09-3528-cr

To Be Argued By:
GEOFFREY M. STONE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3528-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANTHONY STONE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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DAVID B. FEIN
United States Attorney
District of Connecticut

GEOFFREY M. STONE
Assistant United States Attorney
RAYMOND F. MILLER
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

This criminal appeal results from the conviction after guilty plea of the defendant-appellant Anthony Stone. The defendant entered a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2), reserving his right to appeal the district court's September 19, 2007 ruling and October 10, 2008 amended ruling, denying his motion to suppress evidence.

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered its judgment on August 13, 2009. The defendant filed a timely notice of appeal on August 17, 2009, and this Court has jurisdiction to consider this appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

I. (A) Whether the district court erred in determining that the defendant's wife had actual authority to consent, or the officers reasonably believed that she had authority to consent, to a search of the defendant's home where the defendant's wife had been living at the home with the defendant and their children for six years, the defendant kicked her out of the home a week before the search, she returned to the home on several occasions in the week prior to the search to pick-up personal belongings, she still had personal belongings at the home, she continued to receive mail at the home, she retained a key, she continued to have access to the home and during the twelve hours before the search, the defendant called her on numerous occasions and demanded that she move back to the home.

I. (B) Whether the defendant's wife voluntarily consented to a search of the defendant's home where the defendant's wife contacted the police and asked them to accompany her to the defendant's home and then, while at the home, freely directed the police to a gun and ammunition within the home.

II. Whether the district court erred in determining that the defendant did not meet his burden of showing that the search warrant affidavit contained a false statement or omission that was made knowingly, intentionally or with reckless disregard for the truth.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3528-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANTHONY STONE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal concerns the authority of the defendant's wife, Tayarisha Stone, to consent to a search of her family's residence at 157 Henry Street in Windsor, Connecticut. On January 8, 2005, Tayarisha contacted the police and requested that the police accompany her to 157 Henry Street, which was her family's home, so that she could collect personal belongings for herself and her children. Tayarisha advised police officers that she had been living at 157 Henry Street in Windsor, CT with the defendant, who is her husband, and their children for six years. Tayarisha said that the defendant kicked her out of the home a week before the search. She said that she returned to the home on several occasions in the week prior to the search to pick-up personal belongings for herself and her children, but she still had personal belongings at the home. Tayarisha told the officers that during the prior twelve hours, the defendant had repeatedly called her on the phone and demanded that she move back home, and during three calls, the defendant threatened to kill her if she did not return home within one hour. She said that she feared for her safety and she wanted the police to accompany her to the home, so that she could collect personal belongings.

When officers arrived at the defendant's home during the morning of January 8, 2005, Tayarisha and her mother were waiting on the porch and the door was unlocked. The officers did a cursory search of the home to ensure that the defendant was not inside. The officers then went with Tayarisha and her mother into the home. When officers asked Tayarisha if the defendant kept any guns in the house, she freely responded that she believed there was a gun in the closet, and pointed to the closet. The officers seized a black Charter Arms .44 caliber revolver from the closet. When officers asked if there were any other guns in the house, Tayarisha went upstairs on her own accord and provided officers with a Smith & Wesson gun case containing 52 rounds of .45 caliber ammunition and an empty .45 Smith & Wesson magazine.

After Tayarisha obtained her personal belongings from the home, she told the officers that the defendant had two guns which he kept at 157 Henry Street. She said that one gun was black and flat and the other gun was silver with a brown handle with a circular section. Officers determined that the defendant was a convicted felon. Officers obtained a search warrant for 157 Henry Street and, during the afternoon of January 8, 2005, seized the following five firearms from the home: a Maverick 12-gauge sawed-off shotgun; a loaded Marlin 9 mm caliber rifle; a loaded Ruger .357 Magnum revolver; a loaded Smith & Wesson .45 caliber pistol; a loaded Smith & Wesson .22 caliber pistol; and numerous rounds of ammunition. A federal grand jury returned an indictment charging the defendant with possession of a firearm by a convicted felon. The indictment charged the defendant with possessing four firearms that were seized by police during the afternoon search of 157 Henry Street pursuant to the state search warrant.

In this appeal, the defendant contends that Tayarisha did not have authority to consent to the search of 157 Henry Street and it was not reasonable for the police to believe that she had such authority. In addition, the defendant contends that Tayarisha did not voluntarily consent to the search. This Court should reject these claims, as did the district court. Tayarisha had access to the home and common authority over the home, and in any event, the officers reasonably believed that she had authority to consent to a search of the home. Further, by her words and her actions, she freely and voluntarily consented to the limited morning search of the home.

The defendant also contends that the affidavit in support of the search warrant for the defendant's home contained false statements or omissions that were made knowingly, intentionally or with reckless disregard for the truth. The district court properly concluded, however, that the defendant did not meet his burden to show that the affiants made any false statement or omission knowingly, intentionally or with reckless disregard for the truth. Nor has the defendant shown that any false statement or omission was necessary or material to a finding of probable cause. Accordingly, the Court should affirm the judgment and conviction of the district court.

Statement of the Case

On November 9, 2005, a federal grand jury in Connecticut returned an indictment charging the defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *See* Defendant's Appendix ("DA") at 19-20.

On January 9, 2006, the defendant filed a motion to suppress evidence and a supporting memorandum of law. *See* DA at 7. On January 18, 2006, the government filed a memorandum of law in opposition to the defendant's motion to suppress. *See* DA at 7. On May 26, 2006, the defendant filed a supplemental motion to suppress and a supporting memorandum of law. *See* DA at 8. On June 28, 2006, the government filed a memorandum of law in opposition in opposition to the defendant's supplemental motion to suppress. *See* DA at 8.

The district court held evidentiary hearings regarding the defendant's motion to suppress and the defendant's supplemental motion to suppress on November 30, 2006, January 11, 2007, January 24, 2007, January 26, 2007, February 21, 2007 and February 28, 2007. *See* DA at 10-11. On July 10, 2007, the government filed a post-hearing memorandum of law in opposition to the defendant's suppression motions. *See* DA at 11. On July 11, 2007, the defendant filed a post-hearing memorandum of law in support of his suppression motions. *See* DA at 11. On August 7, 2008, the government filed a memorandum of law in reply to the defendant's post-hearing memorandum and on August 8, 2008, the defendant filed a memorandum of law in reply to the government's post-hearing memorandum. *See* DA at 12.

On September 18, 2007, the district court (Ellen Bree Burns, J.) issued an unpublished, written ruling denying the defendant's motion to suppress. DA at 21-41. On October 9, 2008, the district court issued an amended ruling denying the defendant's motions to suppress. DA at 44.

On November 4, 2008, the defendant entered a conditional plea of guilty to count one of the indictment charging him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). DA at 46.

On August 11, 2009, the district court sentenced the defendant principally to a $6,000 fine and a term of 37 months' imprisonment, to be followed by a three-year term of supervised release. *See* DA at 16. The district court entered judgment on August 13, 2009.

On August 17, 2009, the defendant filed a timely notice of appeal. DA at 56. The defendant completed his sentence and has been released from custody.

Statement of Facts and Proceedings Relevant to this Appeal

A. Relevant facts

On November 18, 2007, the district court issued a written ruling denying the motion to suppress. The district court set forth the following factual findings at the outset of its ruling:

> On January 8, 2005, at approximately 9:30 a.m., Defendant's wife Tayarisha Stone ("Tayarisha") called the Windsor Police Department to ask for a restraining order against her husband. Govt. Ex. 15A. Tayarisha stated that the Defendant had told her "I'm gonna kill you and police and you know nobody can, can stop me." Id. Tayarisha indicated that she was at her mother's apartment, located at 646C Windsor Avenue, and the police dispatcher receiving the call told her that an officer would meet her at that location. Id. Officer Kari Tkacz of the Windsor Police Department was dispatched to 646C Windsor Avenue, and took a sworn statement from Tayarisha at approximately 10:00 a.m. In her statement, Tayarisha indicated that her residence

was 157 Henry Street. She also stated the following: (1) she had been separated from her husband for one week, (2) her husband had kicked her out of [157 Henry Street] after a fight, (3) she decided to leave because she "[knew] how [the Defendant] can be", (4) the Defendant "had always been very verbally abusive towards me . . . He has also said he'd kill me before he let me leave", (5) she had moved in with her grandparents at 120 Highland Avenue, (6) the Defendant had repeatedly called her phone asking her to come home, and that "in the past 12 hours, [Defendant] has called my cell phone 23 times", (7) at 8:30 p.m on January 7, 2005, the Defendant made the first of three threats to kill Tayarisha if she did not come home within the hour and (8) the last of these threats was at approximately 9:15 a.m. on January 8, 2005. Govt. Ex. 1

At the evidentiary hearing, the United States (hereinafter the "Government") called as witnesses the following law enforcement officers from the Windsor Police Department: Officer Kari Tkacz, who took Tayarisha's first statement and accompanied her the morning of January 8, 2005 to 157 Henry Street, Sergeant William Freeman, who provided backup for Officer Tkacz, Detective Michelle Neary, who met with Tayarisha the afternoon of January 8, 2005, and Officer Justin Kaldey, who helped prepare the search warrant application for the Defendant's residence at 157 Henry Street. The Government also called Special

Agent James Hartman of the Bureau of Alcohol, Tobacco and Firearms. Their testimonies, which the court finds consistent and credible, recounted the events of January 8, 2005 and the subsequent investigations as follows:

After Tayarisha's first statement (recounted above) was taken, Tayarisha asked Officer Tkacz to accompany her to 157 Henry Street while she retrieved her personal belongings. Vol. 1 at 231. Officer Tkacz called her supervisor, Sergeant Freeman, for assistance. Sergeant Freeman and Officer Tkacz drove in separate vehicles to 157 Henry Street, where they met Tayarisha and her mother. Before entering the house, Sergeant Freeman asked Tayarisha if there were any weapons inside. Vol. 1 at 25; Vol. 4 at 137, 260-61. Tayarisha told the officers that she believed there were firearms in the home. Id. The officers entered the house through a door off the deck, without forcing entry. Vol. 1 at 25 (Officer Tkacz testifying that the door was unlocked); Vol. 4 at 138 (Sergeant Freeman testifying that either Tayarisha or the officers opened the door, but that there was no forced entry). The officers entered with their guns drawn and proceeded to do a cursory sweep of the premises. Once they established that the Defendant was not on the premises, Tayarisha entered. Vol. 4 at 138-39. The officers then asked Tayarisha "where the guns would have been if [the Defendant] were to keep them around," Vol. 4 at 139. Tayarisha responded that she believed there was a gun in the hallway closet, and pointed to the closet. Vol. 1 at 27. Officer Tkacz opened the closet door, saw a .44 caliber gun on the shelf of the closet, and seized it. Vol. 1 at 28. The officers then asked Tayarisha if there were any more firearms in the house. Id. Tayarisha stated that she believed there was another gun in the house, and went upstairs to the master bedroom. Vol. 1 at 29, Vol 4. at 144. Sergeant Freeman accompanied Tayarisha upstairs, where Tayarisha pulled a Smith and Wesson handgun case out of a dresser drawer and handed it to him. Vol. 4 at 144-45. Sergeant Freeman opened the case and found a semiautomatic .45 caliber magazine and 52 rounds of .45 caliber ammunition, but no weapon. Vol. 4 at 147. Both the .44 caliber gun and the .45 caliber case, magazine and ammunition were secured in the trunk of Officer Tkacz's patrol car. Vol. 1 at 29; Vol. 4 at 148. The officers then left the premises and returned to the stationhouse. Vol. 1 at 31-32; Vol. 4 at 151.

The officers testified that they then proceeded to look for the Defendant. Officer Tkacz called the Defendant's cell phone and went to 120 Highland Avenue (where Tayarisha had been staying with her grandparents) to see if the Defendant was there. Vol. 1 at 36. A message was put out over the mobile data terminals, which was sent to other police departments. Other patrol officers were assigned to watch 157 Henry Street and 120 Highland Avenue. Vol. 4 at 152-53. Meanwhile, Officer Tkacz performed a criminal history check on the Defendant, which indicated that he had been arrested for Risk of Injury and Sexual Assault in the 2nd Degree on October 29, 1995, and convicted of Risk of Injury, a felony conviction, on March 20, 1996. Vol. 1 at 40; Govt. Ex. 4B. Officer Tkacz also performed an "in-house" history check of the Defendant to see if he had had any prior interactions with the Windsor Police Department. Vol. 1 at 41. She found a "CAD" activity report (a dispatch report) showing that the Defendant had been arrested for a domestic disturbance on August 26, 2003. Vol. 1 at 43; Govt. Ex. 5B.

Officer Tkacz then prepared a search warrant application to search 157 Henry Street for a Smith and Wesson .45 caliber handgun and ammunition. Govt. Ex.8. The application for the search warrant was based on the Defendant's threats to his wife, the evidence that the Defendant possessed firearms, and the fact that the Defendant was previously convicted of Risk of Injury to a Minor, a felony. Id. The warrant was granted that afternoon. Govt. Ex. 8.

Detective Michelle Neary proceeded to 120 Highland Avenue, where Tayarisha had been staying with her grandparents, to ask for a key to 157 Henry Street for the execution of the search warrant. Vol. 5 at 89-90. Detective Neary could not recall who at 120 Highland provided her with a key, but she recalled providing the key to Sergeant Freeman. Vol. 5 at 146, 150.

Before the warrant was executed, the Defendant was arrested at 120 Highland Avenue. Vol. 1 at 61. After arresting the Defendant, officers proceeded to 157 Henry Street and executed the search warrant, where they found five firearms in various locations in the basement of the house. The officers found a Maverick 12 gauge sawed-off shotgun and a loaded Marlin 9mm caliber rifle in an unlocked closet, a loaded Ruger .357 Magnum revolver and a Smith & Wesson .45 caliber pistol in an unlocked cabinet, and a loaded Smith & Wesson .22 caliber pistol under a couch cushion in the basement. Govt. Ex. 10. Id.

The officers testified that 157 Henry Street appeared to be a single family home (see Vol. 1 at 35-35; Vol. 4 at 149-150, 169; Vol. 5 at 41-42. The basement, where the weapons were found, contained a television, 2 couches, a video game unit, and childrens' items. Govt. Ex. 10.

DA at 21-27.

B. The district court's ruling

1. The morning search

The defendant filed a motion to suppress, that as relevant here, argued that the warrantless morning search of his residence violated his Fourth Amendment rights. On September 18, 2007, the district court issued a written ruling denying the motion to suppress. The court concluded, in pertinent part, that the morning search was conducted lawfully pursuant to the consent of the defendant's wife (*i.e.*, Tayarisha Stone), who had actual authority to consent. DA at 27-37.

The district court rejected the defendant's argument that Tayarisha did not have authority to consent to the search because, according to the defendant, Tayarisha did not have access to, or common authority over, the premises. The district court reviewed relevant case law discussing consent, and then made the following findings:

> [T]he officers present at the morning search consistently testified that when they arrived, Tayarisha and her mother were already there, and that the door was either unlocked, or Tayarisha opened it herself. There was no evidence of forced entry, and Tayarisha retained a key to the house, which the officers used in their afternoon search. In short, the evidence establishes that Tayarisha had access to 157 Henry Street.

DA at 30. The district court further noted that "even if the door had been locked," the Second Circuit has never "'adopted as the clear law of this circuit . . . that access must mean physical access and not legal access.'" DA at 30 (quoting *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 53 (2d Cir. 2003).

In rejecting the defendant's argument that Tayarisha did not have common authority over the residence, the district found that "[t]he facts of this case are readily distinguishable" from the facts in *Illinois v. Rodriguez*, 497 U.S. 177 (1990) and are analogous to the facts of *United States v. Trzaska*, 859 F.2d 1118, 1120 (2d Cir. 1988) *cert. denied*, 493 U.S. 839 (1989) (affirming finding that estranged wife had third party authority to consent to search of marital home). DA at 31. The district court found, in part, the following:

> Here, at the time of the morning search, Tayarisha had been married to the defendant for seven years, had two children with him, had been living with him at the location of the search for six years, and had left the home just one week before the search. She also had returned to the home on several occasions in the week prior to the search to pick up her personal belongings, still had personal belongings in the home, and continued to receive mail at the home. Vol 6. at 12-13.

DA at 32. The district court concluded that "[a]ll of these facts show a much more substantial connection to the premises searched than that of the defendant's girlfriend in *Rodriguez*, and establish that Tayarisha possessed common authority over 157 Henry Street and the power to consent to its search." DA at 32.

Furthermore, the district court found that, "[a]ssuming *arguendo* that Tayarisha did not possess the requisite third party authority to consent, the search was nonetheless valid because the officers reasonably believed that she did." DA at 32. The district court addressed the Supreme Court's decision in *Rodriguez* regarding apparent authority. The district court found that the officers reasonably concluded that Tayarisha had authority to consent based on the following findings:

> In the present case, the facts available to the officers at the time of the morning search justified their reasonable belief that Tayarisha had authority to consent. The sworn statement that Tayarisha gave to the police just prior to the search stated that 157 Henry Street was her home, that she had just been kicked out a week earlier and that the Defendant was threatening to kill her unless she came "home" [which presumably meant the family home].

DA at 33. The district court further concluded that "the totality of the circumstances indicate that Tayarisha voluntarily consented to the morning search." DA at 34.

2. The afternoon search

The defendant also argued that the afternoon search, which resulted in the seizure of the four weapons charged in the indictment, was unlawful for several reasons, including that, as relevant here, (1) the warrant authorizing the afternoon search was tainted by the allegedly "illegal" morning search and (2) the affidavit in support of the search warrant contained false statements and omissions made knowingly, intentionally or with reckless disregard for the truth. In its written ruling, the district court rejected both of these arguments and denied the defendant's motion to suppress.

As to the first issue, the district court concluded that because it found "that the morning search of Defendant's residence was valid, it need not address the Defendant's first argument - that the warrant was 'tainted' by the morning search." DA at 35.

Turning to whether the search warrant affiants intentionally, knowingly or with reckless disregard for the truth made false statements or omissions, the district court first discussed relevant case law and then made the following factual findings:

> In the present case, Defendant has not established that the challenged statements, even those that could be characterized as inaccurate or incorrect, were made with deliberate falsehood or reckless disregard for the truth. Based upon Defendant's threats to Tayarisha and the fact that

they found a firearm at his residence, it was reasonable for the officers to state that the Defendant posed a risk of imminent injury to others. In addition, although the domestic dispute referenced in the affidavit referred to an incident between the Defendant and another woman, because the case had been suppressed, the only information available to Officer Tkacz at the time was that there had been a domestic disturbance at 157 Henry Street and that the Defendant had been arrested. (Vol. 1 at 46). Thus, it was reasonable for her to conclude that the Defendant's wife was the other party. Finally, Defendant argues that the statement that he "is a convicted felon from an arrest in 1996 (class C felony, sexual assault 2nd), which was in the incident report accompanying the warrant application, was incorrect because it implied that he was convicted of Sexual Assault, not Risk of Injury to a Minor. (See Vol. 3 at 71-73). However, Officer Tkacz, who made the statement, testified that the parenthetical was modifying the arrest, not the conviction. This testimony is consistent with the rest of the search warrant application, where Officer Tkacz simply stated that "A. Stone has a felony conviction from 1996 for Risk of Injury, 53-21." Govt. Ex. 8.

In sum, the Defendant has not met his burden of showing that a false statement was made knowingly or intentionally, or with reckless disregard for the truth.

DA at 38-39.

Summary of Argument

I. The district court properly found that Tayarisha had authority to consent to a search of the defendant's home, and in any event, the officers reasonably believed that Tayarisha had authority to consent to the search. Tayarisha had been living at the home with the defendant and their children for six years, the defendant kicked her out of the home a week before the search, she returned to the home on several occasions in the week prior to the search to pick-up personal belongings, she still had personal belongings at the home, she continued to receive mail at the home, she continued to have access to the home, during the twelve hours before the search, the defendant repeatedly called her and threatened to kill her, if she did not move back home, and she identified the home as her residence both orally and in two written statements to police officers. As the district court properly concluded, these facts "establish that Tayarisha possessed common authority over 157 Henry Street and the power to consent to its search." DA at 32. The district court further concluded, even "[a]ssuming *arguendo* that Tayarisha did not possess the requisite third party authority to consent . . . the facts available to the officers at the time of the morning search justified their reasonable belief that Tayarisha had authority to consent." *Id.* at 32-33. Further, the district court did not err in concluding that "the totality of the circumstances indicate that Tayarisha voluntarily consented to the morning search." *Id.* at 34.

II. The district court did not err in determining that the defendant did not meet his burden of showing that the search warrant affidavit contained a false statement or omission that was made knowingly, intentionally or with reckless disregard for the truth. With the exception of one minor inaccuracy, the defendant failed to show that the affidavit contained any false statement, let alone a false statement that was made knowingly, intentionally or with reckless disregard for the truth. Moreover, the defendant did not show, as he must, that the one inaccuracy -- or *any* other alleged false statement or omission -- was material or necessary to a finding of probable cause. Accordingly, the Court should affirm the judgment and conviction of the district court.

ARGUMENT

I. The district court properly concluded that Tayarisha had authority to consent, and voluntarily consented, to the morning search of the residence.

A. Relevant facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing law and standard of review

1. Law relating to consent

A search based on the consent of an individual may be undertaken by law enforcement without a warrant or probable cause, and any evidence discovered during the search may be seized and admitted at trial. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). "It is well established that a warrantless search does not violate the Fourth Amendment if 'the authorities have obtained the voluntary consent of a person authorized to grant such consent.'" *United States v. Hernandez*, 1996 WL 309880 *7 (2d Cir. June 11, 1996) (quoting *United States v. Elliot*, 50 F.3d 180, 185 (2d Cir. 1995)).

The Supreme Court has held that consent may be given by a third party, where that third party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164 (1974). "Common authority" is based upon "the mutual use of the property by persons generally having joint access or control . . . so that it is reasonable to recognize that any of the co-inhabitants has the right to permit inspection in his own right." Id. at 172 n.7. In the Second Circuit, third party consent will validate a warrantless search only if (1) the third party had access to the area searched and (2) the third party had either (a) common authority over the area or (b) a substantial interest in the area or (c) permission to gain access. *United States v. Davis*, 967 F.2d 84, 87 (2d Cir. 1992); *see also United States v. Gradowski*, 502 F.2d 563, 564 (2d Cir. 1974) (per curiam); *United States v. Trzaska*, 859 F.2d 1118, 1120 (2d Cir. 1988), *cert. denied*, 493 U.S. 839 (1989).

In *Illinois v. Rodriguez*, the Supreme Court established the rule of apparent common authority. 497 U.S. 177, 181-82 (1990). The Supreme Court held that an investigating officer may rely upon a "reasonable belief of common authority to validate entry." 497 U.S. at 183. The Supreme Court explained that "in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded . . . is not that [the agents] always be correct, but that they always be reasonable." *Id.* at 185. Accordingly, "determination of consent to enter must be judged against an objective standard: would the facts available to the office at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" *Id.* at 189 (internal quotation omitted).

For the consent to be valid, it must be voluntary, that is, it must be the product of free choice. *See United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993). Whether an individual has voluntarily consented to a search is a fact-based inquiry that must be determined by the "totality of all the circumstances." *Schneckloth*, 412 U.S. at 227; *Wilson*, 11 F.3d at 351. "Factors that courts consider in assessing the voluntariness of a consent include the individual's age, intelligence and educational background, the length and nature of the questions and whether the law enforcement officials engaged in coercive behavior." *United States v. Jones*, 154 F. Supp.2d 617, 621 (S.D.N.Y.

2001) (citing *Schneckloth*, 412 U.S. at 226-27). In addition, courts consider the degree to which the individual cooperates with the police and the individual's attitude about the likelihood of the discovery of contraband. *See, e.g., United States v. Rosi*, 27 F.3d 409, 413 (9th Cir. 1994) (co-occupant who was cooperating with authorities, had joint access to condominium and told agent that pertinent evidence might be found in a lamp consented to search). The government bears the burden of proving by a preponderance of the evidence that consent was voluntary. *See United States v. Matlock*, 415 U.S. 164, 177-78 n.14 (1974).

This fact inquiry is governed by an objective standard. The ultimate question is whether "the officer had a reasonable basis for believing that there had been consent to the search." *United States v. Garcia*, 56 F.3d 418, 423 (2d Cir. 1995). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). "'The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to conduct the search that was undertaken.'" *Garcia*, 56 F.3d at 422 (quoting *Jimeno*, 500 U.S. at 249).

Voluntary consent need not be documented or declared expressly in words; voluntary consent may be implied by the circumstances surrounding the search or by the consenting person's words or actions. *See United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993) (voluntary consent "need not be expressed in any particular form but 'can be found from an individual's words, acts, or conduct'") (quoting *Krause v. Penny*, 837 F.2d 595, 597 (2d Cir. 1988)). "Thus a search may be lawful even if the person giving consent does not recite the talismanic phrase: 'You have my permission to search.'" *United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir. 1981). Moreover, if the law enforcement officer objectively reasonably believes that he or she has consent to search, then there is no Fourth Amendment violation. *Garcia*, 56 F.3d at 423.

Consent to a search or seizure may be given unintentionally and without knowledge of the right to refuse consent. *See Schneckloth*, 412 U.S. at 235-46; *see also Garcia*, 56 F.3d at 423-24 (consent may be valid even though defendant did not understand possible consequences of agent's entry into home and was not informed of right to refuse).

2. The standard of review

In reviewing the denial of a suppression motion, the Court of Appeals reviews the district court's conclusions of law *de novo,* and its findings of fact for clear error, taking those facts in the light most favorable to the government. *United States v. Lucky*, 569 F.3d 101, 105-106 (2d Cir. 2009); *United States v. Watson*, 404 F.3d 163, 166 (2d Cir. 2005).

C. Discussion

1. The district court properly concluded that Tayarisha had actual authority to consent the search of the Stone family's home

The district court properly concluded that Tayarisha had authority to consent to the search of the Stone family's home (*i.e.*, 157 Hentry Street). The evidence amply supported the district court's conclusion that "Tayarisha had access and common authority over the premises at 157 Henry Street." DA at 30. Indeed, Tayarisha had lived at the home with her husband and their children for the prior six years, until the defendant kicked her out one week earlier, she continued to have access to the home, she still had personal belongings at the home and she returned to the home on multiple occasions during the prior week. *See* DA at 22, 30 and 32.

The defendant argues that Tayarisha did not have "access" to the home. *See* Def. Br. at 20. Attempting to support this argument, the defendant argues that "Officer Tkacz testified that at no time during the morning search did she see Tayarisha in possession of a key to the house." *See id.* This argument, however, is a red herring. As the district court correctly found, when the officers arrived at the home in the morning, "Tayarisha and her mother were already there, and . . . the door was either unlocked, or Tayarisha opened it herself." DA at 30. As the district court also found, "[t]here was no evidence of forced entry." *Id.*

Moreover, there was ample additional evidence that Tayarisha in fact had a key to 157 Henry Street. Prior to executing the afternoon search warrant, for example, Detective Neary went to Tayarisha's grandparent's home (*i.e.*, the home where Tayarisha and her children had moved a week earlier) to ask Tayarisha for a key to 157 Henry Street. *See* Government's Appendix ("GA") at 109-113. Detective Neary did not recall specifically who provided her with the key, but recalled that either Tayarisha or someone else at Tayarisha's grandparent's house provided a key to Detective Neary, who subsequently gave the key to Sergeant Freeman. *See id.* Sergeant Freeman testified that Tayarisha gave the key to Detective Neary who handed the key to Sergeant Freeman and that the key was used to enter 157 Henry Street for the purpose of executing the search warrant. *See* GA at 80-82. Furthermore, during the week that Tayarisha and her children were kicked out of their home, Tayarisha went back to 157 Henry Street several times to pick-up items for herself and her children. *See* GA at 125-26. In short, the district court properly concluded that Tayarisha had access to the home at 157 Henry Street.[1] DA at 30.

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[1] The district court noted that this Court has not addressed whether the requisite "access" necessary to satisfy the first prong "must mean physical access and not legal access." DA at 30 (quoting *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 60 (2d Cir 2003). Significantly, under Connecticut law, the fact that the defendant was the title owner to the home did not eliminate or preclude Tayarisha from her property rights to the Stone family's (continued...)

The defendant next argues that Tayarisha did not have common authority over the house at 157 Henry Street. Def. Br. at 21. As an initial and important point, it is beyond dispute that Tayarisha and the defendant were married. Some courts have held that this fact alone creates a rebuttable presumption that Tayarisha had authority to consent to a search of the Stone family's home at 157 Henry Street. *See, e.g. United States v. Gevedon*, 214 F.3d 807, 811 (7th Cir. 2000) (rebuttable presumption that a spouse has actual authority to consent to search of marital home); *United States v. Duran*, 957 F.2d 499, 505 (7th Cir. 1992) (spouse presumptively has authority to consent to search of all areas of marital home); *Moore v. Andreno*, 2006 WL 2008712, *4 (N.D.N.Y. July 17, 2006) (citation

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[1] (...continued)
home. The defendant's acquisition of the home is only one of many factors that Connecticut superior courts would consider in assigning property. If the defendant and Tayarisha legally separated or dissolved their marriage, a superior court might assign to Tayarisha or the defendant all or any part of the Stone family's home. *See* Conn. Gen. Stat. § 46b-81. In fixing the assignment, the court would consider "the length of the marriage, the causes for the . . . dissolution . . . or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and need of each of the parties and the opportunity of each for future acquisition of capital assets and income." *Id.* In addition, the court will "consider the contribution of each of the parties to the acquisition, preservation or appreciation in value of their respective estates." *Id.*

omitted) (husband-wife relationship creates rebuttable presumption of control).

As alleged support for his argument, the defendant argues that Tayarisha and the defendant were separated, as Tayarisha "was kicked out of the house the week before." Def. Br. at 21. The fact that Tayarisha and the defendant were separated, however, does not render Tayarisha's authority inadequate. To the contrary, courts have routinely held that a separated spouse has authority to consent to a search of the marital home. *See, e.g.*, *United States v. Shelton*, 337 F.3d 529, (5th Cir. 2003) (estranged wife had authority to consent to search of marital residence occupied by defendant where wife left home one week earlier, left behind some belongings and kept house key); *United States v. Duran*, 957 F.2d 499, 503-04 (7th Cir. 1992) (estranged wife had authority to consent to search of farmhouse adjacent to marital home even though she had no ownership interest, never used the farmhouse and had no possessions there); *see also United States v. Backus*, 349 F.3d 1298, 1304-05 (11th Cir. 2003) ("the decisions from all of the other circuits that have addressed issues involving consent from an estranged wife to search the marital home from she has fled . . . uphold the resulting searches under various circumstances") (citations omitted).

Further, as the defendant acknowledges, Tayarisha only had left the home one week earlier. This fact supports a finding that Tayarisha had adequate authority to consent to the morning search. Indeed, numerous courts have found adequate authority under various circumstances where the consenting spouse had left or been absent from the marital home for longer periods. *See, e.g., United States v. Brennan*, 898 F.2d 107, 108 (9th Cir. 1990) (estranged wife had authority to consent to search of marital home she jointly owned even though husband had changed locks and she moved out two or three months earlier); *United States v. Crouthers*, 669 F.2d 635, 642-43 (10th Cir. 1982) (partially estranged wife had authority to consent to search where she moved out two weeks earlier, but still had a key and was present with husband); *United States v. Long*, 524 F.2d 660, (9th Cir. 1975) (estranged wife had authority to consent to search of home she left out of fear a month earlier, even though husband had changed locks).

The defendant argues that Tayarisha's "reluctance to enter the premises without the company of the police edifies the argument that she did not have permission to enter." Def. Br. at 21. This argument is misplaced. Indeed, Tayarisha enlisted the help of the police because she *feared for her safety*, not because she did not have any rights or common authority to the Stone family's home. The defendant further argues, in part, that Tayarisha did not pay rent and did not pay utility bills. *See* Def. Br. at 21. This argument is incorrect. While there was no evidence presented to the district court as to who paid rent or mortgage payments, the government submitted utility records from Connecticut Light & Power Company that identified Tayarisha as the customer receiving services at 157 Henry Street from April 2004 through August 31, 2005 and September 9, 2005 through approximately November 4, 2005. *See* GA at 127-129.

Moreover, there were significant additional facts supporting the conclusion that Tayarisha had common authority over the home. Specifically, the district court made the following findings:

> Here, at the time of the morning search, Tayarisha had been married to the defendant for seven years, had two children with him, had been living with him at the location of the search for six years, and had left the home just one week before the search. She also had returned to the home on several occasions in the week prior to the search to pick up her personal belongings, still had personal belongings in the home, and continued to receive mail at the home.

DA at 32 (citation omitted). As the district court concluded, "[a]ll of these facts . . . establish that Tayarisha possessed common authority over 157 Henry Street and the power to consent to its search." *Id.*

Attempting to support his argument that Tayarisha did not have authority to consent to a search of 157 Henry Street, the defendant cites to this Court's decision in *Moore v. Andreno,* 505 F.3d 203 (2d Cir. 2007). The defendant's reliance on *Moore* is misplaced. In *Moore*, this Court affirmed the lower court's determination that the defendant's girlfriend did not have authority to consent to a search of the defendant's locked study. 505 F.3d at 211-12. In *Moore*, however, there was no dispute that the defendant's girlfriend did not have permission to enter the defendant's locked study and, in fact, was forbidden from entering the room. *See id.* at 211. This is in stark contrast to the instant case, where Tayarisha was married to the defendant, she lived with the defendant and their children at 157 Henry Street for six years, she continued to have access to the home, she returned to the home on several occasions during the prior week to obtain personal belongings, she had a key to the home, she still had personal belongings at the home and she continued to receive mail at the home. *See* DA at 30 and 32; *see also* GA at 22, 40-47, 60-77, 83, 85-87, 88-92 and 125-126. Moreover, in *Moore*, the defendant's girlfriend needed to cut the locks with a bolt cutter to gain physical access to the study. *See Moore,* 505 F.3d at 205. In sharp contrast, in this case Tayarisha had access to 157 Henry Street and, indeed, had a key to the home. *See* DA at 30. In short, the facts in *Moore* differ sharply from the facts in this case and its holding is not applicable to the instant case.

In sum, the defendant has not come close to demonstrating that the district court misapplied the law or committed clear error in concluding that Tayarisha had "access and common authority over the premises at 157 Henry Street" and, therefore, had authority to consent to the search. DA at 30 and 32.

2. The district court properly concluded that the officers reasonably believed that Tayarisha had authority to consent to the search

The district court properly concluded that "[a]ssuming *arguendo* that Tayarisha did not possess the requisite third party authority to consent, the search was nonetheless valid because the officers reasonably believed that she did." DA at 32.

Attempting to show that Tayarisha did not have apparent authority to consent to the search of 157 Henry Street, the defendant argues that Tayarisha and the defendant were "separated" and "Tayarisha had vacated the premises at least one week before the search." Def. Br. at 24. The defendant further argues that "[t]he absence of Tayarisha from the premises did not result from the defendant's criminal behavior." *Id.* This argument is plainly without merit and disregards the facts in this case. Indeed, Tayarisha advised the officers that she and her children left the home one week earlier because, *inter alia*, the defendant kicked her out on New Year's Eve of 2005, the defendant threw her clothes in her car trunk, the defendant "has always been very verbally abusive towards" her, the defendant had threatened Tayarisha that she could never leave him and the defendant threatened he would kill her before he let her leave. *See* DA at 68-69. Tayarisha further advised that the defendant repeatedly threatened her over the phone and told her he was going to kill her. *See id.* It is beyond dispute that such conduct is criminal.

Furthermore, there was substantial evidence identifying Tayarisha's address as 157 Henry Street. Significantly, Tayarisha told the officers on January 8, 2005 that her residence was located at 157 Henry Street. *See* GA at 39. Further, Tayarisha identified her residence as 157 Henry in the two sworn statements that she provided to Windsor police officers on January 8, 2005. *See* DA at 68-69 and GA at 146. In addition, numerous other Windsor police records identified Tayarisha's residence as 157 Henry Street. These include the following: the Windsor police report relating to the May 2004 domestic violence incident between the defendant and Tayarisha (*see* GA at 57-59 and 143-144); the Windsor police reports relating to this incident (*see* DA at 66-67 and GA at 140-142); and the report of suspected child abuse/neglect (*see* GA at 145). In addition, when the Windsor police went to 157 Henry Street to investigate the defendant's sexual assault of a tenant in March 2004, the defendant came out of the Stone family's home with Tayarisha. *See* GA at 135-139. Further, when the officers went with Tayarisha and her mother to the Stone family's home on January 8, 2005, Tayarisha collected personal belongings and directed the officers to the .44 revolver in the closet and retrieved the gun case from a bedroom drawer. *See* GA at 4, 22, 44-47, 60-64, 67-69, 72-74 and 88-92; *see also United States v. Williams*, 219 F.Supp.2d 346, 357 (W.D.N.Y 2002) (by directing the officers' search, the consenting girlfriend of the defendant "demonstrated her knowledge, control and use" of the premises).

As alleged support for his argument, the defendant references the Supreme Court's decision in *Rodriguez*. As an initial matter, the defendant incorrectly argues that the Supreme Court "found that the girlfriend of the defendant [in *Rodriguez*] . . . did not have apparent authority to consent" to a search of the defendant's home. Def. Br. at 23. To the contrary, the Supreme Court affirmed the lower court's decision that the defendant's girlfriend did not have *actual* authority to consent, but reversed and remanded for the lower court to determine whether the girlfriend had apparent authority. *See* 497 U.S. at 182, 188-89. Moreover, there are numerous and significant factors distinguishing the defendant's girlfriend in *Rodriguez* from Tayarisha, including that the girlfriend in *Rodriguez* was not married to the defendant, she voluntarily moved out of the defendant's home one month earlier, she did not contribute to the rent, she was not allowed to invite friends to the home and she did not have access to the home when the defendant was not there. *See id.* at 180-81.

The defendant further argues that "Tayarisha did not have any property rights to the premises." As noted above, the fact that Tayarisha was not a title owner to the home, does not mean that she does not have property rights to the residence. *See* Conn. Gen. Stat. § 46b-81. Moreover, as the district court recognized, "the Supreme Court expressly downplayed the significance of property ownership when deciding whether a third party possessed common authority to consent, stating that '[t]he authority which justifies third-party consent does not rest upon the law of property, with its attendant historical and legal refinements.'" DA at 32 (quoting *United States v. Matlock*, 415 U.S. 164, 171, n.7 (1974)).

In short, the district court properly concluded that "the facts available to the officers at the time of the morning search justified their reasonable belief that Tayarisha had authority to consent." DA at 33.

3. Tayarisha voluntarily consented to the morning search

The district court properly concluded that "the totality of the circumstances indicate that Tayarisha voluntarily consented to the morning search." DA at 34. Without providing any further explanation or support, the defendant argues that Tayarisha "did not give consent to the police in writing, or orally, nor in her initial statement to the police. Her request to the police to accompany her to obtain her belongings cannot be viewed as consent by her for the police to search the premises." Def. Br. at 22.

The defendant does not, however, provide any basis for concluding that the district court committed any error, let alone clear error, in its factual findings. Specifically, the defendant has not shown -- because he cannot show -- that the district court erred in making the following findings:

> In the present case, the totality of the circumstances indicate that Tayarisha voluntarily consented to the morning search. Tayarisha contacted the Windsor police herself and asked them to accompany her to 157 Henry Street so that she could collect her personal belongings. When the officers asked Tayarisha if the Defendant kept any guns in the house, she freely responded that she

> believed there was a gun in the closet, and pointed to the closet. Vol. 4 at 139. This gesture was reasonably interpreted by the offices as extending permission to open the closet to see if a gun was in fact there. When officers asked if there were any other guns in the house, Tayarisha went upstairs on her own accord. Even if this court were to credit the Defendant's allegation that the officers requested that she go upstairs and retrieve the other gun, see Vol. 4 at 205, 210 there is no evidence that Tayarisha did not voluntarily consent. Nor is there any evidence that, after finding the Smith & Wesson case, the officers questioned Tayarisha about any other weapons while they were in the house. In short, the police conducted a very limited search, directed by Tayarisha, who freely gave her consent.

DA at 34.

Tayarisha's consent was not coerced in any way. Tayarisha was not detained by the police. To the contrary, Tayarisha called the police and requested their assistance. The police were at the Stone family's home *at Tayarisha's request. See* GA at 38-41. Both officers testified that Tayarisha was cooperative and solicited their assistance. *See* GA at 27-28, 40-41 and 60-64. There is no evidence that Tayarisha was interrogated in any way or that she was pressured into letting the police search the home; nor is there any evidence that Tayarisha was misled by the police, that she did not understand the police or that she was unable to communicate with the police.

Simply put, this case is devoid of facts suggesting that Tayarisha's consent was anything but voluntary. The evidence before the district court demonstrated that Tayarisha freely cooperated with the police and requested their assistance throughout the day. Indeed, even after the morning search, Tayarisha continued to cooperate with the police and request their assistance. Later in the afternoon of January 8, 2005, for example, Tayarisha sat with Detective Neary on her grandparent's couch and voluntarily provided Detective Neary with a second sworn written statement regarding the defendant's firearms. *See* GA at 94-108. In her second sworn statement, Tayarisha again stated that she was afraid of her husband. *See* GA at 146. Furthermore, when Detective Neary later returned to Tayarisha's grandparent's home to ask for a key, either Tayarisha or someone else from that residence provided Detective Neary with a key to the Stone family's home so that the police could execute the search warrant. *See* GA at 48-50, 80-82 and 109-113. Later that day, Tayarisha again contacted the Windsor police to advise them that the defendant had called her and said he was coming to 120 Highland Avenue. *See* GA at 17-18. As the defendant approached 120 Highland Avenue, the Windsor police arrested him.

In sum, the evidence firmly supported the district court's conclusion that Tayarisha voluntarily consented to the limited search of the Stone family's home by the Windsor police during the morning of January 8, 2005.[2]

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[2] The defendant spends considerable time arguing (continued...)

4. Even disregarding the evidence seized during the morning search, there was more than ample probable cause to support the search warrant.

Significantly, the four firearms charged in the indictment were seized from 157 Henry Street during the afternoon search of the home pursuant to the state search warrant. *See* DA at 64. None of the evidence seized during the morning search of 157 Henry Street was charged in the indictment. *See* DA at 19-20. Moreover, none of the evidence from the morning search was necessary or material to the finding of probable cause in support of the state search warrant.

It is an elementary principle of Fourth Amendment law that evidence seized pursuant to a search and seizure warrant supported in part by "tainted" allegations of

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[2] (...continued)
that the morning search of 157 Henry Street cannot be justified based on exigent circumstances, a protective sweep or the plain view doctrine. *See* Def. Br. at 12-17, 26-28. These arguments, however, are non-issues. This case is about consent. Indeed, the district court's ruling denying the motion to suppress is based on the district court's determination that (1) Tayarisha had actual authority to consent to the morning search of 157 Henry Street and, in any event, the officers reasonably believed that she had such authority and (2) Tayarisha knowingly and voluntarily consented to the limited morning search of the home.

probable cause may not be suppressed so long as "untainted" portions of the warrant application establish probable cause. *See, e.g.*, *Segura v. United States*, 468 U.S. 796, 805 (1984); *Laaman v. United States*, 973 F.2d 107, 115 (2d Cir. 1992), *cert. denied*, 507 U.S. 954 (1993); *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1992), *cert. denied*, 474 U.S. 819 (1985).

In the instant case, it is apparent that even disregarding the evidence found during the morning search of 157 Henry Street (*i.e.*, the Charter Arms .44 caliber revolver and the Smith & Wesson gun case and .45 caliber ammunition), the application contained more than ample probable cause to support the search warrant. The application advised the state judge of, *inter alia*, the following: the defendant kicked Tayarisha out of 157 Henry Street one week earlier; the defendant called Tayarisha 23 times on her cell phone during the prior 12 hours; during three telephone calls, the defendant threatened to kill Tayarisha if she did not return home within one hour; the defendant told Tayarisha to call the police, because they would not be able to help her; at approximately 9:00 a.m., the defendant went to Tayarisha's grandparent's home, took Tayarisha's belongings out of her car, threw them on the ground and left in her car; the defendant has always been verbally abusive towards Tayarisha; the defendant has threatened that he would kill Tayarisha before he let her leave; Tayarisha is afraid of her husband; Tayarisha advised that her husband possessed two firearms and he kept the firearms at 157 Henry Street; the defendant is a convicted felon; and the Windsor police has had prior contact with the defendant and Tayarisha for domestic violence. *See* DA at 62-69.

None of this evidence was discovered, or derived from evidence that was discovered, during the morning search of 157 Henry Street. Accordingly, even disregarding the evidence seized during the morning search, there was more than ample probable cause for a warrant authorizing a search of 157 Henry Street for firearms. This provides further justification for denying the defendant's motion to suppress. *See United States v. Trazka*, 111 F.3d 1019, 1026 (2d Cir. 1997) (holding that a second search of premises pursuant to a search warrant was valid despite a prior illegal entry because the affidavit contained sufficient probable cause to support the search warrant after excising the information obtained during the initial illegal search).

II. The district court properly concluded that the search warrant affidavit did not contain a false statement that was made knowingly, intentionally or with reckless disregard for the truth.

A. Relevant facts

The relevant facts are set forth in the Statements of Facts above.

B. Governing law

It is well established that "[e]very statement in a warrant affidavit does not have to be true." *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000) (internal citation omitted). A truthful showing "does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct . . . but surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 2681 (1978).

Before a defendant is entitled to an evidentiary hearing on the issue of whether an officer made an intentional false statement or recklessly disregarded the truth in a search warrant affidavit, the defendant must make two showings. *See id.* at 155-56, 171-72. First, the defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the [officer] in the warrant affidavit." *Id.* at 155-56. This showing must be "more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id.* at 171.

Second, the defendant must show that the alleged false statement or omission was necessary or material to the finding of probable cause. *See id.* at 156, 171-72; *Canfield*, 212 F.3d at 717-18. To determine whether the false information was material or necessary to the issuing judge's probable cause determination, a court should disregard the false information and determine "whether the remaining portions of the affidavit would support probable cause to issue the warrant." *Canfield*, 212 F.3d at 718 (internal quotations omitted). "If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate." *Id.* Material omissions are governed by the same rules. *Id.* "The ultimate inquiry is whether, after putting aside erroneous information and material omissions, 'there remains a residue of independent and lawful information sufficient to support probable cause.'" *Id.* (quoting *United States v. Ferguson*, 758 F.2d 843, 849 (2d Cir. 1985)).

"Once the inaccurate information has been removed from the affidavit, the remaining portions of the affidavit are reviewed *de novo* to determine if probable cause exists." *Id.* Probable cause is "a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . ., including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (internal quotations omitted).

C. Discussion

1. The district court properly found that the defendant failed to show that the affiants made a false statement knowingly, intentionally or with reckless disregard for the truth.

During the proceedings before the district court, the defendant failed to make a substantial preliminary showing that the search warrant affidavit contained a false statement or omission, let alone that such false statement or omission was made knowingly, intentionally or with reckless disregard for the truth. Accordingly, the district court properly concluded that "the Defendant has not met his burden of showing that a false statement was made knowingly or intentionally, or with reckless disregard for the truth." DA at 39.

In his appellate brief, the defendant argues that Officer Tkacz made false statements and materially misleading omissions with reckless disregard for the truth in seven instances. The defendant's arguments are without merit and are addressed in turn.

First, the defendant argues that Officer Tkacz's police report, which was appended to the search warrant application, contained the following false statement: "[at] approx. 0830 and 0930 hrs this morning, Anthony Stone threatened Tayarisha Stone over the phone. According to Tayarisha Stone, Anthony Stone told her 'if you're not here in one hour, the next time I see you I'm going to kill you . . . you can call the police . . . They're not going to help you." Def. Br. at 30. The defendant failed to demonstrate, however, that this statement is false, let alone that the affiants made the false statement knowingly, intentionally or with reckless disregard for the truth. To the contrary, this is precisely what Tayarisha told the officers. In fact, Tayarisha provided a sworn, written statement, which stated, in pertinent part, the following:

> Anthony kicked me out of the house on New Years Eve. I came home from New Year's Eve celebration and my clothes were in the trunk of my car. Anthony was mad because I had gone out. . . . He has always been very verbally abusive towards me and told me I could never leave him because he won't leave me alone. He has also said he'd kill me before he let me leave.
>
> Last night around 8:30 p.m. he repeatedly called me. He had been calling my cell phone all day asking me to come home. I said no. Around 8:30 p.m. he started threatening me over the cell phone. He said, 'If you're not here in one hour, the next time I see you I'm going to kill you. You can tell the police, they're not going to be able to help me.' He made that same threat to me 3 times and then I stopped answering the phone. The last time I talked to him on the phone and he threatened me was around 9:15 a.m. . . .
>
> In the past 12 hours Anthony has called my cell phone 23 times. I am afraid of him because I think

> he is unstable. I would like a protective order against him to protect me and my kids.

DA at 68-69.

The defendant argues that the telephone call records for telephone number 860-805-1809 (identified as "Exhibit O" in the district court proceedings) demonstrate that Tayarisha did not receive any calls at 0830 and 0930 hours. The district court record makes clear, however, that either Tayarisha was not using the telephone associated with telephone number 860-805-1809 on January 8, 2005 or, at a minimum, Tayarisha was using another phone in addition to this telephone. There is no dispute, for example, that Tayarisha made at least three calls to the Windsor police on January 8, 2005, none of which are reflected on Exhibit O. *See* GA at 51-52. Specifically, Tayarisha called the Windsor police at approximately 9:27 a.m. to make a complaint against her husband, she called Officer Tkacz at approximately 10:54 to request assistance in getting her personal items from the family's home and she called Officer Tkacz at approximately 4:43 p.m. to report that the defendant said he was coming to Tayarisha's grandmother's house despite Tayarisha's objection. *See id.* None of these calls are shown on Exhibit O. *See id.* Moreover, it is beyond dispute that the affiants did not have a copy of Exhibit O on January 8, 2005, further undermining any claim that the officers deliberately or recklessly included a false statement.

Second, the defendant argues that the statement that the Windsor Police Department "had prior contact with this couple in Aug. 2003 03-29140 for domestic violence" was in reckless disregard for the truth and amounted to a material misstatement. Def. Br. at 30. It is in fact true, however, that the Windsor police had prior contact with the defendant and his wife for domestic violence. The evidence adduced before the district court established that the domestic violence matter between the defendant and Tayarisha was in May 2004 and related to case number 04-15510. *See* GA at 57-59 and 142-143. The August 2003 matter (referenced as case number 03-29140) related to a domestic dispute at the Stone family's home, but it involved the defendant and another woman. The evidence adduced before the district court demonstrated that the reference to "Aug. 2003, 03-29140" was nothing more than an innocent mistake caused by the fact that Officer Tkacz did not have access to the suppressed records for case numbers 03-29140 and 04-15510 because the files were sealed. *See* GA at 12-16, 53-59 and 114-123. This is supported by the district court's ruling, which stated, in part, the following:

> In addition, although the domestic dispute referenced in the affidavit referred to an incident between the Defendant and another woman, because the case had been suppressed, the only information available to Officer Tkacz at the time was that there had been a domestic disturbance at 157 Henry Street and that the Defendant had been arrested. (Vol. 1 at 46). Thus, it was reasonable for her to conclude that the Defendant's wife was the other party.

DA at 38.

Third, the defendant argues that the statement that "from 2030 hours on 1/7/05 to 0930 hours on 1/8/05, A. Stone made twenty three calls to the complainant's cell telephone" was a materially false statement. The defendant argues that the Windsor police did not sufficiently investigate this allegation and that Exhibit O shows only 13 incoming calls. He also argues that none of these 13 calls can be definitively attributed to the defendant.

At the hearing before the district court, Officer Tkacz testified that she looked for the defendant at 157 Henry Street and 120 Highland Avenue, she reviewed the call history on Tayarisha's phone and she tried calling the number that Tayarisha said the defendant was using. *See* GA at 19, 36-37 and 48-50. In addition, as discussed above, it is beyond dispute that Officer Tkacz did not have Exhibit O on January 8, 2005 and, in any event, Tayarisha either was not using the telephone associated with Exhibit O on January 8, 2005 or also was using another phone. More importantly, there is no dispute that Tayarisha told Officer Tkacz that the defendant had called Tayarisha's phone 23 times during the prior 12 hours. *See* DA at 68-69. Indeed, Tayarisha provided a sworn written statement to precisely this fact. *See id.* The search warrant application attached Tayarisha's sworn statement in which she stated that the defendant had called her cell phone 23 times during the prior 12 hours.

Fourth, the defendant argues that the affiants falsely stated that "A. Stone is [a] convicted felon from a sexual assault in 1996." As an initial matter, the affiants did not make this representation. Rather, in the incident report that was attached to the search warrant application, it states that "A. Stone is a convicted felon from an arrest in 1996 (class C felony, sexual assault 2nd)." It is beyond dispute that the defendant is a convicted felon based on this arrest. Specifically, the defendant was arrested for Sexual Assault 2nd and Risk of Injury to a Minor, both of which were class C felonies, and ultimately, the defendant was convicted of Risk of Injury to a Minor, in violation of Conn. Gen. Stat. 53-21. *See* DA at 60. As the district court found, "Officer Tkacz, who made the statement, testified that the parenthetical was modifying the arrest, not the conviction. This testimony is consistent with the rest of the search warrant application . . ." DA at 38-39. Indeed, the affiants correctly advised the state judge, prominently on the first page of the search warrant application, that the defendant was convicted of Risk of Injury in violation of Conn. Gen. Stat. 53-21. *See* DA at 62.

The defendant further argues that the defendant's Risk of Injury conviction did not support the statement in the application that the defendant had a "history of the use, attempted use or threatened use of force . . . against other persons." Def. Br. at 32. The records presented to the district court, however, revealed that the defendant's risk of injury conviction stemmed from his arrest in October 1995 for sexually assaulting a fifteen year old girl. *See* GA at 130-134. According to the victim's sworn written statement, the defendant pinned her to the ground and raped her. *See id.* During the rape, the defendant stated, "Don't tell anyone, I'll kill you if you tell anybody, I'll kill you if I find out." *See* GA at 133. Moreover, during the middle of the night, the defendant sexually assaulted the minor girl a second time. It is beyond dispute that this conduct involved the use, attempted use or threatened use of physical force against another person. According to the police report, the defendant admitted having intercourse with the minor, but claimed it was consensual. *See* GA at 134. Even if we disregard the victim's sworn statement and accept as true the defendant's statement that he had consensual intercourse with the minor, the defendant, by his own admissions, committed risk of injury to a minor and sexual assault 2nd (*i.e.*, statutory rape). These crimes inherently involve a substantial threat or risk of physical force, that is, they are "crimes of violence." *See United States v. Cherry*, 347 F.3d 404, 408-09 (2d Cir. 2003) (sexual assault 2nd in violation of Conn. Gen. Stat. 53a-71 is a "crime of violence"); *Hongsathirath v. Ashcroft*, 322 F.Supp.2d 203, 204-05 (D. Conn. 2004) (risk of injury to a minor in violation of Conn. Gen. Stat. 53-21(a)(2) is a "crime of violence").

Fifth, the defendant argues that the morning seizure of the .44 caliber revolver and the gun case with the .45 caliber ammunition tainted the search warrant application. As an initial point, this does not appear to be a *Franks* argument, as there is no claim that any statement is false; rather, it appears to be a "fruit of the poisonous tree" argument. In any event, "because the [district] court [found] that the morning search of Defendant's residence was valid," the district court correctly concluded that "it need not address the Defendant's first argument – that the warrant was 'tainted' by the morning search." DA at 15. Further, even assuming *arguendo* that the morning search was unconstitutional (despite compelling evidence to the contrary), the evidence found during the morning search was not material or necessary to the probable cause determination. *See* Part I.C.4., *supra.* Simply put, there still was more than ample probable cause to support the search warrant without this evidence, including, *inter alia*, that the defendant was a convicted felon and Tayarisha's sworn statement that the defendant owned firearms and ammunition, which he kept at their home. *See id.*

Sixth, the defendant argues that the affiants falsely represented that they conducted an independent investigation and concluded that there was probable cause to search the Stone family's home for a firearm and ammunition. Def. Br. at 34. The defendant, however, disregards substantial evidence regarding the Windsor officer's investigation of this matter; moreover, he disregards substantial and compelling evidence establishing more than ample probable cause to search the home for a firearm and ammunition.

The defendant argues, for example, that the Tayarisha learned at 9:30 a.m. that the defendant went to her grandmother's house (*i.e.*, 120 Highland Avenue) and took Tayarisha's belongings out of her car, threw them on the ground and left in Tayarisha's car, and that Officer Tkacz never went to 120 Highland Avenue to corroborate this fact. This argument distorts the timing of events and, more importantly, is inaccurate. The evidence adduced at the hearing established the following sequence of events: Tayarisha said her grandmother called her at approximately 9:30 a.m. (*see* DA at 68-69; GA at 30-31); Tayarisha's grandmother told her that the defendant went to 120 Highland Avenue at approximately 9:00 a.m., threw Tayarisha's clothes on the ground and took her car (*see* DA at 67; GA at 30-31); Officer Tkacz was dispatched to Tayarisha's mother's house at 9:33 a.m. (*see* GA at 33-33); Officer Tkacz started taking Tayarisha's statement at approximately 9:45 a.m. and completed taking the statement at approximately 10:00 a.m. (*see* DA at 68-69; GA at 34-35); Officer Tkacz left 646C Windsor Avenue at approximately 10:15 a.m. (*see* GA at 35); Officer Tkacz drove by 157 Henry Street at approximately 10:21 a.m., but did not find the defendant (*see* GA at 36-38); and Officer Tkacz then drove by 120 Highland Avenue at approximately 10:27 a.m. (*see* GA at 36-38).

The defendant further suggests that the officers did not try to find the defendant, so that they could get the "other side of the story." The defendant disregards substantial evidence in this case. This evidence includes evidence that Officer Tkacz went to 157 Henry Street and 120 Highland Avenue to look for the defendant (*see* GA at 36-37), Officer Tkacz tried contacting the defendant by telephone (*see* GA at 19); the Windsor police put out a message over the mobile data terminals, which was sent to other police departments, to try to locate the defendant (*see* GA at 78-79); and while Officers Tkacz and Kaldy prepared the search warrant application, other Windsor officers were sent to 157 Henry Street and 120 Highland Avenue to look for the defendant (*see* GA at 78-79).

Lastly, the defendant disregards the substantial evidence -- set forth on the face of the search warrant application, in Officer Tkacz's incident report and in Tayarisha's first sworn statement -- establishing probable cause to search the Stone family's home for a firearm and ammunition.

Seventh, the defendant argues that the affiants falsely stated that the defendant posed a risk of imminent personal injury to himself or someone else. As an initial and important point, the affiants advised the state judge of all of the pertinent facts on which this conclusion was based. More importantly, the evidence in this case strongly establishes that this conclusion was in fact correct.

The defendant argues that the fact that the Windsor dispatcher, who received the initial complaint from Tayarisha, dispatched Officer Tkacz on a "Code 1" and referred to the matter as a "10-72 past tense" means that the harm was not imminent. As an initial point, the imminency of potential harm to a victim is not determined by the initial codes used by a dispatcher. In addition, as Officer Tkacz testified, a "10-72 past tense" simply means that the domestic matter was not currently ongoing; that is, that one party to the domestic dispute was not currently present. *See* GA at 24-25. It does not mean that the victim does not face the risk of imminent harm. Indeed, the evidence in this case amply established that Tayarisha faced a serious risk of imminent harm. As the district court concluded, "[b]ased upon Defendant's threats to Tayarisha and the fact that they found a firearm at his residence, it was reasonable for the officers to state that the Defendant posed a risk of imminent injury to others." DA at 38.

2. The defendant did not show that any alleged false statement was material or necessary to a finding of probable cause.

As discussed above, the affidavit contained one minor inaccuracy. The application incorrectly stated that the domestic violence matter involving the Stones was "in Aug. 2003, 03-29140," when in fact it was in May 2004 and related to case number 04-15510. *See* GA at 57-59 and 143-144. Even disregarding the district court's finding that this was nothing more than a reasonable mistake (*see* DA at 38), this inaccuracy is not close to being material or necessary to a finding of probable cause. If anything, this inaccuracy arguably benefitted the defendant, as it presented the domestic violence matter as being more dated. Further, correcting or deleting this inaccuracy would not in any way impact the finding of probable cause.

In fact, even if all of the alleged falsehoods were removed -- despite the fact that the falsehoods alleged by the appellant are true, except for this one inaccuracy -- there still is more than ample probable cause. Specifically, the search warrant application still would establish probable cause to search the defendant's home for a firearm and ammunition.

As discussed above, the application for the search warrant was based on, *inter alia*, the defendant's threats to his wife, the evidence that the defendant possessed firearms and the fact that the defendant was a convicted felon as a result of his conviction for Risk of Injury to a Minor in March 1996. *See* DA at 62-69. The search warrant application advised the state judge, for example, that the defendant was convicted of Risk of Injury in March 1996. *See* DA at 62. The search warrant application also advised the state judge of the following: the defendant and Tayarisha had been married for seven years; the defendant kicked Tayarisha out of the family home one week earlier; the defendant has always been very verbally abusive towards Tayarisha and told her that she could never leave him; the defendant has told Tayarisha that he would kill her before he let her leave him; the defendant repeatedly called Tayarisha on her cell phone on January 7, 2005, asking her to move back home; at approximately 8:30 p.m. on January 7, 2005, the defendant started threatening Tayarisha; the defendant threatened to kill Tayarisha if she did not return home in one hour; the defendant further threatened that the police would not be able to help Tayarisha; and the defendant threatened to kill Tayarisha three times, the last of which was around 9:15 a.m. on January 8, 2005. *See* DA at 66-69.

In addition, the application advised the state judge that at approximately 9:30 a.m. on January 8, 2005, Tayarisha's grandmother told her that the defendant took Tayarisha's belongings out of her car, threw them on the ground and took her vehicle. *See* DA at 68-69. The application advised that during the evening of January 7, 2005 and the morning of January 8, 2005, the defendant called Tayarisha's cell phone approximately 23 times. *See* DA at 69. In addition, the application informed the state judge that Tayarisha contacted the Windsor Police Department because she feared that the defendant would follow through with his threat. *See id.* It also advised the state judge that Tayarisha is afraid of the defendant and she wanted a protective order against him to protect her and her kids. *See id.*

Furthermore, the application advised the state judge that on January 8, 2005, Tayarisha asked Windsor police officers to accompany her to 157 Henry Street so that she could retrieve some personal belongings; while in the first floor hallway at 157 Henry Street, Tayarisha directed the officers to a closet which contained a .44 caliber revolver that was loaded with five rounds; Tayarisha located in the house and provided to the officers a blue Smith & Wesson handgun case that contained 52 rounds of .45 caliber rounds and an empty magazine; and Tayarisha believed that her husband owned another handgun. *See* DA at 67.

This evidence firmly establishes probable cause to support the search warrant. Indeed, the evidence that the defendant was a convicted felon and that he illegally possessed firearms at the Stone family's home, on its own, establish probable cause that contraband or evidence of a crime (*i.e.*, the defendant's unlawful possession of a firearm) would be found at the home. Accordingly, even disregarding all of the *alleged* inaccuracies -- let alone, just the one inaccuracy -- the application contained ample probable cause for the issuance of the warrant to search 157 Henry Street for a firearm and ammunition.

Conclusion

For the foregoing reasons, the judgment of the district court denying the motion to suppress should be affirmed.

Dated: August 11, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

RAYMOND F. MILLER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,351 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Geoffrey M. Stone

GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

ADDENDUM

The Constitution of the United States of America

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Amendment IV

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