10-1773

To Be Argued By:
BRIAN P. LEAMING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-1773

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOHN D. ROY,
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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

Statement of Jurisdiction

The district court (Ellen B. Burns, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. Judgment entered on April 16, 2010. Appendix ("A")[1] 14, 224-26. On April 30, 2010, the defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. A14, 227. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

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[1] The Defendant's Appendix is cited as "A __" and the Government's Appendix is cited as "GA __."

Statement of Issues Presented for Review

I. Did the district court plainly err in admitting a detective's testimony describing information received from a non-testifying witness to explain the purpose for seeking a search warrant for 60 Church Street when the testimony was not offered for the truth of the matter asserted and when the evidence about Roy's possession of firearms was overwhelming?

II. Did the district court abuse its discretion in denying Roy's motion for mistrial when the government asked Roy during cross-examination if he sold cocaine after Roy opened the door to this inquiry with his testimony on direct?

III. Did the district court abuse its discretion when it denied Roy's motion for new trial when the allegedly "new" evidence had been produced to him four months before trial and Roy can show no reasonable probability that this evidence would have produced a different verdict?

IV. Should this Court vacate and remand for re-sentencing when the district court granted Roy's motion to dismiss counsel and represent himself at sentencing without conducting a *Faretta* inquiry before the sentencing hearing and then failed to make explicit factual findings on contested sentencing enhancements?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In March 2007, local police executed three search warrants at defendant John D. Roy's home in Middletown, Connecticut. During the searches, the police seized numerous firearms, multiple rounds of ammunition, and firearms-related equipment (*e.g.*, holsters, gun cleaning kits, magazines, and a utility vest with loaded magazines). In addition, they found drug paraphernalia and cocaine residue in the living room, and in the basement, a

sophisticated marijuana grow operation. The basement grow operation included approximately 136 marijuana plants growing in organic pellets, a watering and lighting system, electric grow lamps, hydroponic pellets, an electronic dehydrator, and cultivated marijuana.

After indictment, Roy was convicted by a federal jury of possession of firearms and ammunition by a convicted felon and possession with intent to distribute and manufacture 100 or more marijuana plants. Prior to sentencing, he moved to dismiss his counsel and the district court, without a hearing, granted the motion. On April 14, 2010, the district court sentenced Roy to 300 months' imprisonment.

In this appeal, Roy raises several claims of error. *First*, he claims, for the first time on appeal, that his right to confront an adverse witness under the Confrontation Clause was denied when a detective was permitted to testify about information he received from a non-testifying witness. *Second*, he claims that the district court abused its discretion by denying his motion for a mistrial after the prosecutor asked him on cross-examination whether he sold cocaine. *Third*, Roy contends that the district court abused its discretion in denying his motion for a new trial, arguing for the first time on appeal that the prosecution suppressed exculpatory evidence. *Finally*, Roy raises various arguments about his sentencing proceeding, including his claim that he was denied counsel at sentencing when the court allowed him to proceed *pro se* without conducting a *Faretta* hearing to determine if his waiver of his right to counsel was knowing and voluntary.

For the reasons set forth below, this Court should affirm the defendant's conviction, but vacate and remand for re-sentencing.

Statement of the Case

On November 14, 2007, a federal grand jury returned a superseding indictment which charged Roy with possession of firearms and ammunition by a convicted felon, in violation of Title 18, United States Code, Section 922(g)(1), and possession with intent to distribute 100 or more marijuana plants, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B). A17-21.

On May 27, 2008, Roy moved to suppress all evidence seized from 60 Church Street. A7; GA1. In pertinent part, Roy claimed that Middletown Police planted cocaine in the living room, and later moved it to a safe in an effort to construct probable cause for the second search warrant of 60 Church Street. GA2-6. The government opposed the motion, and on July 14, 2008, the district court (Ellen Bree Burns, J.) denied the motion to suppress. GA75-89, 144-154. On August 25, 2008, Roy moved for reconsideration of the district court's ruling. A7. The government opposed the motion, and, on August 29, 2008, the district court denied the motion for reconsideration. A35-37.

On September 9, 2008, Roy moved *in limine* for an order precluding the government from offering evidence of the cocaine seized from 60 Church Street. A8; GA204-210. Over the government's objection, the district court granted, in part, Roy's motion *in limine* precluding the

government from offering evidence of the cocaine seized from 60 Church Street. GA211-219, 367-381.

Trial began on September 16, 2008. A9. On September 23, 2008, Roy moved for a mistrial when the government asked him during cross-examination whether he sold cocaine. A9; GA1112. Roy's motion was denied, but the district court instructed the jury to disregard the government's question. GA1113-1122. On September 24, 2008, the jury returned a verdict of guilty on both counts of the superseding indictment. A10.

On October 14, 2008, Roy moved for a judgment of acquittal or, alternatively, a new trial. A10; GA221. Roy's motion was supplemented with a memorandum of law on December 1, 2008. A10; GA223-236. On July 16, 2009, the district court denied Roy's motions. A11; GA243-249.

On November 19, 2009, Roy moved to dismiss his counsel. A12, 96-97. On February 8, 2010, Roy moved again to dismiss his counsel and to proceed *pro se*. A12, 100-104. On February 24, 2010, the district court granted Roy's motion, provided trial counsel remain as stand-by counsel. A13. On April 14, 2010, Roy appeared in district court for sentencing and received a total effective sentence of 300 months of imprisonment. A14, 144, 214, 224. Judgment entered on April 16, 2010. A14. On April 30, 2010, Roy filed a timely notice of appeal. A14, 227.

The defendant is currently serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct as presented at trial

1. Evidence found during the searches of 60 Church Street

In March, 2007, Middletown Police received information from a cooperating witness that Roy was unlawfully possessing firearms at his residence on 60 Church Street. GA400. With this information, Middletown Police Detective William Warner obtained search warrants for 60 Church Street and 23 Hotchkiss Street, a second residence owned by Roy.[2] GA400-403. On March 9, 2007, Middletown Police initiated surveillance of 60 Church Street in anticipation of executing the search warrants, along with an active arrest warrant for Roy. GA510-11. At approximately 7:45 p.m., Roy was observed leaving 60 Church Street driving a green Jeep Cherokee. GA512, 521-523. Roy drove the Jeep Cherokee to 23 Hotchkiss Street. GA405, 523-524.

The search and arrest warrants were executed after 8:00 p.m. GA402-403. Once Detective Warner arrived at 60 Church Street, Middletown Police Department's SWAT entered the premises. GA404. Middletown Police SWAT cleared the residence and found only one occupant, Roy's mother, Roberta Roy, the owner of 60 Church

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[2] The search of 23 Hotchkiss Street is not at issue in this appeal as no items of evidence were seized from this location.

Street. GA406-407. Before the residence was searched, Detective Warner photographed the interior of each room. GA407.

The second floor consisted of three bedrooms, GA411-412, one of which contained weapons and ammunition, along with items tying it to Roy. Specifically, in the middle bedroom on the second floor, officers recovered, among other items, a Beretta 9 mm semi-automatic pistol, a Sig Sauer 9 mm semi-automatic pistol, a FEG 9 mm semi-automatic pistol, an Essential Arms Model J-15 .223 caliber rifle, a nylon tactical vest containing numerous loaded magazines containing .223 and 9mm bullets, a leather shoulder holster which was loaded with 9 mm bullets; and a box containing 5.56 mm bullets. GA417-426, 458, 462-465, 530-547, 552-554, 727-733. They also found evidence showing that Roy used and occupied this middle bedroom, including mail, financial records, mortgage documents pertaining to 23 Hotchkiss Street, state-issued identifications, correspondence and assorted other personal papers. GA430, 475, 548-552, 555-556.

In addition to the middle bedroom, other parts of the house also yielded evidence. On the stairs leading to the basement, officers recovered ten .22 caliber shell casings.[3] GA445. On a shelf at the bottom of the basement stairs, the officers found a .22 caliber indoor target trap. GA446-

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[3] The shell casings were later determined to have been fired from one of the Ruger Model 10-22 Muzzelite .22 caliber rifles recovered from the locked gun safe in Roberta Roy's bedroom. GA576-577, 930-932.

451, 580. Officers also discovered a sophisticated marijuana grow operation, which included 136 marijuana plants growing in organic pellets, a watering and lighting system, electric grow lamps, hydroponic pellets, an electronic dehydrator, and harvested marijuana. GA453-454, 473-474.

Given the amount of evidence to be seized, a second search warrant was sought for the marijuana plants, and marijuana grow equipment, and other items associated with the unlawful possession of controlled substances. GA455-456. No evidence was seized on the evening of March 9, 2007. GA456. Instead, evidence was inventoried and photographed, and the residence was secured by two Middletown Police officers until the second search warrant was obtained the following day. GA456-458.

On the morning of March 10, 2007, Middletown Police returned to 60 Church Street to complete the first search for the firearms and ammunition and to execute the second search warrant. GA720-21. During this second search, in addition to the items located in Roy's bedroom, officers also seized the following relevant items from Roberta Roy's bedroom: a Beretta Model 21-A .25 caliber semi-automatic pistol (on the desk), a Ruger Model 10-22 Muzzelite .22 caliber rifle (in locked gun safe), a Ruger Model 10-22 Muzzelite .22 caliber rife (in locked gun safe), a Smith & Wesson Model 19-3, .357 caliber revolver (in locked gun safe); a Romarm/Cugir Model WASR-3 5.56 caliber rifle (in locked gun safe), and assorted ammunition (in bedroom and gun safe). GA433-434, 561-579. From the living room, officers seized a

plastic container with .45 caliber bullets from a coffee table and marijuana in a container near a desk in the living room. GA439-444.

In the basement, officers removed the marijuana grow operation, including the following: 136 pots with marijuana plants in various states of growth, mechanized sun system grow lights which operated on a track system, a carbon dioxide generator, humidifiers, electronic ballasts, a portable heater, discarded stems and leafs from cultivated marijuana plants, marijuana buds, and assorted marijuana grow calendars and paperwork. GA589-596, 702-724. On a basement door, the officers found a calendar with Roy's handwritten notes regarding the apparent bloom cycles of marijuana plants. GA738-741.

On March 14, 2007, the Middletown Police obtained a third search warrant for 60 Church Street seeking documents and electronic records associated with the marijuana grow operation. GA647. This search warrant resulted in the seizure of handwritten notes by Roy describing the cultivation of marijuana, different strains of marijuana, and the costs of various equipment used to cultivate marijuana. In addition, the police found a promotional pamphlet for a ballast used to grow marijuana. GA654-663.

2. Testimony by witnesses about Roy's possession of weapons

Roy's friend, Louis Coccia, testified that he saw Roy in possession of the firearms recovered from 60 Church

Street. GA811-814, 821-825. Coccia explained that he owned two of the firearms recovered from Roy's bedroom – the Sig Sauer 9 mm pistol and AR-15 rifle – but had left both guns in Roy's possession.[4] GA821-822. Coccia testified further that approximately two months before Roy's arrest, Coccia left the guns with Roy and watched as Roy opened the gun safe in Roberta Roy's bedroom and placed Coccia's guns with the other guns in the safe. *Id.* Coccia also testified that the guns remained at 60 Church Street and on one or two occasions when he visited Roy he saw the guns in Roy's bedroom. GA818-820. According to Coccia, he accompanied Roy to pick up and deliver the gun safe and watched as Roy programmed the safe combination. GA820-821.

As to other firearms recovered from 60 Church Street, Coccia testified that on more than one occasion, he saw Roy in actual possession of each of those firearms and that on two occasions Coccia, Roy, and others went to a remote location to shoot several of the firearms. GA815-818.

Meghan Hinchey, Roy's former girlfriend, testified that she also observed Roy in possession of firearms on multiple occasions. GA770-772. On one occasion, Hinchey attested, she walked into Roy's bedroom and saw numerous guns and ammunition on the bed. *Id.* Hinchey recalled another instance where she accompanied Roy and

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[4] Coccia testified under the protection of immunity authorized by the Acting United States Attorney for the District of Connecticut. GA810-811.

his friends to a location with abandoned cars to shoot the guns. GA772-775.

3. Testimony by witnesses about Roy's distribution of marijuana

Coccia and Hinchey also testified about Roy's possession and distribution of marijuana. Coccia testified that he purchased marijuana from Roy. GA825-826. Hinchey testified that she was aware of the marijuana grow in the basement and that Roy had shown her the room and explained in part the growth process of the plants and equipment that he purchased for the growing operation. GA766-769. Hinchey testified that she knew Roy sold drugs and that he always had money but never appeared to work. GA763-765.

4. Roy's testimony

Roy testified in his own defense and denied knowingly possessing any firearm or ammunition. GA1083-1088. As to the firearms and ammunition in his room, Roy claimed that either the Middletown Police or his house mate Sam Ortiz ("Ortiz") planted the evidence after he left the residence on March 9, 2007. GA1089.

With respect to the drugs, Roy acknowledged that marijuana was being grown in the basement, but testified that his mother and Ortiz's mother were growing the marijuana. GA1173-1176. Roy did admit, however, that he helped construct the mechanized lighting system used to grow the marijuana. GA1176. He also admitted that he

possessed numerous documents and records pertaining to the cultivation and distribution of marijuana. GA1176-77.

B. Post-conviction proceedings

After the jury convicted Roy on both charges in the indictment, A10, he moved for a judgment of acquittal or, alternatively, a new trial. A10; GA221. The district court denied these motions, A11; GA243-249, and shortly thereafter, Roy moved to dismiss his counsel. A12, 96-97. Before receiving a ruling on this motion, he moved, in February 2010 to dismiss his counsel and to proceed *pro se*. A12, 100-104. The district court granted this latter motion on February 24, 2010, providing that trial counsel was to remain as stand-by counsel. A13.

On April 14, 2010, Roy appeared in the district court for sentencing with stand-by counsel. A14. The district court sentenced him to a total effective sentence of 300 months of imprisonment. A14, 144, 214, 224.

Summary of Argument

I. The district court did not plainly err in admitting without objection Detective Warner's background testimony describing the information the police department received which explained the purpose in seeking a search warrant for 60 Church Street. This testimony was not offered to prove the truth of the matter asserted and therefore did not deny Roy his right to confront adverse witnesses under the Sixth Amendment. Thus, the district court committed no error, and certainly no plain error.

Moreover, even if the district court erred in admitting the testimony, it did not influence the verdict because the evidence against Roy on the weapons charge was overwhelming. Roy's friend and former girlfriend both testified that they had seen him in possession of multiple firearms and both testified that they had been with Roy when he fired weapons. In addition, multiple law enforcement witnesses testified about the weapons and ammunition that were recovered from Roy's bedroom at 60 Church Street, and from the rest of the house more generally.

II. The district court did not abuse its discretion when it denied Roy's motion for mistrial based on one allegedly improper question to Roy during cross- examination. Even though the court had entered a pretrial order prohibiting the government from introducing evidence of cocaine, the government's question to Roy about whether he sold cocaine was not improper because Roy opened the door to

such evidence during his trial testimony. In fact, after considering the defendant's motion for mistrial, the district court found that the government could ask Roy if cocaine was included in any of the chemicals and substances recovered from 60 Church Street.

Even if the question was improper, the isolated remark did not deprive Roy of a fundamentally fair trial. It was one question in an otherwise fair trial, the district court immediately struck the question and instructed the jury to disregard it, and given the strength of the evidence, there is every reason to believe that the defendant would have been convicted even without the prosecutor's question.

III. The district court properly exercised its discretion in denying Roy's motion for new trial. Roy argues that he was entitled to a new trial because of "newly discovered" photographic evidence, but the photographs he cites (and now claims were suppressed within the meaning of *Brady v. Maryland*) were produced to him long before trial. And although Roy claims that the photographs show police manipulation of evidence, this claim is pure speculation belied by the record evidence. Finally, Roy cannot show any reasonable probability that this evidence would have changed the verdict. Indeed, there is a good chance that the introduction of these photographs could have *hurt* Roy because it would have allowed introduction of additional evidence relating to cocaine distribution into his trial.

IV. The government does not object to a remand to the district court for re-sentencing. After his conviction,

Roy moved to dismiss his counsel and proceed *pro se*, a motion the district court granted without conducting an inquiry of Roy to ensure that his decision to waive counsel was knowing and voluntary. Because this inquiry should have proceeded the sentencing process, the government agrees that a remand is appropriate. Moreover, on remand, the district court will have the opportunity to make specific factual findings on any objections that Roy raises at sentencing.

Argument

I. The district court did not plainly err by allowing Detective Warner to provide background testimony regarding the basis for seeking a search warrant for 60 Church Street.

A. Relevant facts

The trial began with the testimony of Detective William Warner of the Middletown Police Department. Detective Warner was the affiant on the application for the search warrants of 60 Church Street and 23 Hotchkiss Street. GA400. After providing testimony regarding his background, Detective Warner explained to the jury the basis for the investigation of Roy, and why the police applied for the search warrants. In particular, the following testimony was elicited during direct examination:

> PROSECUTOR: What was the first assignment you received relative to this investigation?

WARNER: I was assigned to apply for a search and seizure warrant for the residence.

PROSECUTOR: Could you tell us, Detective, what was the general nature of the investigation as it was conveyed to you on March 9th of 2007?

WARNER: As it was conveyed to me, an individual had come forward and indicated that a John Roy living at 60 Church Street might be in possession of numerous handguns and assault-type weapons.

PROSECUTOR: And this individual identified the person in the location where these guns may be stored or kept; is that correct?

WARNER: Yes.

PROSECUTOR: What was the address of that location?

WARNER: The address was 60 Church Street, Middletown, Connecticut.

GA400.

No objection was made during this portion of Detective Warner's direct testimony. There was similarly no request to strike any testimony by Detective Warner. Nor did Roy request any limiting instructions.

B. Governing law and standard of review

1. The Confrontation Clause

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment prohibits the admission of out-of-court testimonial statements by witnesses unless the declarant is available for cross-examination. Surveying its Sixth Amendment jurisprudence, the Court concluded that where "testimonial" hearsay statements are involved, the previously permitted approach of "[a]dmitting statements deemed reliable by a judge [was] fundamentally at odds with the right of confrontation." *Id.* at 61.

The Court held that where the government offers "testimonial" hearsay, the Confrontation Clause of the Sixth Amendment requires actual confrontation, *i.e.*, cross-examination, regardless of how reliable the statement may be. *Id*. at 62. The Court, however, carefully limited its holding to "testimonial" statements. *See id.* at 68.

And even "testimonial" statements may be admitted without violating the Confrontation Clause if they are offered "for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9. *See also United States v. Goldstein*, 442 F.3d 777, 785 (2d Cir. 2006) (same); *United States v. Stewart*, 433 F.3d 273, 291 (2d Cir. 2006) (same). As this Court recognized in *Stewart*, "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to

evidence offered for purposes other than to establish the truth of the matter asserted." 433 F.3d at 291.

Evidence may be admitted for a variety of reasons *other* than to establish the truth of the matter asserted. Thus, "'[b]ackground evidence may be admitted to . . . furnish an explanation of the understanding or intent with which certain acts were performed.'" *United States v. Reifler*, 446 F.3d 65, 92 (2d Cir. 2006) (quoting *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988)). "Offering testimony to establish background facts leading up to a sequence of events is likewise an ostensibly non-hearsay use of evidence." *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1998).

2. Plain error review

Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S.

625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). *See also United States v. Draper*, 553 F.3d 174, 181 (2d Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 151 (2d Cir. 2007). "[T]he defendant bears the burden of establishing prejudice." *United States v. Logan*, 419 F.3d 172, 179 (2d Cir. 2005).

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

The district court did not commit plain error by allowing background testimony by Detective Warner to explain why he obtained search warrants for Roy's home. There was no violation of the Confrontation Clause, much less a plain one, and in light of the overwhelming evidence, there was no prejudice in any event.

First, Detective Warner's testimony did not implicate the Confrontation Clause because it was not offered for the truth of the matter asserted, but rather as background information. Detective Warner explained why he began the investigation of Roy and the basis for seeking a search warrant of 60 Church Street. This testimony was not offered to prove that Roy was in unlawful possession of the firearms, or that he possessed firearms at 60 Church Street. Rather, the testimony was offered to "establish the course of the investigation" which is not hearsay. *See United States v. Akinrinade*, 61 F.3d 1279, 1283 (7th Cir. 1995).

Not only is it permissible to offer testimony to explain that the police were lawfully present on the premises being searched, as conceded by Roy in his brief, but also to explain the purpose the police sought a warrant, the type of evidence they sought to obtain, and the nature of the criminal activity they were investigating. *See*, *e.g.*, *United States v. Slaughter*, 386 F.3d 401, 403 (2d Cir. 2004) (statement of witness made to police by witness as to location of discarded gun was not hearsay when offered to explain how the officer recovered the gun); *United States v. Dunigan*, 555 F.3d 501, 508 (5th Cir.) (statement of witness made to police officer describing height and weight of bank robber not hearsay when offered to explain why officer pursued defendant), *cert. denied*, 129 S. Ct. 2450 (2009); *United States v. Bowling*, 239 F.3d 973, 977 (8th Cir. 2001) (statements made to police officer by informant were not hearsay when offered to describe why officers were conducting surveillance and where informant met defendant); *United States v. Wilson*, 107 F.3d 774,

780-781 (10th Cir. 1997) (statements made to police by informant of drug activity at location and the officer's testimony about a controlled drug buy at location were not hearsay when offered to explain why police began its investigation).

This testimony about how and why the police began their investigation was particularly important in this case because it refuted Roy's claim – made in numerous pre-trial motions and throughout trial, *see generally* Part III, *infra*, – that the police framed him and manipulated evidence. By explaining that the police began their investigation in response to information from a witness, the police offered a legitimate explanation for the investigation to counter Roy's "corruption" theory. *See United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994) (background information can be admitted as "appropriate rebuttal to initiatives launched by the defendant"). Because the testimony was properly presented to explain how and why the police began their investigation, it did not violate the Confrontation Clause.

But even if the admission of such testimony could be construed as erroneous, Roy fails to demonstrate how the alleged error was "plain." *See Olano*, 507 U.S. at 734 ("Plain is synonymous with 'clear' or, equivalently, 'obvious.'"). On the contrary, the contested testimony was at least *arguably* admissible to explain the purpose of the investigation and its focus on Roy. On this record, then, it cannot be reasonably be claimed that its erroneous admission was so "obvious that a trial judge . . . [was] derelict" in allowing this testimony. *See United States v.*

Thomas, 274 F.3d 655, 667 (2d Cir. 2001) (en banc) (internal quotations omitted).

Third, Roy has not shown that any allegedly plain error affected his substantial rights, that is, that the error "affected the outcome of the district court proceedings." *Thomas*, 274 F.3d at 668 (internal quotations omitted). To prevail, Roy must demonstrate that the error had a "substantial and injurious effect or influence in determining the . . . verdict." *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) (internal quotations omitted). Roy, however, cannot sustain this burden. Indeed, Roy only states in conclusory fashion that it was prejudicial. Def. Br. at 33.

In making this conclusory argument, Roy ignores the substantial evidence from numerous witnesses that he actually and constructively possessed firearms and ammunition.[5] Following Detective Warner's testimony explaining why the Middletown Police began its investigation of Roy, the jury heard testimony from multiple witnesses that numerous firearms and ammunition were recovered from 60 Church Street, including Roy's bedroom, that Roy maintained a residence at 60 Church Street and lived in the bedroom where

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[5] The allegedly improper statements only addressed Roy's illegal possession of firearms; those statements made no mention of illegal drugs. *See* GA400. In this context, Roy cannot argue – and, indeed he does not argue – that the comments could have had any impact on his conviction for possession of marijuana.

firearms and ammunition were recovered, that he was observed in possession of the firearms, that he was seen shooting the firearms, and that he had access to and the combination for the safe containing firearms. *See Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000) ("[W]here the wrongly admitted evidence was cumulative of other properly admitted evidence, it is less likely to have injuriously influenced the jury's verdict.").

At trial, Meghan Hinchey, Roy's former girlfriend, and Louis Coccia, his friend, both testified that Roy lived in the middle bedroom at 60 Church Street. GA763, 809-810. Hinchey and Coccia both testified that they observed Roy in actual possession of multiple firearms and ammunition on numerous occasions. GA770-772, 811-814, 821-825 Coccia testified that he accompanied Roy to pick up the gun safe and observed Roy program the key code to the safe where several firearms were recovered, and that he saw Roy open the safe and place guns inside. GA819-821. Coccia also testified that he was with Roy on two occasions when they went to remote locations to shoot firearms. GA815-818. Hinchey testified that she saw multiple firearms and ammunition on Roy's bed and was with Roy when he fired a gun. GA772-775.

In addition, multiple law enforcement witnesses testified that numerous firearms and dozens of rounds of ammunition were recovered in Roy's bedroom during the search, and that Roy was seen leaving the residence earlier that evening. GA417-426, 521-523, 530-547, 727-733. In view of the overwhelming evidence of his possession of firearms and ammunition, Roy cannot demonstrate that

there is "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Dominguez Benitez*, 542 U.S. at 81-82 (internal quotations omitted).

Finally, even assuming that there was an error, which was also plain, and that the error affected the result of the trial, Roy cannot demonstrate that a "miscarriage of justice" resulted by the admission of the challenged testimony. *See United States v. Young*, 470 U.S. 1, 15 (1985). The overwhelming evidence offered at trial dwarfed the limited testimony elicited from Detective Warner as explanatory background. It is difficult to view the admission of this evidence as "seriously affect[ing] the fairness or integrity or the public reputation of [the] judicial proceedings." *Thomas*, 274 F.3d at 671.

In sum, Roy has failed to show that the admission of Detective Warner's testimony warrants reversal as plain error.

II. The district court did not abuse its discretion in denying Roy's motion for mistrial when the government asked Roy if he sold cocaine after Roy opened the door to this question in his direct testimony.

A. Relevant facts

On March 10, 2007, during the second search of 60 Church Street, police found and seized from a desk drawer in the living room a plastic container containing suspected

cocaine residue. GA86-87, 136-137, 140. Inside another drawer were plastic spoons with white powder residue, a sample of which tested positive for the presence of cocaine. GA140. On the desk was digital scale with a white powder residue, packaging material and super lactose, a cutting agent. GA136-137, 140-41, 143. A key ring with two keys was recovered from Roy's bedroom. GA140. One key appeared to access a safe and the other was marked "Arctic Cat." *Id.* The "Arctic Cat" key started an All Terrain Vehicle (ATV) parked behind 60 Church Street which was registered to Roy. *Id.* The safe key opened a safe which was affixed under the living room desk. *Id.* Inside the safe was a plastic container with a white powder substance. *Id.* The white powder substance was believed to be cocaine and was sent to the laboratory for testing. GA137.

Before trial, on September 9, 2008, Roy moved *in limine* for an order precluding the government from offering evidence pertaining to "cocaine distribution and other drug evidence for which he was not indicted." GA205. Roy argued that since he was not charged with any offense associated with the cocaine recovered from 60 Church Street, any evidence of his cocaine use or distribution was inadmissible under Fed. R. Evid. 404(b) and 403. GA204-210. The government opposed Roy's motion on the basis that evidence of the cocaine would be properly admitted under Rule 404(b) to prove Roy's knowledge of the marijuana and his intent to distribute same. The government further argued that such evidence was admissible to prove Roy's knowing possession of the firearms as firearms are often tools of the narcotics trade.

GA215-217. Applying either argument, the cocaine evidence would be properly admitted pursuant to Fed. R. Evid. 403. GA217-218.

On September 16, 2008, immediately before the trial was to begin, the district court heard argument on Roy's motion. GA367-381. The district court subjected the evidence to a Rule 403 balancing test and concluded "on balance . . . I'm going to grant [Roy's] motion in limiae (sic) with respect to the cocaine." GA381.

Consistent with this ruling, no evidence of Roy's cocaine use or possession was offered during the government's case-in-chief. The cocaine evidence became relevant during the defense case, and specifically during the defendant's own testimony.

On direct examination, Roy was asked about his employment at the time of his arrest. GA1074-1078. Roy testified that he was "working" in the construction of his house at 23 Hotchkiss Street. GA1075. Roy testified further that he earned income in making plastic figurines and selling them on Ebay. GA1075-1076. Roy was then asked on direct to explain the "chemicals" and "substances" which were found in the living room of 60 Church Street and documented in a photograph marked as Government's Exhibit 44. GA1076-1077. Roy explained that the chemicals were used in the plastic injection process of making figurines. GA1077. Roy's counsel then asked: "So these aren't chemicals related to drugs? These are things you use to do your injection moulding (sic) with?" Roy responded, "yes." *Id.* Roy testified further that

he earned money plowing snow and building computers.[6] GA1077-1078.

Roy also denied possessing any firearms or ammunition, including those recovered from his room. GA1088. Roy claimed that the guns and ammunition found in his room were planted there by his house mate Samuel Ortiz or the Middletown Police. GA1089. Roy also denied any occasion in which he fired guns with Coccia. *Id.* Roy was then asked if he knew that "Ortiz was involved with drugs?" GA1096. Roy responded, "yes." *Id.* When asked what did Ortiz do, Roy responded, "He sold cocaine and marijuana before he went to jail." *Id.*

On cross- examination, Roy testified that he frequently kept his room locked because "Sam [Ortiz was] there." GA1111. Roy testified that he knew Ortiz went to jail for selling cocaine and marijuana, although he never witnessed him do it. GA1111-1112. Roy was then asked, "Isn't true that Sam Ortiz probably worked for you selling cocaine and marijuana?" GA1112. Defense counsel immediately objected and moved for a mistrial. *Id.*

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[6] Roy's former girlfriend, Hinchey, had previously testified that Roy told her he had a catering business, but she had never known him to work, even though Roy had money in the "hundreds, thousands," and knew him to sell drugs. GA763-764. Hinchey had also testified that Roy appeared to be in control over the marijuana, that his "access" to "money" was a "clue," that he "seemed to be the one that kind of was moving things along . . . at one point she was showing me, I think it was an air conditioner or something he had bought for [the marijuana plants]." GA769.

At sidebar, the government argued that Roy "opened the door" to the cocaine evidence. *Id.* First, the government argued that Roy testified that on the living room desk, depicted in Government's Exhibit 44, there were no drugs or cutting agents when in fact cocaine, cocaine residue, and a cutting agent were seized from this location. GA1111-1113. Second, the government contended that Roy opened the door to cocaine evidence when he testified that Ortiz was a dealer of cocaine and marijuana. GA1112. Third, the government argued that Roy's attempt to portray himself as a law-abiding member of the community who was lawfully earning income made it fair game for the government to challenge that assertion. GA1118-1119. Roy argued, by contrast, that the government's question about his cocaine dealing violated the district court's pretrial order. GA1113.

The district court ruled that Roy opened the door to further inquiry about the chemicals and substances recovered during the search and that the government could ask Roy what was on the desk. GA1117. Specifically, the district court ruled that the question would be stricken but the government "can ask [Roy] what was on the top of the desk because he had testified that all the chemicals were related to his plastic figures or whatever they are." *Id.* The district court limited the scope of examination by the government as it did not "want to be trying a case where [Roy is] allegedly a cocaine dealer." GA1120-1121.

After the sidebar, the district court instructed the jury: "Ladies and gentlemen, that last question is stricken from the record and you are not to consider it." GA1122.

When cross- examination resumed, Roy was asked if a plastic container depicted in Government's Exhibit 44 contained super lactose. GA1123. Roy agreed. *Id.* When asked if super lactose was a cutting agent used in connection with drug distribution, Roy responded that he did not know. *Id.* Roy was also asked if the white powdery substance on the desk was cocaine. *Id.* Roy again responded that he did not know. *Id.* There was no further inquiry about the cocaine.

B. Governing law and standard of review

The district court's denial of a motion for mistrial is reviewed for abuse of discretion. *United States v. Smith*, 426 F.3d 567, 571 (2d Cir. 2005). "If a defendant has both objected contemporaneously and unsuccessfully moved the district court for a mistrial based on alleged prosecutorial misconduct, the appropriate standard of review is for an abuse of discretion." *United States v. Schene*, 543 F.3d 627, 641 (10th Cir. 2008) (internal quotations omitted).

"Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *United States v. Young*, 470 U.S. 1, 11 (1985); *accord United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) ("Reversal is an ill-suited remedy for prosecutorial

misconduct . . . ."); *United States v. Burden*, 600 F.3d 204, 221 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 251 (2010) and *cert. denied*, 131 S. Ct. 953 (2011). To warrant reversal, prosecutorial misconduct must "'cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999)).

This Court looks at three factors when considering whether an improper comment caused substantial prejudice: "1) the severity of the misconduct; 2) the measures the district court adopted to cure the misconduct; and 3) the certainty of conviction absent the improper statements." *Burden*, 600 F.3d at 222. "The 'severity of the misconduct is mitigated if the misconduct is an aberration in an otherwise fair proceeding.'" *United States v. Thomas*, 377 F.3d 232, 245 (2d Cir. 2004) (quoting *United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002)).

C. Discussion

The district court appropriately denied Roy's motion for mistrial because there was no prosecutorial misconduct when the government asked Roy if he sold cocaine and marijuana. Notwithstanding the district court's pretrial ruling precluding the government from offering evidence of cocaine distribution, Roy opened the door during his direct examination to inquiry about his possession and distribution of cocaine. Indeed, the district court agreed and permitted the government to inquire about the whether

cocaine and cocaine related substances recovered on the desk at 60 Church Street. GA119-1121. And given the strength of the case against Roy, it is highly unlikely that the prosecutor's one question – which was stricken by the district court – denied the defendant a fair trial.

As a preliminary matter, there was no prosecutorial misconduct because Roy opened the door to the prosecutor's question in his direct testimony. Roy opened the door to the inquiry about whether he sold cocaine in several ways. Roy invited cross- examination regarding cocaine when he specifically testified that the "chemicals" and "substances" recovered from the living room, and depicted on Government's Exhibit 44, were not related to "drugs." GA1076-1077. Roy further testified that without exception the chemicals and substances recovered from the living room were lawfully used in the plastic injection process used to construct figurines he sold on Ebay. *Id*. Moreover, in rebuttal to evidence offered during the government's case-in-chief that Roy had significant sums of money without any apparent lawful employment, Roy testified that he earned lawful income from selling plastic figurines on Ebay, snow plowing and computer building for college students. GA1074-1078.

In other words, Roy attempted to use as a shield the district court's ruling that prevented the government from offering counter evidence of his self-described law-abiding behavior. Armed with the district court's ruling, he portrayed himself as someone who was maintaining lawful employment and testified that the chemicals in the residence were related to his lawful employment. Roy, of

course, knew that the Middletown Police recovered cocaine, cocaine residue, a digital scale, and a cocaine cutting agent from the living room desk area because he successfully moved to preclude such evidence from the jury.

Thus, Roy's testimony opened the door to an appropriate response on cross-examination. "It is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth." *United States v. Havens*, 446 U.S. 620, 626-27 (1980). "When a defendant offers an innocent explanation he 'opens the door' to questioning into the truth of his testimony, and the government is entitled to attack his credibility on cross-examination." *United States v. Payton*, 159 F.3d 49, 58 (2d Cir. 1998); *see also United States v. Garcia*, 936 F.2d 648, 654 (2d Cir. 1991) (defendant's testimony that he had no idea the white powder was cocaine opened door for government to impeach his testimony by establishing that he was familiar with and had used cocaine). In other words, "[a] defendant has no right to avoid cross-examination into the truth of his direct examination, even as to matters not related to the merits of the charges against him." *Payton*, 159 F.3d at 58. Thus, there was no misconduct by the government when it asked Roy if he sold cocaine.

Even if the government's question was improper, reversal is not warranted as it did not deny Roy a fundamentally fair trial. *First*, any alleged misconduct was not severe. Roy does not claim that the misconduct was

either "'pervasive' or part of a 'persistent' trial strategy." *Blissett v. Lefevre*, 924 F.2d 434, 441 (2d Cir. 1991) (quoting *United States v. Weiss*, 914 F.2d 1514, 1524 (2d Cir. 1990)). On the contrary, Roy claims only one question by the government as being prejudicial or otherwise in contravention of the district court's pretrial order. *See United States v. Tutino*, 883 F.2d 1125, 1136 (2d Cir. 1989) (minimal risk of influencing jury through one inappropriate remark). In fact, even after the government was permitted to inquire further about the presence of cocaine or cocaine-related substances, no further objection was made, nor did Roy renew his motion for mistrial at the close of evidence or argue it as a basis for a new trial.

Second, the district court responded promptly to Roy's objection to the government's question, and instructed the jury to disregard the unanswered question. An instruction to disregard the question was "sufficient to eliminate any possible prejudice from the prosecutors remarks." *See Tutino*, 883 F.2d at 1137. Furthermore, during the charge to the jury, the district court instructed the jurors that questions by the attorneys were not evidence and should not be considered by them in deciding the facts. GA1122. On the facts of this case, when the alleged misconduct was limited to one question, the district court's instruction to the jury to disregard the question, and its later instruction on what is considered evidence, were sufficient measures to cure the alleged misconduct. *See Elias*, 285 F.3d at 190-92.

Lastly, it is extremely doubtful that the jury would *not* have convicted Roy on the marijuana and firearm charges

had the government's question of whether Roy sold marijuana *and* cocaine not been asked. As described more completely in the facts above, by the time Roy testified, the jury had heard compelling evidence of Roy's possession of multiple firearms and ammunition, as well as his possession and distribution of marijuana. *See* Statement of Facts, *supra*.

Moreover, Roy's own testimony hardly assisted his defense because in many respects, it lacked credibility. For example, Roy testified that his house mate (Ortiz) or the Middletown Police planted four firearms in his locked bedroom despite the fact that they were purportedly locked in a safe with a combination known only to his mother, GA1142, that numerous magazines, hundreds of rounds of ammunition, and a utility jacket with loaded magazines were similarly planted in his room, that the magazine had inexplicably been loaded with live ammunition, GA1135-1136, and that his friend, Louis Coccia, routinely brought and left guns in his house, including his bedroom, but that he never possessed them, GA1085-1088. Roy's testimony about his role in marijuana distribution was similarly incredible. He placed responsibility for the marijuana plants on his mother, GA1173, and denied his role in the offense. This denial was undermined when he admitted that he constructed the mechanized lighting system used to grow the plants, that documents recovered in his room pertained to equipment used to cultivate marijuana, and that documents in his own handwriting described various strains of marijuana with wholesale or retail prices and the equipment needed to cultivate marijuana. GA1175-1177.

In short, the evidence against Roy was strong, and his own testimony did not undermine that evidence. On this record, the prosecutor's one allegedly improper question could hardly have impacted the jury's verdict. Reversal is not warranted here.

III. The district court did not abuse its discretion when it denied Roy's motion for new trial when the alleged "*Brady*" material had been produced to him before trial and when Roy failed to show that there was a reasonable probability that the allegedly suppressed evidence would have produced a different verdict.

A. Relevant facts

1. Roy's new trial motion

After his conviction, Roy moved for a new trial claiming, in part, that recently obtained photographs proved that the Middletown Police improperly moved a container of cocaine during the initial search of 60 Church Street.[7] A56. In particular, Roy stated in his motion that:

> it appears that a night time photograph taken on Friday, March 9, 2007 shows a jar allegedly of cocaine on a large table littered with other items including those needed for his hobby of making

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[7] Although Roy claimed that the photographs were recently obtained, as described below, the record reflects that those photographs had been given to him before trial.

> plastic toys. Yet photographs taken during the next day in the daylight indicates that the jar is now missing from the table and sitting in an open desk safe. The significance of this is that Middletown police apparently had the jar Friday night and then removed it to the safe on Saturday, thus misleading the Court in both their reports and trial testimony as to what was found when the desk safe was opened on Saturday.

A56. In other words, these photographs, according to Roy, proved that Middletown Police placed the cocaine in the safe on March 10, 2007 to "incriminate him." A57. This so-called "frame-up" was "completed with the key to the desk safe thereafter being placed in John Roy's bedroom." *Id.* Roy also argued that there were other alleged discrepancies in certain police reports, including the placement of certain items of evidence seized from Roy's person on the search warrant return for 60 Church Street, and a social security card which was inventoried as being recovered from his bedroom and his mother's bedroom. A57, 61-64.

In opposition to the motion for new trial, the government argued that Roy failed to establish under Fed. R. Crim. P. 33 that there was insufficient evidence to sustain the verdict. A65. As to Roy's claim of "planted" evidence, the government noted that these same arguments were rejected previously by the district court, and by the jury. A66-68. The district court had rejected these arguments when they were made in the context of Roy's

motion to suppress. In denying Roy's motion to suppress, the district court noted that:

> Roy seems to argue that his speculation that the cocaine was moved inside the safe supports his claim for a *Franks* [*v. Delaware*, 438 U.S. 154 (1978)] hearing, though he does not fully explain his argument.
>
> Roy's speculation is not supported by the evidence. The police reports indicate that the cocaine allegedly observed on the desktop was distinct from the cocaine allegedly found in the safe.

A29. The district court also rejected Roy's claim that certain items of evidence seized from his person were improperly inventoried to bolster its claim that the firearms recovered from his bedroom belonged to him. A31-32. In rejecting his argument, the district court noted that "the government does not claim that these items were found anywhere other than on Roy's person." A31. Nor did the government claim at trial that these items were recovered from somewhere other than Roy's person. GA485-487.

Moreover, as noted by the government in its response, Roy made his arguments about evidence manipulation to the jury. GA1224-1225, 1230-1231. The jury apparently rejected his claims of planted evidence when it convicted him on both counts.

On July 16, 2009, the district court denied Roy's motion for new trial and judgment of acquittal. A71. The district court noted that Roy's motion was based on his argument about alleged evidence tampering: "that crime scene photographs show a jar of what appears to be cocaine in two different locations on March 9 and 10, 2006 . . . [and that Roy] claims that the police moved the jar as well as several of his personal effects between the first and second days of the search." A74-75. According to Roy, "these actions point to the same officers moving guns from other locations to the safe and moving other items around in the house to implicate him." *Id.* The district court rejected this claim:

> The court disagrees. Roy already raised similar arguments about the location of cocaine in support of his motion to suppress. In denying that motion, the court rejected that argument. Roy now says there are photographs documenting the different locations of the cocaine. However, these photographs were in Roy's possession before the trial, and this argument was made to the jury. Specifically, Roy argued that Middletown police officers had moved evidence around the house in an attempt to frame him. The jury chose not to accept this contention and instead credited the evidence of weapons and drugs found by the police. Viewing the evidence in a light most favorable to the government, Roy has not demonstrated that no reasonable trier of fact could have found him guilty. Additionally, Roy has presented no new evidence that would have

changed the jury's verdict had it been presented at trial.

A75 (internal citations to the record omitted).

2. Roy's other post-trial motions

In addition to the motion for new trial, Roy also submitted numerous *pro se* filings alleging police and prosecutorial misconduct. A11 (docs. 93, 94, 99, 100). On November 6, 2009, the government responded to Roy's filings. A12 (doc. 102), A92. More *pro se* filings followed, including a motion for "judicial determination of fact," and a "motion for judgment of dismissal." A12-13 (docs.108, 114 and 119). On March 10, 2010, the government responded to those *pro se* filings submitted after the government's November 6, 2009 response. A13 (doc. 121), A117-120.

On March 30 and 31, 2010, the district court ruled on all pending motions. A13 (docs. 124-126). As to Roy's motions styled "motion for a judgment of dismissal," the district court issued a written ruling. A121-124. In its ruling, the district court acknowledged that Roy's motions were predicated on his repeated claims of evidence tampering and the untimely disclosure of crime scene photographs. *Id.* The district concluded that, "the claims [Roy] now raises are just as meritless, speculative, irrelevant, and factually and legally unsupported as they were when he asserted them as grounds to dismiss the indictment, suppress evidence and for acquittal or a new trial." A121-122. The district court reiterated that it "found

no merit to his claim that the police officers made false and misleading statements about observing cocaine in plain view . . . and that they actually planted that cocaine in Roy's safe to be found and seized when the second warrant was executed." A123. In response to Roy's repeated claims that the police falsely reported the location of certain items of personal property, the district court observed that "even if there was some impropriety in inaccurately reporting the location where the evidence was seized, Roy had not explained how an erroneous inventory report warranted suppression or sanction, especially since the government never claimed that the items were seized anywhere other than from his person when he was arrested." *Id.*

Finally, the district court noted that Roy had also failed to show that any of the alleged evidence tampering was material. A124. As the court concluded, "[h]e does not demonstrate the allegedly fabricated or withheld evidence was exculpatory, material or relevant, or that without the claimed irregularities a reasonable jury might have returned a different verdict. He does not explain how any of his allegations could have undermined a critical element of the government's case, influenced the jury verdict in any way, or caused a fundamental miscarriage of justice." A124.

B. Governing law and standard of review

Federal Rule of Criminal Procedure Rule 33 provides in pertinent part that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the

interest of justice so requires." Fed. R. Crim. P. 33(a). A motion for a new trial "based upon previously-undiscovered evidence is ordinarily not favored and should be granted only with great caution." *United States v. Wong*, 78 F.3d 73, 79 (2d Cir. 1996) (internal quotations omitted). *See also United States v. Spencer*, 4 F.3d 115, 118 (2d Cir. 1993) (new trial on newly discovered evidence is warranted "only in the most extraordinary of circumstances.") Such a motion should only be granted "'upon a showing that the evidence could not with due diligence have been discovered before or during trial, that the evidence is material, not cumulative, and that admission of the evidence would probably lead to an acquittal.'" *United States v. Owen*, 500 F.3d 83, 87 (2d Cir. 2007) (quoting *United States v. Alessi*, 638 F.3d 466, 479 (2d Cir. 1980)).

A new trial is warranted under *Brady v. Maryland*, where (1) "the government failed to disclose favorable evidence, and (2) that the evidence it 'suppressed' was material." *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) (citing *Brady*, 373 U.S. at 87). Evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). To prevail on a *Brady* claim, the defendant must demonstrate that: (1) the evidence was favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence was suppressed by the government, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). There is no "*Brady* violation" unless

the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. *Id.* at 281.

When considering a new trial motion, the district court may hold a hearing to resolve disputed issues of fact. The court's decision whether to hold a hearing in connection with such a motion is reviewed for abuse of discretion. *United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995). A district court does not abuse its discretion in failing to conduct an evidentiary hearing to resolve disputed issues of fact when resolution of those issues is unnecessary to deny the defendant's new trial motion. *See United States v. Stewart*, 433 F.3d 273, 302 (2d Cir. 2006) (upholding district court's failure to hold hearing on extent of Government's awareness of perjured testimony because the "additional evidence of perjury is not sufficiently material to undermine confidence in the verdict"); *United States v. White*, 972 F.2d 16, 22 (2d Cir. 1992) ("Since it is not necessary to resolve the issues that might be the focus of an evidentiary hearing, the district court did not abuse its discretion in refusing to conduct an evidentiary hearing.").

Similarly, this Court reviews a district court's denial of a new trial motion itself for abuse of discretion. *Owen*, 500 F.3d at 87; *Wong*, 78 F.3d at 78. Moreover, this Court "will not disturb the district court's findings of fact in conjunction with a Rule 33 motion unless the findings are clearly erroneous." *United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir. 1992) (citing *United States v. Diaz*, 922 F.2d 998, 1006 (2d Cir. 1990).

When, however, a defendant raises a new claim on appeal, this Court reviews for plain error. As set forth above, this Court may correct an unpreserved error "where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Marcus*, 130 S. Ct. at 2164 (quoting *Puckett*, 129 S. Ct. at 1429). *See generally*, Part I.B.2, *supra*.

C. Discussion

In the district court, Roy claimed he was entitled to a new trial because of newly discovered evidence, namely two photographs, that he claimed proved his defense of "evidence tampering" by the Middletown Police. On appeal, he makes a new claim about the two photographs: that he is entitled to a new trial because the government suppressed the two photographs in violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Because he did not raise a *Brady* claim below, his claim in this Court should be reviewed for plain error.

Regardless of the standard, however, Roy's claim for a new trial fails. Whether this Court reviews his *Brady* claim for plain error, or considers whether the district court abused its discretion by denying his motion for a new trial based on "newly discovered" evidence, his claim for

a new trial lacks merit. *First*, the photographs were neither "newly discovered" evidence, nor suppressed by the government because, as the district court properly found, Roy possessed the two photographs in question before trial. *Second*, Roy fails to show that the photographs in question were material to his defense or exculpatory. *Finally*, Roy cannot show any prejudice from the alleged fact that he did not have these photographs at trial.

First, and most fundamentally, Roy cannot sustain his claim for a new trial – whether on a theory of "newly discovered" evidence or of a *Brady* violation – because the district court found, and the record reflects, that Roy had the photographs in question *before trial*. When the district court denied the new trial motion, the court specifically found that Roy had the photographs before trial. A75 ("Roy now says there are photographs documenting the different locations of the cocaine. However, these photographs were in Roy's possession before the trial . . . ."). And the record supports this finding. Before trial, Roy filed a motion to suppress, arguing, as he did throughout the proceedings below, that the Middletown Police had planted and tampered with evidence found during the searches of his home in March 2007. GA1-6. In response to this motion, the government appended a Middletown Police supplemental report as an exhibit which explained the sequence of events regarding the discovery of the cocaine from 60 Church Street. GA75-143. On May 20, 2008 – some four months before trial – the government provided the entire report to Roy as a supplemental discovery disclosure. GA155-182. The supplemental report provided to Roy included the

photographs he now claims were not provided until just before trial. GA183-184. The fact that Roy did not look at them until the last day of trial, *see* A176, does not transform the photographs into newly discovered evidence, much less into *Brady* material.

In his brief to this Court, Roy does not address (or even mention) the district court's finding that he had the photographs before trial. Instead he argues "that the CD containing those photographs was not produced to the defense until near the close of trial." Def. Br. at 38. Even assuming the truth of this assertion, *i.e.*, that the government provided a CD containing the photographs to the defense during the trial, it does not show that the district court's finding was clearly erroneous. In other words, even if the government provided the defense a CD containing the photographs during trial, this action is not inconsistent with the government having already provided the photographs earlier, in connection with the suppression hearing.

Second, even if Roy could show that he did not have the photographs before trial – which he cannot – Roy cannot show that the photographs were material or exculpatory in any way. Roy claims that the photographs were material to his claim of evidence manipulation by the police, but aside from his speculation, he provides no evidence to sustain this claim.

Roy claims that the "newly discovered" photographs – showing the cocaine in allegedly different locations – would have supported his defense that the police tampered

with the firearms evidence. Def. Br. at 29. Roy surmised that had the jury known that the police placed the cocaine inside the safe in order to connect Roy to it, they might have been more inclined to believe that the police had planted the guns and ammunition as well. *Id.* at 38.

The entirety of Roy's claim is predicated on his speculative (and incorrect) opinion about when the photograph of the cocaine container was taken at 60 Church Street. According to Roy:

> The first photograph, taken on Friday night March 9 before any evidence had been seized, shows a jar containing cocaine on the living room desk. Yet a second photograph taken on Saturday March 10 during the second search, shows the same jar of cocaine inside a safe that was located under that desk. Detective Lukanik claimed that the cocaine was only discovered on Saturday March 10, after police used a key, found in John Roy's bedroom to open it. In the Rule 33 motion, and in subsequent *pro se* motions filed by Mr. Roy, appellant claimed that these photographs were exculpatory because they supported his defense of evidence tampering.

Def. Br. at 38 (citations omitted).

Aside from Roy's speculation that the first photograph was taken at night, however, there is no evidence to suggest that the cocaine inside the safe was found until March 10. Indeed, the record evidence refutes Roy's argument. Roy's claim of evidence manipulation was

made repeatedly below.[8] In response to the claims of manipulation in his motion to suppress, the government provided a supplemental report prepared by the Middletown Police, dated May 16, 2008. This report, which was disclosed to Roy on May 20, 2008, GA155-203, was intended to address Roy's claims of evidence manipulation. GA155. The supplemental report confirmed that the cocaine was not discovered in the locked safe until March 10, and photographed inside the safe, and on the desk after its removal. GA136-140.

In other words, contrary to this persistent claim of evidence manipulation, there was no material exculpatory evidence, and certainly none suppressed or withheld by the government. Despite his repeated assertions that the cocaine was moved from the desk to the desk safe, his claim cannot be substantiated. The entirety of his argument is based on his examination of a photograph and faulty conclusion that the photograph depicting the cocaine-filled container was taken "at night." Unfortunately for Roy, there is no basis for his opinion, and there is certainly no evidence in the record which supports his claim. *See* GA136-140.

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[8] Roy first raised the claim of planted evidence in a conference before the district court on February 27, 2008. A6 (doc. 37). Roy later raised the issue in a *pro se* motion to dismiss filed April 29, 2008. A7 (doc. 41) and then again in his motion to suppress filed on May 27, 2008. GA1-6. As reflected in the docket and in the briefing to this Court, Roy pursued his manipulation claim throughout trial.

Finally, Roy also fails to demonstrate that there was a "reasonable probability" that he would not have been convicted had he received these photographs earlier. As set forth above, the evidence against Roy was strong. It included evidence about the firearms and marijuana operation found in his home, along with the testimony of Hinchey and Coccia who testified Roy possessed the same guns recovered from his bedroom and that he possessed and distributed marijuana. *See* Statement of Facts, *supra*.

Moreover, Roy cannot show how evidence about the alleged manipulation of the cocaine evidence would have changed the jury's verdict. Roy presented his argument that the police planted and tampered with evidence to the jury, but the jury evidently rejected that argument. He argues now that had the jury been presented with the *additional* evidence tampering – as allegedly shown in the photographs – it would have bolstered his firearms-evidence tampering testimony.

Roy's theory that the photographs would have bolstered his tampering theory is pure speculation. As a preliminary matter, Roy's argument about the evidence manipulation allegedly documented in the photographs was not plausible. To credit his argument would require the jury to conclude that after Roy left his residence on March 9, 2007, the police entered the residence and opened the locked safe, removed only five of the firearms, re-locked the safe, placed four of the guns in Roy's bedroom and one of the guns in Roberta Roy's bedroom, orchestrated a second search the following day wherein it invited the fire department to forcibly open the same safe,

and duped or distracted an inspector from the State's Attorney's Office and agents from the DEA, ATF and the FBI from their illicit behavior.

Moreover, far from helping Roy's case, the photographs documenting alleged cocaine evidence – in whatever location – had a significant potential of *harming* Roy's case. Roy fails to appreciate that the cocaine possession was not charged and was not presented to the jury until he testified. Indeed, he sought and obtained a court ruling precluding the government from offering evidence of the cocaine. GA204-210, 381. This order would have been meaningless had he introduced the photographs and argued that they showed police manipulation of the cocaine evidence. With the introduction of these photographs, the jury would have learned about the presence of cocaine in his home, and the district court would almost certainly have authorized the government to offer additional evidence about Roy's participation in cocaine trafficking, including other evidence of cocaine and cutting agents, and testimony regarding Roy's participation in cocaine trafficking. In other words, it is not at all clear that the photographs would have helped Roy's case.

In sum, the district court did not abuse its discretion in denying Roy's motion for a new trial. The evidence he now claims was "newly discovered" or *Brady* material was given to him before trial, and it would not have helped his case in any event.

For substantially the same reasons, the district court did not abuse its discretion in failing to hold a hearing on Roy's new trial motion. Roy identified no relevant factual disputes to resolve at trial. The timing of the production of the CD was irrelevant in light of the record evidence showing that the photographs were produced to him four months before trial. Moreover, as set forth more completely above, those photographs were not exculpatory and would not have helped the defendant's case. *See Stewart*, 433 F.3d at 302; *White*, 972 F.2d at 22.

IV. This Court should remand for re-sentencing to allow the court to conduct a new sentencing proceeding after determining whether Roy wants to proceed *pro se*.

A. Relevant facts

1. The Presentence Report

The presentence report determined Roy's advisory guideline range to be 324 to 405 months of imprisonment. PSR ¶ 74. In determining the guideline range, the base offense level was 26 pursuant to U.S.S.G. § 2K2.1(a)(1). PSR ¶ 25. Four levels were added under U.S.S.G. § 2K2.1(b)(1)(C) because the offense involved at least 8, but less than, 24 firearms. PSR. ¶ 26. Four levels were added pursuant to U.S.S.G. § 2K2.1(b)(6) as Roy possessed the firearms in connection with another felony offense. PSR ¶ 27. Two levels were added for obstruction of justice pursuant to U.S.S.G. § 3C1.1, as Roy was found to have testified falsely at trial. PSR ¶¶ 22, 30. Based on

these conclusions, the presentence report determined that the adjusted offense level was 36. PSR ¶ 33.

The presentence report also calculated Roy's criminal history to include 24 criminal history points placing him in criminal history category VI. PSR ¶ 49. The presentence report determined that Roy qualified for enhanced penalties under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), on count one, and was a career offender pursuant to U.S.S.G. § 4B1.1, on count two. PSR ¶ 24.

Neither party filed any written objections to the presentence report.

2. The sentencing proceedings

On November 19, 2009, Roy filed a *pro se* motion to dismiss counsel. A12, 96. Roy claimed that his attorney, Jonathan Einhorn, "ineffectively represented his interests before, during, and after the trial." A96. Roy also alleged that his attorney "committed perjury" and that their relationship had "become corrupt and aggressive." *Id.* On February 8, 2010, Roy again moved to dismiss his counsel. A100-106. In his second filing, Roy again claimed that the police planted evidence, but now also alleged that Attorney Einhorn refused to file the appropriate motions to address the issue with the court. A100-101. Roy also claimed that Attorney Einhorn was responsible for not identifying the photograph he believed proved that the police planted the cocaine in the safe. A102. Roy stated in

his motion that he was "most definitely invoking my Sixth Amendment Right to represent myself." A103.

On February 24, 2010, the district court granted Roy's motion to dismiss his counsel and to proceed *pro se*, but "with the provision that Attorney Jonathan Einhorn remain as stand-by counsel." A13. Neither Roy nor his attorney filed a sentencing memorandum.

On April 14, 2010, Roy appeared for sentencing with Attorney Einhorn. A144-145. The district court immediately inquired of Roy:

> THE COURT: Mr. Roy, you had a filed a motion in limine (sic) asking for the opportunity to represent yourself.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: But I've asked Mr. Einhorn to be here in case at some point you would like to consult with your attorney, okay?
>
> THE DEFENDANT: Yes, ma'am.

A145. Later in the hearing, the district court inquired again:

> THE COURT: Now you're appearing *pro se* but Mr. Einhorn is here and he's been assisting you. Do you want to have Mr. Einhorn speak on your behalf sir?

THE DEFENDANT: Sure.

A185. At various points during the sentencing hearing, Roy conferred with Attorney Einhorn. A149, 150, 158, 162, 167, 169, 171, 172, 177, 178, 183, 189, 191, and 205 At other times, Attorney Einhorn advocated on Roy's behalf. A149, 171-172, 177, 184, 185-190, and 204.

Roy and Attorney Einhorn objected to the qualification of his prior state convictions as "violent felonies" under the ACCA. After an extended discussion of this issue, the court concluded by stating, "[s]o I am going to accept the convictions of the state court as being legitimate in determining what your criminal history is." A167.

Roy also objected to "the amount of guns" enhancement in the sentencing guideline calculation. A171-172. Attorney Einhorn argued that Roy wanted to "maintain his innocence regarding the weapons in the residence, that was evidence of other persons who owned the weapons." *Id.* Attorney Einhorn argued further that Roy disagreed that the evidence at trial established that the offense involved "between 8 and 24 firearms." A172. Roy then interjected to assert his continuing claim that the police officers had planted cocaine and the guns. A172-182. The district court never returned to his objection on the number of firearms enhancement.

After Attorney Einhorn and the government presented argument to the district court on the appropriate sentence, the district court prepared to impose sentence. The district

court outlined the sentencing factors under 18 U.S.C. § 3553(a) which it considered in determining a reasonable sentence. A204 (discussing need to protect public and deter the defendant).

The district court then stated, "by the way, nobody is disputing that [the guideline range] was properly calculated. Am I correct Mr. Einhorn?" *Id.* Attorney Einhorn responded, "That's correct, Your Honor." *Id.* The district court then stated that the guideline range was 324 to 405 months of imprisonment. *Id.* Attorney Einhorn then interjected that Roy does "take issue" with the calculation. *Id.* Roy explained that he "take[s] issue with the whole thing, Your Honor." A205.

The government similarly noted that it did not concur with the sentencing range calculated in the presentence report. A208. The government explained that it calculated a lower range and noted an apparent mistake in the presentence report regarding the adjusted offense level. *Id.* Correcting for this mistake, the government concluded that the total offense level was 35, not 36, as calculated in the PSR, and that the applicable guideline range was 292 to 365 months of imprisonment. A208-209.

The district court thereafter re-stated the factors it considered in sentencing, and imposed a sentence of 240 months of imprisonment on the felon in possession count, followed by a consecutive sentence of 60 months on the marijuana conviction. A210-214.

B. Governing law and standard of review

1. The right to represent oneself

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. There is, however, the correlative right to dispense with legal assistance and represent oneself. *See Faretta v. California*, 422 U.S. 806, 834 (1975). Because a defendant who decides to act *pro se* relinquishes traditional benefits associated with formal legal representation, the district court must ensure that the accused made his decision "knowingly and intelligently." *Id.* at 835 (internal quotations omitted).

There is no talismanic procedure to determine a valid waiver. *See United States v. Tracy*, 12 F.3d 1186, 1194 (2d Cir. 1993). The district court should, however, engage the defendant in an on-the-record discussion to ensure that he fully understands the ramifications of his decision. *Id.* at 1192 ("The court should strive for a full and calm discussion with the defendant in order to satisfy itself that he has the requisite capacity to understand and sufficient knowledge to make a rational choice.") (internal quotations omitted); *Torres v. United States*, 140 F.3d 392, 401 (2d Cir. 1998). Accordingly, in order for the defendant to represent himself, "courts are duty-bound to examine defendants assiduously as to their knowledge and intent, ever cautious to ensure that the election is not merely the hollow incantation of a legal formula, but a purposeful,

informed decision to proceed pro se." *United States v. Tompkins*, 623 F.2d 824, 825 (2d Cir. 1980). "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835 (internal quotations omitted).

"While a district court's conclusions regarding the constitutionality of a defendant's waiver of his right to counsel is subject to de novo review, [this Court] review[s] its supporting factual findings under a clearly erroneous standard." *United States v. Spencer*, 995 F.2d 10, 11 (2d Cir. 1993) (per curiam).

2. Sentencing law

In *United States v. Booker*, 543 U.S. 220, 245 (2005), the Supreme Court declared the Sentencing Guidelines "effectively advisory." After *Booker*, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). "[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded." *Crosby*, 397 F.3d at 111. "[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges

may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Id.* at 113-14.

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. "In enhancing a defendant's sentence . . ., a district court must make specific factual findings as to that [fact]." *United States v. Carter*, 489 F.3d 528, 538 (2d Cir. 2007) (internal quotations omitted); *see also United States v. Reed*, 49 F.3d 895, 900-901 (2d Cir. 1995). "Although this requirement of making specific factual findings may interfere with the smooth operation of the sentencing hearing, we require specific factual findings to permit meaningful appellate review. *Carter*, 489 F.3d at 538 (internal quotations omitted). "[A] district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." *Id.* at 539. "Where the sentencing judge neither clearly resolves the disputed issue nor explicitly relies on factual assertions made in a PSR, we must remand for further findings." *Reed*, 49 F.3d at 901.

C. Discussion

Roy claims that he was denied his right to counsel at sentencing when he was permitted to proceed *pro se* in the absence of a knowing and intelligent waiver of his right to counsel. Def. Br. at 29, 46-47. He complains that the

district court failed to conduct a *Faretta* inquiry before allowing Roy to represent himself at sentencing. *Id.* at 45. He further claims that the sentence that followed from his *pro se* representation was both procedurally and substantively unreasonable. *Id.* at 51-61.

The government agrees that a more thorough inquiry of Roy was needed before granting his request to proceed without counsel. In his *pro se* filings, Roy expressed an apparent distrust of his attorney. When Roy's motion to dismiss counsel and proceed *pro se* was granted without a hearing, and even though his counsel remained as stand-by counsel, further inquiry was needed to determine if Roy understood the ramifications of his waiver. In considering the nature of Roy's complaints regarding his counsel, and Roy's objections to the presentence report, the government would not object to a remand for sentencing purposes only. *See United States v. Salameh*, 152 F.3d 88, 161 (2d Cir. 1998) (vacating sentences of defendants who proceeded *pro se* at sentencing without formally waiving their right to counsel).

On remand, Roy should be directed to inform the district court whether he wants to proceed to sentencing with counsel, or to proceed as before, *pro se*. If he decides to proceed *pro se*, the district court will have the opportunity to conduct a proper *Faretta* hearing before moving forward with the sentencing proceedings.

Because the government agrees that a remand for re-sentencing is required to allow a more complete consideration of the defendant's request to proceed *pro se*,

the government has not addressed the defendant's remaining challenges to his sentence.

Nevertheless, the government notes that at least some of the defendant's procedural sentencing claims are not without force.[9] For example, at sentencing the defendant expressly challenged the PSR's conclusion that his offense level should be enhanced by four levels for an offense involving between 8 and 24 firearms. Although the government contends that the evidence was sufficient to support this enhancement, the district court never ruled on Roy's objection to this enhancement and never adopted the PSR finding that Roy was responsible for at least 8 firearms. Moreover, even though both parties had challenged the PSR guidelines calculation, the court never adopted a final calculation of the guidelines.

Accordingly, in light of the defendant's *pro se* status at sentencing, the failure of the district court to conduct a *Faretta* inquiry, and the absence of express findings on the applicability of various guidelines enhancments, the government agrees that a remand for re-sentencing is appropriate in this case.

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[9] The government sees no merit to the defendant's argument that his guidelines sentence was substantively unreasonable.

Conclusion

For the foregoing reasons, the defendant's convictions should be affirmed. The government, however, does not object to a remand to the district court for re-sentencing.

Dated: April 11, 2011

Respectfully submitted,

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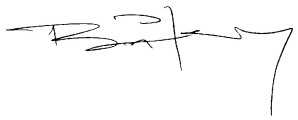
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 13,894 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

Federal Rule of Criminal Procedure 33. New Trial

(a) Defendant's Motion.

Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) *Newly Discovered Evidence.*

Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.*

Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

United States Constitution, Amendment VI

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