

# 10-3515(L)

*To Be Argued By:*  
S. DAVE VATTI

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## United States Court of Appeals

Docket Nos. 10-3515(L),  
11-2886(Con), 11-4139(Con),  
11-4408(Con)

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

PETER MAYLOR, aka Pete, GLENN SMITH, aka  
TOMMY, LUIS MONTAS, ALECK GLADNEY,  
EUGENE ARGRAVES, aka Gene, ALFRED BELL,

(For continuation of Caption, See Inside Cover)

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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*Defendants,*

GUILLERMO RIJO, DONALD PARKER, aka Muff, aka Muffin, MARTIN MCKREITH, aka Unc, JOHN MINTER, aka Joker,

*Defendants-Appellants.*

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## Statement of Jurisdiction

The district court (Mark R. Kravitz, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On March 25, 2010, a jury found the defendant, Donald Parker, guilty of one count of conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of cocaine and one count of possession with intent to distribute cocaine. Defendant's Appendix ("DA") 10. On July 15, 2011, the district court sentenced the defendant to a total effective term of 75 months imprisonment to be followed by four years of supervised release. DA 366. Judgment entered on July 15, 2011. DA 14. On July 15, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), DA 14, and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issues  
Presented for Review<sup>1</sup>**

1. Whether the defendant waived any challenge to the existence of probable cause for a search of his residence based on a claim, abandoned before the district court, that portions of the search warrant affidavit related to a traffic stop and *Terry* frisk should have been removed because the stop and frisk were invalid?
2. Whether the admission of certain testimony and exhibits constituted plain error and violated the defendant's substantial rights where the hearsay and authentication objections were raised for the first time on appeal, where the evidence was properly admitted,

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<sup>1</sup> This appeal is consolidated with three other appeals: *United States v. McKreith*, 11-4139; *United States v. Rijo*, 10-3515, and *United States v. Minter*, 11-4408. In *McKreith*, defense counsel submitted an *Anders* brief based on his conclusion that there were no non-frivolous issues to raise on appeal, and the Government has filed a motion for summary affirmance. In *Rijo*, the defendant waived his appeal rights, defense counsel submitted an *Anders* brief, and the Government has filed a motion to dismiss the appeal. In *Minter*, the defendant waived his appeal rights, defense counsel submitted a merits brief, and the Government has submitted a motion to dismiss the appeal based on the appeal waiver.

and where there was otherwise extensive evidence of the defendant's guilt?

3. Whether the defendant knowingly and voluntarily waived his right to counsel at sentencing where he had previously gone through three appointed attorneys, had requested permission to proceed *pro se*, and had been advised by the district court of the disadvantages of proceeding without counsel?

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-3515(L)  
11-2886 (Con)

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

DONALD PARKER, aka Muff, aka Muffin,  
*Defendant-Appellant.*

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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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## Preliminary Statement

Between October 2007 and May 2009, Peter Maylor (hereinafter “Maylor”) ran a drug trafficking organization that distributed substantial quantities of cocaine and cocaine base (“crack cocaine”) in and around Hartford, Connecticut. The defendant, who was a regular customer of Maylor’s, purchased ounce and multi-ounce quantities of cocaine from Maylor between May

2008 and March 2009. When the defendant was arrested on March 3, 2009, officers seized approximately 20 grams of cocaine, cutting agent, packaging material, a handgun and approximately \$17,000 from his residence after obtaining a search warrant.

On March 25, 2010, following a four day trial, a jury convicted the defendant of one count of conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of cocaine and one count of possession with intent to distribute cocaine. The district court subsequently sentenced the defendant to a total effective term of 75 months, imprisonment and four years' supervised release.

In this appeal, the defendant raises three claims of error. First, despite the fact that he explicitly abandoned this argument below, he maintains that the search warrant for his residence was not supported by probable cause because information in the affidavit related to a traffic stop which occurred just before the search should not have been considered by the issuing judge. Second, he argues, for the first time on appeal, that the district court committed plain error in allowing the admission of certain hearsay testimony and certain physical exhibits that were not properly authenticated. Third, he claims that he was denied his right to counsel at sentencing when the district court permitted him to proceed *pro se* without conducting a hear-

ing to determine if his waiver of his right to counsel was knowing and voluntary.

For the reasons set forth below, these claims have no merit, and this Court should affirm the defendant's judgment of conviction.

### **Statement of the Case**

On December 16, 2009, a federal grand jury returned a superseding indictment charging the defendant with conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). DA 18-20, 24.

On January 21, 2010, the defendant moved to suppress physical evidence seized from his person during a traffic stop on March 3, 2009 and from his home pursuant to a search warrant executed on the same date. DA 7, Government's Appendix ("GA") 742. The government opposed the motion, and the district court held an evidentiary hearing on February 16, 2010. DA 8, 42-184. On March 5, 2010, the district court denied the motion to suppress. DA 190-199.

A jury trial began on March 22, 2010. DA 9. On March 25, 2010, the jury returned a verdict of guilty on both counts of the superseding indictment. DA 9-10, 311-313. On April 2, 2010, the defendant moved for a judgment of acquittal.

DA 10. On June 29, 2010, the district court denied the motion. DA 10.

On July 25, 2010, defense counsel moved to withdraw his appearance and for the appointment of substitute counsel, which was granted by the district court on August 9, 2010. DA 10. On January 11, 2011, the defendant moved to dismiss substitute counsel. DA 12, 314. On January 25, 2011, the district court granted the motion and appointed new counsel to represent the defendant at sentencing. DA 12, GA 817-821. On March 15, 2011, defense counsel moved to withdraw his appearance and, on the same date, the defendant moved to appear *pro se*. DA 315. On March 30, 2011, the district court granted counsel's motion to withdraw and permitted defendant to proceed *pro se*. DA 13, 316-320. On the same date, the defendant filed a motion for new trial. DA 13. On June 29, 2011, the district court denied the motion. DA 14, GA 842-851.

On July 15, 2011, the defendant appeared *pro se* in district court for sentencing and received a total effective term of 75 months' imprisonment. DA 14, DA 335-365. Judgment entered on July 15, 2011, and on the same date, the defendant filed a timely notice of appeal. DA 14. The defendant is currently serving the sentence imposed by the district court.

## Statement of Facts

Based on the evidence presented at trial, the jury reasonably could have found the following facts.<sup>2</sup>

In May 2008, members of the DEA Hartford Resident Office received information that Peter Maylor was a major drug trafficker in Hartford's north end. GA 58-59. In October and November 2008, case agents utilized a confidential informant to conduct two controlled purchases of crack cocaine from Maylor. GA 70-80. Subsequently, in December 2008, the DEA began a wiretap on a cellular phone used by Maylor. GA 87.

During the wiretap, case agents learned that Maylor acquired kilograms of cocaine from a New York source and then distributed cocaine and crack cocaine to numerous individuals in greater Hartford, including the defendant. GA 155-156, 162, 405, 464, 472. Following his arrest in May 2009, Maylor cooperated with the government and testified at the defendant's trial. GA 409, 480, 488.

The defendant met Maylor in approximately April 2008 and, thereafter, Maylor began to regularly supply him with cocaine. GA 409-410.

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<sup>2</sup> The government called the following witnesses at trial: DEA Task Force Officer Frank Bellizzi, Peter Maylor, Stan Kuligowski (a records custodian at the Connecticut Department of Labor), and DEA Special Agent Brent Buckles.

Between May 2008 and March 2009, the defendant purchased an ounce of cocaine, and sometimes up to two ounces, every week to ten days from Maylor. GA 409-410. On some occasions, Maylor provided the defendant with cocaine on credit. GA 423-424. Numerous wire intercepts in which the defendant used coded references such as “put me on the books,” and “put me in the game” to order ounces of cocaine corroborated the relationship between Maylor and the defendant. DA 200, 223; GA 414, 439.

After acquiring the cocaine from Maylor, the defendant re-distributed it to third parties. For example, on February 5, 2009, the defendant called Maylor and requested “2 and Q for 27,” meaning two and a quarter ounces of cocaine for \$2700, which Maylor agreed to provide. DA 215, GA 433. Based on wire intercepts in conjunction with surveillance, case agents suspected that the defendant intended to provide some of the cocaine to a third party, believed to be Corey Pace. DA 216-218, GA 114-124, 434-436. Later that day, case agents observed Pace enter the defendant’s apartment building shortly before the defendant and Maylor met in the building’s parking lot. GA 119-121. Shortly after the defendant went back into the building, Pace walked out and drove away. GA 121. Within minutes, following a traffic stop, police seized approximately an ounce of cocaine from Pace. GA 121-122.

On March 3, 2009, the defendant informed Maylor that “today the third” and that the defendant “got like three phone calls.” DA 225, GA 440-441. He was reminding Maylor that it was the third day of the month when his customers received their state assistance checks and that he had already received calls from customers looking for drugs. GA 440-441. Following a meeting between Maylor and the defendant, Hartford police initiated a traffic stop of the defendant, after which the defendant was arrested. GA 134-135. Case agents subsequently obtained a search warrant for the defendant’s apartment. GA 135, 140, 588-589. During the execution of the search warrant, case agents seized a semi-automatic handgun, ammunition, approximately an ounce of cocaine, narcotics cutting agent, drug packaging material and approximately \$17,000 in cash. GA 139-150, 153, 589-592.

Connecticut Department of Labor records revealed that the defendant did not have any reported wages between 2007 and 2009. GA 574-575.

### **Summary of Argument**

I. The defendant has waived his claim that the search warrant affidavit lacked probable cause if the circumstances surrounding the traffic stop and subsequent *Terry* frisk are removed. He explicitly withdrew his constitutional challenge to the traffic stop and frisk before the dis-

trict court, and, as a result, the court denied as moot that portion of the motion to suppress and did not address the claim that the search warrant affidavit lacked probable cause without the information about the traffic stop and frisk. The only issue that the district court addressed and, therefore, the only suppression issue preserved for appeal, was whether the government violated the defendant's constitutional rights by unlawfully entering his residence to conduct a protective sweep prior to the issuance of the warrant, thereby tainting the warrant. The defendant failed to raise this issue on appeal.

II. The defendant also failed to preserve his evidentiary claims that the district court erred by improperly allowing hearsay testimony and by admitting exhibits that were not properly authenticated. The admission of this evidence did not constitute error, let alone plain error. As to the hearsay claims, the testimony at issue was not offered for its truth, but instead as relevant background information. As to the authentication claims, the testifying officer, as a co-case agent, was an evidence custodian who was well-versed in the procedures used to seize and store the exhibits at issue. And the fact that he was not physically present when some of the exhibits were seized was brought out by defense counsel before the jury when he specifically chose to use his questions regarding authenticity to attack the weight of the evidence, rather than its ad-

missibility. Moreover, the admission of this evidence did not impact the defendant's substantial rights or seriously affect the fairness of the judicial proceedings because the evidence of the defendant's guilt was overwhelming and included the testimony of his source of supply and numerous wiretap calls between him and his source.

III. The defendant knowingly and voluntarily waived his right to counsel at sentencing. When the defendant advised the district court that he wanted to fire his third appointed counsel, the court advised him that he was better served at sentencing by counsel who was more knowledgeable about the law and had experience in similar circumstances. The court also advised that if defendant was unable to get along with his third appointed counsel, he would have to represent himself. Prior to his sentencing, the defendant filed a request to proceed *pro se* and manifested the knowing and voluntary nature of that request by filing a motion for a new trial with a lengthy and detailed supporting memorandum. At sentencing, the defendant made several mitigation arguments on his own behalf. Under the totality of circumstances, the defendant knowingly and voluntarily elected to act as his own counsel, and that election should not be disturbed or permitted to serve as a basis to vacate the convictions.

## Argument

- I. **The defendant waived his claim that the search warrant affidavit lacked probable cause absent the facts of the traffic stop and subsequent *Terry* frisk, and in any event, the affidavit established the requisite probable cause.**

### A. Relevant facts

On March 3, 2009, following the defendant's arrest, law enforcement officers secured the defendant's residence and applied for a state search warrant. GA 135, 140, 588-589. In support of the application, the officers submitted an affidavit which stated, in pertinent part:

Within the last two weeks of February 2009, a Confidential Informant ("CI") provided information that a black male named Donald Parker and using the nickname "Muffin" was selling cocaine from 60 Van Block Avenue, Apartment 10B in Hartford. CI described Parker as 45 years old, 6'2" tall with a large build and stated that Parker drives a Chrysler 300.

During the last two weeks of February 2009, the CI was inside Parker's apartment and observed Parker in possession of multi-ounce quantities of cocaine within the kitchen area.

The CI accompanied law enforcement personnel on a drive-by and pointed out Parker's apartment.

The CI has assisted law enforcement agencies in Connecticut, including the DEA, in past investigations, including by arranging controlled purchases of narcotics that led to drug investigations and seizures of narcotics and firearms. Information by CI has been found to be truthful and reliable based upon verification through police investigation among other things.

On March 3, 2009, law enforcement personnel were conducting surveillance at 60 Van Block Avenue and observed Parker exit the rear door of 60 Van Block Avenue and get into a Chrysler 300. Parker was observed failing to obey a clearly marked stop sign and law enforcement personnel requested the assistance of a marked cruiser to assist in a motor vehicle stop.

Officer Sherry of the Hartford Police Department conducted a traffic stop. When Officer Sherry asked Parker for his license, registration and proof of insurance, Parker indicated he did not have any identification. Parker became evasive, was sweating, refused to make contact and

placed his hands on the gear selector. Officer Sherry asked Parker to exit the vehicle. During the course of a pat-down, Officer Sherry felt an item in Parker's breast pocket. Parker made several attempts to pull away. At this point, Parker was informed he was under arrest for Interfering with Police. Parker informed Sherry that it was a digital scale. During a search incidental to arrest, Officer Sherry removed the scale. While doing so, Officer Sherry observed a folded piece of lottery paper in the same pocket. The folded paper came apart at which point Officer Sherry observed a white powder substance that he recognized as consistent with cocaine. During the same search incidental to arrest, Officer Sherry found a knotted piece of plastic containing a white powder substance in Parker's left pants pocket. The substances field tested positive for the presence of cocaine. In the same pocket, Parker also had approximately \$1500 in United State currency in various denominations.

Through training and experience, the affiants have found that persons who sell illegal drugs often store the narcotics and related paraphernalia within their residence.

DA 39-40. The warrant application sought authorization to seize, among other things, cocaine, drug paraphernalia, drug proceeds and firearms. DA 37.

Following the issuance of the search warrant, team members executed the search. GA 588-589. During the search, team members found a semi-automatic handgun, ammunition, approximately an ounce of cocaine, cutting and packaging materials and approximately \$17,000 in cash (all of which would later be offered into evidence, without objection, at the defendant's trial). GA 139-150, 153, 588-592.

On January 21, 2010, the defendant moved to suppress all evidence seized from his person and statements made by him during the traffic stop as well as all evidence seized from his home on that same date. GA 742. The defendant argued that the traffic stop was pre-textual and unsupported by reasonable suspicion, and that there was no basis for the *Terry* frisk that occurred after the traffic stop. GA 746-748. Further, the defendant argued that the execution of the search warrant at his residence was tainted by a prior, unlawful warrantless entry into the premises and that, accordingly, any evidence seized from the home should be suppressed. GA 749-751.

On February 17, 2010, following the evidentiary hearing held on the motion to suppress, the government filed a supplemental memorandum in which it maintained that the traffic stop and *Terry* pat-down were lawful under the Fourth Amendment, but that, in light of all of the other available evidence that it intended to offer at trial, it would not offer the evidence seized, or statements made, during the traffic stop. GA 771. As a result, the government requested that the defendant's motion to suppress as to the traffic stop be denied as moot, GA 771, a request with which the defendant explicitly agreed. GA 774. Indeed, in a post-hearing supplemental filing, the defendant stated that his motion to suppress the evidence gathered during the traffic stop could be denied as moot and that the only remaining claim to be addressed by the court was whether the agents' alleged unlawful entry into his residence should result in the suppression of the evidence subsequently seized from the residence. GA 774, 777-779.

On March 5, 2010, the district court issued a written memorandum of decision denying the defendant's motion to suppress. GA 190-199. At the beginning of its decision, the court noted:

Mr. Parker originally sought to suppress the evidence seized and statements made during this traffic stop, which Officer Sherry's testimony addressed. How-

ever, following the hearing, the Government filed a supplemental brief, representing that it would not introduce any evidence or statements related to the traffic stop during its case-in-chief at trial. . . . The parties agree that this makes Mr. Parker's motion to suppress the evidence obtained as part of the traffic stop moot. . . . Accordingly, that portion of Mr. Parker's Motion to Suppress is denied as moot, and the Court expresses no opinion as to its merits. The opinion is therefore confined to the subsequent search of Mr. Parker's residence.

DA 191-192.

Having conceded that the issues relating to the traffic stop were moot, the defendant relied solely on his only remaining claim, which was that the officers had entered his residence prior to the issuance of the warrant and remained inside far longer than necessary to conduct a protective sweep, thereby tainting the subsequently issued search warrant. GA 777-779. The defendant speculated that statements in the search warrant affidavit could have been influenced by the fact that the officers had been present inside the residence for an extended period of time prior to the issuance of the warrant. GA 777-778.

The district court concluded that the officers, though initially justified in entering the apartment to conduct a protective sweep, remained inside longer than necessary to conduct the sweep. DA 198. But the court did not suppress the seized evidence. Instead, it concluded that suppression was not warranted because “[i]t is uncontested that the affidavit supporting the warrant application made no mention of the warrantless entry of Mr. Parker’s home or anything the officers may have seen inside.” DA 198. The court noted, “[i]n fact, the officers’ uncontradicted testimony was that they did not see or seize anything of evidentiary value until the warrant was approved.” DA 198. Though the court made clear that it did not “condone the agents’ behavior in prolonging their warrantless stay in Mr. Parker’s home beyond what was necessary to ensure that no one was in the residence[,]” it concluded under *Segura v. United States*, 468 U.S. 796 (1984), that “any Fourth Amendment violation is unconnected to the evidence seized” so that “suppression is unwarranted.” DA 198-199. The defendant did not raise, and the court did not address, the issue of whether the warrant affidavit established probable cause even without the information about the traffic stop and *Terry* frisk.

## **B. Governing law and standard of review**

### **1. Requirements for the issuance of a search warrant.**

The issuance of a search warrant requires that a neutral and detached magistrate find that probable cause exists to believe (1) that a crime has been committed and (2) evidence of the crime will be found in the place to be searched. See *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983). Courts must read warrants in a “commonsense” fashion. *United States v. Bianco*, 998 F.2d 1112, 1117 (2d Cir. 1993) (citing *United States v. Ventresca*, 380 U.S. 102 (1965)). Probable cause does not mean more likely than not, but only a “probability or substantial chance of criminal activity.” *United States v. Bakhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990). Whether an affidavit satisfies the Fourth Amendment requirement that warrants be issued only upon a showing of “probable cause” requires a “commonsense” evaluation of “the totality of the circumstances.” *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

Once a lower court judge has determined that there is probable cause and has issued a warrant, a reviewing court must treat that determination with “great deference.” *Gates*, 462 U.S. at 236; see also *United States v. Salameh*, 152 F.3d, 88, 113 (2d Cir. 1998)(“We accord ‘great defer-

ence’ to a judge’s determination that probable cause exists, and we resolve any doubt about the existence of probable cause in favor of upholding the warrant.”); *United States v. Smith*, 9 F.3d 1007, 1012 (2d Cir. 1993) (“And the duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.”). As a result, “a search based on a magistrate’s determination will be upheld by a reviewing court on less persuasive evidence than would have justified a police officer acting on his own.” *Travisano*, 724 F.2d at 345. A “magistrate’s finding of probable cause is itself a substantial factor tending to uphold the validity of [a] warrant.” *Id.* In close cases, when there has been a magistrate’s determination of probable cause, “doubts should be resolved in favor of upholding the warrant.” *Id.*

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. *See United States v. Watson*, 404 F.3d 163, 166 (2d Cir. 2005); *United States v. Arvizu*, 534 U.S. 266, 275 (2002).

## **2. Plain error review**

A defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time

in the district court. 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). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

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).

### 3. Waiver

A defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See Olano*, 507 U.S. at 733; *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (internal quotation marks omitted). “The law is well established that if, ‘as a tactical matter,’ a party raises no objection to a purport-

ed error, such inaction ‘constitutes a true “waiver” which will negate even plain error review.’” *Quinones*, 511 F.3d at 321 (quoting *Yu-Leung*, 51 F.3d at 1122) (footnote omitted).

Indeed, a motion to suppress must be made before trial unless its delay is justified. *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975). “Similarly, the failure to assert before trial a particular ground for a motion to suppress certain evidence operates as a waiver of the right to challenge the admissibility of the evidence on that ground.” *Id.*; see also *United States v. Figueroa*, 750 F.2d 232, 238-239 (2d Cir. 1984); *United States v. DiStefano*, 555 F.2d 1094, 1100 (2d Cir. 1977).

### **C. Discussion**

#### **1. The defendant expressly waived this argument.**

In his motion to suppress dated January 21, 2010, the defendant argued that evidence seized from his person and statements made during the course of the traffic stop should be suppressed because the traffic stop was pre-textual and not based upon probable cause or even reasonable suspicion and that the subsequent *Terry* frisk was unjustified. GA 746-748. The defendant did not argue that the invalidity of the traffic stop and the *Terry* pat-down necessitated a re-daction of those facts in their entirety from the warrant affidavit and a re-examination of

whether the affidavit still established probable cause. Rather, the defendant sought suppression of the evidence seized from his home on a separate theory, namely that law enforcement personnel conducted an inappropriate warrantless entry into defendant's home prior to obtaining the warrant, thereby rendering the warrant defective. GA 749-751. Thus, the defendant never argued in the court below that the warrant affidavit was devoid of probable cause absent the facts from the traffic stop and ensuing frisk. Accordingly, he has waived this claim and cannot raise it for the first time in this appeal.

Indeed, for the defendant to advance this claim, the district court would first have to have made factual findings and accompanying legal conclusions regarding the validity of the traffic stop and the *Terry* frisk. This did not occur. DA 190-199. Following the evidentiary hearing on the motion to suppress, the government submitted a memorandum in which it noted its continued belief that the traffic stop and *Terry* pat-down "were lawful, proper and consistent with the requirements of the Fourth Amendment," but that "nevertheless, in light of all of the other available evidence that the government has to offer at trial against defendant Parker, . . . the government will not offer as evidence the digital scale and small quantity of narcotics seized during the traffic stop and any statements made during the traffic stop." GA 771. In light of its

representation, the government asked the district court to deny this portion of the motion to suppress as moot. GA 771. The defendant expressly agreed to this request. GA 774. As a result, he explicitly waived any claim that the traffic stop was invalid as well as any further claim that the facts regarding the traffic stop should have been excised from the search warrant affidavit.

In making his claim on appeal, the defendant seems to rely on a footnote in the district court's decision in which it referenced two factual inconsistencies between the suppression hearing testimony of the officer who conducted the traffic stop and the statements in the search warrant affidavit. DA 198. The defendant misreads this footnote. The district court was addressing the defendant's argument that inconsistencies between the officer's testimony and the statements in the affidavit suggested that the statements in the affidavit were influenced by what officers saw inside the defendant's apartment when they remained inside after conducting the protective sweep, and that any claim to the contrary was not credible. GA 778. The court made no finding whatsoever regarding whether the warrant affidavit established probable cause without the information related to the traffic stop and subsequent frisk.

In short, since defendant failed to raise the argument that the warrant affidavit lacked

probable cause absent the facts surrounding the traffic stop and frisk, the defendant should be deemed to have waived any such claim.<sup>3</sup>

**2. The affidavit supported a finding of probable cause even absent the facts of the traffic stop and subsequent *Terry* frisk.**

Assuming *arguendo* that the defendant has not waived this argument, it fails on its merits. Even without the facts related to the traffic stop and frisk, the warrant affidavit established probable cause that evidence of narcotics trafficking would be found in the defendant's residence.

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court, in assessing whether statements by an informant could establish probable cause, "reaffirm[ed] the totality of the circum-

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<sup>3</sup> The district court did not address the portion of the defendant's motion to suppress which attacked the validity of the traffic stop and the *Terry* frisk. If this Court does not agree with the waiver argument and cannot conclude that, absent the information about the traffic stop and frisk, the facts set forth in the warrant affidavit establish probable cause, it would appear to be necessary to remand the case back to the district court so that it can determine, in the first instance, whether, based on the facts elicited at the suppression hearing, the defendant's constitutional rights were violated during the traffic stop.

stances analysis that traditionally has informed probable cause determinations.” *Id.* at 238. In considering the “totality of the circumstances” in the context of an informant’s statements, courts may consider “an informant’s veracity, reliability and basis of knowledge,” *id.* at 230, and the extent to which an informant’s statements—even about a suspect’s innocent activities—are independently corroborated. *Id.* at 241-244 (holding that the corroboration of facts in an informant’s letter that the defendant’s car would be in Florida, that one of the defendant’s would fly to Florida in the next day or so and that the defendant would then drive towards Bloomington, Indiana, all contributed to a legitimate belief that the informant’s additional assertions of criminal activity were true); *see also United States v. Canfield*, 212 F.3d 713, 719 (2d Cir. 2000)(corroboration of “innocent details” means that “there is a higher probability the incriminating facts are true”).

Here, the warrant affidavit contained detailed information provided by an informant which was based entirely upon the informant’s first-hand observations. The informant stated that the defendant, “Donald Parker,” a black male, who used the nickname “Muffin” was selling cocaine from his residence at 60 Van Block Avenue, apartment 10B in Hartford. DA 39. The informant indicated that the defendant drove a Chrysler 300 automobile. DA 39. Further, the informant stated that he had been in

the defendant's apartment within the last two weeks of February 2009 and had seen the defendant in possession of multi-ounce quantities of cocaine, which the informant recognized from his own experience in having possessed cocaine in the past. DA 39. The informant further described personally seeing the defendant make cocaine sales. DA 39.

In addition to providing information based on first-hand knowledge as opposed to rumor or innuendo heard through third parties, the informant also had a proven track record for reliability. The affidavit specified that the informant had previously arranged controlled purchases of narcotics that led to drug investigations and the seizures of narcotics and firearms. DA 39.

Finally, even absent the details of the traffic stop and frisk, some of the information provided by the informant was corroborated by police surveillance, thereby strengthening the conclusion that the informant was accurate and reliable as to the defendant's drug trafficking activity and his base of operation. According to the affidavit, on March 3, 2009, surveillance team members observed the defendant exit 60 Van Block Avenue and drive away in a Chrysler 300, DA 39, confirming two of the details supplied by the informant, namely the vehicle that the defendant drove and the defendant's connection to 60 Van Block Avenue. In sum, a common-sense, practical assessment of the totality of these circum-

stances even without the details of the traffic stop was sufficient for a finding of probable cause and the issuance of a search warrant.

**II. The defendant's various evidentiary objections, raised for the first time on appeal, have no merit and did not substantially impact his rights or undermine the fairness and integrity of the judicial proceedings.**

In this appeal, the defendant raises four evidentiary challenges, none of which were raised below. First, he claims that DEA Task Force Officer Frank Bellizzi improperly gave hearsay testimony when he described the conversation he had with the defendant's girlfriend upon her arrival at the defendant's apartment on March 3, 2009, after law enforcement personnel had secured the apartment pending the issuance of a search warrant. *See* Def.'s Br. at 40-41. Second, he argues that the government did not properly authenticate the evidence seized from the search of the defendant's apartment on March 3, 2009 when it offered those items through Officer Bellizzi, who had left the search location prior to the seizure of the contraband. *See* Def.'s Br. at 42-43. Third, he maintains that Officer Bellizzi, in narrating a traffic stop conducted of one of the defendant's customers shortly after the customer had purchased cocaine from the defendant, should not have been permitted to describe or authenticate the 27.8 grams of cocaine that was

seized because he was not present during the stop. *See* Def.'s Br. at 43-44. Finally, he argues that Officer Bellizzi, in describing the background of the investigation, should not have been permitted to recount hearsay statements of a confidential informant, opine about the alleged "drug dealers" whose phone numbers were in Maylor's telephone records, or describe controlled purchases which occurred during the investigation. *See* Def.'s Br. at 45. The defendant concedes that none of these claims were preserved and that the plain error standard of review applies.

#### **A. Relevant facts<sup>4</sup>**

During his testimony, Officer Bellizzi described what occurred on March 3, 2009, the date of the defendant's arrest. In doing so, he recounted what had occurred when the officers traveled to the defendant's apartment to secure the location pending the anticipated issuance of a search warrant. DA 281. He testified that, after the apartment had been secured, the defendant's girlfriend, Donna Hurst, arrived, and the

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<sup>4</sup> Officer Bellizzi was one of the case agents assigned to this investigation, and, during his testimony, which is only partially reproduced in the defendant's appendix, he covered a variety of topics. The government will not detail all of his testimony, but instead will only set forth the facts related to the defendant's various evidentiary challenges.

two had a conversation. DA 282. She was carrying a purse and told Officer Bellizzi that, inside the purse, she had bond money for the defendant. DA 282. Officer Bellizzi saw the money and estimated that it was a “large sum” of approximately \$10,000. DA 282. She told Officer Bellizzi that she had returned to the apartment to “get some more money.” DA 282. When the government asked, “Did she tell you where that money came from?” defense counsel objected, and the court sustained the objection. DA 282-283. As a result, the government rephrased its question to ask, “Did you end up seizing that money . . . as a result of the conversation you had with her?” DA 283. Officer Bellizzi answered, “Yes, sir.” DA 283. He also testified that he and another officer asked Ms. Hurst to “come to speak to us voluntarily at the police department about her involvement with this incident, and she did voluntarily come back to the police department, where I conducted an interview with her.” DA 283.

In addition, later in his testimony, when the government offered as an exhibit the purse “that contained the thousands of dollars that was in the possession of Ms. Donna Hurst,” Officer Bellizzi confirmed, without offering any details of his interview with Ms. Hurst, that he had seized the approximately \$10,000 from the purse “[a]s a result of what she had told [him] in her conversation with [him].” DA 292-293. When the gov-

ernment then inquired “Did Ms. Hurst indicate where she had taken that money from?” Officer Bellizzi stated that she had advised him that the money had come from the defendant’s apartment. DA 293.<sup>5</sup> For this reason, he requested that fellow agents seize Ms. Hurst’s purse and

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<sup>5</sup> Prior to the government asking this question, defense counsel stated “Judge, could I just have a moment.” GA 150. A few minutes later, at a break in the proceedings, defense counsel said to the district court: “Judge, just one thing: I would ask if the jury could be instructed, there was a time that I went over to counsel just so we could come to a stipulation as to a question rather than . . . . Just if the jury could be told occasionally they’ll see opposing counsel talk to one another, they’re trying to work out matters of evidence, has nothing to do with the facts of the case, ‘and it’s not for your consideration, they’re trying to streamline the process,’ if that’s okay.” GA 159. Although the record is not clear to which question defense counsel was referring, it is the recollection of government counsel that defense counsel was referring to his request to “have a moment” prior to government counsel again asking Ms. Hurst where she had obtained the money. Government counsel believes that defense counsel was aware, from discovery material, that Ms. Hurst could present damaging evidence against the defendant if called as a witness, so he decided not to object to Officer Bellizzi’s testimony that she had advised him the money had come from the defendant’s apartment and, thereby, obviate the government’s need to call her as a witness.

the money that it contained. GA 139-140, 149. Other than the one objection mentioned above, defense counsel did not object to any of this testimony.

Officer Bellizzi also testified as to the items seized from the defendant's apartment as a result of the execution of the search warrant. First, he identified the cocaine seized from the apartment (Gov't Ex. 117), and the government offered it into evidence. Defense counsel, after confirming during a brief voir dire of Officer Bellizzi that he was not the person who recovered the exhibit, did not see it recovered, and did not know when it was recovered, stated in response to the offer, "Judge, I have no objection." DA 284-285. Next, Officer Bellizzi identified two bottles containing a cutting agent and some packaging material (Gov't Ex. 118). DA 287. Defense counsel, after a brief voir dire in which he confirmed that Officer Bellizzi was not the person who recovered the exhibit and did not see it recovered, indicated that he had "no objection" to their admission. DA 288. Officer Bellizzi also identified a firearm, a magazine and .45 caliber rounds (Gov't Ex. 119) recovered during the search. DA 289. Defense counsel again conducted a brief voir dire to confirm that Officer Bellizzi was not the one who recovered the firearm, did not perform any ballistics testing on it, and did not test it for fingerprints. DA 290. At the completion of the voir dire, defense counsel stat-

ed that he had “[n]o objection” to the exhibit’s admission. DA 290. In addition, Officer Bellizzi identified two separate boxes of ammunition seized from the apartment (Gov’t Ex. 120). DA 291. After confirming that Officer Bellizzi was not the one who recovered these items, defense counsel stated that he had “[n]o objection” to their admission. DA 292. Finally, Officer Bellizzi identified a pillow case which contained a substantial portion of the \$17,000 in cash seized (Gov’t Ex. 122), various pieces of mail addressed to the defendant (Gov’t Ex. 123) and additional packaging material (Gov’t Ex. 133), all of which, as he explained, were logged into evidence by other officers. DA 294-295. Defense counsel did not object to this testimony, did not voir dire the witness as to these exhibits and did not object to their admission into evidence. DA 294-295.

Officer Bellizzi also discussed a traffic stop of one of the defendant’s purported customers, Corey Pace, which had occurred on February 5, 2009. DA 279. Specifically, he testified that he and other officers were conducting surveillance on that date in conjunction with intercepted wiretap calls. DA 274. He explained that he and another officer “were following the vehicle that Mr. Pace was operating into the area of Simsbury” and, at the same time, were receiving information from the monitoring room “where they were monitoring the wiretap[.]” DA 274. Earlier that day, Officer Bellizzi had seen the

defendant exit his apartment building with Mr. Pace. DA 273. In response to an intercepted telephone call between the defendant and Maylor, Officer Bellizzi “broke surveillance of Mr. Pace” and “reestablished surveillance” at the defendant’s apartment. DA 276. A short time later, he observed Mr. Pace’s Mercedes-Benz arrive at the defendant’s apartment building and Mr. Pace exit the car and enter the building. DA 277. A few minutes later, they observed Maylor arrive at the building and watched the defendant leave the building and get into Maylor’s vehicle. DA 278. After staying in the vehicle for about a minute, the defendant got back out and re-entered his building. DA 279. About five minutes later, Officer Bellizzi watched Mr. Pace leave the defendant’s apartment building, get into his Mercedes and drive away. DA 279.

At that point, Officer Bellizzi testified, “Mr. Pace was surveilled. He was also subject to a motor vehicle stop based on independent probable cause. . . . maybe a minute or two” after he left the building. DA 279. He said that narcotics were seized from Mr. Pace and Officer Bellizzi identified the “evidence bag containing the drugs that were seized from Mr. Pace on February 5th (Gov’t Ex. 116).” DA 280. The government offered the drugs as a full exhibit, and defense counsel indicated that he had no objection to their admission. DA 280.

Finally, as to the defendant's last evidentiary claim on appeal, Officer Bellizzi, as one of the lead case agents, testified about the background of his investigation of Maylor's drug trafficking operation. In particular, he explained how a confidential informant had identified Maylor (who also testified at trial) as "one of the largest drug traffickers in the Hartford area." DA 235. According to the informant, Maylor "was obtaining kilogram quantities of cocaine from a Hispanic individual in the city, within the City of New York." DA 235. He discussed Maylor's phone records and identified many of his contacts as "known drug traffickers or individuals who had a past narcotics history." DA 240b. And he described the controlled purchases of cocaine that case agents conducted from Maylor using an informant on October 14, 2008 and November 18, 2008, as well as three separate traffic stops conducted of Maylor's customers after each of them had purchased cocaine from him. DA 241-253, 258-264, 267. At no point did defense counsel object to any of this testimony.

## **B. Governing law and standard of review**

### **1. Preserving evidentiary objections.**

In order to preserve an evidentiary issue for appeal, a defendant must make a timely objection at trial and state the specific ground for the objection. Fed. R. Evid. 103(a)(1). "To be timely, an objection . . . must be made as soon as the

ground of it is known, or reasonably should have been known to the objector.” *United States v. Yu-Leung*, 51 F.3d 1116, 1120 (2d Cir. 1995) (internal quotations omitted). The requirement that a defendant specify the grounds of the evidentiary objection serves the dual purposes of giving “the trial judge sufficient information so she can rule correctly[]” while allowing the objector’s adversary “to take steps to obviate the objection.” Wright, 21 *Federal Practice and Procedure, Evidence* § 5036 (2d ed. 2011).

In the absence of a timely objection, this Court reviews the admission of evidence only for plain error. See *United States v. Jackson*, 345 F.3d 59, 65 (2d Cir. 2003). 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)).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. See *Olano*, 507

U.S. at 734. “[T]he defendant bears the burden of establishing prejudice.” *United States v. Logan*, 419 F.3d 172, 179 (2d Cir. 2005).

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).

## **2. Admission of hearsay**

Federal Rule of Evidence 802 generally bars the admission of out-of-court assertions, including oral and written statements, when offered to prove the truth of the matter asserted. *See* Fed.R. Evid. 802. Moreover, 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.

Although the Supreme Court did not specifically define the types of statements that are considered “testimonial” for Sixth Amendment purposes, it did state that the category includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [] police interrogations,” which are some of “the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” *Crawford*, 541 U.S. at 68. In *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004), this Court recognized that “the types of statements cited by the [Supreme] Court as testimonial share certain characteristics; all involve a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.” *Id.* at 228. *Crawford* “at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be

used at a trial.” *Id.*; accord *United States v. Goldstein*, 442 F.3d 777, 785 (2d Cir. 2006). If the challenged statement is not testimonial, the Confrontation Clause is not implicated. See *United States v. Williams*, 506 F.3d, 151, 157 (2d Cir. 2007)(co-defendant’s admissions to third persons about his involvement in murder not testimonial).

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.” *Crawford*, 541 U.S. at 59, n.9. See also *Goldstein*, 442 F.3d at 785 (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 back-

ground 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). “[I]n some instances, information possessed by investigating agents is received at trial not for the truth of the matter, but as background to explain the investigation, or to show an agent’s state of mind so that the jury will understand the reasons for the agent’s subsequent actions.” *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994). “Such evidence can be helpful in clarifying noncontroversial matter without causing unfair prejudice on significant disputed matters.” *Id.*; see also *United States v. Slaughter*, 386 F.3d 401, 403 (2d Cir. 2004) (holding that 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. Bowling*, 239 F.3d 973, 977 (8th Cir. 2001) (holding that 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) (holding that 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 their investigation).

### 3. Authentication

“In order to be admissible, physical evidence must, of course, be properly authenticated.” *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1993). This requires only that the proponent submit “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed. R. Evid. 901(a). “This requirement is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.” *Pluta*, 176 F.3d at 49. “The burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity or to prove beyond any doubt that the evidence is what it purports to be. Rather, the standard for authentication and hence for admissibility, is one of reasonable likelihood.” *Id.* The trial court has broad discretion to determine whether a document has been properly authenticated, and its ruling is reviewed only for abuse of discretion. *Id.* Absent a timely objection to the authentication of evidence, this Court reviews the admission of the evidence under the plain error standard. *See United States v. Jackson*, 345 F.3d 59, 65 (2d Cir. 2003).

#### C. Discussion

At the outset, it bears noting that defense counsel clearly made strategic choices in deciding when to lodge an evidentiary objection. For many of the issues raised here, he explicitly

chose not to object after eliciting what he viewed as helpful information from the witness during voir dire conducted in front of the jury. In addition, given that Maylor was a government witness, defense counsel had an interest in allowing the government to present damning narcotics evidence against him to show that he was a significant narcotics trafficker and thereby cause the jury to view his testimony more skeptically and as self-serving. On appeal, the defendant has conveniently ignored his own trial strategy and opted instead to question the district court's competence in deciding to rely, at least in part, on the defendant's representations that he did not object to the admission of evidence that he now claims was admitted in error.

None of these evidentiary challenges has merit. The defendant has failed to show any error, let alone plain error, and has certainly not established how any error impacted the proceedings or affected his substantial rights.

As to Officer's Bellizzi's testimony regarding his conversation with Ms. Hurst at the time of the March 3, 2009 search, there was no error for three principal reasons. First, his testimony about the amount of money in her purse was based on his own observation of the money and, therefore, was properly admitted. GA 139. Second, his testimony recounting Ms. Hurst's statements as to where she had obtained the money was not offered for its truth and served

only to explain and provide the context for his actions in requesting that the purse and the money within it be seized. GA 140, 150. And third, the very brief, casual nature of the conversation to ascertain the reason for her presence at an apartment that was being secured pending a search warrant did not constitute “structured police questioning” and was not testimonial.<sup>6</sup>

As to Officer Bellizzi’s testimony regarding the evidence seized from the defendant’s apartment, the defendant’s authentication objection on appeal is absolutely contrary to his clear statements to the trial court that he had no objection to the exhibits. Indeed, as discussed above, defense counsel engaged in voir dire of Officer Bellizzi in response to almost every exhibit offered from the search. DA 284-295. During this voir dire, he was able to establish easily that Officer Bellizzi was not the officer who seized these items and was not present during their seizure. DA 284-295. As a result and as part of his trial strategy, he was able to present his authenticity attack as one addressing the weight of the evidence, rather than its admissibility, recognizing, as he must have, that, had he raised an authenticity objection, the government

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<sup>6</sup> Further, as explained in footnote 5 above, it is the recollection of government counsel that defense counsel stipulated to eliciting this testimony from Ms. Hurst, further undermining any claim that the admission of this testimony was plain error.

simply could have called as witnesses the various officers who actually seized the items. Also, even ignoring the fact that defense counsel had ample opportunity to conduct voir dire and object to the admissibility of these exhibits, any authenticity challenge here fails because, according to Officer Bellizzi's testimony, he did serve as the co-custodian of evidence for the case and, as such, was familiar with all of the items seized from the defendant's apartment. GA 143. In addition, DEA Special Agent Brent Buckles was present during the execution of the search warrant, observed the seizure of each of the items offered into evidence and the inventory of those items, and testified that each of the exhibits offered were items actually seized during the search at Parker's residence, thereby buttressing any foundational requirements for the admissibility of those exhibits. GA 589-592.

Likewise, Officer Bellizzi's testimony regarding the narcotics seized from Pace's vehicle was appropriate. His testimony that the traffic stop occurred was not offered for its truth, but rather as background information, and his description of the narcotics seized was sufficiently specific to allow for the court to conclude, had an objection been raised, that the cocaine presented in court was the same cocaine seized from Pace. GA 121-124. Further, Officer Bellizzi had first-hand knowledge of the entire Pace episode, except for the fact that Pace was the subject of a traffic

stop and that cocaine was seized from Pace during the stop. Again, knowing full well that the government could call another witness to discuss at length this incremental detail of the Pace traffic stop and cocaine seizure, the facts of which were undisputed, defense counsel chose not to object to this evidence coming out, in summary fashion, through Officer Bellizzi. In fact, not only did defense counsel choose not to object, but, on cross-examination, he elicited the same testimony so that he could point out that Officer Bellizzi did not have the benefit of searching Pace before he met with the defendant, as he would have done with an informant conducting a controlled purchase, that Officer Bellizzi did not know other locations where Pace may have been prior to meeting the defendant and that Officer Bellizzi did not observe how, when and where the cocaine got into Pace's car. GA 277-278. In light of this cross-examination, it is apparent that defense counsel did not lodge an objection to Officer Bellizzi's testimony because he saw an opportunity to suggest to the jury, through Officer Bellizzi, that the government could not definitively establish that the cocaine in Pace's car came from the defendant.

Finally, there is no merit to the defendant's objections to Officer Bellizzi's testimony regarding his investigation of Maylor. When Officer Bellizzi recounted the information received from a confidential informant about Maylor, identified

individuals on Maylor's phone records as known drug traffickers, and described various controlled purchases and pertinent narcotics seizures connected to Maylor, he was simply providing background information as to the Maylor investigation. This information was not offered for its truth, but instead was offered to explain the officers' various investigative steps, and, in particular, their decision to apply for authorization to conduct a wiretap. Moreover, Maylor was a witness at trial, so the information elicited through Officer Bellizzi was largely duplicative of the information elicited from Maylor as to his drug trafficking activity and was actually helpful to defense counsel, who had to discredit Maylor.

Defense counsel's suggestion on appeal that the government could have limited its questions so that Officer Bellizzi only testified that he became involved in a narcotics investigation of Maylor and that he then initiated a wiretap is problematic because it simply begs too many questions. A jury would be left to speculate as to how the government established Maylor as a target, as to the scope of Maylor's operation and as to the justification for the initiation of a wiretap. The very questions left unanswered by the defendant's proposed solution require the background information that the government provided.

Regardless of whether the admission of any of the evidence highlighted on appeal constituted plain error, the defendant most certainly has failed to show how this evidence prejudiced him. In light of the other evidence presented through the testimony of Maylor regarding the defendant's involvement in the distribution of narcotics and through the intercepted wiretap calls, the defendant cannot establish that any of this challenged testimony 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). He 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).

Maylor testified that he acquired kilogram quantities of cocaine from his primary source of supply in New York and that he distributed both cocaine and crack cocaine to numerous customers, including Alfred Bell, Willie Hunter, Melvin Speight and the defendant. GA 405-407, 409-410, 463-464. Maylor also explained that he sold cocaine to the defendant once every week to ten days over approximately a one year period beginning in May 2008. GA 409-410. Maylor typically sold the defendant an ounce of cocaine at a time, and sometimes up to two ounces. GA 409-410.

During his testimony, Maylor listened to numerous recordings of calls between himself and the defendant and explained that many of the calls included coded references to ounces of cocaine that the defendant ordered and which Maylor agreed to provide. GA 414-446. Maylor also testified that, in multiple calls, the defendant expressed his intent to re-distribute the cocaine acquired from Maylor. GA 428, 433-435, 439-441-442, 445-446. Also, phone records confirmed that, between May 2008 and March 2009, Maylor and the defendant called each other 165 times. Govt. Ex. 87. Records from the Connecticut Department of Labor showed that the defendant did not have any regular employment during 2007 through 2009, GA 574-575, which suggested that the large amount of cash found in his apartment was proceeds of drug trafficking. Further, the cocaine, cutting agent, and packaging material seized from his residence also corroborated the defendant's involvement in drug trafficking. On the basis of Maylor's testimony and the corroborative wire intercepts, the jury had an ample basis to conclude beyond a reasonable doubt that the defendant conspired with Maylor to distribute in excess of 500 grams of cocaine.

Finally, even assuming that there was an error, which was also plain, and that the error affected the result of the trial, the defendant 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 through Maylor and the wire intercepts dwarfed the limited testimony elicited from Officer Bellizzi as explanatory background. It is difficult to view the admission of the challenged evidence as “seriously affect[ing] the fairness or integrity or the public reputation of [the] judicial proceedings.” *Marcus*, 130 S. Ct. at 2164.

In sum, the defendant has failed to show that the admission of Officer Bellizzi’s challenged testimony warrants reversal as plain error.

### **III. The defendant knowingly and voluntarily waived his right to counsel at sentencing.**

#### **A. Relevant facts**

On July 25, 2010, after the trial in this case, defense counsel moved to withdraw his appearance. DA 11. A hearing was held on the motion on August 9, 2010, at which the defendant expressed dissatisfaction with his counsel’s refusal to file certain motions and requested substitute counsel. GA 790-797. The district court agreed to the defendant’s request and appointed substitute counsel. GA 810-811. After multiple continuances, sentencing was scheduled for January 25, 2011. DA 12-13.

On January 11, 2011, the defendant filed a notice of termination of counsel. DA 13, 314.

The district court held a hearing in connection with this filing on January 25, 2011, the date of the scheduled sentencing. GA 817-821. After confirming that the defendant was unhappy with substitute counsel, GA 818, the district court engaged the defendant (“D”) in the following colloquy:

Court: [Y]ou get one more lawyer and then you’re representing yourself, which you don’t want to do. But you actually have to listen to your lawyer, and respect the fact that the lawyer may know more law than you do and may have been involved in similar circumstances in the past, okay?

D: Yes, your Honor.

Court: So Mr. Jacobs sitting behind you, is willing to come in, but if you can’t get along with Mr. Jacobs after Mr. Schaffer, Mr. Hussey and Mr. Jacobs, all of whom I know are good lawyers, you can’t get along with them, you’re going to be representing yourself at sentencing. Is that clear to you?

D: Yes, your Honor.

Court: Okay? I’m not going to appoint a never-ending stream of lawyers so that you can decline to listen to them and take their advice. Okay?

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D: Yes, your Honor. I was asking for, like, my grandmother, she's trying to get me an attorney. I came to ask the Court may I have three weeks to at least, my grandmother's trying to get me an attorney, if that's possible. I'm just asking.

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Court: Well, we can't have you not represented by counsel, and if you find a lawyer that you're able to pay, that's fine. But I think you'll find that Mr. Jacobs is a fine lawyer, and he's a real advocate for his clients . . .

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D: I'm not trying to anger the Court or anything.

Court: Hang on. You're not angering me. I just want it understood that I just can't be appointing lawyers for you from now to infinity.

D: No, I understand.

Court: What we need to do is get you sentenced and then you can take appeals to the Second Circuit from your conviction, or if you're unhappy with your sentencing, but you'll be represented as opposed to going pro se, okay?

D: Yes, your Honor.

Court: Okay, You're not making me angry. I just have this rule of three strikes and you're out, and you'll end up representing yourself, okay?

D: Okay. Thank you, your Honor.

GA 818-820.

On March 16, 2011, the defendant filed a notice of *pro se* appearance and sought to have heard a motion for new trial which his newly appointed counsel had refused to file. DA 315. On March 30, 2011, the district court held a hearing on the motion at which the defendant confirmed that he wished to proceed *pro se* and that he desired to have his motion for new trial, which he had already submitted, heard *pro se*. DA 317-319. The district court granted the request and agreed to docket and hear the motion for new trial. DA 319.

The district court denied the motion for new trial on June 29, 2011, GA 842-851, and proceeded with sentencing on July 15, 2011. DA 335-365. At sentencing, the defendant stated that he had reviewed the Pre-Sentence Report, that he did not have any objections to its contents and that he was prepared to proceed with sentencing. DA 338-339. The district court calculated an advisory sentencing guidelines imprisonment range of 70 to 87 months. DA 342-344. The defendant addressed the district court extensively and made arguments on his behalf.

DA 345-357. He also submitted extensive medical records and a personal letter for the district court's consideration. DA 338. After hearing the parties, the district court imposed a total effective term of imprisonment of 75 months, which was within the 70-87 month range. DA 357.

### **B. Governing law and standard of review**

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). “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).

There is no talismanic procedure to determine a valid waiver. *See United States v. Tracy*, 12 F.3d 1186, 1194 (2d Cir. 1993). Indeed, this Court has rejected rigid waiver procedures or scripted procedures. *See United States v. Fore*, 169 F.3d 104, 107 (2d Cir. 1999) (“district courts are not required to follow a formulaic dialogue with defendants wishing to waive their Sixth Amendment right to counsel and we decline to impose a rigid framework”). Whether a waiver is “knowing and intelligent” depends upon the totality of the circumstances. *Id.* at 108; *see also Dallio v. Spitzer*, 343 F.3d 553, 563-564 (2d Cir. 2003).

“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).

### **C. Discussion**

Based on the totality of the circumstances, the defendant knowingly and voluntarily waived his right to counsel and elected to represent himself at his sentencing.

On August 9, 2010, the district court granted defendant’s trial counsel’s motion to withdraw his appearance and appointed substitute counsel. GA 790-797. It was apparent that trial

counsel and the defendant were in disagreement over motions that defendant wished to file that trial counsel felt lacked merit. GA 790-797. On January 11, 2011, two weeks prior to his scheduled sentencing, the defendant filed a notice of termination of counsel. DA 314. After confirming that defendant was unhappy with substitute counsel, the district court cautioned the defendant that “you get one more lawyer and then you’re representing yourself, which you don’t want to do.” GA 818. The district court then advised the defendant that he needed to respect the fact that “the lawyer may know more law than you do and may have been involved in similar circumstances in the past, okay?” GA 818. The defendant replied that he understood. GA 818. In so advising the defendant, the district court impressed upon him that he was better served at sentencing by an attorney who was more familiar with law and also had experience in similar proceedings. This colloquy was sufficient to apprise defendant of the disadvantages of proceeding without counsel. Moreover, the district court repeatedly, but politely informed the defendant that he was not going to continually be given new lawyers. GA 819-820.

Following this hearing, on March 15, 2011, the defendant’s third lawyer moved to withdraw his appearance. DA 12. On March 30, the district court held a hearing at which the defendant requested that he be permitted to represent

himself and that he wished to have a motion for a new trial heard by the court. DA 317-319. The court granted the request without any further inquiry beyond what had occurred at the January 25, 2011, hearing. No further inquiry was warranted. In that earlier hearing, the district court had already advised the defendant of the disadvantages of not having a lawyer represent him at sentencing. GA 818.

Moreover, not only did the defendant request that he be allowed to proceed *pro se*, he manifested an intent to represent himself by filing a motion for new trial with a lengthy and detailed memorandum that spanned 18 pages. GA 822-835. The defendant's intent to represent himself is further highlighted by the fact that, although the motion was docketed with the Court on March 30, 2011, the papers indicate that he had drafted and signed them on February 9, 2011, only two weeks after he had been appointed his third lawyer. GA 823, 835. He also appears to have attempted to file the motion as early as February 22, 2011. GA 822, 824. Given the warnings he had received at the January 25, 2011, which included the admonishment that he would not be given any further new lawyers, the defendant's filing of *pro se* papers so soon after that hearing only serves to emphasize his desire to represent himself.

Here, at the conclusion of the January 25, 2011, hearing, the defendant had a choice of

whether to proceed with appointed counsel or to proceed with self-representation. The defendant's actions with respect to filing his appearance and seeking to have heard a lengthy motion for new trial that he drafted himself manifested the intent to proceed *pro se*. The defendant certainly had the capacity to do so. He did not hesitate to bring matters to the court's attention when he felt it was in his interest to do so. In his conversations with the court, he was articulate, lucid and indicated that he understood the discussions he had with the court regarding the assignment of counsel. GA 789-813, 818-821. In light of his organized and extensive argument in support of his motion for new trial, the defendant had the intellectual capability to represent himself at sentencing. GA 824-835.

Indeed, the record at sentencing reveals that the defendant capably represented himself. He read the Pre-Sentence Report that had been prepared and indicated that he had no objections. DA 338-339. He provided the court with a personal letter and also provided extensive medical documentation to the court to support sentence mitigation arguments. DA 338. He expressed remorse for his actions and addressed the court regarding his medical conditions. DA 345-349. After hearing the parties, the court imposed a total effective sentence of 75 months imprisonment, which was in the middle of the applicable advisory guidelines range.

Here, given the dialogue between the defendant and the court on January 25, 2011, and the defendant's actions thereafter in seeking to act as his own counsel, the totality of circumstances warrant a conclusion that the defendant knowingly and voluntarily waived his right to counsel at sentencing.

**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 2, 2012

Respectfully submitted,

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**Federal Rule of Appellate Procedure  
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,601 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



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