Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Cat Out of the Bag

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752 F.3d 1206
United States Court of Appeals,
Ninth Circuit.

Clifford GEORGE, Plaintiff–Appellant,

v.

Thomas W. EDHOLM, individually in his capacity as an M.D.; Greg Freeman, individually in his capacity as a PD Officer; Daryll Johnson, individually in his capacity as a PD Officer, Defendants–Appellees.

No. 11–57075.
|
Argued and Submitted June 4, 2013.
|
Filed May 28, 2014.

Synopsis

Background: Arrestee brought § 1983 action against physician, nurse, and police officers, alleging that they violated his rights under the Fourth and Fourteenth Amendments when the physician, forcibly and without consent, removed a plastic baggie containing cocaine base from arrestee's rectum. The United States District Court for the Central District of California, J. Spencer Letts, J., granted summary judgment in favor of defendants. Arrestee appealed. The Court of Appeals, 410 Fed.Appx. 32, affirmed in part, reversed in part, and remanded. On remand, the District Court, George H. Wu, J., granted summary judgment to officers, and arrestee appealed.

Holdings: The Court of Appeals, W. Fletcher, Circuit Judge, held that:

issues of material fact precluded summary judgment on claims against officers on ground that physician was not a state actor;

issues of material fact precluded summary judgment on claims that officers violated arrestee's Fourth Amendment right to be free from unreasonable searches;

officers were not entitled to qualified immunity on arrestee's Fourth Amendment claim; but

officers were entitled to qualified immunity on arrestee's Fourteenth Amendment claim.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

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Thomas W. Edholm, Redding, CA, pro se.

Roger A. Colvin and Sharon Apodaca (argued), Alvarez–Glasman & Colvin, City of Industry, CA, for Defendants–Appellees.

Appeal from the United States District Court for the Central District of California, George H. Wu, District Judge, Presiding. D.C. No. 2:06–cv–00200–GW–AJW.

Before: KIM McLANE WARDLAW and WILLIAM A. FLETCHER, Circuit Judges, and BARBARA M.G. LYNN, District Judge.[*]

OPINION

W. FLETCHER, Circuit Judge:

Clifford George appeals a grant of summary judgment to Pomona Police Officers Greg Freeman and Daryll Johnson. Acting pro se, George sued Freeman, Johnson, and a medical doctor and two nurses under 42 U.S.C. § 1983, alleging that they violated his rights under the Fourth and Fourteenth Amendments when the doctor, forcibly and without consent, removed a plastic baggie containing cocaine base from George's rectum. We reverse in part, affirm in part, and remand for further proceedings.

I. Background

A. Factual Summary

According to a police report written by Officer Freeman, on March 13, 2004, George and another man were standing in the front courtyard of an apartment complex in Pomona,

California. Freeman and his partner were patrolling the area, which they knew to be a hangout for gang members and drug dealers. They spotted the two men, got out of their police cruiser, and approached them. George started to run "towards the front gate, as if he was going to flee." Freeman ordered George to stop, and George complied. George told Freeman he was on parole for an armed robbery conviction.

Officer Freeman and two other officers conducted a parole search of George's apartment. Inside, they encountered George's brother, Jeremiah English. Freeman found a .380–caliber semi-automatic pistol in a hallway closet. Freeman arrested George for violating his parole by living in an apartment with a firearm, English for being a gang member with a firearm, and George's companion for loitering. Freeman and his partner took all three men to the Pomona city jail.

Freeman and Johnson took George to the "strip tank" for a strip search. Freeman wrote in his report that George removed his clothes, but "whe[n] we asked him to turn around, he immediately started shaking and went to the ground as if he was possibly having a seizure.... [W]hen he was on the ground with his right hand he reached under his body and started pushing his finger in his anus attempting to conceal an item, of what appeared to be some plastic baggie. Due to my training and experience in the field of narcotics, myself and Corporal Johnson believed it was a bag of cocaine."

Officer Freeman testified in his deposition that he did not believe that George was having a seizure, "[b]ecause he was concealing the narcotics or cocaine that we recovered out of his rear end." Freeman estimated that he had encountered "similar scenarios ... where someone undergoing a strip search either faked a seizure or attempted to conceal things in their rectum ***1210** during the strip search ... five times —four to five times." Officer Johnson testified similarly in his deposition. He testified that in his experience it is "very common for people to carry [crack cocaine or other contraband] between their butt cheeks." He did not believe George was having a seizure. Rather, he believed that George "was faking having a seizure to cover ... up" his attempt to conceal a plastic baggie of cocaine base in his anal cavity. He testified, "[I]t was obvious to me that that whole fake medical situation was a distraction so he could shove a baggie in his anus."

An unspecified person at the jail called for paramedics. George testified in his deposition that "Freeman kept hollering [to the paramedics], yelling that I swallowed something and he stuck something up his anal and we need to get it out." Officer Freeman testified, "I think I told [the paramedics] that he—that he possibly had a seizure and that we needed to get him medically cleared for booking." He testified further that the paramedics took George to the hospital "to save his life." Officer Johnson testified differently. When asked if "there was anything medically wrong" with George when he took him to the hospital, Johnson answered, "I did not think so." He testified that he and another officer took George to the hospital in a police vehicle. Hospital records state that police officers took George to the hospital, and that George was in police custody when he arrived. Johnson testified that Freeman came to the hospital sometime later. However, George testified that "Freeman and Johnson took me to the hospital."

Freeman was asked about other instances in which a person was taken to the hospital because of cocaine base concealed in the rectum. He responded:

> Specifically, I remember a doctor had one on a Porta–Potty. Another one, I believe the doctor had to give him a sedative or something to relax the body.... I think the doctor used forceps to pull it out of his rectum.

With respect to the instance where forceps were used, Freeman did not say whether the person had consented to the procedure. Freeman did not describe any case in which the person had been intubated or had his bowels evacuated.

Johnson testified that on "six or eight" previous occasions he transported to the hospital people who had inserted into their rectums baggies containing cocaine. He testified:

> I know, in some instances, they were given some type of a pill or a drink, maybe a laxative of some type. On another occasion, there was a laxative like a suppository. Another time I waited in the intensive care unit with somebody that had cocaine in their rectum, and it was all up to the doctor.

Johnson testified that in all but one of the instances, the baggie was intact when it emerged. Johnson described the one instance in which the baggie had not been intact. In that instance, the person had been taken to intensive care because of a high heart rate. At one point, Johnson and another officer had actually seen, "barely protruding," the "clear plastic and the actual white cocaine," but by the time they got to the hospital it was no longer visible:

> The doctor used a type of scope. I believe the person's heart rate was very high and the doctor couldn't find it, and

> we told him that we had actually seen it, the both of us. And so I believe the doctor was—had him taken up to ICU because of his heart rate, and he was monitored. He was given suppository or, you know, some type of laxative, and eventually the laxative worked and the baggie of cocaine was recovered.

***1211** The recovered baggie was not intact when Johnson saw it, but he testified, "I don't know if it came out not intact or if it was ripped by the suspect." When asked if any of the six or eight people had the cocaine "removed surgically," Johnson answered, "No, I have never seen that." But he had seen "some type of device," which he described as "not really forceps," used to pull out a baggie or baggies.

Acting pro se, George sent Requests for Admission to Officers Freeman and Johnson. They provided identical answers to a Request concerning the paramedics' evaluation. They both wrote, "The Los Angeles County Fire Department Paramedics informed me that plaintiff was not having a seizure." In his deposition, Freeman backtracked from this answer. In response to the question, "Did the paramedics convey to you any information about Mr. George's medical condition?" Freeman testified, "I don't remember anything specifically."

Officers Freeman and Johnson both answered "Admit" to the following Request: "Admit that, when you arrived at said medical hospital, you informed *Dr. Edholm,* (the treating [doctor],) that plaintiff appear[ed] to have swollen some drugs and/or that there may be some in his rectum." In their depositions, they both backtracked. During Freeman's deposition, the following exchange occurred:

> Q: You didn't say—you didn't tell anyone anything about him swallowing drugs through his mouth?
>
> ...
>
> A: I don't remember telling anybody about anything....
>
> ...
>
> Q: As you sit here today, do you recall telling Dr. Edholm that the patient may have—or that Mr. George may have swallowed some drugs or "swollen," any sort of variation of that word?
>
> A: No.

Johnson testified, "I don't recall ever saying something like 'swollen' or 'swallowed drugs.' I don't recall that in this incident."

Hospital records indicate that the "police department" told intake personnel that George had swallowed cocaine, had put cocaine into his rectum, and had possibly had a seizure. The hospital's Emergency Department Triage Record, filled out when George arrived at the hospital, stated, "Per P.D.: pt. ingested cocaine & put some into his rectum. Possibly had a seizure."

Officer Johnson testified that George was taken to a room at the hospital, placed on a gurney, and restrained with straps. He testified that nurses initially evaluated George, and that Dr. Thomas Edholm, an emergency-room physician, arrived a short time later. George wrote in his verified complaint:

> The defendant Edholm was then informed by the defendant's [sic] Johnson & Freeman, that there exist a medical emergency ... that plaintiff may have swallowed drugs. "We need it out now."

An intake form lists George's blood pressure as 180/108, his pulse as 108, his respiratory rate as 18, his temperature as 98, and his condition as "stable." The hospital's triage record, prepared at roughly the same time, lists his breathing as normal and describes him as "[a]lert and oriented x 4" (the highest level). The hospital discharge report, signed by Dr. Edholm at George's release, shows George as having had blood pressure of 180/115, a pulse of 120, a respiratory rate of 18, and a temperature of 98. In his deposition, Edholm described these numbers as "severely high" and "consistent with cocaine toxicity."

George testified that Dr. Edholm initially tried to remove the plastic baggie by inserting his fingers in George's rectum. George recounted:

> ***1212** The doctor came in and say, hey, what's the problem.
>
> Freeman kept stipulating we think that he took something and we think he shoved something up his a-s-s and the doctor put—they put me on the table.... I was laying there naked and the doctor said lift him up ... so the officers came and they held me down and then the next thing you know I see the doctor he put on ... this glove and put some type of gel or whatever ... and ... he stuck his fingers his hands up my butt.
>
> ...

> He went up in me and it hurt.... I yelled I said why are you doing this? You can't do this. You're battering me. You can't do this I kept telling him and Freeman kept opening his mouth, too, telling the doctor like, you know, Goddamn it, I know that he's got it, so hold him down so they held me down and then the next thing you know this doctor said, hey, this is not going to work.
>
> ...
>
> [The officers] were holding my legs down.
>
> ...
>
> The police officers ... flipped me over. They said roll him over, because that nurse she was too busy holding that IV in my arm ..., and I kept telling them what are you doing this for, and as soon as he stuck his thing up my ass and I was screaming I was hollering because it hurted.... I mean he had his hands right up my rectum and never had that before, ma'am, you understand, and that violated me and I was, you know, I just never had anybody go up in me like that, ma'am.

George was asked at the deposition if he remembered either of the officers telling Dr. Edholm what to do. He responded, "All I know is I hear Freeman tell him that you need to get this out of his ass. He's got something up his ass, Goddamn it, I know he does." He reiterated later that Freeman said, "I know he's got something up his ass. You need to get that out. I know he does." Freeman denied having said that:

> Q: At any point, did you tell Dr. Edholm that you needed the cocaine out now?
>
> A: No. He would have laughed at me.

Freeman testified that he did not remember holding George down: "If I would have, I would have remembered." Johnson testified that he did not recall holding George down or turning him onto his side.

George testified that Dr. Edholm told him that he would be sedated: "[H]e explained to me ... we're going to paralyze you." George testified:

> I was ... looking at this doctor what he's going to do, because I didn't know what he was going to do and kept getting all these big clamps, I seen these big clamps and I kept asking, you know, I remember one of the officers asking.... He says, well, we're going to open up his rectum with this. That's when I just got hysterical.

George testified that, when he regained awareness, he

> woke up on my back with a big tube down my mouth and stuff kept coming out of me out of my anal. They had a big plastic bag I remember on the bed and whatever that was inside of me was flushing stuff through my stomach coming out of my anal and I remember a lot of stuff, water coming out of my buttock, my anal.
>
> ...
>
> And then I'm still there whatever they're doing flushing me out I'm just laying there and just I was so mad ... because what they had done to me and all I just seen was just blood on that bed ***1213** and everything and my anal hurting so bad because I was bleeding a lot.

He testified that he was still bleeding when he was discharged from the hospital, wearing his jail jumpsuit: "I was hurting bad, ma'am. And even through that jumpsuit I was still bleeding I was bleeding so bad."

Dr. Edholm testified in his deposition that he had no specific recollection of treating George. He testified solely based on notes he had dictated after treating George, which were contained in George's discharge report. Edholm recounted that he was able to feel "a plastic type of material" in George's rectum, but George's resistance prevented him from removing it by hand. Edholm then engaged in what he called "aggressive management."

Dr. Edholm testified that a nurse sedated George. Edholm then inserted a metal anoscope into George's rectum. He stated that through the anoscope, he and one of the police officers viewed a golf ball-sized baggie filled with white material. Edholm removed the baggie with long forceps and gave it to the officer. The plastic baggie was intact.

Dr. Edholm then intubated George and inserted a tube through his nose into his stomach. Through the tube, George was given one gallon of a liquid laxative called GoLYTELY, which, according to Edholm, "flushes and washes everything out of your intestines completely."

Dr. Edholm testified that his treatment of George "was based on the information from the police and the nurses and his physical evidence of cocaine toxicity." This information led him to conclude that George's life was in danger. He

explained, "If a patient has evidence of a life-threatening condition, we have to ... aggressively treat it." Edholm stated the basis for his conclusion was "[t]he elevated blood pressure, pulse, history of having a seizure. If you have a seizure from cocaine, it's usually associated with severe toxicity." Edholm believed that George had ingested cocaine based on the medical history taken by a nurse and recorded on the triage record. In his deposition, he read aloud the nurse's note on the record, saying, "[p]er PD, patient ingested cocaine."

It is undisputed that George did not consent to any of the medical procedures. Dr. Edholm acknowledged in his deposition that the procedures required patient consent and said he acted "without [George's] compliance." Edholm testified that, as an emergency doctor, he does not routinely seek patient consent: "It's an emergency, so I don't routinely ask patients for consent." In his view, the "admissions staff [was] responsible for obtaining patient consent."

Later testing showed that the intact plastic baggie removed from George's rectum contained about 8.99 grams of cocaine base. George was charged with possession of cocaine base for sale in violation of California Health and Safety Code § 11351.5. He pled no contest to the offense. He is currently serving an eight-year prison term. Defendants in this case have made no argument based on *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

B. Procedural History

George brought suit under 42 U.S.C. § 1983 against Officers Freeman and Johnson, Dr. Edholm, and two nurses. He alleged violations of the Fourth and Fourteenth Amendments based on his initial detention, the search of his apartment, and his treatment at the hospital. *See George v. Edholm,* 410 Fed.Appx. 32, 33–34 (9th Cir.2010). Neither Edholm nor the nurses answered the complaint.

The district court granted summary judgment in favor of Officers Freeman and Johnson. It dismissed with prejudice ***1214** George's claims against Dr. Edholm and the nurses because they had not been served. *Id.* On appeal, we affirmed summary judgment as to George's claim arising out of his initial detention. *Id.* at 34. We also affirmed summary judgment in favor of the nurses. *Id.* We reversed and remanded as to the remainder of George's claims. *Id.* at 33–34. We held that George should have been allowed to withdraw his deemed admissions during discovery, held that his sworn complaint should serve as an affidavit, and instructed the district court to allow George to perfect service on Dr. Edholm. *Id.* at 33–34 & n. 1.

On remand, George, now represented by pro bono counsel, served the complaint on Dr. Edholm. Edholm still has not answered. After limited discovery, Officers Freeman and Johnson again moved for summary judgment. The district court granted the motion. The court believed that its ruling, if correct, would resolve George's claims against Edholm. To take care of the "technicality" of Edholm's failure to appear, the court suggested that George voluntarily dismiss Edholm without prejudice. Before George filed a voluntary dismissal, the court entered a final judgment dismissing George's complaint in its entirety. The following day, George filed a voluntary dismissal as to Edholm.

George timely appealed. He appeals only the grant of summary judgment on his claims arising out of his treatment at the hospital.

II. Standard of Review

We review de novo the district court's grant of summary judgment. *Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir.1996). We must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist." *Id.* We will affirm only if no "reasonable jury viewing the summary judgment record could find by a preponderance of the evidence that the plaintiff is entitled to a favorable verdict." *Narayan v. EGL, Inc.,* 616 F.3d 895, 899 (9th Cir.2010). "If a rational trier of fact could resolve a genuine issue of material fact in the nonmoving party's favor," summary judgment is inappropriate. *Bravo v. City of Santa Maria,* 665 F.3d 1076, 1083 (9th Cir.2011). "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." *Id.* (quoting *Nelson v. City of Davis,* 571 F.3d 924, 927 (9th Cir.2009)).

We also review de novo the district court's ruling on qualified immunity. *Furnace v. Sullivan,* 705 F.3d 1021, 1026 (9th Cir.2013). At the summary judgment stage, we ask whether the facts, "[t]aken in the light most favorable to the party asserting the injury," show that the officers violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *overruled in part on*

other grounds by Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). If the officers violated a constitutional right, we determine de novo "whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation." *Martinez v. Stanford,* 323 F.3d 1178, 1183 (9th Cir.2003).

III. Discussion

George claims that the conduct of Officers Freeman and Johnson, and the treatment administered by Dr. Edholm at the hospital, violated his Fourth Amendment right to be free from unreasonable searches, as well as his Fourteenth Amendment right to refuse medical treatment. The district court granted summary judgment to Freeman and Johnson on the ground that Edholm acted as a ***1215** private citizen whose conduct could not be imputed to Freeman and Johnson. The district court further held that even if Freeman and Johnson violated George's constitutional rights, they were entitled to qualified immunity.

A. State Action

The district court held as a matter of law that Dr. Edholm's conduct could not be attributed to the state. We disagree.

George does not dispute that Dr. Edholm is a private citizen whose conduct ordinarily would not be attributable to the state. *See Brunette v. Humane Soc'y of Ventura Cnty.,* 294 F.3d 1205, 1209 (9th Cir.2002). Private action may be attributed to the state, however, if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' " *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (quoting *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). Such a nexus may exist when, for instance, private action "results from the State's exercise of 'coercive power,' " or "when the State provides 'significant encouragement, either overt or covert,' " to the private actor. *Id.* at 296, 121 S.Ct. 924 (quoting *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)).

Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform. *See United States v. Reed,* 15 F.3d 928, 932–33 (9th Cir.1994); *see also Mendocino Envtl. Ctr. v. Mendocino Cnty.,* 192 F.3d 1283, 1301 (9th Cir.1999) (allowing a finding of state action where a jury could find that actions were "unlikely to have been undertaken" without state encouragement (internal quotation marks omitted)). The Supreme Court has stated, "[I]t is ... axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison,* 413 U.S. 455, 465, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) (internal quotation marks omitted). A private party's search may be attributed to the state when "the private party acted as an instrument or agent of the Government" in conducting the search. *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Reed,* 15 F.3d at 931; *United States v. Walther,* 652 F.2d 788, 791 (9th Cir.1981). Police officers may be liable for a private party's search when the police "ordered or were complicit in the search[ ]." *United States v. Sparks,* 265 F.3d 825, 831 (9th Cir.2001), *overruled on other grounds by United States v. Grisel,* 488 F.3d 844 (9th Cir.2007) (en banc); *see also United States v. Ziegler,* 474 F.3d 1184, 1188, 1190 (9th Cir.2007) (finding state action where an FBI agent told a private employer to make a copy of its employee's computer files); *Dyas v. Superior Court,* 11 Cal.3d 628, 114 Cal.Rptr. 114, 522 P.2d 674, 677 n. 2 (1974).

A reasonable jury could conclude that Officers Freeman and Johnson gave false information about George's medical condition to the hospital staff and to Dr. Edholm, with the intent of inducing Edholm to perform an invasive search. There is evidence in the record showing that Freeman and Johnson knew that George did not have a seizure. They both admitted in response to written requests from George that the paramedics told them that George had not had a seizure, and they both testified in their depositions that they believed George was faking a seizure. There is evidence in the record showing that neither Freeman nor Johnson ***1216** believed that George had swallowed any cocaine. They both denied telling anyone that he had done so. But the hospital triage record indicates that hospital staff had been told by police ("per P.D.") that, in addition to inserting cocaine into his rectum, George had also ingested cocaine and had possibly had a seizure. George specifically stated that he heard Freeman tell Edholm that George had swallowed cocaine. There is evidence in the record that the information that George had ingested cocaine and had possibly had a seizure led Edholm to perform a more invasive search than he otherwise would have. Edholm testified that his

decision to treat George aggressively was based in part on that information. Finally, there is evidence in the record that Freeman and Johnson physically assisted Edholm by turning George on the table and holding his legs, and that Freeman emphasized to Edholm the necessity for prompt action in removing the cocaine from George's rectum.

There is, of course, contrary evidence. Freeman backtracked from his response to George's Request for Admission, claiming in his deposition that he did not recall the paramedics saying that George did not have a seizure. Freeman and Johnson both backtracked from their admissions that "plaintiff appear[ed] to have swollen [sic] some drugs." Freeman stated in his deposition, "I don't remember telling anybody about anything." Johnson stated, "I don't recall ever saying something like 'swollen' or 'swallowed drugs.' " These statements, if believed, would tend to show that neither Freeman nor Johnson was the source of the false information in the hospital's triage record. Further, Freeman denied telling Edholm to take the cocaine out of George's rectum, and Freeman and Johnson both stated that they could not remember turning and holding George down in the hospital.

However, a reasonable jury would not be required to believe any of the contrary evidence just described. Instead, it could believe the evidence favorable to George. Based on this evidence, a reasonable jury could find that Freeman and Johnson provided "significant encouragement, either overt or covert," to Dr. Edholm, *Brentwood Acad.,* 531 U.S. at 295, 121 S.Ct. 924, and that they "induce[d], encourage[d] or promote[d]" Edholm to do what he would not otherwise have done, *Norwood,* 413 U.S. at 465, 93 S.Ct. 2804; *see Reed,* 15 F.3d at 932–33, such that Edholm's actions are attributable to the state.

To hold Dr. Edholm personally liable as a state actor, George must establish not only that Edholm was induced to act as he did, but also that Edholm intended to assist Freeman and Johnson in obtaining evidence for their investigation. *See United States v. Attson,* 900 F.2d 1427, 1433 (9th Cir.1990) (holding that "a party is subject to the [F]ourth [A]mendment only when he or she has formed the necessary intent to assist in the government's investigative or administrative functions"). We hold only that Edholm's actions could be attributed to the state, based on our holding that a reasonable jury could conclude that Freeman and Johnson provided false information, encouragement, and active physical assistance to Edholm. We do not reach the different question whether a jury could conclude that Edholm is himself liable under § 1983. *See Harvey v. Plains Twp. Police Dep't,* 421 F.3d 185, 196 n. 13 (3d Cir.2005) (noting that even if a private actor cannot be liable "simply because she is compelled to take an action by a state actor," it is "entirely proper to find that the state actor engaged in state action, including whatever actions the private party was compelled to undertake"); *see also United States v. Booker,* 728 F.3d 535, 540 (6th Cir.2013) ("When police officers bring ***1217** a suspect in custody to a purportedly independent actor, and stand by without interfering while the actor unlawfully batters the subject in a way that the police clearly could not, it can hardly be argued that resulting evidence is admissible.").

B. Fourth Amendment Claim

1. Reasonableness of the Search

Because we hold that Officers Freeman and Johnson could be held responsible for the procedures performed by Dr. Edholm, we now turn to the question whether, taking the facts in the light most favorable to George, this search was unconstitutional. *See Saucier,* 533 U.S. at 201, 121 S.Ct. 2151.

The Fourth Amendment requires that a nonconsensual physical search of a suspect's body, like any other nonconsensual search, be reasonable. *See Winston v. Lee,* 470 U.S. 753, 759–60, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). A body search, however, requires "a more substantial justification" than other searches. *Id.* at 767, 105 S.Ct. 1611. In *Winston,* the Supreme Court rejected the state's request for a court order requiring a suspect to undergo surgery to remove a bullet from the suspect's chest. *Id.* at 755, 105 S.Ct. 1611. In holding that the forced surgery would be unconstitutional, the Court identified three primary factors courts should weigh in deciding the reasonableness of a body search. Those factors are (1) "the extent to which the procedure may threaten the safety or health of the individual," (2) "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and (3) "the community's interest in fairly and accurately determining guilt or innocence." *Id.* at 761–62, 105 S.Ct. 1611. The failure to obtain a warrant, while not necessarily fatal to a claim of reasonableness, is also relevant. *See id.* at 761, 105 S.Ct. 1611; *United States v. Cameron,* 538 F.2d 254, 259 (9th Cir.1976).

The foundational case is *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), in which police

officers entered Rochin's house and saw him swallow two capsules of morphine. *Id.* at 166, 72 S.Ct. 205. The officers took Rochin to a hospital, where "[a]t the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will." *Id.* Rochin vomited up the morphine capsules, which the prosecution then introduced as evidence at trial. *Id.* The Court reversed, holding that the forcible stomach-pumping "shock[ed] the conscience" and was "too close to the rack and the screw" to survive constitutional scrutiny. *Id.* at 172, 72 S.Ct. 205. Though *Rochin* was decided under the Due Process Clause of the Fourteenth Amendment, the Court has made clear it would now "be treated under the Fourth Amendment, albeit with the same result." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 849 n. 9, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Analyzing the *Winston* factors in light of *Rochin,* we hold that there is evidence in the record, viewed in the light most favorable to George, that would support a finding that Officers Freeman and Johnson violated George's Fourth Amendment rights. We address the *Winston* factors in turn.

First, the danger to George's health and safety from the procedures performed in the hospital appears to have been slight, though not nonexistent. Neither George nor the officers have provided evidence of the general risks (or lack thereof) of sedation, anoscopy, intubation, and bowel evacuation. George testified, however, that the anoscopy caused him significant pain and anal bleeding that continued after he left the hospital.

***1218** Second, the "intrusion upon [George's] dignitary interests in personal privacy and bodily integrity" was extreme. *Winston,* 470 U.S. at 761, 105 S.Ct. 1611. Edholm sedated George. He opened George's anus with an anoscope and inserted long forceps into George's rectum. He inserted a tube into George's nose, ran the tube into George's stomach, and pumped a gallon of liquid laxative through George's digestive system, triggering a complete evacuation of George's bowels. When George regained consciousness, the bowel evacuation was still in process. George did not consent to any of these procedures. The officers neither had a warrant authorizing these procedures nor attempted to get one.

These procedures were "highly intrusive and humiliating." *Tribble v. Gardner,* 860 F.2d 321, 324 (9th Cir.1988). The search invaded George's anus and nostrils, as well as his throat, stomach, and intestines. The anoscopy "targeted an area of the body that is highly personal and private." *United States v. Gray,* 669 F.3d 556, 564 (5th Cir.2012), *vacated on other grounds,* —— U.S. ——, 133 S.Ct. 151, 184 L.Ed.2d 2 (2012). Forced sedation, anoscopy, intubation, and bowel evacuation are more invasive than the stomach-pumping that *Rochin* described as "close to the rack and screw." 342 U.S. at 172, 72 S.Ct. 205; *accord United States v. Booker,* 728 F.3d 535, 545 (6th Cir.2013). If George's evidence is believed, the procedures were performed despite his vociferous protests and without explanation, consultation, or other "reasonable steps to mitigate [his] anxiety, discomfort, and humiliation." *Cameron,* 538 F.2d at 258; *see also Winston,* 470 U.S. at 765, 105 S.Ct. 1611 ("[T]o take control of respondent's body, to drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness, and then to search beneath his skin for evidence of a crime ... involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin." (citation and internal quotation marks omitted)).

The search here was at least as invasive as searches we and other courts have characterized as unwarranted intrusions on dignitary interests. In *United States v. Cameron,* a suspect underwent a digital rectal exam and two enemas before being forced to drink a liquid laxative. 538 F.2d at 258. In an opinion by then-Judge Kennedy, we held that search unreasonable. *Id.* at 258–60. In *Ellis v. City of San Diego,* 176 F.3d 1183 (9th Cir.1999), we held that the plaintiff had alleged a clear Fourth Amendment violation when he claimed that doctors sedated him, took blood samples, and inserted a catheter into his penis. *Id.* at 1186, 1191–92; *see also Booker,* 728 F.3d at 547 (sedation, intubation, and anal probing are "an affront to personal dignity ... categorically greater" than the surgery in *Winston*); *Gray,* 669 F.3d at 564 (proctoscopy is "a greater affront to ... dignitary interest[s] than full-on exploratory surgery"); *United States v. Husband,* 226 F.3d 626, 632 (7th Cir.2000) (sedation and reaching into suspect's mouth "constitute a serious invasion of ... personal privacy and liberty interests"); *Rodriques v. Furtado,* 950 F.2d 805, 811 (1st Cir.1991) (vaginal inspection is "a drastic and total intrusion of ... personal privacy and security"); *Kennedy v. L.A. Police Dep't,* 901 F.2d 702, 711 (9th Cir.1989) (visual inspections of body cavities are "dehumanizing and humiliating"), *abrogated on other grounds by Hunter v. Bryant,* 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam); *Tribble,* 860 F.2d at 325 (digital rectal exam is "one of the most intrusive methods of detecting contraband"); *Yanez v. Romero,* 619 F.2d 851, 855 (10th Cir.1980) (catheterization is a "gross personal indignity");

***1219** *Huguez v. United States,* 406 F.2d 366, 379 (9th Cir.1968) (digital rectal exam was "a brutal invasion of privacy"); *State v. Payano–Roman,* 290 Wis.2d 380, 714 N.W.2d 548, 560 (2006) (being forced to drink a laxative is a "significant intrusion").

Intrusive body searches are permissible when they are reasonably necessary to respond to an immediate medical emergency. *See Husband,* 226 F.3d at 635; *People v. Bracamonte,* 15 Cal.3d 394, 124 Cal.Rptr. 528, 540 P.2d 624, 629 (1975). Officers Freeman and Johnson contend that such an emergency existed because of the risk that the baggie of cocaine base in George's rectum would rupture. They contend that the procedures performed by Dr. Edholm were necessary to save George's life. But "since the suspect himself would have been responsible for any such [medical] risk, only a showing of the greatest imminent harm would justify intrusive action for the purpose of removal of the drug." *Cameron,* 538 F.2d at 259 n. 8.

Freeman and Johnson rely heavily on Dr. Edholm's testimony that the procedures were "life-saving treatment" necessary to address the risk that the baggie of cocaine base in George's rectum would rupture. But Edholm's testimony would be of limited use if a jury concluded that Freeman and Johnson were the source of false information leading Edholm to believe that a life-threatening emergency existed. Edholm never testified that he believed the baggie had actually ruptured. He testified only that it could rupture: "If the golf ball size amount of cocaine in his rectum had ruptured, he likely would have died that evening." As to "drug-packing" in general, Edholm testified that "if you don't get the drugs out, then they can rupture." Edholm did not testify that he had any reason to think the baggie in George's rectum was more likely to rupture than in any other drug-packing case.

Viewing the evidence in the light most favorable to George, a reasonable jury could conclude that the only actual risk to George's health was the possibility that the baggie of cocaine base *could* rupture. That sort of speculative, generalized risk cannot on its own justify nonconsensual procedures as invasive as those performed by Dr. Edholm. Every person who hides a baggie of drugs in his rectum faces a risk that the baggie will rupture. But the mere fact "that the suspect is concealing contraband does not authorize government officials to resort to any and all means at their disposal to retrieve it." *Cameron,* 538 F.2d at 258; *see Winston,* 470 U.S. at 767, 105 S.Ct. 1611. Otherwise, highly invasive searches of drug-packing suspects' rectums would never violate the Fourth Amendment. That clearly is not the law. *See Rochin,* 342 U.S. at 172, 72 S.Ct. 205; *Cameron,* 538 F.2d at 256–59; *Bracamonte,* 124 Cal.Rptr. 528, 540 P.2d at 628–31.

The record could support a jury conclusion that the search was not reasonably necessary to address the risk of rupture of the baggie in George's rectum. Officers Freeman and Johnson both testified they had seen doctors allow suspects with drugs in their rectums to pass the drugs naturally, using only laxatives, including one suspect who had a "very high" heart rate and, as a result, was placed in intensive care. A rational jury could thus find that the potential risk of rupture could be adequately addressed by keeping George in the hospital and monitoring his bowel movements. *See United States v. Aman,* 624 F.2d 911, 913 (9th Cir.1980) (allowing police to hold drug-packing suspect "where medical personnel and facilities were immediately available" in case the package ruptured); *Cameron,* 538 F.2d at 258 & n. 7.

***1220** Third, we weigh the intrusiveness of the search against "the community's interest in fairly and accurately determining guilt or innocence." *Winston,* 470 U.S. at 762, 105 S.Ct. 1611. The community has a strong interest in prosecuting those who are selling cocaine base, and George likely could not have been prosecuted without the evidence he had hidden in his rectum. But a jury could reasonably conclude that the baggie of cocaine base could have been recovered through far less intrusive means. If George's life was not in immediate jeopardy, doctors could have kept him in the hospital, administered laxatives, and monitored his bowel movements. *See Cameron,* 538 F.2d at 258. Further, if that course of treatment had been followed, the officers then would have had time to seek a search warrant. *See United States v. Erwin,* 625 F.2d 838, 841 (9th Cir.1980). Under these circumstances, the intrusiveness of the search far exceeded what was necessary to serve the community's interest in recovering evidence of George's crime.

We therefore hold, based on the *Winston* factors, that a jury could conclude the procedures performed by Dr. Edholm violated the Fourth Amendment.

2. Qualified Immunity

Even if Officers Freeman and Johnson violated George's Fourth Amendment rights, they are entitled to qualified immunity if those rights were not "clearly established" at the time of the search. *See Stanton v. Sims,* —— U.S. ——,

134 S.Ct. 3, 4–5, 187 L.Ed.2d 341 (2013) (per curiam); *Ashcroft v. al-Kidd,* —— U.S. ——, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011). For a right to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Viewing the evidence in the light most favorable to George, we hold that Freeman and Johnson are not entitled to qualified immunity on the Fourth Amendment claim.

George has provided evidence that would support a jury conclusion that Freeman and Johnson gave false information to Dr. Edholm, and that this false information induced Edholm to perform unconstitutionally intrusive procedures that he would not otherwise have performed. "[E]very reasonable official would have understood" that conduct to violate the Fourth Amendment. *al-Kidd,* 131 S.Ct. at 2083 (internal quotation mark omitted). We reach this decision based on Supreme Court precedent, "cases of controlling authority in [the officers'] jurisdiction," and "a consensus of cases of persuasive authority." *Wilson v. Layne,* 526 U.S. 603, 615–17, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

First, it was clearly established that a private citizen's search may be attributed to the police when the "the private party act[s] as an instrument or agent of the Government" in conducting the search. *Skinner,* 489 U.S. at 614, 109 S.Ct. 1402. That principle had been repeatedly and clearly applied to doctors' searches of suspects' bodies. *See, e.g., Ellis,* 176 F.3d at 1191–92 (applying the Fourth Amendment to doctor and nurse's actions performed based on police instruction); *Cameron,* 538 F.2d at 256–60 (same); *Bracamonte,* 124 Cal.Rptr. 528, 540 P.2d at 626–31 (same). No reasonable officer could have believed that he could avoid responsibility for an unconstitutional search by using deception to induce a private party to perform the search. The Supreme Court has deemed that principle so obvious as to be "axiomatic." *Norwood,* 413 U.S. at 465, 93 S.Ct. 2804. The Court wrote, "[A] state may not induce, encourage, or promote private persons to accomplish what it is constitutionally ***1221** forbidden to accomplish." *Id.* (internal quotation marks omitted).

Second, it was clearly established that a search of a patient's body must be reasonable. *See Winston,* 470 U.S. at 759–62, 105 S.Ct. 1611; *Cameron,* 538 F.2d at 257–59. As we explained above, forced sedation, anoscopy, intubation, insertion of a nasogastric tube, and bowel evacuation are more intrusive than the stomach-pumping rejected in *Rochin,* and at least as intrusive as other searches characterized as highly invasive by courts across the country. *See, e.g., Husband,* 226 F.3d at 632; *Rodriques,* 950 F.2d at 811; *Kennedy,* 901 F.2d at 712; *Tribble,* 860 F.2d at 325; *Yanez,* 619 F.2d at 855; *Huguez,* 406 F.2d at 379; *Bracamonte,* 124 Cal.Rptr. 528, 540 P.2d at 631. Case law clearly established that the possibility that a baggie of drugs could rupture, standing alone, cannot justify a warrantless search as intrusive as that conducted here. *See, e.g., Rochin,* 342 U.S. at 172, 72 S.Ct. 205; *Cameron,* 538 F.2d at 258, 259 n. 8; *Utah v. Hodson,* 907 P.2d 1155, 1158 (Utah 1995). Indeed, the California Supreme Court so held nearly thirty years before the search in this case. *Bracamonte,* 124 Cal.Rptr. 528, 540 P.2d at 629 & n. 5; *see Stanton,* 134 S.Ct. at 7 (finding important the holdings of courts in the jurisdiction where officials act); *al-Kidd,* 131 S.Ct. at 2086–87 (Kennedy, J., concurring) (same).

C. Fourteenth Amendment Claim

In addition to his claim under the Fourth Amendment, which applies to the states through the Fourteenth Amendment, *see Mapp v. Ohio,* 367 U.S. 643, 654–55, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), George brings a separate Fourteenth Amendment claim based on his right to refuse unwanted medical treatment, *see Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). We do not reach the merits of this claim, *see C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.,* 654 F.3d 975, 978 (9th Cir.2011), but hold that Freeman and Johnson are entitled to qualified immunity.

George has not identified a single case finding a Fourteenth Amendment violation under circumstances like those here. He cites the Seventh Circuit's decision in *United States v. Husband,* 226 F.3d at 632, but the court in that case considered the right to refuse medical treatment only as a factor in analyzing a Fourth Amendment claim. George relies primarily on cases dealing either with the treatment of persons in vegetative states, *see Cruzan,* 497 U.S. at 265, 110 S.Ct. 2841, or with the use of medication to render criminal defendants competent to stand trial, *see Riggins v. Nevada,* 504 U.S. 127, 133–38, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992); *United States v. Rivera–Guerrero,* 426 F.3d 1130, 1133 (9th Cir.2005); *see also Benson v. Terhune,* 304 F.3d 874, 880–85 (9th Cir.2002). Those cases are "readily distinguishable." *Stanton,* 134 S.Ct. at 7. Based on the cases cited to us by George, we cannot say that "every reasonable

official" would have known the procedures performed by Dr. Edholm violated the Fourteenth Amendment. *al-Kidd,* 131 S.Ct. at 2083 (internal quotation mark omitted).

D. Claims Against Edholm

In light of its ruling on Officers Freeman and Johnson's summary judgment motion, the district court suggested that George voluntarily dismiss without prejudice his claims against Dr. Edholm. Before George did so, however, the district court entered a final judgment dismissing George's complaint in its entirety. One day later, George filed a notice of dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(i). George now argues his voluntary dismissal was a nullity because it followed the district court's order of final ***1222** judgment. George cites no case on point, and our circuit does not appear to have addressed the issue. The district court may address that issue, as well as any others related to Edholm, on remand.

Conclusion

We reverse the grant of summary judgment to Officers Freeman and Johnson on George's Fourth Amendment claim. We affirm the grant of summary judgment on his Fourteenth Amendment claim. We decline to address issues related to Dr. Edholm. Each party shall bear its own costs on appeal.

REVERSED in part, AFFIRMED in part, and REMANDED.

All Citations

752 F.3d 1206, 14 Cal. Daily Op. Serv. 5765, 2014 Daily Journal D.A.R. 6622

Footnotes

* The Honorable Barbara M.G. Lynn, District Judge for the U.S. District Court for the Northern District of Texas, sitting by designation.

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88 S.Ct. 507
Supreme Court of the United States

Charles KATZ, Petitioner,

v.

UNITED STATES.

No. 35.
|
Argued Oct. 17, 1967.
|
Decided Dec. 18, 1967.

Synopsis

Defendant was convicted in the United States District Court for the Southern District of California, Central Division, Jesse W. Curtis, J., of a violation of statute proscribing interstate transmission by wire communication of bets or wagers, and he appealed. The Court of Appeals, 369 F.2d 130, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that government's activities in electronically listening to and recording defendant's words spoken into telephone receiver in public telephone booth violated the privacy upon which defendant justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within Fourth Amendment, and fact that electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance. The Court further held that the search and seizure, without prior judicial sanction and attendant safeguards, did not comply with constitutional standards, although, accepting account of government's actions as accurate, magistrate could constitutionally have authorized with appropriate safeguards the very limited search and seizure that government asserted in fact took place and although it was apparent that agents had acted with restraint.

Judgment reversed.

Mr. Justice Black dissented.

Attorneys and Law Firms

****509** ***347** Harvey A. Schneider and Burton Marks, Beverly Hills, Cal., for petitioner.

***348** John S. Martin, Jr., Washington, D.C., for respondent.

Opinion

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute.[1] At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversation, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, ***349** because '(t)here was no physical entrance into the area occupied by, (the petitioner).'[2] ****510** We granted certiorari in order to consider the constitutional questions thus presented.[3]

The petitioner had phrased those questions as follows:
'A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

***350** 'B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.'

We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' Secondly, the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.[4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.[5] But the protection of a ****511** person's general right to privacy—his right to be let alone by other people[6]—is, like

the ***351** protection of his property and of his very life, left largely to the law of the individual States.[7]

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a 'constitutionally protected area.' The Government has maintained with equal vigor that it was not.[8] But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. ***352** See Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits ****512** him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, tha the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, Olmstead v. United States, 277 U.S. 438, 457, 464, 466, 48 S.Ct. 564, 565, 567, 568, 72 L.Ed. 944; Goldman v. United States, 316 U.S. 129, 134—136, 62 S.Ct. 993, 995—997, 86 L.Ed. 1322, for that Amendment was thought to limit only searches and seizures of tangible ***353** property.[13] But '(t)he premise that property interests control the right of the Government to search and seize has been discredited.' Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782. Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under * * * local property law.' Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

***354** The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined

their surveillance to the brief periods during which he used the telephone booth,[14] and **513 they took great care to overhear only the conversations of the petitioner himself.[15]

Accepting this account of the Government's actions as acccurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of *355 such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the * * * allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' Osborn v. United States, 385 U.S. 323, 329—330, 87 S.Ct. 429, 433, 17 L.Ed.2d 394. Discussing that holding, the Court in Berger v. State of New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040, said that 'the order authorizing the use of the electronic device' in Osborn 'afforded similar protections to those * * * of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' Id., at 57, 87 S.Ct. at 1882.[16] Here, too, **514 a similar *356 judicial order could have accommodated 'the legitimate needs of law enforcement'[17] by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in Olmstead and Goldman, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive *357 means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.' Wong Sun v. United States, 371 U.S. 471, 481—482, 83 S.Ct. 407, 414, 9 L.Ed.2d 441. 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment[18] —subject only to a few specifically established and well-delineated exceptions.[19]

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest.[20] **515 *358 Nor could the use of electronic surveillance without prior autorization be justified on grounds of 'hot pursuit.'[21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.[22]

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case.[23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the * * * search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' Beck v. State of Ohio, 379 U.S. 89, 96, 85S.Ct. 223, 228, 13 L.Ed.2d 142.

And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment *359 violations 'only in the discretion of the police.' Id., at 97, 85 S.Ct. at 229.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification * * * that is central to the Fourth Amendment,'[24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

Judgment reversed.

Mr. Justice MARSHALL took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, with whom Mr. Justice BRENNAN joins, concurring.

While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother ****516** WHITE, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate ***360** and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes. Article III, s 3, gives 'treason' a very narrow definition and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses. The arrests on cases of 'hot pursuit' and the arrests on visible or other evidence of probable cause cut across the board and are not peculiar to any kind of crime.

I would respect the present lines of distinction and not improvise because a particular crime seems particularly heinous. When the Framers took that step, as they did with treason, the worst crime of all, they made their purpose manifest.

Mr. Justice HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and unlike a field, Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; ***361** and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra.

The critical fact in this case is that '(o)ne who occupies it, (a telephone ****517** booth) shuts the door behind him, and pays

the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. Ante, at 511. The point is not that the booth is 'accessible to the public' at other times, ante, at 511, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688.

In Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. ***362** That case established that interception of conversations reasonably intended to be private could constitute a 'search and seizure,' and that the examination or taking of physical property was not required. This view of the Fourth Amendment was followed in Wong Sun v.United States, 371 U.S. 471, at 485, 83 S.Ct. 407, at 416, 9 L.Ed.2d 441, and Berger v. State of New York, 388 U.S. 41, at 51, 87 S.Ct. 1873, at 1879, 18 L.Ed.2d 1040. Also compare Osborne v. United States, 385 U.S. 323, at 327, 87 S.Ct. 429, at 431, 17 L.Ed.2d 394. In Silverman we found it unnecessary to re-examine Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider Goldman, and I agree that it should now be overruled.[*] Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptios. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

Mr. Justice WHITE, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be subjected ***363** to the test of reasonableness under the Fourth Amendment and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement.[**]

****518** In joining the Court's opinion, I note the Court's acknowledgement that there are circumstance in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See Berger v. State of New York, 388 U.S. 41, 112—118, 87 S.Ct. 1873, 1911—1914, 18 L.Ed.2d 1040 (1967) (White, J., ***364** dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

Mr. Justice BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a 'search' or 'seizure,' I would be happy to join the Court's opinion. For on that premise my Brother STEWART sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect today's opinion differs sharply from Berger v.State of New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable cause. The Berger case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and abates to a large extent the confusion and near-paralyzing effect of the Berger holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order 'to bring it into harmony with the times' and thus reach a result that many people believe to be desirable.

***365** While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of

broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

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

The first clause protects 'persons, houses, papers, and effects, against unreasonable searches and seizures * * *.' ****519** These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those 'particularly describing the place to be searched, and the persons or things to be seized.' A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one 'describe' a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what ***366** is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says 'particularly describing'? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in Berger, supra, recognized, 'an ancient practice which at common law was condemned as a nuisance. IV Blackstone, Commentaries s 168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse.' 388 U.S., at 45, 87 S.Ct., at 1876. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction. This ***367** principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the 'seizure' of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. See, e.g., Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942).

****520** So far I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption and that the Court's decision in this case, along with its amorphous holding in Berger last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment's applicability to eavesdropping through a wiretap was, of course, Olmstead, supra. In holding tha the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

'The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is ***368** that it must specify the place to be searched and the person or things to be seized. * * *

'Justice Bradley in the Boyd case (Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746), and Justice Clarke in the Gouled case (Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647), said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.' 277 U.S., at 464—465, 48 S.Ct., at 568.

Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to Olmstead, found no Fourth Amendment violation.

It should be noted that the Court in Olmstead based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown, supra, in the cited quotation from the case, theCourt went to great pains to examine the actual language of the Amendment and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court in citing Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898, indicated that even where there was a trespass the Fourth Amendment does not automatically apply to evidence obtained by 'hearing or ***369** sight.' The Olmstead majority characterized Hester as holding 'that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves 100 yards away from his house, and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers, or effects.' 277 U.S., at 465, 48 S.Ct., at 568. Thus the clear holding of the Olmstead and Goldman cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the Fourth Amendment.

While my reading of the Olmstead and Goldman cases convinces me that they were decided on the basis of the inapplicability ****521** of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in Berger v. State of New York, 388 U.S. 41, 76, 87 S.Ct. 1873, 1892, 18 L.Ed.2d 1040, I continue to believe that this exclusionary rule formulated in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, rests on the 'supervisory power' of this Court over other federal courts and is not rooted in the Fourth Amendment. See Wolf v. People of State of Colorado, concurring opinion, 338 U.S. 25, 39, at 40, 69 S.Ct. 1359, 1367, at 1368, 93 L.Ed. 1782. See also Mapp v. Ohio, concurring opinion, 367 U.S. 643, 661—666, 81 S.Ct. 1684, 1694—1698, 6 L.Ed.2d 1081. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the Fourth Amendment. As this Court said in Lopez v. United States, 373 U.S. 427, 438—439, 83 S.Ct. 1381, 1387, 10 L.Ed.2d 462, 'The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear (citing ***370** Olmstead and Goldman). It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman v. United States.'

To support its new interpretation of the Fourth Amendment, which in effect amounts to a rewriting of the language, the Court's opinion concludes that 'the underpinnings of Olmstead and Goldman have been * * * eroded by our subsequent decisions * * *.' But the only cases cited as accomplishing this 'eroding' are Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, and Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. Neither of these cases 'eroded' Olmstead or Goldman. Silverman is an interestng choice since there the Court expressly refused to re-examine the rationale of Olmstead or Goldman although such a re-examination was strenuously urged upon the Court by the petitioners' counsel. Also it is significant that in Silverman, as the Court described

it, 'the eavesdropping was accomplished by means on an unauthorized physical penetration into the premises occupied by the petitioners,' 365 U.S., at 509, 81 S.Ct., at 681, thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court 'need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls.' (At 511, 81 S.Ct., at 682.) Yet this statement should not becloud the fact that time and again the opinion emphasizes that there has been an unauthorized intrusion: 'For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners.' (365 U.S., at 509, 81 S.Ct., at 682 emphasis added.) 'Eavesdropping ***371** accomplished by means of such a physical intrusion is beyond the pale of even those decisions * * *.' (At 509, 81 S.Ct., at 682, emphasis added.) 'Here * * * the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office * * *.' (At 511, 81 S.Ct., at 682, emphasis added.) '(D)ecision here * * * is based upon the reality of an actual intrusion * * *.' (At 512, 81 S.Ct., at 683, emphasis added.) 'We find no occasion to re-examine Goldman ****522** here, but we decline to go beyond it, by even a fraction of an inch.' (At 512, 81 S.Ct., at 683, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement: 'In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion.' (At 513, 81 S.Ct., at 684, emphasis added.) As I made clear in my dissent in Berger, the Court in Silverman held the evidence should be excluded by virtue of the exclusionary rule and 'I would not have agreed with the Court's opinion in Silverman * * * had I thought that the result depended on finding a violation of the Fourth Amendment * * *.' 388 U.S., at 79—80, 87 S.Ct., at 1894. In light of this and the fact that the Court expressly refused to re-examine Olmstead and Goldman, I cannot read Silverman as overturning the interpretation stated very plainly in Olmstead and followed in Goldman that eavesdropping is not covered by the Fourth Amendment.

The other 'eroding' case cited in the Court's opinion is Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. It appears that this case is cited for the proposition that the Fourth Amendment applies to 'intangibles,' such as conversation, and the following ambiguous statement is quoted from the opinion: 'The premise that property interests control the right of the Government to search and seize has been discredited.' 387 U.S., at 304, 87 S.Ct., at 1648. But far from being concerned ***372** with eavesdropping, Warden, Md. Penitentiary v. Hayden upholds the seizure of clothes, certainly tangibles by any definition. The discussion of property interests was involved only with the common-law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that although the Court attempts to convey the impression that for some reason today Olmstead and Goldman are no longer good law, it must face up to the fact that these cases have never been overruled or even 'eroded.' It is the Court's opinions in this case and Berger which for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversation can be 'seized.'[*] I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment.

***373** Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far ****523** as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times.' It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy,

for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, 'The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' ***374** of individuals. But there is not.' (Dissenting opinion, at 508, 85 S.Ct. at 1695.) I made clear in that dissent my fear of the dangers involved when this Court uses the 'broad, abstract and ambiguous concept' of 'privacy' as a 'comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.'' (See generally dissenting opinion, at 507—527, 85 S.Ct., at 1694—1705.)

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of 'persons, houses, papers, and effects.' No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.

All Citations

389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576

Footnotes

1 18 U.S.C. s 1084. That statute provides in pertinent part:

'(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined no more than $10,000 or inprisoned not more than two years, or both.

'(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.'

2 9 Cir., 369 F.2d 130, 134.

3 386 U.S. 954, 87 S.Ct. 1021, 18 L.Ed.2d 102. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, we do nto reach that issue.

We find no merit in the petitioner's further suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, he testified before a federal grand jury concerning the charges involved here. Because he was compelled to testify pursuant to a grant of immunity, 48 Stat. 1096, as amended, 47 U.S.C. s 409(l), it is clear that the fruit of his testimony cannot be used against him in any future trial. But the petitioner asks for more. He contends that his conviction must be vacated and the charges against him dismissed lest he be 'subjected to (a) penalty * * * on account of (a) * * * matter * * * concerning which he (was) compelled * * * to testify * * *.' 47 U.S.C. s 409(l). Frank v. United States, 120 U.S.App.D.C. 392, 347 F.2d 486. We disagree. In relevant part, s 409(l) substantially repeats the language of the Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U.S.C. s 46, which was Congress' response to this Court's statement that an immunity statute can supplant the Fifth Amendment privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. Counselman v. Hitchcock, 142 U.S. 547, 585—586, 12 S.Ct. 195, 206—207, 35 L.Ed. 1110. The statutory provision here involved was designed to provide such protection, see Brown v. United States, 359 U.S. 41, 45—46, 79 S.Ct. 539, 543—544, 3 L.Ed.2d 609, not to confer immunity from punishment pursuant to a prior prosecution and adjudication of guilt. Cf. Reina v. United States, 364 U.S. 507, 513—514, 81 S.Ct. 260, 264—265, 5 L.Ed.2d 249.

4 'The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. * * * And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.' Griswold v. State of Connecticut, 381 U.S. 479, 509, 85 S.Ct. 1678, 1695, 14 L.Ed.2d 510 (dissenting opinion of MR. JUSTICE BLACK).

5 The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's associations.' NAACP v. State of Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for * * * '* * * the right of each individual 'to a private enclave where he may lead a private life. "' Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

6 See Warren & Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193 (1890).

7 See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513.

8 In support of their respective claims, the parties have compiled competing lists of 'protected areas' for our consideration. It appears to be common ground that a private home is such an area, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, but that an open field is not. Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. Defending the inclusion of a telephone booth in his list the petitioner cites United States v. Stone, D.C., 232 F.Supp. 396, and United States v. Madison, 32 L.W. 2243 (D.C.Ct.Gen.Sess.). Urging that the telephone booth should be excluded, the Government finds support in United States v. Borgese, D.C., 235 F.Supp. 286.

9 It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' see, e.g., Silverman v. United States, 365 U.S. 505, 510, 512, 81 S.Ct. 679, 682, 683, 5 L.Ed.2d 734; Lopez v. United States, 373 U.S. 427, 438—439, 83 S.Ct. 1381, 1387—1388, 10 L.Ed.2d 462; Berger v. State of New York, 388 U.S. 41, 57, 59, 87 S.Ct. 1873, 1882, 1883, 18 L.Ed.2d 1040, but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

10 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

11 Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697.

12 Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688.

13 See Olmstead v. United States, 277 U.S. 438, 464—466, 48 S.Ct. 564, 567—569, 72 L.Ed. 944. We do not deal in this case with the law of detention r arrest under the Fourth Amendment.

14 Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations converning the placing of bets and the receipt of wagering information.

15 On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

16 Although the protections afforded the petitioner in Osborn were 'similar * * * to those * * * of conventional warrants,' they were not identical. A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in Osborn simply recognized, as has this Court,

that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. See, Ker v. State of California, 374 U.S. 23, 37—41, 83 S.Ct. 1623, 1631—1634, 10 L.Ed.2d 726.

Although some have thought that this 'exception to the notice requirement where exigent circumstances are present,' id., at 39, 83 S.Ct. at 1633, should be deemed inapplicable where police enter a home before its occupants are aware that officers are present, id., at 55—58, 83 S.Ct. at 1640—1642 (opinion of MR. JUSTICE BRENNAN), the reasons for such a limitation have no bearing here. However true it may be that '(i)nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion,' id., at 57, 83 S.Ct. at 1642, and that 'the requirement of awareness * * * serves to minimize the hazards of the officers' dangerous calling,' id., at 57—58, 83 S.Ct. at 1642, these considerations are not relevant to the problems presented by judicially authorized electronic surveillance.

Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place. Nordelli v. United States, 9 Cir., 24 F.2d 665, 666—667.

Thus the fact that the petitioner in Osborn was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in Berger from reaching the conclusion that the use of the recording device sanctioned in Osborn was entirely lawful. 388 U.S. 41, 57, 87 S.Ct. 1873, 1882.

17 Lopez v. United States, 373 U.S. 427, 464, 83 S.Ct. 1381, 1401, 10 L.Ed.2d 462 (dissenting opinion of MR. JUSTICE BRENNAN).

18 See, e.g., Jones v. United States, 357 U.S. 493, 497—499, 78 S.Ct. 1253, 1256—1257, 2 L.Ed.2d 1514; Rios v. United States, 364 U.S. 253, 261, 80 S.Ct. 1431, 1436, 4 L.Ed.2d 1688; Chapman v. United States, 365 U.S. 610, 613—615, 81 S.Ct. 776, 778, 779, 5 L.Ed.2d 828; Stoner v. State of California, 376 U.S. 483, 486—487, 84 S.Ct. 889, 891—892, 11 L.Ed.2d 856.

19 See, e.g., Carroll v. United States, 267 U.S. 132, 153, 156, 45 S.Ct. 280, 285, 286, 69 L.Ed. 543; McDonald v. United States, 335 U.S. 451, 454—456, 69 S.Ct. 191, 192—194, 93 L.Ed. 153; Brinegar v. United States, 338 U.S. 160, 174—177, 69 S.Ct. 1302, 1310—1312, 93 L.Ed. 1879; Cooper v. State of California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730; Warden Md. Penitentiary v. Hayden, 387 U.S. 294, 298—300, 87 S.Ct. 1642, 1645—1647, 18 L.Ed.2d 782.

20 In Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145, the Court stated:

'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits ar as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.'

Whatever one's view of 'the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest,' United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 433, 94 L.Ed. 653; cf. id., at 71—79, 70 S.Ct. at 437—441 (dissenting opinion of Mr. Justice Frankfurter), the concept of an 'incidental' search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

21 Although '(t)he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others,' Warden Md. Penitentiary v. Hayden, 387 U.S. 294, 298—299, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

22 A search to which an individual consents meets Fourth Amendment requirements, Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477, but of course 'the usefulness of electronic surveillance depends on lack of notice to the suspect.' Lopez v. United States, 373 U.S. 427, 463, 83 S.Ct. 1381, 1401, 10 L.Ed.2d 462 (dissenting opinion of MR. JUSTICE BRENNAN).

23 Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

24 See Osborn v. United States, 385 U.S. 323, 330, 87 S.Ct. 429, 433, 17 L.Ed.2d 394.

* I also think that the course of development evinced by Silverman, supra, Wong Sun, supra, Berger, supra, and today's decision must be recognized as overruling Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, which essentially rested on the ground that coversations were not subject to the protection of the Fourth Amendment.

** In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); (2) by a recording device hidden on the person of such an informant, Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent coversing with the defendant in another location, On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. Hoffa v. United States, supra. It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner 'sought to exclude * * * the uninvited ear,' and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

* The first paragraph of my Brother HARLAN's concurring opinion is susceptible of the interpretation, although probably not intended, that this Court 'has long held' eavesdropping to be a violation of the Fourth Amendment and therefore 'presumptively unreasonable in the absence of a search warrant.' There is no reference to any long line of cases, but simply a citation to Silverman, and several cases following it, to establish this historical proposition. In the first place, as I have indicated in this opinion, I do not read Silverman as holding any such thing; and in the second place, Silverman was decided in 1961. Thus, whatever it held, it cannot be said it 'has (been) long held.' I think by Brother HARLAN recognizes this later in his opinion when he admits that the Court must now overrule Olmstead and Goldman. In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it 'has long held.' This is emphasized by my Brother HARLAN's claim that it is 'bad physics' to adhere to Goldman. Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.

New York
Official Reports

53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877

The People of the State of
New York, Respondent,
v.
Clarence Adams, Appellant.

Court of Appeals of New York
Argued March 30, 1981;

decided May 7, 1981

CITE TITLE AS: People v Adams

SUMMARY

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered January 22, 1980, which affirmed a judgment of the Supreme Court (Harold Silbermann, J.), rendered in Bronx County upon a verdict convicting defendant of attempted murder in the first degree.

At 9:00 P.M. on September 13, 1976, Housing Patrolman Rudolfo Quinones was on duty at Tinton Avenue and 163rd Street in Bronx County. Alerted by a commotion across the street from where he was standing, Quinones observed a man, later identified as defendant, holding a gun to a woman's head. As Quinones approached the couple, the defendant released the woman and began to move in Quinones' direction. Drawing his gun, Quinones ordered the defendant to halt and drop his weapon. The defendant, who was then approximately 25 feet away, fired two shots at Quinones. Patrolman Quinones fired two shots in return and defendant fell to the ground. Believing defendant to be wounded, Quinones began to walk toward him. Defendant suddenly wheeled and fired two more shots at Quinones which fortunately also missed their mark. Defendant ***2** got to his feet and disappeared into a nearby wooded area. Quinones radioed for assistance and several police cars soon arrived. A woman, Arah Blue, approached the police and identified herself as the girlfriend of the gunman. She provided the police with the defendant's name and address and urged the police to go to his apartment because he had threatened to kill her. The police were also told by Blue that defendant kept weapons and ammunition at the apartment and that she was in fear that he might have returned there to carry out his threat against her. Blue then escorted Quinones and the other officers to the defendant's nearby apartment and gave them access by opening the door with a key she was carrying. Upon entering, a cursory inspection of the premises revealed that neither the defendant nor anyone else was present. Blue then pointed out the closet in which she claimed defendant stored his weapons. One of the officers opened the closet door and inside the police found a .308 calibre rifle, 25 rounds of ammunition for the rifle and 44 rounds of .32 calibre ammunition. The police seized these items and exited the apartment without otherwise searching the premises. Upon leaving the building, Blue informed the officers that she did not live in the apartment but resided elsewhere. Five days later, defendant was arrested and charged with the attempted murder of Patrolman Quinones.

The Court of Appeals affirmed the order of the Appellate Division holding, in an opinion by Judge Jasen, that where searching officers rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate that the individual does, in fact, have the authority to consent, evidence obtained as the result of such a search should not be suppressed, since application of the exclusionary rule in such instances of reasonable, good faith reliance by the police would do little to deter misconduct by the authorities.

People v Adams, 72 AD2d 156, affirmed.

HEADNOTES

Crimes
Unlawful Search and Seizure

(1) Where searching officers rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate ***3** that the individual does, in fact, have the authority to consent, evidence obtained as the result of such a search should not be suppressed, since application of the exclusionary rule in such instances of reasonable, good faith reliance by the police would do little to deter misconduct by the authorities; accordingly, where, within minutes of a shooting directed at a fellow police officer, the police were confronted by a woman who stated that the gunman was her boyfriend, that she feared he would try to kill her and that he may have returned to his nearby apartment where he stored weapons and ammunition, the police were under a duty to go to the apartment in order to

apprehend the gunman before he could harm anyone else, and having been admitted to the apartment by the woman, who appeared to have control over the premises, the police were justified in not only determining whether the gunman was present, but also in immediately securing the weapons; time was of the essence and the police conduct was limited in scope to searching for the defendant and seizing the cache of weapons and ammunition stored in the closet. The police should not now be faulted for failing to undertake a more thorough inquiry into the woman's authority to consent to the search of the closet, and the officers' reliance on her authority over the premises was reasonable and warranted by the exigencies of the situation, which called for immediate action.

POINTS OF COUNSEL

Henry Winestine and *William E. Hellerstein* for appellant.
I. Evidence seized in an illegal search of appellant's apartment should have been suppressed. (US Const, 4th, 14th Amdts; NY Const, art I, §12.) (Schneckloth v Bustamonte, 412 US 218; Katz v United States, 389 US 347; Agnello v United States, 269 US 20; Vale v Louisiana, 399 US 30; Coolidge v New Hampshire, 403 US 443; People v Belton, 50 NY2d 447; People v Robertson, 61 AD2d 600, 48 NY2d 993; People v Vaccaro, 39 NY2d 468; People v Cadby, 62 AD2d 52.)
II. The trial court erred when prior to trial it dismissed the count charging reckless endangerment over defense objection and then refused to submit both degrees of reckless endangerment as well as manslaughter in the first degree as lesser included offenses of murder in the first degree, and also refused to submit the affirmative defense of extreme emotional disturbance. (People v Mussenden, 308 NY 558; People v Johnson, 45 NY2d 546; People v Teasley, 73 AD2d 548; People v Williams, 40 AD2d 1023; People v Ross, 70 AD2d 541; People v Rodriguez, 63 AD2d 919; People v Asan, 22 NY2d 526; People v Ortiz, 52 AD2d 518; People v Steele, 26 NY2d 526.)
III. The trial court's erroneous exclusion of evidence which would have impeached a principal prosecution witness violated appellant's right to confrontation (US Const, 6th, 14th Amdts; NY Const, art I, §6). (***4** Sabatino v Curtiss Nat. Bank of Miami Springs, 415 F2d 632, 396 US 1057; United States v Smith, 521 F2d 957.)
Mario Merola, District Attorney (Timothy J. McGinn and *Steven R. Kartagener* of counsel), for respondent.
I. Defendant's guilt was established by overwhelming evidence.
II. The trial court properly denied defendant's motion to suppress the physical evidence found in his apartment within minutes of the shooting. (People v Horman, 22 NY2d 378; People v De Santis, 59 AD2d 257, 46 NY2d 82; People v Goodman, 51 AD2d 1008; Coolidge v New Hampshire, 403 US 443; People v Robertson, 61 AD2d 600, 48 NY2d 993; Barnes v United States, 378 F2d 646; United States v Durkin, 335 F Supp 922; People v Cosme, 48 NY2d 286; People v Oden, 36 NY2d 382; United States v Matlock, 415 US 164.)
III. The court's charge was in all respects proper. (People v Williams, 40 AD2d 1023; People v Bracey, 41 NY2d 296; People v Rodriguez, 63 AD2d 919; People v Scarborough, 49 NY2d 364; People v Mussenden, 308 NY 558; People v Discala, 45 NY2d 38; People v Teasley, 73 AD2d 548; People v Vidal, 26 NY2d 249; People v Patterson, 39 NY2d 288, affd *sub nom.* Patterson v New York, 432 US 197.) IV. The trial court properly excluded the firearm discharge report. (Johnson v Lutz, 253 NY 124; United States v Smith, 521 F2d 957; People v Crimmins, 36 NY2d 230.)

OPINION OF THE COURT

Jasen, J.

On this appeal, we are once again called upon to delineate the bounds of the exclusionary rule. The specific question presented is whether evidence obtained as a result of the warrantless search of a closet in the defendant's apartment should have been suppressed. To answer this question, we must determine whether, under the circumstances of this case, the reasonable, although mistaken, reliance by police officers on the authority of an individual to consent to a search should result in the suppression of evidence obtained as a result of that search.

At 9:00 P.M. on September 13, 1976, Housing Patrolman Rudolfo Quinones was on duty at Tinton Avenue and 163rd Street in Bronx County. Alerted by a commotion across the ***5** street from where he was standing, Quinones observed a man, later identified as defendant, holding a gun to a woman's head. As Quinones approached the couple, the defendant released the woman and began to move in Quinones' direction. Drawing his gun, Quinones ordered the defendant to halt and drop his weapon. The defendant, who was then approximately 25 feet away, fired two shots at Quinones. Patrolman Quinones fired two shots in return and defendant fell to the ground. Believing defendant to be wounded, Quinones began to walk toward him. The defendant

suddenly wheeled and fired two more shots at Quinones which fortunately also missed their mark. Quinones was then not able to return any shots because some bystanders had come into the line of fire. Thereupon, defendant got to his feet and fled through the crowd that had gathered at the scene, disappearing into a nearby wooded area. Quinones radioed for assistance and several police cars soon arrived. Quinones gave the arriving officers a brief description of the perpetrator and the gun he was carrying which, according to Quinones, was "like a .32." A search of the immediate vicinity by the officers proved to be unsuccessful.

At this point, a woman, Arah Blue, approached the police and identified herself as the girlfriend of the gunman. She provided the police with the defendant's name and address and urged the police to go to his apartment because he had threatened to kill her. The police were also told by Blue that defendant kept weapons and ammunition at the apartment and that she was in fear that he might have returned there to carry out his threat against her. Blue then escorted Quinones and the other officers to the defendant's nearby apartment and gave them access by opening the door with a key she was carrying. Upon entering, a cursory inspection of the premises revealed that neither the defendant nor anyone else was present. Blue then pointed out the closet in which she claimed defendant stored his weapons. One of the officers opened the closet door and inside the police found a .308 calibre rifle, 25 rounds of ammunition for the rifle and 44 rounds of .32 calibre ***6** ammunition.[1] The police seized these items and exited the apartment without otherwise searching the premises. Upon leaving the building, Blue informed the officers that she did not live in the apartment, but resided elsewhere. Five days later, defendant was arrested and charged, *inter alia,* with the attempted murder of Patrolman Quinones.

Defendant made a pretrial motion to suppress the evidence obtained from his closet. After a hearing, at which only Quinones was called to testify as to the events of September 13, defendant's motion was denied. Noting that it was incumbent upon the police to pursue their investigation by going to the apartment to see if the defendant was there and that entry to the premises "was granted by somebody who ostensibly had permission" to admit them, the suppression court ruled that no warrant was necessary under the circumstances in order to conduct the limited search of the closet.

On appeal, the Appellate Division affirmed defendant's conviction, two Justices concurring in result and one Justice dissenting. According to the court (p 159), the "limited search was, in effect, conducted by [Arah] Blue, a private individual, not the police" and, therefore, provided no basis for suppression. Alternatively, the Appellate Division adopted the reasoning of the suppression court in denying defendant's motion to suppress, to wit: that the police needed no warrant under the circumstances because they were given permission to open the closet by one appearing to have authority to consent to the search.

The defendant contends that his motion to suppress was erroneously denied. He argues that the entry by the police into his closet was a "search" within the meaning of the Fourth Amendment and, therefore, is subject to the exclusionary rule.[2] The defendant, while conceding that the in- ***7** formation provided by Arah Blue gave the police probable cause to search for weapons in the closet, nevertheless asserts that the failure to obtain a warrant requires that the evidence seized be suppressed. We disagree.

At the outset, we reject the proposition, apparently adopted by the court below, that the search of defendant's closet is not subject to Fourth Amendment scrutiny because it was, in effect, conducted by Arah Blue, a private individual. Of course, it is well settled that evidence obtained as a result of an unauthorized search by a private party is not subject to the exclusionary rule. (Burdeau v McDowell, 256 US 465; People v Gleeson, 36 NY2d 462, 465; People v Horman, 22 NY2d 378, 382.) There is, however, no authority for the proposition that a search actually conducted by police officers, although at the direction of a private individual, is not subject to the requirements of the Fourth Amendment. Indeed, the law is quite to the contrary. Where, as here, there has been affirmative participation by government officials in obtaining evidence, the police cannot avoid the constitutional limitations imposed upon them by claiming that the acts of a private party are also involved. (Lustig v United States, 338 US 74; People v Jones, 47 NY2d 528; People v Esposito, 37 NY2d 156; cf. People v Adler, 50 NY2d 730.) Evidence obtained by the police from the defendant's closet clearly was the fruit of a "search" within the meaning of the Constitution and, therefore, calls into play the full panoply of Fourth Amendment considerations.

Although by its express terms the Fourth Amendment prohibits only "unreasonable" searches and seizures, the Supreme Court has made it clear that "a search conducted without a warrant issued upon probable cause is *'per se* unreasonable * * * subject only to a few specifically

established and well-delineated exceptions.' " (Schneckloth v Bustamonte, 412 US 218, 219, quoting Katz v United States, 389 US 347, 357; see, also, Stoner v California, 376 US 483, 486.) Two such exceptions to the warrant requirement ***8** which have developed over the years are searches conducted pursuant to consent (Davis v United States, 328 US 582, 593-594; Zap v United States, 328 US 624, 630) and searches undertaken in what have come to be called "exigent circumstances" (see Mincey v Arizona, 437 US 385, 392-394; Michigan v Tyler, 436 US 499; People v Mitchell, 39 NY2d 173). Elements of both exceptions to the warrant requirement are present in this case.

It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected. (Schneckloth v Bustamonte, 412 US 218, supra.; Davis v United States, 328 US 582, supra.; People v Lane, 10 NY2d 347.) Furthermore, it is equally clear that these permissive searches are not limited to those instances where consent was given by the defendant. Rather, a lawful search may be conducted without a warrant where "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." (United States v Matlock, 415 US 164, 171; Coolidge v New Hampshire, 403 US 443; Frazier v Cupp, 394 US 731; People v Cosme, 48 NY2d 286.) However, the question whether a warrantless search may be sustained merely upon a showing that the searching officers reasonably, albeit erroneously, believed that the consenting party had sufficient authority over the premises or property to permit the search has been expressly left open by the Supreme Court (United States v Matlock, supra, at p 177, n 14) and heretofore has not been addressed by this court.

Other courts addressing this issue in analogous situations have, for the most part, refused to suppress evidence obtained as the result of a reasonable, good faith belief by law enforcement officials that permission was given by one with actual authority to consent to a search. (E.g., United States v Peterson, 524 F2d 167, cert den 423 US 1088; United States v Sells, 496 F2d 912; United States v Miles, 480 F2d 1217; Nix v State, 621 P2d 1347 [Alaska]; People v Gorg, 45 Cal 2d 776; State v Christian, 26 Wash App 542; State v Drake, 343 So 2d 1336 [Fla]; but see, e.g., ***9** United States v Selberg, 630 F2d 1292; United States ex rel. Cabey v Mazurkiewicz, 431 F2d 839.) The rationale underlying this approach derives from the fact that the Fourth Amendment protects only "against unreasonable searches and seizures". Hence, if the police are acting in a reasonable fashion in response to the circumstances with which they are confronted, then an error in judgment in failing to ascertain the actual authority of the person to consent should not give rise to an unreasonable search. (Cf. Hill v California, 401 US 797.)

A further, although somewhat related, consideration behind this line of reasoning involves the very purpose of the exclusionary rule. The exclusionary rule is designed "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures", not redress "a personal constitutional right of the party aggrieved." (United States v Calandra, 414 US 338, 347-348.) Because the exclusionary rule is primarily aimed at deterring police misconduct, these courts have recognized that its purpose would not be furthered by applying it in instances where the police, believing that they are acting lawfully, engage in a search which later turns out to be "unlawful" because, in hindsight, their reasonable reliance on the consenting person's authority proves to be erroneous. (See, e.g., Nix v State, supra.; People v Gorg, supra.; see, generally, La Fave, Search and Seizure, § 8.3, subd [g].)

We would agree that where the searching officers rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate that that individual does, in fact, have the authority to consent, evidence obtained as the result of such a search should not be suppressed. Application of the exclusionary rule in such instances of reasonable, good faith reliance by the police would do little in terms of deterring misconduct by the authorities in furtherance of the protections afforded by the Fourth Amendment. We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers. Moreover, a warrantless search will not be justified merely upon a bald assertion ***10** by the consenting party that they possess the requisite authority. Nor may the police proceed without making some inquiry into the actual state of authority when they are faced with a situation which would cause a reasonable person to question the consenting party's power or control over the premises or property to be inspected. In such instances, bare reliance on the third party's authority to consent would not be reasonable and would, therefore, subject any such search to the strictures of the exclusionary rule.

Applying these principles to the present case, the police were approached minutes after the shooting took place by a woman who claimed to be defendant's girlfriend. She gave the police the defendant's name and address, which was in the immediate vicinity, and said that he threatened to kill her. She provided precise information as to the nature and location in defendant's apartment of certain contraband, weapons and ammunition, and she possessed a key to the premises. While these facts may have created the inference that Arah Blue resided with defendant in the apartment, it was equally possible that she did not possess the requisite authority and control over the premises to consent to a search. Under ordinary circumstances, faced with such an ambiguous situation, the police should have made inquiry so as to ascertain whether Arah Blue possessed the authority to consent to a search. Indeed, the simple expedient of asking her where she lived prior to conducting the search could have quickly clarified the situation as evidenced by the fact that she informed the police of her actual residence immediately after leaving the apartment. Nevertheless, we conclude that, under the exigent circumstances which confronted the police, it was clearly reasonable for the officers, based on Arah Blue's conduct, to rely on her apparent capability to consent to a search of the closet without making an inquiry to ascertain her actual authority over the premises.

Here, within minutes of a shooting directed at a fellow officer, the police were confronted by a woman who stated that the gunman was her boyfriend, that she feared he would try to kill her and that he may have returned to his nearby apartment where he stored weapons and ammunition. This man posed an immediate threat to both Arah ***11** Blue and the police; he had just senselessly fired four shots at Officer Quinones; he had escaped into a nearby area and was still at large; and he had an arsenal of weapons stored in his apartment. Faced with these exigent circumstances, the police were under a duty to go to the apartment in order to apprehend the gunman before he could harm anyone else. Having been admitted to the apartment by one who appeared to have control over the premises, the police were justified in not only determining whether the gunman was present, but also in immediately securing any weapons which could be used against them or Arah Blue. (Cf. Warden v Hayden, 387 US 294, 298-299.) Time was of the essence and the police conduct was limited in scope to searching for the defendant and seizing the cache of weapons and ammunition stored in the closet. The police should not now be faulted for failing to undertake a more thorough inquiry into Arah Blue's authority to consent to the search of the closet. The officers' reliance on her authority over the premises was reasonable and warranted by the exigencies of the situation, which called for immediate action.

Detached from the tension and drama of the moment, it is sometimes easy for an appellate court to lose sight of the fact that it is the reasonableness of police action which is the linchpin to analysis of any case arising under the Fourth Amendment. When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (Brinegar v United States, 338 US 160, 175), the police conduct of securing the rifle and ammunition in the defendant's closet was a reasonable response to the situation in which they found themselves and, therefore, was not proscribed by the exclusionary rule. We have examined the defendant's remaining contentions and have found them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Cooke and Judges Gabrielli, Jones, Wachtler, Fuchsberg and Meyer concur.
Order affirmed. ***12**

Footnotes

1 The fact that the box of .32 calibre ammunition contained only 44 rounds became particularly relevant at trial in that such ammunition is normally sold in boxes of 50, indicating that 6 rounds had been removed. Defendant testified at trial that he had found the box of ammunition on a subway and that he never owned a .32 calibre handgun.

2 Defendant never raised the contention in support of his motion to suppress that the initial entry into his apartment was unauthorized. Moreover, he conceded at the Appellate Division that the police could properly enter the apartment for purposes of making an arrest based on the information provided by Arah Blue. On this appeal, therefore, we are concerned

solely with the warrantless search of defendant's closet and do not consider the legality of the initial entry by the police into his apartment.

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236 Cal.App.2d 344, 46 Cal.Rptr. 132

THE PEOPLE, Plaintiff and Respondent,

v.

OSCAR W. FIERRO,

Defendant and Appellant.

Crim. No. 3694.
District Court of Appeal, Third District, California.
Aug. 4, 1965.

HEADNOTES

(1)
Searches and Seizures § 29--Incidental to Arrest--Search of Premises.
Generally, there can be no search of a house without a search warrant except as an incident to a lawful arrest therein; probable cause to believe that an article sought is concealed in the house furnishes no justification for searching it without a warrant.

See **Cal.Jur.2d,** Searches and Seizures, § 49; **Am.Jur.,** Searches and Seizures (1st ed § 16).

(2)
Searches and Seizures § 29--Incidental to Arrest--Search of Premises.
Constitutional protection against unreasonable searches and seizures extends to the citizen's hotel room no less than his home.

(3)
Criminal Law § 413.5(2)--Evidence--Evidence Obtained by Unlawful Seizure.
The purpose of the rule excluding illegally seized evidence is deterrence of the lawless acts of federal and state officials.

(4)
Criminal Law § 413.5(6)--Evidence--Evidence Obtained by Unlawful Seizure.
A lawless search and seizure by a private person acting in a ***345** private capacity is not a violation of the constitutional guaranties by a state or federal agency.

See **Cal.Jur.2d,** Evidence, § 127; **Am.Jur.,** Evidence (1st ed § 397).

(5)
Criminal Law § 413.5(5)--Evidence--Evidence Obtained by Unlawful Seizure.
If a private person perpetrates a lawless entry and seizure as the agent of public officials, the vicarious violation of constitutional limitations demands invocation of the rule excluding the evidence so obtained.

(6)
Criminal Law § 413.5(5)--Evidence--Evidence Obtained by Unlawful Seizure.
Where a hotel manager, on informing a sheriff's office of his discovery of pills or capsules in defendant's room, returned to the room for samples of the pills at the request of the sheriff's office and turned the samples over to the sheriff, the hotel manager conducted his second expedition as the emissary of the sheriff's office. Whatever was produced or found by that expedition was produced or found by the sheriff's emissary, the hotel manager, who was the officer's agent throughout the span of his foray, and such material was inadmissible at defendant's trial.

SUMMARY

APPEAL from a judgment of the Superior Court of Yolo County. James C. McDermott, Judge. Reversed.

Prosecution for illegal possession of heroin. Judgment of conviction reversed.

COUNSEL

S. Carter McMorris, under appointment by the District Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, Doris H. Maier, Assistant Attorney General, Edward A. Hinz, Jr., and Daniel J. Kremer, Deputy Attorneys General, for Plaintiff and Respondent.

FRIEDMAN, J.

Defendant Fierro was tried and convicted of possessing heroin in violation of Health and Safety Code section 11500. Defendant contends that the heroin introduced in evidence was the product of an illegal search and seizure.

On July 13, 1963, Fierro registered at a motel in West Sacramento under an assumed name. The motel manager, John Sommer, suspected him of being a narcotic user and pusher because he usually left his room only at nighttime, did not want the maids to clean his room, had visitors after dark and had a number of incoming and outgoing telephone calls. On June 17 when defendant went to the motel office to ***346** pay for his room, Mr. Sommer noted that his eyes did not focus properly and that his features were not "content." Mr. Sommer did not want a narcotic user or pusher living at his motel. Mr. Sommer waited until defendant left the premises, then entered his room. The first item he observed was a white scratch pad on the desk with a burn mark, which he thought had been caused by a very hot spoon. He checked the wastepaper basket in the bathroom and found candy wrappers, and observed candy bars lying about the room. He thought the candy reflected an addict's need for sweets. He opened defendant's closed but unlocked suitcase and saw four vials containing pills or capsules, a spoon and a glass vial with a rubber plunger. Sommer returned to his office, phoned the Yolo County sheriff's office and reported what he had found. He spoke to a detective in the sheriff's office, who told him to return to the room and get some samples of the pills and turn them over to him. Whereupon he returned to defendant's room and took two pills and two capsules from the vials in the suitcase. He noticed a plastic bag containing 10 to 15 powder-filled rubber balloons and a folder paper containing white powders. He took two of the balloons and a sample of the white powder. Then he returned to his office and again called the sheriff's office. The sheriff's detective arrived and Sommer gave him the materials he had taken from the defendant's room. Defendant was then arrested. Upon analysis the powder in the balloons was identified as heroin and the paper bindle as cocaine. The capsules were seconal and the pills methadone.

Defendant presented no evidence, basing his defense on the contention that the narcotics found in his motel room were the product of an illegal search and seizure.

(1) Generally, there can be no search of a house without a search warrant except as an incident to a lawful arrest therein; probable cause to believe that an article sought is concealed in the house furnishes no justification for searching it without a warrant. (*People v. Burke,* 61 Cal.2d 575, 579 [39 Cal. Rptr. 531, 394 P.2d 67].) (2) Constitutional protection against unreasonable searches and seizures extends to the citizen's hotel room no less than his home. (*Stoner v. California,* 376 U.S. 483, 490 [84 S.Ct. 889, 11 L.Ed.2d 856].)

The Attorney General does not argue lawfulness of the search of Fierro's hotel room. He points out that the invasion and seizure were the actions of a private citizen, while ***347** constitutional limitations on search and seizure are aimed at governmental activity. He argues that the sheriff's detective requested Sommer to go into Fierro's hotel room for the limited purpose of acquiring samples of the pills; that discovery and sequestration of the heroin were not part of the mission Sommer was performing for the sheriff's office; in effect, to use the parlance of another branch of the law, Sommer was on "an errand of his own" and "outside the scope of his agency" when he found and took the heroin. Defendant, on the other hand, argues that Sommer, the private citizen, was an agent of the sheriff throughout his second foray into the hotel room.

(3) The purpose of the rule excluding illegally seized evidence is deterrence of the lawless acts of federal and state officials. (*Mapp v. Ohio,* 367 U.S. 643, 648 [81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933]; *People v. Cahan,* 44 Cal.2d 434, 448-449 [282 P.2d 905, 50 A.L.R.2d 513].) (4) A lawless search and seizure by a private person acting in a private capacity is not a violation of constitutional guaranties by a state or federal agency. (*Burdeau v. McDowell,* 256 U.S. 465, 475 [41 S.Ct. 574, 65 L.Ed. 1048, 13 A.L.R. 1159]; *People v. Tarantino,* 45 Cal.2d 590, 595 [290 P.2d 505]; *People v. Randazzo,* 220 Cal.App.2d 768, 770- 776 [34 Cal.Rptr. 65]; *People v. Johnson,* 153 Cal.App.2d 870, 873-877 [315 P.2d 468].) (5) If the private person perpetrates a lawless entry and seizure as the agent of public officials, the vicarious violation of constitutional limitations demands invocation of the exclusionary rule. (*People v. Tarantino, supra;* cf. *Massiah v. United States,* 377 U.S. 201, 206-207 [84 S.Ct. 1199, 12 L.Ed.2d 246].)

(6) In this case official involvement in the lawless quest for evidence was so deep as to evoke the exclusionary rule. Having concluded his first foray into the hotel room, the hotel manager conducted his second expedition as the emissary of the sheriff's office. Whatever was produced or found by that expedition was produced or found by the sheriff's emissary. The officer had sent him into the room for the purpose of collecting evidence for prosecution. All was grist which came to his mill. The agency did not expire nor the emissary revert to private status at the precise second he put the pills in his pocket. The citizen was the officer's agent throughout the span of his foray. The search and sequestration of evidence were just as "official" as though the officer had acted in person. ***348**

In *People v. Tarantino, supra,* recorded conversations were barred by the exclusionary rule because an engineer employed by the police surreptitiously installed a microphone in the suspect's hotel room. The court noted (45 Cal.2d at p. 595): "[The engineer] worked under the direct supervision of an inspector of police, and was paid with public funds." Here there was neither direct supervision nor pay. These are only subsidiary elements, however. In the context of an analogous situation the decisive factor has been described as "the actuality of a share by a [public] official in the total enterprise of securing and selecting evidence by other than sanctioned means." (*Lustig v. United States,* 338 U.S. 74, 79 [69 S.Ct. 1372, 93 L.Ed. 1819], per Frankfurter, J.) In brief, the question is one of the extent of government involvement in an invasion conducted by the private citizen.

The impotence of illegally seized evidence in California criminal prosecutions has been widely known since the *Cahan* decision, *supra,* of 1955. The errand upon which the sheriff's detective sent the citizen was blatantly lawless. It was self-frustrating because it would inevitably ruin the usefulness of evidence acquired as a result of the errand. The situation furnished the detective ample opportunity to apply for a search warrant had he troubled to do so. It is regrettable when the ignorant or unthinking violation of established legal standards destroys the utility of evidence and compels reversal of the conviction of a guilty man. Effective in-service police training and education would contribute mightily toward preventing such abortive and ruinous enterprises.[1]

The prosecution makes no claim of adequate evidence of guilt independent of the illegally seized evidence. Thus the judgment must be reversed. It is so ordered.

Pierce, P. J., and Regan, J., concurred.
A petition for a rehearing was denied August 30, 1965. ***349**

Footnotes

1 The Director of the Federal Bureau of Investigations has stated: " 'Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force. ... Incidents which give justification to charges of civil rights violations by law enforcement officers still occur. ... Every progressive police administrator and officer must do everything in his power to bring about such an improvement that our conduct and our record will conclusively prove each of these charges to be false.' " (FBI Law Enforcement Bulletin, September 1952, pp. 1-2, quoted in *Elkins v. United States,* 364 U.S. 206, 218, fn. 8 [80 S.Ct. 1437, 1453, 4 L.Ed.2d 1669].)

689 F.3d 832
United States Court of Appeals,
Seventh Circuit.

Steven R. RANN, Petitioner–Appellant,

v.

Michael P. ATCHISON,

Warden,[*] Respondent–Appellee.

No. 11–3502.
|
Argued April 4, 2012.
|
Decided Aug. 3, 2012.

Synopsis

Background: Petitioner convicted of two counts of criminal sexual assault and one count of possession of child pornography sought habeas relief. The United States District Court for the Southern District of Illinois, David R. Herndon, Chief Judge, 2011 WL 4974738, denied relief, and petitioner appealed.

The Court of Appeals, Manion, Circuit Judge, held that police did not exceed the scope private searches conducted by the victim and her mother when they subsequently viewed images contained on digital media devices provided to them by the women.

Affirmed

Attorneys and Law Firms

***833** William A. Schroeder (argued), Attorney, Carbondale, IL, for Petitioner–Appellant.

Erica Seyburn (argued), Attorney, Office of the Attorney General, Criminal Appeals Division, Chicago, IL, for Respondent–Appellee.

Before EASTERBROOK, Chief Judge, and FLAUM and MANION, Circuit Judges.

Opinion

MANION, Circuit Judge.

In 2006, Steven Rann was convicted of two counts of criminal sexual assault and one count of possession of child pornography. He was sentenced to consecutive terms of twelve years' imprisonment on each sexual assault conviction and fifteen years' imprisonment on the child pornography conviction. Rann filed a direct appeal in state court arguing that he received ineffective assistance of counsel because his attorney did not seek to suppress incriminating evidence in the form of digital images obtained without a warrant from a zip drive and a camera memory card. The Illinois Appellate Court upheld his conviction, and the Illinois Supreme Court denied his petition to appeal. Having exhausted his state court remedies, Rann filed a petition for a writ of habeas corpus. The district court denied his writ, but did issue a Certificate of Appealability, allowing Rann to bring this appeal. Because ***834** we find that his ineffective assistance of counsel claim lacks merit, we affirm the district court's denial of Rann's habeas petition.

I.

In November 2006, following a jury trial in the Circuit Court of Saline County, Illinois, Steven Rann was convicted of two counts of criminal sexual assault and one count of child pornography. He received consecutive sentences of twelve years' incarceration on each sexual assault charge and fifteen years' incarceration on the child pornography charge. The facts relevant to Rann's habeas petition have been laid out in the Illinois Appellate Court's Rule 23 Order affirming Rann's conviction on direct appeal. They are as follows:

> In January 2006, the defendant's biological daughter, S.R., who was then 15 years old, reported to the Eldorado police department that she had been sexually assaulted by the defendant and that he had taken pornographic pictures of her. Following her interview by the police, S.R. returned to her home, retrieved an Olympus digital camera memory card from the top of a big-screen television set in her parents' bedroom, and took the memory card to the police. The officer to whom she delivered the memory card, Deputy Sheriff Investigator Mike Jones of the Saline County Sheriff's Department, testified at the defendant's subsequent trial that no law enforcement officers accompanied S.R. on her return to her home, and

there is no evidence in the record to suggest that S.R. was directed to attempt to recover evidence for the police or even to return home at all. Images downloaded from the memory card depict the defendant sexually assaulting S.R. and were introduced into evidence at the defendant's trial.... The images, taken in 2005, were admitted as propensity evidence ... and do not relate directly to the charges of which the defendant was convicted in this case.

Sometime subsequent to S.R.'s initial interview with the police, S.R.'s mother brought Deputy Jones a computer zip drive that contained additional pornographic images of S.R. and pornographic images of K.G., who is the defendant's stepdaughter and S.R.'s half-sister. The images on the zip drive are from 1999 and 2000, when S.R. was approximately 9 years old and K.G. was approximately 15 years old, and are directly related to the charges of which the defendant was convicted in this case. Four of the images, taken around Christmas of 1999, were admitted into evidence at the defendant's trial.... Deputy Jones testified that no law enforcement officers were present when S.R.'s mother procured the zip drive, and there is no evidence in the record to suggest that S.R.'s mother was directed to attempt to recover evidence for the police.

Rann's trial counsel did not move to suppress the images found on the zip drive and camera memory card when they were introduced into evidence.

On these facts, the Illinois Appellate Court affirmed the convictions and sentence, and the Illinois Supreme Court denied Rann's petition for leave to appeal. In November 2008, Rann filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a) in the United States District Court for the Southern District of Illinois. The matter was referred to the magistrate judge, who filed a report recommending that the petition be denied. The district court adopted the report and recommendation of the magistrate judge and entered judgment denying Rann's habeas petition. The district court subsequently granted Rann a Certificate of Appealability to consider whether the Illinois Appellate Court reasonably applied United States Supreme Court precedent when it ***835** held that Rann's trial counsel was not ineffective for failing to move to suppress the images recovered from the digital storage devices, and whether the police's viewing of those images constituted a significant expansion of a private search such that a warrant was required to permit police to view the images. This appeal followed.

II.

We review the district court's denial of habeas relief de novo. *Crockett v. Hulick,* 542 F.3d 1183, 1188 (7th Cir.2008). The Antiterrorism and Effective Death Penalty Act ("AEDPA") governs our review of Rann's § 2254 petition. When, as here, a state court adjudicates a petitioner's ineffective assistance of counsel claim on the merits, a federal court can issue a writ of habeas corpus only if the state court's decision was either "contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Martin v. Grosshans,* 424 F.3d 588, 590 (7th Cir.2005) (citing 28 U.S.C. § 2254(d)). The state court's application of federal law must not only be incorrect, but "objectively unreasonable." *See Renico v. Lett,* —— U.S. ——, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010) (citing *Williams v. Taylor,* 529 U.S. 362, 409–10, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Typically, this would involve the state court "apply[ing] a rule different from the governing law set forth in [Supreme Court cases], or if it decides a case differently than the [Supreme Court] on a set of materially indistinguishable facts." *Bell v. Cone,* 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Rann contends that he received ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), specifically arguing that his trial counsel's failure to move to suppress the images found on the zip drive and camera memory card constituted ineffective assistance of counsel. The Illinois Appellate Court determined that these failures did not render Rann's counsel ineffective because any motion to suppress the evidence would have been unsuccessful.

Under *Strickland,* Rann must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Grosshans,* 424 F.3d at 590 (citing *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052). When reviewing claims of ineffective assistance of counsel in habeas petitions, however, we must honor any reasonable state court decision, since "only a clear error in applying *Strickland's* standard would support a writ of habeas corpus." *Holman v. Gilmore,* 126 F.3d 876, 882 (7th Cir.1997). As Rann's ineffective assistance of counsel claim arises from his counsel's failure to move to suppress evidence, Rann must prove " 'that his Fourth Amendment claim

is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.' " *Ebert v. Gaetz,* 610 F.3d 404, 411 (7th Cir.2010) (quoting *Kimmelman v. Morrison,* 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)).[1] *Strickland* ***836** requires that we presume counsel " 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.' " *Ebert,* 610 F.3d at 411 (quoting *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052).

Rann's argument centers on his contention that, when the police searched the digital storage devices and viewed the images on them, they exceeded the scope of the private search conducted by S.R. and her mother. Since the subsequent search by the police exceeded the scope of the initial private search, so his argument runs, the police needed a warrant to "open" the digital storage devices and search them because the record contains no evidence that S.R. or her mother knew the digital storage devices contained images of child pornography prior to the police viewing. Since the police did not obtain a warrant prior to opening the digital storage devices and viewing the images, he claims their doing so constituted an unconstitutional warrantless search in violation of the Fourth Amendment. Rann thus argues that the Illinois Appellate Court unreasonably applied Supreme Court precedent when it found that the police did not expand the initial private search performed by S.R. and her mother and ruled that any motion to suppress the images obtained via that search would have been unsuccessful.

Long-established precedent holds that the Fourth Amendment does not apply to private searches. *See Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). When a private party provides police with evidence obtained in the course of a private search, the police need not "stop her or avert their eyes." *Coolidge v. New Hampshire,* 403 U.S. 443, 489, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Rather, the question becomes whether the police subsequently exceed the scope of the private search. *See United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). In *Jacobsen,* the Supreme Court ruled that individuals retain a legitimate expectation of privacy even after a private individual conducts a search, and "additional invasions of privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115, 104 S.Ct. 1652.

We have not yet ruled on the application of *Jacobsen* to a subsequent police search of privately searched digital storage devices, but the Fifth Circuit has in *United States v. Runyan,* 275 F.3d 449 (5th Cir.2001). There, Runyan was convicted on child pornography charges after his ex-wife and several of her friends entered his residence and assembled a collection of digital media storage devices, which they turned over to the police. *Id.* at 456. Even though Runyan's ex-wife and her friends had only viewed a "randomly selected assortment" of the disks, the police searched each disk and found a trove of child pornography images. *Id.* at 460. The court applied *Jacobsen* to these facts and partially upheld the government search, holding that a search of any material on a computer disk is valid if the private party who conducted the initial search had viewed at least one file on the disk. *Id.* at 465. Analogizing digital media storage devices to containers, the Fifth Circuit ruled that "police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searches unless the police are already substantially certain of what is inside that container based on the statements ***837** of the private searches, their replication of the private search, and their expertise." *Id.* at 463. Since the police could be substantially certain, based on conversations with Runyan's ex-wife and her friends, what the privately-searched disks contained, they did not exceed the scope of the private search when they searched those specific disks. *Id.* at 465.[2]

We find the Fifth Circuit's holding in *Runyan* to be persuasive, and we adopt it. As the Fifth Circuit reasoned, their holding

> is sensible because it preserves the competing objectives underlying the Fourth Amendment's protections against warrantless police searches. A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search. Moreover, this rule discourages police from going on "fishing expeditions" by opening closed containers.

Id. at 463–64. We find that *Runyan's* holding strikes the proper balance between the legitimate expectation of privacy an individual retains in the contents of his digital media storage devices after a private search has been conducted and the "additional invasions of privacy by the government agent" that "must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen,* 466 U.S. at 115, 104 S.Ct. 1652.

Under *Runyan's* holding, police did not exceed the scope of the private searches performed by S.R. and her mother when they subsequently viewed the images contained on the digital media devices. Rann argues that the Illinois Appellate Court relied on conjecture when it found that S.R. and her mother knew the contents of the devices they delivered to the police, pointing to the Illinois Appellate Court's finding that "[a]lthough no testimony exists regarding how the images on the zip drive came to be there ... it seems highly likely that S.R.'s mother [compiled] the images on the zip drive herself, downloading them from the family computer." Rann argues that this is conjecture, yet he offers nothing but conjecture and speculation in its place.

Factual determinations of a state court are "presumed to be correct" and the petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The Illinois Appellate Court specifically found that

> [t]his is not a case where multiple pieces of potential evidence were turned over to the police, who then had to sift through the potential evidence to discover if any factual evidence existed. To the contrary, in this case S.R. turned ***838** exactly one memory card over to the police, and her mother gave the police exactly one zip drive. We cannot imagine more conclusive evidence that S.R. and her mother knew exactly what the memory card and the zip drive contained.

These findings were reasonable based on the trial testimony. S.R. testified that she knew Rann had taken pornographic pictures of her and brought the police a memory card that contained those pictures. S.R.'s mother also brought the police a zip drive containing pornographic pictures of her daughter. Both women brought evidence supporting S.R.'s allegations to the police; it is entirely reasonable to conclude that they knew that the digital media devices contained that evidence. The contrary conclusion—that S.R. and her mother brought digital media devices to the police that they knew had no relevance to S.R.'s allegations—defies logic. For these reasons, the Illinois Appellate Court's factual findings are reasonable, and Rann has failed to present clear and convincing evidence—indeed, any evidence whatsoever—to overcome the presumption of correctness we give to the state court's finding.

Likewise, even if the police more thoroughly searched the digital media devices than S.R. and her mother did and viewed images that S.R. or her mother had not viewed, per the holding in *Runyan,* the police search did not exceed or expand the scope of the initial private searches. Because S.R. and her mother knew the contents of the digital media devices when they delivered them to the police, the police were "substantially certain" the devices contained child pornography. *See Runyan,* 275 F.3d at 463. Accordingly, the subsequent police search did not violate the Fourth Amendment, and Rann's ineffective assistance of counsel claim must fail.

III.

Rann's claim that the police's warrantless search of digital media devices brought to them by his victim and his victim's mother violated the Fourth Amendment is without merit. Because he cannot prevail on his Fourth Amendment argument, Rann's ineffective assistance of counsel claim under *Strickland* must fail. Thus, the Illinois Appellate Court did not unreasonably apply federal law when it denied his appeal. The district court's decision is Affirmed and Rann's application for a writ of habeas corpus is Denied.

All Citations

689 F.3d 832

Footnotes

* Michael P. Atchison, the current warden of the Menard Correctional Center, has been substituted for Donald Hulick as respondent pursuant to Fed. R.App. P. 43(c).

1 As the court pointed out during oral argument, the Supreme Court ruled in *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), that where a state court has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a state prisoner cannot be granted habeas relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. *See id.* at 494, 96 S.Ct. 3037. The Illinois Appellate Court, however, did not assert the benefit of *Stone,* and we have authority to decide Rann's argument on its merits. *See, e.g.,*

Wood v. Milyard, —— U.S. ——, 132 S.Ct. 1826, 1832–34, 182 L.Ed.2d 733 (2012) (procedural forfeitures by a state should be enforced unless strong reasons justify dismissing a collateral attack on the forfeited procedural ground).

2 The Fifth Circuit ruled that the police did, however, exceed the scope of the initial private search when they searched the disks on which Runyan's ex-wife and her friends had not viewed at least one file. *Id.* at 464. There was no way the police could have known the contents of all the disks because the disks were unlabeled and because Runyan's ex-wife admitted she did not search all of the disks before she turned them over to the police. *Id.* The court reasoned that "[t]he mere fact that the disks that [the private individuals] did not examine were found in the same location in Runyan's residence as the disks they did examine is insufficient to establish with substantial certainty that all of the storage media in question contained child pornography." *Id.*

Since S.R. and her mother knew the contents of both of the digital media devices they provided to the police, that problem is not implicated here. For a full and thoughtful discussion of the applicability of *Jacobsen* to police searches performed subsequent to a private search of digital storage devices, see generally *Runyan,* 275 F.3d at 462–64.

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185 N.J.Super. 258
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Appellant,
v.
Ira S. SANDERS, Defendant-Respondent.

Argued June 14, 1982.
|
Decided June 21, 1982.

Synopsis

SYNOPSIS

Pursuant to leave granted, the State appealed from order entered by the Superior Court, Law Division, Atlantic County, suppressing evidence. The Superior Court, Appellate Division, Morton I. Greenberg, J. A. D., held that requirement of Casino Control Act that casino establish detailed security procedure did not establish "state action" such as rendered illegal search of defendant and seizure from him of cocaine, even though defendant, who was suspected by casino personnel of being card counter, was unlawfully ejected from casino premises after being unlawfully taken to casino holding room and searched.

Reversed and remanded.

Attorneys and Law Firms

****481** ***259** Nicholas F. Moles, Asst. Atlantic County Prosecutor, for plaintiff-appellant (Joseph A. Fusco, Atlantic County Prosecutor, attorney; Joseph D. Coronato, Asst. Prosecutor, on the brief).

Mark E. Roddy, Atlantic City, for defendant-respondent (Goldenberg, Mackler & Sayegh, Atlantic City, attorneys).

Irwin I. Kimmelman, Atty. Gen., attorney; Robert B. Sturges, Deputy Atty. Gen., Director, and Kevin F. O'Toole, Deputy Atty. Gen., filed a brief for amicus curiae State of New Jersey, Dept. of Law and Public Safety, Div. of Gaming Enforcement.

Before Judges ALLCORN, FRANCIS and MORTON I. GREENBERG.

Opinion

The opinion of the court was delivered by

****482** MORTON I. GREENBERG, J. A. D.

Pursuant to leave granted, plaintiff appeals from an order dated November 23, 1981 suppressing evidence obtained from defendant as the result of a warrantless search conducted September ***260** 3, 1981. This order reflected the motion judge's decision in an opinion dated December 11, 1981, after he signed the order.

The facts on this matter were developed at an evidential hearing held on November 20, 1981 on defendant's motion to suppress. There were two witnesses at the hearing: Richard Martin, a security officer employed by Caesars Boardwalk Regency Casino Hotel, an Atlantic City casino hotel, and John Wild, a New Jersey state trooper, assigned at the time of the search and seizure to the casino investigation enforcement section in Atlantic City within the Division of Gaming Enforcement of the Department of Law and Public Safety. At the outset of the hearing the motion judge stated that he presumed that since the search was warrantless, the State had "the burden of going forward." The assistant prosecutor acquiesced in this statement. Consequently, Martin and Wild were called as witnesses by the State and were cross-examined by defendant's attorney.[1]

The facts are not at all complicated. At about 4 p. m. on September 3, 1981 defendant was playing blackjack at Caesars. Martin, who was then a plainclothes sergeant in Caesars' security force, was instructed by Shumsky, Caesars' games manager, to eject defendant from Caesars' premises. Shumsky gave this direction because defendant was thought to be a card counter. Martin and two uniformed security officers went over to the table where defendant was playing. They asked defendant to come with them and cash in his chips. Defendant then went to a cashier's cage and cashed in his chips. Defendant caused the security personnel no trouble then or, indeed, as far as the ***261** record shows, at any time. Martin then asked defendant to come to a holding room with him and the two uniformed men. While the record indicates that the request was not an unequivocal direction, there is no suggestion that defendant was told that he did not have to comply with the request. The reason that defendant was taken to the holding room was so that information could be obtained from him with respect to his identity. This information is obtained because, as explained by Martin, "[o]nce a person is

ejected, he is not permitted back in the premises. So we have a file we keep in our office so if the person does come back, we have a record."

When defendant was taken into the holding room he was subjected to a "pat down" search. The purpose of the search was to determine if defendant was armed. Martin conceived that the search was the "proper procedure." In defendant's left front pocket Martin felt a square object. He reached into defendant's pocket to find out if the object was a weapon. It in fact was one of a pair of dice with a spoon on it. Martin also pulled out a small glass bottle. Martin thought that the contents of the bottle was cocaine. The record indicates that until this discovery was made no public employee was involved with defendant. It is also clear that absent the finding of the substance, no public employee would have become implicated in the matter.

Because of the discovery of the bottle, Martin determined to alert the State Police. At the time that the bottle was found, Wild was just outside the holding room. The record is not completely clear as to why Wild was at that location. It does show that at about the time that defendant was being taken to the holding room Wild had been talking to a Lieutenant Pacentrilli on the Caesars' security force. Pacentrilli was ****483** apparently notified by radio that defendant was being ejected. Pacentrilli then went to a spot just outside of the security room. Wild went to the same place, but separately. There is not the slightest suggestion in the record, however, that Wild or any other public officer or employee directed that defendant be ***262** taken to the holding room, searched or ejected. Nor does the record reflect that Wild knew that defendant was being searched. Indeed, the record does not even directly show that Wild knew that defendant or anyone else was being taken to the holding room.

Nevertheless, Wild was given the bottle. When he looked at it he thought that it contained cocaine. Defendant, Wild and Martin then went to Wild's office for the purpose of running a field test for cocaine. The test proved positive. Thereupon defendant was arrested. On October 1, 1981 defendant was indicted for possession of cocaine. *N.J.S.A.* 24:21–20a(1).

On this record the motion judge suppressed. The judge concluded that the search and seizure performed by Martin was unlawful. In reaching this conclusion he indicated that there was no probable cause to believe that defendant had been or was about to engage in any criminal activity. Further, the judge ruled that defendant was no real threat to the officers' safety.

The more substantial issue confronting the motion judge was whether the search and seizure was at all subject to constitutional limitations. The reason for the doubt on this issue is that defendant was taken to the holding room and searched by Caesars' employees rather than the State Police. No regularly employed public employee became implicated in the matter until the bottle with the cocaine was given Wild. The judge recognized that constitutional protections against unreasonable searches and seizures are generally inapplicable to searches performed by private parties. Thus, the exclusionary rule is not applicable to private searches and seizures.

The judge stated, however, that private searches and seizures have been recognized in some circumstances as involving such sufficient aspects of state action as to be held subject to constitutional restrictions and thus the exclusionary rule. In reaching this conclusion he cited *State v. Droutman*, 143 *N.J.Super.* 322, 362 *A.*2d 1304 (Law Div.1976). He noted that in *Droutman* the judge specified three situations in which state action could be found in the ***263** context of apparently private searches. In the first situation joint participation between private citizens and police officers would bring the conduct within the constitutional restrictions. 143 *N.J.Super.* at 328, 362*A.*2d 1304. In the second situation, if the State has significantly involved itself in the illegal search, its fruits may be suppressed. 143 *N.J.Super.* at 330, 362 *A.*2d 1304. A third situation in which the fruits of a seemingly private search may be suppressed is when the private conduct is sufficiently fostered or encouraged by the police or other law enforcement agency. 143 *N.J.Super.* at 332, 362 *A.*2d 1304.

The judge in this case laid the facts against the *Droutman* tests and ruled that the facts did not show there had been joint public-private participation in the search. He ruled, however, that because of the second and third aspects of the tests, state action was involved. He pointed out that each casino was mandated to have a security department and that the security personnel were empowered to enforce the law and to detain persons suspected of violating the law. See *n.j.s.a.* 5:12–99; *n.j.s.a.* 5:12–121; *n.j.a.c.* 19:45–1.11(c)(7). The judge indicated that the State had conferred powers upon casino personnel far in excess of those possessed by private individuals or security guards and that the powers

> ... are virtually equivalent to those granted to the police, rendering casino security personnel *de facto* agents of the

> State when exercising these powers. At present, under the State's theory, any person in a hotel-casino who is suspected of an infraction or offense, criminal or otherwise, can be detained and searched with impunity by casino security. And while such conduct would be illegal on ****484** the part of duly constituted State or local police officers, it is not for casino security personnel due to the purported absence of state action.
>
> It is the opinion of this court that the pervasive regulation over casino security departments and personnel, with the enhanced power it confers, constitutes sufficient involvement or encouragement by the State as to be state action within the purview of *Droutman.* While this factual setting may be novel by way of appellate decision in this State, its rationale finds support in the case law of other jurisdictions, which holds to the effect that similar extensive state regulation over private security officers, and the granting of enhanced police type powers constitutes state action, rendering the Fourth Amendment and the exclusionary rule applicable.

***264** Our initial inquiry is whether the search and seizure was lawful, for clearly if they were lawful, then it would not matter whether state action was implicated. On this point we need not long be detained. In *Uston v. Resorts International Hotel, Inc.*, 89 *N.J.* 163, 445 *A.*2d 370 (1982), the Supreme Court ruled that as of the time of its decision card counting was lawful and that a casino could not eject a patron simply because he is a card counter. The court further noted that the Casino Control Commission had not adopted any rule ordering or approving the exclusion of card counters. Since the Supreme Court had ruled on May 5, 1982, and defendant was apprehended on September 3, 1981, it is beyond any dispute that defendant was lawfully on Caesars' premises and could not be properly ejected for his conduct. It is further clear that Caesars' employees used coercive measures to take defendant to the holding room and that this conduct was unlawful. Martin, of course, characterized his directions to defendant as not being mandatory. Further, he indicated that defendant did not have to go to the holding room. But it is manifest from his testimony that he never told defendant that he did not have to go to the holding room. *See State v. Johnson*, 68 *N.J.* 349, 353, 354, 346 *A.*2d 66 (1975). Thus, defendant was confronted with three security personnel from Caesars, two uniformed, and requested to go to the room. Further, he was on Caesar's premises. If defendant was under no compulsion, then surely such an overwhelming force was not needed. One person would have been sufficient to present defendant with an option. We are satisfied from our review of the record that there is not the slightest question but that Caesars' employees intended to coerce defendant to go to the holding room so that he could be improperly ejected from the premises.[2]

***265** It is further obvious that there was no basis for the pat-down. Defendant was on the premises to play cards. Caesars' security men did not have any reason at all to believe that he was armed or otherwise dangerous. In the absence of at least some basis for suspicion to believe he was armed, the pat-down, which was not incidental to a lawful arrest or detainment, would have been unlawful even if conducted by a police officer. *See State v. Lakomy*, 126 *N.J.Super.* 430, 315 *A.*2d 46 (App.Div.1974). In summary, we conclude that defendant was unlawfully being ejected from the premises, was unlawfully taken to the holding room and unlawfully searched. By any standard, the product of such a search was unlawfully obtained.

Our inquiry must therefore be whether the unlawful conduct of Caesars' employees should result in evidence produced by such conduct being excluded. We see no reason to reach such a conclusion. As already noted in *State v. Droutman, supra*, 143 *N.J.Super.* at 322, 362 *A.*2d 1304, the judge specified three circumstances in which a seemingly private search and seizure may involve ****485** such sufficient state action as to implicate the exclusionary rule. The circumstances specified in *Droutman* are: when there is joint participation between private citizens and police officers, when the State has significantly involved itself in the illegal search, or when the private search was sufficiently fostered or encouraged by the State. In *United States v. Clegg*, 509 *F.*2d 605 (5 Cir. 1975), the court described the test of when governmental activity would implicate the exclusionary rule as follows:

> It is only when the government has preknowledge of and yet acquiesces in a private party's conducting a search and seizure which the government itself, under the circumstances, could not have undertaken that the problem discussed in *United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975) arises. Preknowledge and acquiescence make a search by a private party a search by the government. Fourth Amendment standards must be complied with. Any evidence which, for Fourth Amendment reasons, would have been excluded had it been gathered by the government *pro se* would, of course, have to be excluded if gathered by the only nominally private party. It would be excluded with the aim of deterring the government from further attempts

to utilize knowingly the services of a private party to do for it that which it is forbidden to do for itself. [at 609]

***266** In *United States v. Mekjian*, 505 *F.*2d 1320 (5 Cir. 1975), the court announced as follows:

Burdeau v. McDowell, 1921, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 has made it clear that the fourth amendment was intended as a restraint on the activities of the government and its agents and is not addressed to actions, legal or illegal, of private parties. Where no official of the federal government has any connection with a wrongful seizure, or any knowledge of it until after the fact, the evidence is admissible. See *United States v. Harper*, 7 Cir. 1971, 458 F.2d 891, cert. denied, 406 U.S. 930, 92 S.Ct. 1772, 32 L.Ed.2d 132; *United States v. McGuire*, 2 Cir. 1967, 381 F.2d 306, cert. denied, 389 U.S. 1053, 88 S.Ct. 801, 19 L.Ed.2d 848; *Barnes v. United States*, 5 Cir. 1967, 373 F.2d 517. No objection, therefore, has been raised or could be raised as to the admissibility of any records copied before the initial contact of Mrs. Jones with BS.

A much more difficult issue arises once the government is contacted. The fourth amendment is given a generous interpretation in order to insure that its safeguards are not evaded by circuities. *Byars v. United States*, 1927, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520. Fourth amendment protections can be effectively undercut by the intervening agency of non-governmental individuals. Accordingly, where federal officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, federal authorities are clearly implicated in the search and it must comport with fourth amendment requirements. [at 1327].

Our review of the record convinces us that there is no basis to find state action so as to require us to exclude the evidence on any basis. The trial judge made a finding that there was no joint participation in the search. We see no reason not to accept this factual finding which is fully supported in the record. *See State v. Johnson*, 42 *N.J.* 146, 161–162, 199 *A.*2d 809 (1964). As already noted, the entire process leading to the discovery of defendant's possession of cocaine was put in motion and executed by Caesars' employees. There was no showing that Wild or any other state employee was aware of the situation concerning him. Wild became involved only after the search and seizure had been completed. Thus, Wild did not participate in the search. Nor was there such a preknowledge and acquiescence in Caesars' actions by Wild or any other public employee that Martin could be characterized, in the term of *United States v. Clegg*, 509 *F.*2d at 609, as "only [a] nominally private party." Martin and the other two security men were acting completely for their employer. ***267** When they took defendant to the holding room they in no ****486** sense were doing the State's bidding. Quite to the contrary, they had not the slightest reason to believe that defendant was violating any statute or regulation of the State or any of its subdivisions or agencies. Defendant was being ejected only because it was feared by Shumsky that he would be successful in winning money. That was a private matter between defendant and Caesars.

Finally, we can find no basis for the motion judge's conclusion that the State was involved in the illegal search or fostered or encouraged it. The Casino Control Act does require that the casino establish detailed security procedures. *N.J.S.A.* 5:12–99. Further, the act specifies that the casino must have procedures governing the utilization of its private security force and that the employees of the casino may question any individual reasonably expected of violating certain sections of the Casino Control Act. *N.J.S.A.* 5:12–99(a)(14); *N.J.S.A.* 5:12–121(a). Further, the casino employees may take into custody any person in a reasonable manner for a reasonable time if they have probable cause to believe the person is violating these sections. *N.J.S.A.* 5:12–121(b). But these powers to question and arrest are limited to situations in which the patron is thought to be involved in various forms of unlawful activity. *N.J.S.A.* 5:12–113 to *N.J.S.A.* 5:12–116. The limited extent of these powers is emphasized in *N.J.A.C.* 19:45–1.11(c)(7)(vi), which authorizes "[t]he detainment for probable cause of persons that may be involved in illegal acts for the purpose of notifying law enforcement or Commission authorities." There is nothing in the Casino Control Act or the regulations adopted pursuant thereto that authorized the conduct of Caesars' employees in this case. When Caesars acted to eject defendant it was pursuing nothing but its private interests. In the circumstances its conduct ***268** cannot be imputed to the State, and thus the substance seized from defendant shall not be excluded from admission into evidence at any ensuing trial on the ground that it was illegally seized.[3]

Finally, we note that defendant may not be without other remedy. When the exclusionary rule was extended to the states in *Mapp v. Ohio*, 367 *U.S.* 643, 81 *S.Ct.* 1684, 6 *L.Ed.*2d 1081 (1961), the Supreme Court of the United States was in part motivated by the futility of a trespass remedy against the offending officers. *See* 367 *U.S.* at 670, 81 *S.Ct.* at 1699, 6 *L.Ed.*2d at 1099 (Douglass, J., concurring). Here the search and seizure was by private persons. We are by no means

certain that a tort action against them and their employer would be doomed to failure.[4] From Caesars' viewpoint, a tort remedy would be more of a restraint on its activity than would be an order for suppression. On the other hand, we cannot perceive of how such an order could in any way discourage future unlawful action by any public officer since no public officer was involved in the search and seizure.

The order of November 23, 1981 is reversed and the matter is remanded to the Superior Court, Law Division, Atlantic County, for further proceedings not inconsistent with this opinion.

All Citations

185 N.J.Super. 258, 448 A.2d 481

Footnotes

1 Ordinarily, since a search without a warrant is *prima facie* invalid, the burden of proof is on the State to justify such a search. *See State v. Welsh*, 84 *N.J.* 346, 352, 419 *A.*2d 1123 (1980). The motion judge simply applied this usual rule. We have some doubt, however, as to its applicability in a case in which the search *prima facie* was private. But we do not reach the issue since there were no disputed issues of fact in the Law Division. From our review of the record we are satisfied that there were no significant credibility questions. We decide this case on the assumption that the State has its usual burden.

2 The motion judge indicated that based upon his "perception of the witnesses and testimony, it is the court's opinion that defendant was directed or ordered to accompany the security officers to the holding room." But he made no definitive determination of the issue. We see no reason not to exercise our original jurisdiction and state the obvious. *N.J.Const.* (1947), Art. VI, § V, par. 3; *R.* 2:10–5.

3 We do not imply that we would have reached a different result if defendant had been taken to the holding room because of alleged unlawful conduct. That situation is simply not before us.

4 Of course, we do not suggest that the findings here would be binding in any such later civil action. It would be for the court in that case to determine what effect, if any, the determinations made here should be given. We point out that neither Caesars nor its employees are parties here.

237 N.J. 588
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff-Respondent/Cross-Appellant,
v.
Nathan N. SHAW, a/k/a Dion Shaw, a/k/a Leroy Anderson, Defendant-Appellant/Cross-Respondent.
State of New Jersey, Plaintiff,
v.
Keon L. Bolden, Defendant.

A-33/34 September Term 2016
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078247
|
Argued January 28, 2019
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Decided May 13, 2019

Synopsis

Synopsis

Background: Defendant pled guilty in the Superior Court, Law Division, Monmouth County, Nos. 12-03-0469 and 12-08-1442, to third-degree possession of controlled substance with intent to distribute. Defendant appealed. The Superior Court, Appellate Division, 2016 WL 4474312, affirmed. Defendant petitioned for certification, and State cross-petitioned for certification.

Holdings: After grant of certification, the Supreme Court, Timpone, J., held that:

third-party intervention doctrine did not apply to allow police officers' warrantless search of motel room;

continued detention of defendant, after warrant check returned negative, was de facto arrest;

defendant's confession was product of his unlawful arrest;

defendant had automatic standing to challenge search of tote bag found in vehicle in which he was a passenger; and

driver's consent to search of vehicle was not voluntarily given.

Affirmed in part, reversed in part, and remanded.

****233** On certification to the Superior Court, Appellate Division.

Attorneys and Law Firms

Margaret McLane, Assistant Deputy Public Defender, argued the cause for appellant/cross-respondent (Joseph E. Krakora, Public Defender, attorney; Margaret McLane, of counsel and on the briefs).

Frank Muroski, Deputy Attorney General, argued the cause for respondent/cross-appellant (Gurbir S. Grewal, Attorney General, attorney; Frank Muroski and Jenny M. Hsu, Deputy Attorney General, of counsel and on the briefs).

Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey (American Civil Liberties Union of New Jersey Foundation and Rutgers Constitutional Rights Clinic Center for Law and Justice, attorneys; Alexander Shalom, Edward L. Barocas and Jeanne M. LoCicero, of counsel and on the briefs, and Ronald K. Chen on the briefs).

Opinion

JUSTICE TIMPONE delivered the opinion of the Court.

***597** This appeal concerns a cascade of missteps by police, resulting in several constitutional violations. The case begins with the warrantless search of a motel room, followed by the extended detention of automobile passengers without reasonable suspicion. One defendant then involuntarily consents to a search of an automobile, culminating in the warrantless search of a tote bag found in the car in which another defendant was a passenger. The State raises a number of well-expressed arguments in support of the admissibility of the evidence obtained from the ****234** searches. Nevertheless, the record before us compels the suppression of all evidence seized.

To provide an overview, we will begin our analysis by considering the application of the third-party intervention doctrine -- a recognition that law enforcement need not obtain

a warrant to "reexamine property that has been searched by a private actor and presented to law enforcement" under certain circumstances, State v. Wright, 221 N.J. 456, 479, 114 A.3d 340 (2015) -- to the warrantless search of a motel room. Next, we examine whether a confession spontaneously made during an extended detention not predicated on individualized reasonable suspicion must be suppressed under the circumstances. Thereafter, we review the events surrounding the search of a tote bag and assess whether a passenger had standing to challenge the search of a tote bag that ultimately proved to belong to another passenger. We consider whether the principles of the trespasser and abandoned property exceptions to automatic standing apply under these circumstances, and whether the driver's consent to the vehicle search justified the ***598** search of the tote bag. Lastly, we address the applicability of the inevitable discovery doctrine and independent source rule to this case.

For the reasons stated below, we hold that the police's warrantless search of the motel room ran afoul of the Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the New Jersey Constitution. We further find the third-party intervention doctrine does not apply to motel rooms and that the State's warrantless entry into the room was unlawful. We also find the defendant's extended detention constituted a de facto arrest and that the State failed to show his confession was not a by-product of that arrest. Concerning the tote bag, we find defendant had automatic standing, the trespass and abandoned property exceptions do not apply, and the State failed to show the voluntariness of the driver's consent. Finally, we will not apply the inevitable discovery or independent source exceptions to the exclusionary rule because on remand the State chose not to develop the record on those issues.

With that, we find defendant's confession and the drug evidence must be suppressed.

I.

A.

The facts are culled from the testimony elicited at the suppression hearing. Florida resident Jasmine Hanson was staying at the Crystal Inn motel in Neptune City, New Jersey. She called the front desk to complain she had been bitten by bed bugs and demanded a full refund. She was referred to the motel's owner. Later that afternoon, the motel owner inspected Hanson's room. When no one answered his knocks, he entered her room using his pass key. In search of bed bugs, the motel owner pulled a bed comforter down, revealing a plastic bag containing what he suspected were narcotics. The motel owner called the police and reported his suspicion.

***599** Upon his arrival, Officer Jason Rademacher had the motel owner lead him to Hanson's room where, again using his pass key, the motel owner unlocked the door for the officer to enter. Inside, Rademacher saw a clear plastic bag containing what appeared to him to be two other clear plastic bags of crack cocaine and several small glassine bags of heroin. Nearby, the officer saw a jar of what he suspected was synthetic marijuana on the nightstand and a glass measuring cup containing a spoon and a white, rock-like substance in a drawer. ****235** Next to the measuring cup was a black scale dusted with a white powder.

Rademacher contacted his supervisor, who sent Sergeant William Kirchner to the motel as backup. The officer requested a criminal history check on Hanson. It revealed an outstanding traffic warrant and a recently issued traffic summons on a 2012 black Chevrolet Tahoe, and its plate number. Rademacher collected all the drug evidence and photographed Hanson's motel room.

Rademacher transported the evidence to the station and returned in an unmarked vehicle to wait for Hanson's arrival. Shortly thereafter, the black Tahoe pulled into a parking space. The front passenger, Keon Bolden, immediately exited the vehicle. Rademacher drew his weapon and, keeping it at his side, ordered Bolden back into the Tahoe. Hanson was in the driver's seat. In the back seat were Shakera Dickerson and Nathan Shaw. Rademacher stood by the driver's door awaiting backup.

At least three units arrived on the scene. Hanson produced her license and the Tahoe's rental agreement. Rademacher informed Hanson she had an active warrant and arrested her. The police patted Hanson down, handcuffed her, and placed her in the back of a patrol car. The officer asked to search the Tahoe; Hanson refused consent. Rademacher and Kirchner explained that a drug-detection canine would be brought to perform an exterior sniff of the vehicle. Hanson did not change her mind. Rademacher testified that they waited until all of the occupants of the Tahoe were removed from the vehicle before they requested the canine. The canine's handler testified that when he arrived there were still ***600** occupants in the vehicle, and he had to wait for them to be removed

before he could conduct the exterior sniff. The trial court adopted the handler's narrative, while the Appellate Division endorsed the officer's version of events.

The officers conducted warrant checks on the remaining passengers. Only Dickerson's warrant check came back positive. She was arrested and placed in a second patrol car. Shaw and Bolden were patted down and each seated in separate patrol cars, uncuffed.

The canine's handler attempted to explain the sniff procedure to Hanson; Hanson refused to speak to him and again refused to consent to a search of the vehicle. The handler led the canine to the Tahoe. During the sniff, Shaw told an officer that he had a bag of marijuana in the car. The canine alerted to the presence of narcotics. Shaw was arrested. An officer told Hanson that Shaw admitted he had marijuana in the vehicle and, at that point, she consented to the vehicle search. She signed a consent-to-search form, but did not initial the line attesting that she gave her consent free of coercion.

Rademacher searched the car, immediately finding the brown bag containing marijuana. Meanwhile, other officers found a bag of synthetic marijuana and a box of plastic bags in the center console. On the backseat, in between where Dickerson and Shaw were sitting, Rademacher found a green and white tote bag. From inside the tote bag he recovered 113 stamped glassine bags of heroin, a plastic bag containing suspected crack cocaine, and a purse in which he found a plastic bag of what appeared to be marijuana. Twenty-four of the glassine bags of heroin were stamped in red ink with the phrase "Limit 50." That mark resembled the stamp found on the glassine bags of heroin in Hanson's motel room.

Laboratory testing confirmed the suspected drugs were marijuana, crack cocaine, and heroin. All four passengers were ****236** charged with multiple counts of possession and possession with intent to distribute the drugs found in both the motel room and the tote bag.

***601** B.

All defendants moved before the Superior Court, Law Division to suppress the drug evidence seized from the motel room and the Tahoe.

After finding that the charged defendants had automatic standing to challenge the search, the motion court denied their suppression motion with the following findings:

(1) The motel owner's initial entry into Hanson's motel room did not violate the Fourth Amendment because the Fourth Amendment affords individuals protection only from unreasonable state action -- not from private individuals like the motel owner. The court found the motel owner "surrendered that evidence to the officer by reporting the drugs and asking for someone to come and investigate."

(2) The initial stop of the Tahoe was lawful due to Hanson's outstanding traffic warrant, and the stop did not turn into a de facto arrest of Shaw or Bolden because the officers had "a reasonable and articulable basis that criminal activity was afoot to continue the detention after completion of the background checks based on the totality of the circumstances including[ ] the motel room filled with suspected narcotics, the out-of-state driver's license, and the brief duration of the rental car agreement." Highlighting Shaw and Bolden had not been handcuffed, the court found it reasonable to place them in patrol cars during the canine sniff and found the extension of the stop minimal because the drug-detection canine was already on the scene when the passengers were removed.

(3) Hanson's consent justified a search of the vehicle and all of its contents, including the tote bag. Distinguishing State v. Suazo, 133 N.J. 315, 322, 627 A.2d 1074 (1993), the court emphasized that no one claimed ownership of the tote bag, thus it was reasonable for the officer to assume it was Hanson's and that she had consented to its search. The court remarked that the location of the tote bag was insufficient to put Rademacher on notice that the passengers had a superior privacy interest in it.

C.

Shaw and Bolden entered guilty pleas; Shaw pleaded guilty to one count of third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(3), and Bolden pleaded guilty to one count of first-degree possession of CDS, N.J.S.A. 2C:35-5(b)(1), and one count of possession of CDS with intent to distribute within five hundred feet of certain public property, N.J.S.A. 2C:35-7.1. On appeal, Shaw argued his statement must be suppressed because it ***602** was the fruit

of an unlawful arrest, and that the drug evidence from the Tahoe must be suppressed because Hanson did not have the authority to consent to a search of the tote bag or because her consent was a product of his unlawful arrest.

Bolden asserted that the drug evidence from Hanson's motel room must be suppressed because Rademacher's warrantless search was illegal.

The Appellate Division first addressed Bolden's argument. The State abandoned ****237** its initial assertion that the motel search was exempt under the third-party intervention doctrine and, instead, argued Bolden did not have standing to challenge the search of Hanson's motel room because there was no evidence establishing that he had an expectation of privacy in Hanson's room. The appellate panel noted that the inapplicability of the third-party intervention doctrine only crystalized after this Court's decision in Wright, and found a remand proper to give Bolden the opportunity to establish a reasonable expectation of privacy in Hanson's motel room. The Appellate Division vacated the denial of Bolden's suppression motion and ordered the case remanded.

Turning to Shaw's arguments, the Appellate Division found the extension of his initial detention was unlawful because it exceeded the dictates of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The panel highlighted that the trial court made no findings as to Shaw except to hold that he was in a car with Hanson, who had an outstanding arrest warrant and was the registered guest of the motel room where CDS was discovered. The panel found that there was no reason to continue to detain Shaw once the warrant search on him came up empty and without any evidence of a connection to Hanson's motel room.

The panel examined the circumstances around Shaw's admission that he had marijuana in the vehicle, emphasizing that Shaw was secured in a police vehicle for an extended period of time without cause and was not free to leave. Based on those findings, the panel determined the admission to be the fruit of an illegal detention ***603** that necessitated suppression under State v. Johnson, 118 N.J. 639, 653, 573 A.2d 909 (1990).

The panel concluded Hanson's consent to the search of the Tahoe was involuntary and the trial court erred by not considering the guidelines outlined in State v. King, 44 N.J. 346, 352-53, 209 A.2d 110 (1965). The appellate panel noted that, had the trial court considered the King factors, it would have recognized the presence of an abundance of factors suggesting coercion that could not be overcome by Hanson's incomplete consent form.

Lastly, having found Hanson's consent invalid, the Appellate Division concluded that Shaw did not have standing to challenge the search of the tote bag. Without evidence that any of the passengers claimed ownership of the tote bag or objected to its search, the panel found Shaw without a protected privacy interest in its contents.

D.

We granted Shaw's petition for certification, 228 N.J. 506, 158 A.3d 1177 (2017), and the State's cross-petition, 228 N.J. 518, 158 A.3d 1183 (2017). We also granted the American Civil Liberties Union of New Jersey (ACLU) amicus curiae status.

Following oral argument on November 8, 2017, we ordered this case remanded to the Law Division for the court "to address the application of the inevitable discovery doctrine and the independent source doctrine to the admissibility of the evidence seized in the motor vehicle." In that order we noted that the remand court could take testimony and make new fact findings.

E.

On remand, the parties presented no further testimony. Instead, the court relied on the record as it had been developed at the suppression hearing. The court determined the inevitable discovery doctrine and the independent source doctrine both applied.

****238** ***604** Beginning with the inevitable discovery doctrine, the remand court found it applied for three reasons: (1) Hanson would have been arrested due to her warrant, and the vehicle would have been searched following her arrest pursuant to a lawful inventory search; (2) the positive indication by the drug-detection canine gave police probable cause to obtain a search warrant; and (3) Shaw admitted the marijuana in the car was his.

As for the independent source doctrine, the remand court determined it applied despite the officers' unlawful entry into the motel room because the phone call by the motel owner reporting suspected narcotics, alone, would have been

sufficient to give police reasonable suspicion to stop Hanson and search her vehicle.

II.

A.

In his petition, Shaw contends that he had automatic standing under State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981), to challenge the search of the tote bag and the Appellate Division erred by requiring him to demonstrate a reasonable expectation of privacy. An expectation of privacy analysis, Shaw submits, is appropriate only when a court must determine whether there can be a reasonable expectation of privacy in a novel class of objects, and tote bags, he states, are not a novel class of objects.

In support of Shaw, the ACLU asks us to extend Wright and hold the third-party intervention doctrine cannot exempt a search of a motel room from the warrant requirement. The ACLU also asks us to find the Appellate Division erred by placing the burden on Bolden to prove he had a reasonable expectation of privacy in the motel room. The ACLU further argues the officers did not have reasonable suspicion even to ask for Hanson's consent because the evidence from the motel was unlawfully obtained.

The State responds to Shaw's petition by submitting that a reasonable expectation of privacy analysis is proper because this Court has not yet addressed whether someone can have a reasonable ***605** expectation of privacy in another's bag. The State contends that Shaw lacked any expectation of privacy in Dickerson's tote bag because he hid contraband in it without her knowledge. The State also argues that the trespasser exception to automatic standing should apply.

Additionally, the State argues the evidence seized from the tote bag is admissible under the inevitable discovery doctrine. Specifically, the State alleges the drug evidence in the tote bag would have been inevitably discovered pursuant to the lawful consent search or, alternatively, pursuant to a warrant that would have been granted due to the positive indication by the drug-detection canine.

In its separate response to the ACLU, the State alleges amicus is injecting new arguments that are not before the Court, highlighting that only Bolden challenged the search of the motel room on appeal and he did not petition for review. Alternatively, the State asserts that neither Shaw nor Hanson had a reasonable expectation of privacy in the motel room because Hanson's guest status was either relinquished or terminated when she demanded a full refund or when the motel owner found the drugs. The State urges this Court not to extend Wright and to apply the third-party intervention doctrine. Lastly, the State claims the motel owner's phone call reporting unlawful narcotics is an independent source to suspect Hanson and her cohorts of unlawful drug activities.

****239** B.

In its cross-petition, the State raises five arguments.

Emphasizing "[Shaw] was in the close confines of an automobile with Hanson that had just arrived at the motel where evidence of drug trafficking was seized," the State alleges it was reasonable for the police to assume the passengers were Hanson's confederates and thus it was lawful for them to detain Shaw, even after their fruitless warrant check.

***606** Flowing from that point, the State argues Shaw's detention from the time Rademacher stopped the vehicle to when Shaw confessed was not unreasonable or a de facto arrest under the circumstances.

The State submits Shaw's spontaneous admission was voluntary, because he knew when he saw the drug-detection canine that his marijuana would inevitably be discovered.

The State also maintains Hanson's consent was voluntary under the circumstances, considering that the officers honored her previous refusals, and it was reasonable for the officers to believe Hanson had authority to consent to a search of the entire vehicle and its contents.

Finally, citing the framework for inevitable discovery in State v. Sugar, 100 N.J. 214, 238, 240, 495 A.2d 90 (1985), the State submits "the dog sniff gave the police an 'independent source' of knowledge to arrest defendant for constructive or joint possession of the drugs found inside of Hanson's vehicle."

Shaw responds that, while the initial stop may have been legal, his continued detention and prolonged isolation in a police vehicle was unlawful and a de facto arrest. Because his confession was a product of the illegal arrest, he reasons, it must be suppressed as fruit of the poisonous tree. As for

Hanson's consent, he argues it was either a product of his unlawful arrest or coerced.

Lastly, Shaw argues the independent source and inevitable discovery doctrines do not apply because they were not raised before the trial court. On the merits, Shaw contends there was no separate search to serve as an independent source for the drug evidence, and the police cannot show by clear and convincing evidence that a hypothetical warrant would have been granted.

C.

Following the remand and arguing the State failed to produce evidence that a warrant would have been sought and obtained, Shaw maintains the inevitable discovery and independent source ***607** doctrines do not apply. The State reasserts the doctrines do apply because the motel owner's report served as an independent source for lawfully detaining the vehicle, and police would inevitably have discovered the drug evidence in the vehicle because the police would have obtained a warrant in accord with police procedure after the drug dog's positive indication.

III.

We address chronologically each issue as it arose during the course of the motel and vehicle search, using the search of the motel as the starting point. As usual, we defer to the fact findings of the trial court, provided they are supported by substantial credible evidence in the record, State v. Davila, 203 N.J. 97, 109, 999 A.2d 1116 (2010), but review the trial and remand courts' legal conclusions de novo, State v. Vargas, 213 N.J. 301, 327, 63 A.3d 175 (2013).

Although Shaw did not challenge the search of the motel room on appeal to the Appellate Division or this Court, the Appellate ****240** Division found the motel search unlawful based on Bolden's challenge. The illegality of that search was not appealed by the State. Yet the State argues, in part, that the extended investigatory detention of Shaw was based on a reasonable suspicion of illicit activity in light of the drugs found in Hanson's motel room. Because the search of the motel room is so entangled with the parties' arguments about the validity of Shaw's extended detention, because consideration of the search's constitutionality "is necessary to the complete determination" of this matter, and because the record before us is adequate to permit review of this issue, we now exercise original jurisdiction and review the validity of the search of Hanson's motel room. R. 2:10-5; Price v. Himeji, LLC, 214 N.J. 263, 294-95, 69 A.3d 575 (2013).

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution both safeguard the right of all individuals to be secure in their houses against unreasonable searches and seizures. ***608** State v. Hathaway, 222 N.J. 453, 468, 120 A.3d 155 (2015) (quoting U.S. Const. amend. IV) (citing N.J. Const. art. I, ¶ 7). When law enforcement undertakes a search without a warrant, that search is presumptively unlawful. State v. Pineiro, 181 N.J. 13, 19, 853 A.2d 887 (2004). To overcome the presumption, the State has the burden of demonstrating the search fell within a recognized exception to the warrant requirement. Vargas, 213 N.J. at 314, 63 A.3d 175.

Under the third-party intervention doctrine, a person's reasonable expectation of privacy is not violated by the actions or search of a private, rather than government, actor. See Wright, 221 N.J. at 459, 114 A.3d 340. In such a situation, the initial search by the private actor does not trigger Fourth Amendment protections, which apply only to governmental action. See Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). And the subsequent search by law enforcement -- so long as it does not exceed the scope of the private search -- may not require a warrant if it does "not infringe any constitutionally protected privacy interest that had not already been frustrated as a result of the private conduct." United States v. Jacobsen, 466 U.S. 109, 120, 123, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). As the United States Supreme Court has explained, "[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information." Id. at 117, 104 S.Ct. 1652.

The third-party intervention doctrine traditionally applied to searches of objects either physically conveyed or reported to the police, such as incriminating evidence taken from an office and misdirected or damaged packages. See Wright, 221 N.J. at 459, 468-69, 114 A.3d 340. In Wright, we held that the doctrine could not be applied to searches of private dwellings -- including rented apartments -- under our State Constitution. 221 N.J. at 476, 114 A.3d 340.

We first distinguished searches of the home from the searches to which the doctrine had been previously applied, stressing that "[h]omes are filled with intimate, private details about

peoples' *609 lives that are ordinarily free from government scrutiny," and "[a]n officer's entry into a home is a far greater intrusion than a search of a package presented to the police." Id. at 460, 114 A.3d 340. We noted that the principles applicable to privately owned houses are equally applicable to rental units, observing that tenants do not cede their state and federal rights to their landlord when they rent an apartment. Id. at 475, 114 A.3d 340. We acknowledged that, under certain circumstances, landlords are permitted entry into a tenant's apartment, but **241 emphasized that, generally, "a landlord does not have the authority to consent to a search of a tenant's private living space." Id. at 476, 114 A.3d 340 (citing Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961); State v. Coyle, 119 N.J. 194, 215-16, 574 A.2d 951 (1990)).

Critically, we said "[a] landlord, like any other guest, may tell the police about contraband he or she has observed. And the police, in turn, can use that information to apply for a search warrant. But that course of events does not create an exception to the warrant requirement." Id. at 476-77, 114 A.3d 340 (citation omitted). Stressing that the United States Supreme Court had never extended the doctrine to home searches, and predicting from case law that it would not, we likewise declined to expand the doctrine in that way. Id. at 476, 114 A.3d 340.

One of the cases on which we relied in reaching that conclusion, id. at 472, 114 A.3d 340, was United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997), in which the United States Court of Appeals for the Sixth Circuit refused to extend the third-party intervention doctrine to a motel room. Allen had paid for his motel room in cash, including an additional deposit for any telephone charges he might incur. Allen, 106 F.3d at 697. When he depleted his balance, the motel clerk called to inform him that his remaining credit was insufficient to cover his stay that night. Ibid. When Allen failed to pay or to answer his phone, the motel manager went to Allen's room and, after her knock went unanswered, used her key to enter. Ibid. Inside, she saw loose marijuana and bricks of marijuana *610 lying about. Ibid. She then exited the room, used a special key to deadbolt the door, and called the police. Ibid. When police arrived, they entered the room and observed the marijuana the motel manager had reported. Ibid. Allen was arrested upon his return, and police obtained a search warrant for the motel room, his vehicle, and his briefcase. Ibid.

On appeal from the denial of Allen's suppression motion, "[t]he government argue[d] that the police officers' warrantless search of Allen's motel room was not illegal because it did not exceed in scope the initial private search conducted by the motel manager." Id. at 698. The Sixth Circuit declined to apply the third-party intervention doctrine and found "the motel manager's search of Allen's room did not extinguish Allen's privacy interest in the room's contents." Id. at 699.

We agree that hotel guests have a reasonable expectation of privacy in their rooms akin to that held by property owners and tenants. See Georgia v. Randolph, 547 U.S. 103, 112, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) ("[A] hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room." (citing Stoner v. California, 376 U.S. 483, 489, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951))). This Court has acknowledged the warrant requirement extends to hotel rooms, Hathaway, 222 N.J. at 468, 120 A.3d 155 (citing Stoner, 376 U.S. at 486, 84 S.Ct. 889), and has noted that federal courts have as well, see Hinton, 216 N.J. at 232 n.6, 78 A.3d 553 (citing United States v. Young, 573 F.3d 711, 716, 720-21 (9th Cir. 2009); United States v. Bautista, 362 F.3d 584, 590 (9th Cir. 2004)). While a hotel or motel guest's expectation of privacy may be somewhat lesser in consideration of the realities of the relationship between a guest and motel owner, it is not so reduced that mere entry by the motel owner can be said to entirely deprive the guest of his or her privacy interests.

**242 Although Wright discussed apartments, its reasoning applies with equal force to motel rooms. We therefore reject the *611 State's argument and decline to extend the private search doctrine to hotel and motel rooms. The third-party intervention doctrine cannot excuse law enforcement's search of a motel room from the warrant requirement. To reiterate the guidance we provided in Wright, where a motel owner or employee finds contraband in a guest's room, "the police can use that information to obtain a search warrant and then conduct a search." Wright, 221 N.J. at 478-79, 114 A.3d 340. "In the time it takes to get the warrant, police officers can secure the [motel room] from the outside, for a reasonable period of time, if reasonably necessary to avoid any tampering with or destruction of evidence." Id. at 478, 114 A.3d 340.

Here, the State's reliance on the third-party intervention doctrine was misplaced, and the State failed to show the warrantless search of the motel room was exempt from the warrant requirement. As a result, we find the motel search was

unconstitutional and that the illegal fruits of that search must be suppressed.

We note, as a general matter, that the third-party intervention doctrine is a poor fit to living spaces. Rather, a standing analysis seems more appropriate. See, e.g., Allen, 106 F.3d at 699 (finding that, while the third-party intervention doctrine did not apply, termination of Allen's guest status eliminated any expectation of privacy he had in his motel room). In response to an argument raised by amicus -- one that was not discussed below -- the State asserts Shaw does not have standing to challenge the search of the motel room because he did not demonstrate a connection to the motel room or because Hanson's privacy interest in the room was terminated. As part of that argument, however, the State highlights that Shaw was charged with constructive possession of the drugs recovered from the motel room. Because this was not raised earlier, we decline to engage in a lengthy discussion of the issue. Nevertheless, we highlight that the State's argument neglects our automatic standing jurisprudence, Alston, 88 N.J. at 228-30, 440 A.2d 1311, and incorrectly attempts to shift the burden onto Shaw ***612** to prove a privacy interest in the motel room, see State v. Brown, 216 N.J. 508, 529, 83 A.3d 45 (2014).

IV.

We next consider whether Shaw was lawfully detained and whether, as a result, his statement that he had a bag of marijuana in the car was admissible against him.

A.

Under the Fourth Amendment and Article 1, Paragraph 7, the warrantless seizure of an individual is presumptively unlawful. State v. Coles, 218 N.J. 322, 342, 95 A.3d 136 (2014). In limited circumstances, however, police may lawfully detain someone for investigatory purposes. Ibid.; see also Terry, 392 U.S. at 24, 88 S.Ct. 1868. Police must have particularized suspicion in order to conduct an investigatory stop, State v. Chisum, 236 N.J. 530, 545, 200 A.3d 1279 (2019), meaning "[t]he stop must be reasonable and justified by articulable facts; it may not be based on arbitrary police practices, the officer's subjective good faith, or a mere hunch," Coles, 218 N.J. at 343, 95 A.3d 136.

Moreover, "[t]he duration of an investigative stop must be limited in time and scope to the purpose that justified the stop in the first place." ****243** State v. Gibson, 218 N.J. 277, 292, 95 A.3d 110 (2014). An extended detention will be found unreasonable if it lasts longer than necessary to effectuate the purpose of the continued detention, or if law enforcement uses more intrusive means than necessary to conduct the investigation. Chisum, 236 N.J. at 547, 200 A.3d 1279. If the officer's conduct is more intrusive than necessary, the investigative stop turns into a de facto arrest. State v. Dickey, 152 N.J. 468, 478, 706 A.2d 180 (1998). "Thus, the detention must be reasonable both at its inception and throughout its entire execution." Coles, 218 N.J. at 344, 95 A.3d 136.

There is no simple test for determining at which point a prolonged investigative stop turns into a de facto arrest, but ***613** important factors include unnecessary delays, handcuffing the suspect, confining the suspect in a police car, transporting the suspect, isolating the suspect, and the degree of fear and humiliation engendered by the police conduct. Ibid.

Here, when Rademacher approached the vehicle, all he knew was that a substantial amount of drugs were found in Hanson's motel room, that she was driving a rental car, and that she was not a New Jersey resident. On that basis, the State attempts to justify seizing Shaw, patting him down, and thereafter isolating him in a police car to wait until a drug-detection canine arrived on the scene and sniffed Hanson's vehicle.

Once it was determined that Shaw was unarmed and had no outstanding warrants, however, there was no particularized suspicion that Shaw was engaged in criminal activity that would justify Shaw's further detention. We do not accept the State's argument that a person's mere presence in the car of a suspected drug dealer warrants indefinite detention without any individualized suspicion. Rather than conducting a true investigatory stop, the officers appear to have been operating from the assumption that the passengers were Hanson's confederates. While such a hunch may be reasonable, it is insufficient to justify the extent of the investigatory detention here. Our Constitution requires officers to pursue the least intrusive means when they conduct an extended investigatory detention. Where an officer's hunch proves correct, we still cannot sanction an extended investigatory detention of a passenger if the officer lacked particularized suspicion based on articulable facts. Our Constitution does not provide hindsight as a justification for an investigatory detention.

In short, we agree with the Appellate Division that the State failed to demonstrate any reason for continuing the investigatory detention of Shaw after his warrant check returned negative. On the record established at the suppression hearing, the police lacked the constitutional minimum to hold Shaw while they obtained the drug-detection canine and had the dog sniff the vehicle. Under the circumstances here, isolating Shaw in the back of a ***614** patrol car despite a negative warrant check was a de facto and an unlawful arrest.

It was during that period of unlawful detention that Shaw stated there was marijuana in the bag. We next consider whether that statement is admissible.

B.

"As a general rule, a confession obtained through custodial interrogation after an illegal arrest should be excluded unless the chain of causation between the illegal arrest and the confession is sufficiently attenuated so that the confession was 'sufficiently an act of free will to purge the primary taint.' " State v. Worlock, 117 N.J. 596, 621, 569 A.2d 1314 (1990) (quoting ****244** Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). "The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive." Brown v. Illinois, 422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

In State v. Barry, we explained that, when considering confessions made during illegal arrests, the overarching question is "whether the confession falls on one side or the other of the line that separates confessions which resulted from an exploitation of an illegal arrest from those which were the product of the defendant's free will, the taint of the illegal arrest having been sufficiently attenuated." 86 N.J. 80, 87, 429 A.2d 581 (1981). To reach that determination and, thus, to decide whether to suppress a statement obtained after an unlawful arrest, we consider three factors: "the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Barry, 86 N.J. at 87, 429 A.2d 581; accord Brown, 422 U.S. at 603-04, 95 S.Ct. 2254.

The length of time between the unlawful arrest and the confession is the least determinative due to its ambiguity; a ***615** long detention could suggest increasing pressure or dissipation of the initial shock of arrest, and a short detention could indicate the confession was a product of the initial shock or that the confession was unrelated to the arrest. Worlock, 117 N.J. at 622-23, 569 A.2d 1314. The conditions of the unlawful detention should be considered because they "can be as important as the temporal proximity." Id. at 623, 569 A.2d 1314.

The presence of intervening circumstances that break the causal connection between the arrest and confession can be the most important consideration. Ibid. Such intervening circumstances could include termination of the unlawful detention, Wong Sun, 371 U.S. at 491, 83 S.Ct. 407; presenting the detainee with new evidence, Barry, 86 N.J. at 89-90, 429 A.2d 581; or evidence that the defendant intended to turn himself in, Worlock, 117 N.J. at 624, 569 A.2d 1314.

And, finally, the purposefulness and flagrancy of the police misconduct is particularly relevant in determining whether a confession was the fruit of an unlawful arrest and has justified suppression where the illegal conduct was "calculated to cause surprise, fright, and confusion." Brown, 422 U.S. at 605, 95 S.Ct. 2254; see also Worlock, 117 N.J. at 624, 569 A.2d 1314 (1990).

Applying those principles here, we agree with the Appellate Division and find Shaw's confession was a product of his unlawful de facto arrest and must be suppressed. Shaw's confession occurred during his unlawful detention, and we are not persuaded that the presence of the drug-detection canine purged the taint of the illegal arrest. Shaw was never informed of his right to remain silent and was held without individualized suspicion so the police could investigate his connection to suspected drug activity. Although his confession was not made in response to an interrogation, we are not convinced it was a product of his own free will. The aim of the exclusionary rule is to prevent exploitation of unlawful means by police; to vindicate that aim and the constitutional protections against unlawful seizures, we find suppression of Shaw's admission appropriate.

***616** V.

We now turn to the search of the tote bag. We begin with whether Shaw had ****245** automatic standing to challenge that search, then consider the applicability of exceptions to the automatic standing rule, and finally determine whether

Hanson's consent to search provided an exception to the warrant requirement.

A.

The New Jersey Constitution provides greater protections from warrantless searches and seizures than the Fourth Amendment of the Constitution of the United States. Alston, 88 N.J. at 226, 440 A.2d 1311. Despite our Constitution's similar language, in Alston, we strengthened our legitimate expectation of privacy standard. Id. at 228, 440 A.2d 1311. "[U]nder Article I, Paragraph 7 of the New Jersey Constitution, 'a criminal defendant is entitled to bring a motion to suppress evidence obtained in an unlawful search and seizure if he has a proprietary, possessory or participatory interest in either the place searched or the property seized.' " State v. Randolph, 228 N.J. 566, 581, 159 A.3d 394 (2017) (quoting Alston, 88 N.J. at 228, 440 A.2d 1311).

Our standard both incorporates the legitimate expectation of privacy standard and offers broader protections that advance three important State interests. State v. Johnson, 193 N.J. 528, 543, 940 A.2d 1185 (2008). The first is the State's interest in protecting defendants from having to admit possession to vindicate their constitutional right against unreasonable searches and seizures. Ibid. The second is to prevent the State from arguing a defendant should be subject to criminal liability for possessing contraband, while asserting the same defendant had no privacy interest in the area from which police obtained the contraband without a warrant. Ibid. Our third aim is to increase privacy protections for our citizens and to promote respect for our Constitution by discouraging law enforcement from carrying out warrantless searches and seizures where unnecessary. Ibid.

***617** Whenever a defendant "is charged with committing a possessory drug offense -- as in this case -- standing is automatic, unless the State can show that the property was abandoned or the accused was a trespasser." Randolph, 228 N.J. at 571-72, 159 A.3d 394. "[T]he State bears the burden of showing that defendant has no proprietary, possessory, or participatory interest" in the property searched. Id. at 582, 159 A.3d 394. We have repeatedly rejected arguments that "automatic standing does not relieve defendant of his obligation to show that he had a reasonable expectation of privacy in the [area] searched." Id. at 583, 159 A.3d 394 (discussing Johnson, 193 N.J. at 546, 940 A.2d 1185). Importantly, we will not assess whether someone has a reasonable expectation of privacy if we have already determined that the location from which the contraband was seized enjoys constitutional protection and there are no new or unusual circumstances necessitating such an analysis. Id. at 584, 159 A.3d 394.

We find no reason to engage in an expectation of privacy analysis here. The State alleges Shaw was akin to a trespasser because he put the drugs in Dickerson's bag without her knowledge. But the State failed to produce any evidence to support that point. During the suppression hearing, counsel made passing reference to the tote bag being Dickerson's, but the record is bereft of anything suggesting Shaw put the heroin in the tote bag without her consent.

By arguing Shaw possessed the drugs and had no expectation of privacy in the tote bag, the State appears to do exactly what this Court discouraged in Alston, that is, arguing Shaw has no expectation of privacy in the tote bag, but was so inextricably ****246** linked to drugs found within it that he should be held criminally liable for possession. Because the State failed to produce any evidence that would warrant scrutiny of Shaw's privacy interests, we find Shaw had automatic standing to challenge the search of the tote bag.

B.

Our inquiry cannot end there. In Randolph, "we recognize[d] three exceptions to the automatic standing rule in cases concerning ***618** real property." Id. at 585, 159 A.3d 394. Under two of those exceptions, we held someone accused of possession will not have standing to challenge the search if the State shows the police officer who conducted the search had an objectively reasonable basis, based on the totality of the circumstances, to believe the defendant was trespassing on the property or that the building was abandoned. Id. at 585, 587, 159 A.3d 394 (citing Brown, 216 N.J. at 532, 83 A.3d 45).

The State asks us to apply by analogy either the trespasser or abandoned property exception to the drug evidence found in the tote bag. We cannot, and we dispense with both arguments quickly.

The tote bag was found in the back seat of a car that had four occupants. They were ordered out of the car. The State simply has not established that the bag was abandoned property.

See State v. Carvajal, 202 N.J. 214, 223-24, 996 A.2d 1029 (2010).

The trespasser exception has even less relevancy. The record is devoid of any evidence that Shaw put the drugs in the tote bag without Dickerson's knowledge, or that the officer had an objectively reasonable basis to believe he had done so.

C.

Finally, having established that Shaw had automatic standing to challenge the search of the tote bag, we address whether Rademacher's warrantless search of it fell within the consent-search exception to the warrant requirement and whether the drug evidence obtained must be suppressed.

An individual's consent to search a constitutionally protected area eliminates the need for law enforcement to obtain a warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The consent must be voluntary, that is, " 'unequivocal and specific' and 'freely and intelligently given.' " King, 44 N.J. at 352, 209 A.2d 110 (quoting Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951)). "The burden of proof is on the ***619** State to establish by clear and positive testimony that the consent was so given." Ibid. The ultimate determination must rest on the facts of each individual case. State v. Hagans, 233 N.J. 30, 40, 182 A.3d 909 (2018). And a court's determination must be based on the totality of the circumstances and be supported by sufficient credible evidence in the record. Id. at 42-43, 182 A.3d 909.

New Jersey's Constitution also provides greater protections than the federal constitution when it comes to consent searches. State v. Carty, 170 N.J. 632, 639, 647, 790 A.2d 903, modified on other grounds, 174 N.J. 351, 806 A.2d 798 (2002). Law enforcement must have a "reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity," before officers may ask for consent to search a vehicle. Id. at 647, 790 A.2d 903. This prophylactic rule protects the public from the unjustified extension of motor vehicle stops and from fishing expeditions unrelated to the reason for the initial stop. Ibid.

****247** Leaving aside the unconstitutional search of Hanson's motel room -- which the State uses in part to try to justify the motor vehicle stop and search -- we find the State failed to demonstrate Hanson's consent was voluntary. The trial court did not make specific findings on this issue, but did recite the requirement that the State prove Hanson's consent was given voluntarily. The trial court appears to have relied on the consent-to-search form, on which Hanson tellingly left uninitialed the affirmation that her consent was not a product of coercion.

We agree with the Appellate Division's assessment of Hanson's ultimate consent to search. At the time, Hanson had already been arrested and handcuffed. The officers asked her three different times for consent to search the vehicle. She relented only after an officer informed her of Shaw's unlawfully obtained confession.

Based on this record, we find the trial court's ruling of no coercion in Hanson's consent to search not supported by sufficient credible evidence. We conclude the warrantless search of the ***620** Tahoe was unconstitutional and that the evidence seized through that search is subject to suppression. Nor can the evidence come in through Shaw's confession, obtained -- as discussed above -- as the result of an unlawful detention and which law enforcement used to secure Hanson's consent to search. Whether viewed through the lens of Hanson's non-voluntary consent or Shaw's coerced confession, the evidence obtained from the vehicle is subject to exclusion as fruit of the poisonous tree. See State v. O'Neill, 193 N.J. 148, 171 n.13, 936 A.2d 438 (2007) ("The fruit-of-the-poisonous-tree doctrine denies the prosecution the use of derivative evidence obtained as a result of a Fourth or Fifth Amendment violation."); Johnson, 118 N.J. at 652, 573 A.2d 909.

V.

Lastly, we address whether the inevitable discovery doctrine or independent source rule should be applied to resurrect the suppressed evidence obtained in violation of the constitution.

"When the seizure of evidence is the result of the State's unconstitutional action, the principal remedy for violation of the constitutional right to be free from unreasonable searches and seizures is exclusion of the evidence seized." State v. Bryant, 227 N.J. 60, 71, 148 A.3d 398 (2016). The purpose of the exclusion is its deterrent effect. Ibid. (citing State v. Novembrino, 105 N.J. 95, 137-38, 519 A.2d 820 (1987)). The two exceptions to the exclusionary rule the State asks us to apply in this case -- the inevitable discovery doctrine and the independent source rule -- bear a facial similarity but

have different conceptual bases. State v. Smith, 212 N.J. 365, 393-95, 54 A.3d 772 (2012).

The inevitable discovery doctrine emanates from a recognition by both this Court and the Supreme Court of the United States that the exclusionary rule's purpose of preventing the use of evidence unlawfully obtained by law enforcement is not served -- especially in light of the heavy societal cost -- where the police would have inevitably discovered the evidence. ***621** Sugar, 100 N.J. at 237, 495 A.2d 90. In circumstances in which the State can show law enforcement would have discovered the evidence absent their illegal conduct, we have held the exclusionary rule should not be applied because to do so would place the prosecution at an unjustified disadvantage. Id. at 237-38, 495 A.2d 90. For the inevitable discovery exception to apply, the State must prove that

> (1) proper, normal and specific investigatory procedures would have been pursued ****248** in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
>
> [Smith, 212 N.J. at 391, 54 A.3d 772 (quoting Sugar, 100 N.J. at 238, 495 A.2d 90 (citations omitted)).]

"[A]s with the [independent source rule], [the State] must establish all three elements by clear and convincing evidence," and its "failure to satisfy any one prong of the standard will result in suppression of the challenged evidence." Id. at 395, 54 A.3d 772 (quoting State v. Holland, 176 N.J. 344, 363, 823 A.2d 38 (2003)).

The independent source rule, like the inevitable discovery doctrine, allows the admission of evidence that was discovered wholly independently from the constitutional violation. Holland, 176 N.J. at 354, 823 A.2d 38.

> First, the State must demonstrate that probable cause existed to conduct the challenged search without the unlawfully obtained information. It must make that showing by relying on factors wholly independent from the knowledge, evidence, or other information acquired as a result of the prior illegal search. Second, the State must demonstrate in accordance with an elevated standard of proof, namely, by clear and convincing evidence, that the police would have sought a warrant without the tainted knowledge or evidence that they previously had acquired or viewed. Third, regardless of the strength of their proofs under the first and second prongs, prosecutors must demonstrate by the same enhanced standard that the initial impermissible search was not the product of flagrant police misconduct.
>
> [Id. at 360-61, 823 A.2d 38.]

The inevitable discovery doctrine and independent source rule were not discussed by the trial court or the Appellate Division. A review of the record shows the prosecutor made only passing reference to the inevitable discovery doctrine, and the Appellate Division briefly mentioned "independent source" when explaining ***622** the fruit of the poisonous tree doctrine. Despite the sparse record, we ordered a remand and gave the State an opportunity to develop those two points. The State failed to produce any further support for its position, effectively declining the opportunity. Without a sufficiently developed record, we decline to review these issues and reject the remand court's legal conclusions. The State failed to make the necessary showing under either exception to the exclusionary rule. Accordingly, the unconstitutionally obtained evidence remains suppressed.

VI.

To summarize, we observe today that the third-party intervention doctrine, which concerns frustration of someone's privacy interests, cannot be applied to hotel or motel rooms as the State contends. A challenge to automatic standing is more appropriate, but it is the State that bears the burden of demonstrating a defendant did not have a proprietary, possessory, or participatory interest in the motel room. Here, just as the motion court found, Shaw had automatic standing to challenge the warrantless search of the motel room because he was charged with possession of the drugs recovered from it. The State's bare assertion that Shaw had no connection to the motel room is insufficient to meet its burden. The motel search was thus not exempt from the warrant requirement.

****249** With respect to Shaw's confession, we agree with the Appellate Division that isolating Shaw in the back of a patrol car and extending his investigatory detention without a reasonable, articulable, and individualized suspicion amounted to an unlawful arrest. We find Shaw's confession

was not voluntary and was a by-product of the unlawful de facto arrest, so we affirm the panel's holding that it must be suppressed.

As to the drug evidence found in Dickerson's tote bag, we reverse the Appellate Division, finding instead that Shaw had automatic standing to challenge the search of the tote bag as a result of his being charged with possession of the drugs found ***623** within it. We also find the trespasser and abandoned property exceptions inapplicable. So, the drug evidence found in the tote bag must be suppressed.

We affirm the Appellate Division's finding that the State failed to establish the voluntariness of Hanson's consent.

Finally, because the inevitable discovery and independent source exceptions to the warrant requirement were not raised below, and because the State did not develop the record when given the opportunity to do so before the trial court on remand, we find the State has not met its burden to establish either exception and reject the remand court's legal conclusions.

The judgment of the Appellate Division is affirmed in part and reversed in part. The matter is remanded to the trial court, where the State may proceed with the charges against Shaw without the benefit of his confession or the evidence obtained from the tote bag. Additionally, we reverse the trial court and find the warrantless search of Hanson's motel room unlawful and unconstitutional, and we suppress the drug evidence obtained from Hanson's motel room.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE TIMPONE'S opinion.

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237 N.J. 588, 207 A.3d 229

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279 Neb. 918
Supreme Court of Nebraska.

STATE of Nebraska, appellee,
v.
William E. SMITH, appellant.

No. S–09–375.
|
May 28, 2010.

Synopsis
Background: After his motion to suppress evidence was denied, defendant was convicted, on stipulated facts in a bench trial, in the District Court, Douglas County, Patricia A. Lamberty, J., of possession of a controlled substance with intent to deliver. Defendant appealed.

Holdings: The Supreme Court, Gerrard, J., held that:

private security guard's attempt to reach into defendant's pocket constituted a search that implicated defendant's right of protection against unreasonable searches and seizures;

search was a joint endeavor involving a private person and a state or governmental official as to implicate defendant's right of protection against unreasonable searches and seizures;

neither private security guard nor uniformed and armed off-duty police officer had probable cause necessary to conduct warrantless search of defendant's pocket; and

any express or implied consent to warrantless search was withdrawn by actions of defendant.

Reversed and remanded for new trial.

****917** *Syllabus by the Court*

***918** 1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.

2. **Constitutional Law: Search and Seizure.** To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb. Const. art. 1, § 7, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.

3. **Constitutional Law: Search and Seizure.** An expectation of privacy is reasonable if it has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.

5. **Constitutional Law: Search and Seizure.** The constitutional protection against an unreasonable search and seizure proscribes only governmental action and is inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official.

6. **Constitutional Law: Search and Seizure.** A search is subject to the constitutional safeguard against an unreasonable search if the search is a joint endeavor involving a private person and a state or government official.

7. **Search and Seizure.** In determining what is a joint endeavor between a private person and a government official, it is not essential that the government official be involved in the endeavor at the very outset.

8. **Search and Seizure.** The question whether a search is a private search or a government search is one that must be answered taking into consideration the totality of the circumstances.

9. **Police Officers and Sheriffs: Public Health and Welfare.** A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general, as police officers are considered to ****918** be under a duty to respond as police officers 24 hours a day.

10. **Police Officers and Sheriffs.** A police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith.

***919** 11. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. The warrantless search exceptions include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest.

12. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.

13. **Probable Cause: Words and Phrases.** Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.

14. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

15. **Probable Cause: Appeal and Error.** Appellate courts determine probable cause by an objective standard of reasonableness, given the known facts and circumstances.

16. **Police Officers and Sheriffs: Search and Seizure: Warrantless Searches.** Under the "plain feel" doctrine, a law enforcement officer may make a warrantless seizure of contraband detected during a lawful pat-down search.

17. **Probable Cause.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.

18. **Search and Seizure.** The legality of a seizure under the "plain feel" doctrine depends upon the incriminating character of an object being immediately apparent.

19. **Search and Seizure: Probable Cause.** A search or seizure of a person must be supported by probable cause particularized to that person.

20. **Search and Seizure: Probable Cause.** The fact that a person belongs to a class which contains some members who violate the law does not create probable cause to search that person.

21. **Search and Seizure.** Once given, consent to search may be withdrawn. Withdrawal of consent need not be effectuated through particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.

22. **Police Officers and Sheriffs: Search and Seizure.** If equivocal, a defendant's attempt to withdraw consent is ineffective and police may reasonably continue their search pursuant to the initial grant of authority.

23. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" ****919** reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?

24. **Police Officers and Sheriffs: Search and Seizure.** Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an ***920** unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.

25. **Search and Seizure.** A consensual search is circumscribed by the extent of the permission given, as determined by the totality of the circumstances.

26. **Police Officers and Sheriffs: Search and Seizure.** An officer conducting a consensual search has no authority to command the person being searched to stop interfering with the search.

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WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER–LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

William E. Smith appeals his conviction for possession of a controlled substance with intent to deliver. Smith argues that the district court erred in denying his motion to suppress evidence of illegal drugs that was discovered in his pocket during a pat-down search outside a nightclub. There are two issues presented in this appeal: whether the evidence obtained was the product of a search within the meaning of the Fourth Amendment and, if so, whether the search was reasonable under the Fourth Amendment.

II. BACKGROUND

We have examined the record and find no clear error in the historical factual findings of the district court,[1] nor does either party take issue with the court's factual findings. The pertinent historical facts are as follows.

Force Protection Services, a private security company owned and operated by Joseph South, provided security outside the Manhattan Club (the Club), a dance club in Omaha, Nebraska. ***921** Pursuant to a contract with the Club, Force Protection Services was to conduct a pat-down search of every patron for narcotics or weapons before they entered the Club. At the entrance of the Club is a sign stating that patrons are subject to a pat down and search. It is not uncommon for people in line, who observe the pat down, to get out of line and go back to their car. In addition to Force Protection Services, supplemental police officers are present, pursuant to an agreement with the Club.

On the night of the arrest, the Club was featuring the performance of a local diskjockey, and South and Calvin Harper, a uniformed and armed off-duty police officer, were providing security outside the Club. Smith and his cousin walked up to the Club's entrance. After Smith's cousin was patted down and permitted entry, he turned to Smith and said, "[S]orry, I forgot they pat down." South started to pat down Smith and felt a bulge in Smith's left front pocket.

South started to place his hand toward Smith's pocket and asked Smith twice what was in his front pocket, but Smith did not answer. Smith grabbed South's wrist to prevent South from reaching into his pocket. South instructed Smith to keep his hands in the air. South reached for Smith's pocket again, and again, Smith ****920** pushed South's hand away. Harper intervened at that point and told Smith to keep his hands in the air. Harper placed his arm under Smith's wrist, and South reached into Smith's pocket. South pulled out three cellophane bags containing pills that appeared to be "MDMA," also known as Ecstasy, a Schedule I controlled substance.[2] South handed the bags to Harper, who completed the search and arrested Smith.

The State filed an information charging Smith with possession of a controlled substance with intent to deliver.[3] Smith filed a motion to suppress alleging that he was unlawfully searched and arrested in violation of the U.S. and Nebraska Constitutions. After a hearing, the district court denied Smith's motion to suppress, and thereafter, a bench trial based on the ***922** stipulated facts was held. Smith renewed the objections raised in his motion to suppress. The district court found Smith guilty of possession of a controlled substance with intent to deliver and sentenced him to 3 to 5 years' imprisonment. Smith appeals.

III. ASSIGNMENT OF ERROR

Smith assigns that the district court erred in finding the warrantless search was reasonable.

IV. STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[4] Regarding historical facts, we review the trial court's findings for clear error.[5] But whether those facts trigger or violate Fourth Amendment

protections is a question of law that we review independently of the trial court's determination.[6]

V. ANALYSIS

The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.[7] We note that we have not construed article I, § 7, of the Nebraska Constitution to provide greater rights than those afforded a defendant by the Fourth Amendment.[8] Smith argues that in this case, the district court erred in finding that the search was reasonable. Before we address the reasonableness of the search, however, we must address whether the search came under the purview of the Fourth Amendment or article I, § 7. The State claims it did not.

*923 1. Smith Was Searched Within Meaning of Fourth Amendment

The State's primary argument is that Smith was searched by South, a private actor, not the government. But as a threshold matter, we first consider the State's argument that the Fourth Amendment is not implicated because Smith was not "searched" or "seized." We agree with the district court's conclusion that Smith was searched.

To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, we must determine whether the individual has a legitimate or **921 justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.[9]

For reasons that will be explained more fully below with respect to consent, Smith clearly exhibited an actual expectation of privacy. The State seems to be arguing that because Smith knew the Club patted down patrons, his expectation of privacy was unreasonable. But whether an expectation of privacy is reasonable does not turn on notice.[10] Rather, an expectation of privacy is reasonable if it has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.[11]

We have little difficulty in concluding that Smith's expectation that the contents of his pockets were private was reasonable and that the invasion of that privacy was a search. Generally speaking, courts have implicitly assumed that an individual has a reasonable expectation of privacy with respect to those portions of his or her person that are hidden from *924 public view, including hidden recesses in both one's clothing and body.[12] For example, rummaging through an individual's pockets and other inner recesses of one's clothing constitutes a Fourth Amendment search of the person.[13] Likewise, patting down an individual's outer clothing so as to discover hidden objects therein is also a Fourth Amendment search.[14] In this case, the evidence in question was retrieved from a location hidden from public view, namely Smith's pocket. Such a search is unquestionably a Fourth Amendment search.

2. Search of Smith Was Government Search

Having concluded that a search took place, we turn next to whether the search was a government search. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[15] The constitutional protection against an unreasonable search and seizure proscribes only governmental action and is inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official.[16] But a search is subject to the constitutional safe-guard against an unreasonable search if the search is a joint endeavor involving a private person and a state or government official.[17]

**922 In determining what is a joint endeavor between a private person and a government official, it is not essential that the government official be involved in the endeavor at the very outset.[18] In fact, it is " 'immaterial' " whether the government *925 official originated the idea or joined in it while the search was in progress.[19] It is sufficient that the official " 'was in it before the object of the search was completely accomplished.' "[20] The government may become

party to a search through nothing more than tacit approval.[21] In this case, the State argues that the search was not a joint endeavor between South and the government. Essentially, the State asserts that Harper's actions were a matter of preserving the peace, not a participation in the search of Smith. The facts lead us to conclude otherwise.

The question whether a search is a private search or a government search is one that must be answered taking into consideration the totality of the circumstances.[22] On the record before us, it is clear that the search of Smith was a joint endeavor involving a private person and a state or governmental official. First, we conclude that Harper, although off duty at the time, was acting as a governmental official in his capacity as a police officer. A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general.[23] Police officers are considered to be under a duty to respond as police officers 24 hours a day.[24] It has been widely held, based both on common law and statute, that a police officer is not relieved of his or her obligation to preserve the peace while off duty.[25] In Nebraska, it has ***926** long been the case that a police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith.[26] At the time of the search, Harper was in full police uniform and was carrying a firearm. Although Harper was off duty and employed by the Club, he was acting in his official capacity as a police officer, not as a private citizen.

And the search was a joint endeavor between Harper and South. After South started the pat-down search of Smith and attempted to reach into Smith's pocket, Harper directed his attention to the pat down and reminded Smith to keep his hands in the air. Harper also testified that he reached out his arm and placed his wrist under Smith's arm in order to keep Smith's arm raised. Harper placed ****923** his wrist under Smith's arm before South inserted his hand into Smith's pocket. Harper was clearly involved in the search before the object of the search was completely accomplished. It is without question that Harper's involvement—by directing Smith to hold his hands up and by placing his arm underneath Smith's wrist to prevent him from interfering with South—was more than tacit approval.

Taking all of these circumstances into account, we conclude that Smith established that the search meets the test for a government search. The totality of the facts shows that Harper and South were engaged in a joint endeavor.

3. Search of Smith Was Not Reasonable

The remaining question is whether the search was reasonable. The Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, prohibit only unreasonable searches and seizures.[27] These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.[28] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to ***927** a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.[29] The warrantless search exceptions recognized by this court include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest.[30] In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.[31]

(a) There Was No Probable Cause to Search Smith

In this case, the only warrantless search exceptions that are potentially applicable are for searches undertaken with consent or with probable cause. First, we consider whether there was probable cause for the search. Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.[32] Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.[33] We determine probable cause by an objective standard of reasonableness, given the known facts and circumstances.[34]

The facts and circumstances here are not sufficient to warrant a belief that evidence of a crime would be found in Smith's pocket. We note that the search at issue occurred when South

reached into Smith's pocket—not South's initial pat down. Smith argues that even after the pat down, there was no probable cause to extend the search into Smith's pocket. ****924** We ***928** agree. Under the "plain feel" doctrine, the findings of a lawful pat down can establish probable cause to extend the scope of a search.[35] But the legality of the search depends upon the incriminating character of an object being immediately apparent,[36] and in this case, it was not.

In *Minnesota v. Dickerson,*[37] the U.S. Supreme Court held that an officer may make a warrantless seizure of contraband detected during a lawful pat-down search. The Court reached this conclusion by drawing an analogy to the previously recognized "plain-view" doctrine, which permits police officers to seize an object without a warrant if they are lawfully in a position from which they can view the object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object.[38] The Court explained:

> The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.[39]

When we adopted the "plain feel" doctrine in *State v. Craven,*[40] we examined two cases from the District of Columbia Circuit Court of Appeals that help illustrate the doctrine's principles. In *U.S. v. Gibson,*[41] the court held that an officer who ***929** felt a hard, flat, angular object in a suspect's pocket during a pat down did not have probable cause for an extended search which revealed cocaine in a second pair of trousers worn by the suspect. The officer testified that the object he touched "did not feel like anything a person might normally carry in his pocket,"[42] but did not relate anything from his experience to correlate such an object to criminal activity. Noting the government's difficulty in "explaining how a hard, flat, angular object in someone's pocket would lead a law enforcement officer of reasonable caution to believe an offense had been or is being committed,"[43] the court stated that such an object did not resemble contraband and that thus, its detection did not provide probable cause to extend the search. By contrast, in *U.S. v. Ashley,*[44] the same court held that probable cause for seizure of drugs from a suspect's underwear existed where an officer experienced in the packaging and transportation of narcotics testified that when he felt a hard object under the suspect's trousers while patting down his groin area, he immediately associated the object with crack cocaine even though he was not absolutely certain that the object was cocaine until conducting a more invasive search.

The facts of this case resemble those of *Gibson* far more closely than those of *Ashley.* ****925** In this case, when South was performing the search, he "felt something suspicious" in Smith's pocket, and Smith twice failed to answer South's question about the contents of his pocket. Harper testified that his experience supported his suspicion that Smith might have been engaging in criminal activity, because "nine times out of ten" when South asks patrons what is in their pocket and "the people start reaching for that pocket, it's something he don't want 'em pulling out."

But Smith did not reach for his pocket—he reached for South's arm, to stop South from reaching into his pocket. And probable cause to search requires that the known facts and ***930** circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.[45] Based on our review of the record, neither South nor Harper had the knowledge necessary to objectively warrant the belief that contraband or evidence of a crime would be found in Smith's pocket. As South admitted, he did not know what was in Smith's pocket—"it ... could have been medication, could have been drugs, could have been beads, it could have been a number of things, could have even been candy. We just don't know."

As noted above, the legality of a seizure under the "plain feel" doctrine depends upon the incriminating character of an object being immediately apparent.[46] Here, the extension of the search into Smith's pocket was grounded on intuition, not facts and circumstances known to law enforcement supporting a reasonable belief that Smith was carrying contraband.[47] Furthermore, a search or seizure of a person must be supported by probable cause particularized to that person.[48] South admitted that it was policy to search the pockets of everyone who refused to answer the question of what was in their pockets and to refuse to permit them to leave once a pat down had begun. In this case, Harper's generalized suspicions could not justify a warrantless search of Smith.

"The fact that a person belongs to a class ... which contains some members who violate the law does not create probable cause to search that person."[49]

The State also suggests that the search was reasonable because of the Club's practical interest in providing security to its patrons, arguing that " '[w]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other ***931** official buildings.' "[50] But that is not the issue here. The State's comparison of a search conducted at a dance club to one conducted at an airport or courthouse is not particularly apt.[51] The Club may have been within its rights to condition entry into the Club upon consent to a search. We need not decide that issue, however, because that condition would only authorize the Club to refuse entry to a person who is unwilling to be searched. It would not ****926** justify searching an unwilling person without probable cause.

(b) Smith Did Not Consent to Search of His Pocket

But that implicates the State's remaining argument that Smith consented to the search. The district court found that Smith had been notified of the Club's policy of patting down customers and made no attempt to leave before South patted him down, and Smith concedes that he consented to the initial pat down. But while Smith consented to the pat-down search, he did not consent to South's searching his pocket.

Once given, consent to search may be withdrawn.[52] Withdrawal of consent need not be effectuated through particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.[53] If equivocal, a defendant's attempt to withdraw consent is ineffective and police may reasonably continue their search pursuant to the initial grant of authority.[54] The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of " 'objective' " reasonableness—what would the typical ***932** reasonable person have understood by the exchange between the officer and the suspect?[55] Accordingly, we must determine whether a reasonable person would have concluded that Smith's repeated attempts to thwart South's attempts to search his pocket amounted to a withdrawal of consent.

Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.[56] And because a consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances,[57] an officer conducting a consensual search has no authority to command the person being searched to stop interfering with the search.[58] So, while a suspect's mere reluctance to facilitate a consensual search may not serve to withdraw consent,[59] the suspect's deliberate interference with the search—actions designed to prevent law enforcement from searching further—are clearly sufficient to communicate a withdrawal of consent, because no reasonable observer could conclude that the suspect wanted the search to continue.[60]

For example, in *Lowery v. State,*[61] the court held a defendant withdrew his consent to search by "twice attempt[ing] to reach into his pockets at the same time that the officer was attempting to search the pockets." Similarly, in *Jimenez v. State,*[62] a defendant who twice grabbed a ****927** deputy's hand in an attempt to stop him from searching a pack of cigarettes was held to have withdrawn his earlier consent, and "it was ***933** improper for the officer to continue the search over the defendant's objections."

Here, the record is undisputed that Smith twice lowered his hand at the same time South was attempting to search his pocket. Smith grabbed South's wrist to prevent South from reaching into his pocket. And when South reached for Smith's pocket a second time, Smith pushed South's hand away. Only after Harper intervened and prevented Smith from interfering was South able to reach into Smith's pocket. That search cannot be characterized as consensual. Before any item was confiscated by South or Harper, Smith indicated that his consent to the initial pat down was being withdrawn, by grabbing South's wrist and later pushing South's hand away. Furthermore, South and Harper used their authority to restrict Smith's freedom of movement during the search. And as explained above, no probable cause to suspect criminal activity had been detected before Smith's pocket was searched.

Smith's actions made it apparent he did not intend to permit South or Harper to search his pockets. In fact, the only way South could complete the search was for Harper to physically restrain Smith. Any objective observer watching this scenario

would conclude Smith was not consenting to the search of his pocket. Stated another way, if a suspect had to be physically restrained to prevent interference with a search of his person, the search was not consensual. Smith's actions were clearly inconsistent with the apparent consent to search.

Nonetheless, the State argues that Smith could not withdraw his consent once the pat down had begun. But as explained above, that is not the law. The case cited by the State in support of its argument stands for the proposition that while consent may be withdrawn or limited at any time before the completion of the search, it "cannot be withdrawn, however, after criminal activity has been detected."[63] But that is simply another way of saying that law enforcement does not need consent to search once probable cause has been established, ***934** which we have already concluded did not happen in this case.[64] And it is axiomatic that Smith's refusal to consent to the search of his pockets did not provide probable cause to continue. The Fourth Amendment's protections would be meaningless if refusal to consent to a search could itself justify a nonconsensual search.

Finally, the State suggests that Smith impliedly consented to the search because he was aware that Club patrons were subject to a pat down and search. That may have been the case when Smith got in line, but as noted above, Smith withdrew his consent before his pocket was searched. The Club may have been free to turn him away—but it was not free to turn out his pockets.

As noted above, whether the established historical facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. Based on these undisputed facts, we conclude that the Fourth Amendment was violated in this case. The court erred in not suppressing ****928** evidence resulting from the unlawful search. We also note that the unlawful search in this case was contrary to established law and was sufficiently culpable to be susceptible to meaningful deterrence by suppression of the evidence.[65] And in any event, the State has not questioned whether the exclusionary rule should apply under these circumstances.

VI. CONCLUSION

For these reasons, we conclude that the district court erred in denying Smith's motion to suppress and that as a result, the court erred in convicting and sentencing Smith. Under the circumstances of this case, however, the concepts of double jeopardy do not forbid the possibility of a retrial.[66] We, therefore, ***935** reverse the judgment of the district court and remand the cause for a new trial.

Reversed and remanded for a new trial.

HEAVICAN, C.J., not participating.

All Citations

279 Neb. 918, 782 N.W.2d 913

Footnotes

1 See *State v. Hedgcock,* 277 Neb. 805, 765 N.W.2d 469 (2009).

2 See Neb.Rev.Stat. § 28–405(c)(27) (Reissue 2008).

3 See Neb.Rev.Stat. § 28–416 (Reissue 2008).

4 *Hedgcock, supra* note 1.

5 *Id.*

6 *Id.*

7 *State v. Bakewell,* 273 Neb. 372, 730 N.W.2d 335 (2007).

8 See, *State v. Cody,* 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Vermuele,* 234 Neb. 973, 453 N.W.2d 441 (1990).

9 *State v. Lara,* 258 Neb. 996, 607 N.W.2d 487 (2000).

10 See *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

11 See, *Minnesota v. Carter,* 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998); *Smith, supra* note 10; *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

12 Phillip A. Hubbart, Making Sense of Search and Seizure Law, a Fourth Amendment Handbook 137 (2005).

13 *Sibron v. New York,* 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

14 *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

15 See *State v. Vermuele,* 241 Neb. 923, 492 N.W.2d 24 (1992).

16 *State v. Dixon,* 237 Neb. 630, 467 N.W.2d 397 (1991).

17 See *State v. Abdouch,* 230 Neb. 929, 434 N.W.2d 317 (1989).

18 See *id.*

19 *Id.* at 939, 434 N.W.2d at 324, quoting *Lustig v. United States,* 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949).

20 *Id.*

21 1 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 1.8(b) (4th ed. 2004). See, also, *Abdouch, supra* note 17.

22 *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). See *State v. Mata,* 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers,* 277 Neb. 37, 760 N.W.2d 35 (2009).

23 *Hauser v. Nebraska Police Stds. Adv. Council,* 269 Neb. 541, 694 N.W.2d 171 (2005). See, *State v. Wilen,* 4 Neb.App. 132, 539 N.W.2d 650 (1995); 16A Eugene McQuillin, The Law of Municipal Corporations § 45.15 (3d ed. 2002).

24 *Wilen, supra* note 23.

25 *Id.*

26 See, e.g., *State v. Groves,* 219 Neb. 382, 363 N.W.2d 507 (1985); *State v. Munn,* 203 Neb. 810, 280 N.W.2d 649 (1979); *State v. Williams,* 203 Neb. 649, 279 N.W.2d 847 (1979).

27 *State v. Roberts,* 261 Neb. 403, 623 N.W.2d 298 (2001).

28 *Id.*

29 *State v. Wenke,* 276 Neb. 901, 758 N.W.2d 405 (2008).

30 See *State v. Gorup,* 275 Neb. 280, 745 N.W.2d 912 (2008).

31 *Id.*

32 *State v. Voichahoske,* 271 Neb. 64, 709 N.W.2d 659 (2006).

33 See *State v. Keup,* 265 Neb. 96, 655 N.W.2d 25 (2003).

34 See *Voichahoske, supra* note 32.

35 See, *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); *State v. Craven,* 253 Neb. 601, 571 N.W.2d 612 (1997).

36 *State v. Runge,* 8 Neb.App. 715, 601 N.W.2d 554 (1999) (single-judge opinion).

37 *Dickerson, supra* note 35.

38 See *id.*

39 *Id.,* 508 U.S. at 375–76, 113 S.Ct. 2130.

40 See *Craven, supra* note 35.

41 *U.S. v. Gibson,* 19 F.3d 1449 (D.C.Cir.1994).

42 *Id.* at 1451.

43 *Id.*

44 *U.S. v. Ashley,* 37 F.3d 678 (D.C.Cir.1994).

45 *Id.*

46 See *Runge, supra* note 36.

47 See *id.*

48 *State v. McKinney,* 273 Neb. 346, 730 N.W.2d 74 (2007).

49 *Gaioni v. Folmar,* 460 F.Supp. 10, 13 n. 9 (D.C.Ala.1978).

50 Brief for appellee at 20–21, quoting *Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

51 See, *Wilkinson v. Forst,* 832 F.2d 1330 (2d Cir.1987); *Gaioni, supra* note 49; *Wheaton v. Hagan,* 435 F.Supp. 1134 (D.C.N.C.1977); *Jacobsen v. Seattle,* 98 Wash.2d 668, 658 P.2d 653 (1983); *State v. Carter,* 267 N.W.2d 385 (Iowa 1978); *State v. Iaccarino,* 767 So.2d 470 (Fla.App.2000).

52 See, *State v. Konfrst,* 251 Neb. 214, 556 N.W.2d 250 (1996); *State v. French,* 203 Neb. 435, 279 N.W.2d 116 (1979).

53 *U.S. v. Sanders,* 424 F.3d 768 (8th Cir.2005).

54 *Id.*

55 *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

56 *Sanders, supra* note 53.

57 See *State v. Rathjen,* 16 Neb.App. 799, 751 N.W.2d 668 (2008).

58 See *Sanders, supra* note 53.

59 See *Burton v. U.S.,* 657 A.2d 741 (D.C.1994).

60 See *Sanders, supra* note 53.

61 *Lowery v. State,* 894 So.2d 1032, 1034 (Fla.App.2005).

62 *Jimenez v. State,* 643 So.2d 70, 72 (Fla.App.1994).

63 See *People of Virgin Islands v. Nadal,* No. F195/2006, 2007 WL 703494 at *4 (V.I.Super. Feb. 5, 2007).

64 Compare, e.g., *State v. Chronister,* 3 Neb.App. 281, 526 N.W.2d 98 (1995) (alert by drug detection dog established probable cause for warrantless search before suspect withdrew consent).

65 See, *Herring v. United States,* 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009); *State v. Nuss,* 279 Neb. 648, 781 N.W.2d 60 (2010).

66 See *Rogers, supra* note 22.

330 Or. 85
Supreme Court of Oregon.

STATE of Oregon, Respondent on Review,
v.
Jason Ray TUCKER, Petitioner on Review.

(CF95–0539; CA A90706; SC S45431)
|
Argued and Submitted Jan. 8, 1999.
|
March 9, 2000.

Synopsis

Defendant was convicted in the Circuit Court, Umatilla County, Eric W. Valentine, J., of being a felon in possession of a firearm. Defendant appealed the denial of suppression motion. The Court of Appeals affirmed, 151 Or.App. 775, 951 P.2d 190. On reconsideration, the Court of Appeals, 154 Or.App. 187, 959 P.2d 632, adhered to earlier opinion as modified. Allowing review, the Supreme Court, Riggs, J., held that: (1) in context of warrantless search, a defendant is not required to assert a protected property or privacy interest on which state intruded, and burden is on state to prove that warrantless search did not violate a protected interest of the defendant; (2) if a state officer requests a private person to search a particular place or thing, and if private person acts because of and within scope of officer's request, provision of State Constitution prohibiting unreasonable searches and seizures will apply; (3) tow truck driver's search of camera case in which gun was found was within scope of state trooper's request to search car for papers identifying defendant; and (4) gun would be suppressed because of state's failure to prove it did not violate a protected interest.

Judgment of Court of Appeals reversed.

**183 *86 On appeal from the Court of Appeals.*

Attorneys and Law Firms

Peter Gartlan, Deputy Public Defender, Salem, argued the cause for petitioner on review. With him on the brief was David E. Groom, Public Defender.

Timothy A. Sylwester, Assistant Attorney General, Salem, argued the cause for respondent on review. Hardy Myers, Attorney General, filed the brief for respondent on review. With him on the brief were Michael D. Reynolds, Solicitor General, and Judith Brant, Assistant Attorney General.

Before CARSON, Chief Justice, and GILLETTE, VAN HOOMISSEN, DURHAM, LEESON, and RIGGS, Justices.**

Opinion

*87 RIGGS, J.

In this criminal case, defendant seeks review of his conviction for being a felon in possession of a firearm. ORS 166.270(1). He contends that the trial court erred in denying his motion to suppress evidence seized in a warrantless search of an automobile in which he was a passenger. The Court of Appeals affirmed. *State v. Tucker,* 151 Or.App. 775, 951 P.2d 190 (1997). On reconsideration, the Court of Appeals adhered to its earlier opinion. *State v. Tucker,* 154 Or.App. 187, 959 P.2d 632 (1998).

In this court, defendant argues that the trial court erred both on constitutional and statutory grounds. We resolve the case on the statutory ground, ORS 133.693(4). We hold that, under that statute, the state had the burden of proving the validity of the warrantless search. Because the state failed to meet that burden, we reverse and remand.

We take the following facts from the trial court's findings and the record. Defendant was the sole passenger in an automobile involved in a single-automobile accident. The automobile rolled over, and the force of the accident scattered some of the contents of the automobile across the roadway. Defendant and the driver were taken to the hospital. The state trooper who investigated the accident and the tow truck driver who was to tow the automobile from the scene gathered up the scattered items and put them back in the automobile. The tow truck driver then towed the automobile to the tow truck driver's house.

The trooper had reason to believe that defendant had identified himself falsely during the accident investigation. Without first requesting or obtaining a search warrant, the trooper chose to call the tow truck driver at home and to ask him to look through the papers and mail inside the automobile to help determine defendant's identity. Although the tow truck driver was unable to find defendant's name among the items in the automobile, the tow truck driver did find a gun in a camera case after opening the case to look for identifying items. The

trooper eventually discovered defendant's identity and the fact that defendant was a convicted felon. Ultimately, defendant was charged with, among other ***88** things, being a felon in possession of a firearm. ORS 166.270(1).

Before trial, defendant moved to suppress evidence of the gun, contending that the search by the tow truck driver at the behest of the trooper violated Article I, section 9, of the Oregon Constitution, and the Fourth Amendment to the United States Constitution.[1] Responding to defendant's motion, the state first argued that the search by the tow truck driver did not constitute state action. The state next argued that defendant had the burden of asserting a protected interest in ****184** the gun or the camera case, and that he had failed to meet that burden. The state argued that that was so because, under Article I, section 9, a court will suppress evidence obtained through an illegal search or seizure only if the actions of the police invade a constitutionally protected interest of a defendant. Finally, the state also argued that a passenger in an automobile has no protected privacy or property interest in the automobile or its contents. Defendant responded that he was not required to establish first that he had a protected interest in the gun, the camera case, or the automobile. In defendant's view, the state bore the burden under ORS 133.693(4), quoted below, of proving that the warrantless search and seizure were valid. The trial court denied defendant's motion to suppress and thereafter found defendant guilty of being a felon in possession of a firearm.

Defendant appealed to the Court of Appeals. In affirming the conviction, that court reasoned that, because defendant had not shown a protected interest in the automobile or its contents, the search did not violate his constitutional rights. *Tucker,* 151 Or.App. at 777, 779, 951 P.2d 190. We allowed defendant's petition for review. For the reasons that follow, we conclude that, in the context of a warrantless search, a ***89** defendant is not required to assert a protected property or privacy interest on which the state intruded. Rather, consistent with ORS 133.693(4), the burden is on the state to prove that the warrantless search did *not* violate a protected interest of the defendant.

As noted, we need consider only defendant's statutory argument. *See Leo v. Keisling,* 327 Or. 556, 562, 964 P.2d 1023 (1998) (noting that this court resolves cases on subconstitutional grounds if those grounds exist). ORS 133.693(4) provides:

> "Where the motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution."

OEC 307 provides:

> "(1) The burden of producing evidence as to a particular issue is on the party against whom a finding on the issue would be required in the absence of further evidence.
>
> "(2) The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue."

In this case, the "particular issue" is the validity of the warrantless search. ORS 133.693(4) places the burden of proof at to that issue on the state. Under OEC 307(2), the state had the burden of producing evidence showing that the search was valid. If the state failed to produce such evidence, and no other evidence independently met the state's burden, then OEC 307(1) requires the court to find against the state."

In this court, the state makes two arguments. First, the state argues that the tow truck driver's search of the automobile was the act of a private individual and therefore did not implicate either ORS 133.693(4) or Article I, section 9, of the Oregon Constitution. It is true that Article I, section 9, prohibits only state action that infringes on a citizen's constitutional rights. *See State v. Tanner,* 304 Or. 312, 321, 745 P.2d 757 (1987) ("A section 9 privacy interest is an interest against the state; it is not an interest against private parties."). We assume that ORS 133.693(4), in referring to a "warrantless search," extends no further.

***90** Here, the trooper asked the tow truck driver to look in the automobile to see if any paper or mail revealed defendant's name. The ensuing search thus was not simply the independent volitional act of a private citizen. This court has not addressed previously when Article I, section 9, applies to a search by a private citizen. The answer is not difficult, however. We now hold that, if a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request, then Article I, section 9, will govern the search.

Under that standard, insofar as the evidence produced at the suppression hearing shows, the tow truck driver responded to the trooper's request by searching the interior ****185** of the automobile. The tow truck driver acted within the scope

of the trooper's request when he looked into the camera case, because such a container reasonably *could* have held an identification card, papers, or mail. Therefore, we hold that Article I, section 9, applies to the tow truck driver's search of the automobile.[2] It follows that the terms of ORS 133.693(4) apply to this case.

Second, the state argues that it met any burden that it had under ORS 133.693(4) by proving that the state did not invade any constitutionally protected interest of defendant. That is so, the state posits, because defendant failed to assert a protected interest in the gun or the camera case. The state's argument misstates its statutory burden and misconstrues this court's case law. In *State v. Morton,* 326 Or. 466, 953 P.2d 374 (1998), the police had arrested the defendant pursuant to an illegal warrant. While the police were placing the defendant under arrest, a plastic container fell from her jacket. The police opened the container, discovered methamphetamine, and arrested the defendant for unlawful possession of a controlled substance. ORS 475.992(4)(b). Notwithstanding ***91** the defendant's express denial at the scene of her arrest that she either owned or had any knowledge of the container, this court held that the defendant had a protected interest in the container, because uncontradicted evidence showed that the defendant had been in personal possession of the container only moments before it came into the possession of the police. *Id.* at 469. *Morton* demonstrates that a defendant's denial of a protected interest is not necessarily dispositive of whether the state has met its burden of proving the validity of a warrantless search.

As in *Morton,* here the state failed to prove that defendant lacked a protected interest in the camera case or gun. ORS 133.693(4). Defendant never had the burden of asserting an interest in the item that formed the basis of the criminal charge and that was derived from the warrantless search.

In sum, because the state failed to meet its burden of proving that the warrantless search was valid, defendant was entitled to a ruling that the search was illegal and that the gun discovered as a result of the search must be suppressed. The contrary ruling of the circuit court was error. Defendant's conviction must be reversed.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

All Citations

330 Or. 85, 997 P.2d 182

Footnotes

* Appeal from Umatilla County Circuit Court. 151 Or.App. 775, 951 P.2d 190 (1997), *on recons* 154 Or.App. 187, 959 P.2d 632 (1998).

** Kulongoski, J., did not participate in the consideration or decision of this case.

1 Article I, section 9, of the Oregon Constitution, provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

The Fourth Amendment to the United States Constitution provides, in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

2 The state argues that a statement by the trial court that the tow truck driver exceeded the scope of the trooper's request when the tow truck driver searched the camera case is a finding of fact and, as such, we are bound by the statement. *See State v. Herrin,* 323 Or. 188, 193, 915 P.2d 953 (1996) (holding that only findings of historical fact supported by the record are binding on an appellate court). Whether viewed as a conclusion of law or as a finding of fact, the record does not support the court's statement. We, therefore, are not bound by it.

997 P.2d 182

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497 F.Supp.3d 243
United States District Court, E.D. Kentucky, Southern Division.
(at London).

UNITED STATES of America, Plaintiff,

v.

Joshua GREGORY, Defendant.

Criminal Action No. 6:19-CR-028-CHB
|
Signed 10/28/2020

Synopsis

Background: Defendant moved to suppress. The District Court, Claria Horn Boom, J., 2020 WL 7053502, adopted report and recommendation of Edward B. Atkins, United States Magistrate Judge, 2019 WL 11271385, and denied motion. Defendant moved for reconsideration.

Holdings: On reconsideration, the District Court, Claria Horn Boom, J., held that:

private trash collector was state actor for Fourth Amendment purposes;

police officer and private trash collector entered curtilage of defendant's home;

officer and private trash collector entered protected curtilage of defendant's home through unlicensed physical intrusion;

even if area was not curtilage, defendant had reasonable expectation of privacy;

good-faith exception to exclusionary rule did not apply;

inevitable discovery exception to exclusionary rule did not apply; and

attenuation exception to exclusionary rule did not apply.

Motion granted.

Attorneys and Law Firms

***248** Gregory Rosenberg, AUSA, U.S. Attorney's Office, Lexington, KY, Andrew H. Trimble, AUSA, U.S. Attorney's Office, London, KY, for Plaintiff.

G. George Bertram, Jamestown, KY, David S. Hoskins, Hoskins, Hill & Hill, PLLC, Corbin, KY, for Defendant.

MEMORANDUM OPINION AND ORDER

CLARIA HORN BOOM, UNITED STATES DISTRICT COURT JUDGE

***249** This matter is before the Court on Defendant Joshua Gregory's Motion to Reconsider, Amend and Vacate Order Adopting Magistrate's Recommended Disposition ("Motion to Reconsider") [R. 61]. That Order [R. 60] addressed Defendant's Motion to Suppress [R. 31] in which he sought to exclude evidence obtained during a "trash pull" at his property and from the subsequent search of his home, conducted pursuant to a search warrant supported in part by the trash pull evidence. Magistrate Judge Edward Atkins held an evidentiary hearing on Gregory's suppression motion on October 7, 2019. [R.48] Afterwards, Magistrate Judge Atkins issued his Recommended Disposition denying the Motion to Suppress, [R. 55], and this Court adopted the Recommended Disposition [R. 60]. Gregory then filed this Motion to Reconsider, and the United States responded in opposition [R. 62]. The Court held a second evidentiary hearing on June 19, 2020. [R. 76] The parties filed post-hearing briefs [R. 83; 84]. For the reasons stated herein, Defendant's Motion to Reconsider is granted, and the evidence is ordered suppressed.

I. Background

Deputy Cody Neal with the Wayne County Sheriff's Department approached Danny Flynn, the owner of Cardinal Sanitation, about conducting a trash pull at Defendant Joshua Gregory's residence on November 28, 2018. [R. 81, p. 11–12] Cardinal Sanitation had been collecting the trash at Gregory's residence for at least twelve years, every Wednesday typically between 10:00 a.m. and 11:00 a.m. *Id.* at 8–9, 12. Officer Neal directed Flynn to drive an empty garbage truck to Gregory's house around 8:28 that morning, passing up all other stops along the rural route, to collect the trash. *Id.* at 13–14, 69. Officer Neal also directed that he would accompany Flynn in

the garbage truck during the trash pickup, and Flynn agreed. *Id.* at 11–13.

So at approximately 8:30 that morning, Flynn and Officer Neal drove an empty garbage collection truck to Gregory's residence and backed up the driveway approximately 100 feet, stopping within fifteen feet of Gregory's house. *Id.* at 14–15, 64; Pl.'s Ex. 1 (Stipulation), June 19, 2020. Flynn exited the truck and picked up six or seven bags of trash from the trash cans located by a light pole near the top of Gregory's gravel driveway, placing them in the empty truck. [R. 81, p. 15–16, 66] The light pole was located to the right of Gregory's house (looking up from the road), just a few feet to the right of his driveway and about twenty-seven feet from the house. *Id.* at 82, 89; Pl.'s Ex. 1 (Stipulation), June 19, 2020. The property had no fence or gate [R. 81, pp. 36, 44–45], but the undisputed testimony from the hearings demonstrated that Gregory's property was posted with several "No Trespassing," "Private Property," and "Beware of Dog" signs (referring to Gregory's vicious dog named "Baxter"). *Id.* at 22–23; *see also* R. 48 (first evidentiary hearing); Def.'s Ex. 4 (photograph), Oct. 7, 2019.

Flynn explained that most customers place their garbage beside the road where his company collects it. However, they will enter a customer's property to collect trash if the customer specifically requests ***250** it. [R. 81, pp. 10–11] While he had no record of Gregory (or his grandmother, Jo Carol Koger, the actual property owner) making such a request for Gregory's residence, his company would not enter Gregory's property absent a request. *Id.* Further, he had never received any complaint about entering Gregory's property and picking up the garbage from its location up the driveway beside the light pole. *Id.* at 11.

As Flynn drove the garbage truck to Gregory's residence, Officer Neal activated his cell phone video recorder. *Id.* at 22; Pl.'s Ex. 2 (Video), June 19, 2020. While Flynn collected Gregory's trash, Officer Neal recorded areas on the front and side of Gregory's residence, within several feet of Gregory's house. [R. 81, p. 22] Officer Neal testified that he believed it was imperative for him to record the activities to document that he did not exit the vehicle and to preserve the "chain of custody" for the trash bags. *Id.* at 40–42. He further testified that he did not believe the trash pull could be accomplished without taking an empty truck with no other garbage to avoid contamination. *Id.* at 40–41, 46–47, 62–63. Officer Neal acknowledged that his sole purpose in entering Gregory's property was to further his criminal investigation of Gregory, who he suspected was a drug dealer, and at no time did he emerge from the trash truck to walk to the front door for a "knock and talk." *Id.* at 50, 64.

After collecting the garbage that morning, Officer Neal instructed Flynn to drive to a nearby church and hand the trash over to law enforcement. *Id.* at 67–68. Officer Neal removed the trash from the trash truck. *Id.* at 24. The trash contained some tin cans with drug residue on them and other items associated with drug use. [R. 31-2] This evidence was used to secure a search warrant later that day for Gregory's residence, *id.*, where additional evidence of drug trafficking was found.

Flynn's testimony at the two hearings revealed some significant differences in the way Gregory's trash was collected on November 28, 2018 from its usual, routine collection.[1] First, the garbage was collected around 8:30 that morning, around one-and-a-half to two-and-a-half hours earlier than the customary 10:00 a.m. to 11:00 a.m. pickup time. [R. 81, pp. 27, 30] Flynn testified that he only drove a trash truck or helped with collection when one of his employees missed work, but no employees had missed work that day. *Id.* at 19. Rather, he drove a separate garbage truck at the request of Officer Neal. *Id.* at 18–19. He also testified that the empty truck was a spare; the regular truck that collected trash from Gregory's residence had already left that morning to collect garbage along the route that included Gregory's home. *Id.* According to Flynn, those collection trucks typically carry three crew members: one driver and two passengers. In the spare truck used to pick up Gregory's trash that morning, Flynn drove and Officer Neal was the only passenger. *Id.* at 19–20. Furthermore, Flynn testified that no business purpose was served by assisting Officer Neal:

> Question: What business purpose did [the trash pickup and delivery to law enforcement] serve?
>
> Flynn: It didn't serve any.
>
> Question: What business purpose had you accomplished for Cardinal Sanitation at that point [after picking up Gregory's trash and delivering it to law enforcement]?
>
> ***251** Flynn: Absolutely none.

Id. at 25.

Gregory testified at the first evidentiary hearing. He claimed that the trash was sitting on a metal bench on the back patio of the house on the morning of the trash pull, outside an exterior doorway. He explained that in past years he had

placed his garbage in cans by the light pole for collection, but by November 2018, his practice was to place his garbage cans by the side of the road about 120 feet from his house, near the entrance to his driveway. Before taking the trash to the road, it was his habit to screen his trash for mail with personal information that thieves might steal and needles (as he admitted to being an intravenous drug user at the time and says he wanted to hide this fact). Gregory testified that, on the day of the trash pull, he had not yet screened the trash, so he had not moved it to its normal pickup location by the side of the road. This testimony conflicted with Flynn's testimony that the trash was always placed by the light pole. The Court credits the testimony of Flynn over that of Gregory on this issue.

Gregory, his grandmother, Jo Carol Koger, and Flynn described the landscape surrounding the home. The mobile home was placed on part of a larger 600-acre tract of land Koger owns that she described as slanted and rolling, and it was down a rural road, Kelley Lane Road, with no shoulder. *Id.* at 73–75. Flynn testified likewise that Kelley Lane Road was a narrow road with barely enough room for two cars to pass. *Id.* at 33–35, 75. To place Gregory's mobile home there, the family cleared approximately one acre of the land and cut an "L" shape into the hillside. *Id.* at 74–76. To reach the home from the road, you must travel up a steep driveway, approximately 120 feet long. Trees surround the residence on three sides. *Id.* at 36. There is no back yard, but there is a small back patio area, not visible from the roadway. Gregory testified that he would sometimes sit out in the patio area and occasionally grill out there. A boat was stored on the land directly in front of the home. *Id.* at 90. The area to the right of the home past the light pole (but even closer to the road) held a swing set and a storage building. *Id.* at 82–84. At one point the area also had a garden and a rabbit cage. Koger testified that all of the outdoor activities happened in this area (to the right of the house, driveway, and light pole) and on the small back patio because there was no other flat place on the property suitable for such items and outdoor activities.[2] *Id.* at 83–84. Based on the photos, the rear of the parked trash truck and the light pole were located behind the front perimeter of Gregory's front porch and behind the front perimeter of the swing set and storage building. *See* Def.'s Ex. 1–6 (Drawings and Photographs), June 19, 2020.

After the first evidentiary hearing, Magistrate Judge Atkins issued his Recommended Disposition, finding that the trash pull was not government action and therefore not subject to Fourth Amendment protection. He also found that the search warrant issued after the trash pull was not supported by probable cause, but that the good faith exception applied to prevent suppression of the evidence. Gregory made a series of objections to the Recommended Disposition, and the Court ultimately adopted the Recommended Disposition, denying Gregory's Motion to Suppress.

***252** In his Motion to Reconsider, Gregory argues that the Court made a substantive mistake of fact by finding that Officer Neal "passively sat in the truck," [R. 60, p. 5], when in fact, he directed Flynn's activities and recorded the scene on his cell phone. Gregory also argues that the Court made an error of law by failing to find that the government actors entered the curtilage of the home without a warrant, thereby resulting in an illegal search. Lastly, Gregory argues that the Court misapplied the holding in *United States v. Bruce*, 396 F.3d 697 (6th Cir. 2005), *vacated in part on other grounds on reh'g*, 405 F.3d 1034 (6th Cir. 2005) and, as a result, it incorrectly held that Flynn was acting as a private party when removing the trash from Gregory's home.

For the most part, upon reconsideration, the Court agrees with defense counsel's recitation of errors in the Court's prior Order [R. 60], and here is why. The Court found that Flynn was not acting as a state actor because he did not do anything different on the morning of the trash pull "from the typical way his company had collected the trash for at least 12 years prior, apart from driving an empty truck directly to Defendant's residence with Officer Neal as a passenger." *Id.* at 3. The Court further found that Flynn did not have the intent of assisting law enforcement because he was "carrying out the normally scheduled collection" of Defendant's garbage. *Id.* at 10. But the facts developed, especially those at the second evidentiary hearing, revealed significant differences between the routine collection of Gregory's trash and how it was collected on November 28, 2018—differences attributable to Officer Neal's instructions. These additional facts further revealed Flynn's only purpose in collecting the trash in this manner was to assist law enforcement.

Further, the Court initially found no error by Magistrate Judge Atkins in failing to make factual findings that Officer Neal entered the curtilage of Gregory's home because Officer Neal did not perform the trash pull but rather "passively sat in the truck while the garbage truck driver ... took the trash." *Id.* at 5. The Court reasoned that there was no "search" for Fourth Amendment purposes by Officer Neal (since Flynn was the one to pick up the trash), and therefore Officer Neal's alleged entry into the curtilage was "irrelevant." *Id.*

However, as later-developed facts made clear, Officer Neal did not "passively" sit in the truck. He orchestrated and directed Flynn's actions on the morning of the trash pull, and what is more, he video-taped it. His entry onto the curtilage of Gregory's property is not "irrelevant" as a legal matter because the facts demonstrate he entered the curtilage with the intent of performing a search (of the trash and with the video). This is, in and of itself, an unlawful search under the Fourth Amendment, making the Court's prior finding that "it makes no difference to the outcome whether Officer Neal entered the curtilage as he sat in the front seat of the truck" simply incorrect. *Id.* at 5.

For these reasons, explained in more detail below, the Court will vacate its prior order, [R. 60], and grant Gregory's Motion to Suppress, [R. 31].

II. Legal Standard

Gregory moves the Court to alter, amend, and vacate its order pursuant to Fed. R. Civ. P. 59(e). Under that rule, "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." The United States argues that this rule is an improper vehicle by which to seek reconsideration of an interlocutory order denying a motion to ***253** suppress [R. 62]. The Court agrees but finds that it possesses the inherent authority to reconsider its February 6, 2020 Order.

The Sixth Circuit has distinguished the Court's power under Rule 59 to alter or amend final judgments from the Court's inherent authority to alter or amend interlocutory orders. *See, e.g., Leelanau Wine Cellers, Ltd. v. Black & Red, Inc.*, 118 F. App'x 942, 946 (6th Cir. 2004). Notably, "[t]he Federal Rules of Civil Procedure do not explicitly address motions for reconsideration of interlocutory orders." *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 Fed. App'x 949, 959 (6th Cir. 2004). Rather, district courts have inherent authority under the common law to reconsider such orders. *Id.* (citing *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991)). "This authority allows district courts 'to afford such relief from [interlocutory orders] as justice requires.' " *Id.* (quoting *Citibank N.A. v. Fed. Deposit Ins. Corp.*, 857 F.Supp. 976, 981 (D.D.C. 1994)). "Traditionally, courts will find justification for reconsidering interlocutory orders when there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Id.* (citing *Reich v. Hall Holding Co.*, 990 F.Supp. 955, 965 (N.D. Ohio 1998)); *see also Louisville/Jefferson Cnty Metro Govt. v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009); *Guthrie v. Ball*, No. 1:11-cv-333, 2012 WL 4094526, at *1 (E.D. Tenn. 2012); *Thornton v. Western & Southern Financial Group Beneflex Plan*, No. 3:08-cv-648, 2011 WL 13209817 (W.D. Ky. 2011).

With this standard in mind, the Court views Gregory's Motion to Reconsider, Amend and Vacate [R. 61] as a motion for reconsideration based on the Court's inherent authority to alter or amend its own orders.

III. Burdens of Proof

Before considering the merits of Gregory's motion, the Court must address the applicable burdens of proof in this case. Generally, the proponent of a motion to suppress "bears the burden of establishing the challenged search violates his Fourth Amendment rights." *United States v. Coleman*, 923 F.3d 450, 455 (6th Cir. 2019) (quoting *United States v. Witherspoon*, 467 F. App'x 486, 490 (6th Cir. 2012)) (internal quotation marks omitted). To establish that a search violates the Fourth Amendment, the search must fall within the scope of the Fourth Amendment, meaning the search must be conducted by a state actor. *See United States v. Coleman*, 628 F.2d 961, 964–65 (6th Cir. 1980) (explaining that "the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official"). The area invaded by the state actor must also fall within the scope of the Fourth Amendment's protections. *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006) (explaining that "[t]he 'capacity to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place' " (quoting *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978))).

Because the defendant bears the burden of demonstrating that the alleged search falls within the scope of the Fourth Amendment, he necessarily bears the burden of proving that the search was conducted by a state actor, thereby implicating ***254** the Fourth Amendment. *See United States v. Freeland*, 562 F.2d 383, 385 (6th Cir. 1977) ("Where a motion to suppress evidence has been made, the burden of establishing that the evidence was secured by an unlawful search is on the moving party. It was thus incumbent upon Freeland to demonstrate that sufficient governmental involvement existed to invoke the proscriptions of the Fourth Amendment."); *Coleman*, 628 F.2d at 965 ("Where a motion to suppress

evidence has been made, the burden of establishing that the evidence was secured by an unlawful search is on the moving party. To establish an unlawful search here, [the defendant] must demonstrate that the search was not a private search even though [a private person] alone actively searched the truck."). The defendant must also prove that the state actor searched a constitutionally protected area, or an area in which the defendant had a reasonable expectation of privacy. *Dillard*, 438 F.3d at 682; *United States v. James*, 534 F.3d 868, 872 (8th Cir. 2008) ("When moving to suppress evidence on the basis of an alleged unreasonable search, the defendant 'has the burden of showing a legitimate expectation of privacy in the area searched.' " (quoting *United States v. Pierson*, 219 F.3d 803, 806 (8th Cir. 2000))).

Accordingly, Gregory bears the initial burden of proving that the search was conducted by state actors and that those state actors searched a constitutionally protected area—here, the curtilage of his home or an area in which he held a reasonable expectation of privacy, as discussed in more detail below.

If Gregory demonstrates that there has been a warrantless search—meaning a search of a constitutionally protected area by a state actor, thereby implicating the Fourth Amendment—he has made a prima facie showing of illegality. *See United States v. Jackson*, No. 1:14-cr-29, 2015 WL 4509452, at *8 (E.D. Tenn. July 24, 2015) (citing *United States v. Herndon*, 501 F.3d 683, 692 (6th Cir. 2007)). The burden then rests on the United States to prove the legality of that search, or in other words, to demonstrate the applicability of an exception to the warrant requirement. *See Herndon*, 501 F.3d at 692 ("The government has the burden of proving the legality of a warrantless search." (citation omitted)); *United States v. Oliver*, 686 F.2d 356, 371 (6th Cir. 1982) ("The burden rests on the Government to establish that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment." (citations omitted)).

With these burdens of proof in mind, the Court now turns to the substance of Gregory's motion.

IV. Discussion

For the reasons articulated below, the Court will grant Gregory's Motion to Reconsider and will vacate its February 6, 2020 Order [R. 60]. In so doing, the Court finds that (1) Flynn was acting as a government agent when he participated in the trash pickup at Gregory's home on November 28, 2018; (2) the actions of Flynn and Officer Neal resulted in an illegal search and seizure because the two men entered the curtilage of Gregory's home without license to do so; (3) even if they did not enter the curtilage of the home, Gregory still held a reasonable expectation of privacy in that area and his trash cans; and (4) none of the exceptions argued by the United States saved the warrantless search of Gregory's trash or the subsequent search of his home, and the evidence must be suppressed.

A. State Action

The Fourth Amendment protects from unreasonable searches and seizures. ***255** However, it "proscribes only governmental action and does not apply to a search or seizure, even an unreasonable one, conducted by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official." *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985) (citations omitted). In this Court's Order adopting the Recommended Disposition, the Court concluded that the private trash collector, Danny Flynn, was *not* acting as a government agent when he collected the trash bags from Gregory's property, relying on *United States v. Bruce.* [R. 60] Gregory now asks the Court to reconsider that position, arguing that the present case is distinguishable from the facts and reasoning of *Bruce.* The Court agrees.

A private individual is not transformed into a government agent "merely because there was some antecedent contact between that person and the police." *Bruce*, 396 F.3d at 705 (quoting *Lambert*, 771 F.2d at 89) (internal quotation marks omitted). Furthermore, "a private party is not an agent of the government where 'the intent of the private party conducting the search is entirely independent of the government's intent to collect evidence for use in a criminal prosecution.' " *Id.* (quoting *United States v. Howard*, 752 F.2d 220, 227 (6th Cir. 1985), *vacated on other grounds*, 770 F.2d 57 (6th Cir. 1985)). Accordingly, "two elements must be shown in order to treat ostensibly private action as a state-sponsored search: (1) the police must have instigated, encouraged, or participated in the search; and (2) the private individual must have engaged in the search with the intent of assisting the police." *Id.* (citing *Lambert*, 771 F.2d at 89). "When these two prerequisites are not satisfied, evidence should be considered the fruits of a 'private search and, therefore, not within the purview of the Fourth Amendment.' " *United States v. Foley*, 23 F.3d 408, 1994 WL 144445, *2 (6th Cir. 1994) (quoting *Lambert*, 771 F.2d at 89).

In *United States v. Bruce*, a hotel manager contacted the local police department to report that a hotel employee had smelled burning marijuana coming from the defendant's hotel rooms. 396 F.3d at 702. The hotel manager—at the request of law enforcement "and in accordance with a hotel interdiction program operated in cooperation with the local police"—instructed his cleaning staff to "save, separately secure, and mark the trash bags obtained" from the hotel rooms. *Id.* The police then obtained a search warrant for the hotel rooms based in part on items found in the trash. *Id.* The defendant ultimately filed a motion to suppress the evidence from the rooms, which the trial court denied. The Sixth Circuit affirmed that decision after concluding that neither of the two prongs of the state-action test had been satisfied. *Id.* at 706. As to the first element, the Sixth Circuit found that no search occurred; rather, the cleaning crew had merely preserved the trash that they collected during their "typical cleaning routine," and they had not otherwise deviated from that routine. *Id.* The Court also noted "that hotel employees had initiated contact with the police, and not vice versa." *Id.* The Court then explained that the second element had not been satisfied because the hotel employees "had the distinct and independent intent—and indeed, the obligation—to clean these rooms and empty their trash, just as they would do with any other room in the hotel." *Id.* For the reasons explained below, *Bruce* is distinguishable from the present case.

1. Law Enforcement's Involvement in the Search

The first inquiry of the state-action test, as articulated in *Bruce*, is whether ***256** the police instigated, encouraged, or participated in the search. First, unlike the law enforcement officers in *Bruce*, Officer Neal actively sought out the assistance of a private individual, Danny Flynn, directing the collection of Gregory's trash under circumstances outside Cardinal Sanitation's "typical [trash collection] routine." *Id.* Officer Neal approached Flynn and told him the specific house where he wanted the trash collected. [R. 81, p. 20] Neal accompanied Flynn on the trash run, and virtually every action taken during the trash run was performed pursuant to the direction of Officer Neal. For example, Officer Neal insisted that Flynn take an empty truck and drive directly to Gregory's residence, skipping the normal trash stops along the way. *Id.* at 20–21. This resulted in the trash being collected up to two-and-a-half hours earlier than normal. *Id.* at 27. According to Officer Neal, the *only way* they could conduct the trash pull was if he was in the trash truck, and the truck was empty—meaning this was a special trip. *Id.* at 62–63, 69. Officer Neal even checked the truck to ensure that it was empty. *Id.* at 40. Immediately after leaving Gregory's property, Officer Neal instructed Flynn to drive to a nearby church, where he and another deputy unloaded the trash. *Id.* at 13, 67–68. Flynn testified this was all outside the normal, customary trash pickup:

> Question: So was it Cody Neal's desire to completely change the character of your trash collection, correct?
>
> Flynn: Correct.

Id. at 23–24. Flynn was asked whose idea it was to conduct the trash pull in this manner:

> Question: Was any of this process your idea?
>
> Flynn: No.
>
> Question: Whose idea was it?
>
> Flynn: It was something the cops wanted done.

Id. at 27; *see also Foley*, 1994 WL 144445, at *3 (finding it "clear" that the first prong was met when a woman, upon discovering that a suspicious package addressed to her son was being held at the post office, contacted the police and the police directed her to pick it up).

Moreover, unlike the law enforcement officers in *Bruce* (who never entered the hotel rooms), Officer Neal accompanied Flynn during the trash pull and in so doing, trespassed on to Gregory's property. The government claims that Officer Neal's presence in the truck does not change the analysis because he did not "direct, control or participate in the collection of the garbage; rather, he merely sat in the front passenger seat, holding a cell phone camera for the purpose of recording his *non-participation* in the collection of the garbage." [R. 84, p. 4 (emphasis added)] But the facts developed at the evidentiary hearing, as explained above, flatly demonstrate otherwise. Officer Neal sat in the passenger seat as Flynn drove the truck about 100 feet up Gregory's driveway and parked within fifteen feet of the residence—despite the fact that the property was posted with several "No Trespassing," "Private Property," and "Beware of Dog" signs. [R. 81, pp. 29, 64–65]. Rather than passively sitting in the cab, Officer Neal took a cell phone video during the trash pull, pointed toward Gregory's house (not the trash cans) and areas he would not have been able to view from the road (or at least not with the same clarity). *Id.* at 65. When questioned during the evidentiary hearings, Officer Neal could not articulate *any* legal basis for being on Gregory's property, let alone a basis for videotaping Gregory's house within fifteen feet of

the residence. *Id.* at 47–53, 64. And though he claimed that he had not participated in the trash pull, *id.* at 53, Officer Neal insisted that his presence ***257** at the trash pull (and his videotaping of the scene) was necessary to establish the chain of custody. *Id.* at 41. If the trash pull could not be conducted without Officer Neal and his cell phone camera, as he claimed, then Officer Neal necessarily participated in the search.

And a closer reading of *Bruce* reveals why it is inapposite.[3] There, the officers' sole involvement in the trash collection was simply to ask the cleaning staff to "separately maintain and mark the trash bags" after they were "removed *during their routine cleaning of the rooms*"—nothing more. *Bruce*, 396 F.3d at 706 (emphasis added). While it is true, as the United States points out, that the hotel in *Bruce* participated in a drug interdiction program, that fact in no way affects the outcome of the present case because the police in *Bruce* had no involvement in the trash pull, and it was accomplished as part of the hotel's normal, routine collection protocol. As the Court in *Bruce* observed, "There [was] no evidence that the staff were asked ... [to] deviate from their typical cleaning routine." *Id.* The Sixth Circuit also noted that "hotel employees initiated contact with the police, not vice versa." *Id.* But here, the collection of Gregory's trash was out of the ordinary in significant ways, all specifically at Officer Neal's request and direction. These facts belie the government's claim that Flynn was simply "preserving" the potential evidence that he would have collected in any event.

The Court finds that Officer Neal instigated, encouraged, and participated in the search of Gregory's property, and the first prong of the state-action test is therefore satisfied. To the extent that the United States argues that this first prong is not satisfied because there was not a "search" to begin with, it puts the cart before the horse. Prong one focuses on whether the police instigated, encouraged, and participated in the alleged search, not whether there *was* a search. The question of whether there was an improper search is answered by a different test (or rather, two tests), as explained in more detail below.

2. Private Individual's Intent to Assist Law Enforcement

The second inquiry of the state-action test is whether the private party "engaged in the search with the intent of assisting the police." *Id.* at 705 (citing *Lambert*, 771 F.2d at 89). The *Bruce* Court reasoned that the hotel staff had a separate and independent intent to clean the rooms and empty the trash "just as they would do with any other room in the hotel." *Id.* The housekeeping staff were not "transformed into government agents merely because the police took an interest in the items they planned to remove from the room during their *normal cleaning activities.*" *Id.* (emphasis added). The United States argues that Flynn likewise "was operating independent of the police's intent to conduct a criminal investigation." [R. 84, p. 3] Quoting from this Court's prior decision, [R. 60], and *Bruce*, the government argues Flynn "undoubtedly had the distinct and independent intent—and indeed the obligation—to [collect the] trash." *Id.* at 11 (quoting *Bruce*, 396 F.3d at 706). Analogizing ***258** to the housekeeping staff in *Bruce*, the government argues that "Flynn would have still collected the Defendant's garbage absent any police involvement." *Id.* But Flynn flatly contradicted this argument, explaining that the truck which normally picked up Gregory's trash had *already left* on its route for the day, [R. 81, p. 26], and to beat it there, Officer Neal instructed Flynn to make a special run with an empty spare truck. *Id.* at 18. As a result, they arrived at Gregory's residence roughly two hours earlier than his garbage was usually collected. *Id.* at 29–30. Tellingly, when asked what business purpose he had accomplished by making the trash run in this manner, Flynn testified, "**Absolutely none**." *Id.* at 25 (emphasis added).

Flynn testified he would never have collected Gregory's trash in this manner. When asked if he expected that his efforts were assisting the police, Flynn testified: "Yes.... Well, I knew that they was [sic] wanting something when they asked me and I done [sic] it because the cops asked me to do it." *Id.* at 30. Flynn's actions on November 28, 2018 were not "entirely independent of the government's intent to collect evidence for use in a criminal prosecution," *Bruce*, 396 F.3d at 706, but rather were undertaken for the *specific purpose* of assisting law enforcement. Given that Officer Neal instigated, encouraged, and participated in the trash pull, and Flynn's only intent was to aid the police, Flynn was acting as an agent of Officer Neal, making him a state actor.

B. Fourth Amendment Search

Having determined that Flynn was acting as a state actor when he aided Officer Neal in the trash pull at Gregory's residence, the Court must determine whether the actions of these state actors resulted in an unreasonable search or seizure under the Fourth Amendment.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. As the Supreme Court has explained, "The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' " *Florida v. Jardines*, 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (*quoting United States v. Jones*, 565 U.S. 400, 406 n.3, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)). Thus, pursuant to this "simple baseline" or trespassory test, the warrantless physical intrusion upon a constitutionally protected area constitutes an unreasonable search. *Id.* (citations omitted).

In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court supplemented this baseline approach. *Id.* In that case, the Court found a Fourth Amendment violation where the government attached an eavesdropping device to a public telephone booth and recorded the defendant's phone conversations. In reaching this conclusion, the Court explained that the Fourth Amendment "protects people, not places," and it therefore "cannot turn upon the presence or absence of a physical intrusion." *Id.* at 351, 353, 88 S.Ct. 507. Rather, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351, 88 S.Ct. 507 (internal citation omitted). Accordingly, "[o]ne who occupies [a telephone booth], shuts the door behind ***259** him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* 352, 88 S.Ct. 507. Because the defendant in *Katz* held a reasonable expectation that his phone conversation would remain private, the government's interception of that private conversation constituted an unreasonable search.

In his concurrence to the *Katz* decision, Justice Harlan explained the Fourth Amendment question as follows:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id. at 361, 88 S.Ct. 507 (Harlan, J., concurring). The Supreme Court would go on to apply this two-part reasonable-expectation-of-privacy test in later cases. *See Jones*, 565 U.S. at 406, 132 S.Ct. 945 (citing *Bond v. United States*, 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000); *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)).

In *Florida v. Jardines*, the Supreme Court clarified that, "though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.' " *Jardines*, 569 U.S. at 5, 133 S.Ct. 1409 (quoting *United States v. Knotts*, 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (Brennan, J., concurring in the judgment)); *see also Jones*, 565 U.S. at 409, 132 S.Ct. 945 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."). In that case, law enforcement officers conducted a warrantless dog-sniff of the defendant's front porch. 569 U.S. at 4, 133 S.Ct. 1409. In considering whether this constituted a search, the Supreme Court acknowledged that "property rights 'are not the sole measure of Fourth Amendment violations.' " *Id.* at 5, 133 S.Ct. 1409 (quoting *Soldal v. Cook County*, 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992)). However, when a law enforcement officer gathers information "by physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted by the homeowner," a search has occurred. *Id.* at 6, 133 S.Ct. 1409. Reasoning that the Fourth Amendment's protections would be of little value if state agents could "stand in a home's porch or side garden and trawl for evidence with impunity," *id.*, the Court found that there was "no doubt that the officers entered [the curtilage]" because a front porch is "the classic exemplar" of curtilage. *Id.* at 7, 133 S.Ct. 1409.

The Supreme Court reaffirmed its holding in *Jardines* in *Collins v. Virginia*, —— U.S. ——, 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018), analyzing whether the partially enclosed parking area at the top of the defendant's driveway was curtilage, like a front porch or the side garden referenced in *Jardines*. *Id.* at 1671. In determining the area *was* part of the home's curtilage, the Court did not undertake a *Katz* reasonable-expectation-of-privacy analysis, instead noting

that "[w]hen a law enforcement officer physically intrudes on the ***260** curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Id.* at 1670 (citing *Jardines*, 569 U.S. at 11, 133 S.Ct. 1409).

Both *Jardines* and *Collins* make clear that an individual's Fourth Amendment rights "do not rise or fall with the *Katz* formulation." *Jones*, 565 U.S. at 406, 132 S.Ct. 945; *see also Morgan v. Fairfield Cty.*, 903 F.3d 553, 565 (6th Cir. 2018) ("*Jardines* and, more recently, *Collins* made clear that, outside of the same implied invitation extended to all guests, if the government wants to enter one's curtilage it needs to secure a warrant or to satisfy one of the exceptions to the warrant requirement." (citing *Jardines*, 569 U.S. at 7–8, 133 S.Ct. 1409)). Rather, there are two approaches to determining whether a Fourth Amendment search has occurred. *Hicks v. Scott*, 958 F.3d 421, 431 (6th Cir. 2020) (citation omitted). Under the baseline property-rights approach, a Fourth Amendment search occurs when there is an unlicensed physical intrusion into a constitutionally protected area, such as one's home or the curtilage surrounding the home. *See, e.g., Jardines*, 569 U.S. at 5, 133 S.Ct. 1409. Under the reasonable-expectation-of-privacy test, as espoused in *Katz*, a Fourth Amendment search has occurred when the government violates an individual's reasonable expectation of privacy. *Jones*, 565 U.S. at 406, 132 S.Ct. 945 (citations omitted).

When the baseline property-rights test is satisfied—or in other words, when the government gains information by physically intruding upon a constitutionally protected area—it is unnecessary to consider whether that intrusion also violates a person's reasonable expectation of privacy under *Katz*. *Hicks*, 958 F.3d at 431. Instead, "the physical intrusion itself is enough to establish that a search occurred." *Id.* (citations omitted). As the Supreme Court explained, "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on [the defendant's] property to gather evidence is enough to establish that a search occurred." *Jardines*, 569 U.S. at 11, 133 S.Ct. 1409. The Fourth Circuit applied these two separate tests in a post-*Jardines* trash pull case. *United States v. Jackson*, 728 F.3d 367 (4th Cir. 2013); *see also United States v. Trice*, 966 F.3d 506, 512 (6th Cir. 2020) (applying same approach but declining to address the property-based analysis because the defendant failed to argue it), *petition for cert. filed*, (U.S. Sept. 16, 2020) (No. 20-5718); *United States v. Edwards*, No. 14-223-01, 2015 WL 3456651, *3 (E.D. Pa. May 29, 2015) (agreeing with Fourth Circuit's interpretation of *Jardines* as outlined in *Jackson*).

With these two tests in mind, the Court first considers whether Flynn and Deputy Neal physically intruded on a constitutionally protected area without a license to do so.

1. Physical Intrusion on a Constitutionally Protected Area

Under this baseline test, the Court asks two essential questions: First, were the government agents physically present in a constitutionally protected area? If so, was their presence in that constitutionally protected area the result of an unlicensed physical intrusion? *See, e.g., Jardines*, 569 U.S. at 6–10, 133 S.Ct. 1409.

a. Constitutionally Protected Area

The Fourth Amendment specifies "with some precision" those places and things subject to its protection, namely, persons, houses, papers, and effects. *Id.* at 6, 133 S.Ct. 1409 (quoting ***261** *Oliver v. United States*, 466 U.S. 170, 176, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). It "does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what [the Supreme Court has] called 'open fields'—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text." *Id.* (citing *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924)). However, "when it comes to the Fourth Amendment, the home is first among equals." *Id.* The protection afforded to the home extends to the area "immediately surrounding and associated with the home." *Id.* (quoting *Oliver*, 466 U.S. at 180, 104 S.Ct. 1735) (internal quotation marks omitted). This area, often referred to as the curtilage, is regarded as "part of the home itself for Fourth Amendment purposes." *Id.* (quoting *Oliver*, 466 U.S. at 180, 104 S.Ct. 1735) (internal quotation marks omitted). As the Supreme Court has explained, "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Ciraolo*, 476 U.S. at 212–13, 106 S.Ct. 1809. Accordingly, "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has

occurred." *Collins*, 138 S. Ct. at 1670 (citing *Jardines*, 569 U.S. at 11, 133 S.Ct. 1409).

Whether an area has been searched "depends on the 'proper characterization' of [the area]," at least under the baseline property-rights approach. *Hicks*, 958 F.3d at 432 (quoting *United States v. Werra*, 638 F.3d 326, 331 (1st Cir. 2011)). However, defining the curtilage of a home is not always an easy task. *See Oliver v. United States*, 466 U.S. 170, 182 n.12, 104 S.Ct. 1735 (noting that courts may have "occasional difficulties" in determining whether an area is curtilage or an "open field" not subject to protection). Generally speaking, the curtilage is the "area around the home [that] is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.' " *Jardines*, 569 U.S. at 7, 133 S.Ct. 1409 (quoting *Ciraolo*, 476 U.S. at 213, 106 S.Ct. 1809). In some cases, "the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." *Oliver*, 466 U.S. at 182, n.12, 104 S.Ct. 1735. The front porch, for example, "is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.' " *Jardines*, 569 U.S. at 7, 133 S.Ct. 1409 (quoting *Oliver*, 466 U.S. at 182, n.12, 104 S.Ct. 1735).

Whether other areas around the home also qualify as curtilage "is determined by factors that bear upon whether an individual may reasonably expect that the area in question should be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) (citation omitted). Central to this inquiry is a determination that the area in question hosts the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Id.* (quoting *Oliver*, 466 U.S. at 180, 104 S.Ct. 1735) (internal quotation marks omitted). To address this question, the Supreme Court articulated four factors for courts to consider:

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect ***262** the area from observation by people passing by.

Id. at 301, 107 S.Ct. 1134 (citations omitted). The Court explained, however, that these factors do not "produce[ ] a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." *Id.* Instead, these four factors "are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

With these factors in mind, the Court turns to addressing whether Flynn and Officer Neal entered the curtilage of Gregory's home. The Court finds two post-*Jardines* cases to be instructive: *United States v. Jackson*, 728 F.3d 367 (4th Cir. 2013) and *Commonwealth v. Ousley*, 393 S.W.3d 15 (Ky. 2013). In *Ousley*, the police conducted two warrantless trash pulls on the defendant's property. To complete the trash pulls, the officers walked onto the property late at night and took the trash bags from outdoor trash cans located near the defendant's townhouse. *Id.* at 19. The trash cans were located on the far side of the defendant's one-car driveway, closest to the neighboring townhouse; however, they were only the width of the driveway away from the defendant's townhouse. *Id.* at 21. They were also even with the front of the home. *Id.* at 19. At the time of the trash pulls, the neighboring homes had placed their trash cans at the curb for pickup; however, the defendant's cans had not been taken to the curb and were located about twenty to twenty-five feet from the curb. *Id.* at 20.

The Supreme Court of Kentucky considered the four *Dunn* factors and ultimately determined that the cans were located within the curtilage of the home. More specifically, the court noted that (1) the area was *not* enclosed by a fence, but the home was in an urban area and the trash was only a few feet from the home (about the width of the driveway); (2) the trash was secured in a closed container, and although the trash cans were visible from the street, the contents were not (and the trash cans themselves were hidden if a car was parked in the driveway); (3) the defendant used the area for home storage, staging yard work, and parking his car, activities that were typically part of daily living; and (4) the trash cans were described as being a "very short distance" from the home and "pretty close" to the home. *Id.* at 27–28. The court highlighted the importance of this last factor, explaining that "[t]he closer one gets to the structure of the house, the more likely one is proceeding into the curtilage." *Id.* at 28. The court therefore concluded that the trash cans were within the curtilage of the home and were protected by the Fourth Amendment. *Id.* at 29.

In *Jackson*, the Fourth Circuit also applied the four *Dunn* factors but concluded that the trash can in that case was located outside the curtilage. 728 F.3d at 370–71. The defendant lived with his girlfriend in a multi-unit apartment

complex. *Id.* at 370. Behind each apartment unit was a concrete patio, followed by a two-to-three-foot grass strip, then a concrete sidewalk that ran the length of the building and led to a public street. *Id.* at 370. Beyond the sidewalk was a grass courtyard. *Id.* During a drug trafficking investigation, officers pulled two bags of trash from a trash can located behind the girlfriend's apartment. *Id.* The trash can was not located in its normal place on the apartment's back patio, nor had it been taken to the public street for pickup. *Id.* at 370–71. Rather, it was sitting partially on the strip of grass ***263** and partially on the concrete sidewalk. *Id.* at 371. The Court noted that (1) the trash can was at least twenty feet from the apartment's back door, which was a considerable distance in the context of a multi-unit apartment complex; (2) there was no enclosure surrounding the property; (3) the trash can was found in a common area used by all of the building's residents and guests; and (4) the defendant had not taken any steps to shield the area from the view of passersby. *Id.* at 374. The Court therefore affirmed the district court's conclusion that the trash was taken from an area outside the apartment's curtilage. *Id.*; *see also Edwards*, 2015 WL 3456651 at *3 (explaining that the driveway's close proximity to the home and the neighboring fences that demarcated the defendant's property indicated that some portion of the area was curtilage but the trash cans were placed beyond that area).

Applying the four *Dunn* factors to the present case, the Court concludes that Officer Neal and Flynn entered the curtilage of Gregory's home. The first factor—proximity to the home—weighs strongly in favor of this finding. Gregory's trash cans were approximately twenty-seven feet from his house, just a few feet to the right of the top of his gravel driveway. Pl.'s Ex. 1 (Stipulation), June 19, 2020. Though this is a slightly greater distance than the cans in *Ousley* (which were about the width of the driveway from his house) and *Jackson*, Gregory's home is located in a rural area, on a one-acre lot, not an urban lot, as in *Ousley* and *Jackson*. *See Dunn*, 480 U.S. at 309, 107 S.Ct. 1134 (finding that barn's location sixty yards from the home, a "substantial distance," did not support a finding that the barn was part of the home's curtilage). Further, the trash truck where Flynn and Deputy Neal were riding pulled within fifteen feet of Gregory's house—about the width of the driveway in *Ousley*. The cans in *Ousley* were about twenty to twenty-five feet from the street, whereas Gregory's trash cans were ninety-eight feet eight inches from the road—that is, they were about four times closer to the house than the rural road. As in *Ousley*, the pictures and drawings admitted at the evidentiary hearing reflect that the rear of the trash truck and the light pole where the trash cans were located were flush even with the front porch, again reflecting the proximity to the home. Def.'s Ex. 1–6 (Drawings and Photographs), June 19, 2020. Unlike *Jackson*, neither the trash cans nor the trash truck were anyway near a common area or sidewalk.

The second factor asks whether the area was within an enclosure. As in *Ousley* and *Jackson*, the area at issue was not contained within a fence or other man-made enclosure. However, the unique rural landscape essentially provided a natural barrier for most of the property. As noted above, the one-acre lot was surrounded on three sides by dense woods and was part of a larger 600-acre tract of land owned by Gregory's grandmother. The pictures reflect Gregory had no close neighbors. Given this unique landscape, the absence of an enclosure "cannot deprive [Gregory] of having curtilage surrounding his home." *Ousley*, 393 S.W.3d at 27; *see also Morgan*, 903 F.3d at 561 (under a "commonsense approach [to the *Dunn* factors], the area five-to-seven feet from [the defendants' home] was within the home's curtilage" notwithstanding there was no fence or enclosure).

Under the third *Dunn* factor, the Court must consider how Gregory used the areas. Officer Neal testified that on the morning of the trash pull, a black truck and silver car were parked at the very top of the driveway, and a boat was parked directly in front of the house. [R. 81, pp. 44–45] Gregory testified that he parked his ***264** cars at the top of the driveway, sometimes to obscure the view from passersby of female visitors who he occasionally directed to park on the rear patio to secret them from view. In addition to a small back patio behind the home, Gregory's grandmother testified that the only other areas flat enough for outdoor activities were those portions of the land to the right of the light pole (and closer to the road), containing a swing set (twenty-eight feet to the right of the light pole) and a storage building (sixty-two feet to the right of the light pole). *Id.* at 82–84, 92–93. The photographic exhibits admitted at the hearing confirmed these facts. *See* Def.'s Ex. 3–6 (Photographs), June 19, 2020. The storage building held various yard implements and lawn care supplies according to Koger. [R. 81, pp. 84–86] The same area had previously housed a vegetable garden and rabbit cages years earlier. *Id.* 84–88. These activities —parking your car, home and yard storage, gardening, and raising pets—are traditional activities of daily life that support a finding that the areas were within the curtilage. *See Collins*, 138 S. Ct. at 1671 (partially enclosed carport area where the officer searched "constitutes an area adjacent to the home and to which the activity of life extends, and so is properly considered curtilage"); *Ousley*, 393 S.W.3d at 28 (noting that

home storage, staging yard work, and parking one's car are activities of daily living).

The fourth factor—the steps taken by Gregory to protect the area from the observation of passersby—also weighs in favor of a curtilage finding. As noted above, Gregory's property was surrounded by dense trees on three sides. The only straight view of the property is from the road that sits about 109 feet from the home at the bottom of a gravel driveway. From that view, one can see the front of the property, along with the light pole and trash cans, from a distance. The narrow road in front of the property has no shoulder. It would therefore be difficult for a passerby to simply stop his vehicle and look up the driveway into the property. Flynn testified that someone driving by the residence at a normal rate of speed would only be able to get a passing glance up the driveway. [R. 81, p. 37]

Further, the testimony was consistent that Gregory took steps to ward off visitors. He had at least two "Beware of Dog" signs in his yard, as well as four "Private Property" signs and two "No Trespassing" signs. Consistent with his other efforts to ward off visitors, Gregory had a vicious guard dog, Baxter, and surrounded his property with an underground fence. He ran the electric fence in such a way to allow minimal access (down by the road) to the postal carrier and water company employee. *Id.* at 77. While a passerby would not be able to view the underground fence, it indicates Gregory's efforts to restrict access to his property. Flynn and Officer Neal also testified that the trash cans by the light pole were visible from the road, but not the trash within the cans. Gregory placed his trash in opaque bags then placed them in trash cans, so that the contents were not visible to anyone, reflecting his efforts to keep the area and the contents of his trash private. *See Ousley*, 393 S.W.3d at 27 (noting that trash was in a closed container so it was impossible to tell if it contained trash without opening it).

Though not a trash pull case, *Collins v. Virginia* is helpful in analyzing the *Dunn* factors based on similar facts. There, the Supreme Court found a carport area adjacent to the house at the top of defendant's driveway was curtilage. Standing in the street where he parked, the police officer saw a motorcycle, covered by a tarp, sitting in the carport which was located slightly behind the front perimeter of the ***265** house. *Collins*, 138 S. Ct. at 1668. The driveway ran along the side of the front yard, and the carport where the motorcycle was parked was partially enclosed on two sides by a brick wall (about car height) and on the third side by the home. *Id.* at 1670. The officer walked up the driveway into the parking area, looked under the tarp, and ran the license plate and vehicle identification numbers of the motorcycle, which had been stolen. *Id.* at 1668. The Court held that "[j]ust like the front porch, side garden, or area outside the front window, the driveway enclosure ... constitutes an area adjacent to the home and to which the activity of home life extends, and so is properly considered curtilage." *Id.* at 1671 (*quoting Jardines*, 569 U.S. at 6, 7, 133 S.Ct. 1409) (internal quotation marks omitted).

In this case, Officer Neal rode in the trash truck up Gregory's driveway to an area immediately adjacent to the home and analogous to the carport in *Collins* or the "side garden" referenced in *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409. Based on the photos, the area where the trash truck parked and where the light pole was located were behind the boat parked immediately in front of the house and at least flush (and likely behind) the perimeter of the front porch of the house. These areas were also behind the front perimeter of the swing set and storage building. Though the top of the driveway was not enclosed on two sides by a low wall, as in *Collins*, the area was immediately adjacent to the house on its left side and the top of the driveway was bounded by a hill sloping upwards. To the right of the top of the driveway (and closer toward the road) were other "areas of daily living" like a swing set, storage building and the place where the "side garden" and pets had previously been located. Further, the light pole where the trash was located was not on the path to the front door.[4] Like the officer in *Collins* who, from the road, could see the covered motorcycle at the top of that defendant's driveway, Officer Neal (and his agent, Flynn) saw Gregory's trash cans at the top of his driveway, proceeded up this driveway, and, akin to peeking under the motorcycle's tarp to retrieve the license plate number, opened the trash cans and took a peek. The lack of a low wall around this particular area cannot prevent Gregory from having curtilage, as this area is equivalent to the carport area in *Collins* and the "side garden" referenced by the Supreme Court in *Jardines*. *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409; *see also Morgan*, 903 F.3d at 561.

The United States notes that "[c]ourts have repeatedly held that unenclosed driveways were not curtilage," and urges this Court to reach the same conclusion. [R. 84, p. 12] For instance, the government cites *United States v. Stitt*, 637 F. App'x 927, 930 (6th Cir. 2016) and argues that a driveway cannot be curtilage. There the Sixth Circuit held that the end of the driveway was not curtilage, where "[t]estimony established that *visitors* parked cars in the turnaround [at the end of the driveway]—decidedly not an activity associated

with the privacies of life." *Id.* (emphasis added) (citations omitted). Here, Gregory testified that he occasionally directed female visitors to park on the back patio. Because visitors parked cars there, the United States argues that the area was "decidedly not an activity associated with the privacies of life," *id.*, and was therefore not curtilage. However, the testimony indicates these were isolated incidents, where Gregory occasionally asked his female visitors to park there to obscure their vehicles from the view of any passersby. In other ***266** words, this area provided a certain level of privacy, demonstrating that the top and rear of the driveway, and the back patio area, *were* areas "associated with the privacies of life." *Id.*

Furthermore, despite the United States' arguments, none of the cases cited by the United States announced a bright line rule that unenclosed driveways can never qualify as curtilage; rather, those courts applied the four *Dunn* factors to the unique facts of each case. Most of the cases cited by the government involve urban areas with short (often shared) driveways readily accessible to the public, or other factual distinctions. *See Coleman*, 923 F.3d at 456–57 (noting the absence of a "no trespassing" sign, acknowledging the curtilage issue was "a close[ ] question," and ultimately finding that the driveway was *not* within the curtilage of the home in part because the driveway was "shared with other families and other condo residents frequently walked past cars parked in front of condo units"); *United States v. Galaviz*, 645 F.3d 347, 356 (6th Cir. 2011) (holding driveway was not within the protected curtilage where the driveway was short, the area in question "abut[ed] the public sidewalk," defendant had taken no steps to protect the area from public view, and it was used as a point of entry to the home); *United States v. Estes*, 343 F. App'x 97, 101 (6th Cir. 2009) (noting the driveway was accessible from the adjacent alley).

In two other cases cited by the United States, the courts emphasized the lack of "No Trespassing" signs in finding the area in question was not curtilage. *See United States v. Brown*, 510 F.3d 57, 66 (1st Cir. 2007) (defendant also operated a motor repair business on the property and the driveway was utilized by customers); *United States v. French*, 291 F.3d 945, 952 (7th Cir. 2002) (there were "no gates, barriers, or 'no trespassing' signs" on the area in question). In a case in which the defendant *did* utilize "No Trespassing" signs, the court found other factors outweighed this fact. *United States v. Moffitt*, 233 F. App'x 409, 411–12 (5th Cir. 2007) (noting that the driveway and front yard were "access areas for visitors to enter and knock on the front door" in an "urban neighborhood," and defendant left his front gate open); *see also United States v. Hopper*, 58 F. App'x 619, 623 (6th Cir. 2003) (reasoning that even if the area was curtilage, "law enforcement officials may encroach upon the curtilage of a home for the purpose of asking questions of the occupants"). On this point, the Court finds *Stitt* to be instructive. In addressing the defendant's argument that rural, low-income properties lack clear divisions between curtilage and public areas, the Court in *Stitt* noted that such divisions could be accomplished in rural settings by "a railroad tie, a large rock, *or a sign would have marked the [curtilage] and warned visitors not to proceed further.*" 637 F. App'x at 930 (emphasis added). That is precisely what Gregory did on his rural property.

The cases cited by the United States do not convince the Court that the areas at issue in this case fall beyond the curtilage of Gregory's home. These cases simply demonstrate the principle espoused in *Dunn* that the four curtilage factors do not "produce[ ] a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134. The question of whether a particular area falls within the curtilage of a home must be answered on a case-by-case basis and no single factor is determinative. Under the facts of this case, and applying a commonsense approach with all *Dunn* factors considered, the area fifteen feet from Gregory's house, which can be characterized as the functional equivalent of a carport area, is within the curtilage of Gregory's ***267** home. *See Morgan*, 903 F.3d at 561 (under a "commonsense approach [to the *Dunn* factors], the area five-to-seven feet from [the defendants' home] was within the home's curtilage" notwithstanding that there was no fence or enclosure).

Furthermore, to the extent it is necessary to distinguish this case from the driveway cases cited by the United States, the Court notes that the areas in question on Gregory's property do not abut a public sidewalk or alley; the unique landscape of Gregory's property provided a visual barrier to passersby; the area where the trash truck parked and where the light pole was located were behind the front perimeter of the house, the boat parked in front of the house, the swing set, and the storage building; the driveway did not lead to the front door of the home; the area surrounding the light pole was certainly not a path of entry to the home; and Gregory took significant steps to flag his curtilage and ward off visitors, including a multitude of "No Trespassing," "Private Property," and "Beware of Dog" signage, as noted above.

In sum, based on the unique facts of this case as developed at the evidentiary hearings, each of the four *Dunn* factors weighs in favor of finding that the area where the trash truck parked and the area surrounding the light pole were within the curtilage of Gregory's home. The Court finds that this area is "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134. Accordingly, Flynn and Officer Neal physically intruded upon the curtilage of Gregory's home, a constitutionally protected area.

b. Unlicensed Physical Intrusion

Having determined that Officer Neal and Flynn entered the protected curtilage of Gregory's home, the Court must next consider whether they did so through an unlicensed physical intrusion. In other words, did Gregory give permission, even implicitly, to Flynn and Officer Neal to enter the curtilage of his home, remove his trash in this manner, and videotape his property? *Jardines*, 569 U.S. at 8, 133 S.Ct. 1409.

A license need not be express; instead, it can be implied from the customs of the area. *Id.* (citation omitted). For example, a knocker on the front door of a home is typically treated as an implicit invitation for "solicitors, hawkers, and peddlers of all kinds" to knock and attempt entry. *Id.* (quoting *Breard v. Alexandria*, 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951)). "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* The Supreme Court has noted that compliance with this "traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.* Similarly, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " *Id.* (quoting *Kentucky v. King*, 563 U.S. 452, 469, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)).

However, "[t]he scope of a license—express or implied—is limited not only to a particular area but also to a *specific purpose*." *Id.* at 9, 133 S.Ct. 1409 (emphasis added). The *Jardines* Court explained the types of purposes that would fall outside acceptable societal norms:

> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*.... To ***268** find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. *The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.* Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

Id. (second emphasis added).

In the present case, Flynn testified that his employees would not have traveled onto the property unless expressly asked to do so, and his company had always picked up Gregory's garbage from the cans by the light pole. However, even assuming that Cardinal Sanitation had a license, express or implied, to enter the property and collect trash from cans located by the light pole, that license was limited in purpose. There was, at most, a license for Cardinal Sanitation, a private company, to enter the property for the limited purpose of picking up the trash as part of its *normal collection process*. *See United States v. Biondich*, 652 F.2d 743, 745 (8th Cir. 1981) (noting that "no unusual procedures were followed other than to keep Biondich's garbage separate and available for inspection"). In this instance, however, Flynn was acting as a government agent, with the intent of aiding the police. When he entered the property with Officer Neal, about two hours earlier than his usual trash collection time and under very different circumstances, he was not acting as a Cardinal Sanitation employee, but as a state actor. Instead of entering the property to collect the trash as part of the normal collection routine, he and Officer Neal entered the property for the *purpose* of aiding in a warrantless police search and investigation. This was beyond the limited scope of Cardinal Sanitation's license to enter the property.

Furthermore, even if Flynn was acting within the scope of his license to enter the property and collect the trash, that license would not transfer to Officer Neal simply by virtue of his presence in the passenger seat. "There is no principle in Fourth Amendment jurisprudence to the effect that police are free to do what *some* individual has been authorized to do." *United States v. Certain Real Property Located at 987 Fisher Road, Grosse Pointe, Michigan*, 719 F. Supp. 1396, 1405 (E.D. Mich. 1989) (quoting LaFave, Search and Seizure:

A Treatise on the Fourth Amendment, § 2.6(c), at 30 (1989 Supp.)). Officer Neal had no authority to enter the curtilage and conduct a search (or videotape those areas). "[P]olice have only limited authority to come onto the curtilage." *Id.* at 1405 (quoting LaFave, *supra*, § 2.6(c), at 30). As noted above, they may "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8, 133 S.Ct. 1409. However, "they must conduct themselves as would an ordinary social visitor to the premises. This hardly includes rummaging through the garbage cans of one's host." *Certain Real Property*, 719 F.Supp. at 1405 (quoting LaFave, *supra*, § 2.6(c), at 30); *see also Jackson*, 728 F.3d at 373 (acknowledging that, if the officers trespassed into the curtilage to conduct the trash pull, "it would be fairly clear" that they violated the Fourth Amendment, "[f]or surely if bringing a drug-sniffing dog onto a home's front porch is beyond the scope of the implied license that invites a visitor to the front door, so too is rummaging through a trash can located within the home's curtilage").

***269** Putting aside the "No Trespassing" signs and assuming Officer Neal had an implied license to enter Gregory's front porch or driveway for a "knock and talk," Officer Neal made clear at the hearing that was never his purpose on November 28, 2018:

> Question: You weren't doing a knock-and-talk. You didn't go up to the door and knock on it, did you?
>
> Officer Neal: No.

[R. 81, p. 50]

> Question: Is it correct that you didn't have any other purpose for being on Mr. Gregory's property except for this trash pull?
>
> Officer Neal; Yes.

Id. at 64; *see also id.* at 47–52. Officer Neal never attempted to make contact with Gregory. Instead, he entered the curtilage of Gregory's home—coming within fifteen feet of the home—for the specific purpose of conducting a warrantless search and videotaping areas of Gregory's property that he would not have had access to but for his trespass. *Id.* at 65. His actions, and indeed his sworn testimony, "objectively reveal[ ] a purpose to conduct a search, which is not what anyone would think he had license to do." *Jardines*, 569 U.S. at 10, 133 S.Ct. 1409.

The Sixth Circuit has held that similar activity exceeds the limited license a visitor holds to knock and seek entry. For example, in *Watson v. Pearson*, 928 F.3d 507, 512–13 (6th Cir. 2019), three law enforcement officers attempted to serve a civil levy on Watson at his last known address. *Id.* at 509. The officers knocked on the front door for approximately twenty minutes. *Id.* Watson finally emerged from the home, but stated that it was his girlfriend's home, he did not live there, and he did not have anything of value on his person that the officers could levy. *Id.* Watson left, at which point the officers continued to knock on the front door, even turning the doorknob (but the door was locked). *Id.* They then walked around the exterior of the house to look for items that could be levied. *Id.* During this tour of the property, the officers smelled marijuana and thereafter obtained a search warrant for the premises, which produced evidence indicating the sale and use of marijuana. *Id.* at 509–10. The trial court granted Watson's suppression motion in his criminal case, and he then brought a 42 U.S.C. § 1983 action against the officers who conducted the warrantless search. *Id.* at 510.

The Sixth Circuit ultimately held that the officers had violated Watson's Fourth Amendment rights. The Court acknowledged that an officer may enter the curtilage of a home without a warrant "and knock on the front door in an attempt to speak with the occupants or to ask for consent to search the premises." *Id.* at 512 (citing *Jardines*, 569 U.S. at 8, 133 S.Ct. 1409; *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005)). Under prior Sixth Circuit cases, officers could even walk to the back of a residence to communicate with residents. *Id.* However, "*Jardines* clearly rejected [that] kind of intrusion into the curtilage." *Id.* And even if *Jardines* did *not* prohibit an officer from walking around the house for the purpose of speaking to a resident, the *Watson* Court explained it certainly prohibited an officer from entering the curtilage "*with the intent of performing a search.*" *Id.* (emphasis added); *see also Brennan v. Dawson*, 752 F. App'x 276, 282–83 (6th Cir. 2018) (holding that officer exceeded scope of implied license to knock on front door when he, among other things, walked around the house five to ten times and knocked and peered into windows).

The United States asks the Court to create a trash exception (under an "abandonment" theory) to the curtilage case law, ***270** arguing that "[w]hen garbage is set out in its customary location for collection, the individual has no reasonable expectation of privacy even if that location falls within the home's curtilage." [R. 84 at 15] They cite to *Bruce* (which is not a curtilage case) and *United States v. Thompson*, 881

F.3d 629, 632 (8th Cir. 2018). In *Thompson*, the Eighth Circuit applied the *Katz* reasonable-expectation-of-privacy test to the search of trash cans located in the driveway of the defendant's residence, close to the entrance of his garage. *Id.* The Eighth Circuit held that this was the correct test, even "assuming the trash was within the curtilage of [the defendant's] home," relying on *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). *Thompson*, 881 F.3d at 632. The United States urges the Court to follow the same analysis. [R. 84, pp. 15–16]. However, *Thompson* was decided only months before the Supreme Court's decision in *Collins.* In *Collins*, the Court makes clear that a law enforcement officer's unlicensed physical intrusion into the curtilage of a home constitutes a presumptively unreasonable search under the Fourth Amendment. Neither *Jardines* nor *Collins* makes any exception for *garbage* located within the curtilage, and *Greenwood* did not address that issue, as discussed in more detail below. *See infra*, Section IV(B)(2). The Court therefore declines to follow *Thompson.*

In fact, nothing in the Supreme Court's curtilage case law supports such an exception, and the Court has declined to create similar exceptions to the property-rights test. For example, the Court's decision in *Collins* rejected the state's analogous request to "expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space." *Collins*, 138 S. Ct. at 1671. Calling it an "easy case" the Supreme Court declined to create an exception to the trespassory test. *Id.* In outlining its reasoning, the Court posed the following analogy:

> Imagine a motorcycle parked inside the living room of a house, visible to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.

Id. The Court reasoned that "[n]othing in our case law ... suggests that the automobile exception gives an officer the right to enter a house *or its curtilage* to access a vehicle without a warrant." *Id.* (emphasis added). Such an expansion would "undervalue the core Fourth Amendment protection afforded to the home and its curtilage." *Id.* at 1671. The Court further reasoned that even if the officer had seen illegal drugs through the window of Collins's house, assuming no other warrant exception applied, "he could not have entered the house to seize them without first obtaining a warrant." *Id.* at 1672.[5] The automobile exception "does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." *Id.*

In *Morgan*, the Sixth Circuit likewise declined to create an exception to the trespassory test where the state argued such an exception would make it safer for law enforcement conducting a "knock and talk" ***271** because officers could be posted around the perimeter of the house. *Morgan*, 903 F.3d at 562–63. The Sixth Circuit reasoned:

> Many (if not most) Fourth Amendment violations would benefit police in some way.... *But the Bill of Rights exists to protect people from the power of the government, not to aid the government.* Adopting [defendants'] position would turn that principle on its head.

Id. at 563 (emphasis added). So too here. Nothing in the Supreme Court case law suggests that a special trash exception exists.

Whether it is trash, treasure, or the kitchen sink, law enforcement may not trespass onto the curtilage of a homeowner's property "with the intent of performing a search" and remove that item. *Collins*, 138 S. Ct. at 1671; *Watson*, 928 F.3d at 512. Simply put, neither Officer Neal nor his agent, Flynn, had a license, express or implied, to enter Gregory's curtilage for the purpose of collecting his trash (and videotaping his home) as part of a warrantless police investigation. The facts developed make clear this was *not* part of Cardinal Sanitation's "usual" trash collection. Much like a "visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking for permission," Flynn and Officer Neal did not have a license to do *that. Jardines*, 569 U.S. at 9, 133 S.Ct. 1409. The Court finds that Officer Neal and Flynn physically intruded upon the curtilage of Gregory's home, a constitutionally protected area, without license to do so. The result is the same as in *Jardines* and *Collins*: a Fourth Amendment violation.

2. Reasonable Expectation of Privacy

As noted above, the reasonable-expectation-of-privacy test from *Katz* " 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." *Jardines*, 569 U.S. at 11,

133 S.Ct. 1409 (quoting *Jones*, 565 U.S. at 409, 132 S.Ct. 945). Because the Court concludes that there was an unconstitutional, unlicensed physical intrusion into the curtilage of Gregory's home, it need not consider whether Gregory held a reasonable expectation of privacy in that area. *See id.* However, it is worth noting that, even if this Court agreed with the United States' characterization of the area in which the trash truck and trash bags were located and determined that the area was *not* the curtilage of the home, Gregory still had a reasonable expectation of privacy in that space under the unique facts of this case.

To determine if an individual possesses a reasonable expectation of privacy in a space, the Court must consider the two-part test from *Katz*: "First, the person claiming Fourth Amendment protection must have 'exhibited an actual (subjective) expectation of privacy' in the targeted area. Second, even if the person demonstrates a subjective expectation of privacy, that expectation must also be 'one that society is prepared to recognize as 'reasonable.' ' " *Hicks*, 958 F.3d at 431 (quoting *Katz*, 389 U.S. at 359, 88 S.Ct. 507).

In this case, Gregory lived on a heavily wooded lot and posted multiple "No Trespassing," "Private Property," and "Beware of Dogs" signs. He also had an aggressive dog and had taken steps to keep traditional visitors (like postal workers and employees from the water company) from traveling beyond the mailbox or water meter, which were located only a few feet from the road. He testified about the steps he took to screen his trash for identifying information and to remove items that ***272** might indicate his drug use.[6] Gregory placed his trash in opaque bags then placed them into trash cans (located about 100 feet from the road), concealing their contents. Based on these facts and others outlined herein, the Court finds that Gregory held a subjective expectation of privacy in his trash, the area where the trash truck parked (about fifteen feet from his home), and where the trash was placed by the light pole.

The Court also finds that this expectation of privacy is one that society would recognize as reasonable. Given the trash truck's and the trash cans' proximity to the house and distance from the road, and the additional steps taken to keep the public at a distance (e.g., the "No Trespassing" signs, the protective dog), a member of the public would not reasonably conclude that they could travel 100 feet up Gregory's driveway, park fifteen feet from his home, walk a few steps over to the light pole, and take a look at the contents of his trash. Had the cans been placed at the roadway, clearly deposited for pickup by a third party, a reasonable person traveling down the road might conclude that they could stop, open the lid, and take a peek. In that scenario, the curious traveler would not need to trespass 100 feet onto Gregory's property to look through Gregory's trash.

In *California v. Greenwood*, the Supreme Court considered whether a trash pull involving garbage left at the curb constituted an unreasonable search and seizure. The Court ultimately held that the defendants did not have an objectively reasonable expectation of privacy in trash that they placed on the curb for pickup. 486 U.S. at 39–40, 108 S.Ct. 1625. The Court noted that "[it] is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40, 108 S.Ct. 1625. Further, the defendants had placed the trash on the curb for the express purpose of conveying it to the trash collector, who could have sorted through it or permitted others to do so. *Id.* The Court concluded that the defendants, "having deposited their garbage 'in an area *particularly suited for public inspection* and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,' [ ] could have had no reasonable expectation of privacy in the inculpatory items that they discarded." *Id.* at 40–41, 108 S.Ct. 1625 (emphasis added) (internal citation omitted). The facts here are decidedly different than *Greenwood*, as the trash was not paced at the curb or "in an area particularly suited for public inspection." *Id.*; *see also Jackson*, 728 F.3d at 375 (no reasonable expectation of privacy where defendants left their trash "in a common area shared by other residents of the apartment complex and their guests").

Citing *Bruce* and *Greenwood*, the government argues that Gregory lacked a reasonable expectation of privacy in his trash because he *abandoned* it, having left it at the normal pickup place under the light pole where Cardinal Sanitation would retrieve it. [R. 84, pp. 6–9] First, *Bruce* is not helpful to the government in this regard. The Sixth Circuit held that, even assuming the cleaning staff were state actors, the defendant had no reasonable expectation of privacy in the trash placed in the hotel room where the officer credibly ***273** testified that he instructed the hotel management "that the cleaning staff should collect the trash ... only during their "*ordinary cleaning routine*," and where the evidence demonstrated that no "Do Not Disturb" sign was on the door. *Bruce*, 396 F.3d at 708 (emphasis added). Here, the trash was collected outside Cardinal Sanitation's normal collection routine, and the undisputed evidence demonstrated

that Gregory posted several "Private Property" and "No Trespassing" signs.

Greenwood is also unhelpful. In *Greenwood* the government argued that the defendants' trash, left for pickup at the curb, was "abandoned." 486 U.S. at 51, 108 S.Ct. 1625 (Brennan, J., dissenting). The majority ultimately found that the defendant lacked a reasonable expectation of privacy in the garbage, but it did not rely on an abandonment theory. *Id.* at 40–43, 108 S.Ct. 1625; *see also United States v. Hedrick*, 922 F.2d 396, 398 (acknowledging that "the continued viability of an abandonment approach is questionable" after *Greenwood* (citation omitted)); *Certain Real Property*, 719 F.Supp. at 1405 (discussing *Greenwood*). Rather, it held that the act of depositing the garbage at the curb of a public street—where it was "readily accessible to animals, children, scavengers, snoops, and other members of the public"—for the express purpose of having a third party (the trash collector) pick up the trash, did not evidence a reasonable expectation of privacy. *Greenwood*, 486 U.S. at 40–41, 108 S.Ct. 1625. The Court therefore held that the defendants "could have no reasonable expectation of privacy in the inculpatory items that they discarded." *Id.* at 41, 108 S.Ct. 1625; *see also Hedrick*, 922 F.2d at 401; *but see United States v. Redmon*, 138 F.3d 1109, 1119–20 (7th Cir. 1998) (Coffey, J., concurring) (opining that the abandonment theory "continues to thrive in our Fourth Amendment 'garbage' jurisprudence"). In his dissent, Justice Brennan noted that "[t]he Court properly rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy." *Id.* at 51, 108 S.Ct. 1625 (Brennan, J., dissenting) (citing *California v. Rooney*, 483 U.S. 307, 320, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987) (Brennan, J., dissenting)).

As Justice Brennan indicated, this Court's Fourth Amendment analysis does not turn on whether Gregory "abandoned" his property interest in his trash; rather, the Court must consider whether he retained a reasonable expectation of privacy in that trash. The placement of the trash for pickup by the trash collector is only one factor that the Court considers. In addition, the Court must also consider the trash's *proximity to the home*, as explained by *United States v. Certain Real Property Located at 987 Fisher Road, Grosse Pointe, Michigan.* There, the Court considered whether trash left within the curtilage enjoys Fourth Amendment protection. In that particular community, the homeowners' garbage was not taken to the curb for collection. Instead, the city's "valet garbage service" used several "scooters" to enter the curtilage of each home, pick up the trash, and transport it to a full-size garbage truck waiting at the end of the block. 719 F. Supp. at 1397. Accordingly, to conduct the trash pull at the defendant's residence, a police officer posed as a municipal worker and collected the trash from its usual location at the rear of defendant's home and according to the standard procedure. *Id.* To do so, the officer, dressed as a municipal worker, drove a scooter up the side driveway to the rear of the home, where a barbeque grill and several trash bags were sitting up against the back of the home, and collected the trash bags. *Id.* at 1397–98.

***274** In analyzing the defendants' privacy interest, the court reasoned:

> On a continuum, nobody can retain a reasonable expectation of privacy in garbage that is at a garbage dump; in *Greenwood*, the Supreme Court held that any privacy expectation in garbage at a curbside is also not reasonable. Garbage bags close to home—in a garage waiting to be set out by the curbside, within the curtilage, or in a back porch—can engender privacy expectations. While the garbage bags remained within the curtilage, the claimants retained control over them and could have retrieved them or items contained in them. It is not unheard of for people to retrieve a newspaper or sales slip that had been mistakenly thrown away. A reasonable expectation of privacy in garbage would be at its greatest level when the garbage is still being accumulated in the home.

719 F.Supp. at 1404–05 (citations omitted). Though the trash in *Certain Real Property* remained within the curtilage, the court's reasoning applies with equal force in this case (even assuming Gregory's trash was outside the curtilage). Gregory's trash was not discarded at a dump, nor placed at the curb of a public street. Rather, the trash was placed in its usual place of pickup by the light pole, but that light pole was only about twenty-five feet from Gregory's home and nearly one hundred feet from the public roadway—decidedly not the "functional equivalent" of the curbside in *Greenwood. Certain Real Property*, 719 F.Supp. at 1405. Gregory's expectation of privacy in that trash was therefore greater than if it had been placed at the curb, and less than it would have been had the trash remained in the home. The trash was most certainly close enough to the home that Gregory could retain control over it and certainly could have retrieved an item from it prior to Cardinal Sanitation's normal pick up time a couple hours later.

The *Certain Real Property* Court also noted that, while not dispositive, "the fact that police trespassed to obtain the

garbage is of some relevance. Rather than inadvertent, the trespass was intentional and with the express purpose of finding evidence of drug activity in the garbage." *Id.* at 1405 (citing LaFave, *supra*, § 2.6(c), at 30). Officer Neal's trespass, like the officer's trespass in *Certain Real Property*, while not dispositive with respect to non-curtilage, is "of some relevance." *Id.* Gregory's limited license for Cardinal Sanitation to retrieve his trash at the normal time and in the normal course, was not sufficient for Officer Neal to enter Gregory's property (especially in the face of his "No Trespassing" signs) and did not somehow expose the trash to the public. Gregory testified about his privacy interest concerning his trash. The trash's close proximity to the home —as well as his visible efforts to flag his privacy intentions (e.g., vicious guard dog, "No Trespassing" signage, and the other facts discussed above)—clearly demonstrate that Gregory's subjective expectation of privacy in his trash was objectively reasonable (i.e., one that society would recognize as reasonable), regardless of whether it was placed in its usual place of pickup. No reasonable person would believe that someone from the public could walk (or drive) up Gregory's 100-foot driveway and rummage through his trash cans located a couple of car lengths from his home. The Court holds that under the facts of this case, Gregory was entitled to Fourth Amendment protection until his trash was taken to the curb (or an area readily accessible to the public), or removed by the trash collector in the normal course of collection. This was an unreasonable search in violation of Gregory's Fourth Amendment rights.

***275 C. The Exclusionary Rule**

For the reasons stated above, the Court finds that Officer Neal and Flynn, both acting as state actors, conducted an unreasonable search of Gregory's property. As a result of that illegal conduct, Officer Neal secured video footage of Gregory's property, as well as certain items from the trash, which were then cited as support for a search warrant. With that search warrant, law enforcement conducted a search of Gregory's home and obtained additional evidence, which Gregory moves this Court to suppress along with the trash pull evidence.

Under the "fruit of the poisonous tree" doctrine, "evidence unlawfully obtained, including all derivative evidence flowing from it, should be suppressed." *United States v. McClain*, 444 F.3d 556, 564 (6th Cir. 2005) (citation omitted). This doctrine would require the suppression of any evidence obtained as a consequence of the illegal trash pull, including the evidence from the trash cans and the evidence seized from Gregory's home as a result of the search warrant. However, an illegal search or seizure does not automatically require suppression. *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Suppression is not warranted if: "(1) the government learns of the evidence from an 'independent source'; (2) the connection with the unlawful search becomes 'so attenuated as to dissipate the taint'; or (3) the evidence 'would inevitably have been discovered.' " *Id.* (internal citations omitted). The good faith exception, explained below, could also prevent the suppression of the fruit of an illegal search.

Importantly, the Court must consider whether it would be appropriate to exclude the evidence under the facts of this particular case. To do so, the Court must "weigh[ ] the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence." *Id.* at 907, 104 S.Ct. 3405. When balancing the costs and benefits of the exclusionary rule, the Court is mindful of its purpose: to deter police misconduct. *Leon*, 468 U.S. at 916, 104 S.Ct. 3405. Against this benefit of deterrence, the Court weighs the high costs of exclusion. For example, as a result of exclusion, guilty defendants may go free or receive significantly reduced sentences through favorable plea agreements. *Id.* at 907, 104 S.Ct. 3405; *see also Hudson v. Michigan*, 547 U.S. 586, 595, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (explaining that suppression of evidence may "amount[ ] in many cases to a get-out-of-jail-free card"). In some cases, the favorable outcome for defendants may "offend[ ] basic concepts of the criminal justice system," "[p]articularly when law enforcement officers have acted in objective good faith or their transgressions have been minor." *Leon*, 468 U.S. at 907–08, 104 S.Ct. 3405 (citation omitted). Accordingly, the exclusionary rule should not be indiscriminately applied, as this "may well 'generat[e] disrespect for the law and administration of justice.' " *Id.* at 908, 104 S.Ct. 3405 (quoting *Stone v. Powell*, 428 U.S. 465, 491, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). Stated another way, exclusion is an appropriate remedy only when the deterrence benefits outweigh its high costs. *Davis v. United States*, 564 U.S. 229, 238, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (citation omitted). This presents a "high obstacle" for those seeking application of the exclusionary rule. *Hudson*, 547 U.S. at 591, 126 S.Ct. 2159 (quoting *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364–65, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998)).

1. The Good Faith Exception

As the above-cited cases make clear, "the deterrence benefits of exclusion ***276** 'var[y] with the culpability of the law enforcement conduct' at issue." *Id.* (quoting *Herring v. United States*, 555 U.S. 135, 143, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)). For example, "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* (citing *Herring*, 555 U.S. at 144, 129 S.Ct. 695). However, when law enforcement officers "act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence," then the deterrence rationale behind the rule is weakened. *Id.* (internal citations omitted). Although the government's arguments are somewhat unclear, the United States relies primarily on this good faith exception to argue against suppression. [R. 84, pp. 18–20]

The Court finds that the circumstances of this case warrant exclusion of the evidence obtained from the trash pull. This is not a case in which the law enforcement officer acted with a reasonable good-faith belief. Rather, Officer Neal knowingly trespassed onto Gregory's private property, with absolutely no lawful justification. When pressed to explain the legality of his actions, he offered no valid explanation:

> Question: Is it correct that you didn't have any other purpose for being on Mr. Gregory's property except for this trash pull?
>
> Officer Neal: Yes.

[R. 81, p. 64] He insisted that his presence at the trash pull was necessary to "maintain chain of custody or to say there was no contamination of the bags, the trash," *id.* at 41, and there was no other way to accomplish the trash pull:

> Question: So you're saying without you being ... in the cab of the truck, there was no other way [to accomplish the trash pull]?
>
> Officer Neal: Right.
>
> Question: None whatsoever?
>
> Officer Neal: I don't think so. I mean, I would have to stay with the bags.

Id. at 63.

The Court finds, however, that this trained law enforcement officer did not reasonably believe, in good faith, that it was necessary that he trespass onto the private property of an individual in order to achieve these goals. Based on this Court's review of the trash pull case law, law enforcement accomplish lawful trash pulls routinely and without unlawfully trespassing onto private property. *See, e.g., Jackson*, 728 F.3d at 372–75 (finding officers lawfully obtained evidence from trash pull where cans were not located in the curtilage but rather were located on a common area of the apartment complex); *Greenwood*, 486 U.S. at 37, 108 S.Ct. 1625 (explaining that officer "asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood left on the curb in front of his house and to turn the bags over to her without mixing their contents").[7]

Officer Neal also insisted his presence and the video were necessary "to show that [he] had *no involvement* in collecting the trash." [*Id.* at p. 48, 108 S.Ct. 1625 (emphasis added)] The Court wonders how Officer Neal had "no involvement" in the trash collection, but yet his presence was *necessary* to establish the chain of custody and lack of involvement. He could not have ***277** reasonably believed, in good faith, both of these things at the same time.

More to the point concerning Officer Neal's good faith, despite Officer Neal's insistence of the video's evidentiary import to establish the chain of custody, the video surfaced only on the morning of the first suppression hearing, and only after defense counsel fortuitously subpoenaed Officer Neal along with any "body cam" video. [R. 82] This was several months after the government provided discovery to defense counsel (with no video included). Notably, the original discovery production apparently included pictures of the trash pull evidence after its collection that were taken from the same sheriff's office-issued cell phone used to create the video. [R. 81, p. 58] Despite his insistence regarding the evidentiary importance of the video, Officer Neal notably failed to turn over the video to the defense (and apparently even to the government) until subpoenaed.[8] [R. 82] This omission raises concerns about the credibility of Officer Neal's testimony on this and other issues.[9]

The Court next turns to the evidence obtained by the search warrant of Gregory's house. The affidavit supporting that search warrant relied heavily on the now-suppressed evidence from the trash pull. First, the Court notes that Magistrate Judge Atkins found the affidavit in support of the search warrant lacked probable cause (even *with* the trash pull

evidence), and the Court agrees. [R. 60] Judge Atkins upheld the search, however, under the good faith exception. On this tenuous reed the government asks the Court to heap another layer of "good faith" to save the search of Gregory's house. But here the good faith exception ultimately collapses under the additional weight of the botched trash pull.

The Sixth Circuit previously considered "whether the good faith exception to the exclusionary rule can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment." *McClain*, 444 F.3d at 565. In *United States v. McClain*, two officers responded to a "suspicious incident" at a ***278** vacant home. Concerned that a burglary was taking place at the home, the officers conducted a warrantless search of the residence. They did not find any drugs or witness any illegal activity, but they did discover plant stimulators, grow lights, and other items that indicated a marijuana growing operation. Officers thereafter obtained a search warrant based on that evidence. The Sixth Circuit first held that the officers lacked sufficient probable cause to perform the initial warrantless search, and exigent circumstances did not exist to support the search. *Id.* at 561–64. The Court noted that the officers acted in good faith, and "[s]ometimes the line between good police work and a constitutional violation is fine indeed." *Id.* at 563. However, an "unparticularized hunch that a crime was being committed" inside the home was not enough to justify the warrantless search. *Id.* at 564.

The Court next considered whether the good faith exception should apply to the evidence seized as a result of the search warrant. The Court acknowledged a divide among the circuits on this issue, but ultimately concluded that "this is one of those *unique cases* in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation." *Id.* at 565 (emphasis added). The Court noted that, under the good faith exception, evidence should not be "subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid." *Id.* at 566 (quoting *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989)) (internal quotation marks omitted). In the *McClain* case, "the facts surrounding the initial Fourth Amendment violation were 'close enough to the line of validity to make the officer's belief in the validity of the warrant objectively reasonable.' " *Id.* (quoting *White*, 890 F.2d at 1419). The Court explained that the officers were not objectively unreasonable in suspecting that a burglary was taking place in the defendant's home, nor was there any evidence that the officers knew their search of the home was illegal. *Id.* "More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search, and [the] warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search." *Id.*

This case is distinguishable from *McClain.* As explained above, Officer Neal could not provide any plausible justification for his trespass onto Gregory's property, nor explain any legitimate basis for recording Gregory's property on his cell phone (and failing to turn it over until subpoenaed). Thus, unlike *McClain*, this case is not one in which the facts are "close enough to the line of validity" to save from exclusion the evidence obtained as a result of the search warrant. Furthermore, Officer Neal is the same officer who completed the affidavit that supported the search warrant (which omitted any reference to the video tape and claimed the trash evidence was obtained "during the routine collection of [Gregory's] trash."). [R. 31-2] This fact also distinguishes the case from *McClain*, where the officers who sought and executed the search warrant acted in good faith and were not the same officers who conducted the warrantless search.

One more point about Officer Neal's good faith. As mentioned, the good faith exception only protects conduct that is "objectively reasonable." *Leon*, 468 U.S. at 919, 104 S.Ct. 3405. Generally, that standard is met "only when an (ultimately incorrect) legal authority approved of the officers' actions," such as a warrant later found invalid, or a statute or binding appellate precedent later overturned. ***279** *United States v. Lee*, 862 F. Supp. 2d 560, 568 (E.D. Ky. 2012). Officer Neal's actions were not objectively reasonable because the Fourth Amendment's prohibition on law enforcement entering the curtilage of a person's home with the intent of performing a search was clear at the time of the trash pull. *See, e.g., Jardines*, 569 U.S. at 10–11, 133 S.Ct. 1409; *Morgan*, 903 F.3d at 565. Even so, Officer Neal gave no thought whatsoever to whether his warrantless entry onto Gregory's property included the curtilage. Another deterrence goal served by suppression is for Officer Neal (and others like him) to take heed of the Fourth Amendment's requirements.

2. Inevitable Discovery and Attenuation Exceptions

Finally, the Court will address the government's arguments for saving the evidence from the trash pull and residence search under other exceptions to the "fruit of the poisonous tree" doctrine. As noted above, under the "fruit of the poisonous

tree" doctrine, "evidence unlawfully obtained, including all derivative evidence flowing from it, should be suppressed." *McClain*, 444 F.3d at 564 (citation omitted). The burden is on the government to show that suppression is inappropriate through one of the exceptions (i.e., independent source, attenuation, or inevitable discovery). *United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996).

In its post-hearing brief, the government for the first time makes undeveloped arguments related to inevitable/"but for" discovery and attenuation: "Flynn's collection of the garbage would have occurred all the same even if Officer Neal had driven separately to the residence and observed Flynn's collection from the road."[10] [R. 84, p. 17] But this (late) argument ignores the clear facts of this case: Officer Neal did *not* simply watch from the street and Flynn did *not* collect the trash as part of Cardinal Sanitation's "normal [trash collection] activities." *Bruce*, 396 F.3d at 706. The facts developed demonstrate that Flynn and Officer Neal arrived at Gregory's house a couple hours earlier that the normal trash pick-up time. And Flynn testified that but for Officer Neal's instructions concerning the trash pull on November 28, 2018, this is *not* how the trash would have been picked up that day (or any other day). Maybe Gregory's trash would have been picked up later that morning by the normal truck and crew. But maybe Gregory would have screened his trash in the interval to remove the evidence of his drug use ultimately seized. We simply do not know because Officer Neal jumped the gun. The government bears the burden of proving this exception, and their wholly undeveloped argument fails.

Likewise, the government's half-hearted attenuation argument ("Officer Neal's presence in the driveway is too attenuated to merit suppression of evidence found in the garbage Flynn collected," [R. 84 at 18]) fails for the same reasons as their inevitable discovery argument. Whether a piece of information is "so attenuated as to dissipate the taint" depends on three factors: temporal proximity of the new information to the taint, intervening circumstances, and the "purpose and flagrancy of the official misconduct." *Brown v. Illinois*, 422 U.S. 590, 603–04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *United States v. Mills*, 372 F. Supp. 3d 517, 537 (E.D. Mich. 2019). Not all three factors are equally weighted; rather, whether something is temporally proximate depends on whether there were intervening circumstances, and the ***280** presence or absence of misconduct is the most important factor. *United States v. Shaw*, 464 F.3d 615, 627–28, 630 (6th Cir. 2006).

There were no temporal gaps or intervening circumstances between Officer Neal's presence in the trash truck and its retrieval by Flynn, his agent. Indeed, the facts developed at the evidentiary hearing demonstrate that Officer Neal orchestrated and directed the entire trash pull, and insisted his presence was a necessary part of effectuating the warrantless search. Likewise, there were no gaps or intervening circumstances between the trash pull and the residential search. The warrant for Gregory's residence was obtained later the same day and relied on the trash pull evidence. Further, Officer Neal testified he conducted no additional investigation after the trash pull and before obtaining the search warrant. [R. 48 (first evidentiary hearing)].

Finally, the "purpose and flagrancy" of Officer Neal's misconduct—the "most important" factor—weighs strongly against attenuation. *Shaw*, 464 F.3d at 630. The Sixth Circuit has explained that law enforcement officers act with an unlawful purpose when they undertake an "investigatory" search—that is, "when officers unlawfully seize a defendant 'in hope that something might turn up.' " *United States v. Williams*, 615 F.3d 657, 670 (6th Cir. 2010) (quoting *Brown v. Illinois*, 422 U.S. 590, 605, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)); *see also Shaw*, 464 F.3d at 631 (noting that "*Brown* made it clear that the requisite 'quality of purposefulness' can be demonstrated when the [misconduct], in design and execution, is investigatory in nature"). Here, we do not have to guess at the "quality of purposefulness" related to Officer Neal's conduct. He readily acknowledged his only reason for entering Gregory's private property was to further his drug investigation. The following exchange between defense counsel and Officer Neal highlights the flagrancy:

> Q. Well, you said that before you ever went to Mr. Gregory's residence that day, that you had received information from four different law enforcement agencies that Mr. Gregory was involved in illegal drug usage, correct?
>
> A. I wouldn't have been collecting the trash if I didn't think he was doing that.
>
> Q. And you wouldn't have been videotaping the process if it wasn't for use in a criminal investigation of Mr. Gregory, would you?
>
> A. I videoed to show that I had no involvement in collecting the trash.
>
> Q. Let me ask it this way. Let's just assume you weren't in Mr. Flynn's truck on that particular day. Instead, you

just parked your police cruiser at the bottom of the driveway of Mr. Gregory's. Do you believe you would have been authorized to get out of your car at that point in time, whip out your cellphone camera, turn the video on, walk up the driveway, and start videotaping around Mr. Gregory's house, standing in the same location where you were seated in Mr. Flynn's truck?

A. I don't know the answer to that question.

Q. Well, you don't do that, do you?

A. Not generally, no.

Q. Do you walk up to people's houses that you don't have a warrant to go on their property and you walk right up to their house and start videotaping with a camera for a criminal investigation? Do you believe you're authorized to do that?

***281** A. Walk up the driveway? You're saying walk up the driveway or what?

....

Q. If you can answer that yes or no. Do you believe you're legally authorized to walk up to a person's house like Mr. Gregory, all the way up the driveway to the point where you were sitting in Mr. Flynn's truck, that same point, stand there with your video camera and videotape around his house? Yes or no?

A. Yes. Under certain circumstances, yes.

Q. Which circumstance?

A. There's such thing called a knock-and-talk.

Q. Okay.

A. You can see everything in plain view. It's no different than wearing a body cam.

Q. Okay. That's what I want to ask. But you weren't doing a knock-and-talk, were you?

A. I was riding in the truck.

Q. You weren't doing a knock-and-talk. You didn't go up to the door and knock on it, did you?

A. No.

....

Q. You don't walk up to people's houses and do that without a warrant, do you?

A. Under certain circumstances, yes.

Q. Such as? Other than the walk-and-talk, the knock-and-talk circumstance, what other circumstance authorizes you to do that?

A. Well, a stolen vehicle that I can verify from the road, a stolen vehicle. I mean, there's circumstances that it's possible that that could happen, yes.

Q. Did you have a stolen vehicle in this case?

A. I didn't see one.

Q. Tell me some exception that would authorize you to do that in this case.

A. I don't know.

Q. Tell me what about being in Mr. Flynn's pickup truck or garbage truck that day authorized you to go up to his house like that and videotape to further your criminal investigation.

....

Q. You had no exception under a stolen vehicle case in this case to walk up, did you?

A. No.

Q. Are there any other special circumstances about this case that you believe would have authorized you to walk up on his private property to the point where you were in Mr. Flynn's truck and videotape around his residence?

A. No. I was a passenger in a truck.

[R. 81, pp. 47–52]

Officer Neal (and apparently other law enforcement officers) had Gregory in their sights for some time. When other lawful investigatory measures apparently did not pan out, Officer Neal trespassed onto Gregory's property, cell phone camera in tow, "in the hope that something might turn up." *Williams*, 615 F.3d at 670. Officer Neal could not articulate a single lawful purpose for his actions, and this Court finds none. Officer Neal's unlawful purpose weighs heavily in favor of suppression, like the other factors. The government's one-line attenuation argument fails.

In sum, Officer Neal—and Flynn, acting at Officer Neal's direction—trespassed onto Gregory's private property, videotaped it, and seized Gregory's trash outside ***282** Cardinal Sanitation's normal trash collection procedures as part of a warrantless search to further his criminal investigation. Officer Neal could not articulate a single legal or "good faith" justification for these actions, and this Court finds none. Under these circumstances, the good faith exception and the other exceptions argued by the United States are inapplicable, and the benefits of exclusion—namely, to deter similar police misconduct in the future—outweigh the costs. The facts of this case therefore mandate suppression of the evidence obtained from the trash pull, including the items seized from the trash and the cell phone video,[11] and the evidence seized from Gregory's home as a result of the search warrant.

V. CONCLUSION

For the reasons set forth above, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED** as follows:

1. Defendant's Motion to Reconsider, Amend, and Vacate [**R. 61**] is **GRANTED**.

2. This Court's February 6, 2020 Order Adopting Magistrate Judge's Recommended Disposition [**R. 60**] is **VACATED**.

3. Defendant's Motion to Suppress [**R. 31**] is **GRANTED**.

All Citations

497 F.Supp.3d 243

Footnotes

1 The Court finds Flynn's testimony concerning when and how the trash was collected (and at whose direction) to be highly credible.

2 The Court finds the testimony of Koger and Flynn concerning the landscape surrounding Gregory's home, and its uses, to be credible and corroborated by the photographic exhibits.

3 First, *Bruce*'s state action holding appears to be dicta. The Court stated "we *doubt* that either prong of the *Lambert* test has been satisfied." *Bruce*, 396 F.3d at 706 (emphasis added). The Court went on to hold that even had the cleaning staff been state actors, the defendant had no reasonable expectation of privacy in the trash placed in the hotel room where the officer credibly testified that he instructed the hotel management "that the cleaning staff should collect the trash ... only during their *ordinary cleaning routine*," and where the evidence demonstrated that no "Do Not Disturb" sign was on the door. *Id.* at 708; *see also infra* Section IV(A) (discussing *Bruce*).

4 The pictures reflect no sidewalk (or even path) directly leading to the front porch.

5 The "plain view" argument alluded to by the government, [R. 84 at 16], is irrelevant because that exception involves situations where law enforcement are *lawfully* on defendant's property. *See Morgan*, 903 F.3d at 563 (law enforcement "discovered the marijuana only after entering [defendants'] constitutionally protected curtilage. The plain-view exception does not apply").

6 The United States argues that Gregory "admitted he knew his trash was susceptible to ... snoops once he set it out for collection," citing certain testimony from the first evidentiary hearing. [R. 84, p. 7] However, it is clear from a review of that hearing that Gregory acknowledged only that people could look through his trash once it was placed "in the designated area," which he defined as the area down by the road, *not* by the light pole.

7 To be clear, the Court's ruling is limited to the facts of this case. Trash pulls can be lawfully accomplished, as evidenced by the large body of case law. But here, the trash pull was accomplished unlawfully.

8 At the first evidentiary hearing, Officer Neal testified that he had produced the cell phone video during the state court proceedings and, "to [his] knowledge," had presented the video to DEA Agent Chris Lyon at an earlier date, "before this process started." At the second evidentiary hearing, Officer Neal testified that he would have turned over the video to the DEA agent and the U.S. Attorney's office at the same time he turned over the rest of his case file but had "no idea"

when that was. [R. 81, pp. 54–55] After the second hearing, and in response to an Order from the Court directing the United States to trace the path of the tardy video [R. 76], the government advised that Officer Neal "inadvertently" failed to produce the video along with the rest of his case file, and instead provided it to the government for the first time the weekend prior to the first evidentiary hearing, which took place on a Monday, in response to defense counsel's subpoena. [R. 82] The United States explained that, on October 5, 2019, the Saturday before the hearing, Officer Neal discussed the subpoena with DEA Agent Chris Lyon and mentioned that he had recorded a video of the trash pull on his cell phone. *Id.* At that time, neither Agent Lyons nor the U.S. Attorney's office were aware of any such video. *Id.* The government then turned the video over to defense counsel on the morning of the first evidentiary hearing. *Id.* In other words, when Officer Neal testified at the first evidentiary hearing that he had already turned over the cell phone video to the government at an earlier date, he had actually produced the video *for the first time* less than forty-eight hours prior, in response to a subpoena. Clearly, having discussed this issue with Agent Lyons that Saturday, he was aware of this fact.

9 The Court also notes that the video is focused almost entirely on the front and side of Gregory's house, not the trash.

10 The government does not argue under the inevitable discovery exception.

11 The United States has repeatedly stated that it does not intend to use the cell phone video as evidence in this case.

594 F.3d 522
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of
America, Plaintiff–Appellee,
v.
Stephen Lee BOWERS, Defendant–Appellant.

No. 08–2412.
|
Argued: Jan. 21, 2010.
|
Decided and Filed: Feb. 8, 2010.

Synopsis

Background: Following denial of motion to dismiss the indictment in the United States District Court for the Eastern District of Michigan, Gerald E. Rosen, J., 2007 WL 4465263, defendant was convicted of sexual exploitation of a child in the manufacture of child pornography and possession of child pornography. Defendant appealed.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

defendant's roommate and her boyfriend did not act as government agents when they discovered picture album, and

applying child pornography statute to defendant did not exceed Congress's power under the Commerce Clause.

Affirmed.

Attorneys and Law Firms

***523 ARGUED:** Matthew C. Brown, Law Office, Bloomfield Hills, Michigan, for Appellant. Leonid Feller, Assistant United States Attorney, Detroit, Michigan, for Appellee. **ON BRIEF:** Matthew C. Brown, Law Office, Bloomfield Hills, Michigan, ***524** Timothy P. Flynn, Karlstrom Cooney, Clarkston, Michigan, for Appellant. Leonid Feller, Assistant United States Attorney, Detroit, Michigan, for Appellee.

Before MERRITT, MOORE, and GIBBONS, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

This case requires us to address the continued viability of an as-applied Commerce Clause challenge to a child-pornography conviction under 18 U.S.C. § 2251(a) and 18 U.S.C. § 2252(a)(4)(B), following the Supreme Court's decision in *Gonzales v. Raich,* 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). Because *Raich* makes clear that if a "general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence," *Raich,* 545 U.S. at 17, 125 S.Ct. 2195 (internal quotation marks omitted), Defendant Stephen Lee Bowers's claim that his wholly intrastate, homemade child pornography falls outside the purview of congressional legislative power is meritless. In so holding, we now recognize explicitly that *United States v. Corp,* 236 F.3d 325 (6th Cir.2001), is no longer the law of the Circuit. Bowers's additional challenge to the private-citizen search that uncovered incriminating evidence is also unavailing. We thus **AFFIRM** the judgment of the district court.

I. BACKGROUND

Defendant Stephen Lee Bowers was convicted by a jury of the sexual exploitation of a child in the manufacture of child pornography in violation of 18 U.S.C. § 2251(a) and the possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The facts uncovered at trial, viewed in the light most favorable to the jury's verdict, reveal the following. At the time of his arrest, Bowers resided in a two-story house with a house mate, Titania Valdez. Bowers's bedroom was located on the first floor of the residence while Valdez's bedroom was on the second floor. They shared a kitchen, dining area, bathroom, and common room on the first floor of the house. While Bowers was away for several days on an out-of-town trip in April 2007, Valdez's boyfriend, William McDowell, entered Bowers's bedroom without having obtained Bowers's permission. While snooping, McDowell uncovered an album of what he believed to be child pornography on Bowers's dresser and showed the album to Valdez. Valdez then called her landlord, Rhonda Garza, who, in turn, called the FBI.

In response to Garza's call, two FBI agents, Agents Taube and Winterhalter, arrived at the house. Valdez invited the agents into the home. Agent Taube confirmed the living arrangements in the dwelling, and Valdez assured the agents that they were standing in a shared area of the home. Valdez then directed the agents to the dining room or kitchen table, which was also located within the shared area. Agent Taube immediately "observed [a] black binder" on the table, which Valdez indicated was the album in question. Taube Test., Hr'g Tr. of 9/10/07, at 29–30 (Doc. 63). The agents reviewed the album, confirmed that it likely contained child pornography, and obtained a search warrant for Bowers's bedroom. During the search, the agents uncovered additional pornographic material. The photographs that the agents uncovered in both the album and the subsequent search of Bowers's room included sexual images of young girls both awake and as they slept. In some of the photographs, Bowers had staged the girls in sexual positions, and he ***525** appeared naked beside them and while touching them in a sexual manner. Police also uncovered photographs of children's faces, including his daughter, pasted on pornographic photographs of adults.

Following his arrest, Bowers waived his *Miranda* rights and admitted in a signed, written statement that he had taken the photographs in the album during an approximately two-year time period when he hosted sleep-over parties for his minor daughter and at least three of her minor friends. Haws Test., Trial Tr. of 6/18/08, at 201–05, 207 (Doc. 66). Bowers acknowledged that his daughter and her friends were ten- or twelve-years old at the time of the photographs and that he knew their ages when he took the photographs. *Id.* at 204, 207–08. Bowers stated that he "took photographs of these girls to include pictures of [him]self in their company naked." *Id.* at 208. According to law-enforcement testimony, Bowers admitted that he had shown the photographs to "lots of people," *id.* at 205, but there is no additional evidence in the record or in his written statement regarding his display of the images. There is no allegation that Bowers ever otherwise distributed the photographs or that any of the activity involved in the photographs took place outside the State of Michigan. The record does reflect that Bowers took the photographs with film that had traveled in interstate commerce.

Prior to trial, Bowers filed a motion to suppress the photograph album as the product of an unlawful search and a motion to dismiss the indictment based on the fact that his manufacture and possession of child pornography was noncommercial, wholly intrastate activity that the federal government was without jurisdiction to regulate. Following an evidentiary hearing, the district court denied the motion to suppress, concluding that the album was uncovered during a private search and that the search failed to implicate the Fourth Amendment. The district court also denied the motion to dismiss. Bowers proceeded to trial, and a jury found him guilty on both child-pornography counts. He timely appealed.

II. ANALYSIS

A. Private–Citizen Invasion Did Not Violate the Fourth Amendment

Bowers first argues on appeal that the district court erred in denying his motion to suppress because Valdez and McDowell were acting as instruments or agents of the government when they uncovered the incriminating photograph album. Bowers reasons that because the invasion of his privacy would have been unlawful under the Fourth Amendment had the government agents actually conducted it, McDowell's action is itself unlawful. Bowers also claims that the photograph album was not located on the table when the agents arrived but that Valdez and McDowell conducted a second private-citizen search when they retrieved the album from his bedroom for the agents. We hold Bowers's argument unavailing because Valdez and McDowell never acted as instruments of the government and because law-enforcement officers did not otherwise conduct an unlawful search.

In reviewing the "denial of a motion to suppress, we review [the district court's] conclusions of law and application of the law to the facts ... de novo." *United States v. Hardin,* 539 F.3d 404, 416 (6th Cir.2008) (internal quotation marks omitted). We review a district court's factual findings for clear error. *United States v. See,* 574 F.3d 309, 313 (6th Cir.2009).

This Circuit uses a "two-factor analysis" in determining "whether a private party is acting as an agent of the ***526** government" such that the Fourth Amendment applies. *Hardin,* 539 F.3d at 418. Those two factors require an analysis of "(1) the government's knowledge or acquiescence" to the search, and "(2) the intent of the party performing the search." *Id.* (internal quotation marks omitted). If "*the intent of the private party* conducting the search *is entirely independent* of the government's intent to collect evidence for use in a criminal prosecution," then "the private party is not an agent of the government." *Id.* (internal quotation marks omitted).

In the instant case, neither party contests the fact that law-enforcement agents were not present or involved in McDowell's initial discovery of the album. The FBI gained knowledge of the incriminating evidence as a result of Garza's phone call, and it was only after that privately initiated phone call that the agents arrived at the residence and were invited by a resident of the home to enter the dwelling and to view the previously privately discovered incriminating evidence. The Supreme Court has indicated that it is the moment of the "official invasion of the citizen's privacy" that is key to determining the reasonableness of that action. *United States v. Jacobsen,* 466 U.S. 109, 115, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *see also Hardin,* 539 F.3d at 418–20. In this case, because it was wholly private action that first uncovered the album, with neither involvement by law enforcement nor an intent to aid law enforcement, Valdez and McDowell cannot be considered government agents at the time that the album was discovered initially.[1] *See Jacobsen,* 466 U.S. at 115, 104 S.Ct. 1652 ("Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character." (footnote omitted)); *cf. Hardin,* 539 F.3d at 418 (holding a private party acted as a government agent in conducting a search because the search was "without a doubt the officers' idea" and the officers had sent the private citizen to conduct the search (internal quotation marks omitted)).

The agents' subsequent viewing of what Valdez and McDowell "freely made available for [their] inspection did not violate the Fourth Amendment." *Jacobsen,* 466 U.S. at 119, 104 S.Ct. 1652. Furthermore, based on Valdez's statements that the album contained child pornography, the agents were justified in opening the album to view the potentially incriminating evidence. *See id.* In doing so, the agents "learn[ed] nothing that had not previously been learned during the private search" and "infringed no legitimate expectation of privacy." *Id.* at 120.

To the extent that Bowers argues that Valdez or McDowell conducted a second "search" at the behest of law enforcement because either Valdez or McDowell reentered Bowers's bedroom to obtain the photograph album when the agents arrived, this claim is unsupported by the record. According to the testimony of the two agents, when they entered the house, the album was located on the dining room table, in a shared space, and was readily visible. Agent Taube, when asked, specifically ***527** denied asking Valdez or McDowell to obtain the album from a private space and testified several times that he "definitely did not direct [Valdez] to enter [Bowers's] room." Taube Test., Hr'g Tr. of 9/10/07, at 30 (Doc. 63); *see also id.* at 33–34. Agent Taube also stated that he believed that Valdez and McDowell remained in his sight from the time the agents entered the dwelling until the moment that he saw the album in the shared space and that he did not remember either party leaving the room to retrieve the album. *Id.* at 30–31. Agent Winterhalter's testimony confirmed the same.

Bowers attempts to attack the agents' testimony by asserting that McDowell initially had told an investigator with the Federal Public Defender's Office that McDowell had returned the album to Bowers's room and retrieved it again later at the agents' request. At the suppression hearing, however, McDowell denied making this statement and indicated that the album "was laying on the dining room table" when the agents arrived. McDowell Test., Hr'g Tr. of 10/10/07, at 10–11 (Doc. 64).[2] Apparently confident that Bowers would be gone for the entire weekend, McDowell felt no need to return the incriminating evidence to Bowers's room in order to cover-up his snooping.

Because neither Valdez nor McDowell was acting as a government agent when they first discovered the album, the album was in a common area of the house when the agents arrived, and there is no evidence that the agents exceeded the scope of the initial private search, we conclude that the district court properly denied Bowers's motion to suppress.

B. As–Applied Challenge Fails Under the Commerce Clause

Bowers next raises an as-applied challenge under the Commerce Clause to the constitutionality of 18 U.S.C. § 2251(a) and 18 U.S.C. § 2252(a)(4)(B), which prohibit the manufacture and possession of child pornography produced using materials that were mailed, shipped, or transported in interstate or foreign commerce. *See* 18 U.S.C. §§ 2251(a); 2252(a)(4)(B). Bowers argues that because he produced and possessed child pornography for noncommercial reasons and the activity was wholly intrastate, the Government must establish that his individual actions substantially affected interstate commerce in order for the statutes to be applied constitutionally, which the Government has failed to do. Bowers relies on the Supreme Court's decisions in *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), and *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), as well as this Circuit's decision in *United States v. Corp,* 236 F.3d 325 (6th Cir.2001),

to support his argument. We review de novo a challenge to the constitutionality of a statute, *United States v. Rose,* 522 F.3d 710, 716 (6th Cir.2008), and conclude that Bowers's as-applied challenge is without merit.

This Circuit has determined previously that in analyzing the as-applied constitutionality of child-pornography laws, the Supreme Court's analysis in *Raich* is controlling. *See United States v. Chambers,* 441 F.3d 438, 454 (6th Cir.2006). In *Raich,* the Supreme Court reemphasized that "case law firmly establishes Congress' [s] ***528** power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich,* 545 U.S. at 17, 125 S.Ct. 2195 (citing *Perez v. United States,* 402 U.S. 146, 151, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971), and *Wickard v. Filburn,* 317 U.S. 111, 128–29, 63 S.Ct. 82, 87 L.Ed. 122 (1942)). The Court further indicated that, as *Wickard* established, "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18, 125 S.Ct. 2195. When the larger "general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17, 125 S.Ct. 2195 (internal quotation marks omitted).

Here, there is no question that Congress has a legitimate basis for attempting to regulate the interstate market in child pornography and that the statutes that Bowers challenges are part of a larger comprehensive scheme to regulate that illicit interstate market. *See United States v. Brown,* 327 Fed.Appx. 526, 532–33 (6th Cir.2006), *cert. denied,* 549 U.S. 1273, 127 S.Ct. 1506, 167 L.Ed.2d 244 (2007); *Chambers,* 441 F.3d at 455. In fact, Bowers does not contest Congress's power to enact comprehensive child-pornography laws generally. The question under *Raich,* then, as relevant to this case, is whether Congress had "a rational basis for concluding that leaving home-consumed [and produced child pornography] outside federal control would ... affect price and market conditions" of the larger interstate market that Congress was authorized to regulate, thus allowing it to criminalize wholly intrastate activity as part of its larger comprehensive scheme. *Raich,* 545 U.S. at 19, 125 S.Ct. 2195.

In *United States v. Chambers,* a panel of this court determined that Congress did have a rational basis for regulating possession of child pornography in 18 U.S.C. § 2254(a)(4)(B), and upheld that section as constitutional against an as-applied challenge. *Chambers,* 441 F.3d at 455 (" 'Congress has a rational basis for believing that homegrown child pornography can feed the national market and stimulate demand.' " (quoting *United States v. Gann,* 160 Fed.Appx. 466, 472 (6th Cir.2005))); *see also Brown,* 327 Fed.Appx. at 533. In *Chambers,* like here, "[t]he only evidence [that] the government [had] put forth in support of the interstate or foreign commerce connection was that the ... film used was produced" out of state. *Chambers,* 441 F.3d at 451. We likewise conclude that Congress had a rational basis for believing that the failure to regulate the wholly intrastate production of child pornography, as it has done in 18 U.S.C. § 2251(a), would undermine equally its larger regulatory scheme. *See United States v. McCalla,* 545 F.3d 750, 755–56 (9th Cir.2008), *cert. denied,* 555 U.S. 1174, 129 S.Ct. 1363, 173 L.Ed.2d 591 (2009) (rejecting an as-applied challenge to a conviction under 18 U.S.C. § 2251(a) and refusing to "inquire into the specifics of [the defendant's] possession" because Congress rationally "conclude[d] that homegrown child pornography affects interstate commerce" (internal quotation marks omitted)).

As other Circuits have noted, much of *Raich's* reasoning as to why Congress possesses the power to regulate wholly intrastate drug activity in the furtherance of its larger regulatory scheme applies with equal force to child pornography. *See McCalla,* 545 F.3d at 755; *United States v. Maxwell,* 446 F.3d 1210, 1216 (11th Cir.), ***529** *cert. denied,* 549 U.S. 1070, 127 S.Ct. 705, 166 L.Ed.2d 545 (2006); *United States v. Forrest,* 429 F.3d 73,78–79 (4th Cir.2005); *United States v. Jeronimo–Bautista,* 425 F.3d 1266, 1272 (10th Cir.2005), *cert. denied,* 547 U.S. 1069, 126 S.Ct. 1771, 164 L.Ed.2d 516 (2006). And Bowers's case is no different. For example, even though Bowers claims that he was only interested in a particular type of child pornography—that involving his own child and her friends—and that he would not search for child pornography through other avenues or distribute his own, nonetheless Congress could have believed that even wholly intrastate production and possession involving a particular individual could be diverted eventually to the interstate market because of the high demand for child pornography on that market.[3] *Raich,* 545 U.S. at 22, 125 S.Ct. 2195; *Chambers,* 441 F.3d at 455. Congress could have also desired to regulate intrastate child pornography because of the enforcement difficulties inherent in distinguishing intrastate and interstate action. *Raich,* 545 U.S. at 22, 125 S.Ct. 2195.

In sum, *Raich* indicates that Congress has the ability to regulate wholly intrastate manufacture and possession of child pornography, regardless of whether it was made or possessed for commercial purposes, that it rationally believes, if left unregulated in the aggregate, could work to undermine Congress's ability to regulate the larger interstate commercial activity. *See Raich,* 545 U.S. at 22, 125 S.Ct. 2195 ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate *manufacture and possession* of marijuana would leave a gaping hole in the [Controlled Substances Act]." (emphasis added)); *see also Chambers,* 441 F.3d at 455. The fact that the Government did not prove Bowers's individual conduct substantially affected interstate commerce is irrelevant. *See Raich,* 545 U.S. at 23, 125 S.Ct. 2195 ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." (internal quotation marks and alteration omitted)). Bowers's as-applied challenge must fail. *See Chambers,* 441 F.3d at 455; *accord McCalla,* 545 F.3d at 756; *Maxwell,* 446 F.3d at 1218; *Forrest,* 429 F.3d at 79; *Jeronimo–Bautista,* 425 F.3d at 1273.

Despite the broad reach of *Raich,* Bowers argues that this panel still must employ the case-by-case analysis set forth in *Corp* to determine whether the activity in this case substantially affects interstate commerce. Bowers's argument is misplaced, and we take this opportunity to make clear that, after *Raich,* this court's decision in *Corp* is no longer good law. The panel in *Corp* relied on the Supreme Court's decisions in *Morrison* and *Lopez* to support its case-by-case analysis. *Corp,* 236 F.3d at 331–32. *Raich* makes clear, however, that *Lopez* and *Morrison* are no longer the controlling authorities in this type of as-applied challenge. *Raich,* 545 U.S. at 23, 125 S.Ct. 2195; *see also Chambers,* 441 F.3d at 454. Moreover, as outlined above, given Congress's broad regulatory power in the child-pornography arena, as well as its rational belief that wholly intrastate, noncommercial activity affects the larger interstate commercial market, a case-by-case analysis as conducted in *Corp* would completely contradict the Supreme Court's emphasis in *Raich* that where Congress has the federal ***530** power to regulate a class of activities, "the courts have no power to excise, as trivial, individual instances of the class," *Raich,* 545 U.S. at 23, 125 S.Ct. 2195 (internal quotation marks omitted), and the "*de minimis* character of individual instances arising under that statute is of no consequence," *id.* at 17, 125 S.Ct. 2195 (internal quotation marks omitted).[4] *See also Maxwell,* 446 F.3d at 1215 n. 5 ("[*Raich*] leaves some doubt as to whether, in the Commerce Clause context, an as-applied challenge may ever be sustained so long as Congress may constitutionally regulate the broader class of activities of which the intrastate activity is a part."). We cannot envision, after *Raich,* a circumstance under which an as-applied Commerce Clause challenge to a charge of child-pornography possession or production would be successful.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

All Citations

594 F.3d 522

Footnotes

1 Bowers highlights in his brief that there existed, at one point, conflicting stories surrounding how the photograph album was initially discovered in Bowers's room and whether it was McDowell, Valdez, or Garza who discovered it. Although the parties were not entirely forthcoming about the circumstances under which McDowell discovered the album, such inconsistencies and contradictions are irrelevant to our resolution of the search issue as it is plain that law-enforcement officers were entirely uninvolved in the initial discovery.

2 Furthermore, Bowers's assertion that "Agent Taub [sic] specifically testified that he asked Valdez to get the photo album," Appellant Br. at 25, is a mischaracterization of Agent Taube's testimony. Taube actually stated, "We asked if we could see the album in question. We walked into [the] dining room type area and they showed us the album." Trial Tr. of 6/18/2008, at 269 (Doc. 67).

3 The record also undercuts Bowers's claim of a "limited interest." The evidence at trial established that he had taken photographs of three children in addition to his own daughter and that he had shown the photographs to "lots of people."

4 Bowers is correct that no published opinion has held expressly that *Corp* is obsolete. He is also correct that, since *Raich,* several panels of this Circuit have cited *Corp* in cases involving as-applied challenges. *See Chambers,* 441 F.3d at 451–52; *United States v. Savoy,* 280 Fed.Appx. 504, 508 (6th Cir.), *cert. denied,* 555 U.S. 1077, 129 S.Ct. 742, 172 L.Ed.2d 739 (2008); *Brown,* 327 Fed.Appx. at 532–33; *Gann,* 160 Fed.Appx. at 471; *cf. United States v. Salazar,* 185 Fed.Appx. 484, 487 (6th Cir.), *cert. denied,* 549 U.S. 1010, 127 S.Ct. 531, 166 L.Ed.2d 394 (2006) (noting without further discussion that "*Corp* predates the Supreme Court's recent decision in *Gonzales v. Raich,* 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)"). Not one of those opinions, however, upholds an as-applied challenge applying *Corp's* analysis and many distinguish *Corp* on its "unique" facts. We do not believe that mere citation or mention of *Corp* assures its continued viability, and as no published opinion has addressed directly the continuing validity of *Corp* post-*Raich,* we take this opportunity to make clear that *Corp* is no longer the law of the Circuit. *Salmi v. Sec. of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir.1985) ("[A] prior [panel] decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision ...").

215 F.3d 951
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of
America, Plaintiff–Appellee,
v.
Ray Lewis BOWMAN, a.k.a.
Charles Clark, Defendant–Appellant.

No. 99–30120.
|
Argued and Submitted May 1, 2000
|
Filed June 12, 2000

Synopsis
Defendant was convicted of conspiracy to commit bank robbery, armed bank robbery, use and carrying of a firearm, and interstate transportation of stolen property by the United States District Court for the Western District of Washington, Franklin D. Burgess, J., and he appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) co-conspirator's statements to his girlfriend were admissible under co-conspirator exception to hearsay rule; (2) defendant did not have legitimate expectation of privacy in sealed garbage which he had left at curbside for pick-up; (3) information included in affidavit was not too "stale" to provide the necessary probable cause; (4) allowing witnesses to bank robberies to attend line-ups as group did not create very substantial likelihood of irreparable misidentification; and (5) applying five-level upward enhancement for defendant's "brandishing" of firearm during two of bank robberies charged as overt acts did not result in impermissible double-counting.

Affirmed.

Attorneys and Law Firms

***955** Peter Camiel, Mair, Camiel & Kovach, Seattle, Washington, for the defendant-appellant.

Katrina C. Pflaumer, United States Attorney, and Arlen Storm, Assistant United States Attorney, Tacoma, Washington, for the plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington; Franklin D. Burgess, District Judge, Presiding. D.C. No. CR–98–05121–FDB.

Before: LEAVY, RYMER, and T. G. NELSON, Circuit Judges.

Opinion

RYMER, Circuit Judge:

One of the most successful partnerships in the nation's history began more than a quarter of a century ago in Kansas City, Missouri and ended in 1997 with the arrests of Ray Lewis Bowman and William Arthur Kirkpatrick. They were known as the "Trench Coat Robbers." Their last hit, at Seafirst Bank in Lakewood, Washington, netted a record $4.4 million.

Both expert locksmiths, they would enter banks just before or just after business hours through locked doors. Wearing wigs, fake mustaches and beards, fedoras, baseball caps, tams, or fisherman's caps, and glasses or sunglasses, one of the two would tie-up bank employees with plastic electrical ties while the other would stand guard with a handgun. Bowman usually used whitish makeup and had an "L" shaped wire with a key on it around his wrist; Kirkpatrick usually had a police scanner piece in his ear. Kirkpatrick would case targets (sometimes with the help of his girlfriend, Myra Penney), arrange for rooms in the vicinity (in the case of Lakewood, under the alias "Don Wilson"), ***956** and pay the bills. Both Bowman and Kirkpatrick would be gone from home for weeks at a time. After a robbery they would split the take and head their separate ways, Bowman to Kansas City and Kirkpatrick to Burnsville, Minnesota. On his way home, Bowman would stop in different cities along the way, leaving stolen cash, guns and paraphernalia in safe deposit boxes or storage facilities.

Cheryl Clark met both Bowman and Kirkpatrick in the early 1970s, but started dating Bowman in 1983 and moved in with him a year later. Despite being unemployed, he spent money extravagantly on limousines, $800 dinners, expensive cologne, hand made silk shirts, and silk dresses for Clark. He used pay phones, a post office box, and gave money to Clark to deposit into her account. Once when Kirkpatrick got in trouble, Bowman told Clark that he had to help out Kirkpatrick's then wife, because "you take care of your partner's family." Clark saw Bowman experiment with fake mustaches and a wig; and once, when she could see into a room that Bowman always kept locked, she saw police

scanners and clothing she had never seen Bowman wear. After Clark and Bowman broke up in late 1989, he dated Jenny Delamotte and they started living together in September 1990. The lifestyle continued. He refused to tell Delamotte anything about his employment, but supported her, her child from a previous relationship, and their two children. He maintained a locked room, which Delamotte was not allowed to enter. And he continued to leave town with no advance notice or advice about where he was going or how to contact him.

Meanwhile Kirkpatrick lived with Penney from 1990 until 1997, primarily in the Minneapolis area. Unlike Bowman, Kirkpatrick told Penney he robbed banks for a living, and she helped by making phone calls, laundering the proceeds, and paying the bills. Kirkpatrick explained that he rented, and she therefore was to pay for, two rooms because "Ray snored." He rented two rooms in Fife, Washington before the Seafirst robbery using the alias of "Don Wilson," gave the bills to Penney, and she paid them.

Things started to unravel for Bowman when he failed to pay rent on a storage locker. On May 22, 1997 the manager at Federal Van and Storage in Kansas City opened two of Bowman's footlockers in order to sell the contents. They included silencer parts, a bulletproof vest, a baseball cap with "Police" on it, a police scanner with attached ear piece, books on disguises, and videos about picking locks. The manager called the Bureau of Alcohol, Tobacco and Firearms (ATF), which sent an agent to examine the contents. The manager later identified Bowman as "Charles Clark," the name used by the renter, from a photo montage.

About the same time Michael Senty, to whom Penney had paid $180,000 in cash to build a log cabin on the shores of Lake Superior, near Hovland, Minnesota, reported the suspicious cash transaction to the Internal Revenue Service (IRS). The IRS began a money laundering investigation and served Penney at the cabin with a federal grand jury subpoena. Kirkpatrick called Bowman, who wasn't home, but Kirkpatrick told Penney that he would call every Friday at 4:45 p.m., and if Bowman were not there, would call back at 6:00 p.m., repeating the procedure the next day. Kirkpatrick packed up a number of items, left $350,000 with a friend, and headed for a storage unit in Las Vegas. When Bowman finally called, Penney told him pursuant to Kirkpatrick's instructions that "Uncle Tom had been to the house."

Around mid-October 1997, Bowman delivered two briefcases containing $480,000 to his brother, Dan Bowman, from whom he had been estranged since 1985. He told him that it was not "drug money," and to give the briefcases to Bowman's daughters if anything happened to him. Dan Bowman subsequently turned the money over to the FBI. It had bills marked with Seafirst Bank's Washington State ABA ***957** number, "19–2," and the routing number specifically assigned to the Lakewood Seafirst Bank, "84087." In addition, there was a single strap from one of the bundles that was stamped with Seafirst Bank's Washington ABA number and the Lakewood branch routing number, along with a Seafirst teller's number, "122," initialed and dated by her the day of the robbery, February 10, 1997.

Kirkpatrick was arrested returning from Las Vegas on November 10, 1997. In the car there was a note with the numbers "**11070**" and "**64119**," Ray Bowman's P.O. Box number and zip code; $1,808,776 in cash; numerous credit cards in the name of "Donald Wilson"; two police scanners with ear pieces; a "10 code" sheet listing police radio codes; plastic electrical ties; and four fake moustaches. After trying to bail Kirkpatrick out with $100,000 in cash, Penney was arrested on November 14 for money laundering. She subsequently pled guilty to an Information charging her with laundering the proceeds of Kirkpatrick's bank robberies. A December 2 search of their cabin turned up photographs of Bowman's children on the refrigerator.

During November, Delamotte noticed that Bowman's disposition changed and when asked why he was so upset, Bowman told her that "something happened to a friend of his and he didn't know if it was going to affect him or not." On December 19 the FBI executed a search warrant at Bowman's residence and found notes placing Bowman in Fife, Washington just prior to the robbery of Seafirst Bank; $89,000 in the basement safe; a "10 code" list of police radio codes; makeup, wigs, beards and mustaches with spirit gum to attach them; plastic electrical ties; police scanners with ear pieces; a bulletproof T-shirt and vest; locksmith manuals and a key code, key blanks, a key making machine, and lock picking equipment. He was arrested for possession of an unregistered silencer (found in the trunks stored at Federal Van and Storage in Kansas City), and ultimately was tried and convicted on this offense. On February 11, 1998 the FBI conducted lineups in Seattle; both Bowman and Kirkpatrick refused to speak, or to produce handwriting or voice exemplars.

On August 5, 1998 a federal grand jury returned a four-count superseding indictment against Bowman for conspiracy to

commit bank robbery, armed bank robbery, use and carrying of a firearm, and interstate transportation of stolen property, in violation of 18 U.S.C. §§ 2213(a) and (d), 371, 924(c)(1), and 2314.[1] The armed bank robbery charge (count 2), the use and carrying of a firearm charge (count 3), and the interstate transportation of stolen property charge (count 4), all arose out of the Seafirst robbery. Six different bank robberies (occurring in six different states) were charged as overt acts, although evidence was presented only as to these five:

1. *Hawkeye Bank and Trust Company, Des Moines, Iowa —November 7, 1987 ($48,500)*

At 3:30 a.m. on November 6, 1987, Bowman and Kirkpatrick broke into the Des Moines, Iowa home of a Hawkeye Bank employee. Both men wore trench coats, fedoras, fake mustaches, and wigs; Bowman also wore white makeup and cologne. The employee, his wife, and their child, traveled with Bowman and Kirkpatrick to the bank at gunpoint, where Bowman tied them up with plastic electrical ties. Kirkpatrick was fiddling with something in his ear. The kidnaped employee provided them with one combination to the vault and the assistant manager provided the other when she arrived. Kirkpatrick and Bowman left with $48,500.

At the Seattle lineup, over ten years later, the employee's son identified Bowman; the employee identified someone ***958** other than Bowman; and his wife could not identify anyone. Two other Hawkeye employees who came into work during the robbery identified someone other than Bowman.

2. *Michigan National Bank, Saginaw, Michigan—May 28, 1992 ($122,386)*

Twenty minutes before opening on May 28, 1992, Bowman and Kirkpatrick entered a Saginaw branch of Michigan National through a locked door. Both men wore navy blue windbreakers and blue baseball caps; Bowman again had on white makeup and a fake mustache while Kirkpatrick wore a wrist cord with a key attached to it and had in an ear piece which seemed to be connected to a police scanner. Kirkpatrick tied up the employees with plastic electrical ties while Bowman led a teller into the vault room, where he took $122,386.

Kirkpatrick had rented two rooms at the Lansing, Michigan Holiday Inn from May 10–12, 1992, about two weeks prior to the robbery. On May 29, 1992, the day after the robbery, a safe deposit box attendant at Norwest Bank in Bloomington, Michigan assisted Bowman, whom the attendant recognized, in entering safe deposit box 759 where the FBI later found $11,900; fake mustaches and sideburns; a wig; four handguns; and lock picks. At the Seattle lineup, one of the Michigan National employees did not choose anyone from the Bowman lineup, another chose someone else.

3. *U.S. Bank, Portland, Oregon—February 16, 1994 ($233,026)*

Shortly after 5:00 p.m. on February 16, 1994, Kirkpatrick and Bowman entered the locked doors of a Portland, Oregon branch of U.S. Bank. Bowman wore a trench coat, large glasses, a fake mustache, and a wig while Kirkpatrick wore a mid-thigh length coat, a brimmed hat, and glasses. Bowman, who had an "L" shaped piece of wire hanging from his wrist, ordered the manager to tie up the bank employees with plastic electrical ties. In the vault room, Bowman had the manager open two safe deposit boxes and a cash bus, from which Bowman removed $233,026.

Kirkpatrick rented two rooms at the Comfort Inn in Wilsonville, Oregon from January 6, 1994 through February 17, 1994. About a week prior to the robbery, on February 8, 1994, Bowman made a cash payment for a safe deposit box at the Seafirst Bank in Seattle, Washington, where the FBI later found $7,900, a semi-automatic handgun, and a revolver. None of the three U.S. Bank employees to view the Seattle lineup was able to identify Bowman.

4. *National City Bank, West Carrollton, Ohio—October 6, 1994 ($362,529)*

Just after closing on October 6, 1994, Kirkpatrick and Bowman entered the National City Bank in West Carrollton, Ohio wearing tan mid-length coats and fisherman's hats. Bowman also wore a wig and sunglasses; Kirkpatrick wore glasses and carried a police scanner. At gunpoint, Kirkpatrick secured the employees with plastic electrical ties while Bowman had the head teller open three safe deposit boxes used by the bank as a vault. Approximately $362,529 was taken from the boxes.

Kirkpatrick had rented two rooms at the Comfort Inn in Indianapolis, Indiana from October 3–7, 1994. In Clive, Iowa the day after the robbery, Bowman leased a safe deposit box at Brenton Bank[2] where the FBI later found $200,020 in cash and a handgun.

5. *Seafirst Bank, Lakewood, Washington—February 10, 1997 ($4,461,681)*

The last robbery occurred on February 10, 1997. Around 6:30 p.m., after the bank ***959** had closed, Bowman (wearing sunglasses, a trench coat, and a baseball cap) and Kirkpatrick (wearing glasses, a trench coat, and a tam) entered the locked doors of Lakewood's Seafirst Bank. Kirkpatrick had an ear piece that appeared to be connected to a police scanner. Seafirst had received deposits from local businesses earlier that day, which employees were counting, strapping into 100 note bundles, and stamping with the Seafirst insignia. Kirkpatrick led three Seafirst employees to the safe deposit room at gunpoint, told them to face the wall and shut their eyes, and tied them up with plastic electrical ties. After asking the employees about the vault's security system, Bowman went to the vault room and broke open cash buses containing $4,461,681 and weighing 355 pounds, which he and Kirkpatrick carried out of the bank.

All three employees picked Bowman out of the Seattle lineup one year later. The evidence showed that Kirkpatrick had rented two rooms using the alias of "Don Wilson," with an address in Apple Valley, Minnesota, at the Holiday Inn in Fife, Washington from October 7–22, 1996; the Pony Soldier Inn in Kent, Washington from November 17–22, 1996; and the Pony Soldier Inn again from January 26, 1996 through February 10, 1997. Penney testified that she paid the bill for the Holiday Inn and that Kirkpatrick was gone for several weeks beginning in late January 1997; Delamotte testified that Bowman left their Kansas City home for approximately three weeks in late January 1997. A piece of paper with "Pony Soldier Inn" letterhead was found in Bowman's basement, on which he had jotted down information about a November 26, 1996 piano concert at the University of Washington. On the drive back to Kansas City, Bowman opened safe deposit boxes in Murray, Utah; Denver, Colorado; Omaha, Nebraska; Clive, Iowa; and Kansas City, Missouri. The safe deposit boxes were opened on consecutive days, beginning February 12, 1997; were all rented in Bowman's name; and had the same P.O. Box 11070, Kansas City, Missouri address. In these boxes, the FBI found $1,485,400 in cash (with many of the bills containing the Seafirst stamp), two revolvers, four automatic handguns, gloves, lock picking tools, false mustaches, and spirit gum.

Bowman was convicted on all counts after trial to a jury. He was sentenced to 295 months in custody, and has timely appealed his conviction and sentence. He raises issues about the search of his trash and house, challenges a number of evidentiary rulings, and contends that the district court should not have given him a firearm enhancement under USSG § 2B3.1(b)(2)(C) for two of the robberies when it also sentenced him under 18 U.S.C. § 924(c) for use of a firearm in connection with the Seafirst robbery. The sentencing issue is the only one of first impression. However, we have already held that the application of a § 924(c) enhancement on one count and the guidelines brandishing enhancement on remaining counts does not amount to double counting, *see United States v. Chin–Sung Park,* 167 F.3d 1258 (9th Cir.1999), and now join the Court of Appeals for the First Circuit in holding that Bowman's offense level could properly be increased for brandishing a firearm during robberies other than Seafirst, which is the only robbery for which he was convicted of using a firearm in violation of § 924(c). *See United States v. McCarthy,* 77 F.3d 522, 536–37 (1st Cir.1996). As none of the other issues requires reversal, we affirm.

I

Bowman moved in limine to prohibit Penney from testifying about twenty-two statements Kirkpatrick made to her which the government indicated it wished to introduce.[3] The district court ruled that ***960** many of the statements were admissible as against Kirkpatrick's interest, and that others were admissible on this basis as well as a co-conspirator statement. Bowman argues that the district court's decision violated Federal Rules of Evidence 801(d)(2)(E) and 804(b)(3) because the statements were not in furtherance of the conspiracy or against Kirkpatrick's penal interests, and violated his rights under the Sixth Amendment's Confrontation Clause.

We review a decision to admit co-conspirator statements for abuse of discretion, and the factual determination that statements were made in furtherance of a conspiracy for clear error. *See United States v. Gil,* 58 F.3d 1414, 1419 (9th Cir.1995). Alleged violations of the Confrontation Clause are reviewed de novo. *See United States v. Peterson,* 140 F.3d 819, 821 (9th Cir.1998). Under Rule 801(d)(2)(E), the statement of a co-conspirator is admissible against the defendant if the government shows by a preponderance of the evidence that a conspiracy existed at the time the statement was made; the ***961** defendant had knowledge of, and participated in, the conspiracy; and the statement was made in furtherance of the conspiracy. *See Bourjaily v. United States,* 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Narrations of past events are inadmissible, but expressions

of future intent or statements that "further the common objectives of the conspiracy or set in motion transactions that are an integral part of the conspiracy" are admissible under Rule 801(d)(2)(E). *United States v. Yarbrough,* 852 F.2d 1522, 1535 (9th Cir.1988) (citation omitted).

There is no question that Penney was part of the conspiracy. She helped Kirkpatrick deposit proceeds by putting them in various bank accounts in her name, she cased a bank with Kirkpatrick, she paid the credit card bills that contained expenses for Bowman and Kirkpatrick, and at Kirkpatrick's request she warned Bowman about the IRS subpoena. Almost all of Kirkpatrick's statements were made to keep Penney informed about what was going on, and to enlist her help in conducting and covering up the operation. Although he broadly faults the court for admitting the statements in general, Bowman specifically points to Kirkpatrick's statements that he was a bank robber and that Ray from Kansas City was his partner. He submits that these statements were merely conversation that did not further the conspiracy, and were in the nature of admissions of culpability to someone Kirkpatrick had individually decided to trust. *See United States v. Moore,* 522 F.2d 1068, 1077 (9th Cir.1975) (statement to a tool dealer at swap meet known to co-conspirator was nothing more than casual admission of culpability to someone he had individually decided to trust). However, Penney had to know Kirkpatrick was a bank robber in order to help him. These (and other similar) statements made possible Penney's help in paying bills that included rooms rented for Bowman as well as in communicating with him when the chips were down. Bowman also points to the statement that he called Kirkpatrick and told him to watch Unsolved Mysteries, but this furthered the conspiracy because information about the information known to law enforcement, which often appears on such programs, helped the conspirators monitor the response to the Seafirst robbery and conceal their activities. Likewise, Kirkpatrick's statement that he went to the post office in Seaside, Oregon and sent Ray a key to a storage locker kept Penney up to speed.

While Kirkpatrick's statements about the Las Vegas storage locker having incriminating evidence in it is more problematic, it helped explain why Kirkpatrick had gone to Las Vegas after the subpoena had been served and thus may plausibly have beenmade to keep Penney informed about efforts to conceal the conspiracy. Also, though Bowman does not single it out, Kirkpatrick's statement to Penny that they "went in after closing" at the Seafirst robbery is problematic as it appears to be a narration of past fact not intended to elicit Penney's assistance. However, even if neither statement should have been admitted, the error is harmless. Evidence erroneously admitted in violation of the Confrontation Clause must be shown harmless beyond a reasonable doubt, with courts considering the importance of the evidence, whether the evidence was cumulative, the presence of corroborating evidence, and the overall strength of the prosecution's case. *See Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Here, the evidence linked Bowman to the conspiracy beyond a reasonable doubt. Bowman was identified as one of the Hawkeye robbers; he opened a safe deposit box in Lansing, Michigan the day after the Michigan National bank robbery where the FBI later found almost $12,000 in cash, costumes, guns, and lock picks; he opened a safe deposit box in Clive, Iowa the day after the National City robbery where the FBI later found over $200,000 in cash and a handgun; and he and Kirkpatrick were both identified as ***962** the Seafirst robbers, over a million dollars in cash was found in Bowman's safe deposit boxes with Seafirst stamps, the briefcases he gave to his brother had Seafirst money in them, and a note on Pony Inn stationary in his handwriting was found at his house. This, in addition to other evidence connecting Bowman to Kirkpatrick, including pictures of Bowman's children on Kirkpatrick's refrigerator and notes in Kirkpatrick's car referenced to Bowman's Post Office Box number and zip code, together with Bowman's unexplained wealth and entry into safe deposit boxes located near banks that had just been robbed, renders any error in admitting Penney's testimony about Kirkpatrick's statements harmless.[4]

II

Bowman argues that the district court violated his right to present a defense and abused its discretion by excluding evidence of three other bank robberies attributed to the trench coat robbers where other suspects had been identified by eyewitnesses. In particular, Bowman wanted to show that Francis Bolduc and Francis Larkin were convicted of two such robberies, the June 28, 1988 robbery of First Wisconsin Bank, Greenfield, Wisconsin and the October 18, 1989 robbery of First Wisconsin Bank in Milwaukee. While we have recognized that "other crimes" evidence of third party culpability may be introduced under Rule 404(b) if there are distinctive similarities between the crime charged and the other robberies, such evidence may still be excluded if it is insufficiently probative in light of its prejudicial effect under Rule 403. *See, e.g., United States v. Perkins,*

937 F.2d 1397, 1401 (9th Cir.1991) (recognizing principle but upholding exclusion of "several extraneous robberies"). Here, the district court did not abuse its discretion as the proffered evidence lacked probative value and would have been confusing and diverting. In short, the government had claimed that the First Wisconsin robberies had been committed by the trench coat robbers and had obtained convictions of Bolduc and Larkin after they were identified in a photo montage and in a lineup by employees of the two banks. However, both had been in custody since 1989 and could not, therefore, have committed four of the five robberies alleged as overt acts.[5] Bowman's theory was that all 29 robberies identified in the search warrant affidavit of FBI Special Agent Ronald M. Bone were committed by the same individuals, but he failed to link any evidence having to do with Bolduc and Larkin to robberies for which he was being prosecuted.

In addition to the Wisconsin robberies, Bowman argues on appeal that he should have been allowed to prove that two other suspects (John McMahon and John Capasso) were identified as the robbers in the November 13, 1991 uncharged robbery of Valley Bank, Henderson, Nevada. Assuming the issue is preserved, there is no error for Bowman's only proffer was a list of the 29 robberies.

Nor was exclusion of Bowman's evidence at all critical to his defense. *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), and *Perry v. Rushen,* 713 F.2d 1447 (9th Cir.1983), upon which he relies are ***963** inapposite as in each the proffer was of a percipient witness whose testimony would have exculpated the defendant if believed.

III

Bowman challenges the warrantless search of the two footlockers and his trash, as well as the search warrants issued for his residence and safe deposit boxes.[6] The district court denied Bowman's motions to suppress and upheld the search warrant affidavit under *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

A

First, Bowman argues that the ATF's search of the footlockers after the agent took possession of them, but without obtaining a warrant, violated his Fourth Amendment rights even though the original search was a private search. It is clear that the agent's search is permissible, and constitutional, to the extent that it mimicked the private search conducted by the manager of Federal Van & Storage. *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). In two respects, however, the agent's search differed from the private search: he viewed a film and he tested for fingerprints. The government concedes that viewing the film exceeded the private search,[7] but contends that processing the exterior of videotapes for latent prints was not a search. Viewing the film was harmless error, for its contents were not used against Bowman. The results of fingerprint analysis were used in the search warrant affidavit, but it is not necessary to resolve the government's argument because (as we explain in Part III.E) there was sufficient untainted information to support the probable cause determination.

B

On December 2, 1997, Kansas City Detective Gary Wantland conducted a warrantless search through four trash bags located on the curb in front of Bowman's residence and found a mail folder addressed to Bowman at his P.O. Box address and a portion of a booklet entitled "Locksmith Ledger" depicting "Jimmy Tools"—in particular, a "J" shaped tool.

Bowman's claim that this violated the Fourth Amendment lacks merit, as the case he cites to show he has a legitimate expectation of privacy in his garbage, *California v. Greenwood,* 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), comes out the other way. In *Greenwood* the Supreme Court held that there was no legitimate expectation of privacy in garbage because "bags left on or at the side of a public street are readily accessible to ... members of the public" and garbage is put out "for the express purpose of conveying it to a third party, the trash collector." *Id.* at 40, 108 S.Ct. 1625. Bowman suggests that his trash bags were sealed (although he points to nothing in the record which says so), and submits that this should make a difference, but we fail to see how he has a more legitimate expectation of privacy in sealed garbage left curbside than unsealed garbage left curbside.

C

Next, Bowman argues that the information in the December 1997 affidavit ***964** was too stale to support probable cause because the last of three robberies identified in the application, the Seafirst robbery, occurred ten months before. He also points out that Cheryl Clark had not seen Bowman since 1993, and that the last known contact between Bowman and Kirkpatrick was in 1988.

"[A] search warrant is not stale where there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." *United States v. Nance,* 962 F.2d 860, 864 (9th Cir.1992) (internal quotations and citations omitted). Here, the application sought permission to seize instrumentalities of a career of bank robberies; and it includes information that Kirkpatrick possessed more than $1.8 million taken during the Seafirst robbery just one month before, that Bowman's storage locker contained a considerable variety of bank robbery paraphernalia as recently as May, and that Penney told the government that Bowman and Kirkpatrick planned to execute one last $12 million robbery which was corroborated by Kirkpatrick's November 1997 removal of bank robbery tools from his Las Vegas storage locker. In light of these recitations there was ample basis for the magistrate judge to infer that the items to be seized would still be on the premises.

D

Bowman maintains that Agent Bone made material omissions that invalidate the warrant.[8] First, he claims that Bone should have included information that after the November 13, 1991, Henderson, Nevada robbery, one of the three robberies described in the affidavit, two suspects (John McMahon and John Capasso) were identified. The district court found no intentional recklessness following an evidentiary hearing at which Agent Bone explained that he had talked with Las Vegas FBI agents about the 1991 Valley Bank robbery but that no one had ever mentioned McMahon and Capasso. Although Bowman concedes that Bone did not know that McMahon and Capasso had been identified, he argues that it was recklessly misleading not to inform the magistrate judge about them. We are not firmly convinced that it was, as the evidence showed that the Las Vegas FBI had already ruled out the two identified suspects by the time Bone called about the Valley Bank robbery.

Bowman makes a similar claim regarding the Wisconsin robberies. Bone informed the magistrate judge about a conspiracy to rob banks from 1983 to Kirkpatrick's arrest in November 1997, during the course of which as many as 29 bank robberies were committed. The affidavit explained that because they share a common modus operandi, the FBI refers to these 29 bank robberies collectively as the "Trench Coat Robberies," and states that

> Two of the 29 robberies that fit the modus operandi of the Trench Coat Robberies have been closed due to a successful prosecution of two other defendants. The defendants in that case maintain their innocence.

Bowman faults Bone for failing to indicate that the convictions were based on eyewitness identifications, but does not suggest any basis on which the district court clearly erred in finding no intentional or reckless conduct. Regardless, it is inconceivable that adding this information to what the magistrate judge already knew would defeat the probable cause determination.

E

Bowman argues that the affidavit in support of searching his home and safe ***965** deposit boxes fails to establish that he committed a crime because it lacks any reference to eyewitness identification, forensic evidence connecting him to any of the robberies, and evidence that he was in any of the cities where the robberies occurred on the date of the robberies. We disagree. The affidavit establishes that Kirkpatrick was one of the "Trench Coat Robbers"; that Bowman and Kirkpatrick were arrested together by Kansas City Police in 1974 for grand theft and had been seen together in Bowman's Corvette in 1988; that between 1983 and 1997 each referred to the other as his "partner," including Kirkpatrick's identifying "Ray from Kansas City" as his bank robbery partner to Penney; that pictures of Bowman's children were on Kirkpatrick's refrigerator; that Bowman fits the description witnesses gave of the shorter robber; that Bowman had makeup, wigs and guns, asked Clark to buy firearms for him in her name, and his garbage contained a page torn from "Locksmith Ledger" depicting a "J" shaped tool that resembles the device recovered from the scene of one of the three robberies; that he had rented storage lockers and filled them with bank robbery supplies; that he and Kirkpatrick shared a locker in Las Vegas; and that Kirkpatrick mailed a key in Seaside, Oregon for the new lock on the Las Vegas storage unit to "Ray" and that Bowman received a package postmarked and dated September 12, 1997 from Seaside. In addition, the affidavit shows that Bowman's

lifestyle was consistent with execution of the crimes alleged: he traveled for two weeks at a time; told Clark that he traveled because "you never shit in your own mess kit"; and when he left town, took disguises and guns with him. The affidavit also establishes that Bowman had not filed an income tax return for ten years, did not appear to work, and spent substantial sums freely.

Bowman implies that Penney (who was the source for much of this information) was not reliable because she was Kirkpatrick's girlfriend who had been charged with money laundering and was cooperating with the authorities. The district court thought otherwise and its view is well supported given that Penney's statements were detailed, corroborated, and self-incriminatory.

In sum, the affidavit sets forth facts sufficient to amount to probable cause that Bowman possessed evidence of a bank robbery conspiracy and income tax evasion. Even if not, Bowman does not dispute the district court's finding that the agents relied on the warrants in good faith. *See United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Thus, the evidence seized pursuant to the warrants was admissible.

IV

Bowman maintains that the district court erred in allowing identification testimony from witnesses who viewed a lineup that was tainted because witnesses viewed the suspects together instead of separately, which he claims is a "disapproved" procedure under *United States v. Bagley,* 772 F.2d 482 (9th Cir.1985); knew that suspects were in custody and they should make a pick; and had not been interviewed before the lineup to gauge their memory of the robbers.[9] The lineup, which took place on February 11, 1998 in Seattle, included Bowman and five similar looking men in identical clothing. Twenty-six witnesses viewed the lineup. FBI Agent Alfred Gunn remained in the lineup room to watch the witnesses. They were instructed not to talk to one another, not to let anyone see their choices, and not to make comments or gestures as they viewed the lineups. They were also given a written form with additional instructions about keeping the responses private. Gunn testified that the witnesses did not ***966** talk to each other during the lineup. Only four of the witnesses identified Bowman.

Viewing the totality of the circumstances, we cannot say that the procedure created a "very substantial likelihood of irreparable misidentification." *United States v. Davenport,* 753 F.2d 1460, 1462 (9th Cir.1985). First, the joint identification procedure disapproved in *Bagley* was quite different from that employed here, for in that case a photographic display was seen by two witnesses at the same time and the second one to comment heard the first one's selection before he was called upon to make his. The evil of impermissible influence that exists when a witness knows what others have done does not exist in the format followed in the Seattle lineup. In the absence of any evidence that there was any serial communication among the witnesses, there is no due process violation. Second, Bowman's fear that the lineups were impermissibly suggestive because witnesses knew that the suspects were in custody is misplaced. The witnesses were told that they need not make an identification if they were not confident. In fact, many did not. Moreover, it stands to reason that there *is* a suspect at the lineup stage. Bowman does not suggest how this increases the suggestibility of the procedure. Finally, the witnesses' perceptions were already noted in police reports and Bowman's counsel was able to cross-examine about any deficiencies at the lineup or in their perceptions.

V

Bowman argues that the district court improperly admitted thirteen firearms and seven photographs of the same guns because the government could not directly link them to the any of the robberies charged as overt acts. Of the 140 firearms found in Bowman's lockers and residence, the district court admitted only the thirteen handguns found in the six out-of-state safe deposit boxes opened either immediately before or after four of the bank robberies. The district court held that the prejudicial effect of admitting the evidence did not substantially outweigh its probative value.

Bowman claims that the guns were irrelevant under Rule 401 and 402, and unfairly prejudicial under Rule 403. However, victims of each of the five robberies presented at trial stated that the shorter perpetrator (Bowman) carried a handgun, albeit a different one during different robberies. The guns that were admitted were found in boxes which Bowman had entered between November 1987 and November 1997. The boxes in which the thirteen guns were found also had wigs, lock picks, and more than $1 million in cash. As such, the guns are direct evidence of the conspiracy and

were therefore properly admissible under Rule 401. Nor was their probative value substantially outweighed by the risk of undue prejudice; Bowman defended his possession of half of the Seafirst cash on the footing that he was merely laundering money for Kirkpatrick, but his possession of tools of the robbery trade, including the handguns, shows otherwise. Further, Bowman's possession of these handguns was material to count 3, charging use and carrying of a firearm in connection with the Seafirst robbery. *See, e.g., United States v. Walters,* 477 F.2d 386, 388 (9th Cir.1973) (finding no error in admitting a gun that the government had not linked to the one used during the robbery because it was related to an element of the crime).

Bowman's reliance upon *United States v. Tai,* 994 F.2d 1204 (7th Cir.1993), is misplaced. *Tai* was an extortion case in which the government showed two guns to the jury that were found in the defendant's pawn shop two weeks after his arrest. They were not located with criminal proceeds or instrumentalities, nor were they linked in any way to the plot. As such, the only purpose was to show that Tai, who had two guns, must have a propensity to commit crimes, clearly a violation of Rule 404(b). Here, the guns were found with proceeds and instrumentalities, and were ***967** linked to the conspiracy, if not to a specific robbery. They were, accordingly, admitted for a relevant purpose.

VI

After a break during trial, a deputy United States Marshal wearing a sports jacket and tie walked through a door into the courtroom with Bowman behind him. Bowman was not handcuffed or otherwise restrained. When the deputy saw that the jury was also walking into the courtroom, he turned around and exited. There is no indication that any of the jurors actually saw Bowman. In any event, defense counsel asked the court to inquire of the jury "whether they have seen or observed anything in the courtroom or outside the courtroom which caused them to form any opinions about Mr. Bowman," and only if there were an affirmative response to give a cautionary instruction or declare a mistrial. The court did as requested, and the jurors indicated that they had not seen anything of concern. No mistrial was requested. Bowman argues that he was denied a fair trial because the district court nevertheless did not grant one. We disagree. Assuming the issue is preserved, there was no error and Bowman has not and cannot show prejudice. *See United States v. Halliburton,* 870 F.2d 557 (9th Cir.1989).

VII

Bowman argues that the district court clearly erred in finding beyond a reasonable doubt that he committed the U.S. Bank and National City robberies for purposes of USSG § 1B1.2(d).[10] When, as here, the verdict does not establish which overt acts were committed, § 1B1.2(d) may only be applied if the court, sitting as trier of fact, would have convicted the defendant of conspiring to commit the overt act. USSG § 1B1.2(d), Comment 5. The court sentenced Bowman for the robbery of Seafirst Bank charged in count two, and the robberies of U.S. Bank, Portland, Oregon, and National City Bank, West Carrollton, Ohio, which were alleged as overt acts of the conspiracy charged in count one. Bowman contends that there was no evidence placing him inside either bank or in either city at the time of the robberies.

The district court found the existence of Bowman's guilt of the U.S. Bank and National City robberies to be beyond a reasonable doubt without "a problem," noting a "consistency" between all of the robberies. This finding was not clearly erroneous. Like the Seafirst robbery, for which the jury expressly found Bowman guilty, witnesses gave descriptions of taller and shorter robbers matching Kirkpatrick and Bowman, of robbers wearing trench coats and glasses, who entered the bank after hours without force and used plastic electrical ties to secure the employees. Bowman opened up a safe deposit box around the same time and near both crimes (one in Seattle, Washington; the other in Clive, Iowa), which were later found to possess three guns, disguises, lock picks, and over $200,000 in cash. Finally, Kirkpatrick rented two hotel rooms near both banks at the same time as the robberies.

VIII

The district court applied a five-level upward enhancement pursuant to USSG § 2B3.1(b)(2)(C) for brandishing a firearm in the U.S. Bank and National City robberies, which were overt acts of the conspiracy charged in count one, that Bowman contends was incorrect given his five-year sentence on the § 924(c) count (count four) for use of a firearm in the Seafirst robbery pursuant to USSG § 2K2.4. As Bowman sees it, because the Seafirst robbery was part of the underlying conspiracy offense, and because Bowman ***968** was sentenced under § 2K2.4 for use of a firearm in the Seafirst robbery, also applying the brandishing enhancement

to the other two overt acts constituted impermissible double-counting.[11]

We essentially resolved this question in *United States v. Chin–Sung Park,* 167 F.3d 1258 (9th Cir.1999). There, the defendant was convicted of three bank robberies, on one of which he was also charged with a § 924(c) count. We held that imposing sentence on the § 924(c) count, which is a mandatory minimum 60–month sentence, and applying the guidelines brandishing enhancement on the remaining counts did not amount to double counting. The reason is that "Park is being punished only once for brandishing a firearm in each robbery —via sentencing enhancements for the October and December robberies, and via a § 924(c) firearm sentence for the November robbery." *Id.* at 1261. The same is true here. Each of the robberies that Bowman conspired to commit and for which he was sentenced is scored separately. USSG §§ 1B1.2(d), 3D1.1(a). His conviction for using a firearm during the Seafirst robbery was in violation of § 924(c) but was not enhanced for brandishing a firearm. His conviction for conspiring to rob U.S. Bank and National City Bank was enhanced for brandishing a firearm but was not subject to the mandatory minimum for violation of § 924(c). Thus, he was not punished twice for the same conduct unless Bowman is correct that the U.S. Bank and National City Bank robberies cannot be separated from the Seafirst robbery.

Bowman points to Application Note 2 to § 2K2.4, which states that where a § 924(c) sentence is imposed "in conjunction with the sentence for an underlying offense, any specific offense characteristic for the ... use ... of ... a firearm ... is not to be applied in respect to the guideline for the underlying offense." USSG § 2K2.4, Comment 2. However, as the Court of Appeals for the First Circuit observed in similar circumstances, § 1B1.2(d) "clearly instructs the sentencing court to treat a count charging a conspiracy to commit multiple offenses as separate counts of conspiracy for each offense the defendant conspired to commit." *United States v. McCarthy,* 77 F.3d 522, 536–37 (1st Cir.1996). It concluded that no double counting occurs when there is a § 924(c) count on which the mandatory minimum sentence is imposed, and a brandishing enhancement is applied only when calculating the offense levels relating to non-§ 924(c) count robberies, and we agree.

IX

Bowman finally contends that the district court erroneously gave a *Pinkerton*[12] instruction on co-conspirator liability in connection with the Seafirst robbery which was not warranted by the evidence because the government's theory was that he was directly involved in the Seafirst robbery, and which incorrectly omitted "reasonably foreseeable" language.[13] He submits that this enabled the jury to convict even if they found that he was not involved in the Seafirst robbery and could not foresee that Kirkpatrick would commit it. The instruction on count 2 (Seafirst robbery) was based upon Ninth Circuit Model Jury Instruction 8.05E.[14]

***969** There was no abuse of discretion. Although the government argued that Bowman directly participated in the Seafirst robbery, Bowman argued that he did not. His theory was that he only laundered the money for Kirkpatrick. Thus, the instruction appropriately indicates that Bowman could be liable even if the jury believed that only Kirkpatrick actually committed the Seafirst robbery.

Bowman contends that the failure to include "reasonably foreseeable" language in the *Pinkerton* instruction was exacerbated by the conspiracy instruction, which provided in part:

> Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

However, Bowman did not object to any of this, or to the court's failure to include "reasonably foreseeable" language in the *Pinkerton* instruction, so our review is for plain error. We see none. Unlike *United States v. Morfin,* 151 F.3d 1149 (9th Cir.1998), where we held that it was error (albeit not plain error) to instruct that if the jury convicted on the conspiracy count, the defendant was guilty on the substantive charge as well, the jury here was separately instructed on the conspiracy count (count one) and the Seafirst robbery (count two). There was no possibility of convicting on a theory of vicarious liability. *See United States v. Montgomery,* 150 F.3d 983, 997 (9th Cir.1998). But, even if there were plain error, we cannot say that it affected Bowman's substantial rights as robberies, including the wildly successful Seafirst robbery, were clearly a reasonably foreseeable part of a conspiracy to commit robberies.

AFFIRMED.

All Citations

215 F.3d 951, 55 Fed. R. Evid. Serv. 105, 00 Cal. Daily Op.
Serv. 4635, 2000 Daily Journal D.A.R. 6223

Footnotes

1 Kirkpatrick was charged in the original indictment, but was released to the District of Minnesota where a grand jury had returned an indictment for money laundering and bank robbery.

2 Bowman leased the box in his name with the Kansas City, Missouri address of P.O. Box 11070.

3 The statements were:

· Kirkpatrick was a bank robber and “Ray from Kansas City” was his partner

· Bowman called Kirkpatrick to say that they were featured on “America's Most Wanted” and “Unsolved Mysteries”

· Kirkpatrick wore stage makeup and would one day show Myra Penney how he looked

· Kirkpatrick would not give Bowman's last name because his identity should stay a secret

· Bowman lived in Kansas City and Kirkpatrick once took him $8,000 to Des Moines to even up the split from one of their robberies

· Bowman's calls were important and Penney was to give Kirkpatrick the phone and then leave the room

· Bowman regularly called from phone booths and Kirkpatrick went out to call him from phone booths

· Kirkpatrick had changed his name to Don Wilson in approximately 1988 or 1989 in order to avoid a felony warrant in his real name

· During a trip to Saginaw, Michigan, Kirkpatrick was surprised a car “was still there”

· At one point, Kirkpatrick ran out of money and told Penney that they had to stop building their house or get more money. Shortly thereafter, Bowman called, Kirkpatrick left, and returned with money to finish the house. Kirkpatrick on a later vacation pointed out a Las Vegas bank which he indicated was the source of the money for the house

· In depositing money in the bank, it was important to separate out any bills with extraneous markings on them which would identify them, and to make deposits in small amounts

· After returning from business trips, Kirkpatrick would give Penney credit card bills and receipts to reconcile, ask her to pay them, indicate there were two rooms because “Ray snored,” and would then require the receipts back to be burned

· Kirkpatrick had bought tires in Tacoma on a particular trip

· In January 1997, Kirkpatrick got a call from Ray and left shortly thereafter

· In February 1997, Kirkpatrick called Myra Penney and asked her to record the Seattle news from their satellite dish. Thereafter, Kirkpatrick told her that they “went in after closing”

· Kirkpatrick and Bowman were planning one more final robbery and then to retire. Kirkpatrick said the robbery required four guys and Bowman lined one up. Kirkpatrick was uncomfortable about a stranger but said he had to trust Bowman

· Certain code words were to be used if there was trouble

· Kirkpatrick and Bowman had a system for calling each other after service of an IRS subpoena to assure regular contact and that he would be leaving the house to make calls from a phone booth to Bowman at a particular time

· After service of an IRS subpoena on Penney, Kirkpatrick told her that he had taken $450,000 out of their safe deposit boxes and was taking it to safe keeping in Las Vegas

· The storage locker in Las Vegas had lots of "incriminating evidence in it" and that two others had access to the locker, Bowman and Midnight Dolan

· Kirkpatrick went into a post office in Seaside, Oregon, he told Penney he was sending Ray a key to that storage locker but not one to Midnight Dolan because they had had a falling out

· Kirkpatrick told Penney he was worried about the security of the Las Vegas locker because Bowman and he had had one in Des Moines and had lost stuff in a burglary because of it. Kirkpatrick had therefore decided to retrieve the goods from his Las Vegas storage locker

4 Given this disposition, we do not address whether any of Kirkpatrick's statements were against his interest or whether this exception to the hearsay rule implicates the Confrontation Clause.

5 Indeed, the government discovered during its investigation of Bowman and Kirkpatrick that, one day after one of the Wisconsin robberies for which Bolduc and Larkin were convicted, Bowman, following his usual pattern after a robbery, leased and entered a safe deposit box in Michigan which was later found to contain fake mustaches and money. As a result, the government has advised Bolduc and Larkin that they may have been wrongly convicted for crimes actually committed by Bowman and Kirkpatrick.

6 The lawfulness of a search is reviewed de novo, while the district court's factual findings are reviewed for clear error. *See United States v. Gooch,* 6 F.3d 673, 676 (9th Cir.1993). This court reviews a magistrate judge's issuance of a search warrant for clear error. *See United States v. Fulbright,* 105 F.3d 443, 453 (9th Cir.1997). "Significant deference" is given to the magistrate judge's original determination of probable cause. *Id.* Whether probable cause is lacking because of alleged misstatements and omissions in the supporting affidavit is reviewed de novo. *See United States v. Hernandez,* 80 F.3d 1253, 1260 (9th Cir.1996), *overruled on other grounds, United States v. Medina–Chavarin,* 147 F.3d 1161 (9th Cir.1998).

7 *See Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (agents violated the Fourth Amendment by viewing film found by a private party).

8 A warrant is invalid, or a *Franks* violation occurs, if the defendant establishes by a preponderance of the evidence that the affiant intentionally or recklessly omitted information and the inclusion of the information would defeat a finding of probable cause. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *United States v. DeLeon,* 979 F.2d 761, 763 (9th Cir.1992).

9 This court reviews de novo whether a pretrial lineup was impermissibly suggestive. *See United States v. Montgomery,* 150 F.3d 983, 992 (9th Cir.1998).

10 USSG § 1B1.2(d) provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."

11 We review the district court's interpretation of the Sentencing Guidelines de novo. *See United States v. Smith,* 175 F.3d 1147, 1148 (9th Cir.1999).

12 *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

13 A district court's formulation of jury instructions is reviewed for an abuse of discretion. *See United States v. Service Deli Inc.,* 151 F.3d 938, 942 (9th Cir.1998). When there is no objection to the jury instruction at the time of trial, this court reviews for plain error. *See United States v. Garcia–Guizar,* 160 F.3d 511, 522–23 (9th Cir.1998).

14 The instruction provided:

> Each member of a conspiracy is responsible for the actions of other members performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime. Therefore, you may find the defendant guilty of bank robbery as charged in Count 2 of the Indictment if the Government has proved each of the following elements beyond a reasonable doubt: First, a person committed the bank robbery charged in Count 2 of the Indictment; Second, the person was a member of the conspiracy charged in Count 1 of the indictment; Third, the person committed the bank robbery in furtherance of the conspiracy; Fourth, the defendant was a member of the same conspiracy at the time the offense charged in Count 2 was committed.

396 F.3d 697
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Floyd BRUCE, Defendant–Appellant.

No. 03–3110.
|
Argued: Aug. 3, 2004.
|
Decided and Filed: Feb. 3, 2005.

Synopsis

Background: Defendant was convicted of bank fraud, following entry of guilty plea in the United States District Court for the Southern District of Ohio, Sandra S. Beckwith, Chief Judge. Defendant appealed.

Holdings: The Court of Appeals, Rosen, District Judge, sitting by designation, held that:

hotel cleaning staff acted as private individuals in removing trash from hotel rooms, and, thus, removal did not violate Fourth Amendment;

District Court did not clearly err in discounting defendant's testimony that "Do Not Disturb" signs were present on hotel rooms;

defendant had no expectation of privacy in items they had placed in trash receptacle in hotel rooms;

search warrant for "papers showing ownership and/or control of" illegal narcotics in hotel room was sufficiently specific;

officers did not exceed scope of warrant;

defendant's false claim of United States citizenship was material for purposes of sentence enhancement for obstruction of justice;

defendant was not entitled to downward adjustment for acceptance of responsibility;

government did not breach plea agreement in failing to affirmatively recommend reduction for acceptance of responsibility at sentencing hearing; and

any violation of *United States v. Booker* did not constitute plain error.

Affirmed.

Cook, Circuit Judge, filed concurring opinion.

West Codenotes

Limitation Recognized
18 U.S.C.A. §§ 3553(b), 3742(e).U.S.S.G. § 3C1.1.

Attorneys and Law Firms

***701 ARGUED:** J. Vincent Aprile II, Lynch, Cox, Gilman & Mahan, Louisville, Kentucky, for Appellant. Timothy D. Oakley, Assistant United States Attorney, Cincinnati, Ohio, for Appellee. **ON BRIEF:** J. Vincent Aprile II, Lynch, Cox, Gilman & Mahan, Louisville, Kentucky, for Appellant. Timothy D. Oakley, Assistant United States Attorney, Cincinnati, Ohio, for Appellee.

Before: NELSON and COOK, Circuit Judges; ROSEN, District Judge.*

Rosen, D.J., delivered the opinion of the court, in which NELSON, J., joined. COOK, J., (pp. 720–21), delivered a separate concurring opinion.

ROSEN, District Judge.

I. *INTRODUCTION*

Defendant/Appellant Floyd Bruce was charged in a four-count indictment with three counts of bank fraud in violation of 18 U.S.C. § 1344 and one count of unauthorized use of an access device in violation of 18 U.S.C. § 1029(a)(5). The bank fraud charges arose from Defendant's alleged use of false identification and fraudulent credit cards to obtain funds from three different banks, while the remaining charge rested upon Defendant's alleged use of a credit card issued under a false name to obtain cash and merchandise of value exceeding $1,000 during a one-year period. All of these charges were

based largely upon evidence found in a search of hotel rooms rented by Defendant at the time of his arrest.

On June 10, 2002, Defendant appeared before District Judge Sandra S. Beckwith and entered a plea of guilty to the bank fraud charge set forth in count one of the indictment. As stated in his plea agreement, Defendant understood that he was pleading guilty to an offense which carries a maximum term of imprisonment up to 30 years, a fine of up to $1,000,000, and a three-year period of supervised release. However, Defendant reserved his right to appeal the district court's denial of his motion to suppress the evidence seized from him and his hotel rooms at the time of his arrest. In exchange for Defendant's guilty plea, the Government agreed to dismiss ***702** the remaining counts of the indictment, and also recommended that Defendant be given "the appropriate reduction for acceptance of responsibility, pursuant to United States Sentencing Guideline § 3E1.1(a)." (Plea Agreement at ¶¶ 2, 5, J.A. at 31–32.)

At sentencing on January 17, 2003, the district court imposed a 33–month term of imprisonment followed by a five-year period of supervised release. This sentence incorporated a two-level increase for obstruction of justice, based upon the district court's finding that Defendant had misstated his true citizenship during a presentence investigation interview. In addition, the district court declined to grant a reduction for acceptance of responsibility as recommended in the plea agreement.

Defendant now appeals the denial of his motion to suppress, the sentence enhancement for obstruction of justice, the district court's refusal to grant a reduction for acceptance of responsibility, and the U.S. Attorney's purported violation of the plea agreement by standing silent at sentencing on the matter of acceptance of responsibility. We find no merit in these challenges, and therefore affirm Defendant's conviction and sentence.

II. *FACTUAL AND PROCEDURAL BACKGROUND*[1]

On October 23, 2000, Defendant/Appellant Floyd Bruce, using the name "Vincent Larue," and his traveling companions, Dennis Ritter and Carisse Coleman, checked into the Extended Stay America hotel in Blue Ash, Ohio. They paid for their one-week rental in cash. Defendant was listed as the renter of room 316 and Ritter was recorded as the renter of room 320, but Defendant slept in room 320 with Ritter while Coleman stayed in room 316. Defendant testified that he paid for room 316, gave Ritter the money to rent room 320, and had keys to both rooms.

On October 25, 2000, the hotel manager contacted the Blue Ash Police Department ("BAPD") to report that hotel employees had detected the smell of burning marijuana in the hotel's third floor hallway and suspected it was coming from either room 316 or room 320. At the request of BAPD Sergeant Ed Charron, and in accordance with a hotel interdiction program operated in cooperation with the local police, the hotel manager directed the cleaning crew to save, separately secure, and mark the trash bags obtained from both rooms.[2]

The parties dispute the circumstances that surrounded this trash collection effort. According to Sergeant Charron's testimony at the suppression hearing, he instructed the hotel manager to speak to the cleaning personnel and direct them to obtain and segregate the trash bags during their regular cleaning of the two rooms. Sergeant Charron further testified that he told the hotel manager not to pick up the trash if there was a "Do Not Disturb" sign on the doors to the rooms.[3] Defendant ***703** testified, however, that he specifically recalled placing "Do Not Disturb" signs on the doors to both rooms on October 25 and 26, 2000, and he denied giving permission for hotel staff to clean either of the rooms on these two days. Defendant also produced an affidavit from the hotel's assistant manager stating that the hotel's cleaning policy prohibits the cleaning of rooms with "Do Not Disturb" signs unless management obtains the guest's permission.[4]

In any event, the cleaning staff saved and marked the trash bags from rooms 316 and 320 in accordance with the BAPD's request. In the trash taken from room 316, the police found a partial marijuana cigarette. In the trash removed from room 320, the police found some loose tobacco and a hollowed-out cigar.[5] In addition, police investigation revealed a discrepancy between the name listed on Defendant's rental car application (Alvazo Gregory) and the actual registrant of the driver's license used to rent the car (Richard Grant)—and, of course, neither of these names matched the names given by Defendant and his companions when registering at the hotel. Based on these facts, as well as the payment for the room in cash, the police sought and obtained a search warrant from a municipal court judge to search rooms 316 and 320 of the hotel for evidence of illegal drugs, papers showing ownership and/or control of such drugs, articles used in the

preparation of such drugs for distribution, and any proceeds obtained through such distribution.

While Sergeant Charron was en route to apply for this search warrant in the afternoon or early evening of October 26, 2000, Defendant and Ritter were seen exiting the hotel. They were detained by other officers while Sergeant Charron obtained the warrant and the two rooms were searched. While detaining the two men, the officers discovered that Defendant had $7,004 in cash and Ritter had $1,220 in cash.

In Room 316—the room rented by Defendant, but apparently used by Coleman—the police found a torn-up loan application in a cup and what appeared to be marijuana seeds and stems. In Room 320—the room rented to Ritter, and occupied by Defendant and Ritter—the officers found three MasterCard credit cards in the names of "Gregory Alvazo," "Mario Fuentes," and "Anneliso Blane," and a Discover card in the name of "Kirsten Sembeck England." The police also found two driver's licenses in this room: a New York driver's license bearing Defendant picture under the name "Gregory Alvazo," and a Texas driver's license bearing Defendant's photo under the name of "Mario Fuentes." These items were found inside an envelope, which in turn was inside of Ritter's garment bag.[6] In addition, the search of room 320 revealed a cashier's check in the amount of $7,500 made payable to "Mario Fuentes."

***704** Based on these discoveries, the police obtained a second search warrant to search rooms 316 and 320 and seize false or forged driver's licenses, identification cards, credit cards, and the proceeds gained from the use of these false documents. In support of this warrant application, the officers cited an Ohio statute outlawing forgery. Pursuant to this warrant, the officers seized the above-cited identification documents, credit cards, and cashier's check, and this in turn led to a state court indictment charging Defendant with three counts of forgery and three counts of possession of criminal tools. Subsequently, Defendant was named in the April 3, 2002 four-count federal indictment in this case, with the charges all stemming from the false identification and credit cards found in the hotel room.

By motion filed on May 10, 2002, Defendant sought to suppress the evidence obtained in the search of the hotel rooms. The district court held a hearing on this motion on May 30, 2002, and issued an order denying the motion on June 7, 2002. Defendant then entered a guilty plea to Count One of the indictment on June 10, 2002, while reserving the right to appeal the denial of his motion to suppress. Under the parties' plea agreement, the Government agreed to dismiss the remaining counts of the indictment, and also recommended, in light of Defendant's "voluntary and truthful admission to authorities of his involvement in the instant offense," that Defendant "be given the appropriate reduction for acceptance of responsibility." (Plea Agreement at ¶¶ 2, 5, J.A. at 31–32.)

In an interview with a probation officer during the ensuing presentence investigation, Defendant claimed that he had become a naturalized United States citizen in 1991. Upon being confronted with documentation refuting this claim, however, Defendant asserted that he was a citizen of Bermuda. The probation officer was unable to confirm this latter claim in the course of the presentence investigation—to the contrary, some information indicated that Defendant was not a Bermudian citizen, and that Floyd Bruce might not be his true name. Thus, the probation officer concluded in his final presentence investigation report that Defendant's "true citizenship is unknown," and he recommended that Defendant be given a two-level sentence enhancement for obstruction of justice.

At a sentencing hearing held on January 17, 2003, the district court adopted the recommendation that Defendant's offense level be enhanced under the U.S. Sentencing Guidelines for obstruction of justice. In light of this enhancement and other considerations, the district court further concluded that Defendant was not entitled to the acceptance-of-responsibility reduction that the Government had recommended in the plea agreement. Accordingly, the court arrived at a sentencing range of 27 to 33 months, and it elected to impose a 33–month term of imprisonment, followed by a five-year period of supervised release. This appeal followed, challenging the denial of Defendant's motion to suppress, and also challenging certain events and rulings at sentencing.

III. *ANALYSIS*

Defendant has raised four issues on appeal: (i) whether the district court properly denied his motion to suppress; (ii) whether the district court properly applied a two-level enhancement to Defendant's sentence for obstruction of justice; (iii) whether Defendant should have been deemed eligible for a reduced sentence for acceptance of responsibility; and (iv) whether the U.S. Attorney breached a material term of Defendant's plea agreement by failing to recommend at sentencing that ***705** Defendant be given

a sentence reduction for acceptance of responsibility. In addition, the parties were invited shortly before oral argument to submit supplemental briefs regarding the possible impact of the Supreme Court's recent decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We address each of these matters in turn.

A. The District Court Did Not Err in Denying Defendant's Motion to Suppress.

As his first issue on appeal, Defendant challenges the district court's denial of his motion to suppress the evidence seized from rooms 316 and 320 of the Extended Stay America hotel in Blue Ash, Ohio at the time of his arrest on October 26, 2000. "In reviewing a district court's determination on suppression questions, a district court's factual findings are accepted unless they are clearly erroneous." *United States v. Martin,* 289 F.3d 392, 396 (6th Cir.2002) (internal quotation marks and citations omitted). "A factual finding will only be clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *United States v. Johnson,* 242 F.3d 707, 709 (6th Cir.), *cert. denied,* 534 U.S. 863, 122 S.Ct. 145, 151 L.Ed.2d 96 (2001). The district court's rulings on questions of law, in contrast, are reviewed *de novo* on appeal. *Martin,* 289 F.3d at 396.

1. The Removal of Trash by the Hotel's Cleaning Staff Did Not Violate Any Protected Fourth Amendment Privacy Interest.

The starting point of Defendant's argument on appeal is that the hotel cleaning staff were acting as agents of the local Blue Ash police when they removed the trash from rooms 316 and 320 of the Extended Stay America hotel. In Defendant's view of the evidence, he had established a constitutionally protected privacy interest in these rooms by posting "Do Not Disturb" signs on the doors. Thus, he contends that the government and its agents, the hotel staff, violated his Fourth Amendment rights by entering the rooms and taking the trash without a warrant. Absent the fruits of this purportedly illegal search and seizure, Defendant argues that the warrant subsequently obtained by the police to search the hotel rooms was not supported by probable cause. We conclude on two separate grounds, however, that the cleaning staff's collection of the trash did not run afoul of the Fourth Amendment.

The Fourth Amendment, of course, "proscribes only governmental action and does not apply to a search or seizure, even an unreasonable one, conducted by a private individual not acting as an agent of the government." *United States v. Lambert,* 771 F.2d 83, 89 (6th Cir.), *cert. denied,* 474 U.S. 1034, 106 S.Ct. 598 (1985). "A person will not be acting as a police agent merely because there was some antecedent contact between that person and the police." *Lambert,* 771 F.2d at 89. Rather, two elements must be shown in order to treat ostensibly private action as a state-sponsored search: (1) the police must have instigated, encouraged, or participated in the search; and (2) the private individual must have engaged in the search with the intent of assisting the police. *Lambert,* 771 F.2d at 89. Regarding this latter element of intent, we have explained that a private party is not an agent of the government where "the intent of the private party conducting the search is entirely independent of the government's intent to collect evidence for use in a criminal prosecution." *United States v. Howard,* 752 F.2d 220, 227 (6th Cir.), *vacated on other grounds,* 770 F.2d 57 (6th Cir.1985); ***706** *see also United States v. Foley,* 23 F.3d 408, 1994 WL 144445, at *2 (6th Cir. Apr.21, 1994) ("[I]f the intent of the private party conducting the search is independent of the official desire to collect evidence in a criminal proceeding, then the private party is not acting as a state agent."), *cert. denied,* 513 U.S. 938, 115 S.Ct. 340, 130 L.Ed.2d 297 (1994).

Here, we doubt that either prong of the *Lambert* test has been satisfied. First, the hotel cleaning staff did not engage in any sort of "search" of the trash gathered from rooms 316 and 320, whether at the encouragement of the police or otherwise. Rather, these employees merely were asked to separately maintain and mark any trash bags they removed during their routine cleaning of the rooms, so that the *police* could then search them. Stated differently, the cleaning staff were not asked to *search* for evidence, but merely to *preserve* any possible evidence they might otherwise have removed from the room and discarded in the course of their ordinary cleaning duties. There is no evidence that the staff were asked to look around the rooms, report any suspicious items, or otherwise deviate from their typical cleaning routine. It also is worth noting that hotel employees initiated contact with the police, and not vice versa, based on their detection of an apparent marijuana smell emanating from one of the two rooms rented by Defendant and his travel companions.

Next, whatever motive or incentive the hotel employees might have had to assist the police in detecting unlawful activity in rooms 316 and 320, they undoubtedly had the distinct and independent intent—and, indeed, the obligation—to clean these rooms and empty their trash, just as they would do with any other room in the hotel. If the police had not

contacted them, the cleaning staff surely would have entered the two rooms and removed the trash bags in any event. These private employees are not transformed into government agents merely because the police took an interest in the items they planned to remove from the room during their normal cleaning activities, nor does any additional monetary or public-minded incentive detract from their independent obligation to remove trash from guest rooms. Indeed, if compliance with a police request would have required the cleaning staff to violate a hotel policy, these employees would have been forced to weigh the modest reward for police cooperation against the significant sanction of discipline or discharge by hotel management.

Accordingly, because the cleaning staff were acting as private individuals and not government agents, it is immaterial whether "Do Not Disturb" signs had been placed on the doors of rooms 316 and 320. Any transgression of hotel policy in this regard does not give rise to a constitutional violation. We have recognized, for example, that the government may use information obtained in a private search "even if the private party betrayed a confidence in providing the information to the government." *United States v. King,* 55 F.3d 1193, 1196 (6th Cir.1995). Similarly, we have held that a motel manager's two searches of a guest room, though "probably violations of state trespass laws," did not implicate the Fourth Amendment prohibition against unreasonable searches, and that "the police were entitled to employ the evidence uncovered by these two searches." *United States v. Nelson,* 459 F.2d 884, 887 (6th Cir.1972). It follows in this case that any purportedly improper entry into Defendant's hotel room by private hotel employees did not violate his rights under the Fourth Amendment.

Yet, even if the hotel cleaning staff were deemed government agents, we are ***707** not persuaded that Defendant has established a reasonable expectation of privacy that would permit him to challenge the search of the trash bags collected from rooms 316 and 320. The courts have recognized that hotel guests ordinarily have a protected Fourth Amendment privacy interest in their rooms. *Hoffa v. United States,* 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966); *United States v. Allen,* 106 F.3d 695, 698 (6th Cir.), *cert. denied,* 520 U.S. 1281, 117 S.Ct. 2467, 138 L.Ed.2d 223 (1997). On the other hand, there normally is no privacy interest in trash placed outside a residence for collection. *See California v. Greenwood,* 486 U.S. 35, 40–41, 108 S.Ct. 1625, 1628–29, 100 L.Ed.2d 30 (1988). When trash leaves the owner's control and is put out for collection, anyone is free to rummage through it, whether for an investigative or any other purpose. *Greenwood,* 486 U.S. at 40, 108 S.Ct. at 1628–29. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Similar to trash being put out for collection and thereby leaving the owner's control, one can reasonably assume that items placed into a hotel room trash bin will be picked up and taken away by the hotel's cleaning personnel. Here, of course, if Defendant's testimony is credited on this point, he arguably went to greater lengths to shield his privacy by placing "Do Not Disturb" signs on the doors of the two rooms. Yet, the district court expressly found that Defendant was not a credible witness on this subject, and concluded that no such signs were present when hotel staff arrived to clean the rooms in accordance with their ordinary practice. (*See* District Court 6/7/2002 Order at 7–8, J.A. at 199–200.) Under this assessment of the evidence, which we are bound to accept unless it is clearly erroneous, Defendant cannot claim a legitimate expectation of privacy in any items discovered in the trash.

Defendant contends that the district court clearly erred in two respects, however: by citing purportedly invalid reasons for discounting Defendant's own testimony, and by instead relying upon the testimony of Sergeant Charron to find that no signs were present on the hotel room doors. Regarding the latter, Defendant claims that Sergeant Charron contradicted himself when he testified on direct examination about a written policy mandating that trash be collected only during routine cleaning, but then conceded on cross-examination that no such written policy existed. In light of this discrepancy, Defendant takes issue with the district court's finding that the Sergeant's testimony was "forthright and consistent." (District Court 6/7/2002 Order at 7, J.A. at 199.)

On the other side of the balance, Defendant challenges the district court's stated grounds for discounting his credibility. This argument rests on the following exchange during the cross-examination of Defendant at the suppression hearing:

Q: Mr. Bruce, what were you doing in Cincinnati?

A: We had come to Cincinnati on a social visit, sir.

Q: To see whom?

A: Ms. Carisse Coleman has family here in Cincinnati. And I and Dennis [Ritter] took the opportunity to accompany her down here, sir.

Q: So she is a local girl?

A: I would believe she lived here at this point, but I had met her in New York.

Q: And she has family here?

A: I wouldn't know that information.

***708** Q: You just told us that you thought she had family here, you were here to visit family?

A: I said we had come here on a social visit, sir.

Q: And I asked you why the social visit and you said to see Carisse Coleman's family?

A: I said Carisse is from here. Okay. I'm not very familiar with Cincinnati, she is. And I believe she came here to see her friends.

(5/30/2002 Suppression Hearing Tr. at 77–78.) Based on this testimony, the district court found that Defendant "had no credible explanation for his presence in Blue Ash." (District Court 6/7/2002 Order at 7, J.A. at 199.) Defendant, in contrast, construes this testimony as consistently citing a "social visit" as his reason for traveling to the Cincinnati area.

The district court's assessments of the credibility of Defendant and Sergeant Charron were not clearly erroneous. "[T]he District Court [i]s in the best position to judge credibility," and when "that Court plausibly resolve[s] the discrepancies in the testimony, its findings of fact should not be disturbed." *United States v. Bradshaw,* 102 F.3d 204, 210 (6th Cir.1996), *cert. denied,* 520 U.S. 1178, 117 S.Ct. 1453, 137 L.Ed.2d 558 (1997). Apart from noting the evident inconsistency in Defendant's shifting account of his reason for being in Blue Ash, the district court cited other factors in discounting Defendant's credibility, including: (1) that Defendant was a convicted felon who had an incentive to fabricate testimony in order to evade the charges against him; and (2) that Defendant was in possession of at least three driver's licenses bearing his likeness but using different names or aliases. As the district court aptly observed, "[m]ost honest people find that they do not need aliases and can navigate through life quite nicely with only one driver's license showing their real name." (District Court 6/7/2002 Order at 7, J.A. at 199.) These all are legitimate grounds for discounting the credibility of a witness, and each was sufficiently rooted in the evidentiary record.

Likewise, we find no basis to disturb the district court's finding that Sergeant Charron testified credibly about the instruction he gave to the hotel manager—namely, that the cleaning staff should collect the trash from rooms 316 and 320 only during their ordinary cleaning routine. The sole ground suggested by Defendant for discounting this testimony is that the Sergeant purportedly had to "disavow" his testimony regarding written guidelines for trash collection when, on cross-examination, he was confronted with the written policy and acknowledged that it did not touch upon the subject of trash collection. Such an apparent failure of memory, however, does not necessarily call a witness's truthfulness into question—it merely invites, but does not compel, the factfinder to discount the witness's credibility. Upon considering Sergeant Charron's testimony and his overall demeanor, the district court elected not to do so. Under these circumstances, we cannot disturb a credibility judgment that lies squarely within the province of the district court.

In light of these factual findings, which were not clearly erroneous, the district court reasonably inferred that "Do Not Disturb" signs must not have been placed on the doors of rooms 316 and 320, because the cleaning staff otherwise would not have entered these rooms and collected their trash. It follows that Defendant had no reasonable expectation of privacy in this trash, as he and his travel companions had placed items in the trash bins where they would be picked up during the routine daily cleaning of the rooms, and neither Defendant nor his companions had taken any measures to prevent this typical daily ***709** task.[7] Consequently, we affirm this aspect of the district court's ruling on Defendant's motion to suppress.

2. The First Search Warrant Was Sufficiently Specific and Was Lawfully Executed.

Apart from claiming that the first warrant to search the hotel rooms did not rest upon a proper showing of probable cause because of its reliance upon items found in the trash, Defendant challenges both the language and the execution of this warrant. Specifically, he contends that the warrant was vague and overbroad in its grant of authority to search the hotel rooms for "papers showing ownership and/or control of" illegal narcotics. In addition, Defendant argues that the searches of the rooms exceeded any permissible reading of this language. We find no error in either regard.

"It is well settled that items to be seized pursuant to a search warrant must be described with particularity to prevent the seizure of one thing under a warrant describing another." *United States v. Blair,* 214 F.3d 690, 697 (6th Cir.) (internal quotation marks and citations omitted), *cert. denied,* 531 U.S. 880, 121 S.Ct. 191, 148 L.Ed.2d 132 (2000). Yet, this requirement of specificity "must be flexible, depending upon the type of items to be seized and the crime involved." *Blair,* 214 F.3d at 697. In particular, where a warrant adequately describes "a category of seizable papers," it is not lacking in specificity merely "because the officers executing the warrant must exercise some minimal judgment as to whether a particular document falls within the described category." *United States v. Ables,* 167 F.3d 1021, 1034 (6th Cir.) (internal quotation marks and citation omitted), *cert. denied,* 527 U.S. 1027, 119 S.Ct. 2378, 144 L.Ed.2d 781 (1999).

The first warrant to search the hotel rooms met these standards for particularity. The affidavit in support of this warrant set forth a number of grounds for ***710** Sergeant Charron's belief that evidence of illegal drug trafficking might be found in the rooms, including: (i) the hotel manager's report of the odor of burning marijuana in the hallway outside these rooms; (ii) the discovery of a partial marijuana cigarette and a hollowed-out cigar shell in the trash collected from the rooms; (iii) the payment in cash for a week's stay in the rooms; (iv) the discrepancies in the driver's license used to rent the car being driven by Defendant and his travel companions; and (v) the different names used to rent the car and to register for the two hotel rooms. Given these indicia of probable cause to search the rooms for evidence of drug trafficking,[8] the warrant was appropriately limited to the search and seizure of illegal drugs, papers "showing ownership and/or control" of such drugs, articles used in the preparation of such drugs for distribution, and any proceeds realized from such distribution. Viewed in the context of the suspected illegal activity (drug trafficking) and the other items to be seized (illegal drugs, articles used to prepare drugs for distribution, and drug proceeds), we find that the warrant adequately described a particular category of papers to be seized—namely, those "showing ownership and/or control of" illegal drugs.

To be sure, this authorization necessarily entailed a cursory review of any papers found in the hotel rooms to determine whether they reflected ownership or control of illegal drugs. As noted, however, a warrant is not rendered fatally overbroad merely because "the officers executing the warrant must exercise some minimal judgment" in order to determine whether a document lies within the category specified in the warrant. *Ables,* 167 F.3d at 1034 (internal quotation marks and citation omitted). Defendant has not pointed to any evidence that the officers executing the warrant erred in this judgment as they searched the room for the specified papers and other items. To the contrary, the record reveals that the officers did not seize any papers during this search.

Nonetheless, in challenging the execution of the first warrant, Defendant suggests that the officers must have acted beyond their limited authority, as they purportedly searched in places where they had no reason to look and obtained information beyond what could be gleaned from a cursory review of the documents found in the room. Regarding the former, Defendant observes that the police found certain documents in an envelope discovered inside a garment bag,[9] and he suggests that this is indicative of an overly broad search. Yet, it cannot be said that the garment bag was a place in which papers would not be found—and, indeed, papers *were* found in the bag. Plainly, then, the officers were entitled to look in this luggage for any papers that were subject to seizure under the warrant. *See United States v. Hare,* 589 F.2d 1291, 1294 (6th Cir.1979).

Just as clearly, the officers were entitled—and, in fact, obligated—to review any papers they found during the search, at least to the extent necessary to determine whether they "show[ed] ownership and/or control" of illegal drugs. Defendant surmises that the officers must have exceeded this limited review, because they otherwise could not have obtained all of ***711** the information cited in the application for the second search warrant—namely, that various driver's licenses and credit cards were discovered in the rooms with names different from the ones under which the rooms were registered. All of this incriminating information, however, would have been readily apparent on the face of these items, without the need for any particularly close scrutiny—as noted in the application for the second warrant, for example, the officers discovered two driver's licenses with Defendant's picture but two different names, neither of which he gave when renting the rooms. Under the "plain view" doctrine, the officers could have seized any such incriminating evidence they discovered while executing the first warrant. *See United States v. Blakeney,* 942 F.2d 1001, 1028 (6th Cir.), *cert. denied,* 502 U.S. 1008, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991); *Hare,* 589 F.2d at 1293–94. Likewise, they were free to cite this evidence as providing probable cause for the issuance of the second warrant, which in turn authorized them to seize these items as evidence of a violation of Ohio's

forgery laws. Accordingly, we find no defect in the language or execution of the first warrant that would mandate the suppression of the evidence discovered during this search.

B. The District Court Properly Applied a Two–Level Enhancement for Obstruction of Justice.

As his next issue on appeal, Defendant argues that the district court erred in applying a two-level sentence enhancement for obstruction of justice, based upon the court's finding that Defendant misrepresented his citizenship to a probation officer during the presentence investigation. To the extent that this enhancement rested upon the district court's interpretation of the sentencing guidelines, we review this decision *de novo*. *United States v. Burke,* 345 F.3d 416, 428 (6th Cir.2003), *cert. denied,* 541 U.S. 966, 124 S.Ct. 1731, 158 L.Ed.2d 412 (2004). The district court's factual findings in support of this enhancement, however, are reviewed for clear error. *Burke,* 345 F.3d at 428. More generally, we must "give due deference to the district court's application of the guidelines to the facts." *United States v. Charles,* 138 F.3d 257, 266 (6th Cir.1998) (internal quotation marks and citations omitted).[10]

The district court made the challenged two-level enhancement pursuant to U.S.S.G. § 3C1.1, which provides:

> If(A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

The commentary for this guideline indicates that an enhancement is appropriate ***712** when a defendant "provid[es] materially false information to a probation officer in respect to a presentence or other investigation for the court." U.S.S.G. § 3C1.1, cmt. n.4(h). The commentary further states, however, that an enhancement ordinarily is not warranted if a defendant "provid [es] incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation." U.S.S.G. § 3C1.1, cmt. n.5(c). "Material" information is defined as "information that, if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1, cmt. n.6.

In this case, the district court found that Defendant had obstructed justice within the meaning of § 3C1.1 by making a false statement to a probation officer regarding his citizenship. (*See* 1/17/2003 Sentencing Hearing Tr. at 16–19, J.A. at 51–54.) Specifically, Defendant stated during a presentence investigation interview that he was a citizen of Bermuda until he became a naturalized United States citizen in 1991. He then recanted this claim, however, when the probation officer confronted him with a 1993 document in which he acknowledged that he was an alien who was being released from the custody of the Immigration and Naturalization Service ("INS") until he could be deported. Upon being shown this document, Defendant changed his story and claimed to be a citizen of Bermuda. As noted by the probation officer, however, Defendant's true citizenship remains a mystery, in light of a determination by the British government that Defendant was not a citizen of Bermuda, and in light of Defendant's inability to produce any documentation verifying his citizenship.[11]

While conceding that his claim of U.S. citizenship was false, Defendant argues that this misstatement was not "material" within the meaning of § 3C1.1 and its commentary. Defendant notes that this statement was made and recanted within the course of a single presentence investigation interview, and that this matter was resolved over three months before the final presentence investigation report was released. Under these circumstances, Defendant contends that his false claim of U.S. citizenship did not significantly impede the probation officer's investigation into his background and preparation of a report.

We find no error in the district court's determination that Defendant provided materially false information to the probation officer, thereby warranting a two-level enhancement under § 3C1.1. Initially, we reject Defendant's proposed "no harm, no foul" gloss upon this guideline, under which a defendant would be free to provide materially false information without penalty so long as the probation officer is able to promptly establish that the information is false. The guideline, after all, is triggered by either actual or "attempted" obstructions of justice, indicating that the proper focus is on the defendant's conduct rather than the probation officer's success in conducting a presentence investigation despite the misinformation provided by the defendant.[12] Likewise, the commentary ***713** accompanying this guideline emphasizes that information is "material" where, "*if believed,* [it] would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1, cmt. n.6 (emphasis added). It follows, therefore, that the guideline is applicable even though a probation officer might not have believed the defendant's false assertion or, as here, was able to quickly disprove it.

Moreover, we believe that Defendant has somewhat understated the extent to which his false statement of his citizenship impaired the presentence investigation in this case. Defendant suggests that he made only a false claim of U.S. citizenship, and that, when confronted with information refuting this contention, he promptly identified himself as a citizen of Bermuda. Defendant continues to adhere to this latter claim, and he notes that it has never been conclusively disproved. In Defendant's view, then, his initial interview with the probation officer provided all of the information needed to conduct a thorough presentence investigation, and his false claim of U.S. citizenship did not materially impede this process.

Yet, this overlooks the considerable information uncovered by the probation officer that casts doubt upon Defendant's status as a citizen of Bermuda. In particular, the presentence investigation report cites the conclusion of the British government and of Interpol London that Defendant was *not* a citizen of Bermuda, and that he instead was born in Nigeria under the name of Joseph Ekwensi. Defendant did nothing to dispel this uncertainty, confirming that he had used this name as an alias, and failing to provide any documentation to support his claim of Bermudian citizenship. More importantly, he had already demonstrated, through his false claim of U.S. citizenship, that he could not be relied upon for accurate information about his identity and background. As a result, the probation officer completed the presentence investigation without ever being able to ascertain Defendant's true citizenship.

Under these circumstances, we readily affirm the district court's conclusion that an enhancement under § 3C1.1 was warranted. As correctly observed in the court below, a false statement about citizenship, like misinformation bearing upon other aspects of a defendant's identity, impairs the ability of a probation officer to fully and accurately determine a defendant's criminal history and discover other pertinent background information. For this reason, this and other courts have held that a § 3C1.1 enhancement is appropriate where a defendant provides false identifying information to a probation officer during a presentence investigation. *See United States v. Wilson,* 197 F.3d 782, 785–86 (6th Cir.1999); *see also United States v. Thomas,* 11 F.3d 1392, 1400–01 (7th Cir.1993) (holding that "false information regarding the defendant's identity was clearly material because it thwarted the probation officer from investigating the defendant's personal and criminal history, which are major factors in determining a defendant's sentence"). We see no meaningful distinction, in terms of materiality to a presentence investigation, between ***714** the use of a false name and a false statement of citizenship—and, indeed, the facts here demonstrate that the two may be related, where the probation officer uncovered information casting doubt on both Defendant's citizenship and his true name. Accordingly, we affirm the district court's application of a two-level enhancement under U.S.S.G. § 3C1.1 in determining Defendant's sentence.

C. The District Court Did Not Err in Denying a Downward Adjustment for Acceptance of Responsibility.

Defendant next argues that the district court erroneously denied him a downward sentencing adjustment for acceptance of responsibility. Specifically, in light of his guilty plea, and in light of the Government's recommendation in his plea agreement that he "be given the appropriate reduction for acceptance of responsibility," (Plea Agreement at ¶ 5, J.A. at 32), Defendant contends that he was entitled to the two-level decrease called for under U.S.S.G. § 3E1.1. We affirm the district court's contrary conclusion.

As explained in the application notes accompanying § 3E1.1, "[c]onduct resulting in an enhancement under § 3C1.1 ... ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct." U.S.S.G. § 3E1.1, cmt. n. 4. Here, of course, the district court applied an enhancement for obstruction of justice under § 3C1.1, and we have affirmed this determination. Consequently, Defendant bears the burden of showing that this is an "extraordinary case[ ] in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." U.S.S.G. § 3E1.1, cmt. n. 4; *see also United States v. Harper,* 246 F.3d 520, 528 (6th Cir.2001) (confirming that it is "the defendant's burden to demonstrate that his case is 'extraordinary' such that he deserves the downward adjustment"), *overruled on other grounds by United States v. Leachman,* 309 F.3d 377 (6th Cir.2002). Although this burden is not "insurmountable," *Harper,* 246 F.3d at 528, the sentencing court's determination on this point "is entitled to great deference," because "the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility," U.S.S.G. § 3E1.1, cmt. n. 5.

We agree with the district court that Defendant has failed to identify anything extraordinary about this case that would warrant adjustments under both § 3C1.1 and § 3E1.1. Defendant's claim of acceptance of responsibility rests upon his guilty plea, the statement in his plea agreement reflecting

his "voluntary and truthful admission to authorities of his involvement in the [charged] offense," (Plea Agreement at ¶ 5, J.A. at 32), and his written July 1, 2002 statement to the probation officer admitting his unlawful conduct and apologizing for his actions. As Defendant points out, the application notes accompanying § 3E1.1 cite the "truthful[ ] admi[ssion][of] the conduct comprising the offense(s) of conviction" as a relevant consideration in determining whether to grant a reduction for acceptance of responsibility. U.S.S.G. § 3E1.1, cmt. n. 1(a). Because he has consistently admitted to the conduct alleged in count one of the indictment, the charge to which he pled guilty, Defendant argues that this factor warrants a reduction for acceptance of responsibility.

Yet, all of the acts cited by Defendant as evidencing his acceptance of responsibility flow naturally from, or are closely related to, his election to plead guilty to the offense charged in count one of the indictment. "[W]e require something more, as a matter of law, than a guilty plea ... to demonstrate that the defendant's case is 'extraordinary.' " *Harper,* 246 F.3d at 528. In one case that we deemed "extraordinary," ***715** for example, all of the defendant's "obstructive conduct predated his indictment," the defendant "never denied his own responsibility and guilt," he "cooperated with prison officials" even "before he was ever charged with an offense," and he acted promptly to undo the effects of his obstructive conduct. *United States v. Gregory,* 315 F.3d 637, 640–41 (6th Cir.), *cert. denied,* 540 U.S. 858, 124 S.Ct. 160, 157 L.Ed.2d 106 (2003).

Here, in contrast, the actions reflecting Defendant's acceptance of responsibility are far more limited, and he provided little or no assistance in reversing the harmful effects of his obstructive conduct. Following his guilty plea and the corresponding admission of his involvement in the bank fraud offense charged in count one of the indictment, Defendant hindered the probation officer's presentence investigation by falsely claiming to be a U.S. citizen. Although he promptly retracted this claim upon being confronted with evidence disproving it, Defendant never provided any documentary evidence or other assistance in the probation officer's effort to confirm his subsequent claim of Bermudian citizenship. There is nothing in the record, in other words, that would remove the taint that arose from Defendant's false statement during the presentence investigation. Under these circumstances, we find no error in the district court's determination that "this case does not present an extraordinary occasion where the Defendant should get an acceptance of responsibility reduction despite the fact that he obstructed justice." (Judgment at 8, J.A. at 24.)

D. The Government Did Not Breach the Plea Agreement by Failing to Affirmatively Recommend at Sentencing that Defendant Be Given a Reduction for Acceptance of Responsibility.

As his final issue on appeal, Defendant argues that the Government breached an obligation owed under the parties' plea agreement by failing to recommend at the sentencing hearing that he be given a reduction for acceptance of responsibility. Because Defendant did not raise this objection at sentencing, we review only for plain error. *United States v. Barnes,* 278 F.3d 644, 646 (6th Cir.2002). "When reviewing a claim under a plain error standard, this Court may only reverse if it is found that (1) there is an error; (2) that is plain; (3) which affected the defendant's substantial rights; and (4) that seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Barnes,* 278 F.3d at 646.

The starting point of our analysis is the language of the plea agreement itself, which provides in relevant part:

> In consideration of the defendant's voluntary and truthful admission to authorities of his involvement in the instant offense, the United States Attorney for the Southern District of Ohio recommends that the defendant be given the appropriate reduction for acceptance of responsibility, pursuant to United States Sentencing Guideline § 3E1.1(a).

(Plea Agreement at ¶ 5, J.A. at 32.) Defendant acknowledged his understanding, however, that "after investigation and review, the Court may determine that the ... recommendations as outlined previously are not appropriate and is not obligated to accept such," and that, "[i]n that event, ... he shall not have the right to withdraw his guilty plea." (*Id.* at ¶ 6.)

In light of this plain language, we readily conclude that the Government did not breach the terms of the plea agreement by failing to affirmatively recommend at the sentencing hearing that Defendant be given a reduction for acceptance of responsibility. First, and most importantly, we ***716** note that the agreement did not require the Government to make such a recommendation at sentencing. Rather, the agreement itself included the requisite recommendation, without any stipulation that the Government would recite this term of the agreement on the record at sentencing or at any other hearing. Upon signing the agreement, therefore, the Government fulfilled its obligation under the relevant provision, recommending that Defendant "be given the

appropriate reduction for acceptance of responsibility," and leaving nothing more to be done at sentencing.

In this important respect, this case differs from *Barnes,* the decision upon which Defendant chiefly relies on appeal. Under the plea agreement at issue in *Barnes,* the Government "agree[d] to recommend that the Defendant be sentenced at the low end of the applicable sentencing guideline range." *Barnes,* 278 F.3d at 650 (Suhrheinrich, J., dissenting) (quoting plea agreement). Yet, the Government failed to actually make the promised recommendation on the record at sentencing. Under these circumstances, we found that the Government had "fail[ed] to adhere to the letter of the plea agreement by expressly recommending that Defendant be sentenced at the low end of the guidelines at sentencing." *Barnes,* 278 F.3d at 649.

Here, in contrast, the "letter of the plea agreement" did not call for the Government to make such an express recommendation at sentencing—instead, the agreement itself set forth the Government's recommendation. At most, then, the plea agreement could perhaps be viewed as ambiguous on this subject, suggesting only by implication that the Government would voice its recommendation at sentencing. Under the standard of review that governs here, however, such an ambiguity could not trigger a "plain" error—that is, an error that is "clear" or "obvious" under current law, *see United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993)—which, if uncorrected, would seriously affect the fairness and integrity of Defendant's sentencing. *See United States v. Cogley*, 38 Fed.Appx. 231, 2002 WL 475259, at *4 (6th Cir. Mar.27, 2002) (distinguishing *Barnes* as involving a "manifest" failure to adhere to the terms of a plea agreement, as opposed to a dispute over "two plausible interpretations of the language of" an arguably ambiguous plea agreement).

Moreover, it is important to note the precise scope of the Government's obligation under the plea agreement—namely, to recommend "that the defendant be given *the appropriate reduction* for acceptance of responsibility." (Plea Agreement at ¶ 5, J.A. at 32 (emphasis added).) The agreement further emphasized that the district court was not bound by this recommendation, and that, "after investigation and review, the Court may determine that the ... recommendations as outlined previously are not appropriate." (*Id.* at ¶ 6, J.A. at 6.) The agreement made clear, in other words, that the appropriateness of any reduction for acceptance of responsibility would depend in part upon the outcome of the presentence investigation and the district court's review of the probation officer's findings.

Here, of course, Defendant's failure to obtain a reduction for acceptance of responsibility was due solely to his own conduct during the presentence investigation. At the time the parties signed the plea agreement, the Government recommended that Defendant be given "the appropriate reduction" for acceptance of responsibility in light of his "voluntary and truthful admission to authorities of his involvement in the instant offense." (Plea Agreement at ¶ 5, J.A. at 32.) If nothing further had ***717** occurred, and if Defendant had been truthful and forthcoming during the presentence investigation, he likely would have received the recommended reduction. Such a reduction was no longer "appropriate," however, in light of Defendant's false claim of U.S. citizenship during an interview with the probation officer. Both the Government's recommendation and its underlying basis remained intact—namely, that Defendant initially was eligible for a sentence reduction because of his admission that he had committed the charged offense—but a change in circumstances, attributable exclusively to Defendant, made this reduction no longer "appropriate."[13]

Consequently, we find no error, plain or otherwise, in the Government's failure to recommend at sentencing that Defendant receive a reduction for acceptance of responsibility. The plea agreement did not impose such an obligation, and such a reduction was no longer appropriate in light of Defendant's actions after he signed the agreement and entered his guilty plea pursuant to this agreement. The Government complied with its obligations under the plea agreement, and only Defendant's own subsequent conduct prevented him from realizing the full benefit of the bargain he struck under this agreement.

E. The Impact of the Supreme Court's Ruling in *Booker*

To this point, we have addressed Defendant's challenges to the district court's application of the U.S. Sentencing Guidelines under the standards adopted by this court and others over the past two decades for reviewing such sentencing issues. This entire body of law has been cast in a different light, however, by the Supreme Court's very recent decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108 (U.S. Jan. 12, 2005). To oversimplify a dramatic and far-reaching decision, *Booker* holds, in a two-part opinion issued by two separate 5–4 majorities, (i) that the Sixth Amendment as construed in *Blakely, supra,* applies to the

federal sentencing guidelines, and (ii) that, in order to avoid the Sixth Amendment concerns raised by the guidelines, it is necessary to invalidate two provisions of the Sentencing Reform Act of 1984 that make the guidelines mandatory in federal court sentencing. *See Booker,* 543 U.S. at ——, ——, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108, at *15, *24. In addition, the Court expressly confirmed that its holdings apply to all cases now on direct review. *See* 543 U.S. at ——, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108, at *29. Our task, therefore, is to assess the impact of these rulings upon the present appeal.

Under the first prong of *Booker,* our analysis of the constitutionality of Defendant's 33–month sentence is fairly straightforward. In accordance with the usual pre-*Booker* sentencing practice—and, in particular, the statutory command that the sentencing guidelines were mandatory, *see* 18 U.S.C. § 3553(b)—the district court found by a preponderance of the evidence that Defendant was subject to ***718** an enhancement under U.S.S.G. § 3C1.1 for obstruction of justice, resulting in a two-level increase from 12 to 14. At an offense level of 12 and a criminal history category of IV, Defendant would have faced a sentencing range of 21 to 27 months of incarceration. With an offense level of 14 following the two-level obstruction-of-justice enhancement, however, Defendant faced an increased sentencing range of 27 to 33 months, and the district court sentenced him at the top of this range.

Because the district court believed that the guidelines were mandatory, this 33–month sentence seemingly ran afoul of the rule stated at the conclusion of the first portion of the Supreme Court's *Booker* decision: namely, that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker,* 543 U.S. at ——, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108, at * 15. Absent the factual findings that triggered an obstruction-of-justice enhancement under U.S.S.G. § 3C1.1, Defendant faced a maximum sentence of 27 months under the federal sentencing guidelines. Although Defendant apparently does not dispute at least some of the facts underlying the § 3C1.1 enhancement—in particular, he has not challenged the probation officer's assertion that he falsely claimed U.S. citizenship during the presentence investigation—he does contest the probation officer's overarching conclusions that he concealed his citizenship and that his true citizenship remained unknown. To treat the guidelines as compelling a sentence enhancement on the basis of the district court's resolution of these disputed factual issues would contravene Defendant's Sixth Amendment right to insist that a jury find all such facts beyond a reasonable doubt.[14]

Nonetheless, we review any such violation under the plain error standard, because Defendant failed to raise any objection in the court below concerning (i) the mandatory character of the guidelines, or (ii) the district court's authority to find facts by a preponderance of the evidence that would result in sentence enhancements. *See United States v. Bartholomew,* 310 F.3d 912, 926 (6th Cir.2002); ***719** *United States v. Stewart,* 306 F.3d 295, 312–13 (6th Cir.2002); *see also Booker,* 543 U.S. at ——, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108, at *29 (emphasizing that "we expect reviewing courts," in applying the Court's decision, to decide whether the relevant Sixth Amendment issue "was raised below and whether it fails the 'plain-error' test"). Accordingly, we apply the four-part test set forth earlier, under which we may vacate Defendant's sentence only if it rests upon (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Bartholomew,* 310 F.3d at 926.

Although the district court's error in enhancing Defendant's sentence only became apparent with the decision in *Booker,* both the Supreme Court and this court have recognized that the first two prongs of the plain error standard are satisfied so long as the error is evident at the time of appellate consideration. *See United States v. Cotton,* 535 U.S. 625, 632, 122 S.Ct. 1781, 1785–86, 152 L.Ed.2d 860 (2002); *United States v. Cleaves,* 299 F.3d 564, 568 (6th Cir.2002). Regarding the "substantial rights" element of the plain error analysis, we follow the lead of other courts and leave this issue unresolved, *see, e.g., Cotton,* 535 U.S. at 632–33, 122 S.Ct. at 1786; *Cleaves,* 299 F.3d at 568, because any error here did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

In reaching this conclusion, we find considerable guidance in the decisions that have applied the plain error standard to claimed violations of the rule announced in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Indeed, *Booker* is a direct lineal descendant of *Apprendi* and *Blakely,* with each of these cases further defining the respective roles of judge and jury under the Sixth Amendment. Surely, then, the reasoning that we and other

courts have employed in conducting plain-error review of claimed *Apprendi* violations should carry over to the present context of a claimed violation of *Booker*. In particular, both the Supreme Court and this Court have held that an *Apprendi* violation does not satisfy the fourth prong of the plain error standard if the evidence bearing upon the issue that was impermissibly decided by the judge rather than the jury was "overwhelming" and "essentially uncontroverted." *Cotton,* 535 U.S. at 633, 122 S.Ct. at 1786 (internal quotation marks and citation omitted); *see also Stewart,* 306 F.3d at 317–18; *Cleaves,* 299 F.3d at 569.

We find this reasoning applicable here. Regarding the false claim of U.S. citizenship to the probation officer, Defendant does not deny that he made such a claim, but instead argues that it was not "material" because he promptly retracted it. We already have explained why, in our view, U.S.S.G. § 3C1.1 and its accompanying commentary do not countenance such a "no harm, no foul" view of materiality. On the basis of this uncontroverted fact alone, then, an enhancement for obstruction of justice would have been warranted. Moreover, while Defendant asserts that his claim of Bermudian citizenship has never been disproved, this does not call into question the district court's findings that Defendant both concealed his citizenship (by falsely claiming to be a U.S. citizen) and impeded the probation officer's effort to determine his true citizenship (by failing to provide any supporting documentation for his subsequent claim of Bermudian citizenship, leaving the probation officer to choose between Defendant's bare word and information that refuted Defendant's status as a citizen of Bermuda). We view the evidentiary support for the district court's findings on these points as sufficiently ***720** "overwhelming" to defeat any claim that these findings "seriously affected the fairness, integrity, or public reputation of judicial proceedings."

Two other considerations buttress our conclusion on the fourth prong of the plain error standard. First, we view it as unlikely that the district court would have imposed a lower sentence if it had realized that the guidelines are advisory and not mandatory. Exercising its more limited discretion under the mandatory regime, the district court elected to sentence Defendant at the top of the applicable 27–to–33–month guideline range. Surely, if the district court was not inclined to impose a shorter sentence despite its power to do so within the guidelines' mandatory sentencing scheme, it would not have elected to reduce Defendant's sentence under a more open-ended advisory system.

Next, while *Booker* does not distinguish between offense-related conduct and other sentence-enhancing facts, we cannot help but believe that a judge's findings concerning obstructive conduct toward a probation officer during a court-ordered and judicially-supervised presentence investigation do not trigger the same "fairness" concerns as, say, a judge's determination that a defendant brandished a weapon during the commission of a crime. "United States probation officers serve as officers of the court," and "it is reasonable to view the United States Probation Office itself as a legally constituted arm of the judicial branch." *United States v. Reyes,* 283 F.3d 446, 455 (2d Cir.2002) (internal quotation marks and citations omitted); *see also* 18 U.S.C. § 3602(a) (authorizing the federal district courts to appoint probation officers "within the jurisdiction and under the direction of the court making the appointment"); 18 U.S.C. § 3552(a) (providing that a "United States probation officer shall make a presentence investigation of a defendant ..., and shall, before the imposition of sentence, report the results of the investigation to the court").

Thus, it surely is within the province of the district court to investigate and punish attempts to interfere with a probation officer's performance of duties owed to the court. It follows, in our view, that the district court's factual findings on such matters are entitled to considerable deference. Although *Booker* instructs that such facts cannot trigger a sentence beyond the otherwise-applicable maximum unless they are admitted by the defendant or proved to a jury beyond a reasonable doubt, we cannot conceive that a district court's assumption of this fact-finding role, even if erroneous, could be viewed as "seriously affecting the fairness, integrity, or public reputation of judicial proceedings," as would be necessary to warrant reversal under the plain error standard. Consequently, we hold that any violation of *Booker* in this case does not require a remand for resentencing.

IV. *CONCLUSION*

For the reasons set forth above, we AFFIRM the conviction and sentence of Defendant/Appellant Floyd Bruce.

COOK, Circuit Judge, concurring.

Though I join the majority in affirming Bruce's conviction and sentence, I respectfully decline to join its discussion of Bruce's expectation of privacy in his hotel-room trash because that theoretical constitutional question—whether a search by

state actors rather than the hotel staffers would have violated a reasonable expectation of privacy—ought to be avoided as not "absolutely necessary to [the] decision of the case." *Watters v. TSR, Inc.*, 904 F.2d 378, 380 (6th Cir.1990).

I agree with the majority regarding *Booker* 's impact here —plain-error review ***721** is appropriate. And we affirm Bruce's sentence because the district court's fact-finding—investigating and punishing attempted interference with a probation officer's performance of duties owed the court—did not seriously affect the proceedings' fairness, integrity, or public reputation. But while fact-finding under these circumstances, though violative of the Sixth Amendment, does not warrant resentencing under plain-error review, there may exist many circumstances under which unconstitutional judicial fact-finding *would.* I do not believe the majority intends to suggest otherwise, but the point deserves emphasis: unconstitutional judicial fact-finding may constitute plain error, but does not under these facts.

All Citations

396 F.3d 697, 2005 Fed.App. 0049P

Footnotes

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

1 Notably, while Defendant challenges the district court's denial of his motion to suppress, and while both sides cite to testimony and evidence presented at the hearing on this motion, the underlying transcript of this suppression hearing was not included in the joint appendix provided by the parties on appeal. Nonetheless, we have obtained a copy of the transcript of this May 30, 2002 hearing, and have confirmed that it is consistent with the facts as set forth in the parties' briefs on appeal and in the district court's order denying Defendant's motion to suppress.

2 Under the interdiction program, hotel employees can earn a reward for assisting the police, and a reward apparently was paid to a hotel employee in this case.

3 Although Sergeant Charron testified on direct examination that the hotel interdiction program itself includes a written guideline specifying that trash collection is to be done only as part of the regular cleaning routine, he conceded on cross-examination that the written policies actually do not address the subject of trash collection.

4 Neither party called the hotel's cleaning staff as witnesses, so there is no direct evidence as to whether these employees observed "Do Not Disturb" signs hanging on the doors to the rooms or whether they entered the rooms despite the presence of these signs.

5 The district court observed that marijuana users sometimes use a hollowed-out cigar to smoke marijuana in lieu of other paraphernalia.

6 At the suppression hearing, Defendant testified that he had given this envelope to Ritter for safekeeping.

7 Alternatively, even if the district court had erred in concluding that "Do Not Disturb" signs had been placed on the doors, we believe that other considerations would have altogether eliminated any claimed privacy interest in the items discovered in the trash. First, there surely is a meaningful distinction between items placed in a trash receptacle, where cleaning staff presumably will collect them at some point, and items located in other portions of the room, where hotel personnel would not be expected to inspect or remove them. *Cf. United States v. Bass,* 41 Fed.Appx. 735, 2002 WL 1378219, at *2 (6th Cir. June 24, 2002) (observing that hotel staff generally have no authority to enter a guest's room "except for housekeeping purposes," unless the guest consents or his tenancy has terminated). At a minimum, the Blue Ash police could have relied upon the apparent authority of the hotel cleaning staff to collect the trash from guest rooms, particularly where the police in this case have testified without contradiction that they directed the staff not to collect the trash if a "Do Not Disturb" sign was found on the door. *See Illinois v. Rodriguez,* 497 U.S. 177, 186–89, 110 S.Ct. 2793, 2800–01, 111 L.Ed.2d 148 (1990) (holding that the police may rely on consent given by someone who is reasonably believed to have authority over the premises).

In addition, Defendant confronts the problem that he registered as a guest in one room (316) and then apparently stayed in the other (320), thereby weakening his claim to privacy in either room. Any expectation of privacy was further

diminished by Defendant's use of an alias, as the courts have recognized in cases where hotel rooms were obtained under a false name or with false documents. *See, e.g., United States v. Cunag,* 386 F.3d 888, 894–95 (9th Cir.2004); *United States v. Carr,* 939 F.2d 1442, 1446 (10th Cir.1991); *see also United States v. McRae,* 156 F.3d 708, 711 (6th Cir.1998) (citing *Carr* with approval). Under the combined weight of these considerations, we do not believe that Defendant had a reasonable expectation of privacy in the items collected from the trash receptacles of rooms 316 and 320.

8 Notably, apart from his contention that the items found in the hotel room trash should have been disregarded as the fruits of an unlawful search and seizure, Defendant does not challenge the district court's finding that the warrant was supported by probable cause.

9 As noted by the district court, this garment bag belonged to Defendant's travel companion, Dennis Ritter. Nonetheless, we, like the district court, will assume for present purposes that Defendant has standing to challenge the search of this bag.

10 We recognize that under *United States v. Booker,* 543U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108 (U.S. Jan. 12, 2005), it is no longer mandatory that defendants be sentenced in accordance with the United States Sentencing Guidelines. Sentencing courts must, however, give consideration to the guidelines. *See Booker,* 543 U.S. at ——, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108, at *27 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). Thus, it remains an important part of our appellate review function to determine what the guidelines would call for under the particular facts and circumstances of a given case. We then return below to the broader question of *Booker* 's impact upon this appeal.

11 According to the presentence report, the International Criminal Police Organization ("Interpol") in London concluded in 1991 that Defendant's real identity was Joseph Nnandi Ekwensi, and that he was born in Nigeria in 1965. (*See* Presentence Investigation Report at 6, J.A. at 168.) During an interview with the probation officer, Defendant admitted that he was convicted of two 1988 offenses in England under this alias, but he denied that this was his true name or that he was born in Nigeria.

12 Defendant cites our decision in *United States v. Williams,* 952 F.2d 1504, 1515–16 (6th Cir.1991), for the proposition that § 3C1.1 encompasses only successful efforts to impede an investigation. We have previously rejected this proposed reading of *Williams,* however, explaining that the ruling in that case was limited to the context of false statements made to law enforcement officers during the investigation or prosecution of the charged offense. *See United States v. Aideyan,* 11 F.3d 74, 76 (6th Cir.1993). Citing the commentary to § 3C1.1, we held in *Aideyan* that a false statement to a probation officer triggers an enhancement so long as it is "material," without regard for whether it actually operates as a "significant impediment" to the probation officer's investigation. *Aideyan,* 11 F.3d at 76.

13 Even if the Government had promised to affirmatively and expressly recommend a reduction at sentencing, Defendant's conduct during the presentence investigation arguably would have relieved the Government of this obligation. *See United States v. Skidmore,* 998 F.2d 372, 375–76 (6th Cir.1993) (observing that "a defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement" (internal quotation marks and citations omitted)). Because we do not construe the plea agreement as embodying such a promise, however, we need not resolve this issue.

14 We note that the district court's factual findings in support of the § 3C1.1 enhancement concerned only matters that transpired *after* Defendant entered his guilty plea, and not any events or circumstances surrounding the substantive offenses charged in the indictment. As Justice O'Connor observed in dissent in *Blakely,* such facts are not discoverable prior to trial, and "substantial and real" costs would be incurred if a jury were required to determine such facts beyond a reasonable doubt in order to use them at sentencing. *See Blakely,* 542 U.S. at ——, 124 S.Ct. at 2546 (O'Connor, J., dissenting). Nonetheless, the *Blakely* majority expressly declined to exclude such facts from the reach of its ruling. *See Blakely,* 542 U.S. at —— & n. 11, 124 S.Ct. at 2539 & n. 11. *Booker* 's Sixth Amendment holding, likewise, draws no such distinction among categories of facts that may permissibly be found by a judge versus a jury. *See Booker,* 543 U.S. at ——, 125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108, at * 15. Indeed, the sentence of defendant Booker himself had been enhanced under § 3C1.1 for obstruction of justice (albeit for trial testimony that the district court found perjurious), *see United States v. Booker,* 375 F.3d 508, 509 (7th Cir.2004), and the Supreme Court affirmed the Seventh Circuit's ruling that this mandatory guideline-driven enhancement violated the Sixth Amendment, *see Booker,* 543 U.S. at ——,

125 S.Ct. 738, 160 L.Ed.2d 621, 2005 WL 50108, at *29. We believe, therefore, that *Booker* reaches the district court's use in this case of its own factual findings to trigger a mandatory § 3C1.1 enhancement.

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539 F.3d 404
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Malik D. HARDIN, Defendant–Appellant.

No. 06–6277.
|
Argued: Oct. 30, 2007.
|
Decided and Filed: Aug. 25, 2008.
|
Rehearing and Rehearing En Banc Denied Jan. 16, 2009.

Synopsis

Background: Following denial of motion to suppress, 2006 WL 1469316, defendant was convicted in the United States District Court for the Eastern District of Tennessee, Thomas A. Varlan, J., of narcotics trafficking and weapons offenses. Defendant appealed.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

apartment manager who entered apartment prior to officers' serving arrest warrant had acted as government agent;

confidential informant's tip, by itself, was insufficient to establish requisite reasonable belief to support entry to serve arrest warrant; and

no valid consent was obtained for apartment manager's entry into apartment.

Reversed; conviction vacated; remanded.

Alice M. Batchelder, Circuit Judge, filed opinion concurring in part and dissenting in part and dissenting from the judgment.

Attorneys and Law Firms

***406 ARGUED:** John E. Eldridge, Eldridge & Gaines, Knoxville, Tennessee, for Appellant. David Charles Jennings, Assistant United States Attorney, Knoxville, Tennessee, for Appellee. **ON BRIEF:** John E. Eldridge, Eldridge & Gaines, Knoxville, Tennessee, for Appellant. David Charles Jennings, Assistant United States Attorney, Knoxville, Tennessee, for Appellee. Malik D. Hardin, Ray Brook, New York, pro se.

Before: BATCHELDER, MOORE, and COLE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which COLE, J., joined. BATCHELDER, J. (pp. 427–45), delivered a separate opinion concurring in part and dissenting in part and dissenting from the judgment.

OPINION

KAREN NELSON MOORE, Circuit Judge.

This case poses a series of intriguing questions: first, to enter a residence to execute an arrest warrant, must a police officer have probable cause or only "reason to believe" that the suspect is inside the residence, and did the officers' knowledge in this case satisfy either standard? Second, does an apartment manager become an agent of the government when officers request that the manager enter an apartment to verify the presence of a suspect? Because we hold that the officers' knowledge was insufficient under either standard and that the apartment manager was acting as an agent of the government in this case, we **REVERSE** the district court's denial of Defendant–Appellant Malik D. Hardin's ("Hardin") motion to suppress, **VACATE** Hardin's conviction, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts

Hardin appeals his conviction following a two-day jury trial in June 2006. The jury convicted Hardin of possession with intent to distribute five grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c), and possession of a

firearm by a felon, in ***407** violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

For the most part, the facts in this case are not significantly disputed. On March 28, 2005, Hardin was released from prison and put on federal supervised release. In June 2005, a federal warrant for Hardin's arrest issued following a petition to revoke his supervised release. Joint Appendix ("J.A.") at 125–26 (Gov't Resp. to Def.'s Sent. Mem. at 2). On August 29, 2005, Officer Ed Kingsbury ("Kingsbury"), an investigator with the Knoxville Police Department, received a tip from a confidential informant ("CI") that Hardin might be staying with a girlfriend at the Applewood Apartment complex. J.A. at 84 (Magistrate Judge's Report & Recommendation Re: Mot. to Suppress ("Mot. to Suppress R & R") at 3). The CI also described the vehicle that he believed Hardin to be driving, but the CI could not identify which particular apartment he believed Hardin to be staying in, only its approximate area in the building. *Id.*; *see also* J.A. at 160–63 (Hr'g Tr. at 18–21).

Along with Officer Jason Tarwater ("Tarwater"), Kingsbury went to the apartment building, where the officers spotted what they believed to be the described vehicle[1] near the apartment unit, number 48, that they believed the CI had described. J.A. at 84 (Mot. to Suppress R & R at 3), 149–50 (Hr'g Tr. at 7–8). The officers talked with the apartment manager, whom the government never produced and identified only as "Craig," who informed them that Hardin had not leased any apartment and that the manager had not seen him on the property. J.A. at 84–85 (Mot. to Suppress R & R at 3–4), 168 (Hr'g Tr. at 26). The apartment manager told them that a woman, Germaine Reynolds ("Reynolds"), had leased Apartment 48. J.A. at 85 (Mot. to Suppress R & R at 4). The government and Hardin stipulated that Hardin was an overnight guest of Reynolds, the lessee, and that "standing was not an issue." J.A. at 58 (Mot. to Reveal Identity Mem. & Order at 2 n. 1).

The officers advised the manager of Hardin's criminal history, namely a shootout with police officers following an armed-robbery incident in the mid–1990s, a conviction for which Hardin served ten years in prison. J.A. at 169 (Hr'g Tr. at 27). Kingsbury testified that the apartment manager was shocked and worried about Hardin's potential presence in the apartment complex, and Kingsbury told the manager that "we need to see if he is there" and that "[w]e *asked* him to go ahead and under a ruse check to see if a water leak was in the apartment to see if he was there." J.A. at 151 (Hr'g Tr. at 9) (emphasis added). Kingsbury unequivocally stated that "[w]ithout a doubt" the ruse "was my idea." J.A. at 171–72. (Hr'g Tr. at 29–30). At trial, Kingsbury testified that "[w]e *sent* the manager of the apartment to see if [Hardin] was there." J.A. at 267 (Trial Tr. at 33) (emphasis added).

The officers watched on CCTV as the manager walked to Apartment 48 and entered it. J.A. at 172–73 (Hr'g Tr. at 30–31). Hardin testified that the manager simply entered the apartment, using a key, and called out "Maintenance." J.A. at 221–22 (Hr'g Tr. at 79–80). At that time, Hardin was in the back bedroom, talking on a cell phone to Reynolds. *Id.* Hardin asked her what to do, and she told him to ask what they wanted. J.A. at 222 (Hr'g Tr. at 80). Hardin stated that the manager "said there is a water leak upstairs in the upstairs apartment. Is it all right if I come in and check your bathroom?" and ***408** that he related this information to Reynolds. *Id.* In response, she stated "yes, I guess," and Hardin told the manager he could look at the bathroom. *Id.* After checking the bathroom, the manager stood in the hallway outside the bedroom, looked in, and asked Hardin if he had heard any water running. J.A. at 223 (Hr'g Tr. at 81). The apartment manager returned to the officers and told them that "the guy you are looking for is back in the back bedroom on the right laying on the bed talking on the cell phone." J.A. at 173 (Hr'g Tr. at 31).

Kingsbury testified that he felt they had probable cause at that point. J.A. at 174 (Hr'g Tr. at 32). Earlier in the hearing Kingsbury stated his belief that the CI's information was not sufficient to establish probable cause alone. J.A. at 163–64 (Hr'g Tr. at 21–22); *see also* J.A. at 46–47 (stating that the officers "based their decision that they had probable cause to believe [Hardin] was inside [ ] upon the apartment manager's verification") (Gov't Resp. to Def.'s Mot. to Reveal Identity of Informant at 1–2).

After the apartment manager verified Hardin's presence in Apartment 48, Kingsbury and Tarwater called for two more officers to join them in entering the apartment to arrest Hardin, whom they believed to be dangerous based on his prior conviction. The officers entered abruptly, screaming "police" and "get down on the ground." J.A. at 89 (Mot. to Suppress R & R at 8). They found Hardin sitting on a couch in the front room, and Kingsbury stated that Hardin cooperated in moving to the floor and allowing himself to be handcuffed. *Id.* Kingsbury testified that, as the other officers handcuffed Hardin, he searched the couch on which Hardin had been sitting and found a firearm underneath a cushion. *Id.* Another

officer, Jared Turner, conducted a sweep of the apartment's other rooms, and when he entered the bedroom, "he saw a bed with a bedskirt" and "[i]t appeared to him as though someone might be under the bed, because of the way an area of the sham poked out." J.A. at 94 (Mot. to Suppress R & R at 13). Upon investigation, Turner discovered that the protrusion was a shoe box that contained two more firearms. *Id.* In addition to the three firearms, the officers recovered crack cocaine, marijuana, and approximately $2,000 in cash from Hardin's pockets. J.A. at 92 (Mot. to Suppress R & R at 11).

B. Procedural History

On September 7, 2005, a Grand Jury indicted Hardin on three counts, J.A. at 12–13 (Indictment), and on January 23, 2006, Hardin filed a motion to suppress the physical evidence recovered from the apartment, J.A. at 23–29. Although the officers had a warrant for his arrest, Hardin contended that the officers lacked probable cause to believe that he was present in the apartment where he was staying as a guest.[2] The government argued that probable cause existed because the apartment manager, at the officers' request, ***409** entered the apartment and verified Hardin's presence. J.A. at 30–36 (Gov't Resp. to Mot. to Suppress).

On February 17, 2006, Hardin filed a motion to reveal the identity of the CI. J.A. at 40–45. The government filed a response to Hardin's motion to reveal the identity of the CI in which it argued that the CI's identity was "irrelevant" because probable cause to enter the apartment was "based upon the apartment manager's verification that the defendant was inside." J.A. at 46–47 (Gov't Resp. to Def.'s Mot. to Reveal Identity of Informant at 1–2).

On March 1, 2006, a magistrate judge heard oral argument on Hardin's motion to reveal the identity of the CI. During the hearing, at which no evidence was presented, the magistrate judge questioned Hardin's argument that the apartment manager was acting as an agent or instrument of the government when he entered Apartment 48 to determine whether Hardin was present. J.A. at 132–33 (Mot. to Reveal Identity Hr'g Tr. at 4–5). On March 9, 2006, the magistrate judge issued a Memorandum and Order denying Hardin's motion to reveal the CI's identity. The magistrate judge concluded that the apartment manager was not acting as an agent or instrument of the government because the magistrate judge held that Tennessee negligence law imposes upon apartment managers "a legal duty to all residents of the apartment community to exercise reasonable care in preventing harm to tenants resulting from third-party crimes on the premises." J.A. at 65 (Mot. to Reveal Identity Mem. & Order at 9) (citing *Tedder v. Raskin,* 728 S.W.2d 343, 347–48 (Tenn.Ct.App.1987)).

On March 17, 2006, the magistrate judge held a hearing on Hardin's motion to suppress the physical evidence. On March 29, 2006, the magistrate judge issued a Report and Recommendation denying Hardin's motion to suppress. After noting Hardin's argument that the apartment manager was acting as an agent of the government, the magistrate judge observed that he had already resolved this issue against Hardin following the earlier, non-evidentiary hearing. J.A. at 96 & n. 1 (Mot. to Suppress R & R at 15).

On May 3, 2006, the district court issued a Memorandum and Order overruling Hardin's objections to the magistrate judge's order denying Hardin's motion to reveal the identity of the CI. The district court noted Hardin's objection to the magistrate judge's ruling, in the absence of testimony, that the apartment manager was not acting as an agent of the government, but the court agreed with the magistrate judge that the apartment manager, "upon learning from law enforcement that the defendant may be in one of the apartments, had an independent duty to investigate further and confirm whether, in fact, [Hardin] was in the apartment." J.A. at 112–13 (Mem. & Order at 2–3).

On May 25, 2006, the district court issued a Memorandum and Order overruling Hardin's objections to the magistrate judge's Report and Recommendation and denied Hardin's motion to suppress. The district court stated that "the Court again agrees [with the magistrate judge] that the apartment manager had an independent business duty to enter the apartment and confirm whether the defendant was in the apartment." J.A. at 115 (Mem. & Order at 2).

After a two-day jury trial in June 2006, Hardin was convicted of all counts. On September 26, 2006, the district court sentenced Hardin to 360 months in prison and eight years of supervised release and imposed a $300 Special Assessment. Hardin timely filed a notice of appeal.

***410 II. ANALYSIS**

A. Whether Probable Cause or Reason to Believe is the Correct Standard Governing When Officers May Enter a Residence to Execute an Arrest Warrant

The first question presented by this case concerns the proper standard for evaluating the quantum of proof required for police officers to enter a residence to execute an arrest warrant. In *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the Supreme Court stated that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within." *Id.* at 603, 100 S.Ct. 1371 (emphasis added). Earlier in the opinion, the Court noted that the case involved no contention that "the police lacked *probable cause* to believe that the suspect was at home when they entered." *Id.* at 583, 100 S.Ct. 1371 (emphasis added). In dissent, Justice White stated his understanding that "under today's decision, the officers apparently need an extra increment of *probable cause* when executing the arrest warrant, namely, grounds to believe that the suspect is within the dwelling." *Id.* at 616 n. 13, 100 S.Ct. 1371 (White, J., dissenting) (emphasis added). Given that the officers did *not* have an arrest warrant in *Payton,* the Supreme Court did not elaborate on the quantum of proof necessary for officers to enter a residence to execute an arrest warrant, as the Court simply reversed the judgment against the defendant in the case after noting the absence of an arrest warrant. *Id.* at 603, 100 S.Ct. 1371.

The district court analyzed Hardin's motion to suppress using a probable-cause standard, but on appeal the government argued in its brief that an intervening decision from our court, *United States v. Pruitt,* 458 F.3d 477 (6th Cir.2006), *cert. denied,* 549 U.S. 1283, 127 S.Ct. 1814, 167 L.Ed.2d 325 (2007), controls this case and commands a different standard. In particular, the two-judge majority in *Pruitt* stated that "a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant." *Id.* at 482. In response to the government's argument, Hardin contended in his Reply Brief that the *Pruitt* panel had overlooked our prior decision in *United States v. Jones,* 641 F.2d 425 (6th Cir.1981). Reply Br. at 3–4. In *Jones,* observing that "[i]t is ... fundamental that government officials cannot invade the privacy of one's home without *probable cause* for the entry," we summarized *Payton* as holding that "an arrest warrant can authorize entry into a dwelling only where the officials executing the warrant have *reasonable or probable cause* to believe the person named in the warrant is within." *Id.* at 428 (emphases added).

At first glance, *Jones* and *Pruitt* appear in conflict on this issue, in which case our circuit's rule that "[a] panel of this Court cannot overrule the decision of another panel," *Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir.1985), would mean that our prior holding in *Jones* governs this case, notwithstanding the later view expressed by the majority in *Pruitt.* Indeed, at oral argument the government conceded that *Jones,* as the earlier case in our circuit, was binding and had settled this issue. Upon more careful review, however, we conclude that *Jones* does not control this case because *Jones* involved a distinct factual scenario and because the language in our *Jones* opinion is dicta. Applying the same careful review to our opinion in *Pruitt,* we conclude that *Pruitt* does not control this case either because the language in *Pruitt* purporting to adopt a "lesser reasonable belief standard" ***411** was not necessary to the determination of the issue on appeal and is therefore dicta. *See United States v. Swanson,* 341 F.3d 524, 530 (6th Cir.2003) ("[T]his holding might be considered dicta in that it was not necessary to the determination of the issue on appeal."). We address *Jones* first and then *Pruitt.*

1. *Jones* Does Not Control this Case

In *Jones,* we considered the admissibility of evidence against a person *not* named in an arrest warrant; the arrest warrant was for the defendant's brother. *Jones,* 641 F.2d at 426–27. In *Payton,* in contrast, the officers were seeking to and did arrest Payton.[3] The Court's statement, therefore, that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within" pertained to the Fourth Amendment rights of a person named in arrest warrant. *Payton,* 445 U.S. at 603, 100 S.Ct. 1371. Indeed, in *Payton* the Court specifically observed that its opinion did not address "the authority of the police, without either a search warrant or arrest warrant, to enter a third party's home to arrest a suspect." *Id.* at 583, 100 S.Ct. 1371.

Although our opinion in *Jones* cited *Payton* and summarized *Payton*'s holding—supplying the language in *Jones* that Hardin relies upon as establishing that *Payton*'s "reason to believe" standard is equivalent to a probable-cause standard—*Jones* clearly involved a different factual situation than *Payton.* We noted as much in *Jones,* observing that *Payton* did not address the requirements when the "entry is to the premises of a third person" who then challenges the evidence seized in the search. *Jones,* 641 F.2d at 428 n. 3. Citing our decision in *United States v. McKinney,* 379 F.2d 259 (6th Cir.1967), we stated that "an arrest warrant and probable cause is sufficient" in such circumstances. *Jones,* 641 F.2d at 428 n. 3. Shortly after our decision in *Jones,* however, the

Supreme Court addressed this exact question in *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), and held that *more* was required to protect persons not named in an arrest warrant when officers seize evidence during their intrusion into a residence at which the persons enjoyed a reasonable expectation of privacy.

The Court in *Steagald* explained that "the narrow issue before us is whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests *of persons not named in the warrant,* when their homes are searched without their consent and in the absence of exigent circumstances." *Steagald,* 451 U.S. at 212, 101 S.Ct. 1642 (emphasis added). The Court held that "a search warrant must be obtained absent exigent circumstances or consent" for evidence to be admissible against the person not named in the warrant. *Id.* at 205–06, 101 S.Ct. 1642. The Court noted that the issue involved a conflict among the circuits and specifically ***412** cited our decision in *McKinney* as one "adopting the contrary view that a search warrant is not required." *Id.* at 207 n. 3, 101 S.Ct. 1642. The Court's opinion in *Steagald,* therefore, overruled our opinions in *McKinney* and *Jones* as to their holdings concerning the requirements for the admissibility of evidence against a person *not* named in an arrest warrant when officers enter a dwelling to execute the arrest warrant.

In light of *Steagald,* our opinion in *Jones* does not control this case. Hardin correctly notes that portions of *Jones* refer to a need for officers to have probable cause to believe the person named in arrest warrant is within a dwelling, but for the most part, those portions of *Jones* do not survive *Steagald* because those references to probable cause appeared within our analysis applying the standard (an arrest warrant plus probable cause) that the Supreme Court in *Steagald* rejected in favor of requiring a search warrant. Our other references in *Jones* to probable cause are mere dicta. We introduced our analysis in *Jones* by referring to the "fundamental" principle "that government officials cannot invade the privacy one's home without probable cause for the entry" and summarized the Court's holding in *Payton* by using the term "probable cause." *Jones,* 641 F.2d at 428. Our summary of *Payton,* however, was not essential to our resolution of a case involving distinct facts and a different question of law, and that summary is therefore dicta. *Bridewell v. Cincinnati Reds,* 155 F.3d 828, 831 (6th Cir.1998) ("The country club's ability to satisfy the receipts test in [the statute] was not necessary to the holding in *Brock [v. Louvers & Dampers, Inc.,* 817 F.2d 1255 (6th Cir.1987)], which means that the part of the opinion discussing the receipts test is dicta.").

2. *Pruitt* Does Not Control this Case

Having dispensed with Hardin's argument that *Jones* controls and establishes that *Payton*'s "reason to believe" standard is equivalent to probable cause, we now examine the government's contention that *Pruitt* has definitively settled this issue. We conclude that *Pruitt* has not answered this question and that language in our *Pruitt* opinion purporting to adopt "a lesser reasonable belief standard" is merely dicta.

In *Pruitt,* the defendant and the government disputed the correct interpretation of *Payton*'s "reason to believe" language and noted that a circuit split existed regarding the meaning of that language. *Pruitt,* 458 F.3d at 482. The defendant in *Pruitt* argued in support of the Ninth Circuit's decision in *United States v. Gorman,* 314 F.3d 1105 (9th Cir.2002), which "ruled that probable cause was required to support the reasonable belief that the subject of an arrest warrant was in a third-party's residence." *Pruitt,* 458 F.3d at 482 (citing *Gorman,* 314 F.3d at 1111–15). In response, the government argued that "a majority of the circuits that have ruled on the issue have determined that a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant, and that the officers here had adequate information in this case to meet this standard." *Id.* The two-judge majority "agree[d]" and proceeded to explain why the Supreme Court's "reason to believe" language in *Payton* should be understood as a standard lower than probable cause. *Id.* at 482–85. The majority then simply affirmed the district court's denial of the defendant's motion to suppress.

Judge Clay concurred in the judgment, but his opinion disagreed with the majority's conclusion that the Supreme Court had intended to establish, without any ***413** elaboration, a new standard of "reason to believe" in *Payton.* Judge Clay argued that "the 'reason to believe' standard under *Payton* ... is the functional equivalent of 'probable cause' and not some lesser standard." *Id.* at 485 (Clay, J., concurring). Most importantly, however, Judge Clay highlighted that resolution of this dispute was unnecessary to the outcome of the case: reviewing the officers' evidence demonstrated that "the officers in the instant case had probable cause to believe Defendant was inside [the residence] when they entered." *Id.* at 491 (Clay, J., concurring). Although the majority opinion contained responses to certain other points made in Judge Clay's concurring opinion, *see id.* at 483–

84, the majority opinion did not disagree with Judge Clay's assertion that the officers had satisfied the probable-cause standard.[4] Indeed, nowhere did the majority state that the officers lacked probable cause to believe that the defendant was inside the residence when they entered. It is easy to understand the majority's silence: the officers in *Pruitt* clearly had a great deal of evidence establishing probable cause to believe that the defendant was inside the residence when they entered.

If the officers in *Pruitt* had evidence sufficient to satisfy *either* a standard of probable cause or a lesser reason-to-believe standard, then selecting one standard or the other would "not [be] necessary to the determination of the issue on appeal," which was whether the officers violated the defendant's Fourth Amendment rights. *Swanson,* 341 F.3d at 530; *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta,* 81 N.Y.U. L.Rev. 1249, 1256 (2006) ("A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner."). The preference of a particular standard would therefore be dicta. Indeed, two of our sister circuits have recognized this point and, in similar cases in which the officers' knowledge satisfied *both* standards, the Third and Seventh Circuits simply affirmed the judgments without purporting to adopt one standard or the other. *See Covington v. Smith,* 259 Fed.Appx. 871, 874 (7th Cir.2008) (unpublished) ("We need not choose a side in this split because, again, under either standard the officers here were sufficiently certain that [the defendant] was present at the time of the search."); *United States v. Veal,* 453 F.3d 164, 167 n. 3 (3rd Cir.2006) ("As we conclude that the probable cause standard was met, we need not determine whether a possibly lower standard of reasonable belief should be applied here.").

Considering the facts in *Pruitt,* it is clear that the officers had probable cause to believe that the defendant was inside the residence when they entered, and therefore the majority's conclusion that *Payton* established "a lesser reasonable belief standard" was merely dicta. In *Pruitt,* the defendant failed to report to his parole officer in July 2004 and thereby became a fugitive from justice, with an arrest warrant issuing for him after law- ***414** enforcement officers were unable to find him at his listed address. *Id.* at 478. In August 2004, an anonymous female caller contacted the defendant's parole officer and told the parole officer that the defendant was residing at a specific address in Lorain, Ohio. The parole officer believed the caller to be the ex-girlfriend of the defendant, and "[t]he caller told [the parole officer] that she had seen [the defendant] at the [specific] address within the past few hours, and that [the defendant] was in possession of drugs and a firearm." *Id.* at 478–79. After the parole officer reported the tip to area police officers, the police officers began surveillance of the address. *Id.* Shortly thereafter, the officers observed a man knock at and enter the home; "the man exited the home a few minutes later, and sped away from the scene, prompting the officers to conduct a traffic stop." *Id.* at 479. The driver "produced a driver's license and recited a social security number." *Id.* After the officers showed the driver a photograph of the defendant, the driver identified the defendant as "Meaty," which the officers knew to be the defendant's street name, and the driver "stated that 'Meaty' was inside the residence, and that 'Meaty' had refused to sell him crack cocaine on credit." *Id.*

Such information clearly is sufficient to establish probable cause to believe that the defendant was present inside the residence. Two witnesses reported the defendant's very recent presence at the address, and, after the officers watch one of the witnesses enter and exit the residence, that witness stated he had just seen the defendant inside, identifying the defendant using his street name. Indeed, the officers in *Pruitt* had sufficient confidence in this information that "[a]fter receiving the information from [the driver], the officers went to the Lorain County Municipal Court to seek a search warrant" for the specified address in Lorain. *Id.* This information also convinced a prosecutor and a municipal court judge that probable cause existed, as the officers successfully obtained a search warrant and then entered the residence. *Id.* Due to several procedural errors, however, the district court concluded the search warrant was invalid: the detective forgot to add *any* information to the affidavit accompanying the warrant, and although the detective "recited the factual basis for the search warrant under oath [in municipal court], however, no transcript of his sworn statement was prepared." *Id.* at 479, 480.

We affirmed the district court's ruling that the search warrant was invalid, stating that "the officers could not have had a good faith belief that the warrant was valid because the warrant was obtained with a 'bare bones' affidavit, and no transcript of [the detective's] sworn statement was recorded by the Court." *Id.* at 480–81. In *Pruitt,* the government therefore relied on the arrest warrant only because procedural errors had invalidated the search warrant that the officers had obtained, but the government's evidence regarding the quantum of proof showing the likelihood that the defendant was inside the residence was the exact same evidence the

officers had used in obtaining a search warrant. *See id.* at 483 (holding that the officers had sufficient evidence to believe that the defendant was inside the residence to execute the arrest warrant because the officers "relied on the anonymous tip given to [the defendant's] parole officer, [the driver's] identification of [the defendant] as 'Meaty' in a photograph, and his assertion that 'Meaty' was in the residence at that time selling drugs"). At no point did the majority in *Pruitt* suggest that officers had failed to demonstrate probable cause for the issuance of the search warrant; acknowledging the government's argument that the detective had ***415** merely "fail[ed] ... to follow the correct procedure" and that the searching officers "relied on the warrant in good faith," the majority reasoned that "such a bare bones affidavit cannot support a reasonable belief on the part of law enforcement officials that a warrant is valid." *Id.* at 480–81. Had the above information failed to satisfy a probable-cause standard, the majority could have avoided analyzing whether the officers relied on the warrant in good faith; that is, the majority could have concluded that, even if the officers had properly prepared a complete affidavit and given sworn, recorded testimony, their evidence did not establish probable cause.

In sum, careful review of the facts in *Pruitt* demonstrates that the officers in that case had assembled evidence sufficient to satisfy *both* a probable-cause standard *and* a reason-to-believe standard. The majority's statements in *Pruitt* "holding" that *Payton* established a lesser reasonable-belief standard were unnecessary to the outcome of the case, and when "the facts of the instant case do not require resolution of the question" any statement regarding the issue is simply dicta. *See Wright v. Murray Guard, Inc.*, 455 F.3d 702, 713 n. 4 (6th Cir.2006); *see also Warshak v. United States*, 532 F.3d 521, 525, 528 (6th Cir.2008) (en banc) (stating that "[t]he Constitution does not extend the 'judicial Power' to any legal question, wherever and however presented, but only to those legal questions presented in 'Cases' and 'Controversies,' " noting that "[c]oncerns about the premature resolution of legal disputes have particular resonance in the context of Fourth Amendment disputes," and explaining that courts "reach[ ] case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping, pronouncements of law").[5]

***416** Having concluded that neither *Jones* nor *Pruitt* binds us in interpreting the meaning of *Payton*'s "reason to believe" language, we explain below that this case, too, does not require that we adopt one standard or the other to evaluate the district court's ruling on Hardin's motion to suppress.[6] That is, even assuming that a lesser reasonable-belief standard applies, the officers in this case did not have sufficient evidence to form a reasonable belief that Hardin was present in the apartment.

B. The District Court Erred in Finding that the Officers had Sufficient Evidence to Believe that Hardin was Present in Apartment 48

1. Standard of Review

"In considering a district court's denial of a motion to suppress, we review its conclusions of law and application of the law to the facts, such as its finding of probable cause, de novo." ***417** *United States v. Kincaide,* 145 F.3d 771, 779 (6th Cir.1998). "[A] denial of a motion to suppress will be affirmed on appeal if the district court's conclusion can be justified for any reason." *United States v. Pasquarille,* 20 F.3d 682, 685 (6th Cir.1994). Further, in reviewing the denial of the motion, we may consider trial evidence in addition to the evidence admitted at the suppression hearing. *United States v. Brown,* 66 F.3d 124, 126 (6th Cir.1995); *United States v. Perkins,* 994 F.2d 1184, 1188 (6th Cir.1993) (stating that we have "held generally that [we are] 'not restricted to considering evidence offered during the hearing on the motion to suppress' " and that we "may consider evidence offered during the trial of a case as it may bear on the question of probable cause") (quoting *United States v. McKinney,* 379 F.2d 259, 264 (6th Cir.1967)).

2. Analysis

On appeal, the government contends that several grounds support affirming the district court's denial of Hardin's motion to suppress. These grounds include: (a) that the apartment manager provided reason to believe and/or probable cause to believe that Hardin was inside Apartment 48 and that the manager was not acting as an agent of the government; (b) that the information provided by the CI alone established reason to believe and/or probable cause to believe that Hardin was inside the apartment; and (c) that, even if the apartment manager were acting as an agent of the government, the manager's search was valid due to consent. We find fault with each of these arguments, which we address in turn.

a. Was the Apartment Manager Acting as an Agent of the Government?

The district court denied Hardin's motion to suppress because it rejected Hardin's argument that "the apartment manager's entry into the apartment was police action and therefore the issue of whether the officers had probable cause must be based on the informant's tip alone." J.A. at 115 (Mot. to Suppress Mem. & Order at 2). The district court concluded that the manager was not acting as an agent of the government because it found that "the apartment manager had an independent business duty to enter the apartment and confirm whether the defendant was in the apartment." *Id.* After reviewing the case law and the evidence in this case, we hold that the district court erred in concluding that the apartment manager was not acting as an agent of the government.

Although the nature of the apartment manager's actions was a crucial issue in this case, the magistrate judge essentially resolved the issue in the Memorandum and Order denying Hardin's motion to reveal the identity of the CI, an early stage in the case and prior to hearing any evidence or testimony on the matter. In the magistrate judge's Report and Recommendation regarding Hardin's motion to suppress, the magistrate judge referred in a footnote to the prior order determining that the apartment manager was not an agent of the government, adding briefly that the officers' testimony at the suppression hearing about the apartment manager's reaction upon learning of Hardin's criminal record supported the prior finding that the manager had an independent business motivation for entering the apartment. J.A. at 96 (Mot. to Suppress R & R at 15 n. 1). Likewise, the district court summarized and relied upon the magistrate judge's initial conclusion in overruling Hardin's objections to both of the magistrate judge's reports. J.A. at 112–13 (Mem. & Order Re: Mot. to Reveal Identity); J.A. at 115 (Mem. & Order Re: Mot. to Suppress).

***418** The magistrate judge's conclusion that the apartment manager was not acting as an agent of the government misconstrued cases from both federal and state courts. The magistrate judge concluded that the apartment manager was not an agent of the government after applying the two-part test used in *United States v. Howard,* 752 F.2d 220 (6th Cir.), *vacated on other grounds,* 770 F.2d 57, 62 (6th Cir.1985). The magistrate judge also relied upon a Tennessee Court of Appeals negligence case, *Tedder v. Raskin,* 728 S.W.2d 343, 347–48 (Tenn.Ct.App.1987), citing it as establishing the proposition that "[o]nce a landlord has notice sufficient to cause a reasonably prudent person to foresee the probability of such harm [to tenants resulting from third-party crimes on the premises], the landlord has a duty to act, and the failure to take reasonable steps to address the problem is a breach of that duty." J.A. at 65–66 (Mem. & Order at 9–10) (citing *Tedder,* 728 S.W.2d at 348).

Contrary to the conclusion of the magistrate judge, we believe that both *Howard* and *Tedder* support viewing the apartment manager as an agent of the government in this case. In *Howard,* we used a two-factor analysis developed by the Ninth Circuit to evaluate whether a private party is acting as an agent of the government, explaining that the " 'critical factors ... are: (1) the government's knowledge or acquiescence, and (2) the intent of the party performing the search.' " 752 F.2d at 227 (quoting *United States v. Walther,* 652 F.2d 788, 792 (9th Cir.1981)). *Howard* involved an incident of alleged arson that both the police and the defendant's insurer investigated, and we observed that "where, as here, *the intent of the private party* conducting the search *is entirely independent* of the government's intent to collect evidence for use in a criminal prosecution, we hold that the private party is not an agent of the government." *Id.* (emphasis added). In Hardin's case, the officers testified that the ruse involving the apartment manager's entry to Apartment 48 to check for a non-existent water leak was "without a doubt" the officers' idea. Indeed, at trial, Kingsbury even testified that the officers "*sent* the manager" to verify Hardin's presence. J.A. at 267 (Trial Tr. at 33) (emphasis added). Prior to the officers' arrival and conversation with him, the apartment manager had absolutely no intent to search Apartment 48. Far from being "entirely independent" of the government's intent, the manager's intent to search Apartment 48 was wholly *dependent* on the government's intent.

In *Howard,* we also noted that "[t]he insurance company investigator was rightfully on the property to determine the liability of the insurance company" in light of a consent clause in the insurance contract. *Howard,* 752 F.2d at 227–28. Here, in contrast, Tennessee law provides that a "landlord may enter the dwelling unit without consent of the tenant *in case of emergency* " and defines emergency as "mean[ing] a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." Tenn.Code Ann. § 66–28–403(b). The officers' mere suspicion that a fugitive felon might be on the premises does not constitute an emergency, and, even if it did, surely the "immediate action" contemplated would not include the landlord's unarmed, unescorted entry into the unit where the fugitive was suspected to be.

The magistrate judge also incorrectly relied on *Tedder* as establishing an independent reason for the manager to enter the apartment. *See* J.A. at 65 (Mot. to Reveal Identity Mem. & Order at 9) (citing *Tedder*). Although in *Tedder,* the Tennessee Court of Appeals did ***419** state that the common law imposes a burden on landlords to take due care in regard to injuries to tenants resulting from third-party crimes on the premises, *Tedder,* 728 S.W.2d at 348, the court specifically explained and narrowed its holding, reasoning that "[i]f we held that the unsubstantiated suspicion of one tenant ... is sufficient to give constructive notice of illegal activity, the landlord would be placed in the impossible position of being forced to act as a private law enforcement agency upon such 'notice.' " *Id.* at 350. The court described such a holding as "untenable," offering a further explanation that "the mere uncorroborated suspicion of illegal activity is not sufficient, as a matter of law, to give notice of a dangerous condition triggering the duty of the landlord to act." *Id.* Instead, the court explained that "[a]s in other negligence actions, the plaintiff will have to prove that the landlord was on notice of an unreasonable risk or likelihood of danger to his tenants caused by a condition within his control." *Id.* at 348. In affirming the trial court's grant of a directed verdict for the landlord in *Tedder,* the court noted that that "the criminal acts alleged in this case did not occur in the parking lot or a common area over which the landlord exercised control, but rather inside the apartment of another tenant with a reasonable expectation of privacy." *Id.* at 350. Contrary to the magistrate judge's analysis, *Tedder* shows that the officers' uncorroborated suspicions regarding the possible presence of Hardin in Apartment 48 did not give "notice" that would trigger the apartment manager's duty to act. Given that the apartment manager had no independent duty to act, the magistrate judge and the district court erred in finding that the manager was not an agent of the government.

In addition to our decision in *Howard* and the decision in *Tedder,* our decision in *United States v. Lambert,* 771 F.2d 83 (6th Cir.1985), also shows that the apartment manager was acting as an agent of the government in this case. In *Lambert,* we cited *Howard* to support the proposition that "two facts must be shown" to demonstrate that a person was acting as an agent of the government: "First, the police must have instigated, encouraged or participated in the search" and "Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts." *Lambert,* 771 F.2d at 89. Here, the officers' testimony clearly satisfies both elements. First, Kingsbury testified that the ruse to send the manager into the apartment was "without a doubt" his idea. J.A. at 171–72. (Hr'g Tr. at 29–30). Second, Kingsbury testified that, after telling the manager about Hardin's criminal history, the manager expressed shock and said to the officers that "I don't want him on my property." J.A. at 151 (Hr'g Tr. at 9). This statement indicates that the manager had an intent to assist the officers with their effort to arrest and remove Hardin from the premises. Unlike the arson investigator for the insurance company in *Howard,* who was investigating the scene of the fire to determine his employer's liability, the manager was acting only to assist the officers by determining whether Hardin was present so that they could arrest him. Finally, *Tedder* demonstrates that simply hearing the officers' suspicion that Hardin might be present would not have exposed the manager to liability in that *Tedder* required plaintiffs complaining of a landlord's negligence in preventing third-party criminal conduct "to prove that the landlord was on notice of an unreasonable risk or likelihood of danger to his tenants caused *by a condition within his control,*" and the court specifically noted that individual apartments ***420** were *not* such an area. *Tedder,* 728 S.W.2d at 348, 350 (emphasis added).

In sum, because the officers urged the apartment manager to investigate and enter the apartment, and the manager, independent of his interaction with the officers, had no reason or duty to enter the apartment, we hold that the manager was acting as an agent of the government.

b. Did the Information Provided by the CI Establish Reason to Believe and/or Probable Cause that Hardin was Inside Apartment 48?

Because we hold that the apartment manager was acting as an agent of the government, to sustain the district court's denial of Hardin's motion to suppress would require holding that the information provided by the CI alone established sufficient reason to believe that Hardin was inside Apartment 48. As the majority explained in *Pruitt,* "[r]easonable belief is established by looking at common sense factors and evaluating the totality of the circumstances." *Pruitt,* 458 F.3d at 482. In light of our case law and cases from other circuits, we conclude that, even under this "lesser" standard, which we will assume for the purposes of this section is applicable, the CI's information was not sufficient to establish a reasonable belief that Hardin was inside the apartment.

As an initial matter, neither the magistrate judge nor the district court squarely decided this issue; indeed, it is not

entirely clear that the government argued to the district court that the information from the CI alone provided either probable cause or sufficient evidence to form a reasonable belief that Hardin was inside the residence.[7] Nonetheless, we have stated that ***421** "a denial of a motion to suppress will be affirmed on appeal if the district court's conclusion can be justified for *any* reason." *United States v. Pasquarille,* 20 F.3d 682, 685 (6th Cir.1994) (emphasis added). Furthermore, the government devoted a substantial portion of its appellate brief to making essentially this argument. *See* Appellee Br. at 21–30 (arguing that, under *Pruitt,* the CI's information furnished a sufficient "reason to believe" that Hardin was present in the apartment). We thus now turn to considering whether the CI's information alone was sufficient to establish probable cause.

When compared to cases in our circuit and in our sister circuits, it is clear that the CI's information in this case, standing alone, did not establish even a lesser reasonable belief that Hardin was inside Apartment 48 at the time of the search. A common feature of these cases is recent, eyewitness evidence connecting the suspect to the residence, and often even conduct by the suspect that demonstrates a tie to the residence. The evidence in this case bears little resemblance to such cases.

In this case, in contrast, the CI—who was new to Kingsbury but who had shown reliability to Kingsbury by providing him accurate information regarding another case—provided relatively limited information. In sum, the CI told Kingsbury: (1) that "[*i*]f he [Hardin] is staying anywhere [in the area], he will be staying at this apartment," which the CI was able to describe but not identify by number, J.A. at 161 (Hr'g Tr. at 19) (emphasis added); (2) that Hardin was likely driving "a tan-colored, four-door vehicle, maybe a Caprice," J.A. at 160 (Hr'g Tr. at 18); (3) that the CI "had bought crack cocaine from Mr. Hardin in the past," J.A. at 161 (Hr'g Tr. at 19); (4) that the CI believed Hardin would be staying at the apartment with an unnamed woman, J.A. at 162 (Hr'g Tr. at 20). The CI, however, did *not* say when the CI had last seen Hardin or even that the CI had ever seen Hardin at that apartment. J.A. at 161–62 (Hr'g Tr. at 19–20). When the officers arrived at the apartment complex, they were able to identify the apartment that the CI had described, saw a tan vehicle parked nearby, and learned from the apartment manager that the described apartment was leased to a woman. J.A. at 149–50 (Hr'g Tr. at 7–8).

The limited information described above stands in stark contrast to that possessed by officers in other cases and fails to establish a reason to believe that Hardin was inside the apartment. For instance, in *Pruitt,* as described above, an anonymous caller contacted Pruitt's parole officer, indicating some familiarity with Pruitt, and told the parole officer that she had *seen* Pruitt at a particular address "within the past few hours." 458 F.3d at 478–79. Shortly after officers began surveillance of that address, they observed a man enter and soon thereafter leave the house. *Id.* The officers stopped the man and showed him a photograph of Pruitt, whom the man identified, using Pruitt's street name, as being *currently* inside the residence and in possession of crack cocaine. *Id.* at 479.

Further, as the majority in *Pruitt* noted, *id.* at 482, in our pre-*Payton* case of *United States v. McKinney,* 379 F.2d 259 (6th Cir.1967), we affirmed the denial of a motion to suppress when FBI officers entered a residence to execute an arrest warrant based on three tips: one anonymous tip on the day of the search connecting the suspect to the residence, and two tips a month earlier from acquaintances of the suspect connecting the suspect to the residence. *McKinney,* 379 F.2d at 260–61, 264. Both cases thus involved recent—and, indeed, multiple—sources offering firsthand knowledge connecting the suspect to the residence.

***422** Cases from other circuits also typically involve such recent and firsthand knowledge or involve evidence of the suspect's own conduct. For instance, in *United States v. Lauter,* 57 F.3d 212, 215 (2d Cir.1995), the Second Circuit observed that "a reliable CI, whose father was the landlord at [the apartment complex], told [the officer] that [the suspect] moved to the basement apartment during the weekend." Further, the CI also said that the suspect "was unemployed and typically slept late." *Id.* The Second Circuit accordingly held that "the officers had reason to believe—and, as the district court found, even had probable cause to believe—that [the suspect] lived in the basement apartment and was present at the time they sought to execute the warrant." *Id.*

In *United States v. Gay,* 240 F.3d 1222, 1224 (10th Cir.2001), the defendant had fled in 1997 while on bail for charges relating to the possession of cocaine, and as a result the United States Marshals Service "made numerous attempts to locate and arrest [the defendant], based on an outstanding 1997 Drug Enforcement Agency arrest warrant issue for" the defendant. *Id.* In 1999, multiple informants provided information that the defendant was living with a relative, possibly an uncle, in Shawnee, Oklahoma. Based on this information, officers obtained a search warrant for residence of the defendant's uncle, but when they executed the warrant, they did not find

the defendant. However, a confidential informant at the just-searched residence told the officers that the defendant was presently dealing drugs and armed at all times, and that "[t]he confidential informant knew, from personal experience and numerous visits, [the defendant] lived approximately two miles away." *Id.* at 1225. The informant then "accompanied the officers to [the specified residence], showed them the location of the house, pointed out the duplex, and told the officers [the defendant] was presently in his home." *Id.* Finally, shortly after the informant stated that the defendant was inside the home, an officer "knocked loudly on the front door of the residence and heard a thud from inside the home, which suggested to him a person was inside the duplex at that time." *Id.* at 1227. The Tenth Circuit held that this evidence established that "the officers reasonably believed [the defendant] lived in the residence and was within the residence at the time of entry." *Id.* at 1228.

In *United States v. Route,* 104 F.3d 59 (5th Cir.1997), the officers had arrest warrants for two suspects, the defendant Route and another individual named Crossley. When the officers arrived at Route's residence, "they found Route backing his car out of the driveway and arrested him immediately." *Id.* at 61–62. As the Fifth Circuit noted, the officers' investigation had revealed that Crossley was likely living at Route's residence as well, given that the officers "had confirmed via Crossley's credit card applications, water and electricity bills, car registration, and receipt of mail that Crossley at least was representing to others that he was residing at" Route's residence. *Id.* at 62. When the officers arrested Route, he refused consent to search his residence, and an officer "walk[ed] around the perimeter of the house in search of Crossley" and "heard the television inside the residence and thus suspected that Crossley might be inside the residence." *Id.* at 62. The officer had also "noticed another vehicle remaining in the driveway." *Id.* at 63. As a result, the officer entered the residence to arrest Crossley; although the officer did not find Crossley, he observed in plain view "computer equipment and other items that he believed had been used in the commission of the bank fraud." *Id.* at 62. The Fifth Circuit affirmed the district court's denial of the defendant Route's motion ***423** to suppress this evidence, reasoning that the officers' investigation and observations at the scene supported a "reasonable belief that Crossley resided at" Route's residence and "were sufficient to form a reasonable belief that Crossley was in fact in the residence at the time of the warrant." *Id.* at 63.

In contrasting these cases to the facts in this case, we do not mean to say that officers must have multiple sources before entering a residence to execute an arrest warrant. Rather, these cases simply illustrate the gulf separating the amount and quality of knowledge possessed by the officers in this case from the officers in those cases in which entries have been found lawful.[8] Had the officer testified that the CI had seen Hardin *at the apartment,* this would be a much closer case. Instead, the officers knew only that a single confidential informant claimed that *if* Hardin was staying in the area, he would likely be at a particular described, but unidentified, apartment leased to an unidentified woman and that Hardin was driving a tan, four-door vehicle. J.A. at 160–61 (Hr'g Tr. at 18–19). The CI also asserted only that the CI "had bought crack cocaine from Mr. Hardin in the past" but the CI did *not* say when the CI had last seen Hardin or even that the CI had *ever* seen Hardin at the particular apartment. J.A. at 161–62 (Hr'g Tr. at 19–20). Certainly, the officers did learn that the described apartment belonged to a woman and that a tan vehicle was parked nearby, but the officers also learned that the apartment manager had never seen Hardin before. J.A. at 150–51 (Hr'g Tr. at 8–9). As a result, the officers may well have reasonably suspected that Hardin was generally living at this residence, but they had essentially *no* evidence to indicate that Hardin was *then* ***424** inside the apartment. Because *Payton* requires at a minimum that the officers have "a reasonable belief that the subject of the arrest warrant is within the residence *at that time*," *Pruitt,* 458 F.3d at 483 (emphasis added), the officers' entry violated the Fourth Amendment.

c. Was the Officers' Search Valid Due to Consent?

Finally, as an alternative basis to uphold the district court's denial of Hardin's motion to suppress, the government argues that, even if we view the apartment manager as an agent of the government, the manager's search of Apartment 48 was legal due to consent obtained through the use of the "ruse." Appellee Br. at 35–36. This argument lacks merit.

The only evidence regarding the issue of consent[9] demonstrates that the manager did *not* obtain consent prior to entry, making the entry illegal. At the suppression hearing, Hardin testified that the manager, using his own key, simply entered the apartment and called out "Maintenance" after he entered. J.A. at 221–22 (Hr'g Tr. at 79–80). This evidence demonstrates that the apartment manager entered the apartment without receiving *any* communication or consent

from any individual inside.[10] Even if a consent later followed, "[w]hen an individual consents to a search after an illegal entry is made, consent is not valid and 'suppression is required of any items seized during the search ..., unless the taint of the initial entry has been dissipated before the "consents" to search were given.' " *United States v. Chambers,* 395 F.3d 563, 569 (6th Cir.2005) (quoting *United States v. Buchanan,* 904 F.2d 349, 356 (6th Cir.1990)); *see also United States v. Hotal,* 143 F.3d 1223, 1228 (9th Cir.1998) ("Consent to search that is given after an illegal entry is tainted and invalid under the Fourth Amendment.").

Furthermore, even assuming that the apartment manager merely called out through the closed door and did obtain consent prior to physically entering the apartment, then the manager's use of the ruse that he was investigating a water leak invalidated any possible consent. As a general proposition, although a ruse or officers' undercover activity does not usually violate individuals' rights,[11] we have ***425** noted that "[w]here, for example, the effect of the ruse is to convince the resident that he or she has no choice but to invite the undercover officer in, the ruse may not pass constitutional muster." *United States v. Copeland,* No. 95–5596, 1996 WL 306556, at *3 n. 3 (6th Cir. June 6, 1996) (citing *People v. Jefferson,* 43 A.D.2d 112, 350 N.Y.S.2d 3 (N.Y.App.Div.1973), as holding that consent was "not voluntary and search violat[ed the] Fourth Amendment where officers obtained entry by saying that they were investigating [a] gas leak"); *see also* 2 Wayne R. LaFave *et al.,* Crim. Proc. § 3.10(c) (3d ed. 2007) ("[W]hen the police misrepresentation of purpose is so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy ... the consent should not be considered valid."). Likewise, in *United States v. Carter,* 378 F.3d 584, 588 (6th Cir.2004) (en banc), we recognized that "[a] number of cases ... have held that the confrontation between police and suspect was impermissibly tainted by 'duress, coercion [or] trickery.' " (quoting *Jones,* 641 F.2d at 429) (second alteration in original); *see also Hoffa v. United States,* 385 U.S. 293, 301, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) ("The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area.")

We therefore conclude that the record does not show that the manager obtained consent when he entered the apartment; he simply used his own key and entered the unit. Additionally, even if the manager *did* receive consent, the ruse regarding the water leak presented a situation in which an individual would feel "no choice but to invite the undercover officer in" and any consent was invalid. *Copeland,* 1996 WL 306556, at *3 n. 3; *see also United States v. Giraldo,* 743 F.Supp. 152, 153–55 (E.D.N.Y.1990) (granting defendant's motion to suppress evidence when officer "pretended to be a gas company worker and told defendant she was checking for a gas leak" because " '[c]onsent' was obtained by falsely inducing fear of an imminent life-threatening danger").[12]

***426** In sum, we conclude that whether *Payton* involves a probable-cause standard or a lesser reasonable-belief standard remains an open question in our circuit, to be settled in an appropriate case. Further, we hold that the apartment manager in this case was acting as an agent of the government and that the officers' remaining information failed to establish even a reasonable belief that Hardin was inside Apartment 48. The search of Apartment 48 therefore violated Hardin's Fourth Amendment rights, and all evidence obtained as a result—the entirety of the evidence in this case—should have been suppressed.[13]

***427 III. CONCLUSION**

For the reasons discussed above, we **REVERSE** the district court's denial of Hardin's motion to suppress, **VACATE** Hardin's conviction, and **REMAND** the case for further proceedings consistent with this opinion.

CONCURRING IN PART, DISSENTING IN PART, AND DISSENTING FROM JUDGMENT

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part; dissenting from the judgment.

I agree that the district court's reliance on Tennessee tort law was misplaced, but I disagree with the remainder of the majority opinion. Instead, I find that *Pruitt*'s lesser-reasonable-belief standard is the law of this Circuit; that police—or agents of the police—may obtain consent to enter a suspect's hideout by ruse or deception; and that—at least since *Hudson v. Michigan,* 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006)—exclusion of the evidence would not be the proper remedy in this case.

More significantly, I disagree with the majority's treatment of *United States v. Pruitt,* 458 F.3d 477, 482 (6th Cir.2007). By ignoring *Pruitt*'s clear reasoning and plain language, and

instead conducting a *de novo* reconsideration of *Pruitt*'s facts in an effort to satisfy its preferred (alternative) version of the law, the majority has effectively circumvented *Pruitt*'s precedential effect. But, in doing so, the majority has also nullified *Pruitt*'s holding (i.e., recast it as "dicta") and supplanted *Pruitt*'s majority opinion with its concurring opinion. This is not the proper role for a panel of this court. Moreover, by authorizing this tactic, this opinion sets a troublesome precedent.

While I recognize that, under this new precedent, the possibility now exists that the analysis that follows might be resurrected by a future panel—i.e., some future panel could employ the majority's device and reconsider the decisions in this case (regarding the entry, the ruse, or the remedy), find that it prefers my view of these issues, and deem the majority's purported holdings unnecessary to the outcome and, hence, dicta—I take no comfort in such a possibility. With this opinion, the majority has untethered the law from its foundations and now allows for every decision to be *ad hoc,* limited only by the ingenuity of some future panel.

I cannot join the majority in such an opinion. Therefore, I must dissent.

I. *PRUITT* IS THE LAW OF THIS CIRCUIT

The majority—considering the holding from ***428** *Payton v. New York,* 445 U.S. 573, 603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within" (emphasis added)—poses the question of whether "reason to believe" means "reason to believe" or instead means "probable cause." The majority acknowledges that *Pruitt,* 458 F.3d at 482 (holding that, under *Payton,* "a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant"), is directly on point, but sidesteps *Pruitt* by labeling its reasoning and analysis "dicta" and treating its holding with less regard than it treats the since-overruled opinion of *United States v. Jones,* 641 F.2d 425, 428 (6th Cir.1981) (holding that "an arrest warrant can authorize entry into a dwelling only where the officials executing the warrant have reasonable or probable cause to believe the person named in the warrant is within"). That is, the majority rejects *Pruitt*'s holding. But, I believe that—for better or worse—*Pruitt*'s "lesser reasonable belief standard" is the controlling law in this Circuit.

A. Fourth Amendment Rights are Personal Rights—Protecting People, Not Places

Because "the Fourth Amendment protects people, not places," *Katz v. United States,* 389 U.S. 347, 349, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967),[1] it "provides sanctuary for citizens wherever they have a legitimate expectation of privacy," *Minnesota v. Olson,* 495 U.S. 91, 96 n. 5, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), and there is no dispute that Hardin was entitled to Fourth Amendment protection while in Ms. Reynolds's apartment. But, because "Fourth Amendment rights are personal rights which ... may not be vicariously asserted," *Rakas v. Illinois,* 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), Hardin may not assert Ms. Reynolds's rights, he may assert only his own. *See Georgia v. Randolph,* 547 U.S. 103, 120, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (holding that a warrantless search of a shared dwelling was reasonable as to one occupant, who gave consent; but not to another, who did not). And, because Hardin was the subject of an arrest warrant, while Ms. Reynolds was not, his Fourth Amendment rights (i.e., protections) are different from hers. *Compare Payton v. New York,* 445 U.S. 573, 602, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), *with Steagald* ***429** *v. United States,* 451 U.S. 204, 205–06, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

B. *Payton*—Arrest Warrants and Reason to Believe

In *Payton,* 445 U.S. at 576, 100 S.Ct. 1371, the Supreme Court considered whether the Fourth Amendment "prohibits the police from making a warrantless and non-consensual entry into a suspect's home in order to make a routine felony arrest." "[D]etectives had assembled evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station ... [and] officers went to [his] apartment ... intending to arrest him[, but] had not obtained a warrant." *Id.* After breaking open the door and entering the apartment, an officer spotted a shell casing in plain view and seized it as evidence to be used against Payton at trial. *Id.* at 576–77, 100 S.Ct. 1371. Payton moved to suppress the shell casing on the basis that the warrantless entry was unconstitutional, but the trial court denied the motion. *Id.* at 577, 100 S.Ct. 1371. On direct appeal, the New York Court of Appeals reasoned:

> [T]here is a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of making an arrest, and a significant difference in the governmental interest in achieving the objective of the intrusion in the two instances.

Id. at 579–80, 100 S.Ct. 1371 (quotation marks, editorial marks, citation, and footnote omitted). So, New York's high court upheld the warrantless entry, but the case proceeded to the United States Supreme Court.

The Supreme Court's analysis began with a recitation of the Fourth Amendment's history, *id.* at 583–89, 100 S.Ct. 1371, and culminated in a direct refutation of both the New York court's holding (i.e., that no warrant was necessary) and its reasoning (i.e., because search is different from arrest):

> [T]he critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home .... In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Id. at 589–90, 100 S.Ct. 1371. Thus, the Supreme Court held that "entries to search" and "entries to arrest" are not sufficiently different to justify dispensing with the warrant requirement altogether, and therefore, some type of warrant is necessary—indeed, virtually indispensable—in order to justify the entry into a suspect's home for purposes of effecting an arrest. But, the Court concluded its analysis by clarifying that a "search warrant" is not necessary; an "arrest warrant" will suffice:

> [T]he State[ ] suggest[s] that only a search warrant *based on probable cause to believe the suspect is at home at a given time* can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument unpersuasive. *It is true that an arrest warrant requirement may afford less protection than a search warrant requirement,* but it will suffice to interpose the magistrate's determination of probable cause between the zealous ***430** officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. *Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.*

Id. at 602–03, 100 S.Ct. 1371 (emphasis added). Thus, the Court acknowledged "that an arrest warrant requirement may afford less protection than a search warrant requirement"—that "less protection" being the absence of a determination of "probable cause to believe the suspect is at home at a given time"—and held that, consistent with the Fourth Amendment, an officer holding a valid arrest warrant may enter "when there is reason to believe the suspect is within." *Id.* (emphasis added).

One other aspect of the *Payton* opinion is noteworthy here—the Court was emphatic about the limited extent of its holding: "Before addressing the narrow question presented by these appeals, we put to one side other related problems that are *not* presented today." *Id.* at 582–83, 100 S.Ct. 1371 (emphasis in original; footnote omitted). The Court identified four issues that it was expressly not deciding, including "any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect." *Id.* at 583, 100 S.Ct. 1371. That question was left unresolved until April 1981, when the court decided *Steagald,* 451 U.S. at 205–06, 101 S.Ct. 1642.

C. Sixth Circuit Precedent—*McKinney* and *Jones*

In *United States v. McKinney,* 379 F.2d 259 (6th Cir.1967), we had—some 13 years before *Payton*—already decided the aforementioned, unanswered question concerning police authority to enter the home of a third party to arrest a suspect, when the police have an arrest warrant but no search warrant. In *McKinney,* FBI agents went to the apartment of one Ella Mae Snyder, with an arrest warrant for one Louis Edward Baker, for the purpose of arresting Baker. *Id.* at 260. Upon arrival, three agents encountered appellant Roy McKinney descending the front stairs and asked if Baker was inside. *Id.* at 261. McKinney denied that he was. *Id.* Meanwhile, two other agents had entered the apartment from the rear and arrested Baker. *Id.* The government charged McKinney—who was not the subject of the original search warrant, but an otherwise unimplicated third party—with aiding, abetting, and harboring a fugitive, and McKinney moved to suppress the "evidence obtained as a result of the [ ] search of the Snyder apartment, including the fact of Baker's presence."

Id. The trial court denied the motion, the jury convicted McKinney, and McKinney appealed. *Id.*

On appeal, we reversed because the trial court had failed to instruct the jury on McKinney's right to remain silent, but we also deemed it "useful to discuss [McKinney]'s other contentions because of the possibility that the same issues will arise should the government decide to proceed with a new trial." *Id.* at 262. Specifically, we addressed McKinney's contention that "in the absence of exceptional circumstances, a search warrant must be obtained before entering the dwelling of a third party to execute a valid arrest warrant." *Id.* In rejecting this contention, we reasoned:

> [E]ven if we were to accept [McKinney]'s premise that a search warrant must be obtained in the absence of exceptional ***431** circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant. An arrest warrant is validly issued only when a magistrate is convinced that there is probable cause to believe that the named party has committed an offense. This determination, together with the inherent mobility of the suspect, would justify a search for the suspect provided the authorities reasonably believe he could be found on the premises searched. In *Johnson* [*v. United States,* 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948)], the Supreme Court itself suggested that in the case of a suspect "fleeing or likely to take flight," it would be unnecessary to obtain a search warrant. In order for the search which revealed the presence of Baker in the Snyder apartment to have been valid, however, it must be determined that the F.B.I. *reasonably believed* Baker to have been there.

Id. at 263 (citations and footnotes omitted; emphasis added).

So—working backwards through the analysis—we reasoned that the evidence discovered in the apartment (i.e., Baker) was admissible against third-party McKinney if it was in plain view; the evidence was in plain view if the officers were lawfully entitled to be where they were when they saw it (i.e., in the apartment); and, the officers were lawfully entitled to be in the apartment if they had an arrest warrant and "reasonably believed" Baker would be there. In a footnote concluding this passage, we explained the basis for our use of the phrase "reasonably believed":

> Restatement, Torts 2d, § 204 provides:
>
> > The privilege to make an arrest for a criminal offense carries with it the privilege to enter land in the possession of another for the purpose of making such an arrest, if the person sought to be arrested is on the land or if the actor reasonably believes him to be there.
>
> To the extent that this provision requires the arresting authority to have a reasonable belief that the person to be arrested is on the land to be entered, it is an accurate statement of what the Fourth Amendment demands when an arrest warrant is to be executed on the premises of a third party. But the mere fact that the person named in the warrant happens to be on the premises would not satisfy the Constitutional requirement that persons be free from unreasonable searches.

Id. at 263 n. 3. Notably, neither of the above passages uses the phrase "probable cause."

Consequently, we said that a search warrant was unnecessary (i.e., it was not necessary for police to a make a further showing of probable cause regarding the location) to justify the entry into the dwelling of a third party to execute an otherwise valid arrest warrant. And, we concluded, "considering the totality of the available information, [ ] that the search of the Snyder apartment by the F.B.I. [ ] was not unlawful [and t]he fact of Baker's presence in the apartment was therefore properly received into evidence at [McKinney]'s trial." *Id.* at 264.

In *United States v. Jones,* 641 F.2d 425, 428 (6th Cir.1981), we again addressed this question—whether police had authority, based on an arrest warrant but no search warrant, to enter the home of a third party to arrest a suspect, and the effect of that entry on the admissibility of evidence against a previously unimplicated person not the subject of the arrest warrant. Here, the police went to the residence of one Sarah Howard to execute an arrest ***432** warrant for one Earl Jones. *Id.* at 260. The officers' only bases for suspecting that Earl Jones would be present at Sarah Howard's home were: (1) a confidential informant's tip that Sarah was the girlfriend of Earl's brother, Harold Dean Jones, with the further "possibility" that Earl would be there; and (2) an officer's recollection that Earl and Harold Dean "used to associate together quite a bit." *Id.* at 427. Upon arriving at the residence, the officers demanded entry and entered, announcing that they had a warrant for Earl Jones. *Id.*

Inside the house, the officers found several items of incriminating evidence in plain view, including three rifles, two pistols, a shotgun, drug paraphernalia, and stolen stereo equipment. *Id.* at 427–28. They did not find Earl Jones. *Id.* at 428. But, based on this plain-view evidence the government

indicted and prosecuted Harold Dean Jones on firearms and drug charges. *Id.* at 426. Notably, Harold Dean Jones—like Roy McKinney before him—was not the subject of the arrest warrant, but was instead merely a previously unimplicated third party. Prior to trial, Harold Dean Jones moved to suppress this evidence as the fruit of an unlawful search, but the district court denied the motion. *Id.* Eventually, the jury convicted him and he appealed. *Id.*

On appeal, we determined that the police had failed to demonstrate probable cause to justify their search, reversed the denial of Harold Dean Jones's motion to suppress, and vacated his conviction. *Id.* at 429. We reasoned that "an arrest warrant is not a search warrant"—noting that "an arrest warrant signifies no more than there is a reason to believe the person named in the warrant has committed a crime," i.e., it does not establish probable cause for an entry—and "government officials cannot invade the privacy of one's home without probable cause for the entry." Therefore, an arrest warrant "[b]y itself" was insufficient to justify the entry. *Id.* at 428. Then, citing to *Payton* generally, we announced an absolute rule (deeming it "a constitutional minimum") that: "[A]n arrest warrant can authorize entry into a dwelling only where the officials executing the warrant have reasonable or probable cause to believe the person named in the warrant is within." *Id.*

In a footnote concluding this passage, we explained that we were extending or extrapolating from *Payton,* inasmuch as *Payton* applied to cases in which the "entry is to the residence of the suspect," but "did not answer whether more is required where, as here, entry is to the premises of a third person." *Id.* at 428 n. 3. We further stated—albeit imprecisely, since *McKinney*'s statement on this issue was not quite so rigid or unequivocal[2]—that "[t]his court has held that an arrest warrant and probable cause is sufficient, *United States v. McKinney,* 379 F.2d 259 (6th Cir.1967), but other courts have since held or suggested that more is required." *Id.* (citing cases from the Third, Fourth, Fifth, and D.C. Circuits). Thus, relying on *McKinney* (and, tangentially, *Payton*), we carved out a middle ground position—a search warrant was not necessary, but an arrest warrant alone was not enough. In ***433** finding a middle ground, we required an arrest warrant plus probable cause (albeit without the interposition of a neutral and detached magistrate). On review we concluded that the officers had failed to show probable cause, explaining that "[t]hey were required only to have had sufficient trustworthy information to suggest that Earl Jones' presence was more likely than not," yet had failed to produce facts that even "suggest[ed] that it was probable or likely." *Id.* at 429.

Thus, *Jones*—which required no search warrant—effectively formalized *McKinney*'s assertion that a search warrant was not necessary and that an arrest warrant was sufficient to authorize entry into a third-party's residence, but "only where the officials executing the warrant have *reasonable or probable cause* to believe the person named in the warrant is within." *Id.* at 428 (emphasis added). But *Jones* did not survive *Steagald,* and is no longer good law.

In fact, even if it were good law, *Jones* is not on point with the present case (as the majority appears to acknowledge). *Jones* addressed the admissibility of evidence against a previously unimplicated third party, such as Harold Dean Jones. It did not address the admissibility of evidence against the subject of the original arrest warrant, such as Earl Jones—Malik Hardin's equivalent.

D. *Steagald* Overruled and Nullified *Jones*

A little over two months after our decision in *Jones,* the Supreme Court decided *Steagald,* in which it answered the same question we had decided in *Jones*—"whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant." *Steagald,* 451 U.S. at 205, 101 S.Ct. 1642. But, the Supreme Court did not carve out any middle ground; it held that a search warrant is necessary.

In a fact pattern reminiscent of the two aforementioned cases —*McKinney* and *Jones*—the Court began by explaining that police, acting on a tip from a confidential informant, went to the residence of one Hoyt Gaultney to execute an arrest warrant for one Ricky Lyons. *Id.* at 206, 101 S.Ct. 1642. The officers entered the home on the basis of the arrest warrant and, although they did not find Lyons, they observed cocaine in plain view. *Id.* Petitioner Gary Steagald, who was residing at the Gaultney home at the time of the search, was arrested and indicted on federal drug charges. *Id.* at 207, 101 S.Ct. 1642. Steagald moved to suppress the evidence as the fruit of an unlawful search, but the trial court denied the motion. *Id.* Eventually, the jury convicted him and he appealed. *Id.*

Prior to embarking on its analysis, the Supreme Court acknowledged that the Circuits were divided on this issue, with "[t]wo Circuits hav[ing] joined the [Fifth Circuit] Court

of Appeals in this case in adopting the [ ] view that a search warrant is not required in such situations if the police have an arrest warrant and reason to believe that the person to be arrested is within the home to be searched." *Id.* at 207 n. 3, 101 S.Ct. 1642 (citing *McKinney,* 379 F.2d at 262–63). Thus, when the Court reversed and held that "a search warrant must be obtained absent exigent circumstances or consent," *id.* at 205–06, 101 S.Ct. 1642, it expressly reversed our position in *McKinney* and, by implication, our holding in *Jones. See also Pembaur v. City of Cincinnati,* 882 F.2d 1101, 1105 (6th Cir.1989) ("Indeed, prior to the decision in *Steagald,* the law of this Circuit was that a search warrant was not required ***434** to search premises belonging to a third party for the subject of an arrest warrant when the police had both an arrest warrant and reason to believe that the person to be arrested was inside the premises.").

The Court framed the issue by distinguishing *Payton* because of Gary Steagald's status as a previously unimplicated third party, whereas Ted Payton had been the subject of the arrest warrant:

> Here, of course, the agents had a warrant—one authorizing the arrest of Ricky Lyons. However, the Fourth Amendment claim here is not being raised by Ricky Lyons. Instead, the challenge to the search is asserted by a person not named in the warrant who was convicted on the basis of evidence uncovered during a search of his residence for Ricky Lyons. Thus, the narrow issue before us is whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances.

Id. at 212, 101 S.Ct. 1642. The Court relied on this distinction in its reasoning:

> In sum, two distinct interests were implicated by the search at issue here—Ricky Lyons' interest in being free from an unreasonable seizure and [Gary Steagald]'s interest in being free from an unreasonable search of his home. Because the arrest warrant for Lyons addressed only the former interest, the search of [Steagald]'s home was no more reasonable from [Steagald]'s perspective than it would have been if conducted in the absence of any warrant. Since warrantless searches of a home are impermissible absent consent or exigent circumstances, we conclude that the instant search violated the Fourth Amendment.

Id. at 216, 101 S.Ct. 1642. And, in response to the government's arguments, the Court explained:

> The authorities on which the Government relies were concerned with whether the subject of the arrest warrant could claim sanctuary from arrest by hiding in the home of a third party. Thus, in *Semayne*'s *Case* it was observed:
>
> > "The house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods."
>
> The common law thus recognized, as have our recent decisions, that rights such as those conferred by the Fourth Amendment are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched. *The issue here, however, is not whether the subject of an arrest warrant can object to the absence of a search warrant when he is apprehended in another person's home, but rather whether the residents of that home can complain of the search.* Because the authorities relied on by the Government focus on the former question without addressing the latter, we find their usefulness limited. Indeed, if anything, the little guidance that can be gleaned from common-law authorities undercuts the Government's position.

Id. at 218–19, 101 S.Ct. 1642 (editorial marks and certain citations omitted; emphasis added). The Court concluded by acknowledging: "As noted in *Payton* [ ], an arrest warrant alone will suffice to enter ***435** a suspect's own residence to effect his arrest." *Id.* at 222, 101 S.Ct. 1642 (citations and footnotes omitted).

In the present case, the arrest warrant was for Malik Hardin, who was hiding or residing in the apartment of Germaine Reynolds; the police arrested and charged Hardin, not Reynolds; the government prosecuted and convicted Hardin, not Reynolds; and it is Hardin who appeals, not Reynolds. *Steagald* does not apply to the facts of this case and, more importantly, *Jones*—even if it had survived *Steagald*—would not apply either because the appellant, Hardin, was the person named in the arrest warrant. *See United States v. Buckner,* 717 F.2d 297, 300 (6th Cir.1983) ("The fact that the defendant was the person named on the arrest warrant mandates application of *Payton* rather than *Steagald*."). To the extent that Hardin

was residing in Reynolds's apartment (i.e., the police arrested Hardin in his own home), then *Payton* applies directly. And, to the extent that Hardin was merely a guest in Reynolds's apartment (i.e., the police arrested Hardin in another person's home), then the Supreme Court has yet to rule directly on this situation. In either of these latter two instances, however—one of which certainly applies—*Pruitt* controls in our Circuit.

E. *Pruitt* is the Controlling Law on this Issue in the Sixth Circuit

In *United States v. Wickizer,* 633 F.2d 900, 901 (6th Cir.1980), a case decided shortly after *Payton* (but before *Steagald*), we relied on *Payton*'s holding that an officer possessing a valid arrest warrant may enter the suspect's premises to execute the arrest warrant "when there is *reason to believe* the suspect is within." *Payton,* 445 U.S. at 602–03, 100 S.Ct. 1371. The specific question in *Wickizer* was whether the police—upon arriving at a cabin to execute an arrest warrant for one Ernest Smith—had reason to believe that Smith was inside based solely on "a tip that Smith was staying at [the] cabin with another man and woman and that ... [t]he cabin was owned by Smith's stepbrother." *Wickizer,* 633 F.2d at 901. We resolved this question succinctly, concluding that "[w]e believe the police were properly authorized to enter the cabin." *Id.* (citing *Payton*). Thus, in *Wickizer,* the tip and the suspect's relation to the owner were sufficient to establish "reason to believe."

In *United States v. Buckner,* 717 F.2d 297, 297–98 (6th Cir.1983), a case decided shortly after *Steagald,* we considered "whether an arrest warrant and/or search warrant was required to arrest [Buckner] at his mother's home." Ultimately, we decided the appeal on Fourth Amendment standing—finding that Buckner could not show "a legitimate expectation of privacy in his mother's apartment"—but opined further that even if Buckner had standing to challenge the search, the district court correctly denied the suppression motion "because the police had a warrant for [Buckner's] arrest and reason to believe that he was in his mother's apartment." *Id.* at 300. Although this portion of the *Buckner* opinion is clearly dicta—in the traditional sense—this portion of *Buckner* underlies the theory and reasoning of *Pruitt* and is therefore worth reciting.

Dennis Buckner was a suspect in a bank robbery that went something like this: at approximately 2:30 p.m., a man walked into the bank with a large manila envelope, ordered the teller to put money in it, and, after she did, fled the bank and deposited the envelope in a public mail box across the street. *Id.* at 298. Unfortunately for the robber, a witness directed the police to the mailbox and, upon retrieving the envelope, the police recovered the cash and found that the envelope was addressed to ***436** Buckner at 3289 DuVall Drive. *Id.* The FBI arrived at approximately 4:00 p.m. and, by 5:00 p.m., the police and FBI had arrived at 3289 DuVall Drive with an arrest warrant. *Id.* Buckner was not there. *Id.* Instead, the police spoke with one Claudette Thompson (Buckner's girlfriend), who informed them that Buckner's mother lived nearby. *Id.* But:

> The officers did not get a precise address for the mother's residence from Thompson; rather, they got only a description of where the residence was located, and they had some trouble locating it. After the officers knocked on at least one door in error, Detective Brubrink approached 3214 DuVall and, according to his testimony, knocked on the door which was answered by Buckner's brother. When the door was opened, Brubrink was able to see appellant Buckner sitting in a chair in the apartment. Brubrink and the other officers then entered, informing Buckner that the FBI had a bench warrant for him for carrying a concealed deadly weapon.... In the living room where they arrested Buckner, [the police] seized in plain view manila envelopes resembling the one in which the stolen money had been placed, a pen, and a field jacket which they "patted down" for weapons. The jacket contained a notebook, with the following note: "Larry Hughes, use bank at 4th Street, 2:30."

Id. Buckner moved to suppress the evidence and the district court denied the motion. *Id.*

On appeal, we began our analysis by stating that "[t]wo recent Supreme Court cases, *Steagald* [ ] and *Payton* [ ], form the framework for our discussion," *id.* at 299, and explained that "[t]he fact that [Buckner] was the person named on the arrest warrant mandates application of *Payton* rather than *Steagald*." *Id.* at 300. Relying on *Payton*—i.e., "Under *Payton,* the police could have entered the defendant's own home if they had a warrant for his arrest and reason to believe that he was inside." *id.*—we concluded that, "assuming that [Buckner] did have a legitimate expectation of privacy in his mother's apartment, the [police] entry was proper because the police had a warrant for his arrest plus reason to believe that he was inside." *Id.* at 301. Thus, a suggestion (at most) that the suspect might be at his mother's residence and an imprecise "description of where the residence was located" (from which "the officers knocked on at least one door in error") was sufficient to afford the officers "reason to believe" that Buckner was there, and thereby satisfy *Payton.*

In *United States v. Pruitt,* 458 F.3d 477, 481–82 (6th Cir.2006), we specifically considered "whether officers may rely on an arrest warrant, coupled with the reasonable belief that the subject of the warrant is within a third-party's residence, to enter that residence to execute the warrant"; and whether "a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter [the] residence to enforce [the] arrest warrant." We answered both in the affirmative.

When Demetrius Pruitt failed to report to his parole officer, the court issued an arrest warrant. *Id.* at 478. Based on an anonymous tip, some surveillance, and another informant's unverified statement, the police determined that Pruitt was at his girlfriend's home. *Id.* at 478–79.[3] Upon ***437** arriving at the girlfriend's home, the police "found Pruitt hiding in a kitchen closet" and performed a protective sweep of the premises, whereupon they "found several bags of crack cocaine, marijuana, a wallet, and a loaded .25 caliber pistol[,] all within plain view." *Id.* at 479. The police arrested Pruitt, the government charged him for the drugs and the firearm, and Pruitt moved to suppress the evidence as the result of an illegal search. *Id.* The trial court originally granted the motion, but upon the government's request to reconsider, reversed itself and denied the motion. *Id.*

On appeal, we distinguished *Steagald* and stated the issue as "whether officers may rely on an arrest warrant, coupled with the reasonable belief that the subject of the warrant is within a third-party's residence, to enter that residence to execute the warrant." *Id.* at 481. We explained that "[w]e ha [d] already considered this issue, albeit in dicta, in *Buckner,*" and then adopted *Buckner*'s reasoning, explaining that "the rationale underlying *Buckner* is applicable here," to wit:

> Under *Payton,* the police could have entered the defendant's own home if they had a warrant for his arrest and reason to believe that he was inside. It would be illogical to afford the defendant any greater protection in the home of a third party than he was entitled to in his own home. That illogical result, however, is precisely what would happen if we accepted the defendant's contention that *Steagald* required a search warrant in this case.

Id. at 481–82 (quoting *Buckner,* 717 F.2d at 300). Pruitt argued that, even without a search warrant, the police must still establish probable cause to believe a suspect is in the home, on the theory that "reasonable belief" in *Payton* actually means "probable cause." *Id.* at 482. And, Pruitt insisted, "the police did not have reason to believe that he was in the home at the time of his arrest," *Id.*

We rejected Pruitt's argument and held "that reasonable belief is a lesser standard than probable cause, and that [police need only have a] reasonable belief that a suspect is within the residence, based on common sense factors and the totality of the circumstances, [in order] to enter a residence to enforce an arrest warrant." *Id.* at 485. We offered two reasons for this holding:

> First, we do not agree ... that a "reasonable ground for belief of guilt" is the grammatical analogue to a reasonable belief that an individual is located within a premises subject to search. These are two entirely different inquiries.
>
> Second, ... it is more than likely that the Supreme Court in *Payton* used a phrase other than "probable cause" because it meant something other than "probable cause." ... The *Payton* Court's use of "probable cause" in describing the foundation for an arrest warrant and its use of "reason to believe" in describing the basis for the authority to enter a dwelling shows that the Court intended different standards for the two. Had the Court intended probable cause to be the standard for entering a residence, it would have either expressly stated so or used the same term for both situations. Instead, its use of different terms indicates that it intended different standards [to] apply.

***438** *Id.* at 484 (citations, quotation marks, and editorial marks omitted; paragraph break added). Furthermore, we explained, "it is evident that the Supreme Court does not use the terms probable cause and reasonable belief interchangeably, but rather that it considers reasonable belief to be a less stringent standard than probable cause." *Id.* (citing *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)).

Thus, we have found consistently that when police enter a third-party's residence to execute an arrest warrant, any evidence that they observe in plain view while executing that warrant may be admitted in a subsequent case against the subject of that arrest warrant, so long as the police had a "reason to believe" that the subject of the warrant was within a third-party's residence. Furthermore, that "reasonable belief," based on common sense factors and the totality of the circumstances, is a lesser standard than probable cause. This is the basis for the *Pruitt* decision, and it is the controlling precedent and the law of this Circuit. Moreover, *Wickizer,* 633 F.2d at 901, indicates that a mere tip may be sufficient to establish "reason to believe" and *Buckner,* 717 F.2d at

301, similarly suggests that a vague "description of where the residence [i]s located" may be sufficient.[4]

In the present case, the police received a tip from a confidential informant, advising that Malik Hardin was staying with his girlfriend at a particular apartment complex. Although the informant did not provide the apartment number, he described the apartment and its location within the complex, and he described the car that Hardin had been driving. When the police arrived at the apartment complex, they were able to locate the apartment based on the informant's description, and they verified the location when they identified the car parked nearby. Consulting the apartment manager, the police confirmed that a single tenant, a woman, leased the apartment in question, though the manager had not seen Hardin on the complex premises. From this, I believe that, under the guidance of our established precedent—*Wickizer, Buckner*, and *Pruitt*—the trial court was justified in finding that the police had a reasonable belief, based on common sense factors and the totality of the circumstances, that Hardin was present within Ms. Reynolds's apartment.

F. *Pruitt's* Holding is not Dicta

Black's Law Dictionary defines a "holding" as: "A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision." Black's Law Dictionary (8th ed.2004), holding. In *Pruitt,* the court considered the parties' opposing arguments on the two standards:

> ***439** Pruitt urges this court to adopt the Ninth Circuit's ruling in *United States v. Gorman,* 314 F.3d 1105 (9th Cir.2002)[, in which it] ruled that probable cause was required to support the reasonable belief that the subject of an arrest warrant was in a third-party's residence. Pruitt contends that the officers here could not have had probable cause based only on an uncorroborated anonymous tip and the statement of an unknown and untested drug-seeking informant who provided the officers with fraudulent identification. Pruitt argues that such evidence is insufficient to meet the probable cause standard enunciated in *Gorman.*
>
> In response, the Government argues that while a circuit-split does exist, a majority of the circuits that have ruled on the issue have determined that a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant, and that the officers here had adequate information in this case to meet this standard. We agree.

Pruitt, 458 F.3d at 482. The *Pruitt*-majority then applied the facts to this newly adopted law:

> In this case, the LASSO team evaluated the totality of the circumstances, and formulated a reasonable belief that Pruitt was present at 2652 Meister Road. The team relied on the anonymous tip given to Pruitt's parole officer, Garcia's identification of Pruitt as "Meaty" in a photograph, and his assertion that "Meaty" was in the residence at that time selling drugs. [T]he Lasso team considered Pruitt's background information, including his drug dealing past and his street name, to develop a reasonable belief that Pruitt was in the residence.

Id. at 483. Finally, the *Pruitt*-majority stated its holding and rejected the concurrence:

> [W]e hold that an arrest warrant is sufficient to enter a residence if the officers, by looking at common sense factors and evaluating the totality of the circumstances, establish a reasonable belief that the subject of the arrest warrant is within the residence at that time.
>
> Our holding contrasts with that of the Ninth Circuit, which alone has ruled that reasonable belief is the equivalent of probable cause in determining whether a suspect is within the residence. The concurring opinion suggests that we should adopt this ruling.... We decline to adopt this view....

Id. at 483–84 (certain citations omitted).

So, the *Pruitt* court considered arguments on the law, stated the law for this Circuit, applied the facts, and rendered a decision based on that law and those facts. In every case but this one, that would be a "holding." In this case—according to the majority—that decision is dicta.[5]

Black's Law Dictionary defines dicta, or "obiter dictum," as: "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." ***440** Black's Law Dictionary (8th ed.2004), obiter dictum. The definition also contains this further explanation:

> Strictly speaking an "obiter dictum" is a remark made or opinion expressed by a judge, in his [or her] decision upon a cause, "by the way"—that is, incidentally or collaterally, and not directly upon the question before the court; or

> it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as "dicta," or "obiter dicta," these two terms being used interchangeably.

Id. (citing William M. Lile *et al.,* Brief Making and the Use of Law Books 304 (3d ed.1914)).

The majority contends that, upon "careful review of the facts in *Pruitt,*" the *Pruitt*-majority's legal determination was not necessary to the outcome of the case and, therefore, the *Pruitt* majority's opinion is all dicta and no holding. But, if a proffered opinion has no holding—i.e., if the entire opinion is dicta—then that opinion is merely advisory, and we are not in the business of rendering advisory opinions. Therefore, every appellate opinion must have some form of holding. The majority suggests that the *Pruitt* concurrence is actually its holding. But a holding must also have the endorsement of at least two of the three panel members (hence the term "majority"), and the *Pruitt* concurrence has only one endorsement—in fact, the *Pruitt* majority expressly rejected the concurring judge's argument. *Pruitt,* 458 F.3d at 483–84 ("The concurring opinion suggests.... We decline to adopt this view...."). Therefore, *Pruitt*'s concurrence cannot be its holding.

So, let us consider this simple syllogism: an appellate decision must have a holding; a single-member's position cannot, alone, be a holding; *ergo,* the two-member (majority) position must be the holding. And yet, we are nevertheless left with the present dilemma—the majority has effectively nullified the *Pruitt*-majority's position (i.e., holding) by calling it "simply dicta."

> Once when a deputation visited [President Lincoln] and urged emancipation before he was ready, he argued that he could not enforce it, and, to illustrate, asked them: "How many legs will a sheep have if you call the tail a leg?" They answered, "Five." "You are mistaken," said Lincoln, "for calling a tail a leg don't make it so"; and that exhibited the fallacy of their position more than twenty syllogisms.

Lincoln's Own Stories 115–16 (Anthony Gross ed., Kessinger Publishing 2005) (Harper & Brothers 1912). So, how many holdings does an opinion have if you call its holding dicta?

II. CONSENT TO ENTER A DWELLING CAN BE OBTAINED BY DECEPTION, TRICK, OR RUSE—IT NEED NOT BE KNOWING AND INTELLIGENT

The majority asserts that the apartment manager was acting as an agent of the police when he entered Ms. Reynolds's apartment in search of Malik Hardin and, rather than acknowledging Hardin's consent to the entry, the majority holds that the apartment manager (i.e., the agent of the police) invalidated Hardin's consent by deceiving Hardin through the use of a trick or a ruse—that is, by entering under the guise of investigating a water leak that did not actually exist. I am compelled to agree with the district court that the manager was not an agent of the police, inasmuch as I cannot say that the court's findings are clearly erroneous. *See* ***441** *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (we review findings of fact for clear error); *United States v. Koenig,* 856 F.2d 843, 848 (7th Cir.1988) ("the existence of an agency relationship is a question of fact"). But, I concede that it is a close question and I do find the majority's reasoning compelling on this issue. As for the issue of consent, however, I find the majority's view and explanation completely unfathomable.

Contrary to the majority's assertion—that because entry to the apartment was gained by the use of deception, the entry was illegal—I find that "it is well established that an undercover officer may gain entrance by misrepresenting his identity and may gather evidence while there." *United States v. Pollard,* 215 F.3d 643, 648 (6th Cir.2000) (citing *Lewis v. United States,* 385 U.S. 206, 209, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), and *United States v. Baldwin,* 621 F.2d 251, 252–53 (6th Cir.1980)); *see also United States v. Lord,* 230 Fed.Appx. 511, 514 (6th Cir.2007) ("Therefore, the agents' entry into Lord's home under the guise of being real estate investors and the use of that ruse to look into his bedroom closet did not constitute an unreasonable search prohibited by the Fourth Amendment."); *United States v. Hankins,* 195 Fed.Appx. 295, 302 (6th Cir.2006) ("A person may still validly consent to a guest's entry, even if the guest lies about his or her identity or the reasons for the entry.").

The majority instead relies on an unpublished opinion from this Circuit and a state court opinion. *See United States v. Copeland,* 89 F.3d 836 (table), 1996 WL 306556, 1996 U.S.App. LEXIS 17177 (6th Cir. June 6, 1996); *People v. Jefferson,* 43 A.D.2d 112, 350 N.Y.S.2d 3

(N.Y.App.Div.1973). But, I am unpersuaded, as I find the former inapposite and the latter simply incorrect.

In *Copeland,* 89 F.3d at 836, three officers arrived at Barbara Copeland's home with a search warrant intending to search for drugs. In a plan designed to prevent Ms. Copeland from quickly disposing of any drugs, one officer pretended to be a stranded motorist and knocked at the door asking to use the phone. When Ms. Copeland answered the door, the other two officers emerged from hiding and rushed in to execute the warrant. The officers discovered drugs and arrested Ms. Copeland. The government prosecuted her and the district court denied her motion to suppress.

Ms. Copeland appealed, arguing that the "use of [the] ruse converts what would be reasonable into something constitutionally unreasonable." *Id.* We rejected her argument, saying:

> There is no support for this proposition, and we do not accept it. The use of subterfuge in law enforcement activities has long been recognized by the Supreme Court, which in the context of undercover operations has stated that the Government is entitled to use decoys and to conceal the identity of its agents. The Bill of Rights, of course, provide[s] checks upon such official deception for the protection of the individual. In *Lewis [v. United States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966)], the Supreme Court held that the fact that the resident invited the undercover agent, without knowing that he was a government agent, to his home to purchase drugs was irrelevant in determining that he gave his consent to enter voluntarily. Therefore, even if consent is obtained by deceit, courts will still, in most circumstances, find consent freely given.

Id. (citations, quotation marks, and editorial marks, and footnote omitted).

***442** The majority actually quotes from a footnote in the opinion, for the proposition that "[w]here, for example, the effect of the ruse is to convince the resident that he or she has no choice but to invite the undercover officer in, the ruse may not pass constitutional muster." *Id.* at n. 3. While this statement is true, so far as it goes, it is inapplicable to the present case—the quoted proposition actually stems from cases in which the police pretended to have a warrant when they did not. *See Bumper v. North Carolina,* 391 U.S. 543, 546, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). The Supreme Court explained:

> In *Bumper,* a 66–year–old Negro widow, who lived in a house located in a rural area at the end of an isolated mile-long dirt road, allowed four white law enforcement officials to search her home after they asserted they had a warrant to search the house. We held the alleged consent to be invalid, noting that when a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

Schneckloth v. Bustamonte, 412 U.S. 218, 234, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *see also United States v. Biswell,* 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (in Bumper, "the police relied on a warrant that was never shown to be valid").

The present case did not involve any police coercion—it was the apartment complex manager, not the police, who entered Ms. Reynolds's apartment and there was no show of authority (or pretend warrant), there was merely subterfuge. Even proceeding from the majority's position that the apartment complex manager was an agent of the police, he was still not exerting the authority of the police; he represented himself as the apartment complex manager, which, of course, is just what he was. Moreover, there is no basis to conclude that Hardin felt helpless to keep the manager out or that he had no choice but to let him in. As the majority explained quite ably:

> Hardin testified that the manager simply entered the apartment, using a key, and called out "Maintenance." At that time, Hardin was in the back bedroom, talking on a cell phone to [Ms.] Reynolds. Hardin asked her what to do, and she told him to ask what they wanted. Hardin stated that the manager "said there is a water leak upstairs in the upstairs apartment. Is it all right if I come in and check your bathroom?" and that he related this information to [Ms.] Reynolds. In response, she stated "yes, I guess," and Hardin told the manager he could look at the bathroom. After checking the bathroom, the manager stood in the hallway outside the bedroom, looked in, and asked Hardin if he had heard any water running.

Maj. Op. at § I.A (record citations omitted). Thus, the apartment complex manager asked Hardin for permission to enter, but more importantly, Hardin asked Ms. Reynolds if he should grant the manager permission—the obvious, unstated premise being that Hardin could forbid entry if Ms. Reynolds so instructed. Furthermore, Hardin did not give the manager freedom to roam, he told the manager he could look in the

bathroom. This does not indicated that Hardin felt he had no choice.

I also disagree with the majority's suggestion that the police in this case "falsely induc[ed] fear of an imminent life-threatening danger," *United States v. Giraldo,* 743 F.Supp. 152, 154 (E.D.N.Y.1990), by alleging a water leak. In addition to this ***443** Circuit's established precedent, I find that this case is also on point with numerous other cases in which courts all across America have held that consent to enter a suspect's hideout may be obtained by trickery, deception, or ruse. *See, e.g., United States v. Ojeda–Ramos,* 455 F.3d 1178, 1184 (10th Cir.2006); *United States v. Alejandro,* 368 F.3d 130, 136 (2d Cir.2004); *Storck v. Coral Springs,* 354 F.3d 1307, 1319 (11th Cir.2003); *United States v. Michaud,* 268 F.3d 728, 733 (9th Cir.2001); *State v. Dixon,* 83 Hawai'i 13, 924 P.2d 181, 191 (1996); *People v. Catania,* 427 Mich. 447, 398 N.W.2d 343, 346 (1986); *Iowa v. Ahart,* 324 N.W.2d 317, 319 (Iowa 1982); *Wyche v. Florida,* 906 So.2d 1142, 1144 (Fla.Dist.Ct.App.2005); *Colorado v. Zamora,* 940 P.2d 939, 942 (Colo.Ct.App.1996); *Commonwealth v. Morrison,* 275 Pa.Super. 454, 418 A.2d 1378, 1381 (1980); *Illinois v. Bargo,* 64 Ill.App.3d 1011, 21 Ill.Dec. 789, 382 N.E.2d 83, 84 (1978).

III. SUPPRESSION OF THE EVIDENCE IS NOT JUSTIFIED IN THIS CASE

While executing the arrest warrant, the police conducted a protective sweep, which, in and of itself, is perfectly legitimate. *See Maryland v. Buie,* 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). During the protective sweep, the police observed, in plain view, several pieces of incriminating evidence. "The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." *Washington v. Chrisman,* 455 U.S. 1, 5–6, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982). Thus, the preliminary question was whether the police had a "right to be" in Ms. Reynolds's apartment—such that they could lawfully conduct a protective sweep and legitimately seize plain-view evidence—and, as has been discussed, the majority and I reach different conclusions on that question.

The majority concludes that, despite the arrest warrant, we cannot condone a non-consensual entry because the police did not have sufficient reason to believe that Hardin was in the apartment, and, we cannot condone a consensual entry because the police obtained Hardin's consent improperly, through the use of a trick. Thus, the majority deems the entry unlawful and orders the trial court to exclude the plain-view evidence seized during execution of the arrest warrant. As stated previously, I do not agree that the entry was unlawful, but that disagreement is irrelevant to the present discussion. That is, even if I did agree with the majority that the entry was unlawful, I would nonetheless disagree with the remedy. *See United States v. Leon,* 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) ("Whether the exclusionary sanction is appropriately imposed in a particular case ... is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." (quotation marks and citations omitted)). The Supreme Court most recently explained its position on the exclusionary rule in *Hudson v. Michigan*:

> [E]xclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal manner of entry [i.e., the failure to knock and announce before entering to execute a search warrant] was not a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred or not, the police would have executed the warrant they ***444** had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have never held that evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, but-for cause, or causation in the logical sense alone, can be too attenuated to justify exclusion. Even in the early days of the exclusionary rule, we declined to hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Hudson v. Michigan, 547 U.S. 586, 591–92, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (quotation marks, editorial marks, and citations omitted) ("Suppression of evidence [ ] has always been our last resort, not our first impulse.").

In the present case, whether their belief was reasonable or not, the police clearly believed that Malik Hardin was in Ms. Reynolds's apartment and that he was dangerous. In addition to requesting backup prior to executing the warrant, they sent the apartment complex manager, surreptitiously, into the apartment to confirm (or refute) their belief that Hardin was inside. The manager, acting at the officers' instruction, entered, identified Hardin, and departed (he did not search the premises or even report any plain view evidence). Two points are evident from the foregoing.

First, as police intrusions go, this is as limited and non-invasive as one could be. A no-knock entry would certainly have been more invasive. The police might have knocked and announced their presence, but that was neither prudent nor necessary in this case. *See United States v. Ramirez,* 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998) ("a no-knock entry is justified if police have a reasonable suspicion that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation"). Or they might have conducted an exterior stake-out, in an attempt to confirm Hardin's presence before entering, but the Supreme Court has labeled this an equivalent intrusion. *See Segura v. United States,* 468 U.S. 796, 811, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) ("both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners"). As the Court explained in *Hudson,* "causation in the logical sense alone, can be too attenuated to justify exclusion," and:

> Attenuation can occur, of course, when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

Hudson, 547 U.S. at 592–93, 126 S.Ct. 2159 (quotation marks and citations omitted). I cannot say, based on the facts of this case, that suppression of this evidence furthers the objectives of the Fourth Amendment.

In addition, the Court's hypothesis in *Hudson* holds true here as well, in that: "[w]hether that preliminary misstep had ***445** occurred or not, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." *Id.* at 591, 126 S.Ct. 2159. Certainly, the police could have done as the majority demands and further assured themselves that Hardin was actually in the apartment. They might have sought more specific information from the informant, questioned other residents using Hardin's photo, called the apartment and asked Hardin to identify himself on the phone, peered through the windows, or simply waited for him to emerge. And, having satisfactorily established his presence, they could have proceeded exactly as they did—they could have sent the manager in surreptitiously to determine Hardin's whereabouts within the apartment and followed that reconnaissance with a rapid and forceful entrance, executing the warrant, conducting a protective sweep, and eventually discovering the drugs and the guns. All that is to say that the manner by which they executed the arrest warrant had no bearing on the discovery of the evidence, and therefore, the Fourth Amendment violation—such as it is—is too attenuated to justify suppression of this evidence under these circumstances. *See id.* at 594, 126 S.Ct. 2159.

IV. CONCLUSION

For all of the forgoing reasons, I respectfully dissent from the majority's opinion.

All Citations

539 F.3d 404

Footnotes

1 The officers never searched the vehicle nor did they determine that it belonged to Hardin. J.A. at 286–87 (Trial Tr. at 52–53), 185–86 (Mot. to Suppress Hr'g Tr. at 43–44).

2 Hardin also argued that the officers' protective sweep, which uncovered two of the three firearms in this case, exceeded the permissible scope for such sweeps under *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). On appeal, Hardin filed two supplemental briefs *pro se,* claiming that one of the three counts of which he was convicted was duplicitous and that the district court erred in failing to give a cautionary instruction regarding the trial testimony of

DEA Agent Lewis, the government's expert witness on drug-trafficking matters, insofar as it pertained to the "ultimate conclusion" of Hardin's state of mind. Because of our holding that the district court erred in denying Hardin's motion to suppress the evidence in this case, we do not reach these additional claims.

3 In *Payton,* "officers had assembled evidence sufficient to establish probable cause that [Payton] had murdered the manager of a gas station," and the Court also accepted that the officers had "probable cause to believe that [Payton] was at [his] home when they entered." *Payton,* 445 U.S. at 576, 583, 100 S.Ct. 1371. Nonetheless, the officers had no warrant of any kind when they entered Payton's home, arrested him, and seized evidence; instead, they relied on "New York statutes that authorize [d] police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." *Id.* at 574, 100 S.Ct. 1371. The Court concluded that such statutes were unconstitutional. *Id.* at 576, 100 S.Ct. 1371.

4 In asserting that "the *Pruitt* majority expressly rejected the concurring judge's argument," Dis. Op. at 440, our dissenting colleague misleadingly characterizes the majority opinion in *Pruitt.* The language from *Pruitt* quoted in the dissent pertains only to the *Pruitt* majority's disagreement with Judge Clay's argument that the Ninth Circuit's opinion in *Gorman* correctly interpreted "reason to believe" as the functional equivalent of probable cause. The majority in *Pruitt* did *not* expressly reject or anywhere consider Judge Clay's argument that the officers had probable cause to believe the suspect was inside the residence, eliminating the need to select the lower standard.

5 Our dissenting colleague levels the accusations that we have rendered the majority opinion in *Pruitt* "all dicta and no holding" and that our reading of *Pruitt* permitted the concurring opinion to "usurp [ ] the *Pruitt* majority's ability to make this decision and state a holding." Dis. Op. at 439 & n. 5. The dissent also contends that because "the *Pruitt* court considered arguments on the law, stated the law for this Circuit, applied the facts, and rendered a decision based on that law and those facts" that "[i]n every case but this one, that would be a 'holding.' " Dis. Op. at 439.

The dissent's views are simply wrong. As explained in the quotation from our *en banc* decision in *Warshak,* we are *not* empowered to decide "any legal question, wherever and however presented, but only [ ] those legal questions presented in 'Cases' and 'Controversies.' " *Warshak,* 532 F.3d at 525. To have rendered a binding holding, the "arguments on the law" considered and the proposition of law "stated" by the *Pruitt* majority must have been *necessary* to the outcome of the *case,* not merely to the outcome of a debate regarding an abstract legal question. For that reason, the dissent is wrong to claim that the *Pruitt* concurrence "usurped the *Pruitt* majority's *ability* to make this decision and state a holding," Dis. Op. at 439 n. 5 (emphasis added), because the *Pruitt* majority *never* had any ability to settle abstract legal disputes when the outcome of the case did not require resolving the abstract legal question.

Finally, the dissent's suggestion that our reading of *Pruitt* has removed any holding from the case, potentially rendering it advisory, is absurd. As the dissent recognizes, a holding is "a principle drawn from" a legal opinion, Dis. Op. at 439 (quoting Black's Law Dictionary (8th ed.2004)), and the principle drawn from *Pruitt* is that the officers in that case had information sufficient to believe that Pruitt was inside the residence when they entered to execute the arrest warrant naming him such that the district court properly denied Pruitt's motion to suppress. Although the dissent claims that our opinion, by carefully considering whether a statement in a prior case regarding a legal issue is a holding or dictum, "sets a troublesome precedent," Dis. Op. at 427, we believe that the far more troubling practice is purporting to establish "holdings" supposedly resolving legal questions in cases that do not require that the questions be resolved.

6 Although we recognize that our statements on this matter are dicta, we nonetheless explain briefly why we believe that probable cause is the correct standard and that the Supreme Court in *Payton* did not intend to create, without explanation or elaboration, an entirely new standard of "reason to believe." Several reasons support this conclusion. First, the Court in *Payton* noted the case involved no dispute that the officers had "*probable cause* to believe that the suspect was at home when they entered." *Payton,* 445 U.S. at 583, 100 S.Ct. 1371 (emphasis added). Second, Justice White, in his dissenting opinion in *Payton,* likewise understood the Court as having adopted a standard requiring officers to have an arrest warrant plus probable cause to believe the suspect was inside. *Id.* at 616 n. 13, 100 S.Ct. 1371 (stating that "under today's decision, the officers apparently need an extra increment of *probable cause* when executing the arrest warrant, namely, grounds to believe that the suspect is within the dwelling") (emphasis added) (White, J., dissenting). Third, we agree with Judge Clay that the Supreme Court's tendency in other opinions to explain or define the term "probable cause" using "grammatical analogue[s]" like "reasonable ground for belief" suggests that *Payton*'s use of the phrase "reason to

believe" expressed a standard equivalent to probable cause. *Pruitt,* 458 F.3d at 490 (Clay, J., concurring) (citing and quoting *Maryland v. Pringle,* 540 U.S. 366, 370–71, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), *Illinois v. Gates,* 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)). Fourth, in *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), the Supreme Court considered whether officers executing an arrest warrant in a residence, pursuant to *Payton,* could perform an additional "protective sweep" of the residence. *Buie,* 494 U.S. at 330, 110 S.Ct. 1093. In the course of its analysis, the Court explained that "[p]ossessing an arrest warrant and *probable cause* to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which *Buie* might be found." *Id.* at 332–33, 110 S.Ct. 1093 (emphasis added). Had the Court truly intended the "reason to believe" language in *Payton* to set forth a new, lesser standard, surely the Court in *Buie* would have explained that the officers were entitled to be inside Buie's residence on the basis of an arrest warrant and a "reasonable belief" as to Buie's presence, but the Court used the term "probable cause" instead.

We recognize, as did Judge Clay, that a majority of circuits have concluded otherwise. *Pruitt,* 458 F.3d at 489–90 (Clay, J., concurring). Nonetheless, we do not believe that the Court would have created an entirely new standard without explanation or elaboration. Further, given that Court has treated phrases such as "reasonable ground for belief" as *defining* probable cause, *see Pringle,* 540 U.S. at 371, 124 S.Ct. at 800 ("We have stated, however, that '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt' ....' ") (alteration in original) (quoting *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)), and that the Court in *Buie* even stated the *Payton* standard using the term "probable cause," we believe that the most sensible interpretation of *Payton*'s "reason to believe" language is the view that "reason to believe" is a functional equivalent of probable cause.

7 In the district court, the government did not appear to rely on the CI's information and instead argued that the information provided by the apartment manager supplied the evidence necessary for the officers to enter Apartment 48. For instance, in responding to Hardin's motion to reveal the identity of the CI, the government asserted that the officers "had probable cause to believe [Hardin] was inside based upon the apartment manager's verification that the defendant was inside" and that the CI's identity was "absolutely irrelevant." J.A. at 46–47 (Gov't Resp. to Mot. to Reveal Identity at 1–2). In its previously filed Response In Opposition to Hardin's motion to suppress, the government *did* refer to the CI, arguing that "the officers did not rely solely on that [confidential] informant's information, but went further to verify that they had a reasonable belief that the defendant was inside as required by *Payton.*" J.A. at 32–33 (Gov't Resp. to Mot. to Suppress at 3–4).

The district court and the magistrate judge, however, appear to have understood the government's position to be that the information provided by the CI did not establish the officers' right to enter the apartment to execute the arrest warrant. In denying Hardin's motion to reveal the identity of the CI, the district court noted the government's position that "the agents based their decision that they had probable cause to believe defendant was inside the apartment based on the apartment manager's verification." J.A. at 112 (Mot. to Reveal Identity Mem. & Order at 2). In later denying Hardin's motion to suppress, the district judge again referred to and adopted the conclusion in the magistrate judge's report that "although the arresting officer *admittedly did not have probable cause to enter the apartment based solely on an informant's tip,* the apartment manager's action in entering the apartment to determine if the defendant was present did provide the officers with probable cause." J.A. at 115 (Mot. to Suppress Mem. & Order at 2) (emphasis added); *see also* J.A. at 96 (Mot. to Suppress R & R at 15) ("The government counters that the officers did not rely on the confidential informant's tip for probable cause. Instead, the officers relied on the apartment manager's pre-entry confirmation that the defendant, in fact, was inside the apartment.").

As explained above, however, despite this uncertainty about what the government argued in the district court, we will consider whether the CI's information alone provided evidence sufficient to form a reasonable belief that Hardin was inside the residence.

8 The dissent contends that comparing the evidence in this case to other cases in which courts have found suppression unwarranted does "not illuminate the facts or circumstances necessary to justify suppression." Dis. Op. at 438 n. 4. We find this a puzzling assertion. As we state in text, it may well be that the officers in those cases possessed *far* more than the required certainty and that lesser amounts of evidence might have furnished sufficient reason to believe that the person named in the arrest warrant was inside a residence. But certainly those cases help illuminate the nature of our inquiry and remain relevant to assessing the investigative practices the officers might have employed. Finally, the dissent

mischaracterizes the facts in both *United States v. Wickizer,* 633 F.2d 900 (6th Cir.1980), and *United States v. Buckner,* 717 F.2d 297 (6th Cir.1983), in stating that "*Wickizer* indicates that a mere tip may be sufficient to establish 'reason to believe' and *Buckner* similarly suggests that a vague 'description of where the residence [i]s located' may be sufficient." Dis. Op. at 438 (internal citations omitted) (quoting *Buckner,* 717 F.2d at 301).

First of all, *Wickizer* involved a defendant arguing for the suppression of evidence seized during the search of a residence to execute an arrest warrant *naming another person,* facts comparable to *Steagald* and *Jones,* which the dissent acknowledges "is not on point with the present case." Dis. Op. at 433. Even if the case were on point, the officers in *Wickizer* had more than a "mere tip"—as we stated, they received a tip that the suspect, Smith, "was staying at a cabin with another man and woman," that "[t]he cabin was owned by Smith's stepbrother," and "[t]he police were told that Smith said he wouldn't be taken alive." *Wickizer,* 633 F.2d at 901. As with the cases mentioned in text, this evidence is suggestive of a witness directly and recently tying the suspect to the particular residence.

In *Buckner,* the officers obtained an address printed on an envelope that the suspect had been seen placing in a mail box, and when the officers visited that address, they met a woman "who identified herself as Buckner's girlfriend" and who then "informed them that [Buckner's] mother lived nearby" and gave them "only a description of where the residence was located" but no precise address. *Buckner,* 717 F.2d at 298 & n. 1. The case thus simply does not establish that "a vague 'description of where the residence [i]s located' may be sufficient." Dis. Op. at 438.

9 The government did not appear to have advanced this argument to the district court, and accordingly the record on this point is somewhat sparse.

10 The dissent simply ignores this fact and this aspect of our analysis. The analysis in the following paragraphs offers an *alternative* rationale, on the *assumption* that *even if* the manager obtained consent, the manager's search was illegal due to the deceptive ruse.

We further note that the dissent misleadingly describes the record in claiming that "the apartment complex manager asked Hardin for permission to enter." Dis. Op. at 442. This supposed request for "permission to enter" came *after* the manager had already entered the apartment, and the request pertained to permission to enter the *bathroom,* not the apartment itself, which the manager had entered without any discussion.

11 *See, e.g., Lewis v. United States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). In *Lewis,* the Supreme Court held that "when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Id.* at 211, 87 S.Ct. 424. The Supreme Court also distinguished the case before it from the facts in a prior case, *Gouled v. United States,* 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), which the Court described as involving "a business acquaintance of the petitioner, acting under orders of federal officers, [who] obtained entry into petitioner's office by falsely representing that he intended only to pay a social visit." *Lewis,* 385 U.S. at 209, 87 S.Ct. 424. The Court stated that it "had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking, notwithstanding that the initial intrusion was occasioned by a fraudulently obtained invitation rather than by force or stealth." *Id.* at 210, 87 S.Ct. 424.

12 Our dissenting colleague states that our reasoning on this issue is "completely unfathomable" and describes our view as relying simply upon "an unpublished opinion from this Circuit and a state court opinion." Dis. Op. at 441. Obviously, the numerous citations above soundly refute this latter contention. Nonetheless, we here include a few additional cases to illustrate the decidedly *non-novel* proposition that officers may invalidate an individual's consent through the use of certain ruses or trickery. *See, e.g., United States v. Watzman,* 486 F.3d 1004, 1006–07 (7th Cir.2007) (observing that the government did not challenge the district court's conclusion that a particular search was invalid when officers conducted a "phony 'burglary follow-up' " in which the officers visited the defendant's apartment and "told him they were following up on a burglary he had reported two years earlier" when the officers in fact were targeting the defendant in an investigation into child pornography); *Krause v. Commonwealth,* 206 S.W.3d 922, 924–28 (Ky.2006) (stating that, in a case involving an officer who intended to search for drugs but invented a story that "a young girl had just reported being raped by [defendant's roommate] in the residence" and "asked if he could look around in order to determine whether her description of the residence and its furnishings was accurate," "[t]he use of this particular ruse simply crossed the line of civilized notions of justice"); *Butler v. Compton,* 158 Fed.Appx. 108, 109, 111 (10th Cir.2005) (holding that the plaintiff "has set

forth a cognizable claim that [the officer] violated his Fourth Amendment right" when the officer knocked on the plaintiff's motel door and "replied that he was 'maintenance' and that he was there to fix the sink"); *United States v. Soto,* 124 Fed.Appx. 956, 961 (6th Cir.2005) ("The government has the burden of proving that a valid consent was obtained and 'that the consent was uncontaminated by duress, coercion, or trickery' ") (quoting *Jones,* 641 F.2d at 429). Our dissenting colleague's view is particularly curious given that the dissent *itself* cites a case that contradicts the dissent's contention that our view is "completely unfathomable." Dis. Op. at 441, 442 (citing *Iowa v. Ahart,* 324 N.W.2d 317, 319 (Iowa 1982)). In *Ahart,* the Supreme Court of Iowa reversed the defendant's conviction because it "h[e]ld that if the police effect a ruse to obtain entry to a home based only on conjecture of criminal activity, incriminating evidence seen in plain view in the home does not provide probable cause to issue a subsequent search warrant." *Ahart,* 324 N.W.2d at 318.

We do emphasize that, in many circumstances (such as undercover activity designed to uncover illegal conspiracies and acts), ruses and deception may be a perfectly valid tactic for law enforcement. *See, e.g., Lewis,* 385 U.S. at 210, 87 S.Ct. 424 (stating that a per se bar on deception would "severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings," such as "narcotics traffic"). Likewise, several courts have approved the use of deception in the *execution* of an arrest warrant so as to avoid the potential for violence. *See, e.g., United States v. Michaud,* 268 F.3d 728, 731, 733 (9th Cir.2001) (stating that, in case involving officer who "knocked on [the defendant's] door, claimed to be the assistant manager of the hotel and told her that her boyfriend was sick and needed her assistance," the defendant's "objection to the use of trickery to encourage her to open her hotel room door is unavailing, given the existence of a valid [arrest] warrant"); *Ahart,* 324 N.W.2d at 319 (stating that "[p]olice may use deceptive ploys to secure entry to execute a valid search or arrest warrant"). The problem here is that the deception was carried out by the apartment manager, who was certainly not executing the arrest warrant; rather, the apartment manager's ruse was used to ascertain whether the officers could execute an arrest warrant in compliance with *Payton.* The use of a ruse when officers *already* have probable cause or reason to believe that a person named in an arrest warrant is inside a residence involves an entirely different factual circumstance than that presented in this case.

13 Our dissenting colleague argues that, under *Hudson v. Michigan,* 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), suppression of the evidence is inappropriate in this case. Dis. Op. at 444–45. We disagree. First, we agree with the Tenth Circuit that "the Supreme Court's holding [in *Hudson*] is based on considerations pertaining to the knock-and-announce requirement in particular rather than to other Fourth Amendment violations." *United States v. Cos,* 498 F.3d 1115, 1132 n. 3 (10th Cir.2007).

Second, even were we to agree with the dissent that *Hudson* has any application beyond the knock-and-announce context, the dissent ignores several glaring factual distinctions between *Hudson* and this case. The dissent contends that here, as in *Hudson,* "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence" and that "[w]hether that preliminary misstep had occurred *or not,* the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." *Hudson,* 547 U.S. at 592, 126 S.Ct. 2159; Dis. Op. at 443–44. The officers here had an arrest warrant for Hardin; the officers in *Hudson* had a *search* warrant: "Police obtained a warrant authorizing a search for drugs and firearms *at the home of* petitioner Booker Hudson." *Hudson,* 547 U.S. at 588, 126 S.Ct. 2159 (emphases added). The officers in *Hudson* thus acted with the express purpose of searching for evidence at the defendant's home; the officers here simply had the objective of arresting Hardin, wherever they could find him. The dissent speculates about various other investigatory actions that the officers here could (and should) have pursued, and then concludes that "the manner by which they executed the arrest warrant had no bearing on the discovery of the evidence." Dis. Op. at 445. The record suggests otherwise. Had Hardin exited his apartment while the officers were talking to the apartment manager or other tenants, or while the officers were conducting surveillance of the apartment, the officers may well have simply arrested Hardin outside and taken him directly into custody. Indeed, the record shows that even though the officers arrested Hardin inside the apartment and believed that Hardin was inside the apartment due to an informant's belief that Hardin had a tan vehicle, the officers *did not search* that vehicle or even determine that Hardin had been driving it. J.A. at 286–87 (Trial Tr. at 52–53), 185–86 (Mot. to Suppress Hr'g Tr. at 43–44). Considerable doubt thus exists as to whether the officers would have discovered the evidence in this case had they not illegally entered the apartment without the requisite quantum of proof that the subject of their arrest warrant was currently inside the residence.

1 In *Katz,* 389 U.S. at 349, 88 S.Ct. 507, the parties presented the Supreme Court with the question of "[w]hether a public telephone booth is a constitutionally protected area," but the Court declined that formulation of the issue and instead issued its now-familiar proclamation that "the Fourth Amendment protects people, not places." The Court reasoned that "once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures[,] it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353, 88 S.Ct. 507. Instead, it is "the procedure of antecedent justification [i.e., the warrant requirement] that is central to the Fourth Amendment." *Id.* at 359, 88 S.Ct. 507 (quotation and editorial marks omitted). "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Id.*

In the present case, the majority refers repeatedly to (and appears to adopt as precedent) the concurring opinion in *United States v. Pruitt,* 458 F.3d 477, 485 (6th Cir.2006) (Clay, J. concurring), in which Judge Clay introduces the concept of a "premises search warrant," as though a search warrant applies to particular premises and all persons present therein, rather than to people individually, irrespective of the premises. *Katz* clearly rejects this concept.

2 It appears that *McKinney*'s statement was also less burdensome, inasmuch as *McKinney* required the arresting officers to possess only an arrest warrant and a reasonable belief that the suspect was at the location. Under the *McKinney* articulation, which did not include the phrase "probable cause," it was not suggested that the arresting officers had to make a further showing of probable cause regarding the location. Nonetheless, "an arrest warrant and probable cause" would be "sufficient," as *Jones* asserted, since probable cause would encompass reasonable belief.

3 The police had obtained a search warrant before entering the girlfriend's home to search for and arrest Pruitt, but the district court determined that the search warrant was invalid because "it lacked indicia of probable cause." *Pruitt,* 458 F.3d at 480. We affirmed that portion of the district court's opinion, *id.* at 480–81, and considered the question of whether an arrest warrant and reasonable belief were enough, as though there had never been a search warrant.

4 In an attempt to demonstrate that the information known to the police was insufficient to establish a "reason to believe" that Hardin was in Ms. Reynolds's apartment, the majority cites five cases—*Pruitt, McKinney, Lauter, Gay*, and *Route*—all of which involved a sufficient "reason to believe" the suspect was at the suspected location and, correspondingly, none of which involved circumstances necessitating suppression. *See* Maj. Op. at § II.B.2.b. But the majority cites no case—other than the present case—as an example of the facts or circumstances that would fail to establish "reason to believe" and thereby warrant suppression. Instead, the majority attempts to justify its conclusion by emphasizing the "gulf" that separates those cases from this case—and its apparent assumption that if cases on one side of the "gulf" do not justify suppression, then cases lying on the other side of that "gulf" must. I am not persuaded. As *Wickizer* and *Buckner* demonstrate, both sides of this "gulf" are above the threshold requiring suppression and, therefore, the cases cited by the majority do not illuminate the facts or circumstances necessary to justify suppression.

5 I will concede that am inclined to agree with the majority up to a point. That is, even if the majority were correct that the facts of *Pruitt* satisfy probable cause—a finding that the *Pruitt* majority clearly did not make—then I would agree that the *Pruitt* majority could have, and perhaps should have, deferred decision on the probable-cause vs. reason-to-believe standard. But I cannot agree with the crux of the majority's analysis, which is that the *Pruitt* majority was *required* to defer the decision or that the *Pruitt* concurrence—by arguing the bases for deferral—somehow usurped the *Pruitt* majority's ability to make this decision and state a holding. This contention simply goes too far.

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104 S.Ct. 1652
Supreme Court of the United States

UNITED STATES, Petitioner
v.
Bradley Thomas JACOBSEN
and Donna Marie Jacobsen.

No. 82-1167.
|
Argued Dec. 7, 1983.
|
Decided April 2, 1984.

Synopsis

Defendants were convicted in the United States District Court for the District of Minnesota of possession of an illegal substance with intent to distribute, and they appealed. The Court of Appeals for the Eighth Circuit, 683 F.2d 296, reversed, and petition was filed for certiorari. The Supreme Court, Justice Stevens, held that: (1) removal by federal agents, who had been informed by employees of a private freight carrier that they observed a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside a damaged package, of the tube from the box, the plastic bags from the tube and a trace of powder from the innermost bag infringed no legitimate expectation of privacy and therefore did not constitute a "search" within meaning of Fourth Amendment and, while agents' assertion of dominion and control over the package and its contents did constitute a "seizure," that warrantless seizure was not unreasonable, and (2) federal agents were not required to have a warrant before testing small quantity of a powder to determine whether it was cocaine.

Reversed.

Justice White filed separate opinions concurring in part and concurring in the judgment.

Justice Brennan filed dissenting opinion in which Justice Marshall joined.

**1654 *109 *Syllabus*[*]

During their examination of a damaged package, consisting of a cardboard box wrapped in brown paper, the employees of a private freight carrier observed a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside the package. The employees then notified the Drug Enforcement Administration (DEA), replaced the plastic bags in the tube, and put the tube back into the box. When a DEA agent arrived, he removed the tube from the box and the plastic bags from the tube, saw the white powder, opened the bags, removed a trace of the powder, subjected it to a field chemical test, and determined it was cocaine. Subsequently, a warrant was obtained to search the place to which the package was addressed, the warrant was executed, and correspondents were arrested. After respondents were indicted for possessing an illegal substance with intent to distribute, their motion to suppress the evidence on the ground that the warrant was the product of an illegal search and seizure was denied, and they were tried and convicted. The Court of Appeals reversed, holding that the validity of the warrant depended on the validity of the warrantless test of the white powder, that the testing constituted a significant expansion of the earlier private search, and that a warrant was required.

Held: The Fourth Amendment did not require the DEA agent to obtain a warrant before testing the white powder. Pp. 1656-1663.

(a) The fact that employees of the private carrier independently opened the package and made an examination that might have been impermissible for a Government agent cannot render unreasonable otherwise reasonable official conduct. Whether those employees' invasions of respondents' package were accidental or deliberate or were reasonable or unreasonable, they, because of their private character, did not violate the Fourth Amendment. The additional invasions of respondents' privacy by the DEA agent must be tested by the degree to which they exceeded the scope of the private search. Pp. 1656-1659.

(b) The DEA agent's removal of the plastic bags from the tube and his visual inspection of their contents enabled him to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a "search" within the meaning of the Fourth Amendment. Although the agent's assertion of dominion and control over the package and its contents constituted a *110 "seizure," the seizure was reasonable since it was apparent that the tube and plastic bags contained

contraband and little else. In light of what the agent already knew about the contents of the package, it was as if the contents were in plain view. It is constitutionally reasonable for law enforcement officials to seize "effects" that cannot support a justifiable expectation of privacy without a warrant based on probable cause to believe they contain contraband. Pp. 1659-1661.

(c) The DEA agent's field test, although exceeding the scope of the private search, was not an unlawful "search" or "seizure" within the meaning of the Fourth Amendment. Governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest. ****1655** *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). The destruction of the white powder during the course of the field test was reasonable. The law enforcement interests justifying the procedure were substantial, whereas, because only a trace amount of material was involved and the property had already been lawfully detained, the warrantless "seizure" could have only a *de minimis* impact on any protected property interest. Under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment interests. Pp. 1661-1663.

683 F.2d 296 (CA8 1982), reversed.

Attorneys and Law Firms

David A. Strauss argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey,* and *Joel M. Gershowitz.*

Mark W. Peterson argued the cause and filed a brief for respondents.*

* *Fred E. Inbau, Wayne W. Schmidt, James P. Manak, Howard G. Berringer, David Crump, Daniel B. Hales, William B. Randall,* and *Evelle J. Younger* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

John Kenneth Zwerling filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Opinion

***111** Justice STEVENS delivered the opinion of the Court.

During their examination of a damaged package, the employees of a private freight carrier observed a white powdery substance, originally concealed within eight layers of wrappings. They summoned a federal agent, who removed a trace of the powder, subjected it to a chemical test and determined that it was cocaine. The question presented is whether the Fourth Amendment required the agent to obtain a warrant before he did so.

The relevant facts are not in dispute. Early in the morning of May 1, 1981, a supervisor at the Minneapolis-St. Paul airport Federal Express office asked the office manager to look at a package that had been damaged and torn by a forklift. They then opened the package in order to examine its contents pursuant to a written company policy regarding insurance claims.

The container was an ordinary cardboard box wrapped in brown paper. Inside the box five or six pieces of crumpled newspaper covered a tube about 10 inches long; the tube was made of the silver tape used on basement ducts. The supervisor and office manager cut open the tube, and found a series of four zip-lock plastic bags, the outermost enclosing the other three and the innermost containing about six and a half ounces of white powder. When they observed the white powder in the innermost bag, they notified the Drug Enforcement Administration. Before the first DEA agent arrived, they replaced the plastic bags in the tube and put the tube and the newspapers back into the box.

When the first federal agent arrived, the box, still wrapped in brown paper, but with a hole punched in its side and the top open, was placed on a desk. The agent saw that one end of the tube had been slit open; he removed the four plastic bags from the tube and saw the white powder. He then opened each of the four bags and removed a trace of the ***112** white substance with a knife blade. A field test made on the spot identified the substance as cocaine.[1]

In due course, other agents arrived, made a second field test, rewrapped the package, obtained a warrant to search the place to which it was addressed, executed the warrant, and arrested respondents. After they were indicted for the crime of possessing an illegal substance with intent to distribute, their motion to suppress the evidence on the ground that

the warrant was the product of an illegal search and seizure was denied; they were tried and convicted, and appealed. The Court of Appeals reversed. It held that the validity of the search warrant depended on the validity of the agents' warrantless test of the white powder,[2] that **1656 the testing constituted a significant expansion of the earlier private search, and that a warrant was required. 683 F.2d 296 (CA8 1982).

As the Court of Appeals recognized, its decision conflicted with a decision of another court of appeals on comparable facts, *United States v. Barry,* 673 F.2d 912 (CA6), cert. denied, 459 U.S. 927, 103 S.Ct. 238, 74 L.Ed.2d 188 (1982).[3] For that reason, and because *113 field tests play an important role in the enforcement of the narcotics laws, we granted certiorari, 460 U.S. 1021, 103 S.Ct. 1271, 75 L.Ed.2d 493 (1983).

I

The first clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...." This text protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.[4] A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.[5] This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Walter v.* *114 *United States,* 447 U.S. 649, 662, 100 S.Ct. 2395, 2404, 65 L.Ed.2d 410 (1980) (BLACKMUN, J., dissenting).[6]

When the wrapped parcel involved in this case was delivered to the **1657 private freight carrier, it was unquestionably an "effect" within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.[7] Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.[8] Such a warrantless search could not be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered.[9] Conversely, in this case the fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent *115 cannot render otherwise reasonable official conduct unreasonable. The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred.

The initial invasions of respondents' package were occasioned by private action. Those invasions revealed that the package contained only one significant item, a suspicious looking tape tube. Cutting the end of the tube and extracting its contents revealed a suspicious looking plastic bag of white powder. Whether those invasions were accidental or deliberate,[10] and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.

The additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search. That standard was adopted by a majority of the Court in *Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980). In *Walter* a private party had opened a misdirected carton, found rolls of motion picture films that appeared to be contraband, and turned the carton over to the Federal Bureau of Investigation. Later, without obtaining a warrant, FBI agents obtained a projector and viewed the films. While there was no single opinion of the Court, a majority did agree on the appropriate analysis of a governmental search which follows on the heels of a private one. Two Justices took the position:

> "If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied **1658 to any official *116 use of a private party's invasion of another person's privacy. Even though some circumstances-for example, if the results of the private search are in plain view when materials are turned over to the Government-may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films. Prior to the Government's screening one could only draw inferences about what was on the films.

> The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search." *Id.,* at 657, 100 S.Ct., at 2401 (opinion of STEVENS, J., joined by Stewart, J.) (footnote omitted).[11]

Four additional Justices, while disagreeing with this characterization of the scope of the private search, were also of the view that the legality of the governmental search must be tested by the scope of the antecedent private search.

> "Under these circumstances, since the L'Eggs employees so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not 'change the nature of the search' and was not an additional search subject to the warrant requirement." *Id.,* at 663-664, 100 S.Ct., at 2405-2406 (BLACKMUN, J., dissenting, joined by BURGER, C.J., POWELL and REHNQUIST, JJ.) (footnote omitted) (quoting ***117** *United States v. Sanders,* 592 F.2d 788, 793-794 (CA5 1979), rev'd *sub nom. Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980)).[12]

This standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities. It is well-settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed." *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976).[13] The Fourth Amendment is implicated only if the authorities use information with respect ****1659** to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private ***118** search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.[14]

In this case, the federal agents' invasions of respondents' privacy involved two steps: first, they removed the tube from the box, the plastic bags from the tube and a trace of powder from the innermost bag; second, they made a chemical test of the powder. Although we ultimately conclude that both actions were reasonable for essentially the same reason, it is useful to discuss them separately.

II

When the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder. It is not entirely clear that the powder was visible to him before he removed the tube from the box.[15] Even if the white ***119** powder was not itself in "plain view" because it was still enclosed in so many containers and covered with papers, there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told. Respondents do not dispute that the Government could utilize the Federal Express employees' testimony concerning the contents of the package. If that is the case, it hardly infringed respondents' privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube. The advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection, rather than in further infringing respondents' privacy. Protecting the risk of misdescription hardly enhances any legitimate privacy interest, and is not protected by the Fourth Amendment.[16] Respondents ****1660** could have no privacy interest in the contents of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents. The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment. ***120** See *Coolidge v. New Hampshire,* 403 U.S. 443, 487-490, 91 S.Ct. 2022, 2048-2050, 29 L.Ed.2d 564 (1971); *Burdeau v. McDowell,* 256 U.S. 465, 475-476, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921).

Similarly, the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search.[17] It infringed no legitimate expectation of

privacy and hence was not a "search" within the meaning of the Fourth Amendment.

While the agents' assertion of dominion and control over the package and its contents did constitute a "seizure,"[18] that ***121** seizure was not unreasonable. The fact that, prior to the field test, respondents' privacy interest in the contents of the package had been largely compromised, is highly relevant to the reasonableness of the agents' conduct in this respect. The agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents. Under these circumstances, the package could no longer support any expectation of privacy; it was just like a balloon "the distinctive character [of which] spoke volumes as to its contents, particularly to the trained eye of the officer," *Texas v. Brown,* 460 U.S. ----, ----, 103 S.Ct. 1535, 1545, 75 L.Ed.2d 502 (1983) (plurality opinion); see also *id.,* at ----, 103 S.Ct., at 1543 (POWELL, J., concurring in the judgment); or the hypothetical gun case in *Arkansas v. Sanders,* 442 U.S. 753, 764-765, n. 13, 99 S.Ct. 2586, 2593-2594, n. 13, 61 L.Ed.2d 235 (1979). ****1661** Such containers may be seized, at least temporarily, without a warrant.[19] Accordingly, since it was apparent that the tube and plastic bags contained contraband and little else, this warrantless seizure was reasonable,[20] for it is well-settled that it is constitutionally reasonable for law enforcement officials to seize "effects" that cannot support a justifiable expectation ***122** of privacy without a warrant, based on probable cause to believe they contain contraband.[21]

III

The question remains whether the additional intrusion occasioned by the field test, which had not been conducted by the Federal Express agents and therefore exceeded the scope of the private search, was an unlawful "search" or "seizure" within the meaning of the Fourth Amendment.

The field test at issue could disclose only one fact previously unknown to the agent-whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder. We must first determine whether this can be considered a "search" subject to the Fourth Amendment-did it infringe an expectation of privacy that society is prepared to consider reasonable?

The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.[22] Indeed, this distinction underlies the rule that ***123** Government may utilize information voluntarily disclosed to a governmental informant, despite the criminal's reasonable expectation that his associates would not disclose confidential information to the authorities. See *United States v. White,* 401 U.S. 745, 751-752, 91 S.Ct. 1122, 1125-1126, 28 L.Ed.2d 453 (1971) (plurality opinion).

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular ****1662** test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative-merely disclosing that the substance is something other than cocaine-such a result reveals nothing of special interest. Congress has decided-and there is no question about its power to do so-to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.[23]

This conclusion is dictated by *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), in which the Court held that subjecting luggage to a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment:

> ***124** "A 'canine sniff' by a well-trained narcotics detection dog, however, does not require opening of the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage,

the information obtained is limited." *Id.,* at ----, 103 S.Ct., at 2644.[24]

Here, as in *Place,* the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.

We have concluded, in Part II, *supra,* that the initial "seizure" of the package and its contents was reasonable. Nevertheless, as *Place* also holds, a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on "unreasonable seizures."[25] Here, the field test did affect respondents' possessory interests protected by the Amendment, since by destroying a quantity of the powder it converted ***125** what had been only a temporary deprivation of possessory interests into a permanent one. To assess the reasonableness of this conduct, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.,* at ----, 103 S.Ct., at 2642.[26]

****1663** Applying this test, we conclude that the destruction of the powder during the course of the field test was reasonable. The law enforcement interests justifying the procedure were substantial; the suspicious nature of the material made it virtually certain that the substance tested was in fact contraband. Conversely, because only a trace amount of material was involved, the loss of which appears to have gone unnoticed by respondents, and since the property had already been lawfully detained, the "seizure" could, at most, have only a *de minimis* impact on any protected property interest. Cf. *Cardwell v. Lewis,* 417 U.S. 583, 591-592, 94 S.Ct. 2464, 2469-2470, 41 L.Ed.2d 325 (1974) (plurality opinion) (examination of automobile's tires and taking of paint scrapings was a *de minimis* invasion of constitutional interests).[27] Under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment interests. This warrantless "seizure" was reasonable.[28]

***126** In sum, the federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct. To the extent that a protected possessory interest was infringed, the infringement was *de minimis* and constitutionally reasonable. The judgment of the Court of Appeals is

Reversed.

Justice WHITE, concurring in part and concurring in the judgment.

It is relatively easy for me to concur in the judgment in this case, since in my view the case should be judged on the basis of the Magistrate's finding that, when the first DEA agent arrived, the "tube was in plain view in the box and the bags of white powder were visible from the end of the tube." App. to Pet. for Cert. 18a. Although this finding was challenged before the District Court, that court found it unnecessary to pass on the issue. *Id.,* at 12a-13a. As I understand its opinion, however, the Court of Appeals accepted the Magistrate's finding: the Federal Express manager "placed the bags back in the tube, leaving them visible from the tube's end, and placed the tube back in the box"; he later gave the box to the DEA agent, who "removed the tube from the open box, took the bags out of the tube, and extracted a sample of powder." 683 F.2d 296, 297 (CA8 1982). At the very least, the Court of Appeals assumed that ***127** the contraband was in plain view. The Court of Appeals then proceeded to consider whether the federal agent's field test was an illegal extension of the private search, and it invalidated the field test solely for that reason.

Particularly since respondents argue here that whether or not the contraband was in plain view when the federal agent ****1664** arrived is irrelevant and that the only issue is the validity of the field test, see, *e.g.,* Brief for Respondents 25, n. 11; Tr. of Oral Arg. 28, I would proceed on the basis that the clear plastic bags were in plain view when the agent arrived and that the agent thus properly observed the suspected contraband. On that basis, I agree with the Court's conclusion in Part III that the Court of Appeals erred in holding that the type of chemical test conducted here violated the Fourth Amendment.

The Court, however, would not read the Court of Appeals' opinion as having accepted the Magistrate's finding. It refuses to assume that the suspected contraband was visible when the first DEA agent arrived on the scene, conducts its own examination of the record, and devotes a major portion of its opinion to a discussion that would be unnecessary if the facts were as found by the Magistrate. The Court holds that even if the bags were not visible when the agent arrived, his removal of the tube from the box and the plastic bags from the tube

and his subsequent visual examination of the bags' contents "infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment" because these actions "enabled the agent to learn nothing that had not previously been learned during the private search." *Ante,* at 1660 (footnote omitted). I disagree with the Court's approach for several reasons.

First, as I have already said, respondents have abandoned any attack on the Magistrate's findings; they assert that it is irrelevant whether the suspected contraband was in plain view when the first DEA agent arrived and argue only that the plastic bags could not be opened and their contents tested ***128** without a warrant. In short, they challenge only the expansion of the private search, place no reliance on the fact that the plastic bags containing the suspected contraband might not have been left in plain view by the private searchers, and do not contend that their Fourth Amendment rights were violated by the duplication of the private search they alleged in the District Court was necessitated by the condition to which the private searchers returned the package. In these circumstances, it would be the better course for the Court to decide the case on the basis of the facts found by the Magistrate and not rejected by the Court of Appeals, to consider only whether the alleged expansion of the private search by the field test violated the Fourth Amendment, and to leave for another day the question whether federal agents could have duplicated the prior private search had that search not left the contraband in plain view.

Second, if the Court feels that the Magistrate may have erred in concluding that the white powder was in plain view when the first agent arrived and believes that respondents have not abandoned their challenge to the agent's duplication of the prior private search, it nevertheless errs in responding to that challenge. The task of reviewing the Magistrate's findings belongs to the District Court and the Court of Appeals in the first instance. We should request that they perform that function, particularly since if the Magistrate's finding that the contraband was in plain view when the federal agent arrived were to be sustained, there would be no need to address the difficult constitutional question decided today. The better course, therefore, would be to remand the case after rejecting the Court of Appeals' decision invalidating the field test as an illegal expansion of the private search.

Third, if this case must be judged on the basis that the plastic bags and their contents were concealed when the first agent arrived, I disagree with the Court's conclusion that the agent could, without a warrant, uncover or unwrap the tube ***129** and remove its contents simply because a private party had previously done so. The remainder of this opinion will address this issue.

The governing principles with respect to the constitutional protection afforded closed containers and packages may be ****1665** readily discerned from our cases. The Court has consistently rejected proposed distinctions between worthy and unworthy containers and packages, *United States v. Ross,* 456 U.S. 798, 815, 822-823, 102 S.Ct. 2157, 2171-2172, 72 L.Ed.2d 572 (1982); *Robbins v. California,* 453 U.S. 420, 425-426, 101 S.Ct. 2841, 2845-2846, 69 L.Ed.2d 744 (1981) (plurality opinion), and has made clear that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view" and does not otherwise unmistakably reveal its contents. *United States v. Ross, supra,* 456 U.S., at 822-823, 102 S.Ct., at 2171-2172; see *Robbins v. California, supra,* 453 U.S., at 427-428, 101 S.Ct., at 2846-2847 (plurality opinion); *Arkansas v. Sanders,* 442 U.S. 753, 764, n. 13, 99 S.Ct. 2586, 2593, n. 13, 61 L.Ed.2d 235 (1979). Although law-enforcement officers may sometimes seize such containers and packages pending issuance of warrants to examine their contents, *United States v. Place,* 462 U.S. ----, ----, 103 S.Ct. 2637, 2641, 77 L.Ed.2d 110 (1983); *Texas v. Brown,* 460 U.S. ----, ----, 103 S.Ct. 1535, 1547, 75 L.Ed.2d 502 (1983) (STEVENS, J., concurring in the judgment), the mere existence of probable cause to believe that a container or package contains contraband plainly cannot justify a warrantless examination of its contents. *Ante,* at 1657; *United States v. Ross, supra,* 456 U.S., at 809-812, 102 S.Ct., at 2164-2166; *Arkansas v. Sanders, supra,* 442 U.S., at 762, 99 S.Ct., at 2592; *United States v. Chadwick,* 433 U.S. 1, 13, and n. 8, 97 S.Ct. 2476, 2485, and n. 8, 53 L.Ed.2d 538 (1977).

This well-established prohibition of warrantless searches has applied notwithstanding the manner in which the police obtained probable cause. The Court now for the first time sanctions warrantless searches of closed or covered containers or packages whenever probable cause exists as a result of a prior private search. It declares, in fact, that governmental inspections following on the heels of private searches are not searches at all as long as the police do no more than the private parties have already done. In reaching this conclusion, the Court excessively expands our prior decisions recognizing ***130** that the Fourth Amendment proscribes only governmental action. *Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *Coolidge*

v. New Hampshire, 403 U.S. 443, 487-490, 91 S.Ct. 2022, 2048-2050, 29 L.Ed.2d 564 (1971).

As the Court observes, the Fourth Amendment "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Ante,* at 1656 (quoting *Walter v. United States,* 447 U.S. 649, 662, 100 S.Ct. 2395, 2404, 65 L.Ed.2d 410 (1980) (BLACKMUN, J., dissenting)). Where a private party has revealed to the police information he has obtained during a private search or exposed the results of his search to plain view, no Fourth Amendment interest is implicated because the police have done no more than fail to avert their eyes. *Coolidge v. New Hampshire, supra,* 403 U.S., at 489, 91 S.Ct., at 2049.

The private-search doctrine thus has much in common with the plain-view doctrine, which is "grounded on the proposition that once police are lawfully in a position *to observe an item first-hand,* its owner's privacy interest in that item is lost ...." *Illinois v. Andreas,* 463 U.S. ----, ----, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983) (emphasis added). It also shares many of the doctrinal underpinnings of cases establishing that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities," *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976), although the analogy is imperfect since the risks assumed by a person whose belongings are subjected to a private search are not comparable to those assumed by one who voluntarily chooses to reveal his secrets to a companion.

****1666** Undoubtedly, the fact that a private party has conducted a search "that might have been impermissible for a government agent cannot render otherwise reasonable official conduct unreasonable." *Ante,* at 1657. But the fact that a repository of personal property previously was searched by a private party has never been used to legitimize *governmental conduct* that otherwise would be subject to challenge under ***131** the Fourth Amendment. If government agents are unwilling or unable to rely on information or testimony provided by a private party concerning the results of a private search and that search has not left incriminating evidence in plain view, the agents may wish to duplicate the private search to observe first-hand what the private party has related to them or to examine and seize the suspected contraband the existence of which has been reported. The information provided by the private party clearly would give the agents probable cause to secure a warrant authorizing such actions. Nothing in our previous cases suggests, however, that the agents may proceed to conduct their own search of the same or lesser scope as the private search without first obtaining a warrant. *Walter v. United States,* 447 U.S., at 660-662, 100 S.Ct., at 2403-2404 (WHITE, J., concurring in part and concurring in the judgment).

Walter v. United States, on which the majority heavily relies in opining that "[t]he additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search," *ante,* at 1657, does not require that conclusion. Justice STEVENS' opinion in *Walter* does contain language suggesting that the government is free to do all of what was done earlier by the private searchers. But this language was unnecessary to the decision, as Justice STEVENS himself recognized in leaving open the question whether "the Government would have been required to obtain a warrant had the private party been the first to view [the films]," 447 U.S., at 657, n. 9, 100 S.Ct., at 2402, n. 9, and in emphasizing that "[e]ven though some circumstances-for example, *if the results of the private search are in plain view when materials are turned over to the Government*-may justify the Government's re-examination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search." *Id.,* at 657, 100 S.Ct., at 2401 (emphasis added). Nor does Justice BLACKMUN'S dissent in *Walter* necessarily support today's holding, for it emphasized that the opened containers ***132** turned over to the government agents "clearly revealed the nature of their contents," *id.,* at 663, 100 S.Ct., at 2405; see *id.,* at 665, 100 S.Ct., at 2406, and the facts of this case, at least as viewed by the Court, do not support such a conclusion.

Today's decision also is not supported by the majority's reference to cases involving the transmission of previously private information to the police by a third party who has been made privy to that information. *Ante,* at 1658-1659. The police may, to be sure, use confidences revealed to them by a third party to establish probable cause or for other purposes, and the third party may testify about those confidences at trial without violating the Fourth Amendment. But we have never intimated until now that an individual who reveals that he stores contraband in a particular container or location to an acquaintance who later betrays his confidence has no expectation of privacy in that container or location and that the police may thus search it without a warrant.

That, I believe, is the effect of the Court's opinion. If a private party breaks into a locked suitcase, a locked car, or even a locked house, observes incriminating information, returns the object of his search to its prior locked condition, and then reports his findings to the police, the majority apparently would allow the police to duplicate the prior search on the ground that the private search vitiated the owner's expectation of privacy. As Justice STEVENS has previously observed, this conclusion **1667 cannot rest on the proposition that the owner no longer has a subjective expectation of privacy since a person's expectation of privacy cannot be altered by subsequent events of which he was unaware. *Walter v. United States, supra,* at 659, n. 12, 100 S.Ct., at 2403 n. 12.

The majority now ignores an individual's subjective expectations and suggests that "[t]he reasonableness of an official invasion of a citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Ante,* at 1657. On that view, however, the reasonableness of a particular individual's remaining expectation of privacy should turn entirely on whether the private *133 search left incriminating evidence or contraband in plain view. Cf. *Walter v. United States, supra,* at 663, 665, 100 S.Ct., at 2405, 2406 (BLACKMUN, J., dissenting). If the evidence or contraband is not in plain view and not in a container that clearly announces its contents at the end of a private search, the government's subsequent examination of the previously searched object necessarily constitutes an independent, governmental search that infringes Fourth Amendment privacy interests. *Id.,* at 662, 100 S.Ct., at 2404 (WHITE, J., concurring in part and concurring in the judgment).

The majority opinion is particularly troubling when one considers its logical implications. I would be hard-pressed to distinguish this case, which involves a private search, from (1) one in which the private party's knowledge, later communicated to the government, that a particular container concealed contraband and nothing else arose from his presence at the time the container was sealed; (2) one in which the private party learned that a container concealed contraband and nothing else when it was previously opened in his presence; or (3) one in which the private party knew to a certainty that a container concealed contraband and nothing else as a result of conversations with its owner. In each of these cases, the approach adopted by the Court today would seem to suggest that the owner of the container has no legitimate expectation of privacy in its contents and that government agents opening that container without a warrant on the strength of information provided by the private party would not violate the Fourth Amendment.

Because I cannot accept the majority's novel extension of the private-search doctrine and its implications for the entire concept of legitimate expectations of privacy, I concur only in Part III of its opinion and in the judgment.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

This case presents two questions: first whether law enforcement officers may conduct a warrantless search of the *134 contents of a container merely because a private party has previously examined the container's contents and informed the officers of its suspicious nature; and second, whether law enforcement officers may conduct a chemical field test of a substance once the officers have legitimately located the substance. Because I disagree with the Court's treatment of each of these issues, I respectfully dissent.

I

I agree entirely with Justice WHITE that the Court has expanded the reach of the private-search doctrine far beyond its logical bounds. *Ante,* at 1655-1658 (WHITE, J., concurring in the judgment). It is difficult to understand how respondents can be said to have no expectation of privacy in a closed container simply because a private party has previously opened the container and viewed its contents. I also agree with Justice WHITE, however, that if the private party presents the contents of a container to a law enforcement officer in such a manner that the contents are plainly visible, the officer's visual inspection of the contents does not constitute a "search" within the meaning of the Fourth Amendment. Because the record in this case is unclear on the question whether the contents of respondents' package were plainly **1668 visible when the Federal Express employee showed the package to the DEA officer, I would remand the case for further factfinding on this central issue.

II

As noted, I am not persuaded that the DEA officer actually came upon respondents' cocaine without violating the Fourth Amendment and accordingly, I need not address the legality

of the chemical field test. Since the Court has done so, however, I too will address the question, assuming, *arguendo,* that the officer committed neither an unconstitutional search nor an unconstitutional seizure prior to the point at which he took the sample of cocaine out of the plastic bags to conduct the test.

***135** A

I agree that, under the hypothesized circumstances, the field test in this case was not a search within the meaning of the Fourth Amendment for the following reasons: *First,* the officer came upon the white powder innocently; *second,* under the hypothesized circumstances, respondents could not have had a reasonable expectation of privacy in the chemical identity of the powder because the DEA agents were already able to identify it as contraband with virtual certainty, *Texas v. Brown,* 460 U.S. ----, ----, 103 S.Ct. 1535, 1547, 75 L.Ed.2d 502 (1983) (STEVENS, J., concurring in the judgment); and *third,* the test required the destruction of only a minute quantity of the powder. The Court, however, has reached this conclusion on a much broader ground, relying on two factors alone to support the proposition that the field test was not a search; *first,* the fact that the test revealed only whether or not the substance was cocaine, without providing any further information; and *second,* the assumption that an individual does not have a reasonable expectation of privacy in such a fact.

The Court asserts that its "conclusion is dictated by *United States v. Place,*" *ante,* at 1662, in which the Court stated that a "canine sniff" of a piece of luggage did not constitute a search because it "is less intrusive than a typical search," and because it "discloses only the presence or absence of narcotics, a contraband item." 462 U.S. ----, ----, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983). Presumably, the premise of *Place* was that an individual could not have a reasonable expectation of privacy in the presence or absence of narcotics in his luggage. The validity of the canine sniff in that case, however, was neither briefed by the parties nor addressed by the courts below. Indeed, since the Court ultimately held that the defendant's luggage had been impermissibly seized, its discussion of the question was wholly unnecessary to its judgment. In short, as Justice BLACKMUN pointed out at the time, "the Court [was] certainly in no position to consider all the ramifications of this important issue." *Id.,* at ----, 103 S.Ct., at 2644-45.

***136** Nonetheless, the Court concluded that

> "the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here-exposure of respondent's luggage, which was located in a public place, to a trained canine-did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.,* at ----, 103 S.Ct., at 2644-45.

As it turns out, neither the Court's knowledge nor its imagination regarding criminal investigative techniques proved very sophisticated, for within one year we have learned of another investigative procedure that shares with the dog sniff the same defining characteristics that led the Court to suggest that the dog sniff was not a search.

Before continuing along the course that the Court so hastily charted in *Place,* it is only prudent to take this opportunity-in ****1669** my view, the first real opportunity-to consider the implications of the Court's new Fourth Amendment jurisprudence. Indeed, in light of what these two cases have taught us about contemporary law-enforcement methods, it is particularly important that we analyze the basis upon which the Court has redefined the term "search" to exclude a broad class of surveillance techniques. In my view, such an analysis demonstrates that, although the Court's conclusion is correct in this case, its dictum in *Place* was dangerously incorrect. More important, however, the Court's reasoning in both cases is fundamentally misguided and could potentially lead to the development of a doctrine wholly at odds with the principles embodied in the Fourth Amendment.

Because the requirements of the Fourth Amendment apply only to "searches" and "seizures," an investigative technique ***137** that falls within neither category need not be reasonable and may be employed without a warrant and without probable cause, regardless of the circumstances surrounding its use. The prohibitions of the Fourth Amendment are not, however, limited to any preconceived conceptions of what constitutes a search or a seizure; instead we must apply the constitutional language to modern developments according to the fundamental principles that the Fourth Amendment embodies. *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 356 (1974). Before excluding a class of surveillance techniques from the reach of the Fourth Amendment, therefore, we must be certain that none of

the techniques so excluded threatens the areas of personal security and privacy that the Amendment is intended to protect.

What is most startling about the Court's interpretation of the term "search," both in this case and in *Place,* is its exclusive focus on the nature of the information or item sought and revealed through the use of a surveillance technique, rather than on the context in which the information or item is concealed. Combining this approach with the blanket assumption, implicit in *Place* and explicit in this case, that individuals in our society have no reasonable expectation of privacy in the fact that they have contraband in their possession, the Court adopts a general rule that a surveillance technique does not constitute a search if it reveals only whether or not an individual possesses contraband.

It is certainly true that a surveillance technique that identifies only the presence or absence of contraband is less intrusive than a technique that reveals the precise nature of an item regardless of whether it is contraband. But by seizing upon this distinction alone to conclude that the first type of technique, as a general matter, is not a search, the Court has foreclosed any consideration of the circumstances under which the technique is used, and may very well have paved ***138** the way for technology to override the limits of law in the area of criminal investigation.

For example, under the Court's analysis in these cases, law enforcement officers could release a trained cocaine-sensitive dog-to paraphrase the California Court of Appeal, a "canine cocaine connoisseur"-to roam the streets at random, alerting the officers to people carrying cocaine. Cf. *People v. Evans,* 65 Cal.App.3d 924, 932, 134 Cal.Rptr. 436, 440 (1977). Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar, under the Court's approach, to the police setting up such a device on a street corner and scanning all passersby. In fact, the Court's analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present. In short, under the interpretation of the Fourth Amendment first suggested in *Place* and first ****1670** applied in this case, these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire. Hence, at some point in the future, if the Court stands by the theory it has adopted today, search warrants, probable cause, and even "reasonable suspicion" may very well become notions of the past. Fortunately, we know from precedents such as *Katz v. United States, supra,* overruling the "trespass" doctrine of *Goldman v. United States,* 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942), and *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), that this Court ultimately stands ready to prevent this Orwellian world from coming to pass.

Although the Court accepts, as it must, the fundamental proposition that an investigative technique is a search within the meaning of the Fourth Amendment if it intrudes upon a privacy expectation that society considers to be reasonable, ***139** *ante,* at 1661, the Court has entirely omitted from its discussion the considerations that have always guided our decisions in this area. In determining whether a reasonable expectation of privacy has been violated, we have always looked to the context in which an item is concealed, not to the identity of the concealed item. Thus in cases involving searches for physical items, the Court has framed its analysis first in terms of the expectation of privacy that normally attends the location of the item and ultimately in terms of the legitimacy of that expectation. In *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), for example, we held that "no less than one who locks the doors of his home against intruders, one who safeguards his possessions [by locking them in a footlocker] is due the protection of the Fourth Amendment ..." *Id.,* at 11, 97 S.Ct., at 2483. Our holding was based largely on the observation that, "[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination." *Ibid.* The Court made the same point in *United States v. Ross,* 456 U.S. 798, 822, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572 (1982), where it held that the "Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." The fact that a container contains contraband, which indeed it usually does in such cases, has never altered our analysis.

Similarly, in *Katz v. United States, supra,* we held that electronic eavesdropping constituted a search under the Fourth Amendment because it violated a reasonable expectation of privacy. In reaching that conclusion, we focused upon the private context in which the conversation in question took place, stating that "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment

protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.,* 389 U.S., at 351-352, 88 S.Ct., at 511-512. Again, the fact that the conversations involved in *Katz* were incriminating did not alter our consideration of the ***140** privacy issue. Nor did such a consideration affect our analysis in *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), in which we reaffirmed the principle that the home is private even though it may be used to harbor a fugitive.

In sum, until today this Court has always looked to the manner in which an individual has attempted to preserve the private nature of a particular fact before determining whether there is a reasonable expectation of privacy upon which the government may not intrude without substantial justification. And it has always upheld the general conclusion that searches constitute at least "those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties." *United States v. White,* 401 U.S. 745, 786, 91 S.Ct. 1122, 1143, 28 L.Ed.2d 453 (1971) (Harlan, J., dissenting).

****1671** Nonetheless, adopting the suggestion in *Place,* the Court has veered away from this sound and well-settled approach and has focused instead solely on the product of the would-be search. In so doing, the Court has ignored the fundamental principle that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light." *Byars v. United States,* 273 U.S. 28, 29, 47 S.Ct. 248, 249, 71 L.Ed. 520 (1927). The unfortunate product of this departure from precedent is an undifferentiated rule allowing law enforcement officers free rein in utilizing a potentially broad range of surveillance techniques that reveal only whether or not contraband is present in a particular location. The Court's new rule has rendered irrelevant the circumstances surrounding the use of the technique, the accuracy of the technique, and the privacy interest upon which it intrudes. Furthermore, the Court's rule leaves no room to consider whether the surveillance technique is employed randomly or selectively, a consideration that surely implicates Fourth Amendment concerns. See LaFave, 2 Search and Seizure § 2.2(f). Although a technique that reveals only the presence or absence of illegal ***141** activity intrudes less into the private life of an individual under investigation than more conventional techniques, the fact remains that such a technique does intrude. In my view, when the investigation intrudes upon a domain over which the individual has a reasonable expectation of privacy, such as his home or a private container, it is plainly a search within the meaning of the Fourth Amendment. Surely it cannot be that the individual's reasonable expectation of privacy dissipates simply because a sophisticated surveillance technique is employed.

This is not to say that the limited nature of the intrusion has no bearing on the general Fourth Amendment inquiry. Although there are very few exceptions to the general rule that warrantless searches are presumptively unreasonable, the isolated exceptions that do exist are based on a "balancing [of] the need to search against the invasion which the search entails." *Camara v. Municipal Court,* 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967). Hence it may be, for example, that the limited intrusion effected by a given surveillance technique renders the employment of the technique, under particular circumstances, a "reasonable" search under the Fourth Amendment. See *United States v. Place,* 462 U.S. ----, ----, 103 S.Ct. 2637, 2653, 77 L.Ed.2d 110 (1983) (BLACKMUN, J., concurring in the judgment) ("a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry*"). At least under this well-settled approach, the Fourth Amendment inquiry would be broad enough to allow consideration of the method by which a surveillance technique is employed as well as the circumstances attending its use. More important, however, it is only under this approach that law enforcement procedures, like those involved in this case and in *Place,* may continue to be governed by the safeguards of the Fourth Amendment.

B

In sum, the question whether the employment of a particular surveillance technique constitutes a search depends on ***142** whether the technique intrudes upon a reasonable expectation of privacy. This inquiry, in turn, depends primarily on the private nature of the area or item subjected to the intrusion. In cases involving techniques used to locate or identify a physical item, the manner in which a person has attempted to shield the item's existence or identity from public scrutiny will usually be the key to determining whether a reasonable expectation of privacy has been violated. Accordingly, the use of techniques like the dog sniff at issue in *Place* constitutes a search whenever the police employ such techniques to secure any information about an item that is concealed in a container that we are prepared to view as supporting a reasonable expectation of privacy. The same would be true if

a more technologically ****1672** sophisticated method were developed to take the place of the dog.

In this case, the chemical field test was used to determine whether certain white powder was cocaine. Upon visual inspection of the powder in isolation, one could not identify it as cocaine. In the abstract, therefore, it is possible that an individual could keep the powder in such a way as to preserve a reasonable expectation of privacy in its identity. For instance, it might be kept in a transparent pharmaceutical vial and disguised as legitimate medicine. Under those circumstances, the use of a chemical field test would constitute a search. However, in this case, as hypothesized above, see *supra,* at 1668, the context in which the powder was found could not support a reasonable expectation of privacy. In particular, the substance was found in four plastic bags, which had been inside a tube wrapped with tape and sent to respondents via Federal Express. It was essentially inconceivable that a legal substance would be packaged in this manner for transport by a common carrier. Thus, viewing the powder as they did at the offices of Federal Express, the DEA agent could identify it with "virtual certainty"; it was essentially as though the chemical identity of the powder was ***143** plainly visible. See *Texas v. Brown, supra,* 460 U.S., at ----, 103 S.Ct., at 1547 (1983) (STEVENS, J., concurring in the judgment). Under these circumstances, therefore, respondents had no reasonable expectation of privacy in the identity of the powder, and the use of the chemical field test did not constitute a "search" violative of the Fourth Amendment.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 As the test is described in the evidence, it involved the use of three test tubes. When a substance containing cocaine is placed in one test tube after another, it will cause liquids to take on a certain sequence of colors. Such a test discloses whether or not the substance is cocaine, but there is no evidence that it would identify any other substances.

2 The Court of Appeals did not hold that the facts would not have justified the issuance of a warrant without reference to the test results; the court merely held that the facts recited in the warrant application, which relied almost entirely on the results of the field tests, would not support the issuance of the warrant if the field test was itself unlawful. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." *Spinelli v. United States,* 393 U.S. 410, 413, n. 3, 89 S.Ct. 584, 587 n. 3, 21 L.Ed.2d 637 (1969) (emphasis in original) (quoting *Aguilar v. Texas,* 378 U.S. 108, 109, n. 1, 84 S.Ct. 1509, 1511 n. 1, 12 L.Ed.2d 723 (1964)). See *Illinois v. Gates,* 462 U.S. ----, ----, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983).

3 See also *People v. Adler,* 50 N.Y.2d 730, 409 N.E.2d 888, 431 N.Y.S.2d 412, cert. denied, 449 U.S. 1014, 101 S.Ct. 573, 66 L.Ed.2d 473 (1980); cf. *United States v. Andrews,* 618 F.2d 646 (CA10) (upholding warrantless field test without discussion), cert. denied, 449 U.S. 824, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980).

4 See *Illinois v. Andreas,* 463 U.S. ----, ----, 103 S.Ct. 3319, 3323, 77 L.Ed.2d 1003 (1983); *United States v. Knotts,* 460 U.S. ----, ----, 103 S.Ct. 1081, 1085, 75 L.Ed.2d 55 (1983); *Smith v. Maryland,* 442 U.S. 735, 739-741, 99 S.Ct. 2577, 2579-2580, 61 L.Ed.2d 220 (1979); *Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968).

5 See *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *id.,* at ----, 103 S.Ct., at 2649 (BRENNAN, J., concurring in the result); *Texas v. Brown,* 460 U.S. ----, ----, 103 S.Ct. 1535, 1547, 75 L.Ed.2d 502 (1983) (STEVENS, J., concurring in the judgment); see also *United States v. Chadwick,* 433 U.S. 1, 13-14, n. 8, 97 S.Ct. 2476, 2484-2485, n. 8, 53 L.Ed.2d 538 (1977); *Hale v. Henkel,* 201 U.S. 43, 76, 26 S.Ct. 370, 379, 50 L.Ed. 652 (1906). While the concept of a "seizure" of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the "seizure" of a person within the meaning of the Fourth Amendment-meaningful interference, however brief, with an individual's freedom of movement. See *Michigan v. Summers,* 452 U.S. 692, 696, 101 S.Ct. 2587, 2590, 69 L.Ed.2d 340 (1981); *Reid v. Georgia,* 448 U.S. 438, 440, n. *, 100 S.Ct. 2752, 2753, n. *, 65 L.Ed.2d 890 (1980) (*per curiam*); *United States v. Mendenhall,* 446 U.S. 544, 551-554, 100 S.Ct. 1870, 1875-1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.); *Brown v. Texas,* 443 U.S. 47, 50, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); *United States v. Brignoni-*

Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975); *Cupp v. Murphy,* 412 U.S. 291, 294-295, 93 S.Ct. 2000, 2003-2004, 36 L.Ed.2d 900 (1973); *Davis v. Mississippi,* 394 U.S. 721, 726-727, 89 S.Ct. 1394, 1397-1398, 22 L.Ed.2d 676 (1969); *Terry v. Ohio,* 392 U.S. 1, 16, 19, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889 (1968).

6 See *id.,* 447 U.S., at 656, 100 S.Ct. at 2401 (opinion of STEVENS, J.); *id.,* at 660-661, 100 S.Ct., at 2403-2404 (WHITE, J., concurring in part and concurring in the judgment); *United States v. Janis,* 428 U.S. 433, 455-456, n. 31, 96 S.Ct. 3021, 3032-3033, n. 31, 49 L.Ed.2d 1046 (1976); *Coolidge v. New Hampshire,* 403 U.S. 443, 487-490, 91 S.Ct. 2022, 2048-2050, 29 L.Ed.2d 564 (1971); *Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

7 *United States v. Chadwick,* 433 U.S. 1, 10, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977); *United States v. Van Leeuwen,* 397 U.S. 249, 251, 90 S.Ct. 1029, 1031, 25 L.Ed.2d 282 (1970); *Ex parte Jackson,* 96 U.S. 727, 733, 6 Otto 727, 733, 24 L.Ed. 877 (1878); see also *Walter,* 447 U.S., at 654-655, 100 S.Ct., at 2400-2401 (opinion of STEVENS, J.).

8 See, *e.g., United States v. Place,* 462 U.S. ----, ----, 103 S.Ct. 2637, 2641, 77 L.Ed.2d 110 (1983); *United States v. Ross,* 456 U.S. 798, 809-812, 102 S.Ct. 2157, 2164-2166, 72 L.Ed.2d 572 (1982); *Robbins v. California,* 453 U.S. 420, 426, 101 S.Ct. 2841, 2845, 69 L.Ed.2d 744 (1981) (plurality opinion); *Arkansas v. Sanders,* 442 U.S. 753, 762, 99 S.Ct. 2586, 2592, 61 L.Ed.2d 235 (1979); *United States v. Chadwick,* 433 U.S. 1, 13 and n. 8, 97 S.Ct. 2476, 2485 and n. 8, 53 L.Ed.2d 538 (1977); *United States v. Van Leeuwen,* 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970). There is, of course, a well recognized exception for customs searches; but that exception is not involved in this case.

9 See *Whiteley v. Warden,* 401 U.S. 560, 567, n. 11, 91 S.Ct. 1031, 1036, n. 11, 28 L.Ed.2d 306 (1971); *Wong Sun v. United States,* 371 U.S. 471, 484, 83 S.Ct. 407, 415, 9 L.Ed.2d 441 (1963); *Rios v. United States,* 364 U.S. 253, 261-262, 80 S.Ct. 1431, 1436-1437, 4 L.Ed.2d 1688 (1960); *Henry v. United States,* 361 U.S. 98, 103 (1959); *Miller v. United States,* 357 U.S. 301, 312, 78 S.Ct. 1190, 1197, 2 L.Ed.2d 1332 (1958); *United States v. Di Re,* 332 U.S. 581, 595, 68 S.Ct. 222, 228, 92 L.Ed. 210 (1948); *Byars v. United States,* 273 U.S. 28, 29, 47 S.Ct. 248, 249, 71 L.Ed. 520 (1927).

10 A post-trial affidavit indicates that an agent of Federal Express may have opened the package because he was suspicious about its contents, and not because of damage from a forklift. However, the lower courts found no governmental involvement in the private search, a finding not challenged by respondents. The affidavit thus is of no relevance to the issue we decide.

11 See also *id.,* 447 U.S., at 658-659, 100 S.Ct., at 2402-2403 (footnotes omitted) ("The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection.").

12 In *Walter,* a majority of the Court found a violation of the Fourth Amendment. For present purposes, the disagreement between the majority and the dissenters in that case with respect to the comparison between the private search and the official search is less significant than the agreement on the standard to be applied in evaluating the relationship between the two searches.

13 See *Smith v. Maryland,* 442 U.S. 735, 743-744, 99 S.Ct. 2577, 2581-2582, 61 L.Ed.2d 220 (1979); *United States v. White,* 401 U.S. 745, 749-753, 91 S.Ct. 1122, 1124-1126, 28 L.Ed.2d 453 (1971) (plurality opinion); *Osborn v. United States,* 385 U.S. 323, 326-331, 87 S.Ct. 429, 431-433, 17 L.Ed.2d 394 (1966); *Hoffa v. United States,* 385 U.S. 293, 300-303, 87 S.Ct. 408, 412-414, 17 L.Ed.2d 374 (1966); *Lewis v. United States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *Lopez v. United States,* 373 U.S. 427, 437-439, 83 S.Ct. 1381, 1387-1388, 10 L.Ed.2d 462 (1963); *On Lee v. United States,* 343 U.S. 747, 753-754, 72 S.Ct. 967, 971-972, 96 L.Ed. 1270 (1952). See also *United States v. Henry,* 447 U.S. 264, 272, 100 S.Ct. 2183, 2187, 65 L.Ed.2d 115 (1980); *United States v. Caceres,* 440 U.S. 741, 744, 750-751, 99 S.Ct. 1465, 1467, 1470-1471, 59 L.Ed.2d 733 (1979).

14 See *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Berger v. New York,* 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *Silverman v. United States,* 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).

15 Daniel Stegemoller, the Federal Express office manager, testified at the suppression hearing that the white substance was not visible without reentering the package at the time the first agent arrived. App. 42-43; 58. As Justice WHITE

points out, the magistrate found that the "tube was in plain view in the box and the bags of white powder were visible from the end of the tube." App. to Pet. for Cert. 18a. The bags were, however, only visible if one picked up the tube and peered inside through a small aperture; even then, what was visible was only the translucent bag that contained the white powder. The powder itself was barely visible, and surely was not so plainly in view that the agents did "no more than fail to avert their eyes," *post,* at 1665. In any event, respondents filed objections to the magistrate's report with the District Court. The District Court declined to resolve respondents' objection, ruling that fact immaterial and assuming for purposes of its decision "that the newspaper in the box covered the gray tube and that neither the gray tube nor the contraband could be seen when the box was turned over to the DEA agents." App. to Pet. for Cert. 12a-13a. At trial, the federal agent first on the scene testified that the powder was not visible until after he pulled the plastic bags out of the tube. App. 71-72. Respondents continue to argue this case on the assumption that the Magistrate's report is incorrect. Brief for Respondents 2-3. As our discussion will make clear, we agree with the District Court that it does not matter whether the loose piece of newspaper covered the tube at the time the agent first saw the box.

16 See *United States v. Caceres,* 440 U.S. 741, 750-751, 99 S.Ct. 1465, 1470-1471, 59 L.Ed.2d 733 (1979); *United States v. White,* 401 U.S. 745, 749-753, 91 S.Ct. 1122, 1124-1126, 28 L.Ed.2d 453 (1971) (plurality opinion); *United States v. Osborn,* 385 U.S. 323, 326-331, 87 S.Ct. 429, 431-433, 17 L.Ed.2d 394 (1966); *On Lee v. United States,* 343 U.S. 747, 753-754, 72 S.Ct. 967, 971-972, 96 L.Ed. 1270 (1952). For example, in *Lopez v. United States,* 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963), the Court wrote: "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence.... For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court...." *Id.,* at 439, 83 S.Ct., at 1388 (footnote omitted).

17 We reject Justice WHITE's suggestion that this case is indistinguishable from one in which the police simply learn from a private party that a container contains contraband, seize it from its owner, and conduct a warrantless search which, as Justice WHITE properly observes, would be unconstitutional. Here, the Federal Express employees who were lawfully in possession of the package invited the agent to examine its contents; the governmental conduct was made possible only because private parties had compromised the integrity of this container. Justice WHITE would have this case turn on the fortuity of whether the Federal Express agents placed the tube back into the box. But in the context of their previous examination of the package, their communication of what they had learned to the agent, and their offer to have the agent inspect it, that act surely could not create any privacy interest with respect to the package that would not otherwise exist. See *Illinois v. Andreas,* 463 U.S. ----, ----, 103 S.Ct. 3319, 3323, 77 L.Ed.2d 1003 (1983). Thus the precise character of the white powder's visibility to the naked eye is far less significant than the facts that the container could no longer support any expectation of privacy, and that it was virtually certain that it contained nothing but contraband. Contrary to Justice WHITE's suggestion, we do not "sanction[ ] warrantless searches of closed or covered containers or packages whenever probable cause exists as a result of a prior private search." *Post,* at 1665. A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant. See *United States v. Ross,* 456 U.S. 798, 809-812, 102 S.Ct. 2157, 2164-2166, 72 L.Ed.2d 572 (1982); *Robbins v. California,* 453 U.S. 420, 426-427, 101 S.Ct. 2841, 2845-2846, 69 L.Ed.2d 744 (1981) (plurality opinion); *Arkansas v. Sanders,* 442 U.S. 753, 764-765, 99 S.Ct. 2586, 2593-2594, 61 L.Ed.2d 235 (1979); *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

18 Both the Magistrate and the District Court found that the agents took custody of the package from Federal Express after they arrived. Although respondents had entrusted possession of the items to Federal Express, the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a "seizure," though not necessarily an unreasonable one. See *United States v. Van Leeuwen,* 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970). Indeed, this is one thing on which the entire Court appeared to agree in *Walter.*

19 See also *United States v. Ross,* 456 U.S. 798, 822-823, 102 S.Ct. 2157, 2171-2172, 72 L.Ed.2d 572 (1982); *Robbins v. California,* 453 U.S. 420, 428-428, 101 S.Ct. 2841, 2846-2847, 69 L.Ed.2d 744 (1981) (plurality opinion).

20 Respondents concede that the agents had probable cause to believe the package contained contraband. Therefore we need not decide whether the agents could have seized the package based on something less than probable cause. Some

seizures can be justified by an articulable suspicion of criminal activity. See *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

21 See *Place,* 462 U.S., at ----, 103 S.Ct., at 2641; *Texas v. Brown,* 460 U.S., at ----, 103 S.Ct., at 1541 (plurality opinion); *id.,* at ----, 103 S.Ct., at 1547 (STEVENS, J., concurring in the judgment); *Payton v. New York,* 445 U.S. 573, 587, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 354, 97 S.Ct. 619, 629, 50 L.Ed.2d 530 (1977); *Harris v. United States,* 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968) (*per curiam*).

22 "Obviously, however, a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.' His presence, in the words of *Jones* [*v. United States,* 362 U.S. 257, 267, 80 S.Ct. 725, 734, 4 L.Ed.2d 697 (1960)], is 'wrongful,' his expectation of privacy is not one that society is prepared to recognize as 'reasonable.' *Katz v. United States,* 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring). And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois,* 439 U.S. 128, 143-144, n. 12, 99 S.Ct. 421, 430-431, n. 12, 58 L.Ed.2d 387 (1978). See also *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (use of a beeper to track car's movements infringed no reasonable expectation of privacy); *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (use of a pen register to record phone numbers dialed infringed no reasonable expectation of privacy).

23 See Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 Mich.L.Rev. 1229 (1983). Our discussion, of course, is confined to possession of contraband. It is not necessarily the case that the purely "private" possession of an article that cannot be distributed in commerce is itself illegitimate. See *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

24 Respondents attempt to distinguish *Place* arguing that it involved no physical invasion of Place's effects, unlike the conduct at issue here. However, as the quotation makes clear, the *reason* this did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items. That rationale is fully applicable here.

25 In *Place,* the Court held that while the initial seizure of luggage for the purpose of subjecting it to a "dog sniff" test was reasonable, the seizure became unreasonable because its length unduly intruded upon constitutionally protected interests. See *id.,* 462 U.S., at ----, 103 S.Ct., at 2645.

26 See, *e.g., Michigan v. Long,* 463 U.S. ----, ----, 103 S.Ct. 3469, 3479, 77 L.Ed.2d 1201 (1983); *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975); *Terry v. Ohio,* 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879-1880, 20 L.Ed.2d 889 (1968); *Camara v. Municipal Court,* 387 U.S. 523, 536-537, 87 S.Ct. 1727, 1734-1735, 18 L.Ed.2d 930 (1967).

27 In fact, respondents do not contend that the amount of material tested was large enough to make it possible for them to have detected its loss. The only description in the record of the amount of cocaine seized is that "[i]t was a trace amount." App. 75.

28 See *Cupp v. Murphy,* 412 U.S. 291, 296, 93 S.Ct. 2000, 2004, 36 L.Ed.2d 900 (1973) (warrantless search and seizure limited to scraping suspect's fingernails justified even when full search may not be). Cf. *Place,* 462 U.S., at ----, 103 S.Ct., at 2644-2645 (approving brief warrantless seizure of luggage for purposes of "sniff test" based on its minimal intrusiveness and reasonable belief that the luggage contained contraband); *Van Leeuwen v. United States,* 397 U.S. 249, 252-253, 90 S.Ct. 1029, 1032-1033, 25 L.Ed.2d 282 (1970) (detention of package on reasonable suspicion was justified since detention infringed no "significant Fourth Amendment interest"). Of course, where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances. See, *e.g., Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). We do not suggest,

however, that any seizure of a small amount of material is necessarily reasonable. An agent's arbitrary decision to take the “white powder” he finds in a neighbor's sugar bowl, or his medicine cabinet, and subject it to a field test for cocaine, might well work an unreasonable seizure.

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15 F.3d 928
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Thurman REED, Jr., Defendant-Appellant.

No. 92-30508.
|
Submitted Nov. 5, 1993*.
|
Decided Feb. 7, 1994.

Synopsis

Defendant was convicted in the United States District Court for the District of Alaska, James K. Singleton, Jr., J., on guilty pleas to various narcotics and firearm offenses entered after the District Court, 810 F.Supp. 1078, denied defendant's motion to suppress and to sever counts of indictment. Defendant appealed. The Court of Appeals, Goodwin, Circuit Judge, held that: (1) hotel employee's warrantless search of defendant's room was government action in violation of defendant's Fourth Amendment rights, in light of presence of police lookouts and employee's intent to help police gather proof of narcotics trafficking; (2) independent evidence provided sufficient probable cause for issuance of search warrant for hotel room after tainted evidence from hotel employee's prior illegal search had been excised from warrant affidavit; and (3) police officer's forcible entry of defendant's hotel room was justified despite officer's failure to identify himself as police officer under knock-notice rule.

Judgment affirmed.

Attorneys and Law Firms

***929** John C. McCarron, Ashburn & Mason, Anchorage, Alaska for the defendant-appellant.

Robert J. Erickson, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

Appeal from the United States District Court for the District of Alaska.

Before GOODWIN and HUG, Circuit Judges, and McKIBBEN,** District Judge.

OPINION

GOODWIN, Circuit Judge:

Thurman Reed, Jr. appeals his guilty plea conviction, arguing that the district court erred in denying his motions to suppress. *United States v. Reed,* 810 F.Supp. 1078 (D.Alaska 1992). We agree that the district court erred in suggesting that the Fourth Amendment permits police officers, without a warrant or consent of the occupant, to stand guard while private citizens conduct illegal searches for the purpose of discovering incriminating evidence. This decision conflicts with Ninth Circuit precedent and invites law enforcement officers to circumvent the Fourth Amendment by delegating illegal searches to nongovernment agents.

However, Reed's guilty plea conviction is valid despite this error. Even excising the tainted evidence from the affidavit filed in support of the search warrant, the affidavit establishes probable cause to issue a warrant. The evidence obtained in the later warranted search is, therefore, admissible, and was more than sufficient to sustain Reed's conviction. The district court did not clearly err in rejecting Reed's knock-notice claim.

We affirm Reed's conviction and sentence, but expressly disapprove the district court's published order as inconsistent with circuit law.

***930 I. FACTS**

On January 24, 1992, Lewis S. Watson, assistant general manager of the Best Western Barratt Inn ("Barratt Inn") in Anchorage, Alaska, told Anchorage Police he suspected that one of his guests was using his hotel room for drug activities. Reed, the room's occupant, had checked into the hotel several days earlier and had paid for the room in cash each day.[1] According to hotel employees, Reed had refused maid service and received an unusual number of visitors and telephone calls. In addition, an anonymous caller reported that Reed was using the room to sell narcotics. Watson requested that officers be dispatched to the hotel to protect him while he checked the room.

Accompanied by two police officers, Watson knocked on Reed's door, received no answer, and used his master key to enter. Officer Sponholz accompanied him "ten feet" into the room to assure his safety. On entering, Sponholz noticed a bowl of white powder (which he suspected was crack cocaine), a safe, a cellular phone, and two crack pipes in plain view. (Affidavit in Support of Search Warrant). He also saw that the room was clean and in good condition, and that no one was present. Satisfied that Watson was in no danger, he rejoined his partner in the doorway.

Watson also immediately recognized that the room was clean and in good condition. Nonetheless, he proceeded to go through dresser drawers and to open Reed's latched briefcase. Although the officers did not ask him to conduct this search, they stood guard in the doorway and listened as Watson described his finds.

Reed arrived shortly thereafter and refused to consent to a search of his room. Police then obtained and executed a search warrant, uncovering a pistol and drugs in Reed's room. Based on this evidence, they obtained a warrant for Reed's arrest.

In May, 1992, they learned Reed was staying at the Anchor Arms Motel. Dressed in plain clothes, Detective Koch, who had interviewed Reed several months earlier during the Barratt Inn investigation, went to the Anchor Arms Motel to serve the warrant. In response to Koch's knock, Reed opened the door, looked at Koch, and then closed the door. Assuming that Reed had recognized him from their previous meeting, Koch forcibly opened the door and arrested Reed, discovering additional incriminating evidence in Reed's pocket. A subsequent warranted search of the room uncovered additional weapons and contraband.

Before trial, Reed timely moved to suppress the evidence seized at his Barratt Inn and Anchor Arms Motel rooms, arguing (1) that the initial entry into his Barratt Inn room was unlawful and (2) that Detective Koch's forced entry into his Anchor Arms room violated the knock-notice rule. After an evidentiary hearing before a magistrate judge, the district court denied both motions. *Reed,* 810 F.Supp. 1078. Reserving his right to appeal this decision, Reed then pled guilty to two counts of being a felon in possession of a firearm, one count of possession of an unregistered sawed-off shotgun, two counts of using or carrying a firearm in relation to a drug trafficking crime, and two counts of possession of cocaine with intent to distribute. 18 U.S.C. § 922(g), 26 U.S.C. § 5861(d), 18 U.S.C. § 924(c), & 21 U.S.C. § 841(a)(1). On December 2, 1992, the district court sentenced him to a term of 153 months' imprisonment followed by a four-year supervised release. This appeal followed.

II. THE INITIAL SEARCH OF REED'S BARRATT INN ROOM

The district court found that the initial search of Reed's Barratt Inn room did not violate the Fourth Amendment because it was a private search. We review this legal conclusion de novo, *United States v. Attson,* 900 F.2d 1427, 1429 (9th Cir.), *cert. denied,* 498 U.S. 961, 111 S.Ct. 393, 112 L.Ed.2d 403 (1990), accepting the district court's factual findings unless clearly erroneous, *Id.,* and reject the court's conclusion.

As the district court noted, the Fourth Amendment generally does not protect ***931** against unreasonable intrusions by private individuals. *Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), *United States v. Sherwin,* 539 F.2d 1, 5 (9th Cir.1976). The defendant has the burden of showing government action. *United States v. Gumerlock,* 590 F.2d 794 (9th Cir.) (en banc), *cert. denied,* 441 U.S. 948, 99 S.Ct. 2173, 60 L.Ed.2d 1052 (1979).

However, the Fourth Amendment does prohibit unreasonable intrusions by private individuals who are acting as government instruments or agents. *See Coolidge v. New Hampshire,* 403 U.S. 443, 487, 91 S.Ct. 2022, 2048, 29 L.Ed.2d 564 (1971); *United States v. Walther,* 652 F.2d 788, 792-93 (9th Cir.1981). This court has recognized that there exists a "gray area" between the extremes of overt governmental participation in a search and the complete absence of such participation. *Walther,* 652 F.2d at 791. This case falls within the gray area.

Cases which fall within the gray are best resolved on a case by case basis relying on the consistent application of certain general principles. *Id.* The general principles for determining whether a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes have been synthesized into a two part test. *United States v. Miller,* 688 F.2d 652, 657 (9th Cir.1982). According to this test, we must inquire:

> (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.

Id.

The Barratt Inn search obviously meets the first of these requirements. Officers Rose and Sponholz definitely "knew of and acquiesced" in Watson's search. They were personally present during the search, knew exactly what Watson was doing as he was doing it, and made no attempt to discourage him from examining Reed's personal belongings beyond what was required to protect hotel property. Watson reported his findings to them as he searched.

Thus, the only question is whether Reed has met the second part of the test-did Watson intend to further his own ends, as the government argues, or assist law enforcement efforts? We find, based on Watson's testimony and the circumstances surrounding the search, that Watson intended to help police gather proof that Reed was using his room to deal narcotics. The district court's factual findings to the contrary are clearly erroneous.

Watson testified that he called the police in order to let them know that he felt he had a room and a guest that was "involved in activity they would want to be aware of," and because he suspected Reed was involved in drug activity. He stated that his suspicions about drug dealing played heavily into his reasons for entering the room. Watson had attended a number of Drug Metro unit classes on how to determine when a hotel guest was dealing drugs. These facts suggest that Watson intended to assist the police. *See Walther,* 652 F.2d at 792.

The government contends that Watson entered the room to ensure that hotel property was not damaged and emphasizes that there is no state action if the private individual has a "legitimate independent motivation" for conducting the search. *Id.* at 791-92; *See United States v. Andrini,* 685 F.2d 1094, 1097-98 (9th Cir.1982). Watson testified that it was his idea to go into the room, and that he knew from his previous dealings with the police that he was not an agent of the police department and thus could conduct the search. He said he "wanted to give [the police] enough information so that they knew that there may be things happening in the room that they wanted to take action on."

Moreover, Watson did not stop searching after he had learned the room was in good condition. While the police officers stood in the doorway, he opened closed drawers and a latched briefcase which he knew belonged to Reed. These additional intrusions cannot be justified by any need to protect hotel property and Watson himself admitted he had no such motivation.[2] The district court's opinion ***932** suggests that Watson's interest in preventing criminal activity at the hotel is itself a "legitimate independent motivation" within the *Walther* court's meaning. *See Reed,* 810 F.Supp. at 1079 (noting that "a hotel has a substantial interest in seeing that its premises are not used for illegal activity").

However, the *Walther* court specifically held that a private carrier's interest in preventing criminal activity was not a legitimate independent motivation. 652 F.2d at 792. Moreover, if crime prevention could be an independent private motive, searches by private parties would never trigger Fourth Amendment protection and the second prong of the *Miller* test would be meaningless. This flies in the face of established precedent. In upholding private searches done in the presence of police officers, this court has consistently emphasized that the private searcher had a legitimate motive *other than crime prevention. See, e.g., United States v. Chukwubike,* 956 F.2d 209 (9th Cir.), *cert. denied,* 504 U.S. 945, 112 S.Ct. 2288, 119 L.Ed.2d 212 (1992) (emphasizing that the doctor extracted heroin-laden balloons and tested their contents for *medical* reasons).[3] In opening Reed's briefcase and dresser drawer, Watson had no legitimate independent motive within the meaning of these cases; "snooping" is not a legitimate motive and finding evidence of criminal activity is not independent.

The government and the district court emphasize that the police did not request or directly encourage Watson's search. They claim that we cannot find state action because the police were merely incidental, passive participants.[4] The district court notes that "cases make it clear that the mere presence of government agents and their observation of a private person's actions is not significant participation and does not turn a private search into a joint effort." 810 F.Supp. at 1080.[5]

However, in this case, Officer Rose and Sponholz's presence was more than "incidental." Watson would not have felt comfortable searching Reed's room had police officers not been standing guard in the doorway; without them, Reed might have returned and caught Watson examining his possessions. Thus, the officers served a vital purpose: They were lookouts. Under criminal law, the lookout has always been considered a significant participant in a criminal conspiracy. The analogy is instructive here. Officers Rose and Sponholz knew Watson was invading Reed's personal

property, knew that this conduct is prohibited by law, and helped him do so anyway.

None of the cases cited by the government or the district court has upheld similar conduct.[6] Rather, this case is governed by ***933** *Walther,* in which we held that police cannot acquiesce to or indirectly encourage a private person's search for incriminating evidence without implicating the Fourth Amendment. 652 F.2d at 791-792.[7]

Based on the facts of this case and Watson's testimony, we conclude that the warrantless search of Reed's room at the Barratt Inn constituted government action from its inception, and that Watson's alleged "legitimate independent motivation" was a pretext to search for evidence of narcotics trafficking. Thus, the warrantless search of the room at the Barratt Inn violated the Fourth Amendment. The information gathered in that search is inadmissable evidence which should have been suppressed.

III. THE LATER WARRANTED SEARCH

Reed argues that since the initial police conduct at the Barratt Inn violated his Fourth Amendment rights, all the evidence against him is tainted and must be excluded. We agree that all the observations made by Watson and the officers during the initial Barratt Inn search should not have been included in the affidavit for the search warrant. *United States v. Vasey,* 834 F.2d 782, 788 (9th Cir.1987). However, "information which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source." *Murray v. United States,* 487 U.S. 533, 538-39, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1987). "The mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant." *Vasey,* 834 F.2d at 788 (citations omitted). Rather, "[a] reviewing court should excise the tainted evidence and determine whether the remaining untainted evidence would provide a neutral magistrate with probable cause to issue a warrant." *Id.*

In the present case, police obtained a warrant based on (1) an anonymous call to the hotel front desk which claimed Reed tried to sell crack to a seventeen-year-old girl; (2) Officer Sponholtz's observation of a bowl of white powder, a safe, a cellular phone and two crack pipes in plain view; (3) Watson's statement that Reed had paid in cash, refused maid service,[8] and received an unusual number of phone calls and visitors; (4) Watson's statement that he saw two crack pipes, a safe, a cellular phone, a bowl of what appeared to be cocaine, and a gun in Reed's briefcase; (5) Reed's previous arrest for drug charges; (6) a canine search of the outside of Reed's car, which indicated drugs were present; and (7) an anonymous Crime Stoppers Line call, in which a person gave a beeper and cellular phone number and claimed that "Red" who matched Reed's description was selling cocaine from room 3317 of the Barratt Inn (which was Reed's room).

Only the evidence obtained during the warrantless search of Reed's room (items 2 and 4) at the Barratt Inn is tainted, and should ***934** be excised from the warrant. The information in the warrant regarding the anonymous call to the hotel, Watson's statement that Reed had paid cash and refused maid service, the unusual amount of phone calls and visitors, the canine search of Reed's car, and the anonymous crime stoppers call is untainted evidence obtained from a source independent of the illegal search. Examining this remaining untainted evidence, we conclude that it is sufficient to provide a neutral magistrate with probable cause to issue a warrant. *Vasey,* 834 F.2d at 788. Thus, the evidence obtained during the subsequent warranted search is admissible, and the arrest warrant is valid.

IV. REED'S KNOCK-NOTICE CLAIM

Reed also argues that the police violated the knock-notice rule in forcibly entering his Anchor Arms room without identifying themselves as police officers. The existence of exigent circumstances justifying a decision to dispense with knock-notice is a mixed question of law and fact reviewed de novo. *United States v. Mendonsa,* 989 F.2d 366, 370 (9th Cir.1993). The district court's factual findings are reviewed for clear error. *Id.*

Applying this standard, we find that Officer Koch's forcible entry was justified. Both the magistrate judge and district court found that Reed's testimony that he closed the door to unbolt the chain lock was not credible. This factual finding is not clearly erroneous: Reed was far enough away from the door when the officers entered to avoid being hit by the door. Moreover, Officer Koch was not unreasonable in assuming that Reed recognized him when he slammed the door. *United States v. Allende,* 486 F.2d 1351, 1353 (9th Cir.1973), *cert. denied,* 416 U.S. 958, 94 S.Ct. 1973, 40 L.Ed.2d 308 (1974) (officer can infer refusal to reply from silence). The police

knew Reed was likely to be armed, that he might flee from a window, and that he had a record of criminal activity. Thus, they did not act unreasonably in forcibly entering Reed's room after he closed the door.

The sentence was within the relevant guidelines, and the judgment is affirmed.

All Citations

15 F.3d 928

Footnotes

* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

** Honorable Howard D. McKibben, United States District Judge for the District of Nevada, sitting by designation.

1 Because of previous bad experiences, the hotel considered cash-paying guests a bad risk and required housekeeping staff to enter their rooms on a daily basis.

2 Watson testified that he was "just snooping" when he opened Reed's briefcase. He also admitted he "wanted to give [the police officers in the doorway] enough information."

3 *See also* cases cited in notes 5 and 6, *infra.*

4 In support of this argument, they cite the *Walther* court's statement that:

> ***de minimis*** or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state.

652 F.2d at 791. However the *Walther* court specifically found state action where the police had merely accepted the fruits of the private person's previous illegal searches. *Id.* If accepting the fruits of a private party's search 11 times over a 4 year period without paying a reward constitutes indirect encouragement, surely standing in the doorway during a search and accepting play by play descriptions of its results does so.

5 In support of this statement, the Court cites *Andrini,* 685 F.2d at 1097-98; *United States v. Gomez,* 614 F.2d 643 (9th Cir.1979) and *United States v. Ogden,* 485 F.2d 536 (9th Cir.1973), *cert. denied,* 416 U.S. 987, 94 S.Ct. 2392, 40 L.Ed.2d 764 (1974). These cases are inapplicable. In both *Andrini* and *Gomez,* private citizens opened suitcases to determine their owners, not to look for evidence of criminal activity, and we emphasized that the searchers had an independent motivation *other than crime prevention.* In *Ogden,* police were not present during the initial search.

6 *Miller* is the most similar. There, the police watched from a position near defendant's land while a theft victim entered to photograph his stolen vehicle which the defendant was offering for sale. However, in *Miller,* the citizen did not search any private property other than that he suspected was his own. Thus, unlike Watson, he had an independent motive (recovering his own property) during the *entire course* of the search. Moreover, the *Miller* citizen did not open any closed containers and had the defendant's son's permission to be on his property.

> None of the other cases cited by the District Court and government are applicable. In *United States v. Snowadzki,* 723 F.2d 1427 (9th Cir.), *cert. denied,* 469 U.S. 839, 105 S.Ct. 140, 83 L.Ed.2d 80 (1984), *United States v. Veatch,* 674 F.2d 1217, 1221 (9th Cir.1981), *cert. denied,* 456 U.S. 946, 102 S.Ct. 2013, 72 L.Ed.2d 469 (1982), and *Gumerlock,* 590 F.2d 794, the police were not personally present during the search. In *Attson,* 900 F.2d 1427 (blood test done for medical reasons), *Andrini,* 685 F.2d 1094 (lost luggage opened to determine owner), and *Gomez,* 614 F.2d 643 (same), the private searcher had a personal motive other than helping the police or preventing crime.

7 In *Walther,* an airline employee had provided confidential information to the DEA on eleven occasions over a four year period without obtaining a reward, but with some hope of obtaining one. Without any DEA agents present and without any

direct encouragement from DEA agents, the employee opened and searched a suspicious package and found cocaine. This court held that the cocaine was inadmissible because the DEA agents had acquiesced in the search by obtaining information from the employee on previous occasions and because the employee was motivated to find criminal evidence. The present case involves, if anything, more entanglement between police and a private citizen: police officers were present during the search; Watson reported directly to them as he searched; and Watson was, admittedly, trying to give police information about Reed's alleged drug trafficking.

8 This evidence was actually incorrect, as the hotel records indicate that a maid had entered that morning.

End of Document

275 F.3d 449
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Robert Beam RUNYAN, Defendant–Appellant.

United States of America, Plaintiff–Appellee,

v.

Robert Beam Runyan, Defendant–Appellant.

Nos. 00–10821, 01–11207.
|
Dec. 10, 2001.

Synopsis

Defendant was convicted of sexual exploitation of children and of distribution, receipt, and possession of child pornography, following jury trial in the United States District Court for the Northern District of Texas, Sam R. Cummings, J. Defendant appealed. The Court of Appeals, King, Chief Judge, held that: (1) removal by defendant's wife of child pornography from defendant's ranch constituted private "search" for purposes of Fourth Amendment; (2) police officers exceeded scope of such private search when they failed to confine their examination of computer disks to those disks that wife had examined; and (3) with respect to disks that wife had examined, officers did not exceed scope of her private search if they examined more files than she had examined.

Jurisdiction retained; remanded.

Attorneys and Law Firms

***452** Chad Eugene Meacham (argued), Dallas, TX, for Plaintiff–Appellee.

J.W. Johnson, Johnson Law Office, San Angelo, TX, Terri Raye Zimmermann Jacobs (argued), Jack B. Zimmermann, Zimmermann & Lavine, Houston, TX, for Defendant–Appellant.

Appeals from the United States District Court for the Northern District of Texas.

Before KING, Chief Judge, and JOLLY and BENAVIDES, Circuit Judges.

Opinion

KING, Chief Judge:

Defendant–Appellant Robert Beam Runyan was convicted of sexual exploitation of children in violation of 18 U.S.C. § 2251 and of distribution, receipt, and possession of child pornography in violation of 18 U.S.C. § 2252A. In two separate actions, Runyan appeals his conviction (No. 00–10821) and the district court's denial of his post-trial motion for a new trial (No. 01–11207). On September 24, 2001, we consolidated these two cases for the purposes of appeal. In challenging his conviction, Runyan asserts (among other claims) that the district court erred in admitting evidence obtained pursuant to an unlawful pre-warrant search by law enforcement officials. We hold that portions of the pre-warrant search violated the Fourth Amendment. Accordingly, we REMAND No. 00–10821 to the district court for further findings of fact addressing whether the search warrants would have been sought and issued in the absence of the Fourth Amendment violation. We do not reach any of the other issues raised in No. 00–10821 or any of the issues raised in No. 01–11207 at this time.

I. Factual and Procedural Background

Defendant Robert Runyan lived on a ranch outside Santa Anna, Texas, where he owned and operated Gammon Technologies, a computer repair and service company, from 1990 to 1998. During this time period, Runyan employed a number of local junior high and high school students to perform odd jobs at the ranch and to perform administrative tasks for Gammon Technologies.

Runyan was married to Judith Runyan ("Judith"), who has a daughter, Rickie, from a previous relationship. In January 1999, Judith left Runyan and moved in with a boyfriend in Brownwood. Runyan subsequently filed for divorce.

In June 1999, Judith made several trips to the ranch to retrieve items that she contends were her personal property. She ***453** was accompanied at different times by Rickie and other friends. Judith was aware that Runyan was not present at the ranch at these times. She was not aware that after their separation, Runyan had secured the gated entrance to

the ranch with a chain and lock. Runyan had also changed the locks on the house and the barn and installed surveillance cameras on the property.

On June 17, Judith and Rickie climbed over the fence surrounding the ranch, looked through a window of the ranch house, and saw that Judith's belongings were inside. On June 18, Judith, Rickie, and a friend, Casey Giles, returned to the ranch house (again by climbing the fence surrounding the ranch) and entered the house through a breakfast-room window. After searching through the house for Judith's belongings, they entered the barn next to the house, also by climbing through a window. In the barn, Giles opened a black duffel bag and discovered that it contained pornography, compact disks ("CDs") and computer disks, a Polaroid camera with film, a vibrator, and Polaroid pictures of two individuals, one of whom appeared to be a very young teenager. Under the black bag were two waterproof ammunition boxes containing more pornography. Judith took the black bag back to her Brownwood residence.

Later that day, Judith and six of her friends reentered Runyan's ranch, this time by cutting the chain on the gate with bolt cutters. For the remainder of the day on June 18 and throughout the day on June 19 they removed items identified by Judith as belonging to her. During their search of the ranch house they found a desktop computer that Judith claimed was hers, surrounded by 3.5 inch floppy disks, CDs, and ZIP disks.[1] Judith asked one of her friends, Brandie Epp ("Brandie"), to dismantle the desktop computer and to take it to Judith's Brownwood residence and reassemble it there. In addition to the computer, Brandie took the disks that were lying on the floor surrounding the computer. After reassembling the computer, Brandie viewed approximately twenty of the CDs and floppy disks that had been removed from the ranch and found that they contained images of child pornography. Brandie did not view any of the images on the ZIP disks because the necessary hardware was not connected. After viewing the images, Brandie contacted the sheriff's department. A deputy subsequently arrived, and Brandie turned over twenty-two CDs, ten ZIP disks, and eleven floppy disks to the deputy.

Over the next few weeks, Judith turned over various items found at the Runyan ranch to different law enforcement agencies. She provided the sheriff's department with additional CDs of child pornography and she gave the Santa Anna Chief of Police a 3.5 inch diskette containing child pornography. Judith also called Texas Ranger Bobby Grubbs ("Ranger Grubbs") and turned over to him the black duffel bag and pornographic materials removed from the ammunition boxes in Runyan's barn. At subsequent meetings with Ranger Grubbs on June 28 and July 7, Judith provided him with two additional disks and with Polaroid photographs that she had removed from the ranch. At some point during this time period, Judith also turned over the desktop computer to Ranger Grubbs.[2]

***454** Ranger Grubbs viewed some of the disks delivered by Judith on his computer. He observed images of child pornography. On June 24, 1999, the Coleman County District Attorney went to the Sheriff's office and viewed several images as well. At this time, several of the images were printed out on a color printer and shown to members of the District Attorney's staff. An investigator in the District Attorney's office, Darla Tibbetts, tentatively identified the subject photographed in one of the images. An intern working for the District Attorney's office, Melissa Payne, was then brought to the sheriff's office to assist with the identification. She positively identified the girl in the pictures as Misty Metcalf ("Misty"), a former high school classmate.[3]

On June 28, 1999, upon learning that he was a potential suspect, Runyan went to meet with Ranger Grubbs. At this meeting, after he had been given *Miranda* warnings, Runyan stated that he found a bag of pornography at a rest stop. Runyan stated further that the bag contained CDs and other items, including a vibrator. He admitted that he viewed the materials in the bag and that, out of curiosity, he used his computer to view child pornography available on the Internet.[4]

On July 7, 1999, Customs Service Special Agent Rick Nuckles ("Agent Nuckles") became involved in the investigation. While at the District Attorney's office on an unrelated matter, Agent Nuckles observed agents involved in the Runyan investigation viewing images of child pornography and stated his willingness to work on the case. He was provided with all of the investigative reports, statements, and physical evidence that Judith had turned over, including the desktop computer and the disks. Agent Nuckles then performed an analysis on every piece of evidence he had received, copying the materials onto blank CDs. He examined several images from each disk and CD, including the ZIP disks. Agent Nuckles found two images of Misty, apparently taken with a digital camera or taken with a Polaroid camera and then scanned into a computer.

Also on July 7, Tibbetts and Ranger Grubbs interviewed a number of local young people, including Misty. Misty stated that Runyan hired her when she was a young teenager to perform odd jobs around his ranch and to iron clothes for him. She said that he approached her when she was fifteen about posing for nude photographs. Misty told Tibbetts that Runyan had taken sexually explicit photographs of her on numerous occasions when she was between the ages of fifteen and seventeen. She reported that Runyan had sometimes paid her approximately five dollars per photographic session and that he had promised her more money once he sold the pictures over the Internet to customers in Japan.

Agent Nuckles then filed two applications for federal search warrants, supported by his own affidavits. The first application sought a warrant to search the desktop computer and all the disks for files containing illicit images. The second application sought a warrant to search Runyan's ranch house for any and all computers, computer hardware, software, and devices. The affidavits supporting these applications included statements made by Misty and Judith to Ranger Grubbs as well as information from Runyan's voluntary ***455** statement to Ranger Grubbs. In addition, one of the affidavits also contained a statement indicating that Ranger Grubbs had conducted a "cursory" review of the computer storage media. A magistrate judge issued both warrants, and the search of Runyan's ranch house resulted in the discovery of a computer backup tape that contained one picture of child pornography.

On October 13, 1999, Runyan was indicted on six counts of child pornography charges. Runyan filed three separate motions to suppress the evidence against him, primarily contending that the pre-warrant searches of the disks conducted by the various law enforcement officials involved in the investigation violated his Fourth Amendment rights. Consequently, Runyan argued, any evidence directly or indirectly obtained from these unlawful searches should be suppressed.

The trial court held a hearing on Runyan's motions to suppress on April 20, 2000. At the close of the hearing, the trial court denied the motions, finding that the pre-warrant police searches did not violate Runyan's Fourth Amendment rights because the police did not exceed the scope of the private search conducted by Judith and her companions. The trial court further found that the affidavits were sufficient to show probable cause to search both the disks and Runyan's residence and that the affidavits did not contain any material misrepresentations, omissions, or stale information that would negate the magistrate judge's finding of probable cause.

At trial, Runyan's primary defense strategy was to discredit Misty and to suggest to the jury that it was Misty, not Runyan, who owned the child pornography that was found on the ranch. Runyan also suggested to the jury that it was Misty's boyfriend, Nathan Wood ("Nathan"), not Runyan, who had taken the nude photographs of her at Runyan's ranch and at Runyan's office in town while Runyan was traveling for extended periods.

On April 21, 2000, a jury convicted Runyan of four counts:[5] Count 1—sexual exploitation of children in violation of 18 U.S.C. § 2251; Count 3—distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2); Count 4—receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2); and Count 5—possession of child pornography in violation of § 2252A(a)(5)(B). On July 28, 2000, the district court sentenced Runyan to 240 months on Count 1; 60 months on Count 3, to be served consecutively to Count 1; and 180 months on Counts 4 and 5, to run concurrently with the sentence imposed on Count 1, for a total imprisonment of 300 months. In addition, the district court imposed a three-year term of supervised release and mandatory special assessments totaling $400.

Runyan timely appealed his convictions and his sentence, contending that: (1) the trial court erred in failing to suppress the evidence obtained directly and indirectly from the pre-warrant police searches; (2) there was insufficient evidence introduced at trial to support the interstate commerce element of each of the four charges; (3) the trial court erred in refusing to order the government to produce Nathan's computer and in refusing to conduct an *in camera* review of evidence on Nathan's computer that Runyan contends was exculpatory; (4) the trial court erred in admitting evidence that Runyan refused to consent to the search of the desktop computer; and (5) the trial court erred in not grouping all the counts of his conviction in ***456** the sentencing determination.[6] While that appeal was pending before this court, Runyan filed a motion for new trial based on newly discovered evidence in the district court, alleging that Nathan's computer contained exculpatory evidence that the government withheld prior to trial. The district court denied this motion on September 7, 2001, and Runyan timely appealed to this court. We consolidated Runyan's two actions for the purposes of appeal on September 24, 2001. Because we find that a limited remand to the

district court is necessary to resolve one of Runyan's Fourth Amendment claims, we do not reach any of his other claims at this time.

II. Runyan's Fourth Amendment Claims

Runyan argues that the trial court erred in refusing to suppress evidence against him that was obtained in violation of the Fourth Amendment. He seeks to suppress two categories of evidence: (1) evidence obtained as a result of pre-warrant searches by state and federal law enforcement officials; and (2) evidence obtained pursuant to the search warrants, which were based on the evidence in category one.[7] Runyan argues that state and federal officials' warrantless examination of the tangible materials (including the disks) turned over by Judith was a "search" that violated the Fourth Amendment. According to Runyan, any information that the police[8] obtained as a result of that examination—including testimony of any witnesses identified through the tangible materials—is the "fruit of the poisonous tree" and should be suppressed. Runyan further argues that the magistrate judge would not have issued the warrant permitting customs officials to search his ranch and his computers if Agent Nuckles's affidavit had not contained testimony and evidence that originated in the allegedly unlawful pre-warrant searches. Thus, according to Runyan, evidence seized pursuant to the warrant is also "tainted" by the pre-warrant Fourth Amendment violations and should be suppressed.

"In reviewing the denial of a motion to suppress evidence under the Fourth Amendment, we review the district court's factual findings for clear error and its conclusions regarding the constitutionality of a warrantless search *de novo.*" *United States v. Vega,* 221 F.3d 789, 795 (5th Cir.2000) (internal quotations omitted). We view the facts underlying the suppression determination in the light most favorable to the prevailing party, which in this case is the government. *United States v. Howard,* 106 F.3d 70, 73 (5th Cir.1997). It is the defendant's burden to prove a Fourth Amendment violation by a preponderance of the evidence. *United States v. Riazco,* 91 F.3d 752, 754 (5th Cir.1996). Once the defendant proves a Fourth Amendment violation, the burden shifts to the government to demonstrate why the exclusionary rule should not apply to the fruits of the illegal search or seizure. *United States v. Houltin,* 566 F.2d 1027, 1031 (5th Cir.1978).

The Pre–Warrant Investigation

The Fourth Amendment protects the "right of the people to be secure in ***457** their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment proscribes only governmental action—it is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.' " *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (quoting *Walter v. United States,* 447 U.S. 649, 662, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (Blackmun, J., dissenting)). Runyan makes no attempt to demonstrate that Judith and her companions were acting under the color of government authority when they searched the ranch and the computer storage materials. Runyan's contention is that the police's subsequent review of the materials removed from the ranch was a "search" under the Fourth Amendment.

1. Was there a "search?"

In *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court established that a "search" occurs for Fourth Amendment purposes when the government violates a subjective expectation of privacy that society considers objectively reasonable.[9] *See id.* at 361, 88 S.Ct. 507 (Harlan, J., concurring); *see also California v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (adopting the test proposed in Harlan's *Katz* concurrence); *Kyllo,* 121 S.Ct. at 2042–43 (recognizing the continuing vitality of the *Katz* inquiry).

This court has elaborated on the factors relevant to a *Katz* inquiry. In *United States v. Cardoza–Hinojosa,* 140 F.3d 610, 615 (5th Cir.1998), we indicated that whether an interest is protected by the Fourth Amendment depends on five factors: (1) "whether the defendant has a [property or] possessory interest in the thing seized or the place searched," (2) "whether he has the right to exclude others from that place," (3) "whether he has exhibited a subjective expectation of privacy that it would remain free from governmental intrusion," (4) "whether he took normal precautions to maintain privacy," and (5) "whether he was legitimately on the premises." *Id.* (quoting *United States v. Ibarra,* 948 F.2d 903, 906 (5th Cir.1991)).

We recently indicated in *Kee v. City of Rowlett, Texas,* 247 F.3d 206 (5th Cir.2001), that the *Cardoza–Hinojosa* factors, "while appropriate to determine the expectation of privacy in the context of searches of physical real property," cannot necessarily be applied to other types of searches without modification. *Id.* at 212–13. In *Kee*—which involved a search conducted via an electronic listening device—we determined that it was appropriate to analyze only the two *Cardoza–Hinojosa* factors most applicable to electronic surveillance (i.e., whether the defendant had a subjective expectation of privacy in his conversations and whether he took normal precautions to maintain this privacy). *See id.* at 213. Similarly, in the instant case—which involves a search of personal property rather than real property—we find that ***458** the first, third, and fourth *Cardoza–Hinojosa* factors are most directly applicable and should be dispositive. Thus, we analyze whether Runyan had a possessory interest in the personal property searched, whether he exhibited a subjective expectation of privacy in that personal property, and whether he took normal precautions to maintain that expectation of privacy.

The parties do not dispute that Runyan had a possessory interest in the materials searched. While the record contains some disputed testimony regarding whether Judith or Runyan was the owner of the desktop computer, neither party contests that Runyan was the sole owner of both the storage containers retrieved from the barn and the disks found near the desktop computer in the office, which were the subjects of the pre-warrant search at issue.

In addition, Runyan clearly exhibited a subjective expectation of privacy in both sets of materials in question. Runyan's placement of the non-electronic pornography in the duffel bag and the waterproof ammunition storage containers found in the barn evidences his subjective expectation of privacy in those materials. *See United States v. Villarreal,* 963 F.2d 770, 773 (5th Cir.1992) ("Individuals can manifest legitimate expectations of privacy by placing items in closed, opaque containers that conceal their contents from plain view."). The government concedes that the disks found in the office near the computer are "containers" and that the standards governing closed container searches are applicable. Because neither party contests this point, we assume without deciding that computer disks are "containers." Accordingly, Runyan appears to have manifested his subjective expectation of privacy in the electronic images in question by storing the images in these "containers." *Cf. United States v. Barth,* 26 F.Supp.2d 929, 936–37 (W.D. Tex.1998) (finding that the owner of a computer manifested a reasonable expectation of privacy in the contents of data files by storing them on a computer hard drive); *United States v. Chan,* 830 F.Supp. 531, 534 (N.D.Cal.1993) (analogizing data in a pager to contents of a closed container).

Finally, the record indicates that Runyan took normal precautions to maintain his privacy with respect to these materials. Runyan's efforts to secure the barn against intrusion by locking the barn door, putting a chain on the gate to the ranch, and installing video surveillance equipment at the ranch certainly qualify as normal precautions to maintain privacy. *See Vega,* 221 F.3d at 796 (indicating that relevant factors when evaluating "normal precautions to maintain privacy" include whether the searched area is fenced or railed, whether the searched area was locked, and whether strangers were invited into the searched area).

Because application of the relevant *Cardoza–Hinojosa* factors indicates that Runyan had a protectable privacy interest in the materials that were the subject of the pre-warrant police examinations, those examinations are a series of "searches" within the meaning of the Fourth Amendment. However, this court has recognized that "a police view subsequent to a search conducted by private citizens does not constitute a 'search' within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search." *United States v. Bomengo,* 580 F.2d 173, 175 (5th Cir.1978); *see also United States v. Paige,* 136 F.3d 1012, 1019 (5th Cir.1998). The government contends that the pre-warrant examinations at issue in the instant case were not "searches" because this "private search" doctrine applies.

***459** The Supreme Court articulated the private search doctrine in *Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), and *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). In *Walter,* packages containing pornographic filmstrips were delivered to the wrong company. Employees of the company that erroneously received the shipment opened the packages and found film canisters. The content of each film was described on the exterior of its canister. The employees opened the canisters and one employee attempted to hold the films up to the light, but was unable to observe anything about the content of the films in this manner. *Walter,* 447 U.S. at 651, 100 S.Ct. 2395. The recipients then contacted federal agents, who viewed the films with a film projector without

obtaining a warrant to search the contents of the packages. The sender was indicted on obscenity charges and filed a motion to suppress the films, arguing that the police had conducted a warrantless search of the package and that the exclusionary rule was therefore applicable. *Id.* at 652, 100 S.Ct. 2395.

In upholding that claim, the Supreme Court produced no majority opinion.[10] The opinion announcing the judgment of the Court, authored by Justice Stevens and joined by Justice Stewart, held that the Fourth Amendment's protections apply to a government search conducted subsequent to a private search to the extent that the government's inquiry is more intrusive or extensive than the private search. *Id.* at 657, 100 S.Ct. 2395. Prior to their projection of the films, the officers could only draw inferences regarding the content of the films based on the exterior descriptions. The opinion reasons that the official search significantly expanded on the private search by confirming the actual content of the films. *Id.* Put another way, when the private party unwrapped the containers to reveal the labels on the canisters, the sender's expectation of privacy was frustrated in part, but not eliminated altogether. *Id.* at 659, 100 S.Ct. 2395. The subsequent police determination of the content of the films was a warrantless "search" within the meaning of the Fourth Amendment because it breached the remaining, unfrustrated portion of the sender's expectation of privacy.

In *Jacobsen,* the Court confirmed the rationale of Justice Stevens's opinion in *Walter* and elaborated on what it means to "exceed the scope" of a private search. In that case, a Federal Express employee opened a damaged package and found several plastic bags of white powder inside a closed tube wrapped in crumpled newspaper. The employee put the bags back in the tube, put the tube and the newspapers back in the box, and then summoned federal authorities. The agent who responded to the employee's call opened the box, unpacked the bags of white powder and performed a chemical field test confirming that the white powder was cocaine. *Jacobsen,* 466 U.S. at 111–12, 104 S.Ct. 1652. The addressees were subsequently convicted ***460** of possession of an illegal substance with intent to distribute. They argued that the results of the agent's warrantless search were subject to suppression. *Id.* at 112, 104 S.Ct. 1652.

Adopting Justice Stevens's reasoning from *Walter* that "additional invasions of ... privacy by the Government agent must be tested by the degree to which they exceed the scope of the private search," the Court found that the agent's actions did not violate the Fourth Amendment. *Id.* at 115, 104 S.Ct. 1652. The Court determined that the agent's actions in removing the plastic bags from the tube and visually inspecting their content "enabled the agent to learn nothing that had not previously been learned during the private search." *Id.* at 120, 104 S.Ct. 1652. The Court noted that "[t]he advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection," and concluded that this confirmatory examination could not violate the Fourth Amendment because "[p]rotecting against the risk of misdescription hardly advances any legitimate privacy interest." *Id.* at 119, 104 S.Ct. 1652.

In *Jacobsen,* the Court further noted that the field test performed by the agent could disclose only one fact previously unknown to the agent—whether or not the white powder was cocaine. The Court found that a chemical test that "merely discloses whether or not a particular substance is cocaine" does not compromise any legitimate interest in privacy. *Id.* at 123, 104 S.Ct. 1652. Because Congress has decided that the interest in privately possessing cocaine is illegitimate, the Court reasoned that "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* The Court thus concluded that neither the visual inspection nor the field test could be a "search," because neither action infringed "any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct." *Id.* at 126, 104 S.Ct. 1652.

Runyan argues that the private search doctrine is inapplicable in the instant case because the police exceeded the scope of the private search. He maintains that the police's pre-warrant search of the disks exceeded the scope of the review conducted by Judith and Brandie in a number of ways.

First, Runyan notes that the police officers who examined the materials turned over by Judith looked at a greater number of disks than Judith and Brandie did. Judith and Brandie examined only a randomly selected assortment of the floppy disks and CDs that they removed from the ranch, and they did not examine any of the ZIP disks. Agent Nuckles testified at the suppression hearing that he examined every one of the floppy disks, ZIP disks, and CDs that Judith turned over. In addition, Runyan argues that Agent Nuckles examined more images in reviewing each of these disks than did the private searchers.[11] Runyan further points out that, unlike the private searchers, the law enforcement officers printed out selected images and showed them to employees in the District

Attorney's office in an attempt to identify an individual in one of the images.

***461** While each of the distinctions between the private search and the police search pointed out by Runyan is supported by the record, it is unclear from this court's jurisprudence which of these distinctions are constitutionally relevant. Indeed, there is a remarkable dearth of federal jurisprudence elaborating on what types of investigative actions constitute "exceeding the scope" of a private search.[12]

Language from the Supreme Court's *Jacobsen* opinion suggests that the critical inquiry under the Fourth Amendment is whether the authorities obtained information with respect to which the defendant's expectation of privacy has not already been frustrated. Thus, *Jacobsen* directs courts to inquire whether the government learned something from the police search that it could not have learned from the private searcher's testimony and, if so, whether the defendant had a legitimate expectation of privacy in that information. *See Jacobsen,* 466 U.S. at 118–20, 104 S.Ct. 1652. Since *Jacobsen,* the Court has not elaborated on the nature of the inquiry courts should use to determine whether a police search has exceeded the scope of a prior private search.

The decisions of our sister circuits similarly provide only limited guidance about the nature of this inquiry. Several courts of appeals have indicated that police exceed the scope of a prior private search when they examine objects or containers that the private searchers did not examine. *See, e.g., United States v. Rouse,* 148 F.3d 1040, 1041 (8th Cir.1998); *United States v. Kinney,* 953 F.2d 863, 866 (4th Cir.1992); *United States v. Donnes,* 947 F.2d 1430, 1434 (10th Cir.1991). Far fewer courts have addressed the question whether police exceed the scope of a private search when they examine the same materials as private searchers but examine these materials more thoroughly or in a different manner. While the Supreme Court's distinction in *Walter* between the private searchers' actions in holding the filmstrips up to the light and the police's actions in projecting the filmstrips suggests that the "thoroughness" of the police examination is a relevant factor, the one court of appeals to expressly consider this factor after *Walter* did not find such a difference in thoroughness to be dispositive. *See United States v. Simpson,* 904 F.2d 607, 610 (11th Cir.1990) (finding that the F.B.I.'s search of a box containing pornographic videos and magazines "did not exceed the scope of the prior private searches for Fourth Amendment purposes simply because they took more time and were more thorough" than the private searchers).

Due to the lack of definitive guidance from the Supreme Court and the lack of consensus among our sister circuits regarding the precise nature of the evaluation required, we must tread carefully in our disposition of this issue. Today, we address only three narrow questions: (1) whether a police search exceeds the scope of a private search when private searchers examine selected items from a collection of similar closed containers and police searchers subsequently examine the entire collection; (2) whether a police search exceeds the scope of the private search when the police examine more items within a particular container than did the private searchers; and (3) whether a police search exceeds the scope of a private search when ***462** police searchers identify the subject of a photograph that the private searchers could not identify. Our review of the admittedly scarce jurisprudence indirectly addressing these inquiries leads us to conclude that the police have exceeded the scope of the private search in the instant case.

Initially, we address whether the police exceeded the scope of the private search when they examined the entire collection of "containers" (i.e., the disks) turned over by the private searchers, rather than confining their search to the selected containers examined by the private searchers.[13] There are two lines of authority from other circuits that are instructive in addressing this question.

The Tenth Circuit and the Fourth Circuit have held that a police search exceeds the scope of a prior private search when the police open a container that the private searchers did not open. In *Donnes,* the defendant's landlord found a glove in the defendant's apartment containing a syringe and a camera lens case. Police officers subsequently opened the camera lens case without obtaining a warrant and discovered plastic bags containing methamphetamines. The Tenth Circuit held that the police searchers exceeded the scope of the private search by opening the camera lens case. The court reasoned that closed containers are subject to protection under the Fourth Amendment and that the police's lawful seizure of the glove did not compromise the defendant's expectation of privacy in the contents of the closed container found inside the box. Thus, the Fourth Amendment required the police to obtain a warrant before opening the container and inspecting its contents. *See Donnes,* 947 F.2d at 1436.

In *Kinney,* the defendant's girlfriend called the police when she found guns in his closet that she suspected were stolen. The police confiscated the guns from the closet and then opened a white canvas bag located in the same closet. They found various items of drug paraphernalia in the bag. The Fourth Circuit held that the police exceeded the scope of the private search when they opened the canvas bag.[14] *See Kinney,* 953 F.2d at 866.

These cases, indicating that police exceed the scope of a prior private search when they open a container that the private searchers did not inspect, can be contrasted with the Eighth Circuit's holding in *United States v. Bowman,* 907 F.2d 63 (8th Cir.1990). In *Bowman,* an airline employee opened an unclaimed suitcase and found five identical bundles wrapped in towels and clothing. The employee opened one bundle and found a white powdery substance wrapped in plastic and duct tape. He contacted a federal narcotics agent, who identified the exposed bundle as a kilo brick of cocaine and then opened the other bundles, which also contained kilo bricks of cocaine. The court held that the agent did not act improperly in failing to secure a warrant to unwrap the remaining identical bundles,[15] reasoning that the presence of the cocaine in the exposed bundle " 'spoke volumes as to ***463** [the] contents [of the remaining bundles]—particularly to the trained eye of the officer.' " *Id.* at 65 (quoting *Jacobsen,* 466 U.S. at 121, 104 S.Ct. 1652).

The Supreme Court's guidance in *Jacobsen* is useful in reconciling the apparent tension between the Eighth Circuit's approach in *Bowman* and the Tenth and Fourth Circuits' ostensible conclusion in *Donnes* and *Kinney* that opening a new container is per se exceeding the scope of a prior private search. The *Jacobsen* Court emphasized that the police's actions in that case were unproblematic from a Fourth Amendment perspective because their actions "enabled ... [them] to learn nothing that had not previously been learned during the private search." 466 U.S. at 120, 104 S.Ct. 1652. Thus, under *Jacobsen,* confirmation of prior knowledge does not constitute exceeding the scope of a private search. In the context of a search involving a number of closed containers, this suggests that opening a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside. Such an "expansion" of the private search provides the police with no additional knowledge that they did not already obtain from the underlying private search and frustrates no expectation of privacy that has not already been frustrated.

This reading of *Jacobsen* harmonizes *Bowman* with *Kinney* and *Donnes.* Based on their inspection of the one bundle opened by the private searchers, their own expertise, and the apparent similarity of the bundles, the police in *Bowman* were substantially certain that the other four unopened bundles in the suitcase also contained kilos of cocaine. Thus, they did not exceed the scope of the private search in simply confirming this substantial certainty, despite the fact that they looked at additional containers (or additional items within a container) that the private searchers did not examine.

In contrast, in both *Kinney* and *Donnes* the police's opening of containers that the private searchers did not examine did not serve to confirm information of which they were already substantially certain. In *Kinney,* the police had no reason to believe that the duffel bag located in the same closet as the defendant's illegal weapons contained contraband. In opening the bag, they were not confirming the presence of illegal weapons or any other information that they obtained from the private searcher. Similarly, in *Donnes,* the police search of the camera case provided them with a piece of information—i.e., the defendant's possession of methamphetamines—that they could not have known based on the private search. There is no indication that the private search in *Donnes* made police aware that the defendant possessed methamphetamines. Thus, by opening the additional container, they were not simply confirming knowledge gained by private searchers.

The guideline that emerges from the above analysis is that the police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise. This guideline is sensible because it preserves the competing objectives underlying the Fourth Amendment's protections against warrantless police searches. A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved ***464** unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search. Moreover, this rule discourages police from going on "fishing expeditions" by opening closed containers. Any evidence that police obtain from a closed container that was unopened by prior private searchers will be suppressed unless they can demonstrate to

a reviewing court that an exception to the exclusionary rule is warranted because they were substantially certain of the contents of the container before they opened it.

Applying this guideline to the facts of the instant case reveals that the police's pre-warrant examination of the disks clearly exceeded the scope of the private search. The police could not have concluded with substantial certainty that all of the disks contained child pornography based on knowledge obtained from the private searchers, information in plain view, or their own expertise. There was nothing on the outside of any disk indicating its contents. Moreover, Judith's testimony at the suppression hearing reveals that she did not know the contents of the disks that she turned over, apart from the particular samples that she and Brandie had examined.[16] Indeed, she could not have known the contents of any of the ZIP disks, as she and Brandie did not use hardware capable of reading these disks in their private search. The mere fact that the disks that Judith and Brandie did not examine were found in the same location in Runyan's residence as the disks they did examine is insufficient to establish with substantial certainty that all of the storage media in question contained child pornography.

Thus, the police exceeded the scope of the private search in the instant case when they examined disks that the private searchers did not examine. Both these disks and any evidence obtained as a result of the information found on these disks are potentially subject to suppression. *See* Part II(2), *infra.*

Runyan further contends that the police exceeded the scope of the private search because they examined more files on each of the disks than did the private searchers. Initially, it is important to note that it is not clear from the record that this is true. Agent Nuckles testified that, while he did look at each of the storage devices turned over by Judith prior to obtaining a warrant, he only looked at two or three images on each of these disks. It is unnecessary for us to address this factual dispute, however, as we find that it would not have been constitutionally problematic for the police to have examined more files than did the private searchers. We agree with the Eleventh Circuit's position in *Simpson* that the police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials more thoroughly than did the private parties. *See Simpson,* 904 F.2d at 610. In the context of a closed container search, this means that the police do not exceed the private search when they examine more items within a closed container than did the private searchers. Though the Supreme Court has long recognized that individuals have an expectation of privacy in closed containers, *see, e.g., Smith v. Ohio,* 494 U.S. 541, 542, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) (per curiam); *United* ***465** *States v. Ross,* 456 U.S. 798, 822, 102 S.Ct. 2157, 72 L.Ed.2d 572, (1982), an individual's expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers, *see, e.g., Jacobsen,* 466 U.S. at 119, 104 S.Ct. 1652. Thus, the police do not engage in a new "search" for Fourth Amendment purposes each time they examine a particular item found within the container.

In so holding, we reject the reasoning espoused by the Eighth Circuit in *Rouse,* where that court held that the police exceeded the scope of a private search when they found and examined more items within an airline passenger's bag than the airline employees had found in their prior private search. *Rouse,* 148 F.3d at 1041. We adopt the logic of *Simpson* over that of *Rouse* based on our determination that *Rouse* is inconsistent with the objectives underlying the warrant requirement and the exclusionary rule. Under the reasoning of *Rouse,* police would exceed the scope of a private investigation and commit a warrantless "search" in violation of the Fourth Amendment each time they happened to find an item within a container that the private searchers did not happen to find. Police would thus be disinclined to examine even containers that had already been opened and examined by private parties for fear of coming across important evidence that the private searchers did not happen to see and that would then be subject to suppression. The *Rouse* approach would over-deter the police, preventing them from engaging in lawful investigation of containers where any reasonable expectation of privacy has already been eroded. This approach might also lead police to waste valuable time and resources obtaining warrants based on intentionally false or mistaken testimony of private searchers, for fear that, in confirming the private testimony before obtaining a warrant, they would inadvertently violate the Fourth Amendment if they happened upon additional contraband that the private searchers did not see.

Because we find that the police do not exceed the scope of a prior private search when they examine particular items within a container that were not examined by the private searchers, we accordingly determine that the police in the instant case did not exceed the scope of the private search if they examined more files on the privately-searched disks than Judith and Brandie had. Suppression of any such files is therefore unnecessary.

Finally, Runyan contends that the police exceeded the scope of the private search when they printed out the images of Misty that they had found on the computer and showed these images to employees at the District Attorney's office in an attempt to identify her. He contends that Misty's testimony should thus be suppressed because it is the "fruit of the poisonous tree," i.e., because Misty's identification was derived from the police's illegal conduct in exceeding the scope of the private search. We find it unnecessary to decide today whether a police search exceeds the scope of a private search when police searchers identify the subject of a photograph that the private searchers could not identify.

There is significant factual dispute in the record regarding whether Melissa Payne, the intern in the District Attorney's office, positively identified Misty via printouts of the computerized images or via the Polaroid photographs that Judith found in the duffel bag from Runyan's barn. Payne testified at the suppression hearing (and the government maintains) that she identified Misty via the Polaroids. Because we must interpret these facts in the light most favorable to the government, we must assume ***466** that the actual positive identification came from photographs, not the computer printouts. *See, e.g., United States v. Maldonado,* 735 F.2d 809, 814 (5th Cir.1984) ("In reviewing a trial court's ruling on a motion to suppress ... the evidence must be viewed in the light most favorable to the party prevailing below, except where such a view is either not consistent with the trial court's findings or is clearly erroneous considering the evidence as a whole."). Thus, because we find that Misty's testimony stemmed from evidence (i.e., the Polaroids) that was clearly within the scope of the private search and not the product of illegal police activity, we need not consider whether the act of printing out and circulating the computer images of Misty exceeded the scope of the private search.

2. Is the Exclusionary Rule Applicable?

The exclusionary rule prohibits introduction at trial of evidence obtained as the result of an illegal search or seizure. The rule excludes not only the illegally obtained evidence itself, but also other incriminating evidence derived from that primary evidence. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). In *Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court further extended the exclusionary rule to encompass evidence that is the indirect product or "fruit" of unlawful police conduct. Thus, in the instant case, any "fruits" of the portion of the police search that exceeded the scope of the private search—including any disks that the private searchers did not examine but were viewed by the police prior to the issuance of the warrant—should have been excluded at trial.[17]

However, evidence that is otherwise suppressible under the exclusionary rule is admissible if the connection between the alleged illegality and the acquisition of the evidence is so attenuated as to dissipate the "taint" of the unlawful police activity. *See Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). In applying this principle, the Court has crafted a number of exceptions to the exclusionary rule. These exceptions are designed to ensure that the exclusionary rule puts police "in the same, not a *worse* position than they would have been in if no police error or misconduct had occurred." *Nix v. Williams,* 467 U.S. 431, 443, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (emphasis in original).

In *United States v. Miller,* 666 F.2d 991, 995 (5th Cir.1982), this court outlined the three primary exceptions to the exclusionary rule. Evidence will be admissible despite the exclusionary rule if: (1) it "derives from an independent source," (2) it "has an attenuated link to the illegally secured evidence," or (3) it "inevitably would have been discovered during police investigation without the aid of the illegally obtained evidence." *Id.* (internal citations omitted).

The government argues that the "independent source" exception to the exclusionary rule is applicable in the instant case. The government's position is that the magistrate judge's decision to issue a warrant permitting police to search the computer and the disks was independent of the pre-warrant searches—the same warrant would have been issued even if the police had never conducted a pre-warrant ***467** search of the storage media because the information that the police obtained from Judith's testimony, Runyan's admissions to the police, and Misty's testimony was sufficient to support the warrant. The government maintains that, because the police could have obtained all the information that they acquired through their pre-warrant search of the disks during their subsequent searches pursuant to the warrant, these subsequent, lawful searches were an "independent source," and the information is therefore admissible at trial.

The "independent source" exception to the exclusionary rule was outlined by the Supreme Court in *Murray v. United States,* 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

In that case, the Court considered whether marijuana that was observed by police in plain view at the time of an unlawful entry and that was later seized during a subsequent search pursuant to a warrant was admissible evidence. The Court first clarified that the independent source rule applies not only to evidence obtained for the first time during an independent lawful search, but also to evidence initially discovered during or as a consequence of an unlawful search but later obtained independently from activities untainted by the initial illegality. *Id.* at 537–38, 108 S.Ct. 2529. The Court held that, in order for a later search pursuant to a warrant to be deemed "genuinely independent" of a prior illegal entry, the government must demonstrate two things: (1) that the police would still have sought a warrant in the absence of the illegal search; and (2) that the magistrate judge would still have issued the warrant had the supporting affidavit not contained information stemming from the illegal search. *Id.* at 542, 108 S.Ct. 2529. Because the district court made no specific factual findings addressing whether the police would have sought a warrant in the absence of their prior illegal entry, the Court remanded the case for an explicit finding on this issue.

Thus, in order to avoid suppression of any images on the disks that were not examined by the private searchers, the government must demonstrate that it would have both sought and obtained a warrant even if the police had never exceeded the scope of the private search. In *Murray,* the Supreme Court indicated that the district court's finding that the agents did not reveal their prior warrantless entry to the magistrate judge in the warrant application was sufficient to demonstrate that the police would have obtained a warrant in the absence of the illegal search. *Murray,* 487 U.S. at 543, 108 S.Ct. 2529. In the instant case, however, one of the affidavits submitted by Agent Nuckles in support of the warrant applications refers to his pre-warrant search of the computer storage devices, indicating that Nuckles conducted a "cursory" review of the materials prior to his application.[18] The inclusion of this statement raises a question about whether and to what extent the magistrate judge relied on this statement in issuing the warrants. The district court made no factual findings at the suppression hearing addressing this issue.

***468** Similarly, the district court made no specific factual findings at the suppression hearing indicating whether the police would have sought the warrants if they had not previously exceeded the scope of the private search. As such factual determinations are clearly within the province of the district court, a remand to that court is required.

We retain jurisdiction over these appeals and make a limited remand in No. 00–10821 to the district court to conduct such proceedings as are necessary to make findings of fact addressing: (1) whether the police would have sought the warrants had the police never exceeded the scope of the private search; and (2) whether the magistrate judge would have issued the warrants had one of the supporting affidavits not contained a reference to the illegal pre-warrant search activities. Both parties may develop evidence relating to these inquiries. *See United States v. Parker,* 722 F.2d 179, 185 (5th Cir.1983) (ordering a similar limited remand), *overruled on other grounds sub nom., United States v. Hurtado,* 905 F.2d 74, 75–76 (5th Cir.1990) (en banc).

The clerk of this court is directed to return the record in No. 00–10821 to the district court. Within forty-five days after entry of this remand, the district court shall provide a supplemental order setting forth its factual findings. Once the district court's supplemental order is entered, the clerk of the district court shall return the record, as supplemented, to this court for disposition of these appeals by this panel. The parties may then file supplemental letter briefs addressing the findings contained in the district court's supplemental order on an expedited basis to be established by the clerk of this court.

We do not reach the other issues raised in these appeals at this time.

III. Conclusion

For the foregoing reasons, we retain jurisdiction over these appeals and REMAND No. 00–10821 to the district court on a limited basis for proceedings consistent with this opinion.

All Citations

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Footnotes

1 This opinion will refer to the 3.5 inch floppy disks, the compact disks, and the ZIP disks collectively as “the disks.”

2 It is unclear from the record when this transfer took place.

3 There is conflicting testimony in the record regarding whether Payne was shown Polaroid photographs or computer printouts of Misty.

4 However, Runyan maintains that he never uploaded or downloaded any images containing child pornography from the Internet at these times.

5 Two counts were dismissed prior to trial.

6 The government concedes that Runyan was incorrectly sentenced when the trial court did not group the counts of his conviction.

7 We address only the first of these claims in this opinion.

8 We use the term “police” generically to refer to all of the state and federal law enforcement officials involved in this case.

9 The *Katz* inquiry has traditionally been conceptualized as a two-part test, instructing courts to determine (1) whether the individual challenging the investigative activity had a subjective expectation of privacy and (2) whether society was prepared to recognize that expectation of privacy as objectively reasonable. However, many modern courts, including the Supreme Court in its most recent discussion of *Katz,* have collapsed this two-part test into a single inquiry. *See* *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 2042–43, 150 L.Ed.2d 94 (2001).

10 Justices Stevens and Stewart found that the officers had violated the Fourth Amendment because they exceeded the scope of the private search. Justices White and Brennan found that a Fourth Amendment violation had occurred regardless of whether the official search exceeded the scope of the private search. Justice Marshall completed the five justice majority in favor of suppression by concurring in the judgment while joining neither opinion. The four dissenters found that there was no legitimate expectation of privacy remaining in a package released to a common carrier when the addressee and the intended recipient were both using fictitious names and a private search had “clearly revealed the nature of the[ ] contents” of the package. *Walter,* 447 U.S. at 663, 100 S.Ct. 2395 (Blackmun, J. dissenting).

11 It is unclear from the record whether the selected images from the disks that were introduced at trial were viewed by both the private searchers and the police searchers or whether these images were exclusively the product of the police's more expanded search. At least one ZIP disk was introduced at trial that the private searchers clearly could not have examined because they lacked the appropriate hardware.

12 In the few instances where this court has had the opportunity to consider the applicability of the private search doctrine, we have either declined to reach the issue, *see, e.g.,* *United States v. Grosenheider,* 200 F.3d 321, 327 (5th Cir.2000), or our analysis has been limited to a conclusory statement that the police searchers did not exceed the scope of the private search. *See, e.g.,* *Paige,* 136 F.3d at 1020; *Bomengo,* 580 F.2d at 176.

13 We reiterate the caveat that we are assuming without deciding that the parties are correct in their characterization of computer storage devices as “closed containers.”

14 However, the court did not suppress the evidence. The court reasoned that the police were acting under a reasonable, albeit erroneous, belief that the defendant's girlfriend had authority to consent to the search. *See* *Kinney,* 953 F.2d at 866.

15 We note that the Eighth Circuit in *Bowman* never determined whether the individually wrapped bundles were “containers” as that term has been used in the context of Fourth Amendment jurisprudence.

16 In fact, the record reveals that some of the CDs that Brandie brought back to Judith's Brownwood home did not actually contain child pornography and instead contained family photographs.

17 It should be noted that there is no way of knowing which disks were examined by the private searchers. Thus, if suppression is deemed appropriate, this uncertainty will necessitate suppression of all the disks.

18 Admittedly, this information about Agent Nuckles's pre-warrant search activities was contained in the affidavit underlying the warrant application for Runyan's ranch house rather than the affidavit underlying the warrant application for Runyan's computer and disks. However, given that these affidavits were submitted at the same time and were virtually identical in all other respects, we cannot definitively establish (as the Court in *Murray* could) that these statements regarding Nuckles's pre-warrant search activities played no role in the magistrate judge's decision to issue the warrant for Runyan's computer and disks.

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733 F.3d 816
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Donald Thomas TOSTI, Defendant–Appellant.

No. 12–10067.
|
Argued and Submitted June 14, 2013.
|
Filed Oct. 1, 2013.

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of California, Jeffrey S. White, J., of possessing child pornography. Defendant appealed.

Holdings: The Court of Appeals, Callahan, Circuit Judge, held that:

detectives' viewing of images of child pornography contained on defendant's computer did not constitute a "search" within meaning of Fourth Amendment;

detectives did not exceed scope of prior private search of defendant's computer;

defendant's wife had apparent authority to grant police access to defendant's home office and computer; and

defendant's 96-month sentence was reasonable.

Affirmed.

Attorneys and Law Firms

***818** Amitai Schwartz (argued) and Moira Duvernay, Law Offices of Amitai Schwartz, Emeryville, CA, for Defendant–Appellant.

Melinda Haag, United States Attorney, and Barbara J. Valliere, Assistant United States Attorney, San Francisco, CA; Julia Malkina (argued), United States Department of Justice, Washington, D.C., for Plaintiff–Appellee.

Appeal from the United States District Court for the Northern District of California, Jeffrey S. White, District Judge, Presiding. D.C. No. 3:09–cr–00973–JSW–1.

Before: MARY M. SCHROEDER, KENNETH F. RIPPLE[*], and CONSUELO M. CALLAHAN, Circuit Judges.

OPINION

CALLAHAN, Circuit Judge:

Defendant Donald Thomas Tosti ("Tosti") was convicted of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He appeals from the district court's denial of his multiple motions to suppress evidence derived from both the 2005 search of his computer at a CompUSA store and the 2009 search of his home office. Tosti also challenges his 96–month sentence as unreasonable in light of his advanced age and poor health. We hold that the 2005 search was lawful because the police officers who conducted it did not exceed the scope of the permissible search already conducted by a private party, and the 2009 search was lawful because Tosti's wife had apparent authority, if not actual authority, to consent. We also hold that the district court properly considered Tosti's age and physical characteristics when it exercised its sentencing discretion. Accordingly, we affirm Tosti's conviction and sentence.

I

In January 2005, Tosti took his computer to a CompUSA store for service. According to Tosti, "[he] understood that a technician at CompUSA would have temporary custody of the computer, and would inspect it as needed to complete the requested repairs."

Seiichi Suzuki was working on the machine when he discovered pornographic images of children in a sub-folder, which ***819** prompted him to contact the police. According to Suzuki, he was "opening various folders and subfolders to look for images," and he and a technician "were randomly checking what was on the drive folders

when [they] eventually encountered images that looked like child pornography." Pursuant to the police report, Suzuki advised the police that "he discovered numerous photographs in the file of naked children and adult men." "He said the photographs depicted many graphic sex scenes of children."

Two detectives, George Schikore and Ed Rudolph, responded to Suzuki's call. Detective Schikore arrived first. When he got to the store, "there were numerous images appearing on the computer monitor in a very small 'thumbnail' format." According to Detective Shikore, he "could tell by looking at the [thumbnail] pictures that they depicted child pornography." Detective Schikore purportedly "directed [Suzuki] to open the images in a 'slide show' format so that they would appear as larger images viewable one by one." Suzuki "opened up the individual images in the 'slide show' format, using keys to move forward or backward as requested by [Detective Schikore]."

Detective Rudolph arrived later and scrolled through the active images on the computer monitor. According to Detective Rudolph, there were "more than two-dozen [t]humbnail view graphical files maximized on the desktop." Detective Rudolph stated that he scrolled through the images on the screen, but also indicated that he could tell even from the thumbnail images that they depicted obvious sexual activity between adults and children.

The detectives seized Tosti's computer. Based on Officer Rudolph's observations, Detective Mojib Aimaq thereafter prepared an affidavit supporting the issuance of a search warrant for Tosti's computer, residence, office and two vehicles registered to Tosti and his wife. A Marin County magistrate judge issued the warrant, which was executed the following day.

Tosti was eventually arrested on October 16, 2009.[1] A few days later, on October 20, 2009, Tosti's then estranged wife, Annette Tosti, contacted FBI Special Agent Elizabeth Casteneda. Ms. Tosti had been married to Tosti for approximately twenty years, during the majority of which time they maintained a residence in San Rafael, California.

Tosti had purportedly asked Ms. Tosti to locate financial records, which were stored in a room inside the Tosti home that Tosti was utilizing as an office. During her search, Ms. Tosti found documents that appeared to contain pornography. She turned those documents and some internal and external hard drives over to Agent Casteneda. At that time, Ms. Tosti explained to Agent Casteneda that she lived with her husband in the house and that she had full access throughout the residence. Ms. Tosti also advised Agent Casteneda that she was responsible for cleaning the office.

Two days later, on October 22, 2009, Ms. Tosti again contacted Agent Casteneda and asked her to take several items from the Tosti home. That same day, Ms. Tosti turned over a Dell computer, several external hard drives, and numerous DVDs. None of these were password protected or encrypted, and they appeared to contain pornography.

***820** Ms. Tosti signed a "Consent to Search" form authorizing agents to search the items she turned over on October 22. On that form, Ms. Tosti stated, "The above items both my husband, Donald Tosti and I use." Agent Casteneda did not see any "signs, extra locks or other indicia" that the home office "was anything other than an area of the residence to which Annette Tosti had common access as she consistently maintained." Tosti's brother-in-law also declared he had not seen any indicia that Ms. Tosti's access to the home office was limited. Tosti nonetheless avers that he and Ms. Tosti had "an explicit agreement that [they] would not enter each other's private work areas without first announcing [themselves] and then getting permission."

Tosti was prosecuted pursuant to a superseding indictment charging him with possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He moved to suppress the evidence seized as a result of the Government's 2005 and 2009 searches. The district court granted in part and denied in part Tosti's motions, suppressing only the first batch of evidence that Ms. Tosti had turned over to Agent Casteneda on October 20, 2009. Tosti was subsequently found guilty after a bench trial on stipulated facts.

Prior to sentencing, the probation officer issued a Pretrial Sentencing Report ("PSR") recommending that Tosti be sentenced to 96 months in prison and five years supervised release and be ordered to pay $50,000 in restitution. The guidelines sentencing range was 108–135 months.

At sentencing, the district court engaged in a lengthy colloquy with Tosti. The court discussed, among other things, the guidelines and their advisory nature. The court also noted that, in the instant case, it agreed with the applicable guidelines, in part because "this child pornography proliferation on the Internet and the computers, downloads, has become an increasingly serious problem, one that Congress properly

took notice of." The court made clear that it understood it was required to consider the nature and circumstances of the offense and the history and characteristics of the individual defendant. It recognized that its duty was to impose a sentence "sufficient but not greater than necessary" and to "avoid unwanted disparities and to afford adequate deterrence."

Tosti argued, among other things, that the district court should exercise its discretion to apply a downward variance from the guidelines because of his advanced age and infirm medical condition. Tosti was 76 years old at the time of sentencing. He had suffered four heart attacks and had undergone stenting of his femoral arteries and other lower extremity vessels. He suffered from diabetes, hypertension, heart disease, thyroid disease, and kidney disease, and was taking approximately 22 medications daily. Tosti sought to be sentenced to time served (nine weeks), a lifetime of supervised release, home confinement, and community service. He also sought to pay $100,000 in restitution. The district court addressed Tosti's arguments at sentencing, recognizing that Tosti was older than most defendants and explaining that it had considered Tosti's physical and medical conditions in crafting its sentence.

The district court noted that Tosti "hit the jackpot" and "pushed the [ ] aggravating sentencing factors to the limit" based on (a) the sheer volume of pornography he had collected, (b) his interaction with and manipulation of the images, and (c) the sadistic nature of the images. Nonetheless, the court varied downward from the guidelines and imposed the below-guidelines sentence of 96–months recommended in the PSR. Tosti filed a timely notice of appeal from his conviction and sentence.

***821 II**

We review de novo the denial of a motion to suppress brought on Fourth Amendment grounds. *United States v. Hill,* 459 F.3d 966, 970 (9th Cir.2006). Factual findings are reviewed for clear error. *United States v. Gorman,* 314 F.3d 1105, 1110 (9th Cir.2002). Sentencing decisions are reviewed for an abuse of discretion. *United States v. Rangel,* 697 F.3d 795, 800 (9th Cir.2012).

III

A.

We first consider Tosti's argument that the warrantless searches of his computer at CompUSA were unlawful and that the fruits of those searches must therefore be suppressed. We disagree with his contention.

The 2005 searches derive from Suzuki's original private search of Tosti's computer after Tosti voluntarily relinquished it to CompUSA. The Fourth Amendment's proscriptions on searches and seizures are inapplicable to private action. *See United States v. Jacobsen,* 466 U.S. 109, 113–14, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information." *Id.* at 117, 104 S.Ct. 1652. Instead, the Fourth Amendment "is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* "The additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115, 104 S.Ct. 1652; *see also id.* at 119, 104 S.Ct. 1652 ("The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.").

In *Jacobsen,* employees of a private freight carrier were inspecting a damaged package when they observed a white powdery substance. *Id.* at 111, 104 S.Ct. 1652. They opened the package and found a tube containing a series of plastic bags filled with that powder. *Id.* The employees called the Drug Enforcement Administration (the "DEA"), placed the bags back into the tube, and then placed the tube back into the box. *Id.* The first federal agent on the scene saw that the tube was slit open, removed the bags and saw the white powder. *Id.* He then field tested the powder, identifying it as cocaine. *Id.* at 112, 104 S.Ct. 1652.

The Court held that, among other things, "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search." *Id.* at 120, 104 S.Ct. 1652. Since the DEA's search "infringed no legitimate expectation of privacy" it "was not a 'search' within the meaning of the Fourth Amendment." *Id.*

Pursuant to *Jacobsen,* neither Detectives Schikore nor Rudolph "searched" Tosti's photos for Fourth Amendment

purposes because Suzuki's prior viewing of the images had extinguished Tosti's reasonable expectation of privacy in them. Tosti admitted that by voluntarily taking his computer to CompUSA for repairs he "understood that a technician at CompUSA would have temporary custody of the computer, and would inspect it as needed to complete the requested repairs." Indeed, Tosti appears to concede that he had no reasonable expectation of privacy in the thumbnail version of the pictures that Suzuki had already viewed. Tosti instead argues that ***822** detectives exceeded the scope of Suzuki's private search when: (1) Detective Shikore directed Suzuki to enlarge the images and then viewed the photos in slideshow format; and (2) Detective Rudolph scrolled through the thumbnail photos.

The district court explicitly found that Detective Shikore had viewed only those photos Suzuki had already viewed. Tosti does not contest that conclusion here, nor does the record contradict it. The only question with respect to Detective Shikore, then, was whether Tosti was entitled to suppression because Detective Shikore purportedly viewed those pictures not just as thumbnails, but also as enlarged pictures in a slideshow format.

Even assuming that Detective Shikore viewed enlarged versions of the thumbnails, he still did not exceed the scope of Suzuki's prior search because Suzuki and both detectives testified that they could tell from viewing the thumbnails that the images contained child pornography. That is, the police learned nothing new through their actions. Since Suzuki—a private individual to whom Tosti had voluntarily delivered his computer with the explicit understanding that he would inspect the system to complete the repairs—could discern the content of the photos, any expectation of privacy Tosti had in those pictures was extinguished. Whether detectives later enlarged them (or the size of the enlargements, for that matter) is thus irrelevant.

Similarly, Tosti is not entitled to suppression on the basis that Detective Rudolph scrolled through the thumbnails. Again, scrolling through the images Suzuki had already viewed was not a search because any privacy interest in those images had been extinguished. Moreover, Detective Rudolph did not view any more photos than Suzuki had viewed. Tosti agreed that: (1) there was no "evidence in the record to suggest that either Detective Shikore ... or Detective Rudolph viewed any file folder or images other than the file folder and images opened by Mr. Suzuki"; and (2) the "crux of Dr. Tosti's argument [was] that the detectives allegedly asked Mr. Suzuki to enlarge the images and subsequently scroll[ed] through the file folder." The district court explicitly held "that on the facts presented, this is not a situation where the Detectives reviewed more file folders or images than Mr. Suzuki had viewed." The district court's factual finding is not clearly erroneous.[2]

The cases on which Tosti relies, *Walter v. United States,* 447 U.S. 649, 662, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), and *United States v. Young,* 573 F.3d 711, 713 (9th Cir.2009), are not to the contrary. First, in *Walter,* private employees of a firm that received a misdirected shipment called the FBI after they opened the boxes and found containers suggestive of sexually explicit films. 447 U.S. at 651–52, 100 S.Ct. 2395. Without a warrant, agents extracted the films from the containers and viewed them on a projector. *Id.* at 652, 100 S.Ct. 2395. The Supreme Court reversed the district court's denial of a motion to suppress because the FBI was not entitled to search the films, which had not been viewed by the private individuals, without a warrant. *Id.* at 658–60, 100 S.Ct. 2395.

That case is distinguishable for at least two reasons. First, the private individuals inspecting the package in *Walter* were not its intended recipients. Rather, they were employees of a third-party entity that the ***823** defendant never intended to have access to his films. Here, to the contrary, Tosti voluntarily turned over his computer to CompUSA with the understanding that its employees would inspect the system in furtherance of its repair. Second, the content of the films in *Walter* was not apparent from the private inspection. In that case no private individual had viewed the films; nor could they have done so without a projector. Given the small size of the film strips, their subject matter could not be determined with the naked eye. In the instant case, by contrast, when Suzuki initially viewed Tosti's pictures, their content was discernable, and any expectation of privacy Tosti had in those photographs was extinguished.

Young also provides no support for Tosti's position. In *Young,* a private security guard discovered a gun in the defendant's backpack, which the defendant had left in his hotel room. 573 F.3d at 714. Security contacted the police and took an officer to the defendant's room. *Id.* at 715. The guard then held open the backpack so that police could see the weapon. *Id.* A panel of this court affirmed the suppression of that evidence after analogizing the hotel room to a home and reasoning that "[a] guest has a legitimate and significant privacy interest in the room's contents, and does not lose his expectation of privacy against unlawful government intrusions into his

closed briefcase or the contents of his computer hard drive when hotel staff sees the briefcase, laptop, or other belongings while cleaning the room or changing a light bulb." *Id.* at 721. Unlike Tosti, who voluntarily took his computer to CompUSA to be inspected, the defendant in Young had not voluntarily relinquished his backpack to a third party and had not consented to any such third party inspecting his property.

B.

We also reject Tosti's assertion that the district court erred in failing to suppress the evidence seized from his home office and computer media in 2009. Tosti contends that Ms. Tosti had neither actual nor apparent authority to consent to those searches. Regardless of whether Ms. Tosti had actual authority, the district court properly determined that she had the apparent authority to grant the police access to the materials.

"It is well established that a person with common authority over property can consent to a search of that property without the permission of the other persons with whom he shares that authority." *United States v. Murphy,* 516 F.3d 1117, 1122 (9th Cir.2008). "Under the apparent authority doctrine, a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had the actual authority to grant that consent." *United States v. Welch,* 4 F.3d 761, 764 (9th Cir.1993). "To establish apparent authority, the Government must show that: (1) [officers] believed an untrue fact that they used to assess ... control ...; (2) it was objectively reasonable for [officers] to believe that the fact was true; and (3) if the fact was true, [the third party] would have had actual authority to consent." *United States v. Enslin,* 327 F.3d 788, 793–94 (9th Cir.2003). "[T]he doctrine is applicable only if the facts believed by the officers to be true would justify the search as a matter of law." *Welch,* 4 F.3d at 764.

The Tostis were married and had resided in their shared residence for over twenty years. Ms. Tosti advised Agent Casteneda that both she and Tosti used the computer and storage devices located in their home. Even if Ms. Tosti's representations were not true, there were no objective ***824** indications that Ms. Tosti's access to the office was limited. There were no locks or other signs that Tosti tried to keep his wife out of the office. Also, the computer and electronic media were neither password protected nor encrypted. The fact that Tosti now contests Ms. Tosti's actual authority does not undermine the district court's finding of apparent authority. There was no indication at the time of the search that Agent Casteneda was on notice that Ms. Tosti might not have the authority to consent.[3] All objective indicia supported Agent Casteneda's conclusion that Ms. Tosti's consent was sufficient, and the district court properly denied Tosti's motion to suppress.

C.

Finally, we address Tosti's claim that the district court abused its discretion by imposing a substantively unreasonable sentence that failed to account for his advanced age and infirmities. According to Tosti, his situation is extraordinary and unusual because he is 76 years old, in poor health, and poses little or no risk to either reoffend or to act on his impulses. Tosti argues that it was within the court's discretion to impose minimal prison time.

Although the district court could have decided on a lesser sentence, it nonetheless acted within its discretion in imposing the below-guidelines sentence that it did. "A substantively reasonable sentence is one that is 'sufficient, but not greater than necessary' to accomplish § 3553(a)(2)'s sentencing goals." *United States v. Crowe,* 563 F.3d 969, 977 n. 16 (9th Cir.2009) (quoting 18 U.S.C. § 3553(a)). "The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Ressam,* 679 F.3d 1069, 1089 (9th Cir.2012) (en banc).

The sentencing guidelines provide:

> Age ... may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

U.S.S.G. § 5H1.1. "An extraordinary physical impairment may be a reason to depart downward; e.g., in case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.4.

The district court properly considered Tosti's age and physical condition at sentencing and imposed a below-guidelines sentence based on the totality of all circumstances specific to Tosti's case. The district court weighed the various competing considerations with which it was confronted, and it expressly factored in Tosti's physical condition among all of those circumstances. It ultimately acted within its discretion in imposing a reasonable sentence. *See United States v. Green,* 592 F.3d 1057, 1072 (9th Cir.2010) ("We ... reject Green's argument that her sentence was unreasonable in light of her age and background; the trial judge expressly took ***825** those circumstances into account when imposing her sentence."); *United States v. Seljan,* 547 F.3d 993, 1007 (9th Cir.2008) ("Seljan argues that the district court did not adequately consider his advanced age. This argument is meritless. The district court acknowledged that Seljan's age and health reduced the likelihood of recidivism, and it addressed Seljan's concern that the 20–year sentence at age 87 was tantamount to life imprisonment.").

IV

The district court properly denied Tosti's motions to suppress. The agents did not exceed the scope of the prior authorized private search, and Ms. Tosti had apparent authority to consent to the subsequent searches of her residence and Tosti's computer. Moreover, the district court acted within its discretion in imposing a substantively reasonable sentence that accounts for Tosti's age and infirmities.

AFFIRMED.

All Citations

733 F.3d 816, 13 Cal. Daily Op. Serv. 10,971, 2013 Daily Journal D.A.R. 13,238

Footnotes

* The Honorable Kenneth F. Ripple, Senior Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

1 There is no explanation in the record for the lapse of four years without any apparent activity.

2 We need not, and do not, reach the question whether examining more files within the same electronic folder already searched by a private individual would constitute a search for Fourth Amendment purposes.

3 Even if Agent Casteneda knew that the couple were estranged—a matter that is not clear from the record—Ms. Tosti continued to live in the home and to have access to the devices she turned over to the Government. Accordingly, Agent Casteneda reasonably believed Ms. Tosti had authority.

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