had submitted to defense counsel as Mr. Hernandez's report, the Court concluded that it did not adequately comply with the 2022 amendments to Rule 16. Consequently, with the Government's consent, the Court struck Mr. Hernandez's testimony about the Mexican sourcing and also precluded certain additional opinions Mr. Hernandez was prepared to offer. Because this entire episode demonstrated the Government's misunderstanding about what the 2022 amendments to Rule 16 require, the Court then indicated it would issue an Opinion clarifying what is required. Here is that Opinion.1

As amended in 2022, Federal Rule of Criminal Procedure 16(a)(1)(G) requires the Government, at the defendant's request, to disclose certain information in writing "for any testimony that the government intends to use at trial under Federal Rule of Evidence 702, 703, or 705 [relating to expert testimony] during its case-in-chief." Fed. R. Crim. P. 16(a) (1) (G) (i). In particular, "[t]he disclosure for each expert witness**{2023 U.S. Dist. LEXIS 3}** must contain," inter alia, "a complete statement of all opinions that the government will elicit from the witness in its case-in-chief" and "the bases and reasons for" each of those opinions. Rule 16(a)(1)(G)(iii).

As noted in the official commentary to the 2022 amendment, these provisions exist for good reason. The 2022 additions to Rule 16 address "shortcomings of the prior provisions on expert witness disclosure" -- chief among them, "the lack of adequate specificity regarding what information must be disclosed." Rule 16, Notes of Advisory Committee on 2022 Amendment. The amendment "is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed." Id. "To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment," the amendment "delete[s] the phrase 'written summary'" from the previous version of the Rule and "substitute[s] specific requirements that the parties provide 'a complete statement' of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications, and a list of other cases in which the witness has testified**{2023 U.S. Dist. LEXIS 4}** in the past 4 years." Id. Although "the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases," its language "is drawn from Civil Rule 26" and, in no uncertain terms, "requires a complete statement of all opinions the expert will provide." Id.

{703 F. Supp. 3d 443} As this official commentary recognizes, the prior practice of merely providing a criminal defendant with a brief "summary" of a prosecution expert's opinions proved to be woefully

Appendix D

inadequate. Since an expert witness, by definition, offers opinions outside the everyday knowledge of judges and juries, detailed specificity is required as to bases for those opinions before a court can adequately assess their admissibility or a defendant can contest their weight and meaning before a judge or jury. Although the amendments to Rule 16 largely mirror what has long been required in civil cases under Federal Rule of Civil Procedure 26, these requirements are even more important in criminal cases, since, while civil litigants may depose their opponent's experts in advance of trial, see Fed. R. Civ. P. 26(b) (4), criminal defendants have no such opportunity. But the Government must take the 2022 amendment to Rule 16 seriously if it is to have its intended salutary effect.

That did not occur here.**{2023 U.S. Dist. LEXIS 5}** While the first paragraph of Mr. Hernandez's report (attached here as an Appendix) states that it is a "complete statement of all opinions that the Government will elicit from [Mr.] Hernandez," what follows in the next paragraph is simply the broad statement that Mr. Hernandez will testify, "based on his training and experience," regarding seven broadly and briefly described categories, such as "the means and methods used to produce, store, transport, and distribute wholesale quantities of methamphetamine and fentanyl in the New York City area." The following paragraph only very lightly expands on these descriptions, stating that Mr. Hernandez "will explain," e.g., "how methamphetamine is typically packaged in wholesale form (pounds) and in retail form (grams)"; "that, because drugs like methamphetamine and fentanyl are illegal, customers will frequently pay for the drugs in cash, and as the relationship develops, will be permitted to purchase larger quantities of drugs"; "how large quantities of such drug proceeds are bundled, transported, and laundered"; etc. Appendix.

Even assuming arguendo that these broad and generalized "explanations" can somehow be understood as expert opinions,**{2023 U.S. Dist. LEXIS 6}** the problems only start there. For in place of the Rule's requirement that the expert's report contain "the bases and reasons for" each of the expert's opinions, Fed. R. Crim. P. 16(a)(1)(G)(iii), Mr. Hernandez's report contains just a single sentence in support of all the above: "Inspector Hernandez's testimony will be based on his training, education, and experience, including his 37 years as a law enforcement officer primarily involved in investigating narcotics trafficking." Appendix. Rather than comply with Rule 16, this statement -- which is never elaborated in even the slightest respect -- is a patent evasion of the Rule's requirements. As the Supreme Court and the Second Circuit have long made clear in their holdings with respect to expert testimony under Federal Rule of Evidence 702 (applicable to both civil and criminal cases), a statement of an opinion's bases and reasons cannot merely be "the ipse dixit of the expert" from experience. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Rather, "[amn expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion." Riegel v. Medtronic, Inc., 451 F.3d 104, 127 (2d Cir. 2006).

If defense counsel had lodged a pretrial objection to the Government's purported Rule 16 "disclosure" of Mr. Hernandez's testimony, the Court would**{2023 U.S. Dist. LEXIS 7}** likely have required the Government to amend the disclosure to comply with Rule 16 by providing far greater specificity and analysis. **{703 F. Supp. 3d 444}** Instead, counsel, for whatever tactical reason, chose to wait until trial and then only to object to the testimony from Mr. Hernandez about the sourcing of drugs from Mexico. However, before the Court ruled on that objection, the Government voluntarily narrowed the categories of Mr. Hernandez's testimony and agreed not to inquire not only about such sourcing, but also about most further aspects of Mr. Hernandez's testimony that had not already been introduced without objection.

Nevertheless, the Court hereby puts the Government on notice that in the future the Court will require the Government to produce to the Court in advance of trial its expert disclosures under Rule 16, so that the Court can timely assess their adequacy. The Government might also consider having

Appendix D.

its prosecutors take a look at expert witness reports in civil cases, which typically consist of 20 or more pages of specific opinions and detailed statements of the reasons for those opinions and the methodologies employed. Going forward, the Court will not tolerate the shoddy noncompliance with amended**{2023 U.S. Dist. LEXIS 8}** Rule 16 that was encountered in this case.

New York, NY

November 27, 2023

/s/ Jed S. Rakoff

JED S. RAKOFF, U.S.D.J.

Appendix D

Inner City Press

In Other Media-eg New Statesman, AJE, FP, Georgia, NYT, Azerbaijan, CSM Click here to contact us .

These reports are usually available through Google News and on Lexis-Nexis

For Mrabet Trial US Got OK to Seal Courtroom Then Guilty Got 270 Months Now 2d Cir Cited

By Matthew Russell Lee, Patreon Maxwell Book

SDNY COURT EXCLUSIVE, April 23 - In the U.S. District Court for the Southern District of New York on January 5, a bond or detention proceeding was held by Magistrate Judge Sarah Netburn for Mounir Mrabet, charged with narcotics conspiracy.

Inner City Press was present as the only media in the Mag Court. Related Mag Court live-tweeted thread (more on Patreon here) vlog here

Mrabet was in a white t-shirt; he had been arrested at 6 in the morning. He consented to detention without prejudice.

On May 11, 2023, Mrabet appeared before the assigned District Judge, Jed S. Rakoff. Trial

F

Sources Say, Blaming UN - Update - Editorial

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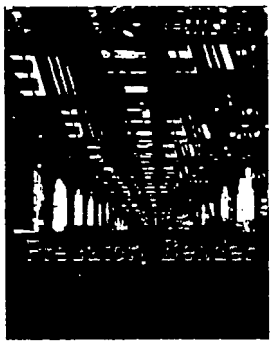

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also includes "Toxic Credit in the Global Inner City"

Community Reinvestment

Bank Beat

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was set for August 8, and discovery production to the MDC was discussed.

Then Mrabet's counsel asked for release on bail. The AUSA replied that Mrabet had 10 kilos of meth and seven phones; 20 arrests, four felonies.

Judge Rakoff said it seemed clear, but for the increasing danger in the MDC. He said in some of his cases, defendants have been moved to other facilities. No commitment to make that recommendation was made by the AUSA. Mrabet remains detained.

Jump cut to June 29, 2023 - Mrabet was back in court, this time being allowed to fire his CJA lawyer (who nevertheless continued to make discovery arguments on his bahalf). Mrabet, speaking for himself, described lock-downs in the MDC and the difficulty of getting discovery on a laptop - he wanted it printed out. Judge Rakoff ordered the print outs. The AUSA said she would look into it - and that a superseding indictment had been added.

On July 5 Judge Rakoff approved the US Attorney's Office proposal to put all the iCloud text messages on a laptop and FedEx it to Mrabet in the MDC, rather than 30 bankers boxes of print-outs which FedEx said would cost over $50,000. The US says this "eliminates the delay of awaiting a CJA-funded laptop from the defense."

A new CJA lawyer was appointed, and on July 14 Judge Rakoff set a new trial date:

F

November 6, 2023.

On August 4 the new CJA lawyer moved to suppress, declaring that Detective Mark Gurleski obtained the warrant based on false statements and annexing NYPD records of interviews about Hyatt room 3344 and a storage locker at 501 Tenth Avenue.

On November 2, 2023, the US Attorney's Office wrote in seeking to have the courtroom sealed during the trial, for UC-1 who they want to leave unnamed, or with pseudonym. They got it approved: "ORDER as to Mounir Mrabet: The Government's request for limited closure of the courtroom is GRANTED. The Government's request for UC-1 to testify at trial using only a pseudonym, is GRANTED. (Signed by Judge Jed S. Rakoff on 11/3/2023)."

They claim an audio feed will be available (as for example SDNY District Judge Paul A. Engelmayer provided in another case Inner City Press wrote in about) - and that "the Government would make the daily transcript of IC-1's testimony available to the public through the court reporter's office."

On November 7, Inner City Press found Courtroom 14B locked midday. It returned at 2 pm and entered the courtroom, only to be told to leave, that an audio feed was available in 23B. But that was locked (as were 24B and 26B, which Inner City Press checked). It was after 3 pm when the sealing without audio

E

ended, and a DEA expert got on the stand. A note was left.

Even as to a belated transcript - at how high a cost? Can that really be called publicly available? Some Districts provide an online list of all proceedings for which closure is sought. Here, nothing --

and on November 9, amid an unrelated JPM Chase settlement with David Boies, guilty verdicts against Mrabet, sentencing set for February 12, 2024.

On December 19, Judge Rakoff docketed the outcome of a conference: "The Government may submit a letter brief, of up to five single-spaced pages, by 12/29/2023 regarding whether the Court should permit non-statutory victims to be heard at Mrabet's sentencing. Defense counsel may submit a responsive letter brief, of up to five single-spaced pages, by 1/12/2024."

The prosecutors' December 29 letter recounts the overdose deaths in room 3344 of the Hyatt Grand Central Hotel on July 29-30, 2022 and cites US v. Sica (2d Cir. 2017)

On March 15, 2024 the US Attorney's Office, noting the 15 year minimum, asked for 30 to life, attaching a Victim Impact Statement from the mother of the deceased: "all you see is money you have made because you do not have a conscience at all. I wish you no mercy."

On March 20 the US Attorney's Office put in another victim impact statement, from the E

father of a deceased: "He had plans to become a professional hockey player. I would ask the Court to do whatever it can to eliminate the evil"

On April 23, the day of sentencing, the US Attorney's Office put in a third victim impact statement, by the father of a deceased hockey player, "he was my best friend, sometimes me and my wife share his stories hours and hours... We need a justice for our son [redacted] We don't want other parents suffer as me and my wife suffered after our loss." Mrabet's sentencing was moved back to April 24.

And Inner City Press went. Thread:

Mrabet: They edited the video, it was illegal. This case was unfair. The indictment was unconstitutional. My name is in caps - I'm not a corporation. I'm not as sharp as these Ivy League students.

Mrabet: These are sharky and murky waters. A no-knock warrant. Apple gave up all my comminications. I'm not responsible for those drugs. Maybe Biden is responsible for those drugs. Or China.

Judge Rakoff: Mr. Mrabet is intelligent, but not on the law. There is something to Mr. Mrabet saying he is a victim. But he chose his acts. The Government wants 30 years. That's overly punitive. But the mandatory minimum is not enough. I sentence you to 22 and a half years.

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Jump cut to February 6, 2025 when a hand written motion by Mrabet, complete with a copy of the warrant with handwriting "False" on it, went into the docket.

Jump against to April 23, 2025, when Judge Rakoff wrote that he has no jurisdiction, for now: "the Court must wait until the mandate of the United States Court of Appeals for the Second Circuit issues with respect to Mr. Mrabet's appeal before addressing or resolving his motions. SO ORDERED. (Signed by Judge Jed S. Rakoff on 4/23/2025)."

The case is USA v. Mrabet, 1:23-cr-69 (Rakoff)

***

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Other, earlier Inner City Press are listed here, and some are available in the ProQuest service, and now on Lexis-Nexis.

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Address Location	Street	City	State	Zip	Apt #
Phone #	Cross Street		Intersection of		Premise Type
Business Name			Business Type		
Event Details					

Details

Summary of Investigation:
1. On August 3, 2022, at approximately 1410 hours, Mounir, Mrabet 08/18/1984 was arrested by Det. Clemente from the 13th detective squad. Prisoner arraignment lookup shows the defendant was ROR. I also checked the NYC Department of Correction Inmate lookup and Mounir, Mrabet is not in the system.

2. Case active. This is inside of a hotel Room. I thought I had Expectation of Privacy - in Hotel - ?

CONFERRED WITH

Routing Rules

ATTACHMENT

No	Attachment	Description
1	PDF 1659742262036_arraignment.pdf	1659742262036_arraignment.pdf
2	PDF 1659742252778_arrestrepor.pdf	1659742252778_arrestrepor.pdf

Reporting Officer:	**Rank** DT3	**Name** CARLOS PEREZ		**Tax Reg. No.** 948262		**Command** 750-NARCOTICS BOROUGH MANHATTAN SOUTH
Reviewing Supervisor:	**Manner of Closing** -	**Date Reviewed:** 08/06/2022	**Date of Next Review**	**Name** STEPHEN LOUD		**Supv. Tax No.** 932923
Endorser:	**Rank** SGT	**Name** STEPHEN LOUD		**Tax Reg. No.** 932923	**Command** 750	**Status** Approved
	Endorsement Date 08/06/2022	**Comments**				

Tracking# 76250273

Information Results

Crime/Condition	Command	Date of This Report
	014-MIDTOWN PRECINCT SOUTH	08/06/2022

Date Reported	Complaint No.	Date Assigned	Case No.	Unit Reporting	Follow-Up No.
07/30/2022	2022-014-08938	07/30/2022	2022 - 184	TEAM 1-6-10	20

Topic/Subject	Activity Date	Activity Time
(Information Results) ARGUS VIDEO REQUEST	08/06/2022	10:00

Reason For Request

Conflict

Details

Reason for this Location

Source	Pct Plan	Other, Specify
UF61 - 2022 - 14 - 8938		

Location

All this Because of the Nebula Drug overdose.

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U.S. Department of Justice
United States Attorney
Choose a District

Memorandum

Type of Activity	Interview	
Date of Activity	January 2, 2023	
Investigation At	Triple Overdose	
USAO Number (if applicable)	2022R00929	
Prepared By	Det. Gurleski	

On 01/02/23 Det. [redacted] and I went to the [redacted] Hotel at [redacted] to obtain records showing that hotel room 3344 was vacant after Mounir Mrabet checked out on 07/25/22, until our victims checked in on 07/28/22.

The representative searched the room number and stated that there is record of a guest checking in on 07/25/22 and checking out on 07/27/22.

The representative did not have an explanation as to why this reservation did not appear in their records when we initially asked in the beginning of the investigation. She stated it was likely a computer issue as their system is old and frequently malfunctions.

U.S. Department of Justice
United States Attorney
Choose a District

Memorandum

Type of Activity	Other	
Date of Activity	February 13, 2023	
Investigation At	Nebula OD	
USAO Number (if applicable)	2022R00929	
Prepared By	Det. Gurleski	

On 12/20/22 I served Apple Inc. with a search warrant for Icloud account Mounirmez@icloud.com

When Apple provided me the return, there were two Icloud accounts provided, Mounirmez@icloud.com, and mezmrabet@icloud.com

It is unclear what caused the second account to be linked to the return.

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U.S. Department of Justice
United States Attorney
Choose a District

Memorandum

Type of Activity	Surveillance	
Date of Activity	Click or tap to enter a date.	He could just All Dates Really
Investigation At	Triple Overdose	
USAO Number (if applicable)	2022R00929	
Prepared By	Det. Gurleski	

on these Dates He Also Deputized Storage Staff to Act as Agents proof-

On 09/29/22, 12/02/22, and 12/29/22 I went to Manhattan Mini Storage located at 645 West 44th Street in Manhattan and observed the inside of unit 5-13-5. The inside of the unit is able to be viewed from above, without entering or breaching the unit in any way.

Inside of the unit I observed a large metal cooking pot and Styrofoam packing material identical to the pot/packing material recovered pursuant to the search warrant conducted at Mounir Mrabet's storage unit at Gotham Mini Storage. It appeared based on the search warrant at Gotham Mini Storage that Mrabet has narcotics shipped to him inside of these large pots.

Attached below are photos of the inside of unit 5-13-5 taken on 09/29/22 and 12/02/22 respectively.

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Tenant Audit History

Saturday, October 8, 2022
8:38 am

StorageMart #1986
645 W 44th St
New York, NY 10036
Phn: (212)245-7337
s1986@storage-mart.com

Mounir Mrabet
501 10 Th Ave New York N.y.
New York, NY 10018
Phn: (917)362-6347
Email:mounirmez@icloud.com

Currently Due:
$351.96 41

Receipt #	Created On	Description	Amount	Unsettled	Balance	Due Date	Unit No	Location	Manager

Tenant Notes:

Friday, September 30, 2022 - DG0127

Notes should not say vendor card, should be access card

Friday, September 30, 2022 - DG0127

Customer came in and stated he left his vendor card, needed to be let to the 5th floor. Verified ID and granted access with my card to 5th floor

Thursday, September 29, 2022 - DG0127

US Department of Justice either Walter Mikowski Office: 212-637-2206 Cell: 646832-7377 or Mark Gurlaski 646-901-4102 need to be called immediately if a package arrives for Mr. Mrabet DO NOT SAY ANYTHING TO THE CUSTOMER.

Thursday, June 16, 2022 - 310175

Transferring guest into different room. Room originally reserved is occupied.

This shows A clear Violation of 4th Amendment Concerns That AUSA Jane Chong clearly Says I haven't showed.

NYPD Property Clerk Invoice

PD 521-141(Rev.12/18)

44

Invoice No. 1001563294

Invoicing Command
7TH PRECINCT

Invoice Status
OPEN

Invoice Date
09/28/2022

Property Type
CONTROLLED SUBSTANCE

Property Category
INVESTIGATORY

Officers	Rank	Name	Tax No.	Command	
Invoicing Officer	DT3	GONZALEZ, VICENTE	948214	NARC BORO MS	OCME_EU No.
Arresting Officer	N/A				OCME_FB No.
Investigating Officer	DT3	ALIBERTI, JOSEPH R	956378	NARC BORO MS	Police Lab Evid.Ctrl.No.
Det Squad Supervisor	N/A				Det Sqd. Case No.
CSU/ECT Processing	N/A				CSU/ECT Run No.

Item	Total QTY	Article(s)	Estimated Value	Pkg. No.	QTY	Disposition
1	1	OTHER PARAPHERNALIA WITH RESIDUE COLOR: BLACK/BLACK MAKE: SNAP-ON RESIDUE: METHAPHETAMINE DESCRIPTION: THE ABOVE ITEM WAS RECOVERED ON THE GROUND FROM INSIDE STORAGE # 5-1-368. DAMAGE/DEFACEMENT DESCRIPTION: WEAR AND TEAR		1516347	1	
2	1	OTHER PARAPHERNALIA WITH RESIDUE COLOR: BLACK/BLACK MAKE: SHRINE RESIDUE: METHAPHETAMINE DESCRIPTION: THE ABOVE ITEM WAS RECOVERED FROM THE GROUND INSIDE OF STORAGE # 5-1-368 DAMAGE/DEFACEMENT DESCRIPTION: WEAR & TEAR		1516347	1	
		Total Cash Value	0.00			

REMARKS

948214 09/28/2022 22:26 : ABOVE IS A COMPLETE LIST OF PROPERTY VOUCHERED AS INVESTIGATORY EVIDENCE. PROPERTY WAS RECOVERED IN REGARDS TO SEARCH WARRANT SIGNED BY THE HONERABLE JAMES L COTT, PROPERTY WAS RECOVERED BY DET. ALIBERTI FROM 501 10 AVENUE STORAGE UNIT NUMBER 5-1-368.

932923 09/28/2022 23:01 : Invoice Approved By 932923

Date of Incident	Penal Code/Description	Crime Classification	Related To	Receipt
07/30/2022	D.O.A., INVESTIGATE	INVESTIGATION		

Prisoner(s) Name	D.O.B	Age	Address	Arrest No./Summons No.	NYSID No.

	Name	Tax No.	Address	Phone No
Finder	ALIBERTI, JOSEPH R	956378	1 POLICE PLAZA NEW YORK, NY 10038	929-248-2326
Owner	JD MO, JD MO		I dont Know him -	
Complainant(s)	DHALIWAL, PARMJOT S		9930 123A STREET 4R2 SURRAY, BA V3V	
Person Vehicle Taken From				

Complaint No. 2022-014-008938

Related Comp No.(s) N/A

Aided/Accident No.(s) N/A

This Defeats The Allegation That they Did a Random! Search.

Not only Deputized by Recieving pictures. But used a false Affidavit...

Invoice No. 1001563294

Property Clerk Copy
printed: 10/14/2022 15:49

PCD Storage No.
—

Page No.1 of 2

E

This is Fruit truck of a poisonous Farm -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE
OFFICE OF THE CLERK
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

Tammi M. Hellwig
CLERK

August 11,2025

Mounir Mrabet
Reg #38281510
FCI Ray Brook
P.O. Box 900
Ray Brook, NY 12977

Mr. Mrabet,

I did some research on your case 23 CR 69 and we do not have Grand Jury Transcripts. If you would like documents on this case it is 50 cents a page.

There's no grand Jury Minutes and There is no bill of Particulars.

Thank you !

Correspondence Clerk
Records Management

PLEASE RETURN A COPY OF THIS LETTER WITH YOUR REMITTANCE

E

Heard MR 8/7-

RULINCS 38281510 - MRABET, MOUNIR - Unit: BRO-H-A

FROM: 38281510
TO: Abate, Camille
SUBJECT: RE: RE: hello i would like all my court transcript
DATE: 11/13/2023 06:06:31 PM

i just felt if i had all those drugs i shouldve had money or a gun
----Abate, Camille on 11/13/2023 12:51 PM wrote:

>

I will mail you your transcripts. There is no bill of particulars in the case.

The Notice of Appeal has to wait until you are sentenced in February; you can't do a Notice of Appeal until the judgment is final and you have been sentenced.

The laptop contained all of the evidence that was admitted into the case - including all the photographs and recordings both audio and video, and stipulations. There was nothing wrong with the jury having the laptop; this way they were able to go over the exhibits.

You say you were not that guy they painted, but all of your video recordings and your texts made you look like that guy they painted. I told you, that was the worst evidence because it was evidence that YOU created.

I am sorry we lost, but in the end the jury could not ignore all the money and drugs in those videos.

MOUNIR MRABET on 11/11/2023 12:20:17 PM wrote
please i would like all my court transcripts and also wanted to tell you they stuck a laptop in the delibration room we dont even know what was on the laptop ..... i need you to give me my bill of particulars and also file notice of appeal for me i will find an appeal lawyer but i need you to thiose things please ,,,

i dont feel that was a fair trial but its okay and im not that guy they painted if i wouldve rep my self i wouldve been better offf because i wouldve exposed everything the feds did in the case

but camille please send me my transcrpits bill of particulars and i have no codefandants i want appeal

E

1

From: Eagan, Miranda (USANYS) [Contractor]
To: King, Lauren (USANYS) [Contractor]
Subject: FW: [encrypt]FW: [EXTERNAL] Apple Response; Case Number: 22 MAG 10217 / 2022R00929; (202200124616)
Date: Friday, January 20, 2023 10:18:32 AM

From: Gurleski, Mark (USANYS) <MGurleski@usa.doj.gov>
Sent: Friday, January 20, 2023 7:44 AM
To: Eagan, Miranda (USANYS) [Contractor] <MEagan@usa.doj.gov>
Subject: [encrypt]FW: [EXTERNAL] Apple Response; Case Number: 22 MAG 10217 / 2022R00929; (202200124616)

Miranda, icloud warrant??

This is an apple return for another case. Can we have these returns transferred to a cellebrite report please

The password for the encrypted file(s): VEVJxy2G7dvT#x$qulMf

From: LawEnforcement@apple.com <lawenforcement@apple.com>
Sent: Thursday, January 19, 2023 1:21 PM
To: Gurleski, Mark (USANYS) <MGurleski@usa.doj.gov>
Subject: [EXTERNAL] Apple Response; Case Number: 22 MAG 10217 / 2022R00929; (202200124616)

Via Email Delivery

This files was used against me in court with out my Consent, my 5th amendment Protects me from self incrimination Also I have an Expectation of privacy in my Encrypted Icloud.

Detective Task Force Officer Gurleski
United States Attorney's Office Southern District of New York
New York, NY - New York

Dear Detective Task Force Officer Gurleski,

Apple Inc. ("Apple") is providing APL000001 and APLiC000001 through APLiC000002 in response to the legal request received by Apple on 2022-12-21. These files are true copies of the Apple data reasonably accessible from Apple's systems and responsive based on the criteria and information provided in the legal request. Said files were prepared by Apple personnel in the ordinary course of business and were obtained during a reasonable search of Apple data.

E

A technical issue was identified that affected Apple's iCloud Photos content data pull where a bug was inadvertently introduced in Apple's iCloud Photos data pull code. Consequently, the iCloud Photos data provided in Apple's response to this search warrant may include photos with a create or modified date that is greater than the end date for timeframe of search specified in the search warrant, or, where no end date was specified, the signed date of the search warrant. Apple does not have an automated mechanism to filter any such files after the creation of the iCloud Photos legal data pulls. Accordingly, if such files are identified in the provided iCloud Photos data, Apple requests that you please delete the data that exceed the scope of the warrant.

This issue was specific to iCloud Photos data and other provided iCloud content data was not affected by this technical issue.

Please note that certain files within the iCloud backup data may contain aggregated data where Apple was unable to apply a date filter. Due to the complexity of the iCloud backup data you may need to work with a cellular forensics expert to access and review the provided data. Apple is unable to provide technical assistance.

Please note that the backup information produced is not a "business record" of Apple, and therefore Apple cannot authenticate as a business record any information extracted from a subscriber's iCloud backup file. You will likely need a forensic expert for such authentication.

only I could Authenticat

You may note entries from IP addresses beginning with "17." and/or "10." for any available connection logs provided. IP addresses beginning with "17." are assigned to Apple and their occurrence in these logs is reflective of activity on Apple internal servers and not an indication of any user connections. IP addresses beginning with "10." in relation to Find My iPhone ("FMIP") logs are also reflective of activity on Apple internal servers and not an indication of any user connections.

How could any one except the Reciever of phō Say whats Real or not.

For data security and customer confidentiality purposes, Apple's production of data containing customer personally identifying information is encrypted using GPG encryption software. Law enforcement officers who receive Apple data must be able to manage production files encrypted with the GPG format without technical assistance from Apple.

Technical information relating to GPG encryption software is available at: http://www.gpg4win.org/doc/en/gpg4win-compendium.html. Information in relation to installing GPG on Windows OS is included in this link under the heading 'Installing Gpg4win'. If you require further technical assistance/information, please consult your agency's Information Technology Department.

The password for the GPG file will be provided in a separate email.

All evidence preservation pursuant to the herein request response is the responsibility of the requesting law enforcement agency.

Sincerely,

E

Lesley
Apple Privacy & Law Enforcement Compliance
lawenforcement@apple.com
http://www.apple.com/privacy/

Enclosures via link at bottom of this email

For more information about Apple's Legal Process Guidelines for U.S. Law Enforcement, please visit:
http://www.apple.com/legal/privacy/law-enforcement-guidelines-us.pdf

****

To access the data, paste the below link in your browser url bar. Automatic download of a GPG file will be triggered.

****Link will expire in 30 days****

Please let the file complete its download before attempting to open it using the instructions in the GPG Password email.

---

https://s.apple.com/ci6o9x4o7l

Once you have decrypted the GPG file, please follow the Read_Me_Instructions document located within the Account Data Links folder. That document will provide instructions on how to download the data.

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the Storage Unit.

a. MRABET had been using another customer's access code to enter Storage Facility-1, often in the middle of the night.

b. On or about September 27, 2022, the Employee observed MRABET entering Storage ~~Facility-1~~.

13. On or about September 28, 2022, pursuant to a judicially authorized warrant, law enforcement agents executed a search on the Storage units. From inside the Open Unit, law enforcement agents recovered, among other things, the following:

a. Approximately 165 whole, round blue tablets, stamped "M" on one side and "30" on the other side, in addition to 18 partial tablets and assorted tablet fragments. Two whole tablets, together weighing approximately 0.219 grams, were subsequently tested and found to contain fentanyl and para-fluorofentanyl, indicating for the whole tablets a likely aggregate weight of approximately 18 grams;

b. Approximately four glass vials containing clear residue, one of which was subsequently tested and found to contain fentanyl, para-fluorofentanyl, and methamphetamine;

c. A blue twist of plastic containing purple residue, which subsequently tested positive for fentanyl; and

d. A glass jar containing solid material, which subsequently tested positive for cocaine.

The Controlled Purchase This Broker Guy set this up.

14. From my review of law enforcement reports and video footage recorded by an undercover law enforcement officer (the "UC"), I have learned that on or about September 27, 2022, the UC spoke with an individual (the "Broker") in an attempt to purchase three pounds of methamphetamine. Three days later, on or about September 30, 2022, the UC met with the Broker at a pre-arranged location in the vicinity of 9th Avenue and West 40th Street in Manhattan to conduct the transaction.

15. At the location, the Broker instructed the UC to call the Mrabet Phone Number. The Broker and the UC then proceeded to a nearby building on West 42nd Street, where they climbed several flights of stairs and entered an apartment unit (the "Apartment") to meet a third individual (the "Dealer"). The UC began a video recording of the encounter starting from his ascent up the stairs (the "UC Video Footage").

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22. During the transaction with the UC, **MRABET** indicated he had a "drill gun" (e.g., a gun that drills or kills people) which his co-conspirator, identified as "Rossi," had stolen from him; and that he had another gun, specifically a BB gun, that a woman had stolen from him. **MRABET** also indicated that he had a "SP22" (a semiautomatic pistol). Those comments corresponded to **MRABET**'s text message communications, during which he described owning different guns, including an SP22 or "piece;" asked for bullets; and threatened other drug dealers with his gun.

23. For example, on September 30, 2022, the same day as the UC transaction during which **MRABET** complained about Rossi stealing his "drill gun," **MRABET** instructed an individual saved in his phone as "Rossi," to return his "drill gun." Other chats made clear that Rossi was a fellow drug dealer who bought fentanyl (e.g., "blues") and methamphetamine (e.g., "tina" and "plates") from **MRABET**. Additionally, two weeks later, on October 16, 2022, **MRABET** texted "Rossi," "...I will fucking shoot u one day..." and "...Now bring me a pound."

Relevant Conduct

24. Although not presented at trial, the Government has advised that there is significant evidence to establish that **MRABET** left behind methamphetamine and fentanyl in a midtown hotel, which later guests found in the hotel closet and used, resulting in a mass overdose event involving three overdoses and two deaths. Additionally, **MRABET** stored methamphetamine and fentanyl, as well as other drugs, in a midtown storage unit. This criminal conduct is described more fully below.

what evidence I have Law Suit pending Because I Show proof :

25. During the early morning hours of July 30, 2022, three men and three women between the ages of 22 and 24 years old met at a midtown nightclub where at least some of them consumed cocaine. The individuals then traveled to the nearby Grand Hyatt Hotel, where the three men were staying, and found at least one steel tube in the hotel room closet. Some hours later, NYPD arrived at hotel room #3344 in response to a 911 call reporting a mass overdose event. One woman and one man were pronounced dead on scene, and a second unresponsive woman was taken to the hospital and eventually recovered. The surviving woman and one of the men both described to law enforcement that the group had used cocaine before arriving at the hotel room, with no apparent ill effects. The individuals reported that inside a closet in the hotel room, a member of the group found a steel container containing a powder substance. The surviving woman denied knowingly consuming the powder, but the man stated that members of the group had in fact consumed the powder.

Respectfully

E

HYATT
NEW YORK

Hyatt Grand Central New York
109 East 42nd Street
New York, NY 10017
Tel: 212-883-1234
Fax: 212-697-3772
grandnewyork.hyatt.com

INVOICE

[redacted]
United States

This is the reciept of the Actual person that was in the Same Room immediatly prior to the people that Died,, overdosed Did they go through a federal indictement. ??????? I dont know why I paid So Much for the Same Room.

Room No.	3344		
Arrival	07-25-22		
Departure	07-27-22		
Folio Window	3		
Folio No.	2435431		
Confirmation No.	5756568001		
Group Name			
Booking No.	1982171696		

Date	Description	Charges	Credits
07-25-22	Destination Fee	39.99	
07-25-22	Destination Fee - Sales Tax 8.875%	3.55	
07-25-22	Destination Fee - NYC Occupancy Tax 5.875%	2.35	
07-26-22	Destination Fee	39.99	
07-26-22	Destination Fee - Sales Tax 8.875%	3.55	
07-26-22	Destination Fee - NYC Occupancy Tax 5.875%	2.35	
07-27-22	Room Allowance	-91.78	
07-27-22	Luggage Storage Paidout	44.00	
07-27-22	Room Allowance	-44.00	
	Total	0.00	0.00
	Balance	0.00	

Guest Signature

I agree that my liability for this bill is not waived and I agree to be held personally liable in the event that the indicated person, company or associa ion fails to pay for any part or the full amount of these charges.

WE HOPE YOU ENJOYED YOUR STAY WITH US!

World of Hyatt Summary

No Membership to be credited

Join World of Hyatt today and start earning points for stays, dining and more. Visit www.worldofhyatt.com

How was your stay at the Hyatt Grand Central New York?
Our goal is to provide every guest with an excellent stay.
Please send any comments or concerns regarding your visit to HyattGCNY@hyatt.com

Lost and Found Inquiries: lost.foundnycgh@hyatt.com

For inquiries concerning your bill, please call 888-588-6308

Please remit payment to:
Hyatt Grand Central New York
Lockbox 842234
1950 N. Stemmons Freeway Ste. 505
Dallas, TX 75207

E

GRAND | HYATT

C/I 130pL

PLEASE NOTE THAT OUR CHECK OUT TIME IS 11:00 AM	
SALUTATION ▪MR ▪MRS ▪MS ▪OTHER	ARRIVAL 28 Jul 22 DEPARTURE 01 Aug 22
LAST NAME [redacted]	ROOM NO. 3344 PERSONS 3
FIRST NAME [redacted]	RATE PER NIGHT
THE FOLLOWING ADDRESS IS ▫ BUSINESS ▪ PRIVATE	PURPOSE OF VISIT ▫ BUSINESS ▫ LEISURE
ADDRESS	COMPANY
	TITLE
CITY STATE/PROV,	TELEPHONE 1-775-9955040
ZIP/POSTAL CODE	E-MAIL
COUNTRY US	METHOD OF PAYMENT VA
LP MEMBERSHIP	
NEWSPAPER	METHOD OF COMMUNICATION ▫ E-MAIL ▪ TEL ▫ NONE
DEPARTURE TIME DEPARTURE FLIGHT	CHECK-OUT TIME 00:00

Safety Deposit boxes are available for your valuables
Important – Please take notice that the proprietor of this hotel keeps safe deposit boxes where money, jewelry, documents or valuables of a like nature may be deposited for safe keeping. This hotel will not be responsible or liable for any loss or injury to such articles or any such property of any individual guest, or boarder, or lodger.

CHECKOUT TIME IS 11:00AM AT THIS HOTEL. 24 HOUR NOTICE IS REQUIRED TO AVOID AN EARLY DEPARTURE FEE OF ONE NIGHTS ROOM AND TAX.

I agree that my liability for this bill is not waived and I agree to be personally liable in the event that the indicated person, company, or association fails to pay for any part of the full amount of these charges. If I do not check out at the front desk I authorize the hotel to process all charges incurred during the stay to the credit card I presented at the time of check-in.

Signature: [redacted]

GRAND | HYATT

PLEASE NOTE THAT OUR CHECK OUT TIME IS 11:00 AM	
LAST NAME	[redacted]
FIRST NAME	[redacted]
ARRIVAL	28 Jul 22
DEPARTURE	01 Aug 22
ROOM NO.	3344
RATE PER NIGHT *Rate change applies	

PLEASE NOTE THAT OUR CHECK OUT TIME IS 11:00 AM	
LAST NAME	[redacted]
FIRST NAME	[redacted]
ARRIVAL	28 Jul 22
DEPARTURE	01 Aug 22
ROOM NO.	3344
RATE PER NIGHT *Rate change applies	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of a Warrant for All Content and Other Information Associated with the iCloud Account with Apple ID mounirmez@icloud.com, Maintained at Premises Controlled by Apple, Inc., USAO No. 2022R00929

22 MAG 10217

TO BE FILED UNDER SEAL

Agent Affidavit in Support of Application for a Search Warrant for Stored Electronic Communications

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

Mark Gurleski, being duly sworn, deposes and states:

I. Introduction

A. Affiant

1. 1. I am a Detective with the New York City Police Department ("NYPD") and a Task Force Officer ("TFO") with the United States Attorney's Office for the Southern District of New York (the "USAO-SDNY"). As such, I am a "federal law enforcement officer" within the meaning of Federal Rule of Criminal Procedure 41(a)(2)(C), that is, a government agent engaged in enforcing the criminal laws and duly authorized by the Attorney General to request a search warrant. During my time with the NYPD and the USAO-SDNY, I have received training in investigating narcotics distribution and trafficking, and I have participated in investigations into the same. I have also participated in the execution of numerous search warrants involving evidence of the sort described herein, including in cases pertaining to narcotics trafficking.

Asking for All users content?

B. The Provider, the Subject Account, and the Subject Offenses

2. I make this affidavit in support of an application for a search warrant pursuant to 18 U.S.C. § 2703 for all content and other information associated with the iCloud account with the Apple ID mounirmez@icloud.com (the "Subject Account") maintained and controlled by

There is no safe haven for Privacy...

Not allowed by SCA - 18. USC 2701-2713 - can not provide content with out Consent

the Court deems appropriate, where there is reason to believe that such notification will seriously jeopardize an investigation. 18 U.S.C. § 2705(b).

II. Probable Cause

A. Probable Cause Regarding the Subject Offenses

Overdose Deaths in Hotel Room Previously Rented by Mounir Mrabet

21. From my involvement in the investigation, law enforcement surveillance, my review of law enforcement reports, and my conversations with other law enforcement officers and witnesses, I have learned the following about a July 30, 2022 mass overdose event in Manhattan, as described below:

a. On or about July 30, 2022, law enforcement officers responding to a 911 call found three individuals in a reserved room of a hotel in Manhattan (the "Hotel Room") who appeared to have overdosed on narcotics. One individual was pronounced dead on scene ("Decedent-1"), a second individual died after resuscitation ("Decedent-2"), and a third individual survived (the "Survivor").

b. Based on my review of a forensic toxicology lab report provided by the New York City Office of the Chief Medical Examiner ("OCME"), I have learned that the immediate cause of death for Decedent-2 was acute intoxication by the combined effects of fentanyl, acetylfentanyl, cocaine, and ethanol.[1]

c. Based on my interviews with the Survivor and additional witnesses who were also in the Hotel Room earlier that morning, I have learned that there were six total individuals in the Hotel Room and that they had used cocaine. Based on my interviews with one of the additional

[1] A request to OCME for records relating to Decedent-1 remains pending.

witnesses, I have further learned that the group had discovered a bag of powder hanging in the closet of the hotel room, and that at least some of the individuals snorted some of the powder.

d. From hotel records, I learned that the individual who rented the hotel room immediately prior to the individuals in the group was MOUNIR MRABET.

Storage Units Reserved in the Name of Mounir Mrabet

2. From my involvement in the investigation and my conversations with other law enforcement officers and witnesses, I have learned the following about two storage units at a self-storage facility in Manhattan ("Storage Facility-1"), as described below:

a. On or about September 29, 2022, an employee at Storage Facility-1 (the "Employee") contacted law enforcement about a storage unit reserved under the name of MOUNIR MRABET ("Storage Unit-1"). One of the unit's two doors had been left open, and when an Employee walked through the open door to assess whether something was wrong, the Employee saw what appeared to be pills in plain view. From my conversation with the Employee, I learned that a second storage unit ("Storage Unit-2") was reserved under the same name, MOUNIR MRABET.

b. Later that day, the Honorable James L. Cott, United States Magistrate Judge for the Southern District of New York, issued a premises warrant authorizing the search of Storage Unit-1 and Storage Unit-2. During the ensuing search of Storage Unit-1, law enforcement seized approximately 183 round blue pills stamped "M" on one side and "30" on the opposite side (the "Pills"). Based on my training and experience, I believed the appearance of these pills was consistent with counterfeit oxycodone pills laced with fentanyl, often referenced by several street names, including "blues." The search also recovered various glass vials and plastic bags.

under MRABET's name. From inside the Open Unit, law enforcement agents recovered, among other things, the following:

a. Approximately 165 round loose blue tablets or tablet fragments, stamped "M" on one side and "30" on the other side, in addition to 18 partial tablets and tablet fragments, some of which subsequently tested positive for fentanyl and para-fluorofentanyl;

b. Approximately four glass vials containing clear residue, one of which contained a substance that subsequently tested positive for fentanyl, para-fluorofentanyl, and methamphetamine;

c. A blue twist of plastic containing purple residue, which subsequently tested positive for fentanyl; and

d. A glass jar containing solid material, which subsequently tested positive for cocaine.

B. Probable Cause Justifying Search of Subject Premises-1

8. From my review of law enforcement reports and video footage recorded by an undercover law enforcement officer (the "UC"), and my personal involvement in this

for reference, but is not incorporated by reference, as Exhibit A. Specifically, after reviewing hotel records that a hotel employee pulled up on a computer, I attested that, "[f]rom hotel reservation records, I know that the individual who rented the Hotel [R]oom immediately prior to the individuals in the group" is MRABET. Storage Unit Warrant Affidavit ¶ 7(c).

On or about January 2, 2023, I revisited the hotel and spoke to the same employee to obtain documentation confirming that MRABET occupied the Hotel Room immediately prior to the decedents, but she indicated that the computer system now showed that another guest had occupied the Hotel Room in between MRABET checking out and the decedents' use of the Hotel Room. When asked, she was not able to explain why the information had not been previously available in the hotel computer system. Notwithstanding this new information, I believe that the Storage Unit Warrant set out sufficient probable cause to believe that the MRABET had committed the Subject Offenses and that the storage units reserved in his name contained evidence, fruits and instrumentalities of the Subject Offenses.

Victim Impact

30. The provisions of the Mandatory Victim Restitution Act of 1996 apply to this Title 18 offense. Although not presented at trial, the Government has advised that there is significant evidence to establish that Mrabet left behind methamphetamine and fentanyl in a midtown hotel, which later guests found in the hotel closet and used, resulting in a mass overdose event involving three overdoses and two deaths. As contact information for the surviving victims and next of kin was not furnished, victim impact statements were unable to be solicited. Additionally, no specific victim or restitution information has been furnished by the Government to date.

Adjustment for Obstruction of Justice

31. The probation officer has no information indicating the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

32. The defendant declined to discuss the instant offense during the presentence interview on the advice of defense counsel. As Mrabet was convicted following a jury trial, he is not entitled to an adjustment for acceptance of responsibility, pursuant to §3E1.1. It is noted that the defendant did not testify at trial.

Offense Level Computation

33. The November 1, 2023, Guidelines Manual, incorporating all guideline amendments, was used to determine the defendant's offense level, pursuant to §1B1.11.

Ct. 1: Conspiracy to Distribute and Possess with Intent to Distribute Narcotics; 21 USC 841(b)(1)(A) and 846

Cts. 2 and 3: Distribution and Possession with Intent to Distribute Narcotics; 21 USC 841(b)(1)(A)

Ct. 4: Possession of a Firearm in Furtherance of a Drug Trafficking Crime; 18 USC 924(c)(1)(A)(i)

34. Counts 1, 2 and 3 are grouped for guideline calculation purposes because the offense level is determined largely on the basis of the total quantity of a substance involved, pursuant to §3D1.2(d).

35. In reference to Count 4, the guideline for a violation of 18 USC 924(c)(1)(A)(i) is §2K2.4. The guideline sentence is the term of imprisonment required by statute (60 months). Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to this count of conviction, pursuant to §2K2.4(b).

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION

1. Program Code	2. Cross File / Related Files	3. File No.	4. G-DEP Identifier
	☐ ☐ ☐ ☐ ☐	BZ-23-0006	WDD5I
5. By: Kareem R Freckleton, SA At New York OCDETF Strike Force		6. File Title MRABET, Mounir	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		8. Date Prepared 01-05-2023	

9. Other Officers: NYPD, SDNY

10. Report Re: Post Arrest of Mounir MRABET on January 5, 2023

DETAILS

1. On January 5, 2023, at approximately 7:30 am, NYPD Mark Gurleski notified Mounir MRABET of his rights witnessed by SA Kareem Freckleton and NYPD John Roberts. A post arrest interview of MRABET was conducted and recorded. The recording of the interview is preserved under exhibit N-1.

ACQUISITION OF EXHIBIT

Exhibit N-1 is one compact disc that contains a recording of SA Kareem Freckleton, NYPD Mark Gurleski and NYPD John Roberts post interview arrest of Mounir MRABET on January 5, 2023 at 99 10th Ave New York, NY 10011.

INDEXING

MRABET, Mounir - NADDIS: Pending

Notice # on this Date During the interview officer Mark Gurleski Says that his probable Cause is the Hotel Deaths, That happened in the Grand Hyatt. Also During this interview I MOUNIR MRABET Asked for a Lawyer Several times And wasn't even Aware Conscious

11. Distribution:	12. Signature (Agent)	13. Date
Division New York OCDETF Strike	/s/ Kareem R Freckleton, SA	01-05-2023
District	14. Approved (Name and Title)	15. Date
Other SARI	/s/ Diette M Ridgeway, GS	01-05-2023

DEA Form -6 (Jul. 1996)

DEA SENSITIVE
Drug Enforcement Administration

Please Look at this Video please.

RESIDENTIAL APARTMENT LEASE

THIS APARTMENT IS NOT SUBJECT TO RENT REGULATION

Owner and Renter make this apartment lease agreement as follows:

Owner's Name: THERA REALTY, LLC

Owner's Address for Notices: 31-10 37TH AVENUE, SUITE 500, LIC, NY 11101

1. Renter's Name: S M Golam Mortuza Azam

Social Security #: [redacted] **Driver License:** NY [redacted] 175 851

Address of Premises to Be Rented: 321 W. 42nd Street, New York, NY 10036

Apt. No.: 3R **Monthly Rent:** $1,700.00

Date of Lease: December 21, 2021 **Beginning:** January 01, 2022 **Ending:** December 31, 2022

1. **HEADINGS:** Paragraph headings are only for ready reference to the terms of this lease. In the event of a conflict between the text and the captions, the text controls.

2. **CONDITION "AS IS":** Renter acknowledges inspecting the apartment prior to signing this lease and accepts the apartment in the condition it is in as of such inspection. Renter acknowledges that the apartment is free of defects.

3. **USE AND OCCUPANCY OF APARTMENT:** The apartment is to be used and occupied for private residential purposes only, as the residence of Renter. The apartment may be occupied only by Renter named in this lease, Renter's immediate family, or other occupants in accordance with the terms of this lease. Renter agrees that the apartment will be occupied only by the following individuals, in addition to Renter:

Name:	Birth Date:	Relation to Renter:

Renter is obligated to advise Owner, in writing, if any additional occupant moves into the apartment. Such notice must be furnished by Renter to Owner within 10 days of the date such additional occupant moves into the apartment. The apartment may not be occupied by more than the number of occupants permitted by law. Renter may have one roommate or where authorized by Real Property Law, §235-f, no roommate.

4. **RENTER'S POSSESSION OF APARTMENT:** Owner shall not be liable for failure to give Renter possession of the apartment on the beginning day of the lease term. Rent shall be payable as of the beginning of the term unless Owner is unable to give possession, in which case rent shall be payable as of the date possession is available. Owner must give possession within 30 days of the beginning day of the lease term. If not, Renter may cancel this lease and obtain a refund of money deposited. Owner will notify Renter as of the date possession is available. The ending date of the lease term will not change in the event Owner is unable to give possession as of the beginning of the lease term.

5. **RENT, ADDED RENT, and RENT ADJUSTMENTS:** a. Rent payments for each month are due on or before the first day of each month at the address above or at a location designated by Owner in writing. Notice from Owner to Renter that rent is due not required. The rent must be paid in full without deductions. The first month's rent and added rent must be paid when Renter signs this lease. They are called "added rent." This added rent will be payable as rent, together with the next monthly rent due. If Renter fails to pay the added rent on time, Owner shall have the same rights against Renter as if Renter failed to pay rent.

6. **FAILURE TO PAY RENT ON DUE DATE:** Rent is due by the first day of each month. Payment after the 5th day of each month shall be considered a "late payment." Renter expressly agrees and understands that three (3) or more late payments in any twelve month period shall be deemed to be a failure to comply with a substantial obligation of this lease and be grounds for the termination of this lease and eviction of Renter by Owner.

7. **FEE FOR LATE PAYMENT:** Due to administrative inconvenience and costs incurred due to late payment of rent, Renter agrees to pay the sum of **$50.00** per month in any month in which the rent is tendered after the late payment date, as added rent. Although Owner is charging a late charge, Owner may commence any action or proceeding with regard to Renter's failure to pay timely rent. This paragraph is not a waiver of Owner's right to collect or demand rent.

8. **DISHONORED CHECK FEE:** If Renter pays rent by check and such check is dishonored for any reason by the bank on which the check is drawn, Renter will be responsible to pay Owner a dishonored check fee of **$25.00**, in addition to the fee for late payment. This fee is added rent.

9. **SECURITY:** Renter has given a security deposit to Owner at the time of Renter's signing of this lease in the sum of **$1,700.00**. If required by law, the account will bear interest at the banking institution's prevailing rate. An annual payment of accrued interest will be made by the banking institution to the Renter, less 1% interest of the security on deposit, to be tendered by the banking institution to Owner. Owner may use or apply all or any part of the deposit as may be required to pay for damage to the apartment during the term of this lease. If Renter carries out all of Renter's obligations under this lease, and if the apartment is returned to Owner at the expiration of the lease term in the same condition as when rented by Renter, ordinary wear and tear expected, Renter's security deposit will be returned in full to Renter, with accrued interest theron, within 30 days of

How did I get 2 point Enhancement for Running Crackhouse.
I'm not on the lease. How did they get warrant -

[redacted] 07-25-22 07-27-22 CHECKED OUT 3344 PRES 2/2

NYCGH - Routing Instructions for Yoon, Jean

Route to Name	Routing Instructions	Begin Date	End Date	Room	Win. Limit	Pct	Used	Payment
Expedia Affiliate Network	NDF RTP	07-25-22	07-27-22		2		1,513.16	CA

NYCGH - Individual Profile ID - 33130043

Individual

Search

More Fields | Stats & Info

Address Information

Last Name [redacted]
First/ Middle
Language / Title
Business Title
Business
H
City
Postal Cd. / Ext.
Country / State US

Internal Information

Salutation
Gender
VIP
Nationality
Global #
Notes

Date of Birth
ID Type
ID Number

Communications

HOME [redacted]

History

Attributes

Select Another Profile

History Information

A/R No.
Member No.
Member Level
Last Room 3344
Last Rate 756.58
Last Visit 07-27-22

Options | OK | Save | New | Close

Preferences | HotSOS* | Comm.

Created By *SPIRIT* On 07-23-22 10:39 At NYCGH Updated By UHERNANDEZ On 07-27-22 08:45 At NYCGH

NYCGH - User Activity Log - Reservation No 28131108

User	Time	Date	Action Type	Description
JCARLOS	02:10	07-28-22	UPDATE RESERVATION	POST CO FLAG P -> C
CKIM	13:28	07-27-22	CHECK OUT	[redacted] checking out on having Arr = 07-25-22 Room = 3344 I
CKIM	13:28	07-27-22	SETTLE CREDIT CARD APPI	SETTLE CREDIT CARD APPROVAL FOR AMOUNT=11 37 USD. P
UHERNANDEZ	08:45	07-27-22	UPDATE RESERVATION	CHECKOUT TIME -> 13 00 SPECIAL REQUEST KING,NOSM,NOI
HYATTPLSVSIFC	17:55	07-25-22	KEY CREATE	4 keys created for room 3344
HYATTPLSVSIFC	17:56	07-25-22	UPDATE RESERVATION	DEPOSIT DUE DATE 2022-07-25-> DEPOSIT AMOUNT 1,513 16-
[redacted]	[redacted]	[redacted]	CHECK IN	has checked in Clean room 3344 on 07-25-22
HYATTPLSVSIFC	17:56	07-25-22	UPDATE RESERVATION	RESERVATION TYPE 5 -> CHECKED IN
HYATTPLSVSIFC	17:55	07-25-22	UPDATE RESERVATION	WINDOW NUMBER 1 PAYMENT METHOD MC -> VS CREDIT CAF
HYATTPLSVSIFC	17:55	07-25-22	RECORD CREDIT CARD API	APPROVED 291 78 USD. FOR PAYMENT TYPE VS APPROVAL C
PGONZALEZ	01:59	07-25-22	UPDATE RESERVATION	RESERVATION TYPE 2 -> 5
PGONZALEZ	01:59	07-25-22	SETTLE CREDIT CARD APPI	SETTLE CREDIT CARD APPROVAL FOR AMOUNT=1,513 16 USC
PGONZALEZ	01:59	07-25-22	RECORD CREDIT CARD API	BATCH DEPOSIT PROCESSING APPROVED 1,513 16 USD. FOR
1442072	16:08	07-23-22	OVERRIDES	OVERRIDE_TYPE ->AVAILABILITY OVERRIDE_BY ->1442072 OVI
1442072	16:08	07-23-22	UPDATE RESERVATION	ROOM -> 3344
SPIRIT	10:39	07-23-22	NEW RESERVATION	RESORT = NYCGH CONFIRMATION NO = 28131108 ARR = 20

Report | Details | Close

Kim,Shannon(1355700) - CA	25-Jul-22	17:56:43	CHECK IN

Yoon, Jean has checked in Clean room 3344 on 07-25-22

HYATTPLSVSIFC	25-Jul-22	17:56:42	UPDATE RESERVATION

RESTYPECH 5 -> CHECKED IN

HYATTPLSVSIFC	25-Jul-22	17:56:35	UPDATE RESERVATION

WINDOWCH 1

REQUEST NO. 19

Stipulations

[*if applicable*]

You have heard evidence in the form of stipulations of testimony. A stipulation of testimony is an agreement among the parties that, if called as a witness, the person would have given certain testimony. You must accept as true the fact that the witness would have given that testimony. It is for you, however, to determine the effect to be given that testimony.

You have also heard evidence in the form of stipulations of fact. A stipulation of fact is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true. It is for you, however, to determine the effect to be given to any stipulated fact.

Adapted from the charge of the Honorable Stephen C. Robinson in *United States v. Leight*, 04 Cr. 1372 (SCR) (S.D.N.Y. 2006); *see also* Sand et al., Modern Federal Jury Instructions, Instr. 5-6.

— Speedy Trial Issues —

UNITED STATES OF AMERICA v. ELLIS MARTINEZ, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
268 F. Supp. 2d 70; 2003 U.S. Dist. LEXIS 10970
Crim. No. 02-10018-NG
June 3, 2003, Decided

Editorial Information: Prior History

United States v. Martinez, 234 F. Supp. 2d 80, 2002 U.S. Dist. LEXIS 23950 (D. Mass., 2002)

Disposition:

{2003 U.S. Dist. LEXIS 1} Motion to dismiss allowed, and superseding indictment dismissed without prejudice.

Counsel For MICHAEL CARLSON, Defendant: J. Martin Richey, Federal Defender's Office, Boston, MA.

For DAMIAN DICENSO, Defendant: John H. Molloy, Revere, MA.

For ELLIS MARTINEZ, Defendant: Jonathan Shapiro, Stern, Shapiro, Weissberg & Garin, Boston, MA.

For CARLOS DIAZ, Defendant: Michael C. Andrews, Boston, MA.

For TOMAS CUBILETTE aka Luis A. Medina, Defendant: Victoria M. Bonilla-Argudo, Bourbeau and Bonilla, Boston, MA.

U. S. Attorneys: John A. Wortmann, Jr., United States Attorney's Office, Boston, MA.

Judges: NANCY GERTNER, U.S.D.J.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant filed a motion to dismiss the superseding indictment on statutory "speedy trial" grounds pursuant to the Speedy Trial Act (Act), 18 U.S.C.S. § 3161(b), because the superseding indictment was brought more than 30 days after a complaint which made identical allegations.Dismissal of a superseding indictment was mandated by statute when brought more than 30 days after the original indictment but the serious nature of the crimes, and the circumstances that led to dismissal warranted dismissal without prejudice.

OVERVIEW: Defendant was charged in the superseding indictment with one count of conspiracy to possess and distribute ecstasy, resulting in serious bodily injury, in violation of 21 U.S.C.S. § 846, and several substantive distribution counts under 21 U.S.C.S. § 841. In an earlier proceeding, the court had determined that the original indictment, which did not contain an allegation of serious bodily injury as part of any of the counts, would preclude the government from seeking an enhanced sentence. Serious bodily injury was an element of the offense that needed to be proved beyond a reasonable doubt and was not merely a sentencing enhancement factor. Because of the court's earlier ruling, the government filed a superseding indictment to include a serious bodily injury allegation. The court held that the indictment needed to be dismissed because it clearly violated the Act when it was filed more than 30 days after the original indictment. The court determined that the dismissal should be without prejudice when the court weighed the seriousness of the underlying offenses, the circumstances that led to the dismissal and the

This Case Law Like Mines About Everything

the overdose Deaths never made it to the Jury but were added in Relavant Conduct. violation of Logic!

impact of re-prosecution on the administration of justice.

OUTCOME: The court allowed defendant's motion to dismiss the superseding indictment and dismissed the indictment without prejudice.

LexisNexis Headnotes

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Statutory Right

See 18 U.S.C.S. § 3161(b).

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview

The penalty provisions of 21 U.S.C.S. § 841 distinguish between a basic crime of drug distribution, zero to twenty years, and an aggravated crime of drug distribution accompanied by serious bodily injury, twenty years to life.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview
Criminal Law & Procedure > Sentencing > Imposition > Apprendi Rule

Apprendi compels the conclusion that "serious bodily injury" under 21 U.S.C.S. § 841 cannot be a mere "sentencing factor" but is rather an "element" of an aggravated offense that must be charged in the indictment and proven to the jury beyond a reasonable doubt.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues
Criminal Law & Procedure > Sentencing > Criminal History > General Overview
Criminal Law & Procedure > Sentencing > Imposition > Apprendi Rule

Apprendi teaches that the distinction between "elements" and "sentencing factors" has constitutional dimension, and is not merely a question of legislative intent. Apprendi begins with the fundamental proposition that a criminal defendant is entitled to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. The United States Supreme Court ultimately holds that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Such facts, in other words, are "elements" of the crime, whatever the legislature may or may not have intended. The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed are by definition "elements" of a separate legal offense. If a fact is by the law the basis for imposing or increasing punishment, for establishing or increasing the prosecution's entitlement, it is an element.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > General Overview

The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives whether the statute calls them elements of the offense, sentencing factors, or Mary Jane, must be found by the jury beyond a

reasonable doubt.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Sentencing > Imposition > Factors
Constitutional Law > Congressional Duties & Powers > General Overview

The United States Supreme Court has emphasized that "serious bodily injury" is a classic, traditional "element" of aggravated crimes. There are certain traditional sentencing factors and certain traditional substantive factors and authority to mix the two is limited by the United States Constitution. Finally, even the U.S. Sentencing Guidelines treat "serious bodily injury" more delicately than drug quantity: it must be found as part of the "offense of conviction" and not merely as "relevant conduct."

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview

Serious bodily injury is an element of 21 U.S.C.S. § 841(b) that the government must charge in the indictment and prove to the jury beyond a reasonable doubt.

Criminal Law & Procedure > Accusatory Instruments > Dismissal

In deciding whether to dismiss the indictment with or without prejudice, the court must consider three factors: 1) the seriousness of the offense; 2) the facts and circumstances of the case which led to the dismissal; and 3) the impact of a reprosecution on the administration of this chapter and on the administration of justice. 18 U.S.C.S. § 3162(a)(1).

Criminal Law & Procedure > Accusatory Instruments > Dismissal
Governments > Legislation > Statutes of Limitations > General Overview

As the United States Supreme Court has observed, dismissal without prejudice is not a toothless sanction: it forces the government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds.

Opinion

Opinion by: NANCY GERTNER

Opinion

{268 F. Supp. 2d 71}*MEMORANDUM AND ORDER RE: DEFENDANT MARTINEZ'S MOTION TO DISMISS COUNTS ONE AND TWO OF THE FIRST SUPERSEDING INDICTMENT*

June 3, 2003

Defendant Ellis Martinez ("Martinez") has moved to dismiss the superseding indictment [document # 109] on statutory "speedy trial" grounds pursuant to 18 U.S.C. § 3161(b). 1 He argues that the superseding indictment, which charges him with one count of conspiracy to possess and distribute 3, 4 Methylenedioxy-methamphetamene/MDMA**{2003 U.S. Dist. LEXIS 2}** (also known as "ecstasy"), resulting in serious bodily injury (21 U.S.C. § 846) and several substantive ecstasy distribution counts

(21 U.S.C. § 841), was brought more than thirty days after a complaint which made the identical allegations, in violation of the Speedy Trial Act. 2 As I explain below, while the statute compels me to allow this motion, the superseding indictment is dismissed without prejudice.

I. *BACKGROUND*

The penalty provisions of 21 U.S.C. § 841 distinguish between a basic crime of drug distribution (zero to twenty years) and an aggravated crime**{2003 U.S. Dist. LEXIS 3}** of drug distribution accompanied by serious bodily injury (twenty years to life). The original indictment in this case did not allege "serious bodily injury" either as part of the conspiracy count or the substantive distribution counts. The government nevertheless took the position that it could seek an enhanced sentence, and that a judicial finding of serious bodily injury by a preponderance of the evidence would compel a twenty-year mandatory minimum.

In an earlier decision, I rejected the government's view and held that *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) compels the conclusion that "serious bodily injury" cannot be a mere "sentencing factor" but is rather an "element" of an aggravated offense that must be charged in the indictment and proven to the jury beyond a reasonable doubt. *See United States v. Martinez*, 234 F. Supp. 2d 80, 87 (D. Mass. 2002)(Gertner, J.). In the wake of that decision, the government filed the superseding **{268 F. Supp. 2d 72}** indictment, which specifically alleged serious bodily injury.

It is clear that this superseding indictment was brought more than thirty days after the initial complaint, 3 and**{2003 U.S. Dist. LEXIS 4}** that it reflects the crime charged in the initial complaint. Since the superseding indictment was thus untimely under the Speedy Trial Act and therefore must be dismissed, I ordered the parties to brief the question of remedy: Whether the dismissal should be with or without prejudice.

{2003 U.S. Dist. LEXIS 5} II. *SIGNIFICANCE OF U.S. v. GOODINE*

Shortly after the parties filed their memoranda on Speedy Trial Act remedies, the government filed an additional memorandum [document # 139] regarding the recent decision in *United States v. Goodine*, 326 F.3d 26 (1st Cir. 2003), which held that drug quantity in 21 U.S.C. § 841(b) "is a sentencing factor, not an element of separate crimes." *Id.* at 27. In open court, the government suggested that *Goodine* may require reconsideration of my earlier decision that the fact of "death or serious bodily injury" in § 841(b) is an "element" of an aggravated distribution crime. If I were to conclude, in light of *Goodine*, that aggravated distribution and simple distribution are not distinct offenses, then there would be no speedy trial issue because the initial indictment would be on all fours with the complaint.

While there is surely some tension between my reading in this case of *Apprendi*, and the First Circuit's view of drug quantity in *Goodine*, my ultimate conclusion - that distribution resulting in serious bodily injury defines a separate, aggravated crime - is fully**{2003 U.S. Dist. LEXIS 6}** consistent with *Goodine*. If *Apprendi* is to retain any meaning, it must be the case that the fact of "death or serious bodily injury" is qualitatively and historically different from a fact such as drug quantity, and therefore must be treated as an "element" of an aggravated crime under § 841(b).

In *Goodine*, the First Circuit treated the distinction between "elements" and "sentencing factors" as strictly a question of statutory construction and congressional intent. *See* 326 F.3d at 28-29. The Court then applied *Apprendi* as a procedural safeguard that constrains the ultimate sentencing outcome. 4 *See id.* at 32-34.

{2003 U.S. Dist. LEXIS 7} **{268 F. Supp. 2d 73}** In any case, the *Goodine* court expressly limited its

holding to drug quantity, leaving the other facts that drive penalties in § 841(b), such as serious bodily injury, "for another day." *Id.* at 27, n.3. Significantly, however, the Court emphasized that drug quantity is a "classic sentencing factor," *id.* at 30, in contrast to "serious bodily injury," which the Supreme Court found to be an "element" of the carjacking statute at issue in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999).

As I explained at length in my earlier opinion, the parallels between *Jones* and this case are substantial:

> Both statutes have an initial section setting forth basic offense elements followed by additional sections that tie increased penalties to additional facts. Specifically, the fact of "serious bodily injury" increases the maximum penalty from 15 to 25 years in Jones and from 20 years to life here. The stark sentencing consequences of "serious bodily injury that prompted the court to draw a constitutional line in the carjacking statute at issue in *Jones* are thus even more **{268 F. Supp. 2d 74}** compelling in the case of § 841(b)(1)(C).**{2003 U.S. Dist. LEXIS 8}** *Martinez*, 234 F. Supp. 2d at 86-7. 5 Moreover, the Supreme Court has emphasized that "serious bodily injury" is a classic, traditional "element" of aggravated crimes. *See Harris v. United States*, 536 U.S. 545, 553, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) ("Tradition and past congressional practice . . . were perhaps the most important guideposts in *Jones*. The fact at issue there - serious bodily injury - is an element in numerous federal statutes . . . and the *Jones* Court doubted that Congress would have made this fact a sentencing factor in one isolated instance"). As I have explained, "there are certain traditional sentencing factors and certain traditional substantive factors" and "authority to mix the two is limited" by the Constitution. *United States v. Wilkes*, 130 F. Supp. 2d 222, 232 (D. Mass. 2001)(Gertner, J.). Finally, even the Sentencing Guidelines treat "serious bodily injury" more delicately than drug quantity: it must be found as part of the "offense of conviction" and not merely as "relevant conduct." *See Martinez*, 234 F. Supp. 2d at 90-91.

{2003 U.S. Dist. LEXIS 9} I therefore stand by my earlier decision that serious bodily injury is an element of § 841(b) that the government must charge in the indictment and prove to the jury beyond a reasonable doubt. The Superseding Indictment was plainly untimely and the Speedy Trial Act requires that it be dismissed.

III. *PREJUDICE*

In deciding whether to dismiss the indictment with or without prejudice, the court must consider three factors: 1) "the seriousness of the offense"; 2) "the facts and circumstances of the case which led to the dismissal"; and 3) "the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(1). After careful consideration, I must conclude that the dismissal in this case should be without prejudice.

First, there is no dispute that the drug conspiracy and distribution charges in this case, which carry heavy penalties of twenty years to life in prison, are very serious. This weighs strongly in favor of dismissal without prejudice. *See United States v. Barnes*, 159 F.3d 4, 16 (1st Cir. 1998).

Second, the circumstances leading to the delay also militate against**{2003 U.S. Dist. LEXIS 10}** dismissal with prejudice. As I have previously explained, the issues here are complex and, while I rejected the government's position, I could understand it testing the issue. *See id.* at 17 (rejecting dismissal with prejudice where, *inter alia*, "there is no evidence that delay was caused by bad faith conduct on the part of the prosecutor").

Third, allowing reprosecution would not have a deleterious effect on the administration of justice or enforcement of the Speedy Trial Act. As the Supreme Court has observed, "dismissal without prejudice is not a toothless sanction: it forces the government to obtain a new indictment if it decides

to reprosecute, and it exposes **{268 F. Supp. 2d 75}** the prosecution to dismissal on statute of limitations grounds." *United States v. Taylor*, 487 U.S. 326, 342, 101 L. Ed. 2d 297, 108 S. Ct. 2413.

Finally, there will be no significant actual prejudice to the defendants since they were clearly on notice from the beginning that the government would pursue "serious bodily injury" allegations. *See Barnes*, 159 F.3d at 18.**IV. *CONCLUSION***

For the foregoing reasons, Defendant Martinez's Motion to Dismiss [document**{2003 U.S. Dist. LEXIS 11}** # 109] is **ALLOWED** and the Superseding Indictment is **DISMISSED WITHOUT PREJUDICE.**

SO ORDERED.

Dated: June 3, 2003

/s/

NANCY GERTNER, U.S.D.J.

Footnotes

1

Defendant Tomas Cubilette has joined in this motion.

2

18 U.S.C. § 3161(b) provides, in relevant part:

Any . . . 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.

3

In its submission on remedy [document # 136], the government argues that only 22 non-excludable days actually elapsed between October 16, 2001 (the date the complaint was filed), and the superseding indictment. However, the government's position is not convincing for two reasons. First, there logically must be separate calculations for whether an indictment is filed within 30 days of a complaint and whether a case is tried within 70 days of an indictment. It does not make sense to apply excludable delay with respect to the 70-day trial clock against the 30-day indictment clock. They are separate statutory obligations with separate statutory "clocks." Second, even if the government were correct that the periods of excludable delay can be combined, there appear to be at least two errors in the government's calculations: i) Martinez's motion to dismiss was filed on 12/6/01, not 12/4/01, adding 2 days of non-excludable delay; ii) the government incorrectly shows an order of exclusion ending on 3/27/02 which, in fact, ended on 3/13/02, adding 14 days of non-excludable delay.

4

While I am bound by the First Circuit's holding in *Goodine* that drug quantity is a sentencing factor, I do not believe that *Apprendi* is a mere procedural restraint on sentencing outcome, for reasons that are clear in several of my prior decisions. *See generally, e.g., U.S. v. Martinez*, 234 F. Supp. 2d 80 (D. Mass. 2002)(Gertner, J.); *U.S. v. Wilkes*, 130 F. Supp. 2d 222, 232 (D. Mass. 2001)(Gertner, J.).

At its core, *Apprendi* teaches that the distinction between "elements" and "sentencing factors" has