In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 15-2371

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MILES MUSGRAVES,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:13-cr-30276-MJR — The Honorable Michael J. Reagan, *Chief Judge*.

BRIEF OF APPELLEE UNITED STATES

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JURISDICTIONAL STATEMENT

Musgraves' Jurisdictional Statement is complete and correct.

STATEMENT OF THE ISSUES

I. Whether the evidence was sufficient for any rational trier of fact to have found Musgraves was a member of the conspiracy to distribute cocaine when the evidence is viewed in the light most favorable to the government.

II. Whether the evidence was sufficient for any rational trier of fact to have found Musgraves possessed a firearm and distributed cocaine when the evidence is viewed in the light most favorable to the government.

III. Whether the district court's determination that Musgraves was not immunized from statements made on November 17, 2013 and, consequently, the denial of Musgraves' motion to suppress and bar those statements, exhibited clear error.

IV. Whether the district court erred in its determination that probable cause existed for the issuance of the search warrant on Musgraves' home and, consequently, the denial of Musgraves' motion to the suppress evidence obtained during the search.

V. Whether the district court's use of Musgraves' career offender range for sentencing was proper where the record demonstrates that the district court would have entered the same sentence regardless.

STATEMENT OF THE CASE

On August 14, 2012, Thomas Tisdale, told Sergeant William Brantley and Officer Curtis McCray of the Alton, Illinois Police Department that he could purchase crack cocaine from a subject known as "L" who lived on Sycamore Street. TrialTr.I_37:18–40:1[1]. "L", who the officers later identified as Miles Musgraves, resided at 1808 Sycamore Street in Alton, Illinois. TrialTr.I_41:13–16; 43:21–24; 57:17–19; 58:14–19. The officers also became aware that Musgraves is the younger brother of Romell Stevens. Hr'g_Tr.(Feb. 6, 2015). Tisdale agreed to cooperate in the ensuing investigation. TrialTr.I_38:24–39:4.

Tisdale called Musgraves' phone and spoke with a female who stated Musgraves was at the residence. TrialTr.I_41:3–41:12. Tisdale informed the female that he wanted to purchase $100 worth of crack cocaine. *Id*. After the officers searched and otherwise prepared him for the controlled buy, Tisdale subsequently drove his own vehicle to Musgraves' home on Sycamore Street and entered the residence with marked buy money and covert video recording equipment to document the encounter. TrialTr.I_39:5–23; 41:17–42:18. Additionally, the officers followed Tisdale during the undercover buy operation in an undercover police

[1]References to documents in the Record on Appeal are designated herein as "R." followed by the appropriate number for the document (i.e. R.1); references to transcripts are designated by the proceeding to which they relate followed by the relevant page number(s) (i.e. "TrialTr.I_1" or "Hr'g_Tr.(Date)"; references to defendant-appellant's brief or appendix are, respectively, to "Def.Br. __" or "Def.App. __"; and references to the appendix of this brief are to "Gov.App. __".

vehicle. TrialTr.I_42:19–24. The officers later viewed the video surveillance which showed the drug transaction in detail with Musgraves, including the hand-to-hand exchange of money for the cocaine. TrialTr.I_57:17–62:12; Gov.App. A. The video also documented a black Nissan Altima registered to his live-in girlfriend, Mildred Parker. TrialTr.I_79:10–20. Laboratory analysis revealed 0.7 gram of cocaine base. TrialTr.III_63:10–14.

On September 21, 2012, Tisdale contacted Musgraves and made arrangements to meet him at his residence for a second purchase of crack cocaine. TrialTr.I_74:8–75:14. Upon Tisdale's arrival at 1808 Sycamore Street, he spoke with Musgraves and Stevens on the front porch before returning to his vehicle. TrialTr.I_75:16–79:16; TrialTr.II_72:10–73:12. Stevens told Tisdale that he knew of Tisdale's cooperation with the police. TrialTr.I_77:1–82:7. Without initiation of the buy, and in an attempt to protect himself and Musgraves, Stevens then yelled at Tisdale, stating, "I don't fucking sell drugs. He don't sell drugs, you don't sell drugs, Rom don't sell drugs. Beat it dude. Beat it." TrialTr.I_77:1–78:13; TrialTr.II_72:10–74:18. When the officers and Tisdale arrived back at the police station from the unsuccessful buy, Tisdale received a call from Stevens in which Stevens again aggressively accused Tisdale of being an informant. TrialTr.I_80:23–82:5; TrialTr.II_73:24–74:3. Right after the phone call from Stevens, Musgraves contacted Tisdale by phone in an attempt to explain his brother's behavior. TrialTr.I_82:9–85:12. Musgraves said that somebody gave him and Stevens' information about

Tisdale. *Id*. Then, Musgraves smoothed over the situation, stating, "I mean **my man** [Stevens] should know better than that shit." *Id*.

Because of Tisdale's exposure, the investigation into Musgraves halted, but by the middle of 2013, the same officers were investigating Stevens for his drug activity. TrialTr.I_85:21–86:1. At that time, Stevens sold cocaine and crack cocaine, which started earlier in the year at Mark Gordon's Mill Street apartment, where Stevens stayed for several months as a guest. TrialTr.I_86:5–10; TrialTr.II_4:24–5:18. During Stevens' stay at Gordon's apartment, drug users would frequent the apartment to purchase crack cocaine from Stevens. TrialTr.II_5:17–25, 75:11–25. Stevens would collect the money from users and either provide the crack cocaine immediately or replenish his own supply while his customers waited and provide it once he returned. TrialTr.II_6:5–13, 76:3–7. One of these users, Donald Bock, went to the house to buy crack cocaine on several occasions. TrialTr.II_26:3–27:22, 82:16–83:18. According to Bock, "I would tell him [Stevens] what I wanted and he would go get it." TrialTr.II_27:3–5. To keep up with this demand, Stevens would "go get" the crack or powder cocaine from Musgraves' house on Sycamore Street, with Gordon as his driver on three of those occasions. TrialTr.II_7:15–9:22, 76:8–77:9, 78:25–79:15. Stevens would then return and dispense the crack to his waiting customers at Gordon's apartment, or, if he bought powder cocaine, cook it in Gordon's kitchen before selling it to his customers. TrialTr.II_9:7–14, 76:25–77:11.

Although Bock predominantly provided money to purchase crack cocaine from Stevens at Gordon's apartment, he put up registered firearms he owned as collateral

for the drug on two occasions. TrialTr.II_25:7–23, 28:11–24, 84:3–87:18. The first occasion involved an Arsenal M7 carbine 7.62 caliber rifle for which Bock received "a gram to two grams" of crack cocaine from Stevens. TrialTr.II_25:17–23, 29:2–6, 84:3–12. Stevens stated, "He [Bock] called me. I was in Wood River and he said that he had--he was bringing his guns, he would trade guns to me if I would let him pawn it to me. I said yeah." Trial Tr.II_84:7–9. After receiving the gun as collateral in exchange, Stevens briefly kept it at Gordon's house. TrialTr.II_11:18–12:12, 85:8–11. On the second occasion, Bock wanted to use his H&K 40 caliber semi-automatic handgun as collateral. TrialTr.II_28:23–29:10, 36:6–11, 87:1–13. Stevens asked Musgraves if he was interested in trading a gun for crack cocaine. TrialTr.II_87:6–13. Musgraves agreed to look at Bock's handgun. TrialTr.II_87:6–13. To facilitate the transaction, Bock drove Stevens to Musgraves' house with the handgun, where Stevens then traded it for crack cocaine. TrialTr.II_29:11–30:17, 87:6–88:7. Stevens also stored the rifle at Musgraves' house as collateral for an earlier debt he owed to Musgraves. TrialTr.II_85:8–23. After Bock unsuccessfully attempted to retrieve the guns by paying back his debt to Stevens, Bock reported them stolen. TrialTr.II_30:25–33:23, 87:6–89:24.

Stevens left Gordon's house around this time and moved into Kenneth Boner's mother's house on Oscar Street, where he continued his drug operation with Musgraves. TrialTr.II_12:13–23, 79:17–81:22, 144:16–148:13. After Stevens' arrest on July 9, 2013, at the Oscar Street house, Stevens told officers that he never bought drugs from Musgraves and attempted to send a message to Musgraves regarding his

informant's identity. TrialTr.II_67:7–11; 92:6–14. Meanwhile, officers interviewed Boner regarding his involvement with Stevens. TrialTr.I_88:8, 89:11; TrialTr.II_150:10–151:8. According to Boner, Stevens' primary source for the drugs he sold at that time was Musgraves. TrialTr.I_94:22–95:17; TrialTr.II_147:25–153:19. Additionally, Boner stated that Musgraves travelled to the Oscar Street house on a few occasions in the black Nissan Altima tied to Musgraves' residence. TrialTr.I_94:22–95:17; TrialTr.II_147:25–153:19. He also identified Musgraves and Musgraves' house based on those events and detailed another drug exchange of Vicodin for cocaine in which he accompanied Stevens to Musgraves' house. TrialTr.I_90:19–95:17; TrialTr.II_147:25–153:19. Boner admitted to using drugs, but he did not have a criminal record at the time of the interview; he did not expect or receive payment for his cooperation; and he did not expect a reduction in any pending charges. TrialTr.II_143:13–144:2, 154:2–9, 162:1–8; Hr'gTr.(Feb. 6, 2015).

After the interview, Brantley typed up the affidavits for a search warrant for the residence of Musgraves based on the controlled buy and attempted controlled buy by Tisdale, along with the information given to them by Boner. TrialTr.I_101:16–102:8; Def.App. 95–100. Brantley consulted a prosecutor in drafting the affidavits. Hr'gTr.(Feb. 6, 2015). The affiants, both Brantley and Boner, appeared before the magistrate. *Id*. Based on the facts presented, the magistrate determined that probable cause existed to issue a search warrant on July 10, 2013. R.99; Def.App. 95–100; TrialTr.I_102:9–14. On July 12, 2013, the officers executed the search warrant at Musgraves' residence on Sycamore Street based on the good

faith belief that probable cause for the warrant was sufficient. *Id*. Items seized during the search included $443 in U.S. currency, three boxes containing 148 rounds of 9mm American Eagle brand ammunition, of which two rounds were missing, and Musgraves' state issued identification card in the dresser drawer in the southeast bedroom. TrialTr.I_103:14–113:17. As a felon, the police arrested Musgraves for possession of ammunition and took him to the Alton police station. TrialTr.III_75:11–76:14. Hr'gTr.(Feb. 6, 2015).

Prior to any interview of Musgraves, attorney Michele Berkel arrived at the police station and stated the she represented Musgraves. Hr'gTr.(Feb. 6, 2015). Berkel and the attorney for the government, AUSA Don Boyce, agreed that Musgraves could be interviewed pursuant to a standard proffer letter which would be provided later. *Id*. Musgraves made a proffer statement and agreed to assist the police in the investigation of illegal firearms and drugs. TrialTr.II_198:1–5; Hr'gTr.(Feb. 6, 2015). The officers made no offer regarding immunity for Musgraves, nor did they offer or enter into any confidential informant agreement because of Musgraves' lack of candor and cooperation as observed by the officers. Hr'gTr.(Feb. 6, 2015). The officers released Musgraves from custody on July 12, 2013, and Boyce sent a standard proffer letter to Berkel covering the discussion that day. Hr'gTr.(Feb. 6, 2015). Berkel sent the proffer letter back to Boyce. Hr'gTr.(Feb. 6, 2015); Gov.App.B. The fourth page of the proffer letter, the acknowledgement and agreement page, was missing, so Boyce attempted to contact Berkel about the missing page. *Id*. Berkel never responded to Boyce's question about the fourth page

and never called or otherwise notified Boyce that there was a problem with any term of the agreement. Hr'gTr.(Feb. 6, 2015).

Over the following few months, Musgraves made very little progress with helping the detectives find cases, prompting McCray to give Musgraves the choice to give them viable information or they would pursue prosecution for the pending charge. TrialTr.II_206:1–207:13. On November 17, 2013, Musgraves contacted McCray unsolicited and reported a man sitting in a car on his street in possession of a firearm and cocaine. TrialTr.III_3:11–9:3. The man, Jesse Smith, drunken and barely cognizant of his surroundings, returned to his car after visiting Musgraves' house with other guests earlier that morning. TrialTr.III_42:14–44:10. McCray told Musgraves to contact the police department. TrialTr.III_3:11–9:3. After that conversation, an individual called 911 about Smith from the same phone number used by Musgraves. TrialTr.II_211:22–216:1. The caller stated that the firearm was located under his seat and drugs were in the visor inside the vehicle. TrialTr.II_214:2–11. McCray later contacted the department to confirmed Smith's arrest and spoke with the assigned detective who stated Smith was initially unconscious. TrialTr.II_185:11–18; TrialTr.III_3:11–9:3. At the time, investigators observed powder cocaine above the visor inside the car and found crack cocaine in Smith's pocket. TrialTr.II_186:3–12. McCray then contacted Musgraves and informed him of the results of the search. TrialTr.III_3:11–9:3. Musgraves adamantly asserted that Smith possessed a firearm. *Id*. As a result, Brantley and McCray conducted a second search the vehicle for a weapon. TrialTr.III_9:2–14:2.

During the search, the officers used the electronic lever on the driver's seat to move the seat all the way forward. TrialTr.III_9:2–14:2. While doing so, a black H&K .40 caliber semi-automatic handgun became visible. *Id*. The officer noted the placement of the handgun pointed toward the inside of the vehicle and the position where the driver could not easily reach it from either under or behind the seat. *Id*. An inquiry by McCray revealed that Bock reported the handgun stolen along with a rifle, described the as an Arsenal M7 carbine 7.62 caliber rifle. TrialTr.III_14:4–16:7, 18:2–21:2. McCray then recalled Stevens' proffer where he stated that he traded crack cocaine for two similar firearms with Musgraves. TrialTr.III_3:2–10. McCray met with Bock and he admitted that he traded the firearms for crack cocaine. TrialTr.III_18:2–21:2. The officer informed the Madison County State's Attorney Office of the information and requested that charges be dropped against Smith due to conflicting information. TrialTr.III_21:8–15.

On June 17, 2014, the government charged Musgraves with: (1) maintaining of a drug-involved premises near a school; (2) conspiracy to distribute cocaine; (3) felon in possession of ammunition; (4); felon in possession of a firearm; and (5) distribution of cocaine near a school. R.41. Musgraves filed a motion to suppress and bar his statements made on November 17, 2013 to McCray concerning Smith under Federal Rule of Evidence 410 and *Miranda v. Arizona*, 384 U.S. 436 (1966). R.60. Musgraves also filed a motion to suppress the evidence found during the search of Musgraves' home based on insufficient probable cause contained in the affidavits

supporting the search warrant. R.61. The district court denied both motions. R.91. Regarding the probable cause for the search warrant, the court stated:

> Having carefully reviewed the record before it, this Court concludes that Judge Hackett had a substantial basis on which to conclude that a search of the residence would detect evidence of criminal activity. Probable cause supported the issuance of the warrant. Assuming *arguendo* that probable cause was absent, *Leon*'s good faith exception to the exclusionary rule applies. This case does not fall within any of the situations precluding application of *Leon* -- the issuing judge totally abandoning his neutral role, the affidavit being utterly barebones such that reliance on it is unreasonable, or the police officer being dishonest or reckless in preparing the affidavits supporting the warrant.

Id. In denying the motion to suppress the November 17, 2013 statements, the court said:

> Plainly, Musgraves was not subject to custodial interrogation when he made the November 17, 2013 statements to Detective McCray. For *Miranda's* safeguards to apply, a suspect must be "in custody" *and* "subject to interrogation." *United States v. Johnson*, 680 F.3d 966, 973-74 (7th Cir.), *cert. denied,* 133 S. Ct. 672 (2012). Musgraves was neither. *Miranda* does not bar admission of those statements. Nor does Federal Rule of Evidence 410 bar the November 17, 2013 statements. Rule 410(a)(4) protects a defendant's statements made during plea discussions with an attorney for the prosecuting authority. *United States v. Olson*, 450 F.3d 655, 680 (7th Cir. 2006) ("Statements made in the course of plea discussions with a prosecutor generally are inadmissible under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410."). Here, Defendant has not identified any statement made on November 17, 2013 during plea discussions with an attorney for the prosecuting authority. Defendant texted, called, and talked to a police officer.

Id.

After these motions were denied, the case proceeded to trial and the government presented the testimony of Sergeant Brantley and Officer McCray, as well as the testimony of Smith, Stevens, Bock, Boner, and Gordon. The latter four

testified as to their involvement with Musgraves as a supplier of cocaine and crack cocaine, along with the origins and traceability of the handgun that ended up in Smith's car. Smith testified that the cocaine found in the visor and weapon found under the seat in his car was not his. TrialTr.III_136:11–20. At the close of evidence for the government, the defense made a motion under Federal Rule of Criminal Procedure 29 for Judgment of Acquittal, questioning the sufficiency of the evidence. TrialTr.III_77:13–16. The court denied the motion. TrialTr.III_79:7–8. After the defense rested its case, the court gave the jury instructions, including a buyer-seller instruction. R.106-2 at 6; Gov.App. C. The jury found Musgraves guilty of all five counts. R.107–13.

During sentencing, Musgraves objected to the court's conclusion that he qualified as a career offender under the U.S. Sentencing Guidelines. R.131. Musgraves had two prior felony convictions at the time of sentencing, a February 2, 2000, conviction for Unlawful Delivery of a Controlled Substance and a September 25, 2006, conviction for Unlawful Possession with Intent to Distribute a Controlled Substance. R.150. Those predicate offenses, combined with the offense in the instant case of Distribution of Cocaine Near a School, qualified Musgraves as a career offender. R.150. Musgraves claimed the 2006 conviction used for that sentencing enhancement was insufficiently reliable to serve as a predicate offense. R.131. The state court convicted Musgraves of a Class X felony and sentenced Musgraves to twenty five months, even though the minimum was nine years. Gov.App. D. As the district court noted, Musgraves plead guilty to unlawfully possessing with the intent

to deliver a controlled substance for the offense in question. R.170. The district court agreed with the government's argument, stating:

> I think it is a predicate for career offender because one of two things had to happen. One is the [local] judge gave an illegal sentence, based upon what should have been a mandatory minimum nine-year, and that would be a drug trafficking offense, it would be a felony, and punishment of more than a year. So that would be an appropriate predicate. Or, backing in to the sentence that he did give, the amount of drug quantity necessary to get there would also be a predicate offense as a distribution amount. . . . So I think, clearly, there is a prior predicate offense that meets the requirements of the career offender act, and the objection as to Paragraph 67 is overruled.

Id.

After the district court determined that Musgraves qualified as a career offender and determined the correct Guideline range, the court properly employed the 18 U.S.C. § 3553 factors to fashion a just sentence. R.170. First, the court considered the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense. According to the court:

> We have severe unemployment, we have high crime, and we have individuals who are addicted to drugs who cannot maintain employment and who cannot lead productive lives because of pervasiveness of drugs. [Musgraves] distributed cocaine, including crack cocaine. Those are serious drugs, and very concerning is the fact that he had firearms and ammunition. Drugs and guns combine to create violence. So this is a serious series of offenses in this case that exacerbates a serious crime problem that we have in this particular community.

Id. Next, the court considered the ability to deter criminal conduct based on the sentence, which it considered in turn with the ability of the sentence to protect the public from future crimes. *Id*. The court stated:

> In terms of the history and characteristics of the defendant, defense counsel called five witnesses to testify as to the defendant's character, and I listened to all of them, and there is no question that they believe that he is a good brother, son, father, and that he deserves a second chance. I heard that at least three times. The problem with that request is that he has had six second chances. This is his seventh case. He first started a long time ago with his first case. And he was given a second chance after that. And as I look at the presentence report, I note that he got his first chance back at age 20, in 1994, when there was an aggravated discharge of a firearm in Madison County. He didn't get any points for that. He was placed on probation. But that didn't get his attention. And then in 1997, at age 23, unlawful possession of a weapon by a previously convicted felon. That didn't get his attention. He was given another chance. He is now on his third. In 1999, it involved a possession of weapons by a felon; thirty months of probation. That didn't get his attention. He was given another chance. Paragraph 65, in 2000, unlawful delivery of a controlled substance; eight years of imprisonment, but 98 days' credit for time served. After that, he was given another chance. We are on the fifth one now. July 2002, unlawful possession of a controlled substance; three years of imprisonment, credit for 98 days' time served. Then he got a sixth chance. September 2006, unlawful possession with intent to deliver. He got 25 months of periodic imprisonment. And there were various other charges in between. So he's had all the second chances that he's entitled to and third chances and fourth chances and fifth chances and sixth chances.

Id. The court also noted the fact that Musgraves framed Smith and characterized him as likely to recidivate. *Id*. The court concluded, "So when I look at all of that and I divorce myself from the career criminal status, I believe an appropriate sentence in this case would have been that of 240 months of incarceration. Anything less than that, I think, would not meet the goals and purposes of 18 U.S.C. 3553." *Id*. The

sentence was less than the Guideline range of 262 to 327 months and less than the 300 month sentence recommended by the government. *Id*.

SUMMARY OF ARGUMENTS

On appeal, Musgraves introduced five issues to this Court, all of which lack merit.

First, the district court did not commit error in finding that sufficient evidence existed to support his conviction for conspiracy to distribute cocaine. The government presented evidence of a conspiracy by establishing that Musgraves fronted quantities of cocaine to Stevens that exceeded his own personal consumption; Musgraves held a gun for Stevens as collateral, Musgraves advised Stevens on how conduct his business; and Musgraves and Stevens agreed to warn each other of future threats stemming from law enforcement authorities.

The district court properly found that sufficient evidence existed to support his conviction for the unlawful possession of a firearm by a convicted felon and distribution of cocaine. The government presented evidence of possession of the firearm by placing Musgraves at the center of an exchange of his cocaine for the weapon facilitated by Stevens. Police later found this weapon in a car that was mere feet from Musgraves' residence and positioned outside of the reach of the incapacitated occupant. The government also presented evidence to support the distribution of cocaine conviction by establishing Musgraves as a dealer of cocaine, showing the placement of cocaine in that same car in an easily accessible location preventing disturbance of the incapacitated occupant, and identifying Musgraves as the 911 caller that pointed police directly to where the cocaine was located.

The district court properly denied Musgraves' motion to suppress and bar the statements that he made on November 17, 2013. The government presented evidence in the hearing on the matter that Musgraves' proffer letter did not extend beyond the meeting on July 12, 2013. Additionally, the government presented evidence that Mugraves and his attorney did not fully execute the proffer letter despite an attempt to follow up with them by the AUSA Boyce. Furthermore, the government presented evidence that the constitutional protections proscribed in *Miranda v. Arizona* did not apply due to the non-custodial nature of Musgraves' statements, nor did the circumstances of these events fit the scenarios described in Federal Rule of Criminal Procedure 11(f).

The district court properly found that the search warrant for Musgraves' house was supported by probable cause. The government presented evidence in the motion hearing showing that the affidavits in support of the search warrant, when combined, contained sufficient facts to establish probable cause under the totality of the circumstances. Further, even if the evidence is lacking to support probable cause for the search warrant, the government presented evidence that the officer who obtained the warrant reasonably relied on it in good faith.

Finally, the district court properly found Musgraves to be a career offender under the career offender sentencing guideline enhancement, U.S.S.G. §4B1.1. The government presented evidence that two of Musgraves' prior convictions were predicate convictions at the time of sentencing, and that those predicates, combined with the conviction in the instant case of Distribution of Cocaine Near a School,

qualified Musgraves as a career offender. Also, the Sentencing Guidelines are only advisory and in this case, the court correctly used the 18 U.S.C. 3553(a) factors after determining the appropriate Guideline range. In the alternative, even if the district court committed error in determining Musgraves' correct sentencing range, the error was harmless and the sentence imposed was reasonable.

ARGUMENTS

I. The evidence was sufficient for any rational trier of fact to have found Musgraves was a member of the conspiracy to distribute cocaine.

INTRODUCTION

The first issue on appeal is whether the evidence was sufficient for any rational trier of fact to have found Musgraves was a member of the conspiracy to distribute cocaine when the evidence is viewed in the light most favorable to the government. Musgraves argues that the evidence presented by the government established a mere buyer–seller agreement instead of a conspiracy to distribute controlled substances.

STANDARD OF REVIEW

Where a defendant has made a Rule 29 motion at the close of evidence, this Court will uphold a jury's verdict against a sufficiency of the evidence standard if a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Melendez*, 401 F.3d 851, 854 (7th Cir. 2005). This Court will only overturn a verdict if the record contains no evidence, no matter how it is weighed, from which the jury could find guilt beyond a reasonable doubt. *Id.* In conducting this analysis, this Court views all evidence in the light most favorable to the government and does not reweigh evidence anew or second guess credibility determinations that the jury made unless "it was physically impossible for the

witness to observe that which he claims occurred, or impossible under the laws of nature for the occurrence to have taken place at all." *United States v. Gonzalez*, 737 F.3d 1163, 1168 (7th Cir. 2013); *Melendez*, 401 F.3d at 854; *United States v. Williams*, 216 F.3d 611, 614 (7th Cir. 2000). The appellant's burden when challenging the sufficiency of the evidence is "nearly insurmountable." *Melendez*, 401 F.3d at 854.

ANALYSIS

Under 21 U.S.C. § 846, to support a conviction for conspiracy, the government must prove that two or more people agreed to commit an unlawful act and that the defendant knowingly and intentionally joined the agreement. *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir. 2010). This Court has distinguished between a defendant's participation in a conspiracy and a defendant's participation in a mere buyer–seller relationship. *United States v. Sullivan,* 903 F.2d 1093, 1098-99 (7th Cir. 1990). This distinction lies in the nature of the agreement that is required to establish a conspiracy.

A mere buyer–seller agreement simply involves a buyer and a seller agreeing to exchange money for drugs. *See United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1993). That type of agreement cannot sustain a conspiracy conviction because the mere buyer-seller agreement constitutes the substantive crime of distribution and involves no separate criminal object. *Id.* A conspiracy, on the other hand, requires an agreement between the buyer and the seller to distribute the drugs. *United States v. Avila*, 557 F.3d 809, 816 (7th Cir. 2009). The agreement between the

buyer and seller can be inferred by the jury from the parties' course of dealings, so an explicit agreement is not necessary. *United States v. Sanchez,* 251 F.3d 598, 602 (7th Cir. 2001). To support this inference, "the government need not present any direct evidence of the agreement; circumstantial evidence alone will suffice." *Avila*, 557 F.3d at 815–16.

The following examples of circumstantial evidence may distinguish a conspiracy from a mere buyer–seller relationship: (1) sales on credit or consignment; (2) an agreement to look for other customers; (3) a payment of commission on sales; (4) an indication that one party advised the other on the conduct of the other's business; and (5) an agreement to warn of future threats to each other's business stemming from competitors or law enforcement authorities. *United States v. Johnson*, 592 F.3d 749, 755-56 (7th Cir. 2010). As the buyer–seller doctrine has evolved, this Court has elevated proof of sales on credit to become the most significant of these factors. *See Johnson*, 592 F.3d 749, 755-56 (7th Cir. 2010); *United States v. Kincannon*, 567 F.3d 893, 897 (7th Cir. 2009); *United States v. Colon*, 549 F.3d 565, 568 (7th Cir. 2008) ("[w]ith fronting, the seller becomes the buyer's creditor, adding a dimension to the relationship that goes beyond a spot sale for cash.")

This Court interpreted the strong relationship between evidence of fronting and proof of a conspiracy in *United States v. Rea*. 621 F.3d 595, 609 (7th Cir. 2010). In the *Rea* case, Ivan Rea delivered methamphetamine to Jose Medina from October 2005 through February 2007. *Id*. at 608. Although the evidence did not establish how

much of this methamphetamine Rea fronted to Medina, the evidence demonstrated that Rea had fronted methamphetamine to Medina on multiple occasions as shown by Medina's debt to Rea. *Id.* at 609. Based upon the fronting of methamphetamine on repeated occasions, this Court found that the relationship between Rea and Medina exceeded a buyer–seller relationship and constituted a conspiracy. *Id*.

Based on the inclusion of additional factors that distinguish a buyer–seller relationship from a conspiracy, the instant case presents stronger evidence of a conspiracy than in *Rea*. First, similar to the relationship between Rea and Medina, Musgraves fronted cocaine to Stevens as evidenced by Stevens' statement that he owed money to Musgraves for cocaine and Musgraves keeping Stevens' gun as collateral. *Rea*, 621 F.3d at 608; Trial Tr.II_85:8–23. Musgraves undoubtedly knew that Stevens was not using all the cocaine himself because Stevens brought over Vicodin and a gun to trade on two separate occasions, got rides to Musgraves house from users several times, and convinced Musgraves to meet him at an unfamiliar residence at least two times to replenish his supply of cocaine. TrialTr.I_90:19–95:17; TrialTr.II_7:15–9:22, 76:8–85:23, 147:25–153:19. Taken together, these indicia point towards drug sales, not just personal use. Additionally, oftentimes Stevens would gather money from users to bring to Musgraves' house for cocaine. TrialTr.II_6:5–13, 76:3–7. Contrary to the contention made in Musgraves' brief, these were not just repeated transactions and resales of drugs by Stevens to his own customers. Def.Br. 20. This was an understood system of providing cocaine, sometimes up front and other times as a direct sale, to Stevens because of his

customer base, and not the purely "quid pro quo" transactions characterized by Musgraves. *Id*. Musgraves provided cocaine to Stevens so that he could indirectly distribute to Stevens' clientele.

Second, Stevens and Musgraves advised each other on the conduct of their businesses and exhibited a level of trust and confidence with each other outside of the bounds of the normal buyer–seller relationship. *Johnson*, 592 F.3d at 755-56. In each case where someone drove Stevens to Musgraves' house for cocaine, Stevens entered the house alone. TrialTr.I_90:19–95:17; TrialTr.II_7:15–9:22, 76:8–85:23, 147:25–153:19. This fact demonstrates that Musgraves and Stevens had rules with each other regarding anonymity in the joint venture of selling drugs and therefore advised each other on how to conduct sales within the joint venture. This level of trust and understanding established within the joint venture is further bolstered by the fact that Stevens stored his own illegally traded gun at Musgraves' house as collateral despite the fact that Musgraves did not like guns in his house. TrialTr.II_85:1–23. In fact, as a convicted felon, it was illegal for Musgraves to have any firearms in his house and, yet, Musgraves was close enough to Stevens to risk this exposure. TrialTr.III_75:11–76:14. Although sufficient reasons existed for Musgraves to avoid guns, he allowed them into his home because he trusted Stevens and they agreed to help one another. TrialTr.II_85:1–23; TrialTr.III_75:11–76:14. Similarly, Stevens trusted Musgraves to hold on to his gun as collateral. TrialTr.II_85:8–23. Moreover, Musgraves' action of fronting cocaine to Stevens,

although a factor in itself, also shows advisement, coordination, confidence, and trust in the joint venture.

The level of trust and confidence shown in this relationship is nonexistent in the more common buyer–seller relationships that Musgraves asserts is the case here. In those relationships, sellers will work on corners to service their buyers or meet the buyer in nondescript areas away from their residence to keep the transactions discreet. Similarly, buyers do not ask sellers in such a clandestine and volatile business to hold valuables for them. Here, Musgraves allowed Stevens into his house for the majority of the transactions and stored an incriminating item for Stevens at his house, while Stevens trusted Musgraves with a valuable gun. TrialTr.I_90:19–95:17; TrialTr.II_7:15–9:22, 76:8–85:23, 147:25–153:19. Thus, their relationship showed a level of trust, understanding, and cooperation in the joint venture far outside of the realm of the normal buyer seller relationship.

Lastly, an agreement existed between Musgraves and Stevens to warn of future threats from competitors or law enforcement authorities. *Johnson*, 592 F.3d at 755-56. Simply stated, Stevens chased Tisdale off from his second attempted buy from Musgraves' front lawn in order to protect Musgraves because he knew that Tisdale was an informant. TrialTr.I_77:1–82:7; TrialTr.II_72:10–74:18. During the attempted buy, Stevens said, "I don't fucking sell drugs. He don't sell drugs, you don't sell drugs, Rom don't sell drugs. Beat it dude. Beat it." TrialTr.I_77:1–78:13; TrialTr.II_72:10–74:18. Stevens' words clarify not only the attempt to protect himself, but also his supplier, Musgraves, and the joint venture of selling drugs as a

whole. Solidifying Stevens' intentions, Musgraves confirmed the mutual understanding of protection between himself and Stevens, and furthermore, their business association, a few minutes later when he called Tisdale to explain the situation. TrialTr.I_82:9–85:12. In that conversation with Tisdale, Musgraves stated, "I mean **my man** should know better than that shit." TrialTr.I_82:9–85:12. Even after his arrest, Stevens attempted to protect Musgraves as part of their mutual understanding of protection. TrialTr.II_67:7–11; 92:6–14. Stevens denied that he bought drugs from Musgraves and tried to alert Musgraves to the informant that set him up so that he wouldn't make the same mistake that Stevens did. TrialTr.II_67:7–11, 92:6–14. Clearly, this series of interactions between Musgraves and Stevens cannot be construed as in passing and void of understanding about protection from the possible ramifications of the overall endeavor.

Additionally, the government gave every opportunity to the jury to consider Musgraves' relationship with Stevens as buyer–seller, including giving a buyer–seller jury instruction that laid out the difference between a buyer–seller relationship and a conspiratorial relationship. R.106-2 at 6; Gov.App. C Notwithstanding this fact, the jury rightfully found Musgraves guilty of conspiracy to distribute cocaine. R.107–13. Considering this evidence, the government established the existence of a conspiracy such that a rational trier of fact could have found Musgraves guilty of conspiracy beyond a reasonable doubt. *Melendez*, 401 F.3d at 854.

II. The evidence was sufficient for any rational trier of fact to have found Musgraves possessed a firearm and distributed cocaine.

INTRODUCTION

The second issue on appeal is whether the evidence was sufficient for any rational trier of fact to have found Musgraves possessed a firearm and distributed cocaine near a school when the evidence is viewed in the light most favorable to the government. Musgraves argues that the evidence presented by the government did not establish possession of the firearm or cocaine found in Smith's vehicle.

STANDARD OF REVIEW

The standard is the same as that of the previous issue.

ANALYSIS

Under Title 18, United States Code, Section 922(g)(1), the government must show (1) defendant was previously convicted of a felony, that (2) defendant knowingly thereafter possessed a firearm, and that (3) such possession affected interstate commerce. Under Title 21, United States Code, Section 841 (a)(1), the government must show (1) the defendant knowingly or intentionally distributed or possessed with the intent to distribute (2) a substance he knew to be a controlled substance. Musgraves challenges the sufficiency of the evidence with respect to only the element of possession. Def.Br. 23, 29–30. As this Court has previously explained, possession may be actual or constructive and may be exclusive or joint. *United States v. Garrett*, 903 F.2d 1105, 1110 (7th Cir. 1990).

Actual possession is the direct physical control over an object. *United States v. Lane*, 267 F.3d 715, 717 (7th Cir. 2001). Constructive possession exists when a person does not have direct physical control over an object, but has the power and intent to exercise control of it. *See United States v. Merritt*, 361 F.3d 1005, 1044 (7th Cir. 2004). In constructive possession cases, if a defendant has exclusive control of the premises where the firearm or drugs was discovered, knowledge, dominion, and control are reasonably inferred. *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012), *United States v. Morris,* 576 F.3d 661, 668 (7th Cir. 2009). When a defendant is in a situation of joint occupancy, the government must further prove direct or circumstantial evidence showing a nexus, or substantial connection, between the defendant and the relevant item. *Griffin*, 684 F.3d at 695, *Morris,* 576 F.3d at 668. "Mere proximity to the [item], mere presence on the property where it is located, or mere association, without more, with the person who does control [it] or property on which it is found, is insufficient to support a finding of possession." *United States v. Katz*, 582 F.3d 749, 752 (7th Cir. 2009); *United States v. Irby*, 558 F.3d 651, 654 (7th Cir. 2009).

This nexus is satisfied by "proximity coupled with evidence of some other factor—including connection with [an impermissible item], proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise is enough to sustain a guilty verdict." *Morris,* 576 F.3d at 668. In looking at evidence of guilt, it is not necessary that such evidence remove every reasonable hypothesis that tends to indicate the innocence of the defendant. *Garrett*, 903 F.2d at

1110. The trier of fact may draw reasonable inferences from circumstantial evidence and base its finding of guilt upon circumstantial evidence alone. *United States v. Starks*, 309 F.3d 1017, 1021–22 (7th Cir. 2002), *Garrett*, 903 F.2d at 1110.

Here, a reasonable jury could have found that Musgraves was in actual possession of the firearm alone based on the evidence presented by the government at trial. The government presented several witnesses that each corroborated Musgraves' eventual possession of the firearm. Stevens testified that one of his customers, Bock, wanted to trade the H&K 40 semi-automatic caliber handgun as collateral for crack cocaine. TrialTr.II_28:23–29:10, 36:6–11, 87:1–13. According to both Stevens and Bock, Bock drove Stevens to Musgraves house with the firearm, and Stevens entered to house with the firearm. TrialTr.II_28:23–29:10, 36:6–11, 87:1–13. Upon returning to the car, Bock stated that Stevens no longer had the weapon and instead had crack cocaine, confirming the trade to Musgraves. TrialTr.II_28:23–29:10, 36:6–11. Stevens confirmed that exchange. TrialTr.II_87:1–13. Gordon also confirmed seeing Bock's rifle in Stevens' possession, adding another layer of validity to the construction of events. TrialTr.II_11:18–12:12. Bock later reported the handgun stolen and presented the papers in district court confirming his previous possession and the serial number before the trade. TrialTr.II_34:9–35:2. All of this evidence placed Musgraves with the firearm. Additionally, police found ammunition during a search of Musgraves' residence. TrialTr.I_103:14–113:17.

Musgraves relies on *United States v. Thomas*, 321 F.3d 627 to show that elapsed time nullifies or weakens evidence of Musgraves' actual possession of the

firearm. Def.Br. 25. In contrast to Musgraves' assertion, mere holding of a firearm establishes possession as a matter of law in the context of a charge under 18 U.S.C. § 922(g)(1) without regard to timeframe. *Lane*, 267 F.3d at 719. In fact, in *Lane*, the government successfully hinged its case on direct evidence in the form of witness testimony to prove actual possession of a firearm a month or more before an arrest was even conducted. *Id.* at 716–719. Here, using the threshold for actual possession established in *Lane*, a reasonable jury could have found that Musgraves was in actual possession of the firearm. *Id.* As in *Lane*, direct evidence in the form of witness testimony from Stevens, along with other witnesses bolstering the series of events, and direct evidence of his possession of ammunition at a later date, led to a reasonable inference that Musgraves took possession of the gun in a trade for crack cocaine. TrialTr.I_103:14–113:17; TrialTr.II_11:18–12:12, 28:23–29:10, 36:6–11, 85:3–6, 87:1–13. This goes beyond the mere touching standard that this Court espoused in *Lane*, with the government proving and the jury agreeing that Musgraves handled the firearm and took it into his home, not just touching it. Musgraves' argument also attacks the credibility of the witnesses. The credibility of witnesses, however, is within the exclusive province of the members of the jury who saw and heard the witnesses testify and in this case and later found that Musgraves handled the weapon and possessed it in his home as part of a deal for crack cocaine. *See, e.g., United States v. Ray*, 238 F.3d 828, 834 (7th Cir. 2001). Furthermore, reweighing evidence, despite Musgraves' desire to do so, is not within the power of

this Court when sufficiency of the evidence is challenged. *Gonzalez*, 737 F.3d 1163, 1168 (7th Cir. 2013).

Additionally, a reasonable jury could have found that Musgraves was in constructive possession of the firearm and that he distributed the cocaine in the visor based on the evidence presented by the government at trial. In joint occupancy cases, although proximity is required in showing the nexus between Musgraves and contraband, it is not dispositive in determining constructive possession. *Griffin*, 684 F.3d at 696. Proximity must be coupled with more evidence, such as a connection with the contraband, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise is enough to sustain a guilty verdict. *Morris,* 576 F.3d at 668.

Musgraves had a clear connection with the firearm and his motive details how the firearm and cocaine ended up in Smith's car. McCray gave Musgraves the choice to help him or face charges stemming from the ammunition. TrialTr.II_206:1–207:13. Two months later, Musgraves texted McCray with the information that a drunken Smith possessed a firearm and drugs. TrialTr.II_185:11–18, TrialTr.III_3:11–9:3, 42:14–44:10. Afterwards, 911 received a call from Musgraves' number with the exact location of the gun and cocaine in the car. TrialTr.II_211:22–216:1. The police search revealed the cocaine above the visor, but not the firearm. TrialTr.II_186:3–12, TrialTr.III_3:11–9:3. Time was running out to get consideration on his charge, so Musgraves urged McCray to search the vehicle. TrialTr.III_3:11–14:2. During that

search, McCray and Brantley found the firearm that he later linked to Musgraves. TrialTr.III_3:11–14:2.

As McCray later realized, and the jury inferred, Musgraves planted his own cocaine and gun in the vehicle. Smith was not aware of the gun and it was unreachable by him under the seat. TrialTr.III_136:11–20. The cocaine was above the visor of the driver's seat, an easily accessible location to Musgraves without disturbing Smith, and separate from the cocaine located on Smith's person. The placement of the cocaine was also conspicuous to police during their routine search, as though there was no attempt to hide it and Musgraves stated the exact place where the cocaine was located. Smith also denied any knowledge of the cocaine and could not recall whether he locked the doors to the vehicle after he entered it. TrialTr.III_4:2–12, 50:24–51:2, 136:11–20. Dissatisfied the police only found the cocaine he planted, Musgraves encouraged detective McCray to search the car again, certain that a firearm was there because he placed it there himself to reduce the pressure placed on him by McCray.

The jury is encouraged to use common sense to draw reasonable inferences from the evidence, and in this case the jury did so. *Starks*, 309 F.3d at 1021–22, *Garrett*, 903 F.2d at 1110. Musgraves was in a precarious situation as the result of his own criminal activity and took advantage of Smith's vulnerability to insulate himself from prosecution. Conflating the concepts of sufficiency of the evidence and construction of the evidence, Musgraves argues that the evidence could have supported a different conclusion regarding possession of the firearm. That may be

true, but the jury was entitled to "choose among various reasonable constructions of the evidence." *See United States v. Harris*, 271 F.3d 690, 703-04 (7th Cir. 2001). That the construction of the evidence the jury chose was not agreeable to Musgraves does not make it incorrect, suspect, or legally deficient. Rather, the construction of the evidence the jury chose was reasonable when all of it is considered. Accordingly, the district court did not commit any error in finding that Musgraves possessed the firearm and distributed the cocaine found in the car.

III. There was no error in the district court's denial of Musgraves' motion to suppress statements that Musgraves made on November 17, 2013.

INTRODUCTION

The third issue on appeal is whether the district court erred in denying Musgraves' motion to suppress and bar statements that Musgraves made on November 17, 2013. Musgraves asks this Court to review the district court's denial of his motion to suppress and bar these "proffer" statements, arguing that proffer discussions held on July 12, 2013 equated to a verbal proffer contract. Flowing from that argument, Musgraves asserts that the alleged agreement extended to the statements Musgrave made on November 17, 2013. Next, Musgraves claims that the November 17, 2013, statements were not freely made because of the possibility of prosecution communicated to him by McCray and, therefore, the statements should have been suppressed.

STANDARD OF REVIEW

This Court reviews questions of law in a district court's ruling on a motion to suppress statements *de novo*, but reviews factual findings for clear error. *United States v. Greve*, 490 F.3d 566, 571 (7th Cir. 2007). In this case, to reverse the district court's denial of the motion to bar proffer statements, this Court must find the district court's determination to be clearly erroneous because it was based on whether an oral agreement existed, which is a factual determination based on the perceived credibility of witnesses at the suppression hearing. *United States v. Biggs*, 491 F.3d 616, 621 (7th Cir. 2007); *Greve*, 490 F.3d at 571; *United States v. Schmidt*,

760 F.2d 828, 836 (7th Cir. 1985). Along the same lines, "[n]ew arguments or theories not raised in the district court . . . are forfeited and reviewed for plain error." *United States v. Walsh*, 723 F.3d 802, 807 (7th Cir. 2013).

ANALYSIS

Federal Rule of Criminal Procedure 11(f) states that the admissibility of plea discussions and related statements is governed by Federal Rule of Evidence 410. Federal Rule of Evidence 410(a) prohibits the use of certain evidence against a defendant, including "a statement made during the plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or . . . resulted in a later-withdrawn guilty plea." Under *Miranda*, the prosecution may not use statements obtained through custodial interrogation of the defendant without requisite procedural safeguards used to protect the defendant from self-incrimination." *Miranda v. Arizona,* 384 U.S. at 466.

First, as agreed in the proffer letter, AUSA Boyce did not use Musgraves' statements from July 12, 2013 at trial. As the proffer letter itself states, and the government acknowledged, the "proffer or discussion," was "off–the–record." That letter did not, however, discuss immunity or extend outside of the bounds of the discussions that day as Musgrave asserts. The letter itself clearly refers to a one–time grant of protection from statements made by Musgraves to the officers. Law enforcement typically use proffer letters to determine if they will offer the individual providing a statement a confidential informant agreement to work in the future. The officers determined that Musgraves did not appear to be completely forthright, so

the officers decided not to extend a confidential informant agreement to him. Hr'gTr.(Feb. 6, 2015). The officers did not communicate any grant of immunity to Musgraves, either. Hr'gTr.(Feb. 6, 2015). Simply stated, there is nothing from the interactions of AUSA Boyce and the officers with Musgraves on July 12, 2013, and in the following days that can be construed extending immunity to Musgraves into the indefinite future.

Second, the discussions that were conducted during Musgraves' July 12, 2013, meeting with police and AUSA Boyce may not have even resulted in a valid proffer agreement for the statements made that day. On that date, Berkel, as Musgraves' attorney, discussed a limited immunity deal with Boyce through a standard proffer letter, but no formal written agreement was memorialized. Hr'gTr.(Feb. 6, 2015). AUSA Boyce, as promised, sent Berkel the standard proffer letter. *Id*. Berkel sent back an incomplete agreement because the acknowledgement and agreement page was missing. *Id*. In good faith, Boyce emailed Berkel about the incomplete proffer letter, but Berkel never responded about Musgraves' failure to sign the letter. Therefore, an argument can be made that the July 12, 2013, statement was not covered by any agreement because Musgraves failed to execute the agreement. Regardless, during Musgraves' interview on July 12, 2013, officers did not communicate any grant of immunity or extend a confidential informant agreement to Musgraves. *Id*. As a result, there can be no reasonable expectation of future immunity.

It is also important to note that the contract and agency principles that Musgraves attempts to use in his brief to argue that a proffer agreement existed is a new argument not raised in his original motion to suppress the alleged "proffer statements." R.60. Because this argument was not raised at the district court level, it is forfeited and reviewed for plain error. *Walsh*, 723 F.3d at 807. It is well established that "the plain error standard allows appellate courts to correct only particularly egregious errors for the purpose of preventing a miscarriage of justice." *United States v. Conley,* 291 F.3d 464, 470 (7th Cir. 2002). For an error to be "plain," it must be of such an obvious nature that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady,* 456 U.S. 152, 163 (1982). "It cannot be subtle, arcane, debatable, or factually complicated. It must be—plain; but it needn't be blatant." *United States v. Caputo,* 978 F.2d 972, 975 (7th Cir. 1992).

The district court did not commit an "egregious error" when it failed to consider and apply contract and agency principles during its decision on this motion. *Conley,* 291 F.3d at 470. If argued, the contention here would be that, although Musgraves' defense counsel missed this argument in its brief supporting the motion, it was plainly obvious that the district court should have looked into extending the language of a proffer letter or terms of the proffer letter through contract and agency principles to statements made months after July 12, 2013, statements. R.60. Helping highlight the absurdity of this argument, Musgraves relies on a footnote in an Eighth Circuit case in support of his claim that Rule 11(e)(6)(D) applies to

discussions with law enforcement as well as discussions with government attorneys if the agents represent that they are working on behalf of the United States Attorney's Office. *See United States v. Millard,* 139 F.3d 1200, 1205 n. 4 (8th Cir.1998). In *Millard*, the law enforcement officer declared that he was working with an AUSA to offer a particular deal if the defendant cooperated. Contrasting *Millard*, the officers here made general statements to Musgraves that law enforcement commonly make, that "all will be well" if Musgraves cooperated. Hr'gTr.(Feb. 6, 2015). Additionally, the officers never offered immunity and Berkel spoke with AUSA Boyce directly, eliminating any possible confusion on the authority needed to make a deal in this case. *Id*.

Moreover, this Court has rejected the argument posited by Musgraves regarding *Millard* on several occasions. In *United States v. Springs,* 17 F.3d 192, 195 (7th Cir. 1994), this Court said that the defensive claim that a voluntary statement made to law enforcement is rendered inadmissible merely because it was made in the hope of obtaining leniency is preempted by the language "with an attorney for the government" that was added to Rule 11(e)(6)(D). *See United States v. Brumley*, 217 F.3d 905, 909-10 (7th Cir. 2000); *see also United States v. Lewis,* 117 F.3d 980, 984 (7th Cir. 1997). Based on the facts of this case, determining that an unsigned proffer letter and the discussions surrounding it extended beyond the bounds of the language of the proposed agreement based on attenuated contract and agency principles would require a tortured interpretation of the words plain, obvious, and uncomplicated. Therefore, the district court did not commit plain error by failing to

suppress Mugraves' statements on this basis and the argument should not be considered by this Court.

Furthermore, Musgraves was not in custody or interrogated at any time during the November 17, 2013, statements. Musgraves made a series of unsolicited statements to McCray via text messages that were later used against him by the government at trial. As the district court noted, "In order for *Miranda*'s safeguards to apply, a suspect must be in 'custody' and subject to 'interrogation.'" *United States v. Johnson*, 680 F.3d 966, 975 (7th Cir. 2012); R. 91. When Musgraves made the statements to McCray on November 17, 2013, he was sending text messages and making telephone calls voluntarily in his own home. These statements were freely given outside of a custodial setting, so *Miranda* safeguards do not apply. *United States v. Thompson*, 496 F.3d 807, 810-11 (7th Cir. 2007). Citing *United States v. Cahill*, Musgraves further contends that the statement were involuntary because he *believed* that he possessed immunity from prosecution, however, "[a] defendant's perception that he is providing testimony under a grant of immunity does not make his statement involuntary, unless the perception was reasonable." 920 F.2d at 427. In *Cahill*, law enforcement told the individual that he was a possible defendant and no offer of immunity was ever made. *Id*. Afterwards, the defendant actually signed a proffer agreement and the Court still found that the belief by the defendant that his statements made afterwards were immunized was unreasonable. *Id*. Here, not only was Musgraves informed that he was a possible defendant and an offer of immunity could not be extended, the proffer letter was also likely never completed.

Hr'gTr.(Feb. 6, 2015); Gov.App. B. Converse to Musgraves' claims, *Cahill* actually extends a determination of voluntariness beyond the facts of the case at hand. For these reasons, the district court did not err in denying Musgraves' motion to suppress and bar the statements.

IV. The district court did not err in its determination that probable cause existed for the issuance of the search warrant on Musgraves' home and, consequently, the denial of Musgraves' motion to suppress evidence.

INTRODUCTION

The fourth issue on appeal is whether the district court erred in its determination that probable cause existed for the issuance of the search warrant on Musgraves' home. Musgraves claims the affidavits in support of the search warrant application failed to establish probable cause because the information contained in the affidavits by Boner and Brantley lacked detail, were conclusory, and were insufficiently corroborated. Musgraves further looks at Brantley's affidavit in a vacuum, determining that its singular staleness invalidates the entire warrant. Afterwards, Musgraves contends that the good faith exception to the warrant requirement does not apply here.

STANDARD OF REVIEW

This Court considers whether a search warrant was supported by probable cause under a "complex standard of review." *United States v. McIntire,* 516 F.3d 576, 578 (7th Cir. 2008). This Court reviews the district court's findings of fact for clear error and the district court's legal conclusions without deference. *Id.* On the mixed

question of whether the facts amounted to probable cause, no weight is assigned to the district court's decision but "great deference" is given to the issuing judge's conclusion. *Id*. at 578. In the instant controversy, the district court made no findings of fact "so the appropriate inquiry is whether, with the benefit of 'great deference,' the issuing judge acted on the basis of probable cause." *United States v. Garcia*, 528 F.3d 481, 485 (7th Cir. 2008).

ANALYSIS

A search warrant affidavit establishes probable cause when it "sets forth facts sufficient to induce a reasonable prudent person to believe that a search thereof will uncover evidence of a crime." *United States v. Jones,* 208 F.3d 603, 608 (7th Cir. 2000). The Supreme Court has adopted a "totality of the circumstances" standard when making probable cause determinations. *Id.* When a warrant application is supported by an informant's observations, the veracity of the informant is a significant consideration. *Id.* This Court has identified five factors to consider when the credibility of an informant is at issue: (1) the degree to which the informant has acquired knowledge of the events through first-hand observation; (2) the amount of detail provided; (3) the extent to which the police have corroborated the informant's statements; (4) the interval between the date of the events and the police officer's application for the search warrant; and (5) whether the informant personally appeared and presented an affidavit or testified before the magistrate, thus allowing the judge to evaluate the informant's knowledge, demeanor, and sincerity. *United States v. Koerth,* 312 F.3d 862, 866 (7th Cir. 2002). None of these factors is alone

dispositive of the issue because "a deficiency in one factor may be compensated for by a strong showing in another factor or by some other indication of reliability." *United States v. Johnson,* 289 F.3d 1034, 1038-39 (7th Cir. 2002). If information given by the informant is too old, it is considered stale and probable cause no longer exists, but when combined with information that is sufficiently fresh that indicates that the evidence would still be on the premises, a finding of probable cause is valid. *United States v. Adames*, 56 F.3d 737, 748 (7th Cir. 1995); *Sgro v. United States,* 287 U.S. 206, 210–12 (1932).

Musgraves' argument centers on the notion that the information in the affidavits was not provided by persons of previously demonstrated reliability and that not every conceivable detail was included in the affidavits. Def.Br. 41, 43–45. When viewed with these principles in mind, however, it is clear that there was a substantial basis for the issuing judge to conclude that a probability of criminal activity existed based on the totality of the circumstances and common sense. The affidavits in support of the search warrant in this case contained Boner's statements regarding Boner's knowledge of Musgraves' sales of cocaine to his brother, Stevens, and Brantley's statements about an earlier controlled buy. Def.App. 95–100. Boner stated that on July 6, 2013, he was with Stevens when Stevens went into Musgraves' house with prescription Vicodin and came back out with cocaine. Def.App. 99–100. Boner stated that around midnight on July 8, 2013, he was present when Musgraves sold cocaine to Stevens. *Id.* Boner identified Musgraves in a photo, identified Musgraves' car, and identified 1808 Sycamore as Musgraves' house. *Id.* Brantley's

affidavit also contains details about the controlled purchase of crack cocaine from Musgraves at 1808 Sycamore on August 14, 2012. Def.App. 95–98. In Brantley's affidavit, he does not make any representations about the past reliability of Boner, but, "even when an affiant has not sufficiently explained his belief that an informant is reliable, the issuing court may still find probable cause if reliability can be inferred from the totality of the circumstances." *United States v. Lowe*, 389 Fed. Appx. 561, 563 (7th Cir. 2010); Def.Br. 45; Def. App. 95–98.

The facts here show that the reliability of Boner's statements could be inferred based on the totality of the circumstances. *Koerth*, 312 F.3d at 866. Boner's information was based on his personal observations and was detailed in that it identified the dates, the locations, and, in one instance, the time of the drug sales along with the types of drugs being sold. Def.App. 99–100. Boner was able to identify Musgraves' photo, his car, and his house. *Id*. Additionally, the events described by Boner occurred only a few days before the application for the warrant and he personally appeared and presented the affidavit before the magistrate as part of that application. TrialTr.I_101:16–102:8, Hr'gTr.(Feb. 6, 2015). Based on these facts that address every factor described in *Koerth*, the totality of the circumstances weigh heavily toward showing that Boner's information was reliable. 312 F.3d at 866.

Musgraves attempts to rely on the holding in *United States v. Glover* to attack the sufficiency of Boner's affidavit. There, this Court found that the omission of information about the informant's background clearly and directly affected the credibility of his affidavit. 755 F.3d 811, 817 (7th Cir. 2014). In that case, "his

criminal record, especially while serving as an informant; his gang activity; his prior use of aliases to deceive police; and his expectation of payment," were the determining factors that this Court used to strike down the validity of the warrant. *Id*. Here, although he admitted to using drugs, Boner did not have a criminal record at the time of his affidavit, he was not part of a gang, he did not use aliases to deceive police, he did not expect or receive payment for his help, and he did not expect or receive a reduction in charges for his help. TrialTr.II_143:13–144:2, 154:2–9, 162:1–8; Hr'gTr.(Feb. 6, 2015). The circumstances in *Glover* are exceptional and create a threshold for invalidating the credibility of an informant that clearly is not met here.

Moreover, Musgraves wants this Court to view each affidavit separately in a vacuum instead of taking the holistic approach of viewing both affidavits underlying the search warrant together, which is the only logical way to determine the validity of the information presented for the warrant. While the controlled buy on August 14, 2012, would have been insufficient to show probable cause eleven months later on its own, as Musgraves contends, the fact that Musgraves had previously sold cocaine out of 1808 Sycamore tended to corroborate Boner's first-hand accounts of drug sales at that residence included in his affidavit. Def.App. 95–100. In turn, Boner's statements provided information sufficiently fresh and detailed that, in combination with that dated information, gave the magistrate judge enough corroborated and reliable information to support his finding of probable cause to believe that evidence of criminal activity was on Musgraves' premises. *Adames*, 56 F.3d at 748; Def.App. 95–100.

Also, both affidavits do not contain the kind of conclusory statements that have been found insufficient previously. Examples of such conclusory statements include that the affiant, "has cause to suspect and does believe" that contraband is present, *Nathanson v. United States,* 290 U.S. 41, 44, 47 (1933), and that "affiants have received reliable information from a credible person and believe" that contraband is being stored, *Aguilar v. State of Tex.*, 378 U.S. 108, 113–15 (1964). The statements in the affidavits in this case were sufficiently detailed with first-hand information and video observation (i.e. the hand to hand drug transaction) that was sufficiently corroborated to show that they were reliable. Def.App. 95–100. Nowhere do the phrases "cause to suspect and does believe," "have received reliable information from a credible person and believe," or any other conclusory statements appear in the affidavits because none of the information used in the affidavits is second-hand speculation. Therefore, there was a substantial basis for the issuing judge to conclude that a search of the residence would detect evidence of criminal activity.

Even if this Court were to find that the search warrant was not supported by probable cause, the evidence should survive under the good faith exception to the exclusionary rule, as stated in *United States v. Leon*, 468 U.S. 897 (1984). "It is well settled that under *Leon*, the suppression of evidence seized pursuant to a search warrant that is later declared invalid is inappropriate if the officers who executed the warrant relied in good faith on the issuing judge's finding of probable cause." *United States v. Searcy*, 664 F.3d 1119, 1124 (7th Cir. 2011). An officer's decision to

obtain a warrant is prima facie evidence that he or she was acting in good faith. *United States v. Otero*, 495 F.3d 393, 398 (7th Cir. 2007). A defendant can rebut the presumption of good faith only by showing (1) that the issuing judge abandoned his or her detached neutral role, (2) the officers were dishonest or reckless in preparing the affidavit, or (3) the warrant was so lacking in probable cause as to render the officer's belief in its existence entirely unreasonable. *Id.*

Police officers are "charged with knowledge of well-established legal principles," and they have a "responsibility to learn and follow legal precedent." *United States v. Mykytiuk*, 402 F.3d 773, 777–78 (7th Cir. 2005), *Koerth*, 312 F.3d at 869. Thus, evidence obtained based on a search warrant is admissible unless, "(1) courts have clearly held that a materially similar affidavit failed to establish probable cause under facts that were indistinguishable from those presented in the case at hand, or (2) the affidavit was so plainly deficient that any reasonable well-trained officer 'would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.'" *Searcy*, 664 F.3d at 1124.

A district court's denial of a request for a *Franks* hearing is reviewed by this Court for clear error. *United States v. Carmel*, 548 F.3d 571, 577 (7th Cir. 2008); *see United States v. Spears*, 673 F.3d 598, 604 (7th Cir. 2012) ("Where a defendant challenges the denial of a *Franks* hearing itself, we have found that a 'showing that a warrant was based on a false statement requires an examination of historical facts, not the eventual legal determination that any given set of facts add up to probable

cause for the issuance of a warrant,' and have applied a clear error standard of review"). A district court's decision will be reversed under the standard "only if, after reviewing the record as a whole, [the appellate court is] of 'the definite and firm conviction that a mistake has been committed.'" *United States v. Whitley*, 249 F.3d 614, 621 (7th Cir. 2001). To merit a *Franks* hearing, the defendant bears the difficult task of making "a substantial preliminary showing" of three "hard to prove" elements: (1) the warrant affidavit contained false information; (2) the false information was included in the affidavit intentionally or with reckless disregard for the truth; and (3) the misrepresentations were necessary to the determination of probable cause to issue the warrant. *United States v. Maro*, 272 F.3d 817, 821 (7th Cir. 2001); *Whitley*, 249 F.3d at 620.

Musgraves asks the Court to infer bad faith on the part of Brantley because the affidavits did not contain details about the credibility of Tisdale and Boner because Brantley did not check the criminal history of Boner or include criminal history information on Tisdale. Def.Br. 46. Musgraves also asserts that a supposed flaw in the Tisdale buy was relevant adverse information. *Id.* at 47. Musgraves' argument is essentially that because Boner, Tisdale, and Brantley were not subject to a full adversarial cross examination and details he finds relevant were not included in the affidavits, bad faith should somehow be imputed to Brantley. *Id.* Musgraves' argument is unavailing.

Brantley was entitled to rely on Tisdale's information about his purchase of crack cocaine because the exchange was captured on video. Gov.App. A. Brantley

watched that exchange, which created this requisite reliability for his affidavit. Brantley also testified that he has prepared dozens of affidavits in support of search warrants for drug cases and other cases, and it has always been his practice to include only those facts that are necessary to demonstrate probable cause. Hr'gTr.(Feb. 6, 2015). Brantley estimated that he presented 5-10 search warrants to Judge Hackett of the Madison County, Illinois, Circuit Court, the magistrate judge in this case, in the past and that the affidavits never contained that type of impeachment information that Musgraves now argues should have been included in his affidavit in this case. *Id*. Brantley testified that no judge in Madison County, Illinois, including Judge Hackett, ever inquired about the criminal history of an informant or source of information whose statements formed the basis of probable cause for a search warrant. *Id*. Brantley stated that he is aware of no search warrant that he has obtained that was later found to be invalid. *Id*.

The affidavits in this case contain the types of information typically included in a search warrant application and that has never been found insufficient before. Hr'gTr.(Feb. 6, 2015). The affidavits in this case omitted the types of information typically omitted, and Brantley stated that he is aware of no case where any judge has asked for the omitted information or where omissions have rendered a search warrant invalid. *Id*. Brantley sought a search warrant, which is a prima facie showing of good faith, and he included the types of information always found by magistrates to be sufficient in his past applications. *Otero*, 495 F.3d 393, 398 (7th Cir. 2007); Hr'gTr.(Feb. 6, 2015). In fact, to ensure the validity of the search warrant in

this case, Brantley consulted a prosecutor in drafting the affidavits used in applying for the warrant. *See United States v. Pappas,* 592 F.3d 799, 802 (7th Cir. 2010) (consulting with a prosecutor prior to applying for a warrant "provides additional evidence of [an officer's] objective good faith."); Hr'gTr.(Feb. 6, 2015). Based on this evidence, any characterizations in Musgraves' brief that Brantley was dishonest or reckless in preparing the affidavit, or that the magistrate abandoned his neutral role when reviewing the application, are unfounded. Also, Brantley stated he knew of no court ever holding that an affidavit materially similar to those he presented to the magistrate failed to establish probable cause, nor did Musgraves identify such a case. Def.Br. 46–48; Hr'gTr.(Feb. 6, 2015). Brantley did exactly what he thought he was supposed to do in order to comply with the law, which is the essence of good faith that satisfies the exception. Furthermore, although Musgraves argues that district court erred in its decision to deny his request for a *Franks* hearing based on the affidavits, that argument is misguided as well. Def.Br. 41. Again, Musgraves failed to demonstrate that Brantley made an intentional or reckless false statement or omission in his affidavit, which must be shown preliminarily before a *Franks* hearing is granted. *Maro*, 272 F.3d at 821. Based on the foregoing facts, the district court did not err in its determination that probable cause existed for the issuance of the search warrant.

V. The district court's use of Musgraves' career offender range for sentencing was proper.

INTRODUCTION

The fifth and final issue on appeal is whether the district court's use of Musgraves' career offender range for sentencing was proper. Musgraves claims that his 2006 conviction for Unlawful Possession with Intent to Distribute a Controlled Substance (Gov.App. D) does not qualify him as a career offender under the enhancement guidelines set out in U.S.S.G. §4B1.1. Musgraves points to a discrepancy in the crime of conviction and the sentence to argue that the charge was a possession conviction only, and thus not a predicate "controlled substance offense" for the purposes of the Career Offender Sentencing Guideline enhancements.

STANDARD OF REVIEW

This Court's review of a district court's career offender determination is *de novo*. *United States v. Billups*, 536 F.3d 574, 578 (7th Cir 2008). If this Court finds that a miscalculation in the Sentencing Guidelines range occurred, a two–step review process is conducted. *United States v. Abbas*, 560 F.3d 660, 666–67 (7th Cir. 2009). First, the Court makes a harmless error determination. *Id*. Then, the Court looks at the substantive reasonableness of the sentence under an abuse–of–discretion standard. *Id*. Reasonableness is necessarily deferential because the district court is uniquely positioned to discern the appropriate sentence. *United States v. Walker,* 447 F.3d 999, 1008 (7th Cir. 2006); *United States v. Williams,* 425 F.3d 478, 481 (7th Cir. 2005).

ANALYSIS

The Illinois Criminal Code is similar to the United States Code in the arrangement of the prohibitions and penalties for drug trafficking offenses. 21 U.S.C.

841(a) criminalizes various acts of drug trafficking, and § 841(b) lists a series penalty provisions for violations of § 841(a) based on drug types and amounts. Similarly, § 401 of the Illinois Controlled Substances Act criminalizes various acts of drug trafficking, and Sections 401(a) through 401(i) set out the penalties for violations involving various drug types and amounts. For example, § 401(a)(2)(B), the Illinois Class X felony originally charged in the Musgraves' prior conviction, sets the penalties for trafficking between 100 grams and 400 grams of cocaine at not less than 9 and not more than 40 years' imprisonment. Section 401(a)(2)(A) sets the penalties for trafficking between 15 grams and 100 grams of cocaine at 6 to 30 years' imprisonment. Section 401(c)(2) states that trafficking between 1 and 15 grams is punished as a Class 1 felony, and Section 401(d) penalizes trafficking less than 1 gram of cocaine as a Class 2 felony. Under the Illinois Unified Code of Corrections, a Class 1 felony is punishable by a term of imprisonment between 4 and 15 years or a term of periodic imprisonment between 3 and 4 years. 730 ILCS 5/5-4.5-30. A Class 2 felony is punishable by a term of imprisonment of 3 to 7 years or a term of periodic imprisonment between 18 and 30 months. 730 ILCS 5/5-4.5-35. As Musgraves points out, the offense as charged is punishable by a minimum term of imprisonment of nine years, however, Musgraves was sentenced to a term of twenty five months' periodic imprisonment. Musgraves' sentence would not have been legal under Illinois law if he had been convicted as originally charged.

It is not clear, however, how this happened, and the available court records offer no clear explanation. One of two things must have occurred: either (1)

Musgraves was convicted as charged of possessing with intent to distribute between 100 and 400 grams of cocaine, and he was simply sentenced to an illegally lenient term of periodic imprisonment; or (2) the charge was reduced, without written amendment to the charging document, to possession with intent to distribute less than 1 gram of cocaine, for which the sentence of 25 months' periodic imprisonment would have been a legal sentence for a Class 2 felony. Under either scenario, the prior qualifies as a predicate "controlled substance offense" for the purpose of the Career Offender Guideline enhancement. A "controlled substance offense" is a drug trafficking felony punishable by a term of imprisonment exceeding one year. U.S.S.G. §4B1.2(b). The district court agreed that both the Illinois Class X felony originally charged and the Class 2 felony that could have been the reduced charge qualify as a "controlled substance offense" under the guidelines because both are drug trafficking offenses punishable by a term of imprisonment exceeding one year. Def.Br. 49; R.170. Therefore, the Career Offender Guideline enhancement was properly applied.

In *United States v. Booker*, the United States Supreme Court invalidated both the statutory provision, 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV), which made the Guidelines mandatory, and § 3742(e) (2000 ed. and Supp. IV), which directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines. 543 U.S. 220, 222 (2005). As a result of that decision, the Guidelines are now advisory, permitting district courts to tailor sentences in light of other statutory concerns like § 3553(a). *Id.* Sentencing post-*Booker* requires the sentencing judge to properly calculate the advisory guidelines range in the same manner as before

Booker, and then to make a discretionary decision whether to sentence the defendant within the advisory range or outside it in light of the very broadly stated sentencing factors set forth in § 3553(a). *United States v. Robinson,* 435 F.3d 699, 700-01 (7th Cir. 2006); *United States v. Cunningham,* 429 F.3d 673, 675-76 (7th Cir. 2005). Here, the district court correctly calculated the Guideline range, which was 262 to 327 months. R.50, 170. Then, under 18 U.S.C. § 3553(a), district court considered the four factors in the statute. R.170. First, the district court considered the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense. The sentencing court noted the crime–ravaged nature of the community and Musgraves' contribution to the problem. *Id*. Next the court considered the ability to deter criminal conduct based on the sentence, which it considered in turn with the ability of the sentence to protect the public from future crimes of Musgraves. *Id*. The sentencing court emphasized Musgraves' repeated criminal conduct despite being given ample opportunity by the state and federal judiciary to alter his lifestyle and become a productive member of his community. *Id*. The court also noted the fact that Musgraves framed Smith and characterized Musgraves as likely to recidivate. *Id*. After looking at all of these factors, and the Guidelines with and without enhancement, the court sentenced Musgraves to a below–the–Guidelines sentence of 240 months of incarceration. *Id*.

Even if the district court committed an error in determining the Guideline range, the error was harmless and the sentence was reasonable. "To prove harmless error, the government must be able to show that the Guidelines error "did not affect

the district court's selection of the sentence imposed." *Abbas*, 560 F.3d at 667. In *United States v. Abbas*, the harmless error determination was simplified because the district court expressly stated that it would have imposed the same sentence even if the Career Offender enhancement did not apply. *Id.* at 667. Like *Abbas*, the district court here stated, "So when I look at all of that and I divorce myself from the career criminal status, I believe an appropriate sentence in this case would have been that of 240 months of incarceration. Anything less than that, I think, would not meet the goals and purposes of 18 U.S.C. § 3553." R.170. The district court expressly stated that even if Musgraves was not a career offender under the Guidelines, it would have exercised its discretion under the § 3553(a) factors to go outside of the Guideline recommendations, therefore, the error was harmless. *Abbas*, 560 F.3d at 667; R.170.

Furthermore, there is nothing about the sentence that could be construed as objectively unreasonable. The district court's explanation provided sufficient justification for an upward departure from the Guideline range. According to *Abbas*, "where . . . the judge has made a searching evaluation of a defendant's case, applied the statutorily mandated factors to the sentence and clearly articulated why the given defendant warrants a sentence that would be a departure from the correct range, the sentence is reasonable." 560 F.3d at 668. As the district court explicitly articulated, Musgraves has had six second chances in the past to reform his behavior. R.170. The district court noted that Musgraves is a career criminal that has contributed significantly to the problems his community is facing and he is

highly likely to recidivate. *Id*. Musgraves' sentence below the calculated Guidelines, if anything, was showing of leniency based on the statutory maximum and what the United States Attorney's Office asked for. *Id*. "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Gall v. United States*, 552 U.S. 38, 51, (2007). As this Court noted in *Hawkins v. Unites States*, "[N]ot every error is corrigible in a postconviction proceeding, even if the error is not harmless." 706 F.3d 820, 823 (7th Cir.) *opinion supplemented on denial of reh'g*, 724 F.3d 915 (7th Cir. 2013). The reason why we give district courts broad discretion in sentencing is because of their understanding of the facts of each case, the circumstances of each case, and the effects these cases can have on the community. The district court was correct in its sentencing decision, whether the career offender statute is applied or not applied.

CONCLUSION

For the foregoing reasons, the United States prays that the rulings and sentence of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,535 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Seventh Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010, Program Release 14.0.6129.5000, in 12-point Century Schoolbook font, a proportionally spaced typeface.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	**COURT OF APPEALS**
	)	**NO. 15-2371**
Plaintiff-Appellee,	)	
	)	**Southern District of Illinois**
vs.	)	**District Court No. 13-CR-30276**
	)	
MILES MUSGRAVES,	)	**Honorable Michael J. Reagan,**
	)	**Chief Judge Presiding**
Defendant-Appellant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 15-2371

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MILES MUSGRAVES,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:13-cr-30276-MJR — The Honorable Michael J. Reagan, *Chief Judge*.

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APPENDIX
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2012 08 14 15:44:44
GOVERNMENT
EXHIBIT
5
PENGAD 800-631-6989

(70 of 77)
2012 08 14 15:48:50
GOVERNMENT
EXHIBIT
PENGAD 800-631-6989

U.S. DEPARTMENT OF JUSTICE

United States Attorney
Southern District of Illinois

Stephen R. Wigginton
United States Attorney

Nine Executive Drive
Fairview Heights, IL 62208

Phone: 618.628.3700
TTY 618.628.3826
FAX 618.622.3810

July 15, 2013

Michele L. Berkel
44 E. Ferguson Ave.
Wood River, IL 62095

Re: Miles Musgraves; Various Matters in the Southern District of Illinois

Dear Ms. Berkel:

You have indicated that your client, Miles Musgraves, wants to meet with investigating agents and members of my staff to make an "off-the-record" proffer or discussion. We are always interested in pursuing such matters, and will consider such an "off-the-record" proffer or discussion concerning criminal matters about which your client may have knowledge in this district and elsewhere.

To assure that there are no misunderstandings concerning the meaning of "off-the-record," I am writing to clarify the ground rules for any "off-the-record" proffer or discussion with your client. The ground rules and conditions of any "off-the-record" proffer or discussion with your client are as follows:

First, except as provided in the fourth paragraph below, no statements or information provided by your client during the "off-the-record" proffer or discussion will be used against your client in any criminal case during the government's case in chief, WITH THE SPECIFIC EXCEPTION THAT STATEMENTS OR INFORMATION PROVIDED BY YOUR CLIENT MAY BE USED IN ANY PROSECUTION OF YOUR CLIENT REGARDING OR RELATING TO A HOMICIDE. That is, however, the only limitation on the use the government may make of your client's statements.

Second, the government may make derivative use of any information revealed during the proffer. The government may pursue any investigative leads suggested by any statements made by or other information received from your client. This provision is intended to eliminate the necessity for a pre-trial Kastigar hearing should your client wish to proceed to trial. Your client should understand that by agreeing to make an "off-the-record" proffer your client waives the right to any Kastigar-type objection and, by extension, to a Kastigar hearing. Thus, should your client proceed to trial, the government will not have to prove that the evidence it would introduce at trial is not derived from any statements made by or other information received from your client during the "off-the-record" proffer or discussion. MM

Third, if your client is a witness at any future trials and offers testimony materially different from any statements made or other information provided during the "off-the-record" proffer or discussion, the attorney for the government may cross-examine your client concerning any statements made or other information provided during the "off-the-record" proffer or discussion. This provision is necessary in order to assure that your client does not abuse the opportunity for an "off-the-record" proffer or discussion, does not make materially false statements to a government agency and does not commit perjury when testifying at any future trials. MM

Fourth, if at any future trial or any other proceeding in which your client is a defendant or a witness, your client were to testify contrary to the substance of his proffer statement, or through any manner whatsoever, either personally or through an attorney or other representative, including, but not limited to, opening statements, cross-examination of witnesses, direct examination of witnesses, or the presentation of exhibits or other evidence, present a position inconsistent with the information provided in his proffer statement, the government may use either as evidence in chief, or rebuttal evidence, any statements made or other information provided by your client. This provision is necessary to assure that no court or jury is misled by receiving information or implications materially different from that provided by your client. In addition, we want to emphasize that the above-mentioned examples are not totally inclusive of the uses the government may make of your client's "off-the-record" proffer or discussion. MM

Fifth, the government has agreed that no statements made or other information provided by your client during the "off-the-record" proffer or discussion will be used against your client in any criminal case during the government's case in chief. The government will, however, be free to provide any such information to any United States District Court in the event your client either pleads guilty or is found guilty at a later trial. This provision is necessary to comply with Rule 32 of the Federal District Court to comply with its statutory duty to receive information from any source whatsoever in deciding appropriate sentences. MM

Sixth, pursuant to Section 1B1.8 of the Sentencing Guidelines, no self-incriminating information given by your client will be used to enhance the Offense Level against your client except as provided in that Section. The government may, however, use any statements made or other information provided by your client to rebut evidence or arguments at sentencing materially different from any statements made or other information provided by your client during the "off-the-record" proffer or discussion. M.M.

Seventh, while an "off-the-record" proffer or discussion is many times a preliminary step to the government's accepting a plea agreement offer, you should know that before any offer is accepted, the government will assess whether your client was completely truthful during the "off-the-record" proffer or discussion. The determination of whether your client has been completely truthful is within the sole discretion of the government and if the government does not determine that your client has been completely truthful, we will not even consider the plea agreement offer you may make. You and your client should further understand that no promises are being made as to whether any offer will be accepted or what the terms of any agreement may be. Your client should also understand that even if the government determines that your client has been completely truthful, the government is not obligated to extend a plea agreement offer or consider any plea proposal you make. In addition, the possibility exists that the government will not accept your offer but will make a counter-offer that is unacceptable to your client. Even if that happens, your client will nevertheless be bound by the terms of this agreement. M.M.

Eighth, you and your client should understand that the Court is not a party to this agreement. Your client should also understand that should a plea agreement result from an "off-the-record" proffer the Court is not bound by the terms of any such plea agreement. M.M.

I trust you will find these ground rules fair and reasonable. If your client wishes to engage in an "off-the-record" proffer or discussion under these ground rules then both you and your client should initial each paragraph in the spaces provided and sign the acknowledgment and agreement attached to this letter.

Sincerely,

STEPHEN R. WIGGINTON
United States Attorney

DONALD S. BOYCE
Assistant United States Attorney

DSB

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of cocaine do not enter into a conspiracy to distribute cocaine simply because the buyer resells the cocaine to others, even if the seller knows that the buyer intends to resell the cocaine.

To establish that a seller knowingly became a member of a conspiracy with a buyer to distribute cocaine, the government must prove that the buyer and seller had the joint criminal objective of distributing cocaine to others.

GIVEN REFUSED
NO OBJECTION
OBJECTION BY:
Plaintiff Defendant

DEFENDANT'S SUGGESTED JURY INSTRUCTION NO. 23

5.10(A) 7th Circuit Pattern Jury Instruction

_____withdrawn_____given_____given as modified_____refused

09/28/2006 Scanned

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED
2226 SEP 28 2006
CLERK OF CIRCUIT COURT #33
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

No. 06-CF-
Class X

MILES LOUIS MUSGRAVES
M/B DOB 09/11/73

Defendant

INFORMATION

William A. Mudge, State's Attorney in and for the County of Madison, State of Illinois, in the name and by the authority of the People of the State of Illinois, charges that:

MILES LOUIS MUSGRAVES

on the 25th day of September, 2006, at and in the County of Madison, in the State of Illinois, committed the offense of:

UNLAWFUL POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE in that said defendant knowingly and unlawfully possessed with the intent to deliver one-hundred grams or more but less than four-hundred grams of a substance containing cocaine, a controlled substance, other than as authorized in the Controlled Substances Act, in violation of 720 ILCS 570/401(a)(2)(B), and against the peace and dignity of the said People of the State of Illinois.

A true copy of the original on file in my office
Attested to this 16 day of Aug 2012
JUDY NELSON
Clerk of the Circuit Court, 3rd Judicial Circuit
Madison County, Illinois
By _____ Deputy Clerk

CIRCUIT COURT MADISON COUNTY, ILLINOIS

William A. Mudge
State's Attorney, Madison County, Illinois

Bail is set at $ 500,000

JUDGE

The undersigned on oath, says that the facts set forth in the foregoing information are true in substance and matter of fact.

#9608
Alton Police Department

SJ/JEH

SWORN to before me this 28th day of September, 2006.

"OFFICIAL SEAL"
JENNIFER E. HAWKINS
Notary Public, State of Illinois
My commission expires 02/15/2010

Notary Public

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) Case No. **06-CF-2226**
)
MILES MUSGRAVES)

ORDER

State's Attorney: **JEN VUCICH** Defense Attorney: **NEIL HAWKINS**

Charge: **UNL POSS W/INTENT TO DELIVER CNTRL SUBSTANCE**

Case is called for a change of plea. All parties present. The negotiations are stated on the record to which all agree. Defendant stipulates to a factual basis and waives P.S.I. Criminal history is stated.

The defendant changes his plea on listed charges to guilty. The defendant is admonished as to his rights and persists in said plea. Plea is accepted. Finding and judgment of guilt are pronounced.

P.S.I. is waived and defendant makes statement. Defendant is sentenced as follows:

☐ Sentenced to D.O.C. for a period of _____ with credit for time served.
☐ Sentenced to Probation for a period of _____ Unsupervised ☐;
☐ Ordered to pay fine in the amount of $_____;
☐ Drug Assessment $_____;
☐ Ordered to pay Court Costs;
☐ Ordered to pay lab fee in the amount of $_____;
☐ Ordered to pay restitution in the amount of $_____ to _____;
☐ Ordered to pay P.S.F. in the amount of $25 per month;
☒ Other: 25 MONTHS PERIODIC IMPRISONMENT IN MC JAIL. TIME SERVED. NO MITTIMUS TO ISSUE. DEFT TO BE RELEASED TO DOC ON A PAROLE HOLD

Defendant acknowledges sentence and is advised of appeal rights.

DATE: November 5, 2008

Court Reporter: DWILLIAMS

J Hackett
Hon. JAMES HACKETT
Judge Presiding

FILED
NOV 05 2008
CLERK OF CIRCUIT COURT #42
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

11362008

People
Plaintiff/Petitioner

vs.

Miles Musgraves
Defendant/Respondent

No. 06 CF 2226

Div. _____

ORDER

Defendant remanded to the custody of the Illinois Dept of Corrections pursuant to Ottawa hold

Defendant released to this hold

FILED
NOV 05 2008
CLERK OF CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Date 11/5/08

J Hackett
Judge